UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MICHAEL C. SKAKEL Petitioner	:	CIVIL NO. 3:07 CV 1625 (PCD)
v.	:	
PETER J. MURPHY Respondent	:	OCTOBER 27, 2008

APPENDIX TO PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 16844

STATE OF CONNECTICUT,
Appellee

v.

MICHAEL SKAKEL,
Appellant.

BRIEF OF THE DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

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NATURE OF THE PROCEEDINGS

Michael Skakel was arrested and charged on January 19, 2000 for the October 30, 1975 murder of Martha Moxley in Greenwich, Connecticut. See In re Michael S., 258 Conn. 621, 622 (2001). Mr. Skakel, who was 39 years old on the date of his arrest, initially was presented in juvenile court because he was 15 years old at the time of the homicide. See Appendix at A19 (hereinafter "App. Axx"). The juvenile court (Dennis, J.) granted the State's motion to transfer the matter to the regular criminal docket because of Mr. Skakel's age.[1] App. A348. The Defendant moved to dismiss the case under the applicable five-year statute of limitations, App. A31, which the trial court denied. App. A32. Following a month-long jury trial (see Tr.5/7/02 – Tr.6/6/02), Mr. Skakel was convicted of murder on June 7, 2002. He was sentenced to a term of incarceration of 20 years to life in accordance with the 1975 adult sentencing laws. Tr.8/29/02 at 86. This appeal followed.

STATEMENT OF FACTS

1. October 30, 1975: Mr. Skakel's Alibi and No Physical Evidence

On October 30, 1975, fifteen-year old Michael Skakel was 20 minutes away from Greenwich's Belle Haven community at the time his fifteen-year old neighbor and friend, Martha Moxley, was killed around 10:00 p.m.[2] Two of the Defendant's older brothers

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[1] Mr. Skakel filed an interlocutory appeal from the transfer order. This Court held that the transfer order was not an appealable final judgment and dismissed the appeal. In re Michael S., 258 Conn. 621, 631 (2001).

[2] The State charged that the murder occurred between the hours of 9:30 p.m. on October 30, 1975 and 5:30 a.m. on October 31, 1975 (App. A22), but the overwhelming evidence showed that the victim was killed around 10:00 p.m. In 1975, the police consulted with Dr. Joseph Jachimczyk, a medical examiner from Houston, Texas who concluded that the time of death was about 10:00 p.m. Tr.5/8/02 at 38; Tr.5/28/02 at 128-131. His opinion is supported by the observations of several people, including Mrs. Moxley, Helen Ix and David Skakel, who heard dogs barking around this time. See Testimony of Mrs. Moxley, Tr.5/7/02 at 76 (she heard incessant barking between 9:30 p.m. and 10:00 p.m.); Helen Ix, Tr.5/9/02

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(Rushton, Jr. and John), his two cousins (James and Georgeann Dowdle) and a neighbor (Helen Ix) confirmed that Mr. Skakel had left Belle Haven around 9:30 p.m. and did not return until after the murder.[3]

On October 30, 1975, the older Skakel children (including the Defendant), his cousin, James Dowdle, his sister's friend, Andrea Shakespeare, and the tutor, Kenneth Littleton,[4] went to the Belle Haven Club for dinner around 6:00 p.m. Tr.5/9/02 at 159-60; Tr.5/28/02 at 24; Tr.5/29/02 at 4-5; Tr.5/22/at 11; Tr.5/9/02 at 119. They returned to the Skakel house around 8:30 p.m. or 8:45 p.m. Tr.5/9/02 at 119; 161. Martha Moxley, Helen Ix and Geoffrey Byrne stopped by the Skakel house (Id. at 65; State's Ex. 80 at 30) and they hung out in the driveway with the Defendant and then listened to music in the car. Tr.5/9/02 at 67-8. The Defendant, Martha, Geoff and Helen initially were in the Skakel car in the driveway. Id. at 110. Later, brothers Tom, John and Rush, and cousin Jimmy Dowdle were in the car. Rush indicated that he had to take his cousin home, and only Tom, Martha,

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at 74; 84-5; 89 (her dog was really agitated and barking violently between 9:45 p.m. and 10:15 p.m.; it was "scared violent barking"; he was staying in one spot in the middle of the road facing the Moxley property and in the direction of where the victim's body was found); David Skakel, Tr.5/22/02 at 85 (heard the Ix dog barking between 9:30 p.m. and 10:00 p.m.). Also, between 9:30 p.m. and 10:00 p.m., Mrs. Moxley heard a commotion outside. Tr.5/7/02 at 42-3; 75. Several years later, she recalled that it was at this point that she heard her daughter screaming and other voices. Id. at 82.

[3] See Testimony of Helen Ix, Tr.5/9/02 at 110-112; J. Dowdle, Tr.5/22/02 at 10-15; Rushton Skakel, Jr., 5/22/02 at 63-65; Georgeann Dowdle, Tr.5/23/02 at 47-48; John Skakel, Tr.5/28/02 at 33-35; Defendant's taped interview with Hoffman,Trial Ex. 80, at 46-75.

[4] The Defendant is one of seven children. Tr.5/9/02 at 68-9. In 1975, Rushton, Jr. was 19 years old and a sophomore at Dartmouth, Tr.5/22/02 at 62; Julie was 17 years old, Tr.5/9/02 at 117; Tommy was the next oldest; John was 16 years old, Tr.5/28/02 at 24; David was 12 years old, Tr.5/22/02 at 83; and Stephen was the youngest. The Defendant's father, Rushton Skakel, Sr., was out of town on a hunting trip that night, Tr.5/9/02 at 156; the Defendant's mother died in 1973. Tr.5/29/02 at 93.

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Geoff and Helen got out of the car.[5] The car drove off. Tr.5/9/02 at 112. Helen Ix's recollection is that the Defendant left with them. Id. at 111; see also. Trial Ex. 80, at 39; 46-50. The Defendant, his two brothers and his cousin left Belle Haven around 9:30 p.m. to go to his cousin's house across town to watch a newly-released Monty Python movie that began at 10:00 p.m. See footnote 3. They watched the show and then the Skakel brothers returned home around 11:00 p.m. Tr.5/22/02 at 18; 65; Tr.5/28/02 at 34.

The victim's body was found under a large pine tree on the Moxley property around 11:30 a.m. on October 31, 1975. The victim was laying face down, and her pants were around her ankles. Tr.5/7/02 at 116-1. The victim suffered multiple and severe injuries to her head and stab wounds to her neck that were consistent with being caused by a piece of golf club shaft. Tr.5/8/02 at 115-116. Three pieces of a golf club were found near the victim's body.[6] Tr.5/7/02 at 161. The investigation revealed that the victim had been assaulted near her driveway and then dragged to the pine tree. Id. at 162; Tr.5/8/02 at 138; 147. The State had no forensic or physical evidence linking Michael Skakel to this murder. Tr.5/8/02 at 153-154; 178.

2. Another Suspect: Kenneth Littleton

At trial, the defense pointed to Kenneth Littleton as a possible third-party suspect for the murder. Littleton began his employment as the part-time Skakel family tutor on the day Martha Moxley was murdered.[7] Tr.5/9/02 at 155. Littleton testified under a grant of

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[5] Helen Ix walked home with Geoffrey Byrne. Martha Moxley and Tommy Skakel stayed in the driveway and were engaged in "playful flirtation." Tr.5/9/02 at 70.

[6]The golf club was a Tony Penna golf club. Tr.5/7/02 at 169-70. The same brand was found at the Skakel residence. Id. at 172; Tr.5/9/02 at 13. It was common for golf clubs to be left about the Skakel property. Tr.5/8/02 at 24; 66.

[7]Littleton was working at the Brunswick School in Greenwich as a teacher and coach, Tr. 5/9/02 at 154, when he accepted the part-time tutoring position. Littleton later was

immunity since he had been a suspect in the murder for many years. Tr.5/9/02 at 155.

Littleton was interviewed on a number of occasions by the Greenwich police after the murder. It was not, however, until the third interview that he admitted going outside near the time of the murder to investigate a disturbance at the rear of the Skakel driveway. Tr.5/13/02 at 102; Tr.5/9/02 at 164-167. Littleton testified that he never left the Skakel property. Tr.5/9/02 at 167.

Littleton was one of the chief suspects in the murder. Tr.5/22/02 at 100. In 1991, Inspectors Jack Solomon, now the police chief of Easton (Id. at 97), and Frank Garr, approached Littleton's former wife, Mary Baker, for help in the investigation. Tr.5/22/02 at 100. She agreed to tape their conversations. Tr. 5/13/02 at 164. On tape, Ms. Baker reminded Littleton that he had told her he committed the murder during a car trip from Baltimore to Connecticut in 1984. Id. at 160-166. Ms. Baker testified that her statement was untrue and fabricated, and that Littleton was in a manic and psychotic state during the 1984 trip. Id. at 164-167. Inspector Solomon testified that Ms. Baker had told him that Littleton had admitted to her that he had buried a bloody piece of a golf club in the woods. Tr. 5/22/02 at 137-138.

In 1992, Littleton met with Dr. Kathy Morall, a forensic psychiatrist assisting the prosecution. Tr.5/13/02 at 108. At that meeting, Littleton testified that he had told his former

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diagnosed with bi-polar disorder in 1985. On the date he testified he was taking six psychiatric medications. Tr.5/9/02 at 152-153. Littleton testified that his "life went down the tubes" the summer following the murder. He was arrested in Nantucket and dismissed from Brunswick School and St. Luke's School, and was continually pursued by the Connecticut authorities. Tr.5/13/02 at 34. In the 1980's he was involved in an incident and lied about his identity. He told the police his name was Kenny Kennedy. Id. at 43-45. He gave the Kennedy name because President Kennedy was his hero. Id. at 47. Littleton had a paranoid suspicion that the "Skakels slash Kennedys" were trying to blow his heart out with an intravenous dosage of cocaine. Id. at 52. In the mid 1980's Littleton was drinking heavily and suffered blackouts. Id. at 125.

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wife that he had killed Martha Moxley. Littleton also testified that he told Mary that he killed the victim by stabbing her through the neck. Id. at 118.

3. The Elan Statements: Emotional And Physical Torture

From 1978 to 1980 Michael Skakel was physically and emotionally brutalized at Elan, a residential "treatment" facility for adolescents and young adults located in Poland Springs, Maine. For two years, Mr. Skakel was held captive in this secluded environment where the residents regularly were beaten unmercifully and emotionally tortured.[8]

The centerpiece of the State's case against Mr. Skakel was several statements he allegedly made to residents and a staff person during his tormented time at Elan. The Elan Program touted a controversial behavioral modification program that relied upon peer and staff confrontation predicated on intimidation, humiliation, physical beatings and emotional poundings. Joseph Ricci, the founder of Elan, was universally feared by the residents. Tr.5/23/02 at 114, 133; Tr.5/16/02 at 72; 218; Tr.5/17/02 at 57; 109. Elan even had its own cult-like lingo to describe positions and events, *i.e.* night owls, expeditors, haircuts, being shot down and general meetings.[9] Tr.5/16/02 at 65.

The most glaring example of Elan's technique of persecution was the "general meeting," which "was probably the scariest word" at Elan. Id. at 70. When a staff member

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[8] See generally Testimony of Charles Seigan, 5/16/02 at 57; 68; 72-6; 89-93;117; John Higgins, 5/16/02 at 187-8; Sarah Petersen, 5/23/02 at 116-17; 134; 141; 153-55; Mike Wiggins, 5/23/02 at 196-99; Donna Kavanah, 5/23/02 at 209-15; Greg Coleman, 5/17/02 at 183; 186. In its closing argument, even the prosecution admitted that a "concentration camp type atmosphere" existed at Elan. Tr.6/3/02 at 17.

[9] A "night owl" was a resident assigned to guard the entrances so that people would not run away. Tr.5/16/02 at 67; 179. An "expeditor" was a resident assigned to Elan's police force who was required to take head counts every 15-20 minutes. Id. at 66. A "haircut" was a verbal reprimand for minor infractions, while "being shot down" meant if a resident were disobedient, their position was taken away and they were required to wear shorts, go barefoot and made to scrub floors all day. Id. at 93-4.

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yelled "General meeting!" residents were required to drop whatever they were doing and attend. Id. 70. The typical general meeting was attended by over 100 people present. Id. at 72-3. A staff person stirred up the crowd– almost like a pep rally -- against the person for whom the general meeting was called. The "victim" of the general meeting was hidden in a back room and only displayed before the crowd once the assembly had become sufficiently frenzied. A staff member always asked whether anyone had any feelings towards the target, inevitably resulting in a barrage of 20-30 out-of-control people rushing and screaming at the person. Id. at at 90; see also 5/17/02 at 169; 5/23/02 at 116. The target inevitably received some type of punishment at the general meeting.[10] Tr.5/16/02 at 74. If Ricci did not like how the target of the general meeting answered a question, he would "continue to confront them and pelt them emotionally, have them spanked or placed in the boxing ring."[11] Tr.5/23/02 at 117.

Approximately six months into his two-year Elan nightmare, Mr. Skakel tried to run away. His punishment was severe. For three days, Mr. Skakel was ordered in the corner of the dining room on a stage where he had to alternate sitting and standing each hour

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[10] One of the Elan survivors, Mike Wiggins, provided the most graphic testimony about the horrors of a general meeting at Elan during this time period. For 14 days he was forced to sit facing in the corner during the day and made to sleep under the urinals at night. The staff then called for a general meeting and he was ordered into the boxing ring many times and then forced to lean over a chair while the staff and residents paddled him with a plywood paddle with holes. He was beaten so badly that his buttocks were black and became bloody. His scars from the torture session are still visible. The emotional and physical assault lasted around eight hours until he finally admitted that he was a chicken. Once he made that admission, he was forced to dress up in a chicken costume. Tr.5/23/02 at 181; 196-99; See also Testimony of Sarah Petersen, Id. at 141; 153; 155; Testimony of Donna Kavanah, Id. at 209-15.

[11] Alice Dunn, a former Elan staff person, testified the boxing ring was used to beat the words out of the person. The ring actually was a human circle of people, and the target of the meeting would be required to fight round after round, encountering a new boxer for each round. Tr.5/17/02 at 84; see also, Tr.5/23/02 at 120.

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without any sleep. Tr.5/17/02 at 8; 80; Tr.5/24/02 at 6. Two "personal overseers" or "gorillas" guarded him at all times. Tr.5/17/02 at 8; 99; 134-5; Tr.5/24/02 at 6-10. These were "trusted residents" handpicked by the Elan staff. Tr.5/17/02 at 99; 135.

After standing and sitting in a corner for three days, the Elan staff and residents – about 150 people led by Ricci -- victimized Mr. Skakel at a brutal general meeting. Tr.5/17/02 at 8; 17; 57; Tr.5/24/02 at 6. One witness testified that "[t]hey dragged him into the room, they put him against the wall and that's where the confrontations started." Tr.5/17/02 at 80-1; 86. During the meeting, Ricci accused Mr. Skakel of murdering Martha Moxley. Tr.5/16/02 at 75; Tr.5/17/02 at 57; Tr.5/23/02 at 171-2; Tr.5/24/02 at 10-11. When Mr. Skakel denied his involvement in the murder, Ricci "got more agitated, verbally intolerant and abusive." Tr.5/17/02 at 58. Mr. Skakel was crying throughout Ricci's bullying. After repeated denials, Ricci ordered Mr. Skakel into the boxing ring where he was "brutalized." Id. at 9. At the end of each round, Ricci asked Mr. Skakel if he killed Martha Moxley. For hours, Mr. Skakel denied any involvement and was placed back in the ring for another round against a fresh fighter.[12] Tr.5/23/02 at 173; Tr.5/24/02 at 10-11. This physical and emotional torture lasted for hours. Tr.5/23/02 at 173; Tr.5/24/02 at 10-11. The assault finally ended when Mr. Skakel responded "I don't know" to Ricci's accusation that he murdered Martha Moxley. Tr.5/17/02 at 84-5; 5/23/02 at 175; 5/24/02 at 14. Whenever Mr. Skakel was confronted about the murder after this general meeting, he responded that he just didn't know. Tr.5/17/02 at 85.

After that general meeting, the question of whether Mr. Skakel had been involved in

[12]Each fighter slugged Mr. Skakel as hard as possible. Tr.5/23/02 at 174. While he was being pummeled in the ring, the students cheered on the person beating him, chanting, "hit him hard, hit him harder, get him, get him." Id. at 174-75; Tr.5/24/02 at 14.

the murder haunted him as a topic of conversation throughout the Elan community.[13] Tr.5/16/02 at 75. For weeks, he was required to wear a chest-to-floor cardboard sign 16 hours a day that said confront me on why I murdered Martha Moxley, yet he steadfastly denied it.[14] Tr.5/17/02 at 94; 96. He also was confronted in therapy. One witness recalled Mr. Skakel's reaction as being either annoyed that he was being asked again or crying and shaking his head. Tr.5/16/02 at 78. He would finally say that he didn't know and that would stop the questions.[15] Id. at 104. It got to the point, however, that Mr. Skakel was told repeatedly that he would never be permitted to leave Elan unless he confessed to the murder. Tr.5/23/02 at 146; 155.

Despite the pummeling, the beating and the threats, witness after witness from Elan

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[13] Sarah Petersen, who arrived at Elan in January 1979 testified that "Almost anytime any kind of general meeting was called, Mike Skakel was asked to stand up and he was dealt with in some kind of manner." Tr.5/23/02 at 114. Ricci would "just confront him again and again and say have you copped to your guilt, we know you did this and just go on and on and on, just totally pretty much torturing him." Id. at 115. She witnessed Mr. Skakel being pummeled in the boxing ring on more than one occasion, as well as being paddled for denying his involvement in the murder. Id. at 125. During these beatings, Mr. Skakel was crying, "sometimes just uncontrollably." Petersen testified that after hours of this torment, Mr. Skakel would finally say "I don't know, maybe I did" which "immediately" stopped the beatings. Id. at 122-4.

[14] See also Testimony of Sarah Petersen, 5/23/02 at 114-5; Michael Wiggins, 5/23/02 at 177; Donna Kavanah, 5/23/02 at 207; Angela McFillan, 5/24/02 at 4. As part of Elan's protocol for sign-wearers, Mr. Skakel was required to stand up in the dining hall and read his sign before every meal. Tr.5/17/02 at 99.

[15] Elizabeth Arnold testified that she was present in a group session a day or two after the general meeting in which Mr. Skakel stated over and over that he didn't remember and he didn't know what happened. Tr.5/17/02 at 5; 12. While Ms. Arnold's grand jury testimony was limited to Mr. Skakel not remembering, at trial, she significantly embellished her prior testimony. She testified that he said he was very drunk, that he had some sort of blackout, and that he didn't know if he had done it or if his brother had done it. She also said that he remembered something about running around outside and that his brother had "f-d" his girlfriend. He said his brother had stolen his girlfriend and had fooled around with her. Id. at 3-4. Arnold admitted that she ***never told the grand jury this information***, but reading Mark Fuhrman's book about the case had helped her recall it. Id. at 22-3.

testified that Mr. Skakel never confessed to killing Martha Moxley.[16] There were only two exceptions, John Higgins and Greg Coleman, two Elan residents who stood out among many others for the brutality of their conduct and the unreliability of their stories.

Higgins, a member of Elan's elite police force, often served as Michael Skakel's abusive personal overseer.[17] About 20 years post-Elan, Higgins – who had a reputation for being untruthful[18] -- surfaced after learning about a reward being offered for the Moxley murder in *People* magazine. Tr.5/16/02 at 220, 222; 228. He now claimed that one time while serving "night owl" duty with Mr. Skakel, Skakel had a conversation with himself in which he first said he did not know whether he did it; then, that he may have done it; then, that he did not know what happened; then, that he must have done it; then, that he did it. Id. at 179; 182; 227. Higgins said he was "totally uninvolved verbally" and simply watched Skakel talk to himself for two hours. Id. at 213-14.

Higgins' ridiculous story reinforces other Elan survivors' opinions that he is untrustworthy. Higgins was a member of the Elan police force, Id. at 216-17, which made him an extremely unlikely candidate to hear Michael Skakel's "bleed out" confession. Moreover, Higgins never reported Mr. Skakel's "confession" to the Elan staff or authorities.[19] Id. at 220. Finally, Higgins made the preposterous claim that the first and only

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[16] See Testimony of Sarah Petersen, Tr.5/23/02 at 158; Donna Kavanah, Tr.5/23/02 at 209; Dorothy Rogers, Tr.5/16/02 at 143-4; Alice Dunn, Tr.5/17/02 at 78; Angela McFillan, Tr.5/24/02 at 35; Mike Wiggins, Tr.5/23/02 at 176; Elizabeth Arnold, Tr.5/17/02 at 16; Charles Seigan, Tr.5/16/02 at 99.

[17] In that role, Higgins screamed at Mr. Skakel every few minutes and ordered him around. He was mean-spirited towards Skakel and he "seemed to really like making Mike Skakel's life miserable." Tr.5/23/02 at 152-3; 160.

[18] Tr.5/23/02 at 129; 178.

[19] Other Elan witnesses opined that if John Higgins ever heard anyone confess to murder, he would have run to Joe Ricci with it because it would have furthered his own status within

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time at Elan he heard about the Moxley murder was from Mr. Skakel during the "night owl" session despite the fact that Higgins was at Elan from May of 1978 through early 1980, Tr.5/16/02 at 178, and thus, he necessarily would have been present for the beating sessions in which Mr. Skakel was confronted over and over with this murder.[20]

Gregory Coleman, one of the most aggressive Elan tormenters and a "head gorilla",[21] also came forward at least 20 years post-Elan with an equally fantastic story after watching a television news magazine story. Tr.5/17/02 at 170. Coleman, a long-time heroin addict and convicted felon, had been hospitalized several times for mental illness and had problems that plagued him for most of his life. Id. at 151-52. Coleman, undoubtedly the State's most important witness since he was the only witness to say without equivocation that Michael Skakel admitted that he killed Martha Moxley, died of a drug overdose in 2001 about four months after he testified at the probable cause hearing. Id. at 89; 99. Over objection, Coleman's sterilized testimony from pretrial proceedings was "read" to the jury by a prosecutor; the jury never was able to observe the demeanor of this key witness.

Coleman – armed with a baseball bat – stood guard over Michael Skakel with

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the program. See Testimony of Sarah Petersen, 5/23/02 at 161; Michael Wiggins, 5/23/02 at 180; Angela McFillan, 5/24/02 at 32; 69.

[20]Attendance at general meetings was mandatory. Tr.5/24/02 at 10; see also Tr.5/16/02 at 70. Further, it was a topic of conversation among the Elan residents (Tr.5/16/02 at 75) and Higgins would have had to have been blind not to have noticed the chin-to-floor sign that Mr. Skakel was forced to adorn. See Tr.5/17/02 at 94; 96.

[21]See Tr.5/17/02 at 170. During his reasonable cause testimony in the Juvenile Court, Coleman candidly admitted that he was involved in the violent beating of a female resident, Kim Freehill. She was paddled so violently with open hands and a wooden mallet that she had to be taken to the hospital. Coleman nonchalantly testified that the assault was so horrific that "she went into shock" and "lost the ability to retain her bowel movements. " Tr.6/21/00 at 57-8. The trial court refused to permit any testimony relating to Coleman's beating of Kim Freehill, ruling it was not relevant. Tr.5/29/02 at 3; Tr.5/16/02 at 110-7; Tr.5/23/02 at 124; Tr.5/29/02 at 132-5.

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another person[22] in the dining room after Skakel's escape attempt failed but prior to his first general meeting. Coleman was singled out for guard duty because of his intimidating size. Tr.5/17/02 at 134-35. The rules mandated absolutely no talking. Tr.5/24/02 at 8. Nonetheless, Coleman claimed that Skakel told him, "I am going to get away with murder because I am a Kennedy," and then said he had made advances to this girl, she spurned his advances, and he drove her head in with a golf club. According to Coleman, Mr. Skakel said that he hit her so hard that the golf club broke in half and that two days later he returned to the body and masturbated on it.[23] Tr.5/17/02 at 137.

Coleman's story changed dramatically each time he told it.[24] First, as with Higgins, it is not believable that Mr. Skakel would choose Coleman, the head "gorilla", to be his confidante when Coleman was standing over him with a baseball bat. This doubt is magnified because talking between the personal overseer and the person being guarded was prohibited under the Elan Code. Tr.5/24/02 at 8. It is particularly incredible that Coleman would not have reported this important event to the staff. See generally Testimony of Sarah Petersen, 5/23/02 at 161; Angela McFillan, 5/24/02 at 32. Coleman obviously would have been rewarded at Elan with extra privileges and elevated status and power. It makes no sense that Coleman and Higgins would have kept this information to

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[22]Significantly, none of the people identified by Coleman as witnessing Mr. Skakel's statements were produced by the State to support Coleman's story. See Tr.5/17/02 at 157.
[23]Coleman was the only witness who said anything about masturbating on the body. This story, of course, could not be true since the victim was found less than 24 hours after the murder. Tr. 5/7/02 at 155-160.
[24] It is not surprising that Coleman's story constantly changed since he had been exposed to three different TV tabloid shows about the murder – one prior to testifying before the grand jury and two additional ones. Tr.5/17/02 at 163.

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themselves at (and after) the general meeting devoted to the topic.[25]

Coleman's testimony was untrustworthy for other reasons.[26] Coleman, a 20-25 bag a day heroin addict, testified before the grand jury one hour after shooting up. Tr.5/17/02 at 155; 168-9. He was unable to focus at the probable cause hearing because he was under severe heroin withdrawal that required him to go to the hospital after testifying. Id. at 173-6. He admitted at the probable cause hearing that his recall was questionable because of his ingestion of drugs and alcohol over a long period of time, the passage of time, and because he had been exposed to television tabloid shows and read about the case. Tr.5/17/02 at 150; 163; Tr.5/20/02 at 41; 53-4. Finally, Coleman, like Higgins, clearly had self-serving motivations for testifying.[27]

4. Post-Elan statements, hearsay and prejudicial tabloids

The State bolstered the inherently unreliable Elan statements with hearsay, prejudicial statements and the unprecedented admission of prejudicial tabloid articles.

The triple hearsay testimony of Mildred Ix: The State presented a statement purportedly made by the Defendant enmeshed in three levels of hearsay. Before the grand

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[25] Coleman's claim that he never attended a general meeting for Michael Skakel, Tr.5/17/02 at 141, is equally incredible. There were numerous general meetings for Mr. Skakel (Tr.5/23/02 at 114) and attendance at general meetings was mandatory. Tr.5/24/02 at 10.

[26] Coleman's testimony lacked corroboration. He provided the names of three possible witnesses to Mr. Skakel's confession, but none of them testified. He claimed Skakel received special treatment, but no one else saw it. He testified that during a primal scream session, Mr. Skakel was told by Alice Dunn to get in touch with his guilty feelings over the incident in Connecticut and he repeatedly screamed that he was sorry. Tr.5/17/02 at 139; 180-1; 189; 192; Tr.5/20/02 at 47-8. But, Coleman was unable to name one other Elan resident who was present for this session, Tr.5/17/02 at 191, and Alice Dunn did not corroborate Coleman. Instead, she recalled a primal scream session in which Coleman was present where the topic was getting Mr. Skakel to address his feelings of loss and sadness over his mother's death. Id. at 90-1.

[27] Prior to testifying in the juvenile court proceedings, he wrote to Inspector Garr while incarcerated and demanded $1,200.00. Coleman reminded Garr that he did what he had to do to help out Garr when he testified before the grand jury. Tr.5/20/02 at 23-4.

jury, Mildred Ix, a Skakel neighbor and friend of the Defendant's father, testified that Mr. Skakel, Sr. told her that Michael had allegedly told him that he, Michael, could have murdered the victim. Tr.5/15/02 at 128 (App. at A497); Trial Ex. 87 (App. A473). At trial, Mrs. Ix denied that Mr. Skakel, Sr. said this to her, Tr.5.15.02 at 128 (App. at A497), and explained that when she testified before the grand jury she mistakenly attributed her thoughts to the Defendant's father. Id. at 133; 137. The trial court ruled that the statement of the father to Mrs. Ix was admissible under the residual exception to the hearsay rule. Id. at 117-19.

The irrelevant and prejudicial testimony of Larry Zicarelli and Edwin Jones: Larry Zicarelli,[28] the Skakel family chauffer from 1976 to 1977 testified that in the spring of 1977, he drove the Defendant to New York City after the Defendant had had a fight with his father. Tr. 5/16/02 at 2-15. During this day trip, Zicarelli represented that the Defendant made the following statements: (1) that he had "done something very bad" and that "he either had to kill himself or get out of the country"; Id. at 15; and, (2) that if Zicarelli knew what the Defendant had done, he would never talk to him again. Id. at 22-23. The State offered those statements as a confession to the Moxley murder, when, in fact, he was expressing guilt over having been discovered sleeping with his mother's dress.[29]

The defense called Edwin Jones, the person who had contacted the State about Zicarelli. Apparently, Zicarelli casually discussed this incident with Jones in 1990.

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[28]Zicarelli had been approached by the police for assistance during his employment at the Skakels, yet he never told the police about Michael Skakel's alleged statements. Zicarelli was called by Inspector Garr in the early 1990s. Id. at 30-35; 45.

[29] Mr. Skakel's sister, Julie, testified the Defendant never adjusted to their mother's death in 1973. He was found sleeping with one of his mother's dresses, which led to the problem with his father. Zicarelli took the Defendant to New York for an appointment after the Defendant had this problem with his father over sleeping with one of his mother's dresses. Tr.5/29/02 at 92-3; see also defense closing argument, Tr.6/3/02 at 66.

Tr.5/28/02 at 5-7. In 1993, Jones contacted Inspector Garr. Id. at 6. During the State's cross-examination of this witness, Mr. Jones testified that Zicarelli told him that the Defendant **confessed** to the murder of Martha Moxley. Id. at 16.

The discredited testimony of Matthew Tucharoni: Mr. Tucharoni, a hairdresser employed at the Golden Touch hair salon in Greenwich in 1975, waited 26 years to come forward with his story.[30] Tr.5/15/02 at 157-8; 169. He claimed that the Defendant, his sister (Julie) and his brother (Rush) came in for haircuts in the spring of 1976 for the first and only time. Id. at 158; 167; 181-2. As Tucharoni was trimming the Defendant's hair, Tucharoni claimed that the Defendant said, "I am going to get a gun and I am going to kill him." He reported that Julie said, "you can't do that" to which the Defendant replied, "Why not, I did it before, I killed before." Id. at 166-7. Julie Skakel rebutted Mr. Tucharoni's story. She indicated that she never went with Michael and Rush for haircuts; that it was not something the three of them would have done since they did not get along; that the Defendant went to Mike the barber for his haircuts; and that the Tucharoni incident never happened. Tr.5/29/02 at 80-1.

The statements made by the Defendant to Meredith, Pugh & Hoffman: The Defendant related what he did on October 30, 1975 after returning from his cousin's house to three trial witnesses: Michael Meredith in 1987; Andrew Pugh in 1991, and Richard Hoffman in 1997. He told Mr. Meredith that he "unequivocally" was innocent of murdering Martha Moxley. Tr.5/20/02 at 111; 126; see also Testimony of Hoffman, Tr.5/21/02 at 151-2. The Defendant said that after returning home from his cousin's house on October 30,

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[30]In fact, he contacted the State just before the start of evidence at the urging of a long-time customer, a Stamford sheriff. Id. at 169; 177-8. Even though Tucharoni had cut the Stamford sheriff's hair every four to five weeks for 15-20 years, he only brought up this incident in 2002. Id. at 202-3.

1975, he was unable to sleep so he snuck outside and he ran to a house on Walsh Lane where he hoped to see a lady naked. Trial Ex. 80 at 78, 83. On his way back to his house, he stopped at Martha Moxley's house and climbed a tree by their front door, hoping to see Ms. Moxley through a window. Id. at 85-93. While in the tree, he masturbated for 30 seconds, then realized that if got caught, everyone would think he was crazy. Id. at 94-96; See also Tr.5/20/02 at 112; 165. He climbed down the tree, thought he heard something, and then ran home. As he was running home, he remembered thinking, "Oh my God, I hope to God nobody saw me jerking off." Exhibit 80 at 103. When Mrs. Moxley came to the Skakel house the next morning and spoke with the Defendant, he remembered feeling panicked and thinking, "Oh my God, did they see me last night?", referring to his masturbation-in-the tree episode. Id. at 105-107.

The admission of prejudicial Tabloid articles: Geranne Ridge testified that she met the Defendant for no more than ten minutes at her condominium in Boston in the spring of 1997. Tr. 5/21/02 at 9-10. She claimed that Mr. Skakel was a guest of her house guest, Marissa Verrochi.[31] Id. at 10-1. She recalled that the Defendant jokingly made the statement "Ask me why I killed my neighbor." Id. at 13-4. Ms. Ridge denied that the Defendant made any other incriminating admissions about the murder. Id. at 14; 63. When confronted with a tape recorded phone call to a friend in February 2002, wherein she related statements allegedly made by the Defendant, Id. at 20-28; Trial Ex. 104, she testified that she had made up the information to appear self-important and that she acquired the information from tabloids and other sources, including gossip. Tr.5/21/02 at 69-71. The State showed Ms. Ridge three tabloids she had brought to court and asked her

[31] Ms. Verrochi testified that she was never in the presence of Michael Skakel and Gerrane Ridge. Tr.5/23/02 at 92.

to locate the information she had provided to her friend. Id. at 109-113 (Trial Exhibits 105, 106 and 107, App. A533-A541). The three inflammatory tabloids (*The Star*, *The National Enquirer* and *The Globe*) were then admitted, over Defendant's objection of relevance and prejudice. The court gave a cautionary instruction that the tabloids were not being offered for the truth. Ms. Ridge then testified that the tabloids made no mention of the information she imparted to her friend. Tr.5/21/02 at 114-117. She also stated that the tabloids were not her only sources of the information she provided to her friend. Id. at 129-30.

ARGUMENT

I. THIS PROSECUTION FOR NON-CAPITAL MURDER WAS BARRED BY THE FIVE-YEAR STATUTE OF LIMITATIONS IN EFFECT IN 1975

This case should never have been charged or tried. The State charged the Defendant with the crime of non-capital murder over 24 years after the alleged conduct and over 19 years beyond the statute of limitations. The State's power to prosecute anyone for this crime lapsed on October 30, 1980 due to the five-year statute of limitations in effect for all non-capital felonies in 1975. Indeed, this Court has already so held, on indistinguishable facts, in State v. Paradise, 189 Conn. 346 (1983) (affirming dismissal of non-capital murder charge brought in 1981 for 1974 crime). Moreover, historical analysis confirms that the prosecution of Michael Skakel for non-capital murder was subject to a five-year limitations period at all times from ***1846 to 1976***. Because the State prosecuted an expired cause of action, the Defendant's conviction should be reversed and the matter remanded with an order to dismiss the charge against him.

A. Procedural Background: The Motion to Dismiss

On June 20, 2000, the Defendant filed a Motion To Dismiss claiming that the prosecution was time-barred under Conn. Gen. Stat. § 54-193, the statute of limitations in

effect on October 30, 1975. App. at A31.[32] The trial court denied the motion by Memorandum of Decision dated December 11, 2001. App. A32.

The trial court's ruling demonstrates confusion between capital and non-capital murder statutes of limitations. The trial court erroneously "distinguished" controlling precedent of this court governing the non-capital statute of limitations, State v. Paradise, by holding that Paradise never decided the issue presented in this case – despite the fact that the entire premise of Paradise becomes utterly nonsensical if construed not to control here. App.A39. The trial judge thus overruled Paradise without saying so. The court then "followed" two cases involving capital murder charges, State v. Ellis, 197 Conn. 436 (1985), and State v. Golino, 201 Conn. 435 (1986), without engaging in any historical analysis or grasping the critical differences between the precise charges involved. App. A35-39.

In the end, the trial court concluded that the instant murder prosecution was not subject to the statute of limitations set forth in Section 54-193 (Rev. to 1975) because murder historically was considered a grave offense to which the statute of limitations was never intended to apply. App. A39. This is simply incorrect. The trial court's conclusion misreads this court's established precedent, and disregards the historical difference between capital murder (murder in the first degree, which was never time-barred) and non-capital murder (murder in the second degree, which was time-barred).

B. This Prosecution For Non-Capital Murder Is Time-Barred Under State v. Paradise

This court's decision in State v. Paradise, 189 Conn. 346 (1983), is directly on point and demonstrates that the instant prosecution is barred by the five-year statute of

[32] The statutes and related materials for murder and the statute of limitations are contained in the Appendix, at pages A40-167.

limitations set forth in Conn. Gen. Stat. § 54-193 (Rev. to 1975) (App. A77). The material facts in Paradise are identical to the facts in the present case, and the statutory law governing that case is exactly the same as is applicable here. In Paradise, the defendants (Paradise and Ellis) were charged with murder pursuant to Conn. Gen. Stat. § 53a-54a (Rev. to 1975)[33] and other non-capital felonies. Paradise, 189 Conn. at 347. The crime in Paradise occurred in 1974, but the defendants were not charged until 1981. Id. The defendants moved to dismiss arguing that the five-year statute of limitations governing non-capital crimes, set forth in Conn. Gen. Stat. § 54-193 (Rev. to 1975) (App.A77), prohibited their prosecution for all of the crimes, including murder. Id. at 347-48. The trial court agreed, dismissing with prejudice. Id. at 348.

This court affirmed in a unanimous decision that expressly acknowledged its implications for unsolved murders involving pre-1976 conduct.[34] 189 Conn. at 353. The holding of Paradise is easily identified: a non-capital murder prosecution under § 53a-54a for an offense occurring prior to the effective date of the amended statute of limitations (April 6, 1976) is governed by the five-year limitations period set forth in § 54-193 (Rev. to 1975), rather than the unlimited statute of limitations enacted in Public Act 1976, No. 76-35 (App. A82). The charges against the Paradise defendants were dismissed because they

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[33] The murder statute under which the Paradise defendants were charged is the exact statute under which the Defendant was charged. App. A126.

[34] This Court understood exactly what it was saying in Paradise by candidly acknowledging that its holding would have ramifications for other murder cases involving pre-1976 conduct:

> The state expressed concern at oral argument that the refusal to accord § 54-193 retrospective effect would have far reaching ramifications on the criminal justice system in Connecticut and directly affect a number of unsolved class A felonies. We share this concern. Yet, as Mr. Justice Frankfurter has stated: "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."

Id. at 353. (citation omitted).

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could not be saved by the non-retroactive 1976 amended statute of limitations.

The trial court in the instant case construed Paradise to mean "simply" that the 1976 amendment to the statute of limitations for murder was not retroactive. App. A39. The trial court concluded that Paradise did ***not*** hold that the pre-1976 statute of limitations bars a non-capital murder prosecution after five years. Id. This reasoning – promoted by the State in its briefing to the trial court – is illogical.

The fundamental premise underlying the entire Paradise opinion – a premise explicitly conceded by the State of Connecticut in that very case – is that a murder prosecution under § 53a-54a (Rev. to 1975) was barred by the five-year statute of limitations in effect in 1975.[35] The reason that Paradise focused on the retroactivity issue

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[35] The State and the Paradise defendants all recognized that the murder prosecution was prohibited by the five-year statute of limitations. For example, the State averred in its brief to the Connecticut Supreme Court, "At the time the appellees allegedly committed the charged crimes the applicable statute of limitations was five years." App. A151. The Paradise trial court agreed and ruled, "In short, there was a five year statute of limitations with regard to the instant crime." App. A163. (O'Neill, J., trial court decision).

Furthermore, this Court has recognized in later opinions that Paradise stands for the proposition that the 1975 five-year statute of limitations barred the prosecution of murder pursuant to Connecticut General Statutes § 54a-53a (Rev. to 1975). For example, in State v. Crowell, 228 Conn. 393, 397 (1994), this Court stated:

> The defendants in Paradise were arrested in 1981 on charges that they had committed a murder in 1974. ***The statute of limitations in effect at the time of the murder was five years. The legislature amended the statute in 1976 to eliminate the limitation period for the prosecution of murder and certain other felonies.***

(emphasis added). The Crowell court's summary of Paradise is especially significant in that it took place after the decisions in State v. Ellis (1985) and State v. Golino (1986). Crowell clearly demonstrates this Court's recognition that the statute of limitations for non-capital murder in 1975 was five years; see also State v. Morrill, 197 Conn. 507 (1985) (a case involving a 1978 murder where this Court stated there was no statute of limitations for murder in 1978 (because of the 1976 amendment) and then cited to Paradise, inferring that prior to the 1976 amendment, there ***had been*** a statute of limitations for non-capital murder); State v. Kioukis, Nos. CR 353774A, CR 353773A, 1998 WL 27827 at *3 (Conn. Super. Ct. Jan 14, 1998) (Radcliffe, J.) (Stating that the Paradise court refused to give

is that all parties and the court understood that the prosecution was barred unless saved by the 1976 amendment.[36] There would have been no need to determine the retroactivity of the 1976 amendment to the statute of limitations in Paradise ***if the murder prosecution had not been barred by the 1975 five-year statute of limitations.***

Because Paradise involves the same murder statute and the same statute of limitations applicable to the instant case, and because the Paradise trial court dismissed the murder charge as being barred by the 1975 statute of limitations, which decision was affirmed by this court, Paradise is controlling and demonstrates that the prosecution in the instant case is barred by the 1975 statute of limitations.

C. Historical Analysis Conclusively Confirms That The Prosecution For A Non-Capital Murder In 1975 Was Subject To A Five-Year Statute Of Limitation Pursuant To Conn. Gen. Stat. § 54-193 (Rev. to 1975)

There is a very good reason that everyone in Paradise, including the State, understood that a defendant could not be prosecuted for non-capital murder under the pre-1976 statute of limitations more than five years after the offense. ***It had been that way in Connecticut for 125 years, since 1846***. Indeed, beyond its misreading of Paradise, the fundamental flaw in the trial court's ruling lies in its failure to grasp the long-recognized distinction in Connecticut law between capital murder (historically known as murder in the

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retrospective effect to the 1976 statute of limitations and that the Paradise court held that the statute of limitations in effect on the date of the offense was controlling).

[36] In fact, the plain meaning of the text of the 1975 statute of limitations – "No person shall be prosecuted for ...any crime or misdemeanor of which the punishment is ... imprisonment in the Connecticut Correctional Institution, Somers except within five years...." – is that murder, as a crime in which imprisonment is mandatory, must be prosecuted within five years of its commission. See P.A. 03-154 (the meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes); State v. Whiteman, 204 Conn. 98, 101 (1987) (criminal statutes, and in particular criminal statutes of limitation, should be strictly construed in favor of the accused).

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first degree, which was never time-barred) and non-capital murder (historically known as murder in the second degree, which was subject to a three-year statute of limitations until 1882, and a five-year statute of limitations thereafter). Far from being a recent development in the 1970s, this distinction has deep roots in Connecticut law.

Historically, in Connecticut, the prosecution of an offense has been limited by time[37] unless the offense was punishable by the death penalty. In 1821, the legislature enacted the predecessor to Conn. Gen. Stat. § 54-193 in a form that is quite similar to the statute of limitations that governs this case. See Conn. Stat., tit. 59, § 11, pp. 311-12 (Rev. to 1821) (App. A60). The 1821 statute of limitations required that prosecutions for offenses punishable by imprisonment in Newgate prison must be brought within three years of the date of the offense.[38] At the time of the 1821 enactment, there was one degree of murder that carried only one penalty – death.[39] The 1821 legislature's intent was to exempt from

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[37] "A statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict." Stogner v. California, 123 S. Ct. 2446, 2452 (2003). "Statutes of limitation ... are found and approved in all systems of enlightened jurisprudence." Wood v. Carpenter, 101 U.S. 135, 139 (1879). Statutes of limitations further important policy interests by " foreclos[ing] the potential for *inaccuracy* and *unfairness* that stale evidence and dull memories may occasion in an unduly delayed trial." State v. Whiteman, 204 Conn. 98, 101 (1987); State v. Kruelski, 41 Conn. App. 476, 479-80 (1996).

[38] Even before Independence, the Connecticut Colony had a general one year statute of limitations for crimes which exempted capital offenses. The 1672 statute of limitations explicitly stated: "provided always this Law shall not extend to any capital offence." Laws of Conn. Colony, p. 34, § 11 (Rev. to 1672) (App. A41). This exemption remained in essentially the same form through the revisions of 1702, 1750 and 1808. Laws of Conn. Colony, 57, (Rev. to 1702) (App. A43); Laws of Conn. Colony, 134 (Rev. to 1750) (App. A46); Gen. Stat., tit. 101, ch. I, § 2 (Rev. to 1808) (App. A48).

[39] Prior to 1846, the common law crime of murder was recognized and its punishment provided for by statute as follows: "Every person who shall commit murder, and be thereof duly convicted, shall suffer death." Smith v. State, 50 Conn. 193, 196 (1882) (quoting Conn. Gen. Stat., 1838, p. 144, § 3).

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the statute of limitations any crime except for treason for which the penalty was death.[40]

In 1846, however, the legislature separated the crime of murder into two degrees and prescribed the punishment for each degree. Smith v. State, 50 Conn. 193, 196 (1882) (citing Conn. Gen. Stat., tit. 6, ch. 2, § 3, p. 223 (1849)) (App. A95). The sole object of the statute was to make the punishment proportionate to the degree of atrociousness of the murder.[41] Id. First degree murder, which required express malice aforethought,[42] carried a mandatory sentence of death; second degree murder, which required only implied malice, was punishable by life imprisonment.[43] Id. at 197; see also Conn. Gen. Stat., tit. 6, ch. 2, §§ 3-5, p. 223 (1849) (App. A95); State v. Ellis, 197 Conn. at 455.

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[40] In 1821, those offenses carrying a mandatory sentence of death were: treason, murder, perjury with the intent to take away life, arson causing death or the endangering of life, burning of any building or vessel thereby causing death, cutting out the tongue, blinding, or castrating another, and rape. General Statutes, tit. 22, §§ 3, 5, 6, 7, 8, 10 (Rev. to 1821) (A87-A88). Treason, although punishable by death, was explicitly covered by the three-year limitation. Conn. Stat., tit. 59, § 1, p. 311 (Rev. to 1821) (App.A60).

[41] The preamble to the new murder statutes recited, "[W]hereas the several offences which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment." Public Acts 1846, ch. 16, § 1 (App.A93).

[42] First degree murder included murder by poison, by lying in wait, or by any other kind of wilfull, deliberate and premeditated killing, or murder committed in perpetrating an arson, rape, robbery or burglary. Conn. Gen. Stat., tit. 6, ch. 2, § 3, p. 223 (1849) (App. A95); see also McBrien v. Warden, 153 Conn. 320, 322-6 (1966) ("The more atrocious types of murder were enumerated and classified as murder in the first degree, and all other kinds of murder were classified as murder in the second degree; "The death penalty was retained for murder in the first degree, but life imprisonment was provided for murder in the second degree").

[43] The Connecticut Supreme Court recognized that the legislature had historically found certain types of murders more atrocious than others, the more atrocious of which required the death penalty, and the less atrocious which only mandated imprisonment. See State v. Walters, 145 Conn. 60, 71 (1958) ("Originally, in Connecticut, the penalty for murder was death. In 1846 it came to be felt that there were only certain types of murder in which that punishment was warranted."). This fact is underscored in the preamble to the 1846 act. See Smith v. State, 50 Conn. at 196 (quoting Public Acts 1846, ch. 16, § 1) (App. A93). "[T]he legislative purpose in subdividing the crime of murder into the classifications of first and second degree was to eliminate the death penalty in all cases of murder not falling within the types classified as murder in the first degree." State v. Walters, 145 Conn. at 71.

At the time of the 1846 amendment to the murder statute, the applicable statute of limitations provided for a three-year time limit on felony prosecutions for which the punishment was imprisonment at Newgate Prison, and no time limit for the prosecution of capital offenses. Conn. Gen. Stat., tit. 59, § 11 (Rev. to 1821) (App. A60). The Connecticut Supreme Court in State v. Ellis indicated that the 1846 legislature divided murder into two classes for purposes of the statute of limitations. See Ellis, 197 Conn. at 456. In other words, first degree murder, punishable by death, would not be subject to a statute of limitations, while second degree murder, punishable by imprisonment, would be subject to the three-year statute of limitations for felony offenses. Therefore, the legislature had historically mandated that certain murders, because they were not considered sufficiently "atrocious," would in fact be subject to a statute of limitations. The legislature did ***not*** amend the 1821 statute of limitations in 1846, when it classified second degree murder as being punishable only by imprisonment. This statutory scheme containing a statute of limitations for certain types of murder remained in effect for 125 years.[44]

In 1951, the legislature removed the automatic death penalty provision for murder in the first degree and instead empowered the jury to recommend mandatory life imprisonment in its verdict after consideration of all of the evidence. P.A. 1951, No. 369, codified at Conn. Gen. Stat., tit. 64, ch. 417, § 1406b (1951 supp.) (App. A99). Thus, at

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[44] The statute of limitations maintained essentially the same form from 1821 to 1976; the only major change during that period was that the time limit for felony prosecutions was increased from three years to five years in 1882. See generally State v. Ellis, 197 Conn. 436 (1985); see also 1882 Public Acts, ch. 15, p. 15 (App. A66) (statute of limitations for felonies punishable by imprisonment increased to five years). In 1827, the Connecticut State Prison came into existence and the term "new-gate" was replaced by the term "Connecticut State prison" in the statutory framework. Public Acts 1827, Ch. 27, § 9, at 166 (App. A63). In 1969, the designation "state prison" was changed to the Connecticut Correctional Institution at Somers." Public Acts 1969, No. 69-297 (App. A73).

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that time, first-degree murder became a crime that was only potentially punishable by death. However, this amendment did not alter the fact that second-degree murder remained punishable ***only*** by imprisonment. The statute of limitations in effect at the time of this 1951 amendment provided for a five-year statute of limitations for felony offenses for which the punishment was imprisonment at the "State Prison," and no limitation for the prosecution of capital offenses. Conn. Gen. Stat., tit. 65, ch. 532, § 8871 (Rev. to 1949) (App. A68). Thus, even after the 1951 amendment to the murder statute, ***second*** degree murder was still subject to the five-year statute of limitations in the same way that it had been since 1846, even though the relationship between ***first*** degree murder and the statute of limitations became questionable due to first degree murder's new status as a potentially non-capital crime.[45] See State v. Ellis, 197 Conn. at 456-57.

The 1969 Penal Code, which became effective in 1971, eliminated degrees of murder but made no changes to the governing statute of limitations. The legislature drafted a single murder statute stating that a person was guilty of murder when "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception." P.A. 1969, No. 828, § 55(a)(1) (App. A120), codified at Conn. Gen. Stat. § 53a-54 (Rev. to 1973) (App. A123). For the first time in 125 years, all murders under the Penal Code were potentially punishable by death. At the time of the enactment of the Penal Code, the statute of limitations in effect still provided for a five-year statute of limitations on all felonies, but no statute of limitations for capital offenses. Conn. Gen. Stat. § 54-193 (Rev. to 1973) (App. A75). Thus, for the first time

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[45] In Ellis, the Connecticut Supreme Court ultimately ruled that ***first-degree*** murder remained ungoverned by the statute of limitations even though it was a crime that might not be punishable by death. Id. This ruling does not affect the present case, which did not involve a first-degree murder charge.

since 1846, because death was now a possibility for all persons convicted of murder, and because capital offenses were always excluded from the statute of limitations, the five-year statute of limitations previously applicable to non-capital or second-degree murders was arguably inapplicable (for a short while) to murder charged under the 1969 Penal Code. See State v. Ellis, 197 Conn. at 456-57 (ruling that first degree murder (capital felony) remained unlimited by the statute of limitations even though after 1951, it was a crime that might not be punishable by death).

The uncertainty (for statute of limitations purposes) resulting from the Penal Code' s declassification of murder was short-lived. In 1973, the legislature redefined murder and enacted the capital felony statute (P.A. 73-137, § 3) (App. A129), effective October 1, 1973, in response to the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, reh'g denied, 409 U.S. 902 (1972). The October 1, 1973 amendment to the murder statute (published in the 1975 revision) provided, "Murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed as provided by section 53a-46a." Conn. Gen. Stat. § 53a-54a (Rev. to 1975) App. A5). Additionally, the 1973 amendment added the crime of capital felony to the Penal Code and stated that capital felony would be punishable by death if, after a hearing in accordance with Conn. Gen. Stat. § 53a-46a, certain aggravating factors were found. Conn. Gen. Stat. §§ 53a-54b; 53a-46a(g) (Rev. to 1975) (App. A139; A113).

As a result of the 1973 amendment, murder returned to being a crime ***only*** punishable by imprisonment. Capital felony became the only type of murder that potentially could be punishable by death. This amendment returned the murder statutes to the same scheme that had historically existed since 1846: the most atrocious murders were

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governed by the capital felony statute and were subject to the death penalty, while all other murders were covered by the murder statute and were subject to imprisonment but not death.[46] Thus, as had been the case for 125 years previously, murder became subject to the five-year statute of limitations for felonies because it was not a crime punishable by death, while the prosecution of capital felony was unlimited. See Conn. Gen. Stat. § 54-193 (Rev. to 1975) (App. A77).

This analysis makes clear why the non-capital murder charges against Michael Skakel, for an offense occurring in 1975, were subject to the five-year statute of limitations contained in § 54-193. This very same statute of limitations had applied to all non-capital offenses for the past 125 years. Until 1976, when it expressly amended the statute, the legislature historically had recognized that there was a difference between capital murder (murder in the first degree) and non-capital murder (murder in the second degree) and provided for a statute of limitations for non-capital murders.[47] In this case, the Defendant

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[46] The close analogy between the historical categories of murder and current classifications was described by Justice Borden, one of the drafters of the Penal Code, as follows:

> [C]apital felony is a more serious kind of murder than murder committed in violation of § 53a-54a. In effect, capital felony is to murder, under our current legislative scheme, as first degree murder was to second degree murder, under our legislative scheme that existed before the enactment of our penal code. Before the enactment of the penal code, the difference between first and second degree murder was not simply one of sentence enhancement. "The more atrocious types of murder were enumerated and classified as murder in the first degree, and all other kinds of murder were classified as murder in the second degree." McBrien v. Warden, 153 Conn. at 326.

State v. Jones, 234 Conn. 324, 366 (1995) (Borden, J., concurring and dissenting).

[47] The punishments for other once-capital crimes were reduced from death to imprisonment, thus bringing them within the statute of limitations. "The laws of 1642 made idolatry, witchcraft, blasphemy, murder, bestiality, adultery, rape, kidnapping and false witnessing punishable by death. G. Clark, A History of Connecticut (2d Ed. 1914) p. 444." State v. Ross, 230 Conn. 183, 250 n.31 (1994). However, by 1835, the legislature eventually redesignated many of these crimes as offenses that were no longer punishable by death; Id. at 293 n.8; presumably due to changing attitudes about the severity of the

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was **NOT** charged with capital felony. Instead, he was charged under the non-capital murder statute, which in 1975 was subject to a five-year statute of limitations.

D. This Court's Prior Rulings Support A Determination That This Prosecution For A 1975 Non-Capital Murder Over 19 Years After The Offense Is Barred By The 1975 Five-Year Statute Of Limitations

The trial court misconstrued three cases addressing the statute of limitations in the context of Connecticut's murder statutes. The court erroneously distinguished the controlling case involving a ***non-capital*** murder charge, State v. Paradise, and then failed to distinguish the two cases that involved a capital murder charge, State v. Ellis, 197 Conn. 436 (1985), and State v. Golino, 201 Conn. 435 (1986). Paradise has been addressed, supra. Ellis and Golino, properly read, serve only to bolster the Defendant's claim.

1. State v. Ellis is a capital murder case, and its historical analysis supports the Defendant's analysis here

The defendants in State v. Ellis were charged with ***capital*** murder under Conn. Gen. Stat. § 53a-54b (Rev. to 1975), not murder under § 53a-54a (Rev. to 1975), the statute involved here. Indeed, Ellis literally was a sequel to Paradise because it involved the very same defendants, now charged with capital felony after the non-capital charges were thrown out by Paradise. 197 Conn. at 439.[48] Thus, Ellis addressed the question whether

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crimes. See also Public Acts 1830, ch. 1, § 6, at 254 (App. A91) (punishment for other crimes reduced from death to imprisonment). Similarly, changing attitudes toward the gravity of certain murders caused the legislature to separate the crime of murder into degrees and to designate second degree murder as a non-capital crime in 1846. See Public Acts 1846, ch. 16, § 1 (App. A93). Importantly, the legislature did nothing to amend the statute of limitations during this time in order to keep these once-"grave" offenses outside of any limitation period. Thus, it is clear that historically, there was a statute of limitations applicable to non-capital murder in the same manner as the statute of limitations applied to other crimes that were once designated as capital offenses.

[48] The statute of limitations in effect was the same statute of limitations at issue in Paradise, which provided for a five-year statute of limitations for felonies for which "the punishment is or may be imprisonment" at Somers, and no statute of limitations for crimes punishable by

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the same statute of limitations barred prosecution on new ***capital*** felony charges. Id. at 459 (noting that Paradise did not address whether the legislature also intended to bar capital prosecutions). The Ellis defendants argued that under the applicable statute of limitations, capital felony was included in the list of crimes "of which the punishment is ***or may be*** imprisonment" at Somers because capital felony could be punishable by imprisonment at Somers if the death penalty were not imposed. Id. The defendants thus claimed that their prosecution for capital felony was precluded by the five-year statute of limitations contained in § 54-193. Id.

This court's analysis in Ellis included an historical examination of the statute of limitations for murder. Id. at 442-54. The court noted that the statute of limitations has always excluded capital prosecutions. Id. at 443-44. The statute of limitations classified crimes according to their severity, the most grave of which were the crimes punishable by death and, thus, not subject to any statute of limitations. Id. at 450. Most significantly for present purposes, this court agreed that the 1846 legislature divided murder into two types for statute of limitations purposes, with capital murder (then called first degree murder) subject to an unlimited statute of limitations and all other murder (then called second degree murder) subject to the five- (then three-) year limitation contained in § 54-193. Id. at 456 ("We believe that the 1846 legislature effectively classified murder into separate classes for purposes of the statute of limitations.") The court observed that the legislature, in abrogating the mandatory death penalty for murder in the first degree (the predecessor to capital felony) in 1951, did not intend to reclassify that crime as a crime not "punishable

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death. Id. at 441 (citing Conn. Gen. Stat. § 54-193 (Rev. to 1975)). At the time of the offense in Ellis, capital felony was punishable either by death or imprisonment, as determined in postconviction proceedings. Id. at 440.

by death" for statute of limitations purposes. Ellis, 197 Conn. at 456-57. Because capital felony had always been considered one of the gravest of offenses, and because the legislature in 1951 had not intended to reclassify capital felony as a crime not "punishable by death", the Ellis court concluded that capital felony was never intended to be subject to the statute of limitations. Id. at 456-57.

Far from supporting the trial court's ruling in the present case, Ellis actually undermines that ruling by confirming that ***only*** the most atrocious class of murder falls outside of the statute of limitations. The class of murder that knows no time limits is precisely the kind charged in Ellis – capital felony, formerly known as first degree murder. The class of murder subject to the statute of limitations, by contrast, is the kind of murder charged in Paradise – and in this case. Ellis and Paradise make clear that capital felony and non-capital murder are not analogous crimes in terms of gravity, contrary to the trial court's reasoning. Rather, capital felony is akin to what was formerly known as first degree murder, while murder pursuant to § 53a-54a, the statute under which the Defendant was charged, is similar to what was formerly designated as second degree murder. Justice Borden, one of the authors of the Penal Code, has made that very point. See footnote 46, supra.

The trial court misunderstood the import of Ellis, a capital felony case, in the context of this non-capital murder case. It is emphatically true that the availability of the statute of limitations historically depends on the gravity of the offense charged. But it is equally true that the legislature historically has recognized that certain murders are not as grave as others. See Public Acts 1846, ch. 16, § 1 (App. A93) ("[W]hereas the several offences which are included under the general denomination of murder, differ so greatly from each

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other in the degree of their atrociousness that it is unjust to involve them in the same punishment."). Specifically, as of 1975, non-capital murder pursuant to § 53a-54a, like second-degree murder prior to the Penal Code, was considered by the legislature to be a less atrocious crime than capital felony. The consequences of this distinction for statute of limitations purposes are clear. The line drawn by Ellis follows the line drawn by the legislature between 1846 and 1976: capital felony (formerly first degree murder) is not subject to a statute of limitations, whereas murder (formerly second degree murder) is subject to the statute of limitations.

2. This Court's holding in State v. Golino – another capital murder case– is also not applicable to this non-capital murder prosecution

State v. Golino also involved a murder prosecution on charges that potentially punishable by death. The defendant was arrested in 1983 for murder committed in 1973 in violation of Conn. Gen. Stat. § 53a-54(a)(1) (Rev. to 1972). Golino, 201 Conn. at 436-37. At the time of the offense in Golino, murder was punishable as a class A felony unless the death penalty was imposed pursuant to Conn. Gen. Stat. § 54a-46. Golino, 201 Conn. at 438; see also Conn. Gen. Stat. § 53a-54(c) (Rev. to 1972). The Golino statute thus potentially provided for the application of the death penalty, which is why the case does not apply here. Again, ***the statute under which Michael Skakel was charged did not permit the imposition of death under any circumstances***. This distinction makes all the difference under the applicable statute of limitations, as both Ellis and Golino understand.

The crime in Golino was committed after the United States Supreme Court's ruling in Furman v. Georgia, 408 U.S. 238 (1972), which invalidated Connecticut's death penalty scheme as unconstitutional, but before the murder statute was amended in October 1973

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establishing the crime of capital felony and once again distinguishing between capital and non-capital murder, as had been the case from 1846 to 1971. See P.A. 73-137 (App.A29). The defendant in Golino argued that his prosecution was barred by the five-year statute of limitations applicable to felonies punishable by imprisonment because, due to the judicial invalidation of the death penalty, he could not have been constitutionally sentenced to death for murder. Id. at 439.

The Golino court disagreed and concluded that the crime with which the defendant was charged, murder in violation of Conn. Gen. Stat. § 53a-54(a)(1), was an offense "punishable by death" for purposes of the statute of limitations because it prescribed a possible death sentence. Id. at 438-39. The court noted that it had previously concluded in Ellis that the statute of limitations as a whole represented a classification scheme whereby the allowable period of prosecution was related to the "gravity of the offense." Id. at 444. The court concluded that the legislature used the phrase "punishable by death" in the applicable statute of limitations as a shorthand reference to a category of crimes which, because of their atrocious nature, would always be amenable to prosecution. Id. at 446.[49]

Nothing in Golino changes the analysis for determining whether a murder prosecution for a pre-1976 offense is subject to the statute of limitations. The issue, as always, turns on the gravity of the offense charged as determined by the legislative

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[49] The court noted that, although the statute of limitations underwent several revisions between 1821 and 1973, these revisions "did not alter the basic classification scheme in which the gravest offenses, including murder [in the first degree] were placed outside any period of limitations." Id. at 445. The court's imprecise reference to "murder" here, as at other points in the opinion, understandably means "capital murder" given that the defendant in Golino was charged with a capital offense. The court's reference, to be historically accurate, necessarily must be to first-degree (capital) murder only, as Ellis makes clear. See Ellis, 197 Conn. at 456 (noting historical distinction between two classes of murder for statute of limitations purposes).

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classification. The offense charged in Golino, ***unlike that charged here***, was a crime that the legislature had determined was so atrocious as to be death eligible. In contrast, the type of murder with which the Defendant was charged was not thought to be sufficient atrocious to warrant death and, thus, exclusion from the statute of limitations. The Golino Court properly held that the unavailability of the death penalty due to constitutional infirmities in the sentencing process was irrelevant to this question.

In this case, the State prosecuted an expired cause of action, and therefore, the Defendant's conviction should be reversed and the matter remanded with an order to dismiss the charge against him.

II. THE PROSECUTION'S SUPPRESSION OF EXCULPATORY EVIDENCE AND ITS FAILURE TO COMPLY WITH DISCOVERY ORDERS REQUIRES A NEW TRIAL[50]

The single most important piece of exculpatory evidence in this case was suppressed by the State and physically withheld from the defense until after the jury returned its verdict. This evidence was a composite sketch of a man observed by a neighborhood security guard on the road near the scene of the murder, at around the time of the murder. The evidence was compelling because the man depicted in the sketch strongly resembled Kenneth Littleton – the Skakel tutor who was a principal suspect in the case for years, and the defense's primary target as the possible murderer of Martha Moxley. Yet, despite multiple written discovery requests ***explicitly*** asking for disclosure of any such sketch (and any other evidence relating to third-party culpability), and despite the fact that those discovery motions were granted by the court well before trial, the State never disclosed it

[50] Whether a Brady violation has occurred is reviewed *de novo*. United States v. Payne, 63 F.3d 1200, 1209 (2d Cir. 1995). A trial court's denial of a motion for new trial and its rulings on discovery issues are both reviewed for abuse of discretion. State v. Lambert, 70 Conn. App. 583, 586-87 (2002); Babcock v. Bridgeport Hosp., 251 Conn. 790, 820 (1999).

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until after Mr. Skakel was convicted. The State also failed to produce its lengthy "profile reports" of Kenneth Littleton and Thomas Skakel. The State's conduct plainly violated Brady v. Maryland, and the discovery rules. A new trial is warranted.

A. The State's Suppression Of The Sketch Warrants A New Trial

1. Defendant's Discovery Requests

During pre-trial discovery the Defendant filed two comprehensive motions for discovery and inspection seeking, inter alia, exculpatory evidence, evidence that someone other than the Defendant was involved in the murder or near the scene, and sketches or composite drawings. App. A168 (¶¶ 1, 9, 21, 22, 52, 55); A196 (¶¶ 1, 21, 22, 55, 57). The State did not object to these requests. See Tr.8/15/01 at 9-23. The court ordered compliance with all requests not objected to. Tr.8/15/01 at 9-23. The State thereafter filed a "Notice of Service: State's Disclosure" advising the Court (and the Defendant) that it had delivered "to counsel for defendant" its discovery responses. App. A225. The State later told the Court that it had provided an "open file" and permitted inspection of 1,806 pages of police reports. Tr.8/29/02 at 8-9. However, ***the State never produced any sketch***, and no such sketch was included in the "open file" that the State made available for inspection.[51]

2. The Composite Sketch Suppressed By the State

The critical piece of evidence at issue was a composite sketch based on the witness statements of Charles Morganti, Jr., a Belle Haven security guard.[52] Mr. Morganti reported

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[51] The State has never made the claim that the sketch was in the file made available to the defense before trial. As part of its post-trial motions, the defense was prepared to offer proof establishing that the sketch was not part of the State's file, but the trial court refused to permit such evidence. Tr. 8/28/02, at 44-45.

[52] The police reports relating to Mr. Morganti and the sketch were attached to the Defendant's Amended Motion For New Trial and accompanying memorandum of law dated August 26, 2002. See App. A243 – A329. The sketch is at App. A296.

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to police that on the night of the homicide at around 10:00 p.m. he observed a white male walking on Field Point Road near Walsh Lane. App. A298; A302. Morganti related that he had confronted the same man earlier. Morganti described the man as six feet tall, 200 pounds, late 20's to early 30's, dark rimmed glasses, fatigue jacket, tan slacks and blond hair. App. A298. Morganti assisted the Greenwich police department in putting together a "composite picture" of the suspect. App. A301. The physical description provided by Morganti and the composite sketch prepared by the police depicts an individual who strongly resembles the Skakel tutor, Kenneth Littleton.[53]

Despite this similarity to Littleton, the police apparently concluded that the person Morganti saw at around 10:00 p.m. was Carl Wold, a young man who lived in the area. The police evidently were not moved by the fact that both Wold and his father told the police that he arrived home at approximately 8:00 to 8:15 p.m. and did not leave his home thereafter. App. A304-A306. In 1994, Inspector Frank Garr, an inspector in the prosecutor's office, reached the same conclusion despite the chronological impossibility of the Wold hypothesis. App. A309. Notwithstanding two 1975 reports that Carl Wold arrived home at between 8:00 and 8:15 a.m. and did not leave, (App. A304; A306-7), Garr wrote in his 1994 report that Carl Wold was the person Morganti saw at around 10:00 p.m. App. A309.[54]

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[53] On the date of the murder, Littleton was 23 years old, 6' 1" tall and weighed about 200 pounds. He wore silver rimmed glasses and had dark, wavy hair. App. A242; A314 – A325. Most importantly, the Morganti sketch resembled a photograph of Littleton that was taken a few months before the homicide.The photograph depicts Littleton as a coach at Brunswick School in Greenwich. App. A242; A323; A325.

[54]Morganti explained that he was replacing a wooden stanchion when he made the observation. App. A309. Some 19 years earlier (November 6, 1975) Greenwich police filed a report that Mr. Robert Bjork of Otter Rock Drive observed Morganti replacing a white road stanchion on the night of the homicide at 9:50 p.m. App. A133.

3. The Trial Court's Denial of Defendant's New Trial Motion and Refusal to Hold a Hearing on Defendant's Claims of Misconduct

After the Defendant was convicted, but prior to sentencing, Defendant's new counsel inquired about the existence of the sketch that had been the subject of multiple discovery demands prior to trial. For the first time, the State's Attorney provided a copy of the sketch to the defense, on August 21, 2002. App. A296 (fax line across top). The State never explained why the sketch had not previously been produced, or where it had been located. Based on this new development, the Defendant filed an amended motion for a new trial on August 26, 2002. App. A243; A277.

The trial court denied defendant's motion[55] and refused to hold an evidentiary hearing. The State was never required to justify its conduct or proffer evidence to establish its compliance with applicable law. Instead, the court ruled that: (1) the State did not suppress the composite sketch under Brady because the Defendant was "on notice" that such a sketch existed based on the police reports that were provided to the defense;[56] (2) the Defendant's discovery motion only sought the right to "inspect" items;[57] (3) the sketch

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[55] The trial court heard argument prior to sentencing, and defense counsel supplemented his written offer of proof contained in his August 26, 2002 memorandum during argument. Tr.8/28/02; Tr.8/29/02.

[56] The State defended its non-disclosure of the sketch by arguing that the police reports put the defense on notice that a sketch existed. Tr.8/28/02 at 67. Among the 1,800 pages of police reports provided to the defense, only 4 pages (App. A298; A307; A309) referred to a white male being seen by a security guard near the murder scene around 10 p.m. One page refers, in the future tense, to the preparation of a composite sketch. App. A301. Another page refers to Morganti assisting unidentified "investigators" in making a composite sketch. App. A309. However, no such sketch was produced by the State despite being under a court order to do so, and despite its certification to the court that it had complied with the discovery orders. App. A225; A230.

[57] The State argued it was not required to give the defense a copy of the sketch despite two discovery motions requesting sketches or composite drawings. The State claimed its duty was fulfilled by implicitly placing the defense on "notice" that a sketch existed by disclosing

was not material under Brady because it was inadmissible unless and until the security guard testified, which he did not; and, (4) the amended motion for new trial was not timely, despite having been filed five days after disclosure of the sketch. Tr.8/28/02 at 90-91. The trial court's rulings were erroneous.

4. The State Was Required To Provide The Composite Sketch To The Defendant Pursuant To Brady v. Maryland

The disclosure of exculpatory evidence is a right that the both our state and federal constitutions provide as part of their basic "fair trial" guarantee. See U.S. Const., amends. V, VI; Conn. Const., art. I, § 8. The United States Supreme Court has recognized time and again that governmental deception of the court and jury, or knowing suppression of evidence favorable to the accused, was conduct inconsistent with the most "rudimentary demands of justice." Mooney v. Holohan, 294 U.S. 103, 112 (1935); Brady v. Maryland, 373 U.S. 83 (1963). In Strickler v. Greene, 527 U.S. 263 (1999), the United States Supreme Court articulated three components to a "true Brady violation": (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and, (3) prejudice must have ensued. Strickler, at 281-2. In this case, the State's failure to disclose the sketch of a man who resembled a third-party culpability suspect is a "true Brady violation."

a. The sketch was favorable to the Defendant

Mr. Skakel buttressed his alibi defense by also offering third-party culpability evidence that Kenneth Littleton may have been the killer. See discussion infra, at 39. The

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police reports making reference to a sketch. Tr.8/28/02 at 67. The State conceded that it probably did not provide a copy of the sketch to trial counsel. Tr.8/29/02 at 6.

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sketch turned over after trial bore a striking resemblance to Littleton.[58] Compare App. A242; A296; A323; A325. Thus, the sketch was favorable to the defense because it would have assisted the Defendant in his defense that someone else, namely Kenneth Littleton, committed the crime. See Boyette v. Lefevre, 246 F.3d 76, 91 (2d Cir. 2001) (evidence that could have helped defense suggest an alternative perpetrator is favorable to the defense under Brady). Also, the sketch could have been used to impeach Littleton's testimony that he did not leave the Skakel property when he went outside at 9:30 p.m. the night of the murder. See id. (evidence that impeaches a prosecution witness is favorable to the defense under Brady).

b. The prosecution suppressed the sketch

Despite two written motions for the production of any sketches or composite drawings, and a court order commanding production, the State never produced the sketch. The State's argument that it somehow satisfied its Brady obligation to produce any and all sketches by having an open file policy and dumping on the Defendant 1,800 pages of other documents – in which a reference to the sketch is buried in two pages – is disingenuous. A prosecutor's Brady obligation cannot be satisfied by such "needle-in-the-haystack" tactics.

The State's logic, which the trial court adopted, distorts Brady and ignores the particular facts of this case. Brady does not contemplate a treasure hunt. United States v. Agurs, 427 U.S. 97, 112-13 (1976). Rather, Brady imposes an ***affirmative*** disclosure requirement on the State. Moreover, the Defendant ***did*** ask for the sketch – twice. Under

[58] The State knew at the time of the Defendant's arrest how Littleton looked in 1975 because a 1998 book about the murder, *Greentown*, contained a 1975 photo of Littleton as coach of a team at Brunswick School in Greenwich. App. A269; A323. A comparison of the composite drawing and photo put the State on notice that it possessed Brady material that should have been immediately disclosed. App. A242.

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the circumstances of this case, a reasonable defendant would only have concluded that the State did not have a sketch, because if it had a sketch it would have produced it. United States v. Bagley, 473 U.S. 667, 682 (1985) (incomplete response to specific request represents to defense that evidence does not exist).[59]

Furthermore, it was error for the trial court to permit the State to rely upon its open file policy as a substitute for disclosures required to be made under Brady. See State v. Wilcox, 254 Conn. 441, 453 n.19 (2000) ("open file policy" is not substitute for disclosure); State v. Van Eck, 69 Conn. App. 482, 498 (2002); Strickler v. Greene, 527 U.S. 263, 283 n.23 (1999) (when the prosecution maintains open file policy, defendant is entitled to rely on fact that file is complete). An open file policy is useless if certain documents are culled out and segregated. Not only was the sketch missing from the file when it was reviewed by the defense, Tr.8/28/02 at 44-5, but also absent was a warrant application that had been prepared for the Defendant's brother, Thomas Skakel.[60]

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[59] See also Strickler v. Greene, 527 U.S. 263 (1999) (prosecution suppressed evidence under Brady even though information had been available to the petitioner's counsel from which he could have learned that the suppressed evidence existed); United States v. Payne, 63 F.3d 1200 (2d Cir. 1995) (where Government produced a large volume of material in discovery, defendant can reasonably assume that files did not include other undisclosed exculpatory documents); United States v. Gil, 297 F.3d 93 (2d Cir. 2002) (one document produced among 2,700 pages of poorly indexed material considered suppressed under Brady where specific discovery requests had been made prior to trial).

[60] On April 16, 2002 Defendant's trial counsel filed a discovery motion seeking production of any arrest warrant affidavits and applications. App. A227, ¶3. The State did not object and claimed it had already complied. App. A230. At trial, it became apparent that a warrant application existed for the arrest of Defendant's brother, Thomas Skakel. Tr.5/8/02 at 30-5; 67;72; 84-91. Only after defense counsel made several oral requests for the warrant, Tr. 5/8/02 at 35-36, 85, did the State comply five days later. Tr.5/13/02 at 90. The trial court excused the late compliance because the defense did not press the issue after it filed its April 16, 2002 discovery motion, and because the application could not be located. Tr.5/8/02 at 87. Apparently, neither Thomas Skakel's arrest warrant application nor the sketch were in the State's file. Consequently, an open file would not have helped the defense find the sketch. The non-disclosure of the arrest warrant affidavit, the sketch and

c. The sketch was material.

The sketch clearly was material under Brady. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Strickler v. Greene, 527 U.S. at 289-90. The defendant need not show that the evidence, if disclosed, would have resulted in his acquittal. United States v. Schwarz, 259 F.3d 59, 64 (2d Cir. 2001).

At trial, the defense offered a third-party culpability claim by theorizing that Kenneth Littleton may have been the killer. Certainly, "a picture is worth a thousand words," and the ability for the jury to view a sketch of a man seen near the crime scene at the relevant time that resembles Kenneth Littleton (and ***not*** 15 year old Michael Skakel) would have materially assisted the defense.[61] If defense counsel had been given the composite drawing, he could have argued that the drawing bore a striking resemblance to Kenneth Littleton. The jury may well have concluded that Morganti saw Littleton near the murder scene at the time of the murder. Furthermore, defense counsel could have argued that the person depicted in the sketch was ***not*** the Defendant. Finally, if the sketch had been disclosed, the State would not have been able to argue in its summation that "[t]he only evidence that remains against Ken Littleton ... is that 11 years after the crime he was diagnosed as being manic depressive." See Tr.6/3/02 at 115.

The suppressed evidence was also material because it undermined Littleton's

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the profiles of Littleton and Thomas Skakel (see discussion infra) evinces a pattern of non-disclosure of exculpatory evidence.

[61] This Court has recognized the importance of composite drawings in promoting the interests of justice. Siemon v. Stoughton, 184 Conn. 547, A.2d 210 (1981) (new trial ordered where undisclosed sketch resembled unknown nude male who may have committed the assault).

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version of events, and thus bore directly on his credibility. If Littleton is the six foot tall, 200 pound white male who Morganti saw between 9:30 and 10:00 p.m., his testimony that he did not leave the Skakel property was false. If the sketch depicts Littleton, then he was walking near the Moxley residence around the time of the murder. See State's Trial Ex. 1 (Overview of Belle Haven).

The trial court erroneously ruled that the sketch was not material because it would not have been admissible at trial. Tr. 8/28/02 at 90-01. The court indicated that the Defendant did not call Morganti to testify at the trial and the sketch would not have been admissible "until or unless Morganti testified."[62] Tr. 8/28/02 at 91. The court misses the point. Mr. Morganti was not called to testify at trial ***because the defense did not have the sketch***. The obvious fact is that Morganti ***would have*** been called to testify if the sketch had been produced to defendant, and the sketch would have been admissible (as the trial court recognized) through Mr. Morganti. The Defendant could not have known that it was necessary to call Morganti without first having the sketch, and the defense cannot be blamed for its failure to call a witness to lay the foundation for a document that was suppressed. Additionally, even if the sketch were deemed inadmissible, inadmissible evidence may still be material under Brady. United States v. Gil, 297 F.3d at 104 (citing Spence v. Johnson, 80 F.3d 989, 1005 n.14 (5th Cir. 1996)). As noted, the sketch doubtlessly would also have been an effective tool in the cross-examination of witnesses, including Mr. Littleton. The prosecution's failure to produce the Littleton look-alike sketch resulted in a "true Brady violation," and therefore, a new trial is warranted.

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[62] Composite drawings are not subject to the hearsay rule. State v. Packard, 184 Conn. 258, 273 (1981). They are admissible as long as there is proper authentication which can be provided by the witness who gave the information -- in this case, Morganti -- or the sketch artist or both. State v. Weidenhof II, 205 Conn. 262, 275 (1987).

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5. The Trial Court's Order On Discovery Mandated That The Sketch Be Provided To The Defense

The State also violated the trial court's discovery order that all requests that were not objected to by the State should be provided to the defense. The Defendant's motions for discovery cited Practice Book § 40-1, et seq. and sought the production of sketches and composite drawings. App. A168; App. A196. The State did not object to these requests. Therefore, the court's discovery order included the disclosure of the sketch that resembled Kenneth Littleton.[63] The State's disclosure nonetheless omitted a copy of the composite drawing, Tr.8/29/02 at 2, 6, 8-9, and thus violated the court order. Furthermore, the State's nondisclosure also violated the Practice Book discovery rules. See Conn. Prac. Bk. § 40-11 et seq.

This Court has made clear that the State's failure to produce discoverable material in its possession can lead to a new trial if the non-production affected the result of the trial, even in the absence of bad faith. See, e.g., State v. Williamson, 212 Conn. 6 (1989); Conn. Prac. Book § 40-5. The burden is on the State to prove that the failure to produce the composite drawing was harmless beyond a reasonable doubt. Id. It simply cannot do so here, where the suppressed material was a police sketch of a man seen near the crime

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[63]The trial court ruled that the Defendant's discovery motion only sought the right to "inspect" items, and therefore, the court's discovery order entitled the Defendant to inspect the items and nothing else. Tr.8/28/02 at 90-91. The court's ruling is erroneous for several reasons. First, it is factually incorrect. The discovery motion sought more than an order to inspect. It requested an order "requiring the prosecuting authority to disclose any and all materials sought herein..." It also sought an order directing the prosecuting authority to disclose in writing the existence of...all information, objects, materials...enumerated hereinafter." App. A196-97. This plainly included composite drawings and sketches. The trial court's order directing the State to comply with Defendant's motion for discovery and inspection likewise was not limited to inspection. Tr.8/15/01 at 9. Second, whether or not the discovery request was limited to inspection, the State never produced the sketch at all, for copying, inspection, or any other purpose. The "inspection-only" point is a red herring.

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scene at the relevant time who resembled the defense's prime suspect, Kenneth Littleton. Accordingly, the proper remedy for the State's violation of the trial court's discovery order and the Practice Book provisions is a new trial. See Conn. Prac. Bk. § 40-5; State v. McKiernan, 78 Conn. App. 182, 200 n.10 (2003) (primary purpose of sanction under Practice Book § 40-5 is to ensure that defendant's rights are protected, not to exact punishment on State; court to consider extent of prejudice and feasibility of rectification).

6. The Amended Motion For New Trial Was Filed In A Timely Manner

The trial court's conclusion that the sketch issue was raised too late because it should have been included in the original motion for new trial is unfair. Tr.8/28/02 at 93-4. New counsel obtained the sketch on August 21, 2002. See App. A296. The court's conclusion was erroneous because: (1) the State did not disclose the sketch until August 21, 2002 (App. A296) and within five days of disclosure an amended motion for new trial was filed (App. A243); (2) the original, timely motion for new trial was, in part, already based on a Brady violation (albeit, Thomas Skakel's arrest warrant affidavit and the Littleton interviews) and the amended motion simply raised additional Brady claims based on the newly discovered sketch. Because a Brady violation can be raised by way of a petition for new trial or a writ of habeas corpus, it would not serve the interests of justice to bar the Defendant from making the claim before he was sentenced, particularly when there was no prejudice to the State. Moreover, our criminal rules do not require court permission to seek an extension to amend motions when the original motion is timely filed. The court incorrectly refused to invoke the interests of justice provision of Practice Book § 42-54 to permit the amendment. Tr. 8/28/02 at 93. Thus, the court's denial of the amended motion for new trial as untimely is erroneous.

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B. The State's Suppression Of "Profile Reports" Of Littleton And Thomas Skakel As Suspects Prepared By The Police In 1992 Warrants A New Trial

Eight years prior to the Defendant's arrest, the lead investigator prepared two "profile reports" – one for Kenneth Littleton and one for Thomas Skakel – that contained incriminating evidence pointing to each as the possible killer of Martha Moxley. Tr.5/13/02 at 76-7; 81. The State never disclosed the reports[64] despite Defendant's pretrial discovery motion that sought all exculpatory information including any evidence that someone other than the Defendant was involved in the commission of the murder. App. A201, ¶ 22.

At oral argument on the amended motion for new trial, the trial court reviewed the profiles in camera, marked them under seal as a State's Exhibit, and denied the amended motion for new trial and request for evidentiary hearing. Tr.8/28/02 at 59, 89, 93. The court ruled that the profiles were protected from disclosure under the work-product doctrine because they contained the mental impression of the author, former Inspector Solomon. Tr.8/28/02 at 88-89. The trial court's ruling was in error and ignores the State's fundamental duty to disclose exculpatory information to the defense.

1. The State Was Required To Provide The Summary Profile Reports Pursuant To Brady v. Maryland

The profile reports are not work product,[65] but even if they were, the doctrine cannot

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[64] The issue of the Littleton profile report first arose when former State's Attorney Inspector John Solomon testified at trial. See Tr.5/10/02 at 84; Tr.5/13/02 at 60-2; 72-3; 76-7; 80-2; Tr.5/22/02 at 133. Solomon testified that he had prepared the report in 1992 and included most of the important information that had made Littleton a suspect. Tr.5/13/02 at 62-82. Defense counsel asked the trial court for a copy of the report during his examination of Littleton, but the court denied the request by responding "not right now." Tr.5/13/02 at 77. The Littleton report consisted of forty-three (43) pages. Tr.5/13/02 at 81.

[65] "To be protected under this doctrine, the work of the attorney must be such that it forms an essential step in the procurement of data and must involve duties normally performed by

trump the State's obligation to disclose exculpatory information under Brady. Thus, the State's work product is discoverable if the information is exculpatory. Mincey v. Head, 206 F.3d 1106, 1133, n.53 (11th Cir. 2000); United States v. DeMarco, 407 F. Supp. 107, 111 n.2 (C.D. Cal. 1975); see also Connecticut Practice Book §§ 40-11 (duty to disclose exculpatory information) and 40-14 (prosecutor's work product protected except for exculpatory material).

The Littleton and Thomas Skakel profiles are favorable to the Defendant because they would have assisted him with his claim that he was not the killer. See Boyette v. Lefevre, 246 F.3d 76, 91 (2d Cir. 2001) (finding that evidence that could have helped the defense suggest an alternative perpetrator is favorable to the accused under Brady). Additionally, there is no doubt that the profile reports were suppressed because they were not produced to the defense despite a specific request for the type of information contained in the profile, Tr. 5/13/02 at 77, 81, and despite a discovery order. Finally, the reports were material. See discussion, supra, at 39-40 and incorporated herein.

2. The Trial Court's Order On Discovery Mandated That The Profile Reports Be Provided To The Defense

Because the State did not object to the Defendant's request that the State provide "any evidence that someone other than, or in addition to the Defendant, was involved in the commission of the offense....", the court ordered the State to comply. Tr.8/15/01 at 9. This order obviously included the production of the Littleton and Thomas Skakel profiles, yet the State failed to comply and failed to raise any work-product objection. The disclosure of the profiles was also required by the Practice Book. See C.P.B. § 40-11 et seq. The

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attorneys." Barksdale v. Harris, 30 Conn. App. 754, 761, cert. denied, 225 Conn. 927 (1993). No such showing was made here by the State.

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information in the profiles was material because it would have buttressed the third-party culpability claim, and therefore, the Defendant was prejudiced by its non-compliance. The proper remedy here for this violation is a new trial. See C.P.B. § 40-5; State v. McKiernan, 78 Conn. App. at 200 n.10.

C. Conclusion

The State's suppression of either the sketch or the summary profile reports independently warrants this Court to order a new trial. However, the reviewing court must view the suppressed Brady evidence collectively. Kyles v. Whitley, 514 U.S. 419, 436 (1995). The State engaged in a pattern of misconduct in failing to turn over numerous pieces of exculpatory evidence. Certainly, when viewed collectively, the State's suppression of the sketch and the profile reports clearly requires a new trial.

III. THE JUVENILE COURT ERRED IN TRANSFERRING THIS CASE TO THE ADULT CRIMINAL DIVISION OF THE SUPERIOR COURT [66]

The Defendant was charged as a juvenile because he was 15 years old on the date of the murder. A hearing was held to transfer Defendant's matter to the regular criminal docket pursuant to Conn. Gen. Stat. § 17-60a. Before a valid transfer can be ordered, the statute requires, inter alia: (1) "a complete investigation" of the Defendant pursuant to Conn. Gen. Stat. § 17-66; (2) a finding that there is no state institution designed for the care and treatment of children to which the court may commit the child; and (3) that the adult division provides a more effective setting for the disposition of the case and the institutions to which said court may sentence a defendant are more suitable for the care and treatment of such child. Conn. Gen. Stat. § 17-60a. The court ruled on January 31, 2001 and ordered

[66] Because this matter presents issues of statutory construction, the review is plenary. In re Steven M., 264 Conn. 747, 757 (2003).

the 40-year old Defendant transferred. App. A.348. The transfer was invalid because the statutory requirements were not met.

A. The Juvenile Court Erred In Ordering The Defendant Transferred Without A Section 17-66 Report

Joseph Paquin, the probation officer responsible for preparing the report pursuant to Conn. Gen. Stat. § 17-66, admitted that he failed to comply with the statute, Tr.10/20/00 at 58, and the court, in its memorandum, acknowledged Paquin's non-compliance. Paquin failed to investigate the "parentage and surroundings of the child, ... his habits and history, ... home conditions, habits and character of his parents" as required by Section 17-66. The court acknowledged that the report was mandatory, that it failed to address the topics referred to in the statute and that it was limited to a determination of the appropriate forum, juvenile vs. adult. App. A349-A351. Having failed to submit a report in compliance with § 17-66, it is not surprising that Paquin testified that he did not know whether there was any facility where the Defendant could receive adequate treatment. Id. at 14.

This Court has held that the failure to follow a mandatory procedure which affects important rights entitles a defendant to a new trial regardless of prejudice. State v. Pare, 253 Conn. 611 (2000). Here, not only did the State fail to comply with the mandatory Section 17-66 report, but prejudice resulted because Paquin failed to adequately explore available facilities for Defendant's treatment and care in the state, Tr.10/20/00 at 9, and outside the state. Id. at 12. Thus, the transfer to the Adult Division was invalid because of the inadequate Section 17-66 report.

B. The Juvenile Court Erred In Finding That There Was No Appropriate Placement For The Defendant In The Juvenile Division

Before the Defendant could be ordered transferred, the court was required to find

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that there was "no state institution designed for the care and treatment of children to which said court may commit such child which is suitable for his care or treatment." Conn. Gen. Stat. § 17-60(a)(2). The court held that if the Defendant were found delinquent, its only option was to commit him to the Department of Children and Families (DCF). Because, however, the regulations of DCF, which were adopted in 1994,[67] prohibit placement of anyone over the age of 18, the Defendant by regulation could not be placed in a state institution for the care and treatment of children as required by the transfer statute. Def. App. at (4-7). It was error to permit the regulation to trump the statute.

Section 17-68, does not prohibit a commitment to a state institution if the delinquent is over 18. DCF has improperly imposed this requirement on the statute through its regulations and thwarted the will of the legislature. Salmon Brook Convalescent Home v. Comm'n On Hosps. & Health Care, 177 Conn. 356, 363 (1979); Yanni v. DelPonte, 31 Conn. App. 350, 356 (1993) (Lavery, J., concurring) ("When a statute and regulation conflict, the statute must prevail."). In 1975 it was not the intent of the legislature that a person over the age of 18 be automatically transferred when he allegedly committed murder at age 15. This conclusion is reinforced by the fact that the DCF regulations were not adopted until 1994. The Court's rigid adherence to the 1994 DCF regulation foreclosed it from considering out-of-state placements. App. A353-A354. Consequently, the court ignored testimony from three witnesses -- Mr. Paquin, Clinton Roberts (a former probation officer and currently a sentencing consultant), and Attorney Bernadette Coomaraswamy (a former juvenile court advocate in 1975) -- that out-of-state placements in 1975 and at the

[67] The regulations referred to by the court in its opinion are §§ 17a-145-48 through 17a-145-53, of the Regulations of Connecticut State Agencies governing the licensing of child care agencies and facilities.

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time of the transfer hearing were common. Tr. 10/20/00 at 43, 46-7; 10-11; 32-33. Such commitments, according to Paquin, included delinquents who committed serious crimes. Id. at 10.

The court determined that even if the DCF regulations permitted commitments of juveniles who were over the age of 18, commitment was limited to institutions in the State because subsection 2 of the transfer statute refers to state institutions. Conn. Gen. Stat. § 17-60a(2); App. A352. This conclusion ignored the long-standing practice of placing delinquents out of state for serious crimes. Furthermore, a statute must be interpreted "in a manner that will not thwart its intended purpose or lead to absurd results." State v. Spears, 234 Conn. 78, 81; Turner v. Turner, 219 Conn. 703, 712 (1991). Section 17-60a(2) requires the institution to provide for the "care and treatment" of the child. To promote that goal, a fair reading of the phrase "state institution" would include a private institution in the state or a private or public institution outside of the state with whom the State of Connecticut would contract. In fact, Day Top, a facility in Newtown, accepts both juveniles and adults. Tr.10/20/00 at 30, 36.

The court's conclusion that the Defendant could not be serviced by the Juvenile Division led to its erroneous ruling that the adult division of the Superior Court was the appropriate venue for Defendant's case. No evidence was offered to support this finding. Rather, the evidence indicated that the juvenile system was fully capable of meeting Defendant's needs, to the extent he had any, in the event he was adjudged delinquent. Furthermore, the court erred in failing to give appropriate weight to Defendant's present circumstance and needs, if any. A properly prepared § 17-66 report would have addressed this issue. Because the transfer was erroneous, and thus, the Defendant was tried in the

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Adult Division, the matter should be remanded with an order that it be dismissed.

IV. THE CONVICTION MUST BE OVERTURNED DUE TO A PERVASIVE PATTERN OF PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Throughout its closing argument, the State engaged repeatedly in precisely the kind of misconduct that has been condemned by this Court as improper and unconstitutional. The misconduct was pervasive, it was effective, and it deprived Mr. Skakel of a fair trial. Mr. Skakel was convicted of murder based on a series of falsified stories manufactured by the State during its closing argument to mislead the jury:

- The State intentionally distorted the chronology of events to fabricate a forensic cover-up allegedly perpetrated by defendant – without a shred of evidence to support its false claims.
- The prosecution argued that the "Skakel family" had conspired to fabricate an alibi, despite the fact that the alleged "conspiracy" never occurred according to any witness, including the State's witnesses.
- The State improperly argued to the jury that the "Skakel family" believed that the Defendant was guilty of murder – that they "had a killer living under their roof" – and thus obtained a conviction based on the "family's" opinion about his guilt.
- The State called the Defendant a "spoiled brat" to inflame the jury's passions.
- The State altered the evidence by showing the jury a made-for-conviction movie that literally fabricated a confession.
- The State told the jury that the Defendant masturbated on the victim's body despite the absence of any proof that he did so, and extensive proof that no such thing ever happened.

A. The Law: The State's Closing Argument Deprived Defendant Of His Constitutional Right To A Fair Trial

The law governing this claim is well-established:[68]

[68] See, e.g., State v. Ceballos, 266 Conn. 364 (2003); State v. Rizzo, 266 Conn. 171 (2003); State v. Payne, 260 Conn. 446 (2002); State v. Singh, 259 Conn. 693 (2002); State v. Santiago, 73 Conn. App. 205 (2002); State v. Stevenson, 70 Conn. App. 29, 40, 43 (2002).

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- A prosecutor's arguments may not be based on acts not in evidence. State v. Payne, 260 Conn. 446, 456-57 (2002);

- A prosecutor "may not appeal to the emotions, passions and prejudices of the jurors or otherwise inject extraneous issues into the case that divert the jury from its duty to decide the case on the evidence." State v. Rizzo, 266 Conn. 171, 248 (2003);

- A prosecutor may not attack the character of the defendant by stigmatizing him using name-calling. See State v. Couture, 194 Conn. 530, 562 (1984);

- A prosecutor may not express his own opinion, directly or indirectly, as to the credibility of witnesses or the guilt of the defendant. State v. Singh, 239 Conn. 693, 713. (2002).

The State used all of these improper prosecutorial tactics in this case.[69] The misconduct was egregious and of constitutional proportions.[70] Because a constitutional right is squarely implicated, it is of no aid to the State that defense counsel did not object to the State's persistent misconduct. The fundamental due process question remains the same where, as here, the issue is raised for the first time on appeal under State v.Golding, 213 Conn. 233, 239-40 (1989). Connecticut courts have routinely employed the Golding analysis to review unpreserved claims of prosecutorial misconduct. See, e.g., State v. Ceballos, 266 Conn. at 375-76. The fact that defense counsel did not object does not make the deprivation of due process any less severe or the prejudice any less damaging.[71] The

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[69] The State's closing argument is reproduced in the Appendix. App. A356; A375.

[70] "[P]rosecutorial misconduct of constitutional proportions may arise during the course of closing argument...." State v. Singh, 259 Conn. at 693. The issue is whether the prosecution's conduct so infected the trial with unfairness as to make the conviction a denial of due process. State v. Alexander, 254 Conn. at 303. Once a series of serious improprieties has been identified it must be determined whether the totality of the improprieties leads to the conclusion that the defendant was deprived of a fair trial. State v. Rizzo, 266 Conn. at 249.

[71] This Court recently stated in State v. Thompson, 266 Conn. 440, 480 (2003) that only instances of "grossly egregious misconduct" will require reversal in the absence of a defense objection at trial. The prosecutor's misconduct in the present case certainly

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fairness of the trial, not the fault of the attorneys, is the overriding issue. See State v. Couture, 194 Conn. at 562. Fairness demands a new trial in this case.

B. Facts Relevant to This Claim of Prosecutorial Misconduct

1. The State's False And Misleading Story About A Forensic Cover-Up By Michael Skakel and His Family

The State had no forensic or physical evidence linking Mr. Skakel to this murder. It turned this weakness into a strength by devising an elaborate story about a forensic "cover-up" perpetrated by Michael Skakel during the 1990s, more than 15 years after the murder. The State first noted the fact that Mr. Skakel had told people that he had masturbated in a tree near the murder scene. Tr.6/3/02 at 10-12. The State then argued – falsely -- that Michael only started telling people his masturbation tale after Dr. Henry Lee became involved in the case in the early 1990s. Thus, according to the State, the masturbation story was fabricated by "the Skakels" in 1992 as a shrewd anticipatory measure necessitated by the appearance of ace forensic scientist Dr. Henry Lee, whose participation made the Skakels fear the inevitable discovery of DNA evidence linking Mr. Skakel to the murder scene. This theory became central to the State's case.

The prosecutor told the jury this story over and over again in both phases of his closing argument:

> This, as you review the evidence, is where the absolutely weird masturbation story acquires significance. It's incorrect to say this is not a forensic case. . . . Henry Lee presented to you some weeks ago the history of DNA in solving crimes. By 1991 or 1992, it was the real deal in criminal investigation. When this case, this investigation was revived in late 1991, every criminal investigator on the planet was totally attuned to this miraculous new technology and of course that would include the PIs the Skakel family had hired to assist them in the defense, Sutton Associates. . . . You didn't have to

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satisfies this requirement. Defense counsel's inattention cannot excuse the unfairness that resulted from the prosecutor's plainly outrageous conduct present in this case.

> be a fly on the wall when the Sutton Associates came into the picture in 1992 to understand why the defendant soon was serving up his bazaar [sic] tale of masturbation in a tree to his friend, Andy Pugh, and later to Richard Hoffman. . . . And not knowing what traces may have been recovered from her body and of course the crime scene investigation or from her clothing or exactly who he may have related this horrible tale to, particularly in his years at Elan, he needed some kind of explanation. Tr. 6/3/02 at 10-12.
>
> In 1992, he told somewhat the same story to Andy Pugh . . . . And he asked Pugh to please return Sutton Associates, and their persistent phone calls. This of course to get out the appropriate explanation should there be semen at the scene one day connected to the crime. Id. at 18.
>
> So, it is Michael Skakel who has set the buffet menu here. As a result, starting in 1992 with Andy Pugh, the defendant having already consulted with Sutton Associates, has spun a tale of tree climbing, spying and masturbating that occurred after his return from Terriens. Id. at 93-94.
>
> [T]hat does not mean that you cannot consider the sudden presence of Sutton Associates particularly as it relates to the defendant's Andy Pugh masturbation story. This is simply more evidence of what the defendant was doing to avoid a successful prosecution. Id. at 110.
>
> [H]ow about the bloody smears on Martha's thighs[?] What better evidence could you ask for when you are trying to reason out just what [defendant] meant when he started talking about his masturbation stories? Id. at 112.
>
> The only person on earth who knew the defendant had masturbated anywhere was the defendant so why ever mention it to Andy Pugh – only one conceivable reason, to help explain himself should his DNA ever be discovered. Id. at 113.

The State's elaborate story of a forensic cover-up is demonstrably false. First, the undisputed evidence at trial, elicited by the State itself, clearly showed that the Defendant had confided the masturbation incident to a friend, Michael Meredith, in ***1987***, some five years before Dr. Lee and Sutton Associates became involved. Tr. 5/20/02 at 112, 127.[72] Second, to support its made-up theory, the prosecutor incorrectly told the jury that DNA was "the real deal" in solving crimes by 1991/1992, and that by late 1991 "every criminal

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[72] Mr. Skakel told the same thing to another friend, Andrew Pugh, sometime in ***1991***, not 1992. Tr. 5/20/02 at 163.

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investigator on the planet was totally attuned to this miraculous new technology and of course that would include the PIs the Skakel family had hired to assist them in the defense, Sutton Associates." 6/3/02 at 10-12. Once again, this factual claim has absolutely no basis in the record evidence. In fact, the State's statement of "fact" is directly contrary to the undisputed evidence at trial.[73]

The State's false argument carried devastating force, if believed, because it demonstrated that Mr. Skakel possessed a grotesque consciousness of guilt, and simultaneously focused the jury on the State's extreme (and groundless) allegation that Mr. Skakel had masturbated on the victim's lifeless body. See Part IV.B.5. infra. In truth, the prosecution spun this story to inflame the passions of the jury and misdirect its attention. In the process, the State overstepped the bounds of zealous advocacy, conduct which requires reversal. State v. Payne, 260 Conn. at 456-57; State v. Rizzo, 266 Conn. at 248.

2. The State's False Story About A Skakel Family Conspiracy To Orchestrate A Fabricated Alibi

The State liked the "cover-up" theme because it simultaneously (1) explained why it took the State twenty-five years to charge Michael Skakel, (2) showed a familial consciousness of guilt, and (3) played into the State's theme that Michael Skakel and his family believed that their privileged station somehow put them above the law. So, again without a shred of evidence to support it, the State fabricated an elaborate story about a Skakel family "conspiracy" to falsify evidence that would supply an alibi for Mr. Skakel. This devastating "cover-up" theme not only conveyed a familial verdict of guilt, it also gutted the

[73] Far from being an established forensic tool in 1992, forensic DNA analysis was just emerging at that time. Dr. Lee testified that DNA testing had been "just introduced, we just started learning DNA" in 1991. Tr. 5/7/02 at 156; see also Testimony of Dr. Terri Melton, Tr. 5/15/03 at 50 (in 1993 the field of DNA was still "in its infancy.").

credibility of all alibi witnesses in one argumentative thrust, and appealed to the jury's sense of outrage that a wealthy family thought it was able to trick the police by concocting a false alibi. The State's conduct was grossly egregious because it was deliberate and false.

In his summation, the prosecutor repeatedly told the jury that Rushton Skakel, Sr. had orchestrated a series of false alibi statements given by the Skakel children, and certain Skakel relatives, to the Greenwich police. The State told the jury:

> And, then the alibi, that is the cornerstone of the defense here. . . . You will want to look at how it was produced. Somebody had the bright idea to get the players out of town in the immediacy of the investigation on October 31. . . . Not until after their return from Windham did the alibi begin to come up. Indeed, you just heard of the events of November 15 a lot last week, how father Rushton took all of his kids, Terrien as well, as a group, to give their stories to the police. By whom was it produced [?] Tr. 6/3/02 at 20-21.
>
> Let's stay with the alibi. Why is it so suspect. How was it produced. What did the Skakel family do – and I didn't really hear much from Mr. Sherman on this – what did the Skakel family do to put this together. Someone seeing the police all over the place decided, had the good sense to get the players out of the area. The oldest brother had already gone off to D.C. [for college], so the first thing the next morning Littleton was ordered to take the four players, Michael, John, Thomas and Jim Terrien, out of the way for awhile, for a short trip upstate . . . . The importance of that sudden brief one night trip is that the alibi didn't begin to take shape until some time after the return from Windham. Id. at 97
>
> And then you had the additional fact of two weeks after the murder, father Skakel, father Rushton Skakel, escorting the entire family together plus Jim Terrien almost like leading the VonTrapp family over the alps to the police station to give their recorded but unsworn statements. Id. at 97-98.
>
> Consider what the family group did to advance the alibi here in the courtroom. Id. at 98.
>
> Yet, even on this basic fact, the defendant's witnesses couldn't get on the same page. Id. at 98.
>
> Brother John, cousin Georgeann, they spoke to the police in 1975, as did everybody else. They were not under oath at that time. Certainly they were a lot more malleable then as 16 and 17 year olds then they are now as adults. Id. at 100.

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> Julie Skakel is the best example of a family support group continuing to this day to do whatever it takes to keep the wraps on Michael Skakel. Id. at 102.
>
> And then [Rushton Skakel, Sr.] escorted or rehearsed a group of alibi witnesses down to the police station a few weeks later. Id. at 110.
>
> By the time Detective Lunney arrived at the Skakel home to collect that four iron [golf club], they had 36 hours to dispose of the evidence. In fact, they were already on their way to Windham. Id. at 112.
>
> And the most amazing thing about these dozen admissions of the defendant, it is not like they were produced as a group. It is not like they were marched down to the Greenwich Police Station by Dad to all give an alibi. Id. at 129.

Thus, according to the State, the senior Mr. Skakel had "ordered" the family tutor, Ken Littleton, to whisk some (but not all) of the "players" in the conspiracy to the Skakel home in upstate Windham, New York, to fabricate an alibi. Once this was accomplished, then Mr. Skakel "escorted" and "led" the "rehearsed" alibi witnesses to give their false statements to the Greenwich police. This story of a family "alibi" conspiracy has no evidentiary support; in fact, the evidence was all to the contrary. The State's own witness Ken Littleton – who was the family "tutor baby sitter" in charge of the children at the time of the murder, and who by his own admission would have "love[d] to screw" Michael Skakel – completely undermined the State's alibi conspiracy story. Tr. 5/13/02 at 141, 138.[74] The prosecutor also misrepresented the circumstances under which the Skakels gave statements to the Greenwich police a few weeks later.[75] The State's overreaching cannot be

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[74] Notwithstanding his dislike for the defendant, Mr. Littleton testified that he was never asked by the Skakels to cover up anything. Tr. 5/13/03 at 5,9, 16. Mr. Littleton admitted that it was his idea to take the kids up to Windham. Id. at 23. Rushton Skakel, Sr. was not even home. Moreover, Littleton flatly denied hearing the children discuss the murder at any time to, from or at the Windham home. Tr. 5/9/02 at 176.

[75] Greenwich police officers had immediate access to the Skakel children, and questioned them even before the Windham trip. Tr. 5/29/03 at 75. The police officers testified that the Skakels were fully cooperative with the investigation from the moment the police arrived at

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justified and the grave consequences of this misconduct require a new trial. State v. Payne, 260 Conn. at 456-57.

3. The State's Argument that the "Skakel Family" Believed That They "Had a Killer Living Under Their Roof"

The foregoing "conspiracy" and "cover-up" allegations against the Skakel family were part of a larger story told by the State to the jury. Well beyond attacking the alibi witnesses, the State created a theme that the Skakel family itself believed that Mr. Skakel killed Martha Moxley because, otherwise, they would not have sent him to Elan. The State argued:

> One thing that I submit helps tie all this together, particularly on the subject of Elan, and really see the truth, is the defendant's very presence at that place. The defense scoffs at the idea despite I think such clear evidence of a cover up. Why was the defendant at Elan. This is really not a matter of seeing the forest from the trees. It is genuinely transparent.
>
> Clearly, the defendant had a major problem. Already he was an alcoholic, a substance abuser. Already he was beyond the control of his family. He was becoming suicidal. I doubt his family was even aware of the sexual turmoil he was going through. Elan was a last resort but why exactly so drastic a resort.
>
> You heard from Rogers and Coleman he was being hidden from the police is probably part of it. It is likely also, if it was a private juvenile justice system, basically a family's response is what can we do to make sure this doesn't happen again. And where does that ring the truest, at that horrible general meeting with the monster himself, Joe Ricci.
>
> One thing, every client of Elan who was there during that particular era recalls vividly, is Joe Ricci referring to a file and telling the defendant that he wasn't getting our of that ring until he explained why he killed her and then being

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the scene on October 31, 1975, and did nothing to hinder police access to evidence or witnesses during the initial investigation, despite the fact that police had no warrants. Tr. 5/8/02 at 20-21; Tr. 5/9/02 at 26. The State also knew from a police report prepared on November 15, 1975 that Rushton Skakel, Sr. did not "march" his hand-selected alibi witnesses to the police station to give an alibi, but rather, he responded to Detective Lunney's request to interview particular witnesses. Tr.5/28/02 at 83; See Police Report, 11/15/75, App. at A276. According to the police report, Detective Lunney requested James Terrien's appearance at the police department. Id.

> forced to where a sign, confront me on the murder of my neighbor.
>
> Where did Ricci get that information. Clearly he didn't get it from the police. Why did Ricci have that information. Why did Ricci confront the defendant with that information. The answer, the only one that makes sense, lies in why the defendant was there in the first place, lies in why his family felt a need to put him in that awful place. Why, because that's what they decided that they had to do with the killer living under their roof.

Tr. 6/3/02 at 129-31 (emphasis added).

In this improper summary of the evidence, the State asked the jury to conclude that Michael Skakel was guilty of murder ***because even his own family thought he was the "killer."*** This theory of guilt was terribly improper, for three reasons. ***First***, any belief of the Skakel family concerning the Defendant's guilt is irrelevant and inadmissible as evidence.[76] If the evidence is inadmissible, then a fortiorari, an argument based on the evidentiary theory is inadmissible. The issue of the Defendant's guilt was for the jury to decide without consideration of the opinions of others. ***Second***, the State told the jury that the Defendant's family believed him to be guilty. The prejudice of this argument is extreme. See Arpan v. United States, 260 F.2d 649, 659 (8th Cir. 1958) ("getting of the fact before the jury, that the [defendant's own] mother had been of the opinion that appellant was guilty, was a crossing into the issue of guilt and that it might cast shadows of prejudice upon the jury's resolution of that question"). ***Third***, the State asked the jury to infer what the Skakels told

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[76] See Conn. Evid. Code 703(a) (opinion testimony is inadmissible if it embraces an ultimate issue to be decided by the jury). See Arpan v. United States, 260 F.2d 649, 658 (8th Cir. 1958) (reversing murder conviction based, in part, on mother's testimony that she believed her son had shot the victim: "Clearly, it was immaterial in the legal establishing of appellant's guilt what the mother's thoughts or opinion in the matter may have been."); State v. Lahti, 597 P.2d 937, 938 (Wash. App. 1979) (alleged suspicions of ex-wife about abuse could not have been shown "without improperly substituting [the witness's] judgment for that of the jury."); State v. Gourley, 578 P.2d 713, 717 (Kan. 1978) (error to admit statement of defendant's half-brother expressing opinion that defendant had committed the murder; harmless error).

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Elan's director, Mr. Ricci, about Michael's guilt. Otherwise, the State argued, Ricci would not have forced Michael to accuse himself. Ricci did not testify, and the Skakels who testified were not questioned regarding what they said to Ricci. The State argued that the Defendant was guilty because the Skakels must have told Ricci that he was guilty. Such evidence would have been inadmissible hearsay if proffered at trial; thus, it was improper to ask the jury to infer such evidence during the State's closing argument.

4. The State's Scripted Argument Calling Defendant "The Killer" and "Spoiled Brat" Violated Due Process

The State also found it necessary to engage in highly prejudicial name-calling. Thus, it called Michael Skakel "the killer." Tr. 6/3/02 at 131 (the family sent him to Elan because that's what they decided that they had to do with the killer living under their roof."). The prosecutor also twice called defendant a "spoiled brat" during both phases of his summation. Tr. 6/3/02 at 16; 126. Exactly this type of conduct has repeatedly been condemned by this Court as unacceptable in a trial where a person's liberty is at stake. See State v. Couture, 194 Conn. at 562-64 (murder conviction reversed because prosecutor called defendant "cold-blooded killer" and coward); State v. Oehman, 212 Conn. 325, 335 (1989) (improper to call defendant "spoiled killer.")

5. The State's False Allegation That Defendant Masturbated on the Victim's Body

There was no semen found on the victim's body or at the scene of the crime, and the State knew it, yet the State wanted the jury to believe that Michael Skakel masturbated on the victim's body because that image would ensure passionate outrage.[77] The State

[77] See Tr.6/3/02 at 112 ("It is unquestionable that when the defendant repeatedly struck Martha with the golf club, crouched over her to stab her, masturbated on her that he got

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wanted the jury to believe that Mr. Skakel's non-inculpatory admission of teenage, peeping-tom masturbation was actually something else entirely: a confession to murder. It also wanted the jury to believe there was actual forensic support for this fabrication.

To defend its indefensible conduct, the prosecution claimed that this argument was justified due to the testimony of Greg Coleman.[78] Even though the masturbation story was untrue, the State seized on its prejudicial potential and made it a central focal point of its closing argument. Worse, the State intentionally distorted the forensic evidence to fit the discredited tale.[79] The actual physical evidence was that there was ***no*** semen found anywhere on or near the body. Tr.5/8/02 at 102, 153. The State's argument improperly invited the jury to speculate that the Defendant had committed a monstrous act. State v. Singh, 259 Conn. at 718; State v. Copas, 252 Conn. 318, 336-39 (2000).

6. The State's Misuse of the Evidence in its Audio-Visual Presentation of a Fictional Confession During Closing Argument

In the coup-de-grace of its improper closing argument -- during its rebuttal presentation providing the final images that the jurors took with them before deliberations -- the State showed the jury a movie it had made to "prove" its case. In this movie, the State literally produced an audio-visual confession by flashing huge six-foot high gruesome

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plenty of her blood on himself."); see also Id. at 12 (claiming the Defendant administered the ultimate and sickest of "humiliations").

[78] Coleman, who died of a heroin overdose prior to trial, testified via prior testimony that the Defendant told him in November, 1978 that he had returned two days after the murder and masturbated on the victim's body. Tr. 5/17/02 at 138, 160. Of course, the story was not true and could not have been true. The murder occurred during the nighttime on October 30, 1975, and the body was found just past noon the very next day. Tr. 5/7/02 at 155-160. Coleman was the ***only*** "witness" who said anything about masturbating on the body, and the State knew that the masturbation could not have occurred as this sole witness had testified.

[79] The State argued that the blood smear on Exhibit 23 supported its masturbation claim ("This is evidence ... that he masturbated on her body.") This claim was groundless and highly prejudicial.

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images of the victim's body at the murder scene while simultaneously playing an edited audiotape of defendant's admission of "guilt" – ***about a different event.*** The prosecutor turned Mr. Skakel into a narrator of the murder by splicing together a deceptively edited version of his taped interview with Richard Hoffman, in which the Defendant described his guilty feelings about masturbation, as a voice-over to horrific photographs of the murder scene. The State also created deceptive visual connections by simultaneously showing a transcript of the edited Hoffman interview, complete with red-lettered selections for emphasis, in connection with the gruesome photos. This video production went beyond the pale; in the hands of the State's movie crew, an admission of masturbation literally became a confession to murder.[80]

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[80] The Court is urged to view the State's video presentation. The computer disk was marked as a State's Exhibit during the argument on the Amended Motion For New Trial. Tr.8/28/02 at 51.Two passages are especially improper. First, as the State played the audio tape of Michael Skakel's guilty feelings about masturbating, "I remember just like having the feeling of panic like, oh, shit, you know, like my worry of what I went to bed with, I don't know, you know what I mean, I had a feeling of panic," it displayed digital photos of the victim's slain body, and also blew up in red letters the words "what I went to bed with" as the Defendant was saying them on the recording. See Tr.6/3/02 at 138; Affidavit of Michael Sherman. App. at A274. This visual distortion of the evidence changed its meaning, intentionally. The State juxtaposed images that did not go together and highlighted words to overemphasize their impact. Worse still, the State altogether left out key words contained in the actual testimony that it purported to display. The actual testimony was "And then I was like 'I'm running home,' I ran home, and I remember thinking 'Oh my God. I hope to God nobody saw me jerking off.' And I remember thinking before I went to bed that I was gonna tell Andy Pugh that I thought I saw somebody in there that night. And then I woke up, went to sleep, and then I woke up to Mrs. Moxley saying 'Michael have, have you seen Martha?" I'm like, "What?" And I was like still high from the night before, a little drunk, then I was like "What?" I was like "Oh my God, did they see me last night?" And I'm like 'I don't know,' I'm like, and I remember just having a feeling of panic. Like 'Oh shit.' You know. Like my worry of what I went to bed with, like may ..., I don't know, you know what I mean I just had, I had a feeling of panic. And um, I said 'Maybe she's in our barn, I don't know." State's Trial Exhibit 80, at 103-107. The State's version deleted the essential reference to Mr. Skakel's fear that someone saw him masturbating the prior night. Likewise, the State played and displayed the following words that Michael Skakel spoke regarding his supposed amorous intentions on the night of the murder, "I will be bold tonight, you know booze gave me, made me, gave

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Courts have found it improper to allow the prosecution to replay audio or video evidence during closing arguments.[81] The State's use of its audio-visual display during its closing argument was improper because it vastly distorted the meaning and import of the images presented and appealed to the passions, prejudices and emotions of the jury. The State confronted a credible alibi defense, and had no physical or forensic evidence tying the Defendant to the crime. Thus, any evidence containing possible admissions or incriminating statements by the Defendant was crucial to the State's case.[82] The State's use of the selectively edited snippets of the Defendant's voice pasted into the graphic photos of the victim conveyed false literal and subliminal messages to the jury. This manipulative use of prejudicially edited evidence during the summation was improper.

C. The State's Misconduct In Closing Argument Was Harmful

Six factors are used to determine the harmfulness of prosecutorial misconduct during closing argument: (1) the severity of the misconduct; (2) the frequency of the misconduct; (3) the extent to which the misconduct was invited by defense conduct or argument; (4) the centrality of the misconduct to the critical issues in the case; (5) the

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me, courage again." But the State displayed the words next to flashing digital photos of Martha's slain body, as if it were a confession to murder. See Tr.6/3/02 at 136; Affidavit of Michael Sherman. App. at A273. This crossed the line from advocacy into fabrication of evidence.

[81] People v. Ammons, 622 N.E.2d 58, 60 (Ill. App. 1993) (error to allow the prosecutor in closing argument to play an audiotape of defendant's statement to police because "allowing such evidence to be reintroduced dramatically overemphasized its credibility"). The jury should pass upon the evidence "free of the overemphasis given any portion of it by verbatim repetition during the trial's waning moments." Id.; see also State v. Muhammad, 820 A.2d 70, 82 (N.J. Super. A.D. 2003) (warning against replaying edited video testimony during summation because "[s]killful editing has the capacity to encapsulate the strong points of a party's case, with the corresponding capacity to give the jury a myopic view of the facts.")

[82] The prosecution's use of this audio-visual display was also extremely prejudicial because of the fact that the Defendant did not testify at trial. The prejudice was further compounded by the State's simultaneous projection of graphic photos of the victim's body, which had the effect of sending subliminal messages to the jury in an attempt to arouse their passions.

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strength of the curative measures adopted; and (6) the strength of the State's case. See State v. Singh, 259 Conn. at 723. These factors overwhelmingly favor the Defendant.[83]

The severity and frequency of the misconduct pervaded the prosecutor's closing argument, both in its initial presentation and on rebuttal. Lengthy passages with multiple references to improper themes and unproven allegations have been quoted at length already. See Part IV.B. supra. None of this was invited by the defense.

This misconduct must be viewed against the background of a very weak case against the Defendant. See State v. Singh, 259 Conn. at 723-24. The State had no physical or forensic evidence connecting the Defendant to the murder. Its entire case against the Defendant was based on supposed "admissions" made by the Defendant that were either highly equivocal in nature, or highly questionable in authenticity, or both. There was an alibi which, if believed, placed the Defendant miles away from the scene at the time of the murder. Additionally, more than a quarter-century had passed since the crime, and so memories were lost or faded and witnesses had died, or grown ill. Much of the testimony received in evidence was hearsay. These circumstances rendered the misconduct severely prejudicial by any measure. The misconduct was also central to the core issues in the case.

Each instance of prosecutorial misconduct reviewed above is sufficient to warrant reversal. When viewed in combination, the totality of the prosecutor's misconduct was clearly egregious so as to implicate the Defendant's right to a fair trial. See State v. Reynolds, 264 Conn. 1, 215 n.183 (2003). A new trial is required.

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[83] The only factor in the State's favor is that defense counsel did not object to the grossly improper conduct until the motion for new trial was filed. Fortunately, this neglect will not defeat an otherwise meritorious claim of prosecutorial misconduct. See, e.g., State v. Ceballos, 266 Conn. at 375-76; State v. Singh, 259 Conn. at 699.

D. Even If The Misconduct Did Not Rise To The Level As To Violate The Defendant's Constitutional Rights, This Court Should Exercise Its Supervisory Authority And Grant The Defendant A New Trial[84]

The due process violation is clear, and reversal is required based on the foregoing analysis. However, even absent such a finding, reversal is warranted here under the Court's supervisory authority recognized in such cases as State v. Payne, 260 Conn. at 451 and State v. Pouncey, 241 Conn. 802, 812-813 (1997). The basis for invoking such authority here is simple: prosecutorial misconduct during closing argument has reached epidemic proportions in criminal trials in Connecticut. See n.68, supra. A very clear message urgently must be sent to prosecutors around the State that this conduct will not be tolerated, and will result in a lost conviction. The application of an appellate court's supervisory authority is appropriate when the prosecutor's conduct is so offensive to the sound administration of justice that only a new trial can effectively prevent such assaults on the integrity of the tribunal. State v. Pouncey, 241 Conn. at 812. That circumstance exists in this case.

V. THE ADMISSION OF THE HEARSAY TESTIMONY OF GREGORY COLEMAN VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION.[85]

Michael Skakel was convicted of murder by a jury that never had the opportunity to see or hear one of the State's most crucial witnesses. This "witness" was an oft-convicted

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[84] Alternatively, the Defendant seeks review of these unpreserved claims under the plain error doctrine. P.B. § 60-5 provides that an appellate court "may in the interests of justice notice plain error not brought to the attention of the trial court." Under this doctrine, the Court may reverse a criminal conviction when prosecutorial misconduct has so pervaded the trial so as to have impaired the effectiveness or integrity of the judicial process. State v. Satchwell, 244 Conn. 547, 556 n.13 (1998). The defendant must show that the failure to grant relief will result in a manifest injustice. State v. Smith, 70 Conn. App. 393, 397 n.3 (2002). For the reasons detailed supra, failure to grant relief in this case will result in a manifest injustice due to the frequency and severity of the prosecutor's misconduct.

[85] Evidentiary rulings are reviewed for abuse of discretion and the trial court's application of constitutional standards is reviewed de novo. State v. Henry, 76 Conn. App. 515. 530 (2003) (citations omitted).

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felon and long-term heroin addict named Gregory Coleman, who had died of an overdose prior to trial. Coleman had come forward about 20 years after the Moxley murder after hearing a television news magazine story about the case with the far-fetched claim that Mr. Skakel had "confessed" to Coleman late one night in 1978 at the Elan School while he, the head "gorilla", was standing guard over Skakel with a baseball bat. The jury was allowed to hear this dubious testimony without ever observing Mr. Coleman himself, because, prior to his death in 2001, Coleman had told his story "on the record" to the one-person Grand Jury and at the probable cause hearing. Coleman literally was under the influence of heroin, or in active withdrawal, when he gave this prior testimony, which consisted of multiple versions of admittedly "mistaken" story-telling.

Over objection, the jury was permitted to hear Coleman's transcribed – and hence sanitized -- testimony recast in the State's own image, transformed into the reassuring persona of the Assistant State's Attorney whose staged reading of Coleman's former testimony was all the jury ever saw or heard. Admission of this evidence under these circumstances violated Mr. Skakel's constitutional right to confrontation.

A. Procedural Background

At trial, the State sought to introduce the prior testimony of Gregory Coleman from the hearing in probable cause which took place on April 18 and 19, 2001.[86] Tr.5/17/02 at 129. The Defendant filed a Motion in Limine and Memorandum of Law seeking to exclude Coleman's former testimony on the grounds that (1) its admission at trial would violate the Defendant's right to confrontation as guaranteed by the state and federal constitutions

[86] At trial, the State introduced Coleman's testimony at the adult court probable cause hearing on April 18 and 19, 2001 in full. Excerpts from two earlier proceedings were introduced as prior consistent statements and not for their truth. Tr.5/20/01 at 71.

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because the testimony lacked the requisite "indicia of reliability" under Ohio v. Roberts, 448 U.S. 56 (1980) and State v. Outlaw, 216 Conn. 492 (1990), and (2) it was not admissible under the former testimony exception to the hearsay rule. App. at A425; A433.

The trial court admitted the evidence in a ruling that either ignored the extensively-briefed constitutional claim. The full text of the court's ruling was this: "Okay; the objection is overruled. It's prior testimony, clearly a hearsay exception." Tr.5/16/02 at 53 (App. at A471). The court did not address the Confrontation Clause issue even though the constitutional standard is more restrictive than the hearsay standard.[87] The Court admitted the evidence without any finding that it carried any indicia of reliability.

B. Coleman's Prior Testimony Was Inherently Unreliable

The admission of Mr. Coleman's prior testimony violated the Defendant's confrontation rights under the federal and state constitutions because the prior testimony lacked the required "indicia of reliability."[88] The two-prong test regarding the admissibility of an unavailable declarant's prior statements requires that (1) the prosecution must either produce or demonstrate the unavailability of the declarant; and (2) the declarant's statement is admissible only if it bears adequate "indicia of reliability" which serve to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. State v. Outlaw, 216 Conn. 492, 503-04 (1990) (citing Ohio v. Roberts, 448 U.S. 56, 63 (1980)).[89]

The reliability requirement under Outlaw is ***not*** automatically satisfied merely because

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[87] Evidence that is admissible under a hearsay exception may still be excluded if it violates the Confrontation Clause. State v. Outlaw, 216 Conn. 492, 504 (1990).

[88] See U.S. Const., amend. VI; Conn. Const., art. I, § 8.

[89] In Ohio v. Roberts, the Supreme Court recognized that the confrontation clause ordinarily envisions "a personal examination and cross-examination of the witness, in which the accused has an opportunity ... of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." 448 U.S. at 63-64.

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the former testimony was given under oath and subject to cross-examination; rather, courts must look beyond these factors to consider other circumstances in determining whether prior testimony satisfies the confrontation clause. See, e.g., State v. Rivera, 221 Conn. 58 (1992) (court considered witness's motive in testifying, inconsistency in factual testimony and fact that witness implicated himself in determining reliability of prior testimony).[90] Additionally, although testimony given at a probable cause hearing possesses some reliability safeguards, this Court has held that it is nevertheless necessary to review the record for specific indicia of reliability. State v. Outlaw, 216 Conn. at 505.

The trial court here completely failed to perform the necessary "reliability" analysis required under Outlaw. If any testimony can ever fail that test, it was the performance of Gregory Coleman giving his prior testimony in this case. The following points illustrate why Mr. Coleman's testimony was the very antithesis of reliable;

- Coleman, a twenty to twenty-five bag a day addict, testified in the grand jury one hour after shooting up with heroin. Tr.5/17/02 at 155; 168-9; Tr.5/20/02, at 38.
- Coleman testified at the probable cause hearing under severe heroin withdrawal requiring him to go to the hospital after testifying. Tr.5/17/02 at 173-4.
- Coleman testified that he was unable to focus during his probable cause testimony due to heroin withdrawal. Id. at 176.
- Coleman testified that his testimony at the probable cause hearing was unreliable because "my recall at times would be questionable" on both days of his testimony. Tr.5/17/02 at 150.
- Coleman was forced to recant his earlier testimony that the Defendant spoke about the murder at Elan many times; Tr.5/17/02 at 210; that the Defendant was at Elan

[90] See also State v. Anthony, 448 A.2d 744, 755 (R.I. 1982) (excluding unavailable witness's prior testimony because of serious doubts clouding the reliability of the witness's account and finding lack of veracity as an issue affecting admissibility rather than simply weight); State v. Armes, 607 S.W.2d 234 (Tenn. 1980) (holding that use of preliminary hearing testimony of unavailable witness was impermissible in part because its questionable veracity).

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because the authorities were investigating his brother for the crime; Tr.5/17/02 at 163; and that the Defendant had confessed to him personally five or six times. Tr.5/17/02 at 177.[91]

On these facts, the suggestion that Coleman's testimony carries the "indicia of reliability" necessary to satisfy the constitutional requirement of Outlaw makes a mockery of the constitutional guarantee. The cross-examination of Mr. Coleman at the probable cause hearing revealed only the lack of any reliability, and the absolute need for the fact-finder to observe his physical presence as he told his lies from the witness stand. Mr. Skakel was deprived of his right to confront this witness in the only forum that mattered – at trial.

VI. THE TRIAL COURT ERRONEOUSLY ADMITTED COERCED CONFESSIONS[92]

The most damaging evidence presented against Michael Skakel at trial were statements supposedly made by him under conditions of shocking brutality. Defendant was physically beaten and psychologically tortured at Elan using tactics that cannot be sanctioned by any civilized government. See Statement of Facts at 5-12.

A. The Defendant's Federal Due Process Rights Were Violated

The Connecticut Supreme Court has held, in no uncertain terms, "[a] confession which is coerced violates due process and should be excluded whether it results from

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[91]Coleman's testimony also was unreliable because of the factual impossibility coupled with his suspicious motivation for testifying. Mr. Coleman testified regarding two highly prejudicial admissions of the Defendant that were proven factually impossible by the State's investigation: (1) that the Defendant masturbated on the victim's body two days after the victim was killed; and (2) that the Defendant used a driver golf club to beat the victim. Tr.5/17/02 at 205, 149. At the probable cause hearing, Mr. Coleman in fact recanted his previous testimony before the Grand Jury that the Defendant had told him that he had used a driver rather than an iron. Tr.5/17/02 at 108. Also, Mr. Coleman's self-serving motivations for testifying undermined the testimony's reliability. He had made requests to Connecticut authorities for cash and a reduced sentence in return for his testimony. Tr.5/20/02 at 25-26; Tr.5/17/02 at 166.

[92]The Defendant seeks review of this unpreserved claim of error pursuant to State v. Golding, 213 Conn. 233, 239-40 (1989); see State v. Smith, 200 Conn. 465, 475 (1986).

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pressure exerted by a police officer or a private individual." State v. Smith, 200 Conn. 465, 476-77 (1986). State action occurs "when a trial court permits the prosecution at a jury trial to utilize as evidence of guilt a confession which is extracted under circumstances that so overbear the individual's will as to render the statement involuntary, that is not the product of a rational intellect and a free will." Id. (internal quotations omitted).

State v. Smith has never been overruled. However, we bring to the Court's attention a case involving fundamentally different facts, Colorado v. Connelly, 479 U.S. 157, 167 (1986), in which the Supreme Court stated that state action is required in order for the admission of an involuntary confession – in Connelly, a confession "compelled" by the defendant's mental illness -- to constitute a violation of a defendant's federal due process rights. We feel strongly that Colorado v. Connelly is distinguishable and is not controlling in this case. The confession at issue in Connelly was ***not*** obtained by force or by any other coercive tactics of anyone, state actor or otherwise; rather, the confession was entirely voluntary and was produced by the defendant's self-generated compulsion, as a result of his mental illness, to reveal his involvement in the crime. Id. at 160-62. The focus of the Connelly court was on the effect of the defendant's mental illness, not third-party compulsion. Id. at 164-65. By contrast, the present case involves the use of torture or beating, which is more akin to the situation in Brown v. Mississippi, 297 U.S. 278 (1936).

The trial court's admission of the alleged "confessions" made to Elan residents violated the Defendant's right to due process under the United States Constitution. See Argument infra, at 71-72, incorporated herein.

B. The Defendant's State Due Process Rights Were Violated.

Whether or not Smith survives Connelly as a matter of federal constitutional law, the

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Defendant's rights under the due process clause of the Connecticut Constitution were also violated here.[93] See Conn. Const., art. I, § 8. State v. Geisler, 222 Conn. 672, 684 (1992), provides a non-exclusive list of tools to be employed in construing "the contours of our state constitution." An examination of these tools demonstrates that the Connecticut Constitution should be interpreted to prohibit the admission of a confession extracted by coercion of a third-party, whether a state actor or not.

Text of the Constitutional Provision: The mandatory nature of article first, § 8 of the Connecticut Constitution *requires* that an accused be provided with due process of law before being compelled to incriminate himself. Conn. Const., art. I, § 8. As discussed below, the mandatory due process required under the state constitution prohibits the use of a confession coerced by a private individual.

Holdings and Dicta of State Supreme and Appellate Courts: As noted, Justice Callahan's unanimous, unequivocal opinion of the Court in State v. Smith made it perfectly clear that this Court does not distinguish, for due process purposes, between confessions extracted by private beatings versus those extracted by police brutality. 200 Conn. at 476-77. Either way, the inherent reliability of the confession itself is cast in doubt. Moreover, contrary to the "logic" of Colorado v. Connolly, this Court recognized in Smith that a profound constitutional value is implicated "when a trial court permits the prosecution at a jury trial to utilize as evidence of guilt a confession which is extracted under circumstances that so overbear the individual's will as to render the statement involuntary, that is not the

[93] The Defendant seeks review of this issue under State v. Golding as well.

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product of a rational intellect and a free will." Id. (internal quotations omitted).[94]

Federal Precedent: Colorado v. Connelly, is factually distinguishable, and does not preclude this court from holding that the state constitution, which is often found to provide broader rights than the federal constitution, prohibits the admission of a confession coerced by a private individual.[95]

Sister States' Decisions: Several other jurisdictions have held that their state constitutions or statutory provisions prohibit the admission of a confession coerced by a private individual. See State v. Bowe, 881 P.2d 538 (Haw. 1994) (due process clause of state constitution prohibits the use of a confession coerced by a private individual).[96]

Historical Analysis: The English courts long ago recognized that confessions, which had previously been admissible regardless of the circumstances under which they were obtained, were often extracted by torture or the promise of pardon, making such confessions inherently unreliable. Griffin v. State, 496 S.E.2d 480, 483 (Ga. App. 1998) (citing 3 Wigmore, Evidence § 818(3), pp. 294-95). No distinction was made between confessions resulting from official state action and those secured by private individuals. Id.

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[94] Although State v. Smith was decided a few months prior to Colorado v. Connelly, Connelly does not preclude this court from determining that the state constitution's due process clause provides broader rights than the federal constitution. See State v. Marsala, 216 Conn. 150, 159-60 (1990). The Connecticut Supreme Court, post-Connelly, has also continued to review the totality of circumstances in involuntary confession cases that do not involve police coercion. See State v. Gonzalez, 206 Conn. 213, 223 (1988).

[95] See State v. Miller, 67 Conn. App. at 551 n.9; State v. Pin, 56 Conn. App. 549, 555-56, cert. denied, 252 Conn. 951 (2000) (both noting that requirement of state action is an open question under state law).

[96] See also Commonwealth v. Brandwein, 760 N.E.2d 724, 731 n.10 (Mass. 2002); State v. Rees, 748 A.2d 976, 977-78 (Me. 2000); Griffin v. State, 496 S.E.2d 480, 483 (Ga. App. 1998); People v. Sorbo, 649 N.Y.S.2d 318, 319 (N.Y. Sup. Ct. 1996); State v. Martin, 645 So.2d 752, 754 (La. App. 5th Cir. 1994), cert. denied, 650 So. 2d 1174 (La. 1995); People v. Seymour, 470 N.W.2d 428, 430 (Mich. App. 1991). Importantly, these decisions were rendered after Colorado v. Connelly.

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The common law voluntariness doctrine was transplanted to the American colonies and was the rule in the United States during most of the 19th century. Id. (citing Imwinkelried, Courtroom Criminal Evidence § 2305, p. 798 n.52). This doctrine applied to both private and official state action. Id. (citing Imwinkelried, Courtroom Crim. Evid. § 2304, p. 791 n.16; § 2305, p. 798 n.52); See Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (coercion of any nature is offensive to due process). Connecticut Jurists have noted the historical significance of the state constitutional guarantee against the use of an involuntary confession. "[I]f the ***least degree of influence*** appear to be exercised over the prisoner's mind, to induce him to disclose his guilt, the whole will be rejected." State v. Stanley, 223 Conn. 674, 698-00 (1992) (Berdon, J., dissenting) (quoting 2 Z. Swift, A Digest of the Laws of Connecticut (1823) p. 408) (emphasis in original).

Public Policy: The idea that the State at trial may use a "confession" extracted by privately-sponsored torture is wrong. As Justice Brennan noted in Colorado v. Connelly, the majority's failure to recognize all forms of involuntariness or coercion as antithetical to due process reflects a refusal to acknowledge free will as a value of constitutional consequence. Colorado v. Connelly, 479 U.S. at 176 (Brennan, J., dissenting). Due process derives much of its meaning from a conception of fundamental fairness based on a person's right to make vital choices voluntarily. Id. The voluntariness inquiry must include more than the narrow question whether police did the beating. Id. at 177.

C. The Elan Statements Were Not Voluntary

"In order to be voluntary, a confession must be the product of an essentially free and unconstrained choice by the maker.... If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of the confession offends due

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process." State v. James, 237 Conn. 390, 410-11 (1996). The State obtained a conviction in this case by using to its advantage statements made by young Michael Skakel within Elan's depraved confines. The statements allegedly made by the Defendant while at Elan were coerced and their use at trial offended due process because they were extracted while the Defendant was subjected to an atmosphere of physical and psychological torture and intimidation. See Facts, supra at 5-12. The Defendant was beaten, spat upon, humiliated in countless ways, sleep-deprived, and "monitored" by brutes wielding baseball bats and other instruments of physical and psychological pressure. This atmosphere of pervasive physical and emotional torture, in which the Defendant suffered numerous beatings and emotional attacks and knew that others had suffered worse, caused the Defendant to fear further torture and retribution if he did not admit that he killed Martha Moxley. The Elan statements were beaten out of the Defendant and cannot be deemed voluntary.

D. Harmfulness

In the present case, the State is unable to prove that the admission of the alleged confessions was harmless beyond a reasonable doubt. These alleged confessions were the linchpin of the State's case. Because there was absolutely no physical or forensic evidence tying the Defendant to this crime, the only evidence against the Defendant at trial was the alleged confessions that he made. As such, this evidence was indisputably crucial.

VII. THE TRIAL COURT ABUSED ITS DISCRETION IN NUMEROUS EVIDENTIARY RULINGS, WHICH RESULTED IN SUBSTANTIAL INJUSTICE TO DEFENDANT

A. The Triple Hearsay Statement Of Mildred Ix Was Not Admissible

The trial court improperly found that the statement from Skakel, Sr. to Mrs. Ix, that the Defendant told him that he could have committed the crime, was admissible under the

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residual exception to the hearsay rule. Tr.5/15/02 at 117-19. For the residual or "catch all" exception[97] to apply, the statement must be supported by equivalent guarantees of trustworthiness and reliability. Conn. Code of Evid. § 8-9. The trial court concluded that the statement by Skakel, Sr. to Mrs. Ix. satisfied this requirement, citing (1) the close relationship between Skakel, Sr. and Ix; and (2) the fact that this statement was not something that a person would confide in a close confidant unless it were true. Tr.5/15/02 at 118. These factors are insufficient indicators of trustworthiness or reliability.

The trial court erroneously relied on the nature of the relationship between Skakel, Sr. and Mrs. Ix. There is no hearsay exception for statements made to close friends about one's children; such statements are not so inherently reliable as to afford them their own hearsay exception. While family friends may discuss normal childhood problems, it is unlikely that Skakel, Sr. would reveal to Ix that his son had confessed to this crime. The State theorized that the Skakel family conspired to cover up the Defendant's guilt. This conspiracy would topple quickly if Skakel, Sr. had made such a statement to Mrs. Ix. Also, a claim that one family member would not falsely incriminate another has been considered and rejected by Connecticut courts.[98] State v. Oquendo, 223 Conn. 635, 667-68 (1992).

The admission of this evidence was harmful and affected the outcome of the trial. A father's statement that his son confessed to him is incredibly damning and could not have been overlooked by the jury. Because the State's evidence against Michael Skakel was

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[97] This exception is to be applied only in the "rarest of cases" and should not be used for "near misses" that cannot be made to fit into traditional exceptions. State v. McClendon, 248 Conn. 572, 585 (1999); Tait, Handbook of Conn. Evid. (3d ed.) § 8.52.2.

[98] Further, a statement made by a child to a parent is not inherently reliable so as to satisfy the residual exception. State v. Rivera, 40 Conn. App. 318, 327 (1996) ("[t]here is no special sanctity attached to a statement allegedly made by a son to a [parent] such as to vest it with the aura of reliability necessary to invoke the residual exception").

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weak, this evidence was most likely a decisive factor in the result of the trial.

B. The Court Erred In Admitting Tabloid Articles Containing Sensational Allegations Regarding The Defendant And The Kennedy Family

Despite daily admonitions to the jury not to read the newspapers, that ban was lifted for the admission of supermarket tabloid articles. These tabloids were irrelevant and prejudicial.[99] See Conn. Code of Evid. §§ 4-1, 4-3. (1) **The *Star* article** (App.A542) discussed an affair between the Defendant's cousin Michael Kennedy and his teenaged babysitter. The article underscored the pervasive theme of the State's case that the Defendant believed he was above the law because he was a Kennedy. (2) **The *Globe* article** (App.A537) recounted the Defendant's book proposal and made repeated reference to the Defendant as a "recovering addict," labeled him as a liar and further painted him as a person with something to hide ("I am a member of a family sick unto death" and "You're only as sick as your secrets"). This article also advanced the theme that the Kennedys thought they were above the law, referencing the William Kennedy Smith trial. (3) **The *Enquirer*** article (App.A533) again branded the Defendant as a person with something to hide, called him a liar, and impugned his character. The article further recounted tales of sex, alcohol and drugs involving the Kennedy family.[100] The *Enquirer* article emphasized the State's theme that the Kennedy family could get away with anything and concluded by stating that the Defendant refused to cooperate with police during the Moxley

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[99]The court's limiting instruction did not remove the prejudice of this highly inflammatory evidence. Arizona v. Fulimante, 499 U.S. 279, 296, reh'g denied, 500 U.S. 938 (1991).

[100] The article stated that Michael Kennedy had fathered several illegitimate children, that family members believed William Kennedy Smith was guilty of rape, and that the Defendant, because of drug and alcohol use in the 1990s, may have confessed to killing Martha Moxley to Michael Kennedy's babysitter, Marissa Verrochi.

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investigation.[101] Their harmfulness is obvious and a new trial is required.

C. The Court Erred In Excluding Littleton's 1977 Felony Convictions

The trial court prevented the defense from impeaching Kenneth Littleton with three felony burglary convictions because they occurred in 1977.[102] Tr. 5/13/02 at 38-40. Connecticut has not adopted a ten-year ban on use of convictions; see State v. Cooper, 227 Conn. 417, 432-33 (1993) (26 year old conviction admitted); State v. Nardini, 187 Conn. 513, 526 (1982); and remoteness in time is but one factor the court may consider in deciding whether to permit use of a felony conviction to impeach a witness. Conn. Code of Evid. § 6-7 (three factors to be considered: prejudice, indicator of untruthfulness and remoteness). The trial court's limited analysis failed to consider that burglary is a crime that this Court has held to have a special relationship with a witness' veracity. See Nardini, 187 Conn. at 526. The court also failed to consider the lack of prejudice to the prosecution, State v. Askew, 245 Conn. 351, 363 (1998), as well as Littleton's critical importance to the Defendant's theory of the case. The court abused its discretion in excluding the convictions and the error was not harmless. A new trial should be ordered.

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For these reasons, this matter should be dismissed with prejudice because of the expiration of the statute of limitations and the erroneous transfer of the case from juvenile court. Alternatively, this matter should be remanded with an order for a new trial.

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[101]This article ***post-dated*** Ms. Ridge's conversation with her friend, and thus, was completely irrelevant to the fact it attempted to prove – that Ms. Ridge did not obtain information from this article. These sensational statements should not have been admitted.

[102]Because the Defendant's constitutional rights to present a defense, to due process and to cross-examine a key witness were implicated, the burden rests with the State to prove that the error was harmless beyond a reasonable doubt. State v. Casanova, 255 Conn. 581, 595 (2001).

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CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing Brief has been mailed postage prepaid this 24th day of November, 2003 to the following counsel of record and interested persons in accordance with Practice Book § 62-7:

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