UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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

MEMORANDUM IN SUPPORT OF
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This memorandum is submitted in support of the respondents' motion for summary judgment on the petitioner's application for a writ of habeas corpus filed pursuant to 28 U.S.C. §2254. In his application, the petitioner claims that the state conviction that resulted in his imprisonment was obtained in violation of his rights under the United States Constitution. Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 by a Person in State Custody (hereinafter "Habeas Corpus Petition"), paragraph 19. The petitioner is not entitled to federal habeas corpus relief because: (1) the rulings that he challenges were resolved exclusively under state law; (2) his federal claims are unexhausted; or (3) the state court rejected his claims based on a reasonable application of clearly established federal law. Accordingly, this court should grant the respondent's motion for summary judgment.

I. ARGUMENT

A. Standard of Review Governing Federal Habeas Corpus Petitions

The standard governing review of claims by federal habeas corpus petitioners is set forth in 28 U.S.C. § 2254 (d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"). The act amended § 2254(d) to read as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
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> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the United States Supreme Court recognized that when Congress enacted AEDPA, it "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." Id., at 399. The court stated that §2254 (d)(1) "prohibits a federal court from granting a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id. Thus, when considering an application for a writ of habeas corpus by a state prisoner, federal courts must ask three questions to determine whether habeas relief should be granted: "(1) Was the principle of the Supreme Court case law relied upon by the petitioner 'clearly established' when the state court ruled? (2) If so, was the state court's decision 'contrary to' that established Supreme Court precedent? (3) If not, did the state court decision constitute an 'unreasonable application' of that principle?" Williams v. Artuz, 237 F.3d 147, 152 (2nd Cir. 2000), cert. denied, 534 U.S. 924, 122 S.Ct. 279, 151 L.Ed.2d 205 (2001).

Accordingly, when considering a state prisoner's application, federal courts must first determine whether the petitioner's claim "is based on a principle of Supreme Court case

law that was 'clearly established' when the state court ruled." Lurie v. Wittner, 228 F.3d 113, 125 (2nd Cir. 2000), cert. denied, 532 U.S. 943, 121 S.Ct. 1404, 149 L.Ed.2d 347 (2001); accord Williams v. Taylor, 529 U.S. at 390. Where the petitioner's claim is based on clearly established Supreme Court case law, the federal court must determine whether the state court's ruling is in conflict with that precedent. In Lurie v. Wittner, supra, the Second Circuit held that a "state court decision is 'contrary to' existing Supreme Court precedent (i) when it applies a rule of law 'that contradicts the governing law set forth in' the Supreme Court's cases . . . or (ii) when it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent." Id., 228 F.3d at 127, quoting Williams v. Taylor, 529 U.S. at 406; see also Price v. Vincent, 538 U.S. 634, 640, 123 S.Ct. 1848, 155 L.Ed.2d 877 (2003); Kennaugh v. Miller, 289 F.3d 36, 42 (2nd Cir.), cert. denied, 537 U.S. 909, 123 S.Ct. 251, 154 L.Ed.2d 187 (2002).

Where the state court's decision is not directly opposed to Supreme Court precedent, but does involve an application of the Supreme Court's case law, a federal court considering a state prisoner's habeas corpus petition corpus must determine whether the state court's application of federal law was unreasonable. Lurie v. Wittner, supra, 128-29. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the [the Supreme] court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Clark v. Stinson, 214 F.3d 315, 321 (2nd Cir. 2000) cert. denied, 531 U.S. 1116, 121 S.Ct. 865, 148 L.Ed.2d 778 (2001); see also Kennaugh v. Miller, 289 F.3d at 42.

In Williams v. Taylor, supra, the Supreme Court identified two principles to guide the lower federal courts in applying the reasonableness standard of §2254 (d)(1). First, the court made clear that the reasonableness of the application of federal law by state courts would be judged by an objective standard. Justice O'Connor, writing for the court, stated that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id., 529 U.S. at 409. Second, the court emphasized that an unreasonable application of federal law is different from an application that is simply incorrect or erroneous. The court stated that:

> In §2254 (d)(1), Congress specifically used the word "unreasonable" and not a term like "erroneous" or "incorrect." Under §2254 (d)(1)'s "unreasonable application" clause, then, *a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.* Rather, that application must also be unreasonable.

(Emphasis added.) Williams v. Taylor, supra, 411; accord Woodford v. Visciotti, 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (*per curium);* Bell v. Cone, 535 U.S. 685, 698-99, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

More recently, the Supreme Court provided further guidance on the "unreasonable application" standard in Yarborough v. Alvarado, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d (2004). In Yarborough, the court explained that:

> The term "unreasonable" is "a common term in the legal world and, accordingly, federal judges are familiar with its meaning." At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Application of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was

> unreasonable require's considering the rule's specificity. *The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations*.

(Emphasis added; citations omitted.) Yarborough v. Alvarado, 541 U.S. at 663-64.

Finally, the provisions of §2254 (d)(1) require the federal courts to give great respect to the process provided by state courts, which are equally empowered to interpret and enforce the federal constitution, when determining whether to grant habeas corpus relief. See Sawyer v. Smith, 497 U.S. 227, 241, 110 S.Ct. 2822, 111 L.Ed.2d 193, rehearing denied, 497 U.S. 1051, 111 S.Ct. 17, 111 L.Ed.2d 830 (1990) ("State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution.").

B. Federal Habeas Corpus Relief is not Warranted on the Petitioner's Claims

The petitioner raises six claims in which he asserts that he is entitled to habeas corpus relief under §2254. Specifically, the petitioner claims that: (1) the Connecticut Supreme Court's reinterpretation of the law governing application of the statute of limitations violated his right to due process and his right against prosecution under ex post facto laws; (2) the trial court violated his right to due process and to present a defense when it refused to hold an evidentiary hearing regarding his claim that the state had withheld exculpatory evidence in violation of the United States Supreme Court's ruling in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (3) the trial court violated his right to due process of law when permitted his case to be transferred to the adult criminal docket; (4) the misconduct of the prosecutor deprived him of due process of law and a fair trial; (5) the trial court violated his right to confrontation when it admitted the prior testimony of a witness; and (6) the trial court violated his right to due process when

it admitted evidence of confessions that were the product of coercion. Habeas Corpus Petition, paragraph 19.

In each of these claims, the petitioner contends that the Connecticut Supreme Court erred in applying provisions of the federal constitution. See id. It is clear, therefore, that the petitioner seeks *de novo* review of the state court's actions in his habeas corpus petition. In doing so, the petitioner misconstrues the nature of federal habeas corpus review. In Lockyer v. Andrade, 538 U.S. 63,123 S.Ct. 1166, 155 L.Ed.2d 144 (2003), the United States Supreme Court stated that when considering claims for habeas corpus relief, it does "not reach the question of whether the state court erred. . . ." Id., at 71. The court concluded, therefore, that *de novo* review of the state court decision is unnecessary, and thus inappropriate, "in deciding the only question that matters under § 2254(d)(1) – whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law." Id.

Moreover, when applying the AEDPA standards, "the federal court should review the 'last reasoned decision' by a state court. . . ." Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). When such review is conducted in this case, it is clear that the petitioner has fallen far short of demonstrating that he is entitled to federal habeas corpus relief.

1. The petitioner is not entitled to habeas corpus relief because the state supreme court overruled its existing precedent to hold his prosecution was not time-barred

On January 14, 2000, the petitioner was arrested and charged with murder in connection with the 1975 death of Martha Moxley. State v. Skakel, 276 Conn. 633, 639, 888 A.2d 985, cert. denied, _ U.S. _, 127 S.Ct. 578, 166 L.Ed.2d 428 (2006), Appendix D. The petitioner moved to dismiss, claiming that prosecution of the murder charge was

barred by General Statutes § 54-193 (Rev. to 1975). Motion to Dismiss Pursuant to Practice Book § 41-8(3), Appendix F.[1] At the time of the victim's murder, § 54-193 provided that non-capital offenses punishable by imprisonment in the state penitentiary were subject to a five-year statute of limitations. The petitioner argued that because he was charged with non-capital murder and more than five years had elapsed between the crime and his arrest, his prosecution was barred by the statute of limitations. Brief of the Defendant-Appellant, State v. Skakel, Supreme Court Case No. 16844, (hereinafter "Petitioner's Supreme Court brief") at 16-17, Appendix A.

The trial court, *Kavanewsky, J.*, rejected the petitioner's claim and denied his motion to dismiss. Memorandum of Decision Re: Motion to Dismiss, State v. Skakel, Case No. CR00-135792-T, Judicial District of Stamford-Norwalk, Appendix I. The trial court concluded that the application of § 54-193 is determined by the "gravity of the offense charged, [and] not solely its punishment." Id., at 8. The court, therefore, found that the legislature had never intended the statute of limitations to bar prosecution of the crime of murder. Memorandum of Decision Re: Motion to Dismiss, State v. Skakel, Case No. CR00-135792-T, Judicial District of Stamford-Norwalk, at 4-7, Appendix I. Accordingly, the trial court held that § 54-193 (Rev. to 1975) did not bar the petitioner's prosecution. Id., at 8.

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[1] Section 54-193 (Rev. to 1975) provided, in pertinent part, that:

> No person shall be prosecuted for . . . any crime or misdemeanor of which punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers, except within five years next after the offense has been committed; nor shall any person be prosecuted for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the Connecticut Correctional Institution, Somers, but within one year next after the offense has been committed . . . .

On appeal to the Connecticut Supreme Court, the petitioner claimed that the trial court erred in ruling that his prosecution was not barred by the statute of limitations. Petitioner's Supreme Court brief at 16-32, Appendix A. The state offered two arguments in response to the petitioner's claim. First, the state argued that the trial court correctly ruled that the 1975 statute of limitations did not bar prosecution of the petitioner for murder. Brief of the State of Connecticut-Appellee, State v. Skakel, Supreme Court No. 16844, (hereinafter "State's Supreme Court brief") at 13-27, Appendix B. Alternatively, the state urged the court to overrule its decision in State v. Paradise, 189 Conn. 346, 456 A.2d 305 (1983), and apply the 1976 amendment to the statute of limitations to the petitioner's case. State's Supreme Court brief at 27-28, Appendix B.

In 1976, the state legislature amended § 54-193 to remove any time limitation on the prosecution of class A felonies. See Public Act 76-35, § 1.[2] In State v. Paradise, supra, the Connecticut Supreme Court ruled that the 1976 amendment to the statute of limitations did not apply retroactively to crimes that occurred prior to the enactment of the amendment. Id., at 350-53. In this case, the state urged the court to overrule Paradise and hold that the 1976 amendment of the statute of limitation did apply retroactively to the petitioner's case. State's Supreme Court brief at 27-28, Appendix B. Because the 1976 amendment removed the time limitation on the prosecution of all class A felonies, including

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[2] Public Act 76-35, § 1, provides, in pertinent part, as follows:

> No person shall be prosecuted for . . . any . . . OFFENSE EXCEPT A CAPITAL FELONY OR A CLASS A FELONY FOR which the punishment is or may be imprisonment . . . IN EXCESS OF ONE YEAR, except within five years next after the offense has been committed; nor shall any person be prosecuted for . . . ANY OTHER OFFENSE, EXCEPT A CAPITAL FELONY OF A CLASS A FELONY, but within one year next after the offense has been committed . . . .

murder, application of the amendment to the petitioner's case would provide an alternative basis for upholding the decision of the trial court. See Thorpe v. Commissioner of Correction, 73 Conn. App. 773, 779, 809 A.2d 1126 (2002) (reviewing court may rely on alternative grounds for upholding ruling of the trial court).

In rejecting the petitioner's claim, the Connecticut Supreme Court specifically declined to determine whether the trial court had correctly ruled that the petitioner's prosecution was not barred by the 1975 statute of limitations. State v. Skakel, 276 Conn. at 667 n.31, Appendix D. Instead, the court upheld the trial court's ruling on the alternative basis offered by the state, concluding that State v. Paradise was wrongly decided and should be overruled. Id., at 666. The court held that because "the five year limitation period of the pre-1976 amendment version of § 54-193 had not expired with respect to the October, 1975 murder of the victim when the 1976 amendment . . . became effective . . . [Public Act] 76-35, § 1, is the operative statute of limitations for the purposes of this case." Id., at 666-67. The court held that because Public Act 76-35, § 1, did not limit the time period within which class A felonies must be prosecuted, the trial court properly denied the petitioner's motion to dismiss. Id., at 667.[3]

The petitioner now claims that he is entitled to federal habeas corpus relief because his conviction was "obtained and affirmed in violation of the Ex Post Facto Clause and the Due Process Clause." Habeas Corpus Petition, paragraph 19, Ground One. Specifically, the petitioner contends that his rights under the federal constitution were violated when the

[3] The Connecticut Supreme Court's resolution of this claim in the petitioner's direct appeal is described in greater detail in the respondent's statement of material facts filed pursuant to Local Rule 56(a)1. See Respondent's Local Rule 56(a)1 Statement, dated October 27, 2008, at 12-17.

state supreme court overruled its own precedent to hold that his prosecution was not barred by the statute of limitations. Id.

The petitioner's claim fails for several reasons. First, the petitioner is not entitled to federal review of his claim because the trial court's ruling permitting his prosecution was based on state law and did not implicate his rights under the federal constitution. Second, the petitioner cannot obtain relief on his federal claim because it was not properly raised in the Connecticut Supreme Court and is, therefore, unexhausted. Finally, if considered on the merits, the petitioner's claim fails because it is not based upon "clearly established federal law" and because the Connecticut Supreme Court's ruling was neither "contrary to" nor "an unreasonable application of" the controlling precedent of the United States Supreme Court. 28 U.S.C. § 2254 (d)(1).

a. The petitioner is not entitled to federal review of his claim because the trial court's ruling permitting his prosecution was based on state law and did not implicate his rights under the federal constitution

"[F]ederal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 503 U.S. 62, 68, 112 S.Ct. 475, 480, 116 L.Ed. 2d 385 (1991). A federal court conducting habeas review is limited to determining whether a petitioner's custody is in violation of federal law." Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998) cert. denied, 525 U.S. 840, 1199 S.Ct. 101, 142 L.Ed. 2d 81 (1998); see 28 U.S.C. §2254(a); Smith v. Phillips, 455 U.S. 209, 211, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (holding that non-constitutional claims are not cognizable in federal habeas proceedings).

In this case, the petitioner claims that the state courts applied Connecticut's statute of limitations improperly. The manner in which a state applies its own statute of limitations is, of course, a question of state law and cannot ordinarily be the basis for a claim in a

federal habeas proceeding. See Bradshaw v. Richey, 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005). The petitioner's claim, however, relates not to the state courts' interpretation of the statute of limitations, but rather, to the court's *reinterpretation* of that law. The petitioner contends that his rights under the Ex Post Facto Clause and the Due Process Clause were violated when "the Connecticut Supreme Court unexpectedly overruled its own binding interpretation of the applicable statute of limitations in order to authorize [his] criminal prosecution . . . ." Habeas Corpus Petition, paragraph 19, Ground One.

In advancing this claim, the petitioner overlooks the fact that the trial court and the state supreme court applied different theories in resolving the issue. The trial court's ruling authorizing the petitioner's prosecution did not involve a reinterpretation of the statute of limitations. Rather, the trial court denied the petitioner's motion to dismiss based on its conclusion that the application of § 54-193 is determined by the "gravity of the offense charged, [and] not solely its punishment." Memorandum of Decision Re: Motion to Dismiss, State v. Skakel, Case No. CR00-135792-T, Judicial District of Stamford-Norwalk, at 8, Appendix I. Thus, the trial court found that the legislature had never intended the statute of limitations to bar prosecution of the crime of murder. Id., at 4-7. Accordingly, the trial court held that the § 54-193 (Rev. to 1975) did not bar the petitioner's prosecution. Id.

On appeal, the Connecticut Supreme Court upheld the trial court's ruling on the alternative ground that the 1976 amendment to the statute of limitations, which removed the time limitation on the prosecution of all class A felonies, applied retroactively to the petitioner's case. State v. Skakel, 276 Conn. at 667, Appendix D. Because the Supreme Court upheld the trial court's ruling on alternative grounds, the court stated that it had "no

reason to address the state's . . . contention that the legislature never intended to establish a limitation period for murder and, consequently, that the five year limitation period of the pre-amendment version of § 54-193 . . . does not bar the state's prosecution of the [petitioner] for the murder of the victim." Skakel, supra, 667 n.31, Appendix D.

When evaluating a petitioner's claim under § 2254, "the federal court should review the 'last reasoned decision' by a state court. . . ." Robinson v. Ignacio, 360 F.3d at 1055. Here, the last reasoned decision by a state court on the issue of whether the 1975 statute of limitations barred the petitioner's prosecution for murder was the ruling of the trial court. Because the trial court relied exclusively on state law, the court's ruling did not implicate the petitioner's rights under the federal constitution. Accordingly, § 2254 affords the petitioner no basis for relief on his claim. Estelle v. McGuire, 503 U.S. at 68; Dunnigan v. Keane, 137 F.3d at 125.

b. The petitioner cannot obtain relief because his claim was not properly presented in state court

Federal habeas corpus relief "shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . ." 28 U.S.C. § 2254(b)(1)(A). Indeed, even if a petitioner can demonstrate a "clear violation" of his rights, federal relief is unwarranted unless available state remedies are exhausted. Duckworth v. Serrano, 454 U.S. 1, 3-4, 102 S.Ct. 18, 70 L.Ed.2d 1 (1981) (per curium). Accordingly, a state prisoner seeking federal habeas corpus relief must first exhaust available state remedies in order to give the state courts the opportunity to pass upon and correct alleged violations of his or her federal constitutional rights. Baldwin v. Reese, 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004). "The requirement for exhaustion. . . is designed to give the state courts the opportunity to address and correct violations of

Constitutional rights. That purpose is fulfilled when the state court has a *fair and meaningful chance to grant relief on what is essentially the same claim raised in federal court*. (Emphasis added.) Jones v. Keane, 329 F.3d 290, 295 (2nd Cir.), cert. denied, 540 U.S. 1048, 124 S.Ct. 804, 157 L.Ed.2d 693 (2003).

Moreover, the United States Supreme Court explained that to "protect the integrity of the federal exhaustion rule, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies. . . ." (Emphasis in original.) O'Sullivan v. Boerckel, 526 U.S. 838, 848, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). Thus, in order to meet the exhaustion requirement, the petitioner must present his federal claims in a procedurally proper manner according to the rules of the state courts. Id., at 845-46; see Baldwin v. Reese, 541 U.S. at 29-33. Accordingly, "[a] petitioner meets the fair presentation requirement if the state court rules on the merits of his claims, or if he presents his claims in a manner that entitles him to a ruling on the merits." Gentry v. Lansdown, 175 F.3d 1082, 1083 (8th Cir. 1999). In this case, the petitioner is not entitled to habeas corpus relief because he did not properly present his federal constitutional claim to the Connecticut Supreme Court. See Yeats v. Angelone, 166 F.3d 255, 260 (4th Cir.), cert. denied, 526 U.S. 1095, 119 S.Ct. 1517, 143 L.Ed.2d 668 (1999) ("Absent cause and prejudice or a miscarriage of justice, a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule.")

On appeal to the Connecticut Supreme Court, the petitioner claimed that the trial court erred in ruling that the statute of limitations did not bar his prosecution for the victim's murder. Petitioner's Supreme Court brief at 17-20, Appendix A. In response, the state

argued that the trial court correctly ruled that the statute of limitations did not bar the prosecution. Brief of the State of Connecticut-Appellee, State v. Skakel, Supreme Court No. 16844, (hereinafter "State's Supreme Court brief") at 13-27, Appendix B. Alternatively, the state urged the court to overrule its decision in State v. Paradise, supra and apply the 1976 amendment of the statute of limitation to the petitioner's case. State's Supreme Court brief at 27-28, Appendix B.

In his reply brief, the petitioner argued that the plain meaning of § 54-193, as well as the rule of lenity, made clear that the prosecution for a non-capital murder committed prior to the 1976 amendment of the statute of limitations had to be commenced within five years of the commission of the crime. Reply Brief of the Defendant, State v. Skakel, Supreme Court No. 16844 (herein after "Petitioner's Supreme Court reply brief") at 2-4, Appendix C. The petitioner also urged the court to reject the state's request to reconsider and overrule its decision in State v. Paradise. Petitioner's Supreme Court reply brief at 2, Appendix C. The petitioner, however, made no claim that overruling Paradise would violate his rights under the United States Constitution.

In its decision, the Connecticut Supreme Court upheld the trial court's ruling on the petitioner's statute of limitations claim by overruling State v. Paradise and applying the 1976 amendment of the statute of limitations to the petitioner's case. State v. Skakel, 276 Conn. at 666-67, Appendix D. Thereafter, the petitioner filed a motion for reconsideration and reargument en banc pursuant to §§ 70-7 and 71-5 of the Connecticut Practice Book. Motion for Reconsideration, to Reargue and for Reconsideration and Reargument en Banc, State v. Skakel, Supreme Court No. 16844, Appendix O. In his motion for reconsideration, the petitioner claimed, for the first time, that the state supreme court's decision reversing

"longstanding Connecticut law violated the Ex Post Facto Clause . . . and the Due Process Clause[ ]." Id., at 3. The Connecticut Supreme Court denied the petitioner's motion without opinion. Order, dated March 14, 2006, State v. Skakel, Supreme Court No. 16844, Appendix Q.

"Before a federal court may grant habeas relief to a state to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents them to a federal court in a habeas petition." O'Sullivan v. Boerckel, 526 U.S. at 842. In order to ensure that this requirement is met, the federal court must ask "not only whether the prisoner had exhausted his state remedies, but also whether he has *properly* exhausted those remedies." (Emphasis in original.) Id., at 848. Thus, in order to meet the exhaustion requirement, a petitioner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." Id., at 845. The petitioner failed to do so here because he did not properly brief and argue his federal constitutional claim in the Connecticut Supreme Court.

In this case, the petitioner did not raise his federal constitution claim until he filed his motion for reconsideration and reargument en banc. "Those claims of error not briefed are considered abandoned." Czarnecki v. Plastic Liquidating Co., Inc., 179 Conn. 261 n.1, 425 A.2d 1289 (1979). "Unless a claim of error is included in the brief, and particularly if it is not presented in oral argument, the court treats it as abandoned." WILLIAM M. MALTBIE, CONNECTICUT APPELLATE PROCEDURE, § 327 (2nd ed. 1957). See State v. Colon, 272 Conn. 106, 153 n.19, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S.Ct. 102, 163 L.Ed.2d 116 (2005) ("We have repeatedly stated that [w]e are not required to review issues

that have been improperly presented to this court through an inadequate brief . . . ."); W. HORTON AND K. BARSCHI, CONNECTICUT RULES OF APPELLATE PROCEDURE, § 67-4 (2007-2008).

The petitioner will, no doubt, contend that his federal claim was properly presented by its inclusion in his motion for reconsideration and reargument en banc. Any such claim is without merit. "A petitioner meets the fair presentation requirement if the state court rules on the merits of his claims, or if he presents his claims in a manner that entitles him to a ruling on the merits." Gentry v. Lansdown, 175 F.3d at 1083. Here, the petitioner fails the test for fair presentation of his claim on both grounds. The Connecticut Supreme Court denied the petitioner's motion for reconsideration and, therefore, did not rule on the merits of his federal claim. Order, dated March 14, 2006, State v. Skakel, Supreme Court No. 16844, Appendix Q. Moreover, because the Connecticut Supreme Court has the discretion to deny any such motion for reconsideration or reargument, and thus decline to consider the merits of any claims raised therein, the petitioner failed to present his claim "in a manner that entitles him to a ruling on the merits." Gentry, supra, 1083.

Indeed, when considering petitions for writs of certiorari, the United States Supreme Court has "almost unfailing"; Howell v. Mississippi, 543 U.S. 440, 443, 125 S.Ct. 856, 160 L.Ed.2d 873 (2005)(per curium); refused to consider a federal claim "unless it was either addressed by, or properly presented to, the state court that rendered the decision [the court is being asked to review]." Adams v. Robertson, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997)(per curium). Where, as here, the state court is silent on the federal question at issue, the Supreme Court assumes that the issue was not properly presented. Id., at 86.

Finally, the petitioner may argue that the assertion of his federal claim was timely because his first opportunity to claim that the abandonment of State v. Paradise violated his constitutional rights was after the Connecticut Supreme Court had issued its decision. This contention is equally without merit. The demise of Paradise was readily foreseeable in light of the shaky foundations of the original decision, subsequent Connecticut Supreme Court decisions that moved away from the simplistic retroactivity analysis employed in that case; see In re Michael S., 258 Conn. 621, 627-29, 784 A.2d 317 (2001); State v. Parra, 251 Conn. 617, 628 n.8, 741 A.2d 902 (1999); In re Daniel H., 237 Conn. 364, 372-73, 376 A.2d 462 (1996); and other decisions by the Connecticut Supreme Court casting doubt on the assumptions underlying Paradise. See State v. Ellis, 197 Conn. 436, 459-60, 497 A.2d 974 (1985); State v. Golino, 201 Conn. 435, 443-46, 518 A.2d 57 (1986). Moreover, because the state's brief attacked Paradise on several grounds and expressly asked the court to overrule it; State's Supreme Court brief at 13-28, Appendix B; the petitioner had every opportunity to anticipate and assert the federal question in his reply brief.

Because the petitioner did not properly present to the Connecticut Supreme Court his claim that overruling Paradise would violate his federal constitutional rights, the claim is unexhausted. Consequently, the petitioner cannot obtain federal habeas corpus relief on the claim. 28 U.S.C. § 2254(b)(1)(A); see Yeats v. Angelone, 166 F.3d at 260.

c. The state court ruling applying the 1976 amendment of the statute of limitations to the petitioner's case was neither contrary to nor an unreasonable application of clearly established federal law

"An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State. 28 U.S.C. § 2254(b)(2). Although the petitioner 's claim was not properly

raised in state court and is, therefore, unexhausted, this court should deny the petitioner relief on the claim because it is wholly meritless. The petitioner's claim lacks merit because: (1) it is not based upon "clearly established federal law," as determined by the United States Supreme Court; and (2) the Connecticut Supreme Court's ruling applying the 1976 amendment of the statute of limitations to the petitioner's case was neither "contrary to" nor "an unreasonable application of" United States Supreme Court precedent. 28 U.S.C. § 2254(d)(1).

In Williams v. Taylor, supra, Justice O'Connor, writing for the court, observed that § 2254(d)(1) "prohibits a federal court from granting a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id., 529 U.S. at 399. Justice O'Connor explained that "*the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings . . . of the [Supreme Court] as of the time of the relevant state-court decision*." (Emphasis added.) Id., at 411. Justice O'Connor stated, therefore, that "§ 2254(d)(1) restricts the source of clearly established law to [the Supreme Court's] jurisprudence." Id.

In this case, the petitioner claims that his conviction was "obtained and affirmed in violation of the Ex Post Facto Clause and the Due Process Clause." Habeas Corpus Petition, paragraph 19, Ground One. Specifically, the petitioner contends that his rights under the federal constitution were violated when the Connecticut Supreme Court overruled its decision in State v. Paradise in order to hold that his prosecution was not barred by the statute of limitations. Id. The petitioner, however, is unable to point to any

ruling of the United States Supreme Court that would support his claim. Instead, the petitioner attempts to fashion support for his claim by merging the holdings of two Supreme Court decisions: Stogner v. California, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003) and Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1963).

In Stogner v. California, supra, the court held that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution." Id., 539 U.S. at 632-33. In Bouie v. City of Columbia, supra, the court held that the Due Process Clause prohibits a judicial construction from being "applied retroactively . . . to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal." Id., 378 U.S. at 362. Neither of these holdings address the circumstances of this case.

Here, the legislature amended the statute of limitations to remove the time limitation on the prosecution of all class A felonies, including murder, before any existing time limit on the petitioner's prosecution had expired.[4] Thus, unlike Stogner, this case does not involve a legislative enactment applied to revive a time-barred prosecution. See Stogner, 539 U.S. at 618. Moreover, when the Connecticut Supreme Court overruled existing precedent to hold that the amendment to the statute of limitations applies retroactively, it did not result in an unforeseeable expansion of the basis for criminal liability, as did the ruling of the South Carolina Supreme Court in Bouie. Indeed, the United States Supreme Court has never considered a due process or ex post facto claim based on facts similar to those presented in this case.

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[4] This statement assumes for the purposes of argument, but does not concede, that the pre-amendment version of General Statutes § 54-193 imposed a time limitation on the prosecution of non-capital murder.

Because there is no United States Supreme Court precedent on the issue, the petitioner attempts to fashion a legal theory on which to base his claim by merging the concepts that underlie the decisions in Stogner and Bouie. In order to obtain relief under § 2254, however, the petitioner's claim must be "based on a principle of Supreme Court case law that was 'clearly established' when the state court ruled." Lurie v. Wittner, 228 F.3d at 125; accord Williams v. Taylor, 529 U.S. at 390. "[A] rule was not 'clearly established' unless it was 'compelled by existing precedent'" Hogan v. Hanks, 97 F.3d 189, 192 (7th Cir. 1996), cert. denied, 520 U.S. 1171, 117 S.Ct. 1439, 137 L.Ed.2d 546 (1997), quoting Saffle v. Parks, 494 U.S. 484, 488, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

Here, it is clear that the rule the petitioner asks this court to apply was not compelled by existing precedent at the time that the state supreme court ruled. The petitioner's claim, therefore, is not based on "clearly established federal law." Hogan v. Hanks, supra, 192; Saffle v. Parks, supra, 488. Accordingly, the petitioner is not entitled to habeas relief under § 2254 (d)(1). See Vasquez v. Strack, 228 F.3d 143, 148 (2nd Cir. 2000), cert. denied sub nom, Vasquez v. Mazzuca, 531 U.S. 1166, 121 S.Ct. 1128, 148 L.Ed.2d 994 (2001).[5]

Finally, the petitioner cannot show that the Connecticut Supreme Court's decision rejecting his claim was either contrary to, or involved an unreasonable application of,

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[5] Even if the petitioner's claim were not subject to AEDPA, he would still be barred from obtaining federal habeas corpus relief on his claim by the United States Supreme Court's ruling in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). In Teague, the Supreme Court held that, in general, new constitutional rules should not be declared or applied in collateral proceedings, such as habeas corpus review. Id. 489 U.S. at 315-16. A constitutional rule is considered "new" for the purposes of Teague if it "breaks new ground, imposes a new obligation on the States or the Federal Government, or was not *dictated* by precedent existing at the time the [petitioner's] conviction became final." (Emphasis in original.) Saffle v. Parks, 494 U.S. at 488. In this case, because the rule advocated by the petitioner has *never* been recognized by the United States Supreme Court, the rule is clearly "new" for the purposes of Teague.

clearly established federal law. See 28 U.S.C. § 2254 (d)(1); Williams v. Taylor, 529 U.S. at 399.

In this case, the Connecticut Supreme Court looked to the United States Supreme Court's ruling in Stogner v. California, supra, for guidance in determining whether the provisions of the 1976 amendment to the statute of limitations could be applied to the petitioner's prosecution for a 1975 murder without offending the Ex Post Facto Clause. State v. Skakel, 276 Conn. at 681, Appendix D. In Stogner, the United States Supreme Court held that "a law enacted *after expiration of a previously applicable limitations* period violates the Ex Post Facto Clause when it is applied to revive *a previously time-barred prosecution*." (Emphasis added.) Stogner, 539 U.S. at 632-33. But, as the Connecticut Supreme Court noted, the Stogner court specifically stated that its ruling "does *not* prevent the State from extending time limits . . . for prosecutions not yet time barred." (Emphasis added by state court.) Skakel, supra, 681, quoting Stogner, supra, 632. Accordingly, when ruling that the amended statute of limitations applied to the petitioner's case, the Connecticut Supreme Court specifically stated that "the five year limitation period of the pre-1976 amendment version of § 54-193 had not yet expired with respect to the October, 1975 murder of the victim when the 1976 amendment to that statutory provision became effective." Skakel, supra, 666-67, Appendix D.[6]

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[6] For the purposes of its analysis in this case, the Connecticut Supreme Court assumed, without deciding, "that the five year limitation period of the pre-1976 amendment version of § 54-193 applies to murder." State v. Skakel, 276 Conn. at 667 n.31, Appendix D. The trial court, however, explicitly ruled that the statute of limitations in effect at the time of the victim's murder did not bar his prosecution for that crime. Memorandum of Decision Re: Motion to Dismiss, State v. Skakel, Case No. CR00-135792-T, Judicial District of Stamford-Norwalk, at 4-7, Appendix I. Because the Connecticut Supreme Court declined to decide the issue, it remains unresolved as a matter of state law.

Moreover, the Connecticut Supreme Court's ruling in this case was entirely consistent with the decisions of other state and federal courts that have considered the constitutional implications of retroactive application of amendments to the statute of limitations. See e.g., United Stated States v. Madia, 955 F.2d 538, 540 (8th Cir. 1992); United States v. Richardson, 512 F.2d 105, 106 (3rd Cir. 1975); People v. Anderson, 53 Ill.2d 437, 440, 292 N.E.2d 364, 366 (1973); United States v. Kurzenknabe, 136 F.Supp. 17, 23 (D.N.J. 1955).

In its decision overruling Paradise and applying the 1976 amendment to the statute of limitations to the petitioner's case, the Connecticut Supreme Court did not consider the United States Supreme Court's ruling in Bouie v. City of Columbia, supra. When the holding in Bouie is considered, however, it is clear that there was no reason for the state supreme court to have done so.

In Bouie, the United States Supreme Court held that the South Carolina Supreme Court's retroactive application of its construction of a criminal statue to the defendants in that case violated due process. The court found that "a deprivation of the right to fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." Bouie, 378 U.S. at 352. The court, therefore, concluded that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' [the construction] must not be given retroactive effect." Id., at 354. Subsequently, in Rogers v. Tennessee, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001), the court provided further insight as to the scope and meaning of Bouie. In Rogers, the court made clear that its decision in Bouie "was rooted firmly in well-

established notions of *due process*. (Emphasis in original.) Id., at 459. "It's rational rested on the core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what had previously been innocent conduct." Id.

In this case, the retroactive application of the Connecticut Supreme Court's abandonment of the rule of Paradise to the petitioner, and the resulting removal of an impediment to his prosecution, simply had no impact on the petitioner's fair warning that his conduct – bludgeoning the victim to death – was a violation of the law. Thus, the United States Supreme Court's decision in Bouie had no application to the petitioner's case. Cf. Rose v. Lundy, 423 U.S. 48, 53, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975) (*per curium*) (upholding defendant's conviction under statute prohibiting "crimes against nature" because, unlike in Bouie, the defendant "[could] make no claim that [the statute] afforded no notice that his conduct would be within it's scope").

Accordingly, the Connecticut Supreme Court's ruling in this case was neither contrary to, nor an unreasonable application of, clearly established federal law. See 28 U.S.C. § 2254 (d)(1); Williams v. Taylor, 529 U.S. at 399.

2. The petitioner is not entitled to habeas corpus relief because the state failed to disclose allegedly exculpatory evidence in violation of Brady v. Maryland

The petitioner claims that his right to a fair trial was violated when the state suppressed allegedly exculpatory evidence in violation of the United States Supreme Court's decision in Brady v. Maryland, supra. Habeas Corpus Petition, paragraph 19, Ground Two. Specifically, the petitioner claims that the state violated his rights under Brady when it failed to disclose a composite sketch and two "profile reports" prepared by

an investigator. Id. The petitioner has failed to show that federal habeas corpus relief is warranted with respect to either claim.

a. Facts relating to the petitioner's claims

On May 21, 2001, the petitioner filed a pretrial motion for disclosure and production requesting any material that was exculpatory in nature. In response, the state provided the petitioner with numerous reports and documents relating to the investigation of the case. The documents disclosed by the state included several reports that provided information about the composite sketch. State v. Skakel, 276 Conn. at 694-97, Appendix D.

One such report stated that on October 31, 1975, investigating officers at the scene of the murder were approached by special officer Charles Morganti, Jr. Morganti informed the investigators that he had been on special patrol duty in Belle Haven the previous evening when, at about 10:00 p.m., he observed a white male walking on Field Point Road and turn onto Walsh Lane. Morganti indicated that he saw the same man a few minutes later walking northbound on Otter Rock Drive, just north of its intersection with Walsh Lane. A second report indicated that Morganti was interviewed again the next day and that he agreed to go to the detective bureau to help produce a composite sketch of the individual that he had seen on Field Point Road on the evening of October 30, 1975. State v. Skakel, 276 Conn. at 694-95, Appendix D.[7]

[7] Another report indicates that the police interviewed Carl Wold, a resident of Walsh Lane, on November 5, 1975. Wold told the police that he had gone out for his nightly walk at about 7:20 p.m. on October 30, 1975 and that the course he followed had taken him along Field Point Road. He recalled having a short conversation with an officer at the Field Point police both and later, while on his way home, that he had been stopped by another officer on Field Point Road. State v. Skakel, 276 Conn. at 695-96, Appendix D.

Another report disclosed to the petitioner indicated that Inspector Frank Garr of the state's attorney's office interviewed Morganti on October 8, 1994, nineteen years after the victim's murder. Morganti informed Garr that James F. Murphy, a private investigator retained by the Skakel family, had contacted him and questioned him about the individual whom he had stopped on Field Point Road on the evening of October 30, 1975. The report further stated that Morganti had reported the entire incident to the police at the time of the original investigation of the murder and assisted the police in making a composite sketch of the individual. The report also stated that Garr, Morganti and Murphy went together to Otter Rock Drive, the location where Morganti recalled having seen the individual for a second time on the evening of the murder. State v. Skakel, supra, 696-97, Appendix D.

The petitioner's trial commenced on May 7, 2002. Petitioner's Supreme Court brief at 1, Appendix A. On May 13, 2002, John Solomon, a former inspector with the state's attorney's office, testified outside the presence of the jury regarding an issue raised in a motion pending before the court. During his testimony, Solomon made reference to a report that he had prepared in connection with the investigation of Martha Moxley's murder. Solomon characterized the report, which he wrote in 1992, as a profile of Kenneth Littleton summarizing why, at the time the report was written, Littleton was considered a suspect. State v. Skakel, 276 Conn. at 707-708, Appendix D. The petitioner's trial counsel immediately requested a copy of the report, to which the trial court responded: "Not right now. You are talking about examining a witness." Id., at 708. At the same proceeding the state elicited testimony from Solomon in which he indicated that he had prepared a similar profile report regarding Thomas Skakel. Id. The petitioner, however, failed to renew his request for the profile reports before the conclusion of the trial. Id.

The jury returned a verdict of guilty on June 7, 2002. Judgment, State v. Skakel, Case No. CR00-135792-T, Judicial District of Stamford-Norwalk, Appendix J. On June 12, 2002, the petitioner filed a motion for a new trial pursuant to Practice Book § 42-53.[8] Defendant's Motion for New Trial, State v. Skakel, Case No. CR00-135792-T, Judicial District of Stamford-Norwalk, Appendix K. The petitioner's motion made no mention of the composite sketch or the profile reports. Two and a half months later, on August 26, 2002, the petitioner filed an amended motion for a new trial and requested that the court hold an evidentiary hearing on the claims set forth in the amended motion. Defendant's Amended Motion for New Trial and Request for an Evidentiary Hearing, State v. Skakel, Case No. CR00-135792-T, Judicial District of Stamford-Norwalk, Appendix L.

In his amended motion for a new trial, the petitioner claimed that the state had violated his rights under Brady v. Maryland when it failed to disclose the composite sketch of the individual observed by Morganti and the profile reports prepared by Solomon. Defendant's Amended Motion for New Trial and Request for an Evidentiary Hearing, State v. Skakel, Case No. CR00-135792-T, Judicial District of Stamford-Norwalk, Appendix L; State v. Skakel, 276 Conn. at 697, 708, Appendix D. The state opposed the petitioner's motion, claiming that it was untimely under Practice Book § 42-54.[9] State's Objection to

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[8] Practice Book § 42-53(a) provides, in pertinent part, as follows:

> Upon motion of the defendant, the judicial authority may grant a new trial if it is required in the interests of justice . . . .

[9] Practice Book § 42-54 provides, in pertinent part, as follows:

> Unless otherwise permitted by the judicial authority in the interests of justice, a motion for a new trial shall be made within five days after a verdict . . . or within any further time the judicial authority allows within the five-day period.

Defendant's Amended Motion for New Trial and Request for Evidentiary Hearing, State v. Skakel, Case No. CR00-135792-T, Judicial District of Stamford-Norwalk, at 1, Appendix M. The state also argued that the petitioner had failed to establish a Brady violation with regard to the composite sketch because it had not been suppressed and was not material to the petitioner's defense. Id., at 6-7.

The trial court held a hearing on the petitioner's motion on August 28, 2002, the day on which the petitioner was to be sentenced. Transcript of proceedings on August 28, 2002, State v. Skakel, Case No. CR00-135792-T, Judicial District of Stamford-Norwalk (hereinafter "Transcript, 2/28/02"), Appendix N. During the hearing, the court asked petitioner's trial counsel whether, prior to trial, he had received the 1975 report that referred to Morganti's willingness to participate in the production of a composite sketch and the 1994 report that referred to the completed sketch. The petitioner's counsel answered in the affirmative with respect to both reports. Transcript, 2/28/02 at 35, Appendix N; State v. Skakel, 276 Conn. at 698-99, Appendix D.

Thereafter, the trial court denied the petitioner's motion for a new trial. Transcript, 2/28/02 at 86-87, Appendix N; State v. Skakel, 276 Conn. at 699, Appendix D. The court rejected the petitioner's claim regarding the composite sketch on the ground that it was untimely and because the petitioner had failed to show that the sketch had been suppressed. Transcript, 2/28/02 at 89-91, 93-94, Appendix N; Skakel, supra, 699 n.65, Appendix D. The court rejected the petitioner's claim regarding the profile reports because he failed to raise it within the five-day period prescribed by Practice Book § 42-53. Transcript 8/28/02 at 93-94, Appendix N; Skakel, supra, 709, Appendix D.

On appeal, petitioner claimed that the state's failure to disclose the composite sketch and the profile reports prior to trial violated his rights under Brady. Petitioner's Supreme Court brief at 32-33, 43-44, Appendix A. The Connecticut Supreme Court rejected both claims. The court concluded that the trial court had properly found that the petitioner and his trial counsel were on notice of the existence of the composite sketch through the investigative reports disclosed to them by the state. State v. Skakel, 276 Conn. at 702-703, Appendix D. The court held, therefore, that the petitioner "failed to establish that the state suppressed the composite drawing within the meaning of Brady." Id., at 707.

In addition, the state supreme court ruled that the trial court acted within its discretion when it rejected the petitioner's claim on the ground that it had not been raised in a timely manner. State v. Skakel, 276 Conn. at 710, Appendix D. The court observed that although the petitioner became of aware of the reports during the trial, he did not raise a Brady challenge to the state's failure to produce them until two and a half months after the five-day limitation period of Practice Book § 42-54 had expired. The court noted further that the petitioner had offered the trial court no reason for the delay. Accordingly, the court found that the trial court had not abused its discretion when it rejected the petitioner's claim as time barred. Skakel, supra, 710-711, Appendix D.[10]

b. The petitioner is not entitled to habeas corpus relief because the state failed to disclose the composite sketch

The petitioner claims that the state violated his rights under Brady v. Maryland when it failed to disclose a composite sketch of an individual who was seen walking on a nearby

[10] The Connecticut Supreme Court's resolution of the petitioner's Brady claim is described in greater detail in the respondent's statement of material facts. See Respondent's Local Rule 56(a)1 Statement at 17-24.

street on the evening of the victim's murder. Habeas Corpus Petition, Paragraph 19, Ground Two. The petitioner's claim fails because the Connecticut Supreme Court reasonably applied the controlling precedent of the United States Supreme Court in rejecting the petitioner's claim.

In this case, the Connecticut Supreme Court correctly identified the principles announced in Brady and its progeny as governing the analysis of the petitioner's claim. See State v. Skakel, 276 Conn. at 699, Appendix D. The only "remaining issue, then, is whether [the petitioner] can obtain relief on the ground that the state court's adjudication of his claim involved an 'unreasonable application of [those principles].'" Bell v. Cone, 535 U.S. at 698. Review of the state supreme court's decision in this case makes clear that the court reasonably applied the governing principles of Brady and its progeny.

In Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), the United States Supreme Court stated that:

> In Brady, this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., at 682; see also Kyles v. Whitley, 514 U.S. 419, 433-434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Greene, 527 U.S. at 280-281. The court, therefore, stated that "[t]here are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must

have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. Id., at 281-82.

Moreover, it is well established that "[e]vidence is not 'suppressed' if the defendant either knew, see, e.g., United States v. Robinson, 560 F.2d 507, 518 (2d Cir. 1977), cert. denied, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978), or should have known, see e.g., United States v. Brown, 582 F.2d 197, 200 (2d Cir.), cert. denied, 439 U.S. 915, 99 S.Ct. 289, 58 L.Ed.2d 262 (1978), of essential facts permitting him to take advantage of any exculpatory evidence." United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982), cert. denied, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983); accord, United States v. Payne, 63 F.2d 1200, 1208 (2nd Cir. 1995), cert. denied, 516 U.S. 1165, 116 S.Ct. 1056, 134 L.Ed.2d 201 (1996). "As a result, the [prosecution] is not required to disclose [evidence] to a defendant who is 'on notice of the essential facts that would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish.'" LeRoy, 687 F.2d at 618, quoting United States v. Stewart, 513 F.2d 957, 600 (2d Cir. 1975).

The court in LeRoy explained that "[t]he rationale underlying Brady is not to supply a defendant with all the evidence in the [prosecution's] possession which might conceivably assist in the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence only known to the [prosecution]. LeRoy, 687 F.2d at 619, citing United States v. Ruggerio, 472 F.2d 599, 604 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2772, 37 L.Ed.2d 398 (1978).

These are precisely the principles that were applied by the Connecticut Supreme Court in this case. In rejecting the petitioner's claim, the court observed that "[t]o establish

a Brady violation, the defendant must show that [1] the government suppressed evidence, [2] the suppressed evidence was favorable to the defendant, and [3] it was material [either to guilt or to punishment]." (Alterations in original). State v. Skakel, 276 Conn. at 700, Appendix D. The court noted, however, that "evidence is not considered to have been suppressed within the meaning of *the Brady doctrine if the defendant or his attorney either knew or should have known, of the essential facts permitting him to take advantage of* [*that*] *evidence.*" (Emphasis and alterations in original.) Id., at 701-702, quoting United States v. Payne, 63 F.2d at 1208, Appendix D.

The state supreme court concluded that the trial court had properly found that the petitioner and his trial counsel were on notice of the existence of the composite sketch through the investigative reports disclosed to them by the state. State v. Skakel, 276 Conn. at 702-703, Appendix D. The court took particular notice of the fact that petitioner's trial counsel had expressly acknowledged that he was aware of the reports. Id., at 703. The court held, therefore, that the petitioner "failed to establish that the state suppressed the composite drawing within the meaning of Brady." Id., at 707. Accordingly, the petitioner cannot show that the court's ruling in was either contrary to, or involved an unreasonable application of, clearly established federal law. See 28 U.S.C. § 2254 (d)(1).

c. The petitioner is not entitled to habeas corpus relief because the state failed to disclose the profile reports

The petitioner claims that the state violated his rights under Brady when it failed to disclose two profile reports prepared by an investigator. Habeas Corpus Petition, Paragraph 19, Ground Two. The petitioner is not entitled to habeas corpus relief on his

claim because: (1) the petitioner's claim was defaulted in state court; and (2) the petitioner cannot establish that the reports were suppressed.

i. The petitioner cannot obtain review of his claim because it was defaulted in state court

It is well-established that a state prisoner who defaults his federal claim in state court pursuant to an independent and adequate state procedural rule will be denied federal habeas review absent a showing of cause for the default and actual prejudice arising therefrom or that failure to consider the federal claim will result in a fundamental miscarriage of justice.[11] Edwards v. Carpenter, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000); Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (where state court refused to review claim not raised at trial in accordance with state rules, federal habeas relief was unavailable absent a showing of "cause" and "prejudice").

"Such a rule is adequate if it is regularly or consistently applied by the state court, see Johnson v. Mississippi, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), and it is independent if it does not 'depend[ ] on a federal constitutional ruling,' Ake v. Oklahoma, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)." Yeats v. Angelone, 166 F.3d at 260. This "independent and adequate state ground doctrine prohibits the federal courts from addressing the habeas corpus claims of state prisoners when a state-law default prevented the state court from reaching the merits of the federal claims." Thomas v. Lewis, 945 F.2d 1119, 1122 (9th Cir. 1991).

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[11] The "fundamental miscarriage of justice" exception applies to those cases where "a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey v. Zant, 499 U.S. 467, 494, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); see also Smith v. Murray, 477 U.S. 527, 537, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

A procedural default in the state courts will prohibit federal habeas review only if "the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar. . . ." (Citations omitted.) Glenn v. Bartlett, 98 F.3d 721, 724 (2d Cir. 1996). Such a bar to federal review exists because a habeas petitioner who has failed "to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance"--just as the petitioner who has failed to exhaust his state remedies has done. Coleman, 501 U.S. at 731-32. Indeed, the United States Supreme Court has explained that without this rule, "a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws."[12] Id., at 730-31. "State procedural rules 'are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system.'" Lambrix v. Singletary, 520 U.S. 518, 525, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997).

"[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). "[T]he mere fact that counsel failed to

[12] "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." Coleman, 501 U.S. at 729.

recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." Id., at 486-87.

A petitioner also must establish that actual prejudice resulted from the error, "infecting his entire trial with error of constitutional dimensions" and denying him "fundamental fairness" at trial. Murray v. Carrier, 477 U.S. at 494. "The showing of prejudice required under Wainwright v. Sykes is significantly greater than that necessary under the more vague inquiry suggested by the words 'plain error.' . . . The habeas petitioner must show not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimension. . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) Murray, 477 U.S. at 493-94.

In this case, the trial court denied the petitioner's Brady claim regarding the profile reports because it was not made with the five-day time limit prescribed by Practice Book § 42-54. Transcript, 2/28/02 at 93-94, Appendix N. In ruling on the petitioner's claim, the court observed that the petitioner's trial counsel had initially asked to be provided with a copy of the report pertaining to Kenneth Littleton during his cross-examination of John Solomon, the investigator who had prepared the reports. Id., at 88. The court acknowledged that it directed the petitioner's counsel to make the request at a more appropriate time after he had completed his examination. Id., see State v. Skakel, 276 Conn. at 708, Appendix D. The court noted that petitioner's counsel never renewed his request for the reports. Transcript, 2/28/02 at 88, Appendix N. The court further observed that counsel for the petitioner did not raise the claim until they filed their amended motion for a new trial more than two and a half months after the return of the verdict and only two

days before the hearing on their motion. Id., at 93-94. Finally, the court noted that petitioner's counsel neither requested an extension of time to file their amended petition nor did they make an attempt to show cause as to why the claims could not have been raised within the allowed time. Id. The court concluded, therefore, that the interests of justice would not be served by permitting late filing of the petitioner's claim. Id., at 94.

On appeal, the Connecticut Supreme Court observed that although the petitioner became of aware of the reports during the trial, he did not raise a Brady challenge to the state's failure to produce them until two and a half months after the limitation period of Practice Book § 42-54 had expired. The court also noted that the petitioner had offered the trial court no reason for the delay. Accordingly, the state supreme court concluded that the trial court had not abused its discretion when it rejected the petitioner's claim as time barred. Skakel, supra, 710-711, Appendix D.

The Connecticut courts declined to consider the petitioner's claim because he had failed to comply with the requirements of the Connecticut Practice Book when raising the claim. The state rules of court are an adequate basis on which to find procedural default because they are "regularly" and "consistently" applied; Johnson v. Mississippi, 486 U.S. at 587; and they are independent because they do not "depend[ ] on a federal constitutional ruling." Ake v. Oklahoma, 470 U.S. at 75. See also Yeats v. Angelone, 166 F.3d at 260. Finally, "the last state court rendering a judgment in the case clearly and expressly state[d] that its judgment rests on a state procedural bar. . . ." Glenn v. Bartlett, 98 F.3d at 724.

Because the Connecticut Supreme Court's ruling was based on adequate and independent state grounds; see Yeats, supra, 260; and because the petitioner has not

even attempted to establish cause and prejudice with regard to his default; Murray v. Carrier, 477 U.S. at 488-94; the petitioner cannot obtain federal habeas corpus review of his defaulted claim. Cf. Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305-07 (9th Cir. 1996) (reversing district court's ruling granting writ on merits where no cause or prejudice shown to excuse default).

ii. The petitioner is not entitled to relief on his Brady claim because he cannot show that the profile reports were suppressed

Even if the petitioner's Brady claim were not defaulted in state court, he would still not be entitled to relief on the record of this case. "In order to establish a Brady violation, a [petitioner] must show, *inter alia*, (1) that the [prosecution] failed to disclose favorable evidence, and (2) that the evidence it 'suppressed' was material." United States v. Payne, 63 F.3d at 1208, citing Brady v. Maryland, 373 U.S. at 87; Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). On this record, the petitioner cannot show that the profile reports were suppressed within the meaning of Brady.

The record of this case makes clear that the petitioner's trial counsel was aware of the existence of the profile reports during trial. In ruling on the petitioner's motion for a new trial, the trial court made note of the fact that the petitioner's trial counsel first requested a copy of the report pertaining to Littleton while cross-examining Solomon during the trial. Transcript, 2/28/02 at 88, Appendix N. The Connecticut Supreme Court also noted that counsel for the petitioner "became aware of the two reports during trial . . . ." State v. Skakel, 276 Conn. at 710, Appendix D. However, because both the trial court and the state supreme court declined to review the petitioner's claim as procedurally defaulted, neither court made express findings on the issue of suppression. Id., at 710-11.

After the petitioner's conviction, however, he filed a petition for a new trial pursuant to General Statutes § 52-270 and Practice Book § 42-55. Memorandum of Decision, Skakel v. State, Case No. CV05-4006524-S, Judicial District of Stanford-Norwalk (hereinafter "Memorandum of decision on petition for new trial"), at 1, Appendix S. Section 52-270 provides that "the superior court may grant a new trial of any action that comes before it for the discovery of new evidence . . . ." The court hearing the petition will grant a new trial if the petitioner can "demonstrate . . . that: the proffered evidence is newly discovered, such that it could not have been discovered by due diligence; (2) it would be material on a new trial; (3) it is not merely cumulative; and (4) it is likely to produce a new result in a new trial . . . ." Asherman v. State, 202 Conn. 429, 434, 521 A.2d 578 (1987).

In his petition for a new trial, the petitioner claimed that the state suppressed the two profile reports prepared by Solomon during the investigation of the victim's murder. The petitioner argued that evidence included in the reports was exculpatory and material. Memorandum of decision on petition for new trial at 11, Appendix S. The court, *Karazin, J.*, concluded that the evidence from the reports could not be considered "newly discovered." Id., at 12. The court based this conclusion on "the criminal trial court record" as well as the testimony of the petitioner's trial counsel, Attorney Michael Sherman. Id. The court indicated that Sherman testified that "he had met with John Solomon, the Littleton report's author, extensively prior to trial and Solomon told him about the profile reports." Id. Accordingly, the court rejected the petitioner's claim. Id.[13]

[13] Solomon also prepared a profile report pertaining to the petitioner. The report summarized the results of the investigation of the petitioner as a suspect. Memorandum of decision on petition for new trial at 11, Appendix S.

It is well established that "evidence is not considered suppressed within the meaning of the Brady doctrine if the defendant or his attorney '"either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence.'" United States v. Payne, 63 F.3d at 1208, quoting, United States v. Zackson, 6 F.3d 911, 918, (2d Cir. 1993). It is clear, therefore, that on this record, the petitioner cannot prevail on his Brady claim regarding the profile reports prepared by Solomon. See United States v. Payne, supra; United States v. LeRoy, 687 F.2d at 619.

3. The petitioner is not entitled to habeas corpus relief because of the manner that the state court applied a state statute when transferring him to the adult criminal docket

Because the petitioner was fifteen years old at the time of the victim's murder, he was originally charged as a delinquent in the Superior Court for Juvenile Matters. The state file a motion under General Statutes § 17-60a (Rev. to 1975) to transfer the petitioner to the regular criminal docket. State v. Skakel, 276 Conn. at 654, Appendix D. After conducting hearings pursuant to § 17-60a, the juvenile court, *Dennis, J.*, ordered the petitioner's transfer to the adult criminal docket of the Superior Court. Memorandum of Decision, In re Michael S., Docket No. DL00-01028, Superior Court for Juvenile Matters, Judicial District of Stamford-Norwalk, at 7, Appendix G.

On appeal, the petitioner claimed that his transfer to the regular criminal docket was invalid because the statutory requirements for transfer had not been met in three ways. Petitioner's Supreme Court brief at 45-48, Appendix A. First, the petitioner claimed that the probation office failed to investigate the "parentage and surroundings of the child" and the "habits and character of his parents," as required by General Statutes § 17-66. Petitioner's Supreme Court brief at 46, Appendix A. Second, the petitioner claimed that

the juvenile court improperly relied on regulations of the Department of Children and Families (DCF) that had not been in effect at the time of the murder in determining that there were no state institutions suitable for his care and treatment. Id., at 46-47. Finally, the petitioner claimed that the juvenile court improperly failed to consider placement of the petitioner in an out-of-state institution. Id., at 48. The Connecticut Supreme Court rejected each of the petitioner's claims challenging the validity of his transfer to the regular criminal docket. State v. Skakel, 276 Conn. at 660-63, Appendix D.[14]

The petitioner now claims that he was deprived of his right to due process of law when the state supreme court upheld the ruling of the juvenile court transferring his case to the adult criminal docket. Habeas Corpus Petition, paragraph 19, Ground Three. Specifically, the petitioner claims that he was denied due process "when the Connecticut Supreme Court permitted a state regulation to abrogate [his] statutory rights under Connecticut General Statutes Sections 17-60a and 17-66." Id.

The petitioner's claim should be rejected for two reasons. First, the petitioner is barred from obtaining relief on his claim because it was not properly raised in state court and is, therefore, unexhausted. If considered on the merits, the petitioner's claim should be rejected because it is based entirely on state law and is not cognizable in a federal habeas corpus proceeding.

[14] The Connecticut Supreme Court's ruling on the petitioner's claim that his transfer to the adult criminal docket was improper is described in greater detail in the respondent's statement of material facts. See Respondent's Local Rule 56(a)1 Statement at 24-29.

a. The petitioner's claim that his transfer to adult court violated due process was not raised in state court and is therefore unexhausted

Federal habeas corpus relief "shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . ." 28 U.S.C. § 2254(b)(1)(A). Accordingly, a state prisoner seeking federal habeas corpus relief must first exhaust available state remedies in order to give the state courts the opportunity to pass upon and correct alleged violations of his or her federal constitutional rights. Baldwin v. Reese, 541 U.S. at 29. In this court, the petitioner claims that the Connecticut Supreme Court deprived him of his right to due process when it affirmed the juvenile court's ruling transferring him to the adult criminal docket. Habeas Corpus Petition, paragraph 19, Ground Three. In his appeal to the Connecticut Supreme Court, however, the petitioner made no claim that his transfer violated his right to due process, or violated any other provision of the federal constitution. See Petitioner's Supreme Court brief at 45-49, Appendix A; Petitioner's Supreme Court reply brief at 15-17, Appendix C. Indeed, the petitioner did not even mention the federal constitution or cite a single federal case in support of his claim on appeal. See id.

"If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, *they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution*." (Emphasis added.) Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d (1995); see also Baldwin v. Reese, 541 U.S. at 29-33. State courts are not required to "consider *sua sponte*" federal claims not clearly raised by the prisoner. Gray v. Netherland, 518 U.S. 152, 163, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996), quoting Picard v. Connor, 404 U.S. 270, 277, 92 S.Ct. 509,

30 L.Ed.2d 438 (1971). Because the petitioner did not raise his federal claim regarding his transfer to adult court on appeal to the Connecticut Supreme Court, he may not now obtain federal habeas corpus relief on that claim. 28 U.S.C. § 2254(b)(1)(A).

b. The petitioner's claim is based entirely on state law and is not cognizable in federal habeas corpus

"An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). Although the petitioner 's claim was never raised in state court and is, therefore, unexhausted, this court should deny relief to the petitioner because his claim is wholly meritless. The petitioner's claim lacks merit because it is based on state law and does not implicate his rights under the federal constitution.

"A federal court may not issue the writ on the basis of a perceived error of state law" Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); see also Estelle v. McGuire, 502 U.S. at 68. ("federal habeas corpus relief does not lie for errors of state law"). "A federal court conducting habeas review is limited to determining whether a petitioner's custody is in violation of federal law." Dunnigan v. Keane, 137 F.3d at 125, see 28 U.S.C. §2254(a); Smith v. Phillips, 455 U.S. at 211. "[E]rrors in the application of state law . . . are usually not questioned in a federal habeas corpus proceeding." Seymour v. Walker, 224 F.3d 542, 552 (6th Cir. 2000), cert. denied, 532 U.S. 989, 121 S.Ct. 1643, 149 L.Ed.2d 502 (2001). "Thus, federal habeas corpus relief is not available for state law violations that do not rise to the level of federal constitutional violations." Alfini v. Lord, 245 F.Supp. 493, 499 (E.D.N.Y. 2003) citing Estelle v. McGuire, supra, 67-68. "Generally, [errors of state law] cannot rise to the level of a due process violation unless they 'offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as

fundamental.'" Seymour v. Walker, supra, 552, quoting Montana v. Egelhoff, 518 U.S. 37, 43, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996); see also Lisenba v. California, 314 U.S. 219, 228, 62 S.Ct. 280, 86 L.Ed.2d 166 (1941) (state law errors rise to constitutional dimension only if they "so infuse the proceeding with unfairness as to deny due process of law").

Here, the petitioner has done nothing more than claim error in the Connecticut Supreme Court's interpretation of its own state law and then affix a constitutional label to it. "A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." Carrizales v. Wainwright, 699 F.2d 1053, 1055 (11th Circuit 1983). When the state supreme court's decision is considered, it is clear that the court's ruling did not address a matter of constitutional dimension.

The Connecticut Supreme Court rejected each of the petitioner's claims challenging the validity of his transfer to the regular criminal docket. State v. Skakel, 276 Conn. at 660-63, Appendix D. First, the court rejected the petitioner's claim that his transfer was unlawful because the investigation required by § 17-66 was incomplete. The court agreed that the probation officer's investigation did not meet the requirements of § 17-66. Skakel, supra, 660, Appendix D. The court concluded, however, that the juvenile court properly held that departmental regulations precluded DCF from accepting the commitment of the petitioner because he was over the age of eighteen. Consequently, the court ruled that any deficiency in the investigation had no bearing on the juvenile court's ultimate decision to transfer the petitioner to the regular criminal docket. Id.

The state supreme court also rejected the petitioner's claim that the juvenile court improperly relied on DCF regulations that were not in effect at the time of the murder with

which he was charged in determining that there were no state institutions suitable for his care and treatment. State v. Skakel, 276 Conn. at 661, Appendix D. The court noted that before the juvenile court could order a transfer to the regular criminal docket under General Statutes § 17-60a (Rev. to 1975), it was first required to find that "there is no state institution designed for the care and treatment of children *to which* [*the*] *court may commit such child* which is suitable for his care and treatment." (Emphasis in original.) Skakel, supra, 661, Appendix D. The court concluded, therefore, that under § 17-60a, the commitment alternatives available to the juvenile court are those alternatives available *at the time of the hearing*. Id., at 662. Accordingly, the court held that the juvenile court properly considered the DCF regulations in effect at the time of the hearing in determining that there were no suitable placements available for the petitioner. Id.

Finally, the court rejected the petitioner's claim that the juvenile court had improperly failed to consider the suitability of placing the petitioner in an out-of-state institution. The court noted that under the provisions of General Statutes § 17-420, the commissioner of DCF may transfer "any person committed, admitted or transferred to the department . . . to any private agency or organization within or without the state under contract with the department," provided that certain circumstances are met. State v. Skakel, 276 Conn. at 662, Appendix D. The court concluded, therefore, that "a necessary prerequisite to the out-of-state transfer of a juvenile found to be delinquent is that the juvenile first must be "committed, admitted or transferred to the department." Id. The court observed, however, that the juvenile court had properly determined that under state law, no person over the age of eighteen could be committed to the care and custody of DCF. Thus, the petitioner, who was forty years old at the time of the transfer hearing, could not have been placed in

an out-of-state institution. Id. The court held, therefore, that the juvenile court had "properly declined to explore out-of-state placement alternatives for the [petitioner]." Id.

When the Connecticut Supreme Court's decision is considered, it is clear that it did not offend a fundamental principle of justice; see Montana v. Egelhoff, 518 U.S. at 43; or infuse the proceeding with unfairness so as to deny due process of law. Lisenba v. California, 314 U.S. at 228. Accordingly, the petitioner is not entitled to federal habeas corpus relief on his claim.

4. The petitioner is not entitled to habeas corpus relief because of the alleged impropriety by the prosecutor during his closing argument

The petitioner claimed for the first time on appeal that his right to a fair trial was violated as a result of the prosecutor's misconduct during closing argument. Petitioner's Supreme Court brief at 62, Appendix A. Specifically, the petitioner claimed that the prosecutor engaged in improper argument when he: (1) maintained that the petitioner had fabricated a story to explain any possible discovery of his semen at the crime scene; (2) asserted that the Skakel family had conspired to fabricate an alibi for the petitioner; (3) contended that the Skakel family believed that the petitioner was guilty of the murder; (4) referred to the petitioner as a "killer" and a "spoiled brat"; (5) asserted that the petitioner had masturbated on the victim's body; and (6) misused evidence in an audiovisual presentation to make it appear that the petitioner had confessed to the murder. Id., at 49-61. The Connecticut Supreme Court rejected each of the petitioner's misconduct claims. State v. Skakel, 276 Conn. at 742-69, Appendix D.

The petitioner now restates his prosecutorial misconduct claim, essentially without modification, in support of his petition for federal habeas corpus relief pursuant to § 2254.

Habeas Corpus Petition, paragraph 19, Ground Four. The petitioner's claim should be denied because the Connecticut Supreme Court reasonably applied clearly established federal law in rejecting the petitioner's claim on direct appeal.

a. The ruling of the Connecticut Supreme Court

The Connecticut Supreme Court began its analysis by setting forth the legal principles that governed its review of the petitioner's claim. The court stated that, under its ruling in State v. Stevenson, 269 Conn. 563, 849 A.2d 626 (2004), it would afford review to all of the petitioner's claims of misconduct, whether they were preserved or not, in its analysis of his claim that the prosecutor's argument deprived him of a fair trial. State v. Skakel, 276 Conn. at 742-43, Appendix D. The court then indicated that:

> [I]n analyzing claims of prosecutorial misconduct, we engage in a two step analytical process. The two steps are separate and distinct: (1) whether misconduct occurred in the first instance; and (2) whether misconduct deprived a defendant of his due process right to a fair trial.

Skakel, supra, 747, quoting, State v. Ancona, 270 Conn. 568, 595-96, 854 A.2d 718 (2004), cert. denied, 543 U.S. 1055, 125 S.Ct. 921, 160 L.Ed.2d 780 (2005), Appendix D.

The court then discussed the principles that it would apply in determining whether misconduct had occurred. The court stated that, when making such a determination:

> [T]he reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument . . . .

State v. Skakel, 276 Conn. at 745, quoting, State v. Ancona, supra, 593, Appendix D. The court also stated that "the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. . . ." Id. The court noted that:

> It is well established . . . "that a prosecutor in fulfilling his duties, must confine himself to the evidence in the record . . . . Statements as to facts that have not been proven amount to unsworn testimony which is not the subject of proper closing argument. . . .
>
> A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to the evidence.

Skakel, supra, 746, quoting, Ancona, supra, 595, Appendix D. The court further stated that:

> In addition, "[a] prosecutor may not appeal to the passions and prejudices of the jurors . . . . [S]uch appeals should be avoided because they have the effect of diverting the [jurors] attention from their duty to decide the case on the evidence. . . .

Skakel, supra, 746, quoting, Ancona, supra, 595, Appendix D.

In discussing the second step of the two-step analytical process, the courted noted that "the touchstone for appellate review of claims of prosecutorial misconduct is a determination of whether the defendant was deprived of his right to a fair trial, and this determination must involve the application of the factors set out by [the] court in State v. Williams, 204 Conn. 523, 540, 529 A.2d 653 (1987)." State v. Skakel, 276 Conn. at 743, quoting, State v. Ancona, 270 Conn. at 591, Appendix D. The court then discussed application of the Williams factors as follows:

> In determining whether prosecutorial misconduct was so serious as to amount to a denial of due process, [the] court, in conformity with courts in other jurisdictions, has focused on several factors. Among them are the extent to which the misconduct was invited by defense conduct or argument . . . the severity of the misconduct . . . the centrality of the misconduct to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case . . . .

Skakel, supra, 743, quoting, Ancona, supra, 591, Appendix D.

Having set forth the "overarching principles" that would govern its determination of the petitioner's due process claim, the court turned its attention to each of the instances of misconduct claimed by the petitioner in the direct appeal from his conviction. Skakel, supra, 747.[15]

i. Prosecutor's argument that the petitioner fabricated a story about masturbating at the crime scene

The initial investigation of the murder, the petitioner had told investigators that he had not left his house after returning from his home of his cousin, James Dowdle, on the night of the murder. At trial, however, several witnesses testified that the petitioner told them that he had left his house on the night of the murder and masturbated in the vicinity of the location where the victim's body was found. Skakel, supra, 748, Appendix D. Michael Meredith testified that, in 1987, the petitioner told him that on the night of the murder, he had climbed a tree on the Moxley property and masturbated while watching the victim through her bedroom window. Id. Andrew Pugh testified that in 1992, the petitioner told him that he had masturbated in the tree under which the victim's body was found. Pugh also testified that the petitioner had urged him to talk to investigators from Sutton Associates, an investigative agency that the petitioner had retained. Id. The state also introduced the prior testimony of Gregory Coleman, who testified that while he and the petitioner were residents at the Elan School, the petitioner told him that he had killed the victim with a golf club and that he had returned to her body two days later and masturbated

[15] Because of the fact bound nature of the petitioner's prosecutorial misconduct claim, the respondent's description of the Connecticut Supreme Court's ruling on the claim in his statement of material facts is reproduced in its entirety here. See Respondent's Local Rule 56(a)1 Statement at 29-43.

on it. Id. The state also introduced a tape-recorded conversation between the petitioner and Richard Hoffman in which the petitioner stated that he had snuck out of his house on the night of the murder and masturbated in a tree on the Moxley property. Id., at 748-49.

The state also presented the testimony of Henry Lee, the former chief criminalist for the state, who explained that he had published a paper in 1979 about the potential application of DNA technology to forensic science. Lee also testified that DNA technology was being used in criminal investigation in the United States as early as 1989, but that it was still a new and developing technology in 1991. Skakel, supra, 749, Appendix D.

In his closing argument, the prosecutor asserted that the petitioner began telling people that he had masturbated in the vicinity of the victim's body because he feared that "his semen might one day be identified in a crime lab . . . ." Skakel, supra, 749, Appendix D. The prosecutor further argued that by the early 1990s, the petitioner's need to identify ana alternate explanation for the presence of his semen at the crime scene took on particular urgency because, by that time, DNA had become "the real deal in criminal investigation" and because "every criminal investigator on the planet was totally attuned to this miraculous, new technology, and, of course, that would include the [private investigators] that the Skakel family had hired to assist them in the defense, Sutton Associates." (Alteration in original.) Id.

On appeal, The petitioner claimed that the prosecutor had devised "an elaborate story about a forensic 'cover-up' perpetrated by [the petitioner] during the 1990s, more than 15 years after the murder." Petitioner's Supreme Court brief at 51, Appendix A. The petitioner claimed that the prosecutor's argument was improper for two reasons. Id., at 52.

First, the petitioner claimed that the prosecutor intentionally misrepresented the chronology of events to make it appear as though the petitioner and his investigators had devised the masturbation story only after Lee became involved in the investigation in the early 1990s. Petitioner's Supreme Court brief at 51-52, Appendix A. The state supreme court rejected the petitioner's claim as unsupported by the record. The court noted that the prosecutor repeatedly mentioned the Meredith's testimony during his closing argument and explicitly stated that the petitioner had related his story to Meredith in 1987, five years before Lee was involved in the case. Moreover, the court stated that, in light of the conduct of the petitioner and his investigators, it was not improper for the prosecutor to argue that the petitioner, or Sutton Associates, or both, considered it urgent for Pugh to repeat the story that the petitioner had told him in 1992. The court concluded that because the prosecutor had merely asked the jury to draw reasonable inferences from the evidence, his argument was not improper. State v. Skakel, 276 Conn. at 750-51, Appendix D.

Second, the petitioner claimed that the prosecutor's assertions that by 1992, DNA was "the real deal" and that "every criminal investigator on the planet was totally attuned to this miraculous new technology" were unsupported by the record. Petitioner's Supreme Court brief at 52-53, Appendix A. The court noted that there was not a great deal of testimony regarding the state of DNA science in 1992. As a result, the court concluded that the prosecutor's comments "might be characterized as something of an overstatement of that testimony." State v. Skakel, 276 Conn. at 751, Appendix D. Nevertheless, the court observed that by 1992, "professional investigators, such as Sutton Associates, undoubtedly

were aware of DNA technology and its enormous potential in the forensic arena." Id.[16] Noting that the petitioner did not object to the comments at trial and recognizing that advocates must be afford leeway in argument, the court concluded that the prosecutor's comments did not deprive the petitioner of his right to a fair trial. Id., at 751-52.

ii. Prosecutor's argument that the Skakel family had created an alibi for the petitioner

At trial the state adduced evidence that, on the day that the victim's body was discovered, Kenneth Littleton was directed to take the petitioner, his brothers Thomas Skakel and John Skakel, and their cousin James Dowdle, to the family's hunting lodge in Windham, New York. Littleton took the children to Windham on the following morning. State v. Skakel, 276 Conn. at 752-53, Appendix D. Littleton testified that on the day following the murder, a number of people to whom he referred as "suits" came to the Skakel home. Littleton testified that he could not have know known about the house in Windham prior to that time, so he believed that one of the "suits" told him about it. Littleton testified that the decision to take the Skakel children to the Windham house was "made as a group" and that he probably volunteered to take the children to the house after he learned about it. Skakel, supra, 753, Appendix D. The petitioner's father, Rushton Skakel Sr., testified that he did not recall directing Littleton to take the children to Windham, but stated that Littleton would not have had the authority to take the children anywhere without his permission. Id.

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[16] The Connecticut Supreme Court took judicial notice of the fact that DNA technology was being used in criminal investigations in the state as early as 1989. Skakel, supra, 751 n.101, Appendix D; see State v. Hammond, 221 Conn. 264, 278, 604 A.2d 793 (1992).

At trial, the state also adduced the testimony of James Lunney, a former detective with the Greenwich police department. Lunney testified that he contacted the petitioner's father on November 14, 1975, and asked that he bring his children to the police station to provide statements about their activities at the time of the murder. State v. Skakel, 276 Conn. at 753, Appendix D. Lunney testified that the following day, the petitioner's father brought all of his children, with the exception of Rushton Skakel, Jr., who was away at college, to the police station. Lunney also testified that the petitioner's father remained in the room with the petitioner while the petitioner gave his statement. Id.

In his closing argument, the prosecutor asserted that the petitioner's family, and in particular, the petitioner's father, Rushton Skakel, Sr., "had 'produced' an alibi for the [petitioner] after the murder." State v. Skakel, 276 Conn. at 753-54, Appendix D. Specifically, the prosecutor argued that on the day the victim's body was found, someone in the Skakel family, most likely the petitioner's father, had decided to send the petitioner, Thomas Skakel and John Skakel to the Windham house to shield them from the police and give them time to construct a story. Id., at 754. The prosecutor also maintained that if the trip had simply been to protect the Skakel children from a killer on the loose, then all of the children would have gone to Windham. The prosecutor, however, pointed out that the younger Skakel children had remained at home. Id. Finally, the prosecutor asserted that a few weeks after the trip, after the petitioner's alibi witnesses had time to construct a cohesive story, the petitioner's father escorted all of those witnesses to the police station where they gave unsworn statements to the police. Id.

On appeal, the petitioner claimed that the prosecutor "fabricated an elaborate story about a Skakel family 'conspiracy' to falsify evidence that would supply [him with] an alibi

. . . ." Petitioner's Supreme Court brief at 53, Appendix A. The petitioner argued that the prosecutor did so "without a shred of evidence" to support his theory. Id. The Supreme Court rejected the petitioner's claim. State v. Skakel, 276 Conn. at 754, Appendix D.

With respect to the prosecutor's remarks regarding the trip to Windham, New York, the court noted that, on the day that the victim's body was discovered, several unidentified persons, whom Kenneth Littleton described as "suits," came to the Skakel residence to help take control of the situation. While the unidentified persons were there, it was decided that Littleton would take the petitioner, his brothers, Thomas and John, and his cousin, James Dowdle, to the hunting lodge in Windham. State v. Skakel, 276 Conn. at 754, Appendix D. Moreover, Rushton Skakel Sr., the petitioner's father, testified that Littleton would not have had the authority to take the children anywhere without his permission. Id. The court concluded, therefore, that the prosecutor's argument that Littleton was directed to take the petitioner and the other children to Windham in order to keep them from being questioned by the police was based on reasonable inferences drawn from the testimony of Littleton and the petitioner's father. Id., at 754-55.

The court also concluded that it was not improper for the prosecutor to urge the jury to infer that the petitioner's father had been instrumental in orchestrating the petitioner's alibi. State v. Skakel, 276 Conn. at 755, Appendix D. The court noted that after the victim's body was discovered, a number of persons had descended on the Skakel residence apparently for the purpose of taking control of the situation. Furthermore, the petitioner, his older siblings and his cousin had been whisked away to Windham as soon as possible after the murder. Id. The court concluded, therefore, that "it was not

unreasonable for the for the [prosecutor] to implore the jury to infer that such an effort had been undertaken on the [petitioner's] behalf." Id.

iii. Prosecutor's argument that the Skakel family believed the petitioner had killed the victim

At trial, the state adduced evidence from former students at the Elan School regarding statements that the petitioner made while he was a student there. Two of these witnesses, Gregory Coleman and Dorothy Rogers, testified that the petitioner told them that he had been sent to Elan to protect him from the authorities investigating the victim's murder. State v. Skakel, 276 Conn. at 756, Appendix D. Other witnesses testified that it was common for Elan students to be confronted regarding the issues that had resulted in their being sent to the school. Alice Dunn, a former Elan student, testified that she attended a meeting at which Joseph Ricci, the director of the school, confronted the petitioner about the victim's murder. Dunn testified that Ricci was referring to a "good sized" file as he confronted the petitioner. Dunn stated that Ricci made reference to the golf club that had been used to kill the victim during his interrogation of the petitioner. Id. Dunn testified that Elan administrators obtained the information used to confront students at the school from institutions that they had previously attended or from their therapists. Id.

Detective Lunney testified that the Greenwich police department had played no role in the petitioner's referral to Elan and never communicated with Elan administrators about the victim's murder. State v. Skakel, 276 Conn. at 756-57, Appendix D. In the grand jury testimony of Mildred Ix, which was admitted into evidence, she indicated that the petitioner's father had confided to her that the petitioner stated that he had been drinking on the night of the murder and might have been involved in the victim's death. Id., at 757.

In his closing argument, the prosecutor outlined the reasons why the petitioner had been sent to Elan, underscoring the evidence demonstrating that the petitioner's family had sought to shield him from the police and that Elan administrators routinely confronted him about the victim's murder. State v. Skakel, 276 Conn. at 757, Appendix D. He stated that:

> "You heard from Rogers and Coleman [that] 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 we can do to make sure this doesn't happen again. And where does that ring the truest? At the horrible general meeting with the monster himself, Joe Ricci."

Skakel, supra, 757-58, Appendix D. The prosecutor emphasized the actions of Joe Ricci, the director of Elan, in confronting the petitioner regarding the murder. Id. The prosecutor then made the following argument:

> "Where did Ricci get that information? Clearly, he didn't get it from the police. Why did Ricci confront the [petitioner] with that information? The answer, the only one that makes sense, lies in why his family felt a need to put him in that awful place. Why? Because that's what they decided they had to do with the killer living under their roof."

Skakel, supra, 758, Appendix D.

On appeal, the petitioner claimed that the prosecutor's argument was improper because it was based on statements that the Skakel family allegedly made to Ricci. The petitioner argued that if the out-of-court statements made by the Skakel family had been offered at trial, they would have been excluded as hearsay. The petitioner claimed, therefore, that the prosecutor's argument was improper because it was based on inadmissible hearsay evidence. Petitioner's Supreme Court brief at 57-58, Appendix A. The Connecticut Supreme Court rejected the petitioner's claim. The court concluded that the prosecutor's argument was not based on the presumed hearsay statements of the Skakel family, but, rather, was based on the testimony of Dorothy Rogers and Gregory

Coleman, both of whom testified that the petitioner told them that his family had sent him to Elan to shield him from the police. State v. Skakel, 276 Conn. at 757, Appendix D.

The petitioner also claimed that the prosecutor's argument was improper because he "asked the jury to conclude that [the petitioner] was guilty of murder *because even his own family thought that he was the 'killer.'*" (Emphasis in original.) Petitioner's Supreme Court brief at 57, Appendix A. The petitioner argued that "any belief of the Skakel family concerning the [petitioner's] guilt is irrelevant and inadmissible as evidence." Id., citing Arpan v. United States, 260 F.2d 649, 658 (8th Cir. 1958) (reversing conviction based, in part, on testimony of defendant's mother that she believed her son had shot victim). The Supreme Court rejected the petitioner's argument. The court concluded that the focus of the prosecutor's argument was not on the opinion of Skakel family regarding the petitioner's guilt, but, rather, was on "the likelihood that the [petitioner] had disclosed his involvement in the murder to one or more members of his family." State v. Skakel, 276 Conn. at 759, Appendix D. The court found that the inference that the prosecutor asked the jury to draw was well supported by the evidence, including testimony that the petitioner was repeatedly confronted about the murder by Elan staff members and evidence that the petitioner had intimated to his father that he was involved in the victim's murder. Id. Accordingly, the court found that it was not improper for the prosecutor to argue that "Elan administrators likely had learned from the [petitioner's] family about the [petitioner's] involvement in the victim's murder . . . ." Id.

iv. Prosecutor's use of the terms "killer" and "spoiled brat" to refer to the petitioner

In his closing argument, the prosecutor asserted that the petitioner's family had sent the petitioner to Elan "[b]ecause that's what they decided that they had to do with the killer

living under their roof." State v. Skakel, 276 Conn. at 759, Appendix D. On two other occasions, the prosecutor described the petitioner as a "spoiled brat." In his initial closing argument, the prosecutor asserted that "before any resident in Elan had an inkling of the [petitioner's] having committed this murder, the spoiled brat smugly boasted, I can get away with anything and continued to describe to Coleman how he had beaten [the victim's] head in with a golf club . . . ." Id., at 760. The prosecutor made a similar statement during his rebuttal argument, again referring to the petitioner as a "spoiled brat." Id.

On appeal, the petitioner characterized the prosecutor's use of the terms "killer" and "spoiled brat" to describe him as "highly prejudicial name-calling." Petitioner's Supreme Court brief at 58, Appendix A. The state supreme court rejected both of the petitioner's claims. The court concluded that when viewed in context, the prosecutor's use of the word "killer" was "neither gratuitous nor inflammatory." State v. Skakel, 276 Conn. at 759-60. Rather, the court found that the prosecutor had merely "used the term as a shorthand for 'the person who had killed the victim.'" Id., at 760. The court concluded, therefore, that "the challenged reference was benign." Id.

The state argued that the prosecutor's reference to the petitioner as a "spoiled brat" was not inappropriate because it was reasonably intended to explain the petitioner's "smug bravado in confessing to Coleman." State's Supreme Court brief at 55, Appendix B. The court observed that, "[n]otwithstanding the evidentiary basis for the [prosecutor's] remarks . . . it would have been preferable for the [prosecutor] to have avoided using the moniker, "spoiled brat" in referring to the [petitioner]." State v. Skakel, 276 Conn. at 761, Appendix D. Nevertheless, the court stated that "[w]hen the objectionable references are viewed in the context of the entire trial . . . it is apparent that they were isolated, relatively innocuous

and not unduly prejudicial to the [petitioner]." The court concluded that "[b]ecause there [was] no likelihood that the challenged comments affected the fairness of the [petitioner's] trial, his claim of a due process violation [was] clearly without merit. Id.

v. Prosecutor's argument that the petitioner had masturbated on the victim's body

At trial, the state introduced into evidence the prior sworn testimony of Gregory Coleman, who had been a student at the Elan School with the petitioner.[17] Coleman testified that while they were students at Elan, the petitioner had confessed to killing the victim and returning to her body two days later and masturbating on it. State v. Skakel, 276 Conn. at 761, Appendix D. In his testimony, Coleman acknowledged that he was addicted to drugs and that his addiction affected his memory. Coleman also acknowledged that there was a discrepancy between his testimony that the petitioner had returned to the victim's body two days after her death and the fact that the victim's body was discovered the day after she was murdered. Id.

The state also presented the testimony of Henry Lee, the state's former chief criminalist. Lee testified that the two reddish marks discovered on the upper portion of the victim's inner thighs were consistent with bloody hands attempting to push the victim's legs apart. State v. Skakel, 276 Conn. at 762-63, Appendix D. Finally, the state presented the testimony of several witnesses who stated that the petitioner had admitted to masturbating in a tree next to the victim's house. One of these witnesses, Andrew Pugh, testified that

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[17] In April 2001, Coleman testified at the petitioner's hearing in probable cause held pursuant to General Statutes § 54-46a. Coleman died on August 10, 2001, before the petitioner's trial began. The state introduced a transcript of his testimony from the probable cause hearing into evidence at the petitioner's trial pursuant to § 8-6 of the Connecticut Code of Evidence. State v. Skakel, 276 Conn. at 711, Appendix D.

the petitioner stated that he had masturbated in the same tree under which the victim's body was found. Id. at 763.

In his closing argument, the prosecutor urged the jury to conclude that, after killing the victim, the petitioner had pushed her legs apart and masturbated on her dead body. State v. Skakel, 276 Conn. at 762-63, Appendix D. The petitioner claimed that the prosecutor's argument was improper because "[t]here was no semen found on the victim's body or at the scene of the crime, and the state knew it . . . ." Petitioner's Supreme Court brief at 58, Appendix A. The petitioner argued that it was improper for the state to base its argument on Gregory Coleman's testimony because it was inherently unreliable. Id., at 59 n.78. Coleman had stated that the petitioner told him that he masturbated on the victim's body two days after he had killed her. In fact, the victim's body was found the day after she was killed. The petitioner claimed, therefore, that Coleman's "story was not true and could not have been true." Id. The petitioner also maintained that the prosecutor's argument that the blood smears on the victim's thighs supported his claim that the petitioner had masturbated on her body was "groundless and highly prejudicial." Id., at 59 n.79. Finally, the petitioner claimed that the prosecutor's argument was improper because it was inconsistent with the results of the autopsy, which had failed to disclose the presence of semen. Id., at 58-59.

The Connecticut Supreme Court rejected the petitioner's claim. The court noted that the jury was free to credit one aspect of a witness's testimony while discrediting other portions of that testimony. State v. Skakel, 276 Conn. at 763, citing State v. Meehan, 260 Conn. 372, 381, 796 A.2d 1191 (2002), Appendix D. The court concluded, therefore, that it was not improper for the prosecutor to base his argument on Coleman's testimony.

Skakel, supra, 763, Appendix D. The court also indicated that Lee's testimony regarding the blood smears on the victims thighs, when coupled with Coleman's testimony, supported the conclusion that the petitioner had masturbated on the victim. Id.

The court also stated that the evidence regarding the petitioner's numerous admissions that he had masturbated in the victim's yard provided support for the prosecutor's argument that the petitioner had fabricated the story in order to explain the presence of any of his semen on the victim's body. State v. Skakel, 276 Conn. at 763, Appendix D. Finally the court observed that Dr. Wayne Carver, the Chief Medical Examiner, testified that although the pathologist who performed the autopsy failed to detect the presence of semen in the victim's pubic region, there was nothing in the autopsy report to suggest that any attempt had been made to determine whether semen was present on any other part of the victim's body, including her buttocks. The court ruled that "[b]ecause the autopsy did not rule out the possibility of the existence of semen on those other parts of the victim's body, the [prosecutor's] argument underscoring that possibility was not improper. State v. Skakel, 276 Conn. at 763-64, Appendix D.

vi. Prosecutor's use of an audiovisual display in his closing argument

During the rebuttal portion of the state's closing argument, the prosecutor played for the jury approximately two minutes of the thirty-two minute tape-recorded interview that the petitioner had given to Richard Hoffman. State v. Skakel, 276 Conn. at 764, Appendix D.[18] The state played the two-minute portion of the audio tape in three separate segments. As

[18] Hoffman, a writer who collaborated with the petitioner on a book about his life, interviewed the petitioner in 1997. State v. Skakel, 276 Conn. at 650, Appendix D. The tape of the entire interview was introduced into evidence and played for the jury during the state's case in chief. Id., at 764.

each segment was played, the state displayed a transcript of that segment on a screen so that the jury could read the transcript while listening to the tape recording. Id., at 764-65.

After playing the first segment of the tape recording, the prosecutor argued that the petitioner's statements in that segment contradicted his claimed alibi. State v. Skakel, 276 Conn. at 765, Appendix D. [19] In the second segment of the tape, the petitioner described his decision to go to the Moxley's house to "get a kiss from Martha." Id., at 765-66.[20]

At the end of his rebuttal argument, the prosecutor stated the following in regard to the petitioner's interview with Hoffman:

> "And then, the [petitioner] does the most amazing thing . . . . He takes us on his staggering walk down memory lane. He first avoids the driveway oval where the club head was found and, more likely, [where] he first caught up with [the victim], given [Henry] Lee's testimony about blood in the driveway where the whole terrible thing started. Then he has himself under a street

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[19] The petitioner claimed that the victim had been murdered at approximately 10:00 p.m. on October 30, 1975, and that he was at the home of his cousin, James Dowdle, at that time. State v. Skakel, 276 Conn. at 652, Appendix D. The petitioner claimed that he and his brothers Rushton Skakel, Jr. and John Skakel had gone to Dowdle's house to watch the television program Monty Python's Flying Circus with Dowdle. Id., at 650. In the first segment of the interview that was played, the petitioner stated that when he returned home from Dowdle's house, he remembered that his neighbor, Andrea Shakespeare, had already left. The prosecutor argued that the evidence showed that Shakespeare had not left the Skakel house until after Rushton Skakel, Jr., John Skakel and Dowdle had gone to Dowdle's house. The prosecutor argued, therefore, that the petitioner could not have known that Shakespeare had gone home if he had accompanied his brothers and Dowdle to Dowdle's house. Id., at 765.

[20] In the second segment of the tape recording that was played, the petitioner stated the following:

> "I said, 'Fuck this, [y]ou know why should I do this, you know, Martha likes me, I'll go get a kiss from Martha.' 'I'll be bold tonight." [Y]ou know booze gave me, made me, gave me courage again."

State v. Skakel, 276 Conn. at 765-66, Appendix D.

> light throwing rocks and yelling into that circle with the exact same motion that had to have been [sic] used to beat [the victim] to death.
>
> "Why this explanation. It's kind of obvious. As he explained to Hoffman, what if somebody saw me that night and then . . . ."

State v. Skakel, 276 Conn. at 766, Appendix D.

At this point, the prosecutor stopped talking, the transcript of the third segment appeared on the team and the tape recording of the segment was played for the jury. State v. Skakel, 276 Conn. at 766, Appendix D. In the third segment of the interview, the petitioner stated the following:

> "And then I woke up, went to sleep, woke up to [the victim's mother Dorothy] Moxley saying "Michael, have . . . seen Martha?'"

Skakel, supra, 766, Appendix D. Just as the petitioner finished saying "'Michael, have you . . . seen Martha," a photograph of the victim, smiling, appeared in the lower right hand corner of the screen, beneath the written text. Id. After a short pause, the recording continued, as follows:

> "I'm like, 'What?' And I was still high from the night before, a little drunk, then I was like 'What?' '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."

Skakel, supra, 766, Appendix D. At this point, a photograph, previously introduced into evidence, depicting the victim's body lying under the tree, appeared in the lower right hand corner of the screen, to the side of the written text. Id., at 766-67. After a few seconds, the photograph disappeared and the recording continued, as follows:

> "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."

Skakel, supra, 767, Appendix D. At this point, another photograph, which also had been introduced into evidence, depicting the victim's badly beaten body, then appeared in the

lower right hand corner of the screen, next to the written text. Id. The prosecutor then continued his argument, as follows:

> "How could the sight of Dorothy Moxley possibly produce a feeling of panic in an innocent person, in a person who had gone to sleep knowing nothing of [the victim's] murder. The evidence tells you that the only person who had experienced that poor girl lying under the tree, not in his dreams but firsthand, would have cause to panic on awakening that morning."

Skakel, supra, 767, Appendix D.

On appeal, the petitioner claimed that the state's "manipulative use of the of prejudicially edited evidence during the summation was improper." Petitioner's Supreme Court brief at 61. The petitioner argued that the state had "literally produced an audio-visual confession by flashing huge six-foot high gruesome images of the victim's body at the murder scene while simultaneously playing an edited audiotape of [the petitioner's] admission of 'guilt' – *about a different event*. (Emphasis in original.) Id., at 59-60. The petitioner complained that "[t]he prosecutor turned [the petitioner] into a narrator of the murder by splicing together a deceptively edited version of his taped interview . . . in which the [petitioner] described his guilty feelings about masturbation, as a voice-over to horrific photographs of the murder scene." Id., at 60.

The state supreme court concluded that it was not improper for the prosecutor to play for the jury two minutes of the petitioner's tape-recorded interview with Richard Hoffman and to display photographs of the victim while the tape was being played. State v. Skakel, 276 Conn. at 767-68, Appendix D. The court noted that the presentation consisted of the written transcript of the interview, which the jury had already seen, the corresponding audio and three unaltered pictures of the of the victim that had been admitted into evidence. Id., at 769. The court stated that by juxtaposing the photographs

of the victim with the petitioner's statements, the prosecutor "sought to convey to the jury in graphic form what the state believed was the real reason for the [petitioner's] panic, that is, that he had killed the victim." Id. The court, therefore, was not persuaded that there was a reasonable likelihood that the state's presentation confused the jury or prejudiced the [petitioner] in any way. Id.

The court also rejected the petitioner's claim that "the state 'splic[ed] together a deceptively edited version of his [taped-recorded] interview with Hoffman' so as to omit critical portions of the [petitioner's] comments indicating that the reason he woke up in a panic was that he feared that someone may have seen him masturbating the night before." State v. Skakel, 276 Conn. at 769 n.106, Appendix D, quoting Petitioner's Supreme Court brief at 60, Appendix A. The court found that, contrary to the petitioner's claim, "the segment of the interview that the state played for the jury, in which the [petitioner] described his feelings of panic upon waking up the morning after the murder, was not altered or spliced in any way." Skakel, supra, 769 n.106, Appendix D. Accordingly, the court rejected the petitioner's claim that the prosecutor's use of audiovisual aides during closing argument violated his right to a fair trial. Id., at 769.

b. The state court ruling on the petitioner's prosecutorial misconduct claim was neither contrary to nor an unreasonable application of clearly established federal law

In his petition for a writ of habeas corpus, the petitioner claims that he was deprived of his right to due process of law and a fair trial by improper remarks made by the prosecutor during closing argument at his state trial. The petitioner contends that he is entitled to relief under 28 U.S.C. §2254(d)(1) because the Connecticut Supreme Court's rejection of his due process claim. Habeas Corpus Petition, paragraph 19, Ground Four.

The petitioner's claim fails because he cannot show that the ruling of the Connecticut Supreme Court in this case was either "contrary to" or "an unreasonable application of" the controlling United States Supreme Court precedent. See 28 U.S.C § 2254(d)(1); Williams v. Taylor, 529 U.S. at 399.

i. The Connecticut Supreme Court's ruling is not "contrary to" controlling United States Supreme Court precedent

In order to prevail on his claim, the petitioner must show that the Connecticut Supreme Court's rejection of his due process claim in this case was "contrary to ... clearly established Federal law" as determined by the United States Supreme Court. 28 U.S.C § 2254(d)(1); Williams v. Taylor, 529 U.S. at 399. In Lurie v. Wittner, supra, the Second Circuit held that a "state court decision is 'contrary to' existing Supreme Court precedent (i) when it applies a rule of law 'that contradicts the governing law set forth in' the Supreme Court's cases . . . or (ii) when it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent." Id., 228 F.3d at 127, quoting Williams v. Taylor, 529 U.S. at 406. Here, the petitioner does not identify any decision of the United States Supreme Court that is contradicted by the Connecticut Supreme Court's ruling or in which the court arrived at a different result after confronting "a set of facts that are materially indistinguishable" from the facts of this case. Accordingly, the petitioner has failed show that the Connecticut Supreme Court's decision is "contrary to" controlling United States Supreme Court precedent. His claim, therefore, should be rejected. § 2254(d)(1).

ii. The Connecticut Supreme Court reasonably applied the United State's Supreme Court's ruling in Darden v. Wainwright

The controlling federal precedent for claims of prosecutorial misconduct during closing argument is the United States Supreme Court's decision in Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 305 (1986). The analysis employed by the Connecticut Supreme Court in this case to determine whether misconduct by the prosecutor violated the petitioner's right to due process was first adopted by the court in State v. Williams, 204 Conn. at 540. This analysis is routinely used by the Connecticut courts in evaluating due process claims arising from misconduct by prosecutors. See, e.g., State v. Stevenson, 269 Conn. at 575-76; State v. Reynolds, 264 Conn. 1, 163-76, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S.Ct. 1614, 158 L.Ed.2d 244 (2004); State v. Correa, 241 Conn. 322, 356-58, 696 A.2d 944 (1997); State v. Marshall, 87 Conn. App. 592, 603-605, 867 A.2d 57 (2005). In State v. Williams, supra, the Connecticut Supreme Court stated that "[i]n analyzing the defendant's claim, we ask whether the prosecutor's conduct 'so infected the trial with unfairness as to make the resulting convictions denial of due process.'" Id., 204 Conn. at 539, quoting Darden v. Wainwright, 477 U.S. at 181. Thus, the Williams analysis was the means adopted by the Connecticut Supreme Court to apply the principle articulated by the United States Supreme Court in Darden.[21]

[21] The test adopted by the Connecticut Supreme Court in Williams is essentially identical to the Second Circuit's prosecutorial misconduct analysis. See, e.g, United States v. Coriaty, 300 F.3d 244, 255 (2d Cir. 2002); United States v. Elias, 285 F.3d 183, 190 (2d Cir. 2002); United States v. Tocco, 135 F.3d 116, 130 (2d Cir. 1998).

In order to prevail on his claim, the petitioner must show that the Connecticut Supreme Court's application of the Williams analysis to the facts of this case was so far off the mark that it constituted an "unreasonable application" of the rule of Darden. The petitioner's claim fails because he cannot make the required showing on this record.

In Darden, the United States Supreme Court held that, when determining whether remarks by a prosecutor in closing argument violated the defendant's right to a fair trial:

> [I]t "is not enough that the prosecutor's remarks were undesirable or even universally condemned." The relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

(Citations omitted.) Darden v. Wainwright, supra, 181, quoting Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). When Darden's controlling principle is fully stated, it becomes clear that this is *precisely* the standard applied by the Connecticut Supreme Court in ruling on the petitioner's claim in this case. But when the facts of Darden are considered, the petitioner's claim becomes even more tenuous.

In Darden, the petitioner was convicted of murder, robbery and assault with intent to commit murder and was sentenced to death. Darden v. Wainwright, supra, 170. On federal habeas, the petitioner challenged his capital conviction and death sentence based on improper argument by the prosecutor in the guilt phase of the case. Id., at 178-79. In his closing argument, the prosecutor improperly: (1) argued that the Florida Division of Correction was partially to blame for the petitioner's crimes because he was on furlough from prison at the time he committed them; (2) stated his personal belief that the death penalty would be the only guarantee against similar acts by the petitioner in the future; (3) referred to the petitioner as an "animal"; and (4) made several offensive comments

reflecting his emotional response to the case.[22] Id., at 179-80. Nevertheless, the United States Supreme Court rejected the petitioner's due process claim; id., at 181; and upheld his conviction and death sentence. Id., at 187. It is difficult to imagine, therefore, that the Connecticut Supreme Court's decision rejecting a due process claim based on the prosecutor's benign comments and conduct in this case could, somehow, be an unreasonable application of the rule set forth in Darden.

The weakness in the petitioner's claim becomes even more evident when the United States Supreme Court's recent guidance on § 2254's "unreasonable application" standard is considered. In Yarborough v. Alvarado, supra, the court stated that:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow.... Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable require's considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

(Citations omitted.) Id., 124 S.Ct. at 2149. In this case, the petitioner's claim is based on the Connecticut Supreme Court's application of a general rule stating that due process claims arising from improper argument by a prosecutor are evaluated not on the inappropriateness of the challenged comments but, rather, on the impact the challenged comments had on the fairness of the trial. See Darden v. Wainright, 177 U.S. at 181. Under Yarborough, therefore, the Connecticut Supreme Court is entitled to substantial leeway in applying the rule. Thus, when Yarborough's guidance is considered, it

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[22] For example, in his argument, the prosecutor stated that "I wish [the victim] had had a shotgun in his hand when he walked to the back door and had blown [Darden's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." Darden v. Wainwright, supra, 180 n.12.

approaches absurdity to suggest that the thoughtful and well-reasoned decision of the Connecticut Supreme Court in this case was an "unreasonable application" of the United States Supreme Court's ruling in Darden. See also Ewing v. California, 538 U.S. 11, 34 n.2, 123 S.Ct. 1179, 155 L.Ed. 108 (2003) (noting that courts are "faced with imprecise commands [and] must make difficult decisions" when asked to assess "whether prosecutorial misconduct deprived [a] defendant of a fair trial").

5. The petitioner is not entitled to habeas corpus relief because of the trial court admitted the prior testimony of a witness who died prior to trial

In April 2001, Gregory Coleman, a former student at the Elan School, testified at the petitioner's hearing in probable cause.[23] Coleman testified that in 1978, when he and the petitioner were both students at Elan, the petitioner told Colman that he had killed the victim with a golf club. State v. Skakel, 276 Conn. at 711, Appendix D. At the hearing, the petitioner's trial counsel vigorously cross-examined Coleman regarding his struggle with drug addiction, his prior acts of misconduct, his prior inconsistent statements about the subject of his testimony, his lack of recollection due to the passage of time, his ongoing drug abuse and his failure to report the petitioner's confession to either Elan administrators or law enforcement authorities. Id., at 714. Under cross-examination, Coleman admitted that he was suffering from withdrawal symptoms during his testimony. Id., at 711. Coleman

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[23] General Statutes § 54-46a, provides, in pertinent part, as follows:

> No person charged by the state . . . shall be put to plea or held to trial for any crime punishable by death or life imprisonment unless the court at a preliminary hearing determines there is probable cause to believe that the offense charged has been committed and that the accused person has committed it.

died in 2001 before the petitioner's trial. At trial, over the petitioner's objection, the state introduced Coleman's testimony at the probable cause hearing into evidence under the former testimony exception to the hearsay rule. Id.; see Conn. Code Evid., § 8-6(1).

On appeal, the petitioner claimed that the admission of Coleman's prior testimony violated his right to confrontation under both the state and federal constitutions. Petitioner's Supreme Court brief at 65, Appendix A. The petitioner maintained that the admission of Coleman's testimony violated his right to confrontation because it "lacked the requisite 'indicia of reliability' under Ohio v. Roberts, [448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)]." Petitioner's Supreme Court brief at 64-65, Appendix A. The petitioner argued that "the reliability requirement . . . is *not* automatically satisfied merely because the former testimony was given under oath and was subject to cross-examination . . . ." (Emphasis in original.) Id., at 65-66. Rather, the petitioner argued that "courts must look beyond these factors [and] consider other circumstances in determining whether [the admission of the prior testimony of an unavailable witness violates] the confrontation clause." Id., at 66. In this case, the petitioner claimed that Coleman's prior testimony bore none of the "indicia of reliability" required by the constitution to permit its admission at trial. Id., at 66-67.

The Connecticut Supreme court rejected the petitioner's claim. The court stated that under Ohio v. Roberts, supra, "all hearsay statements were admissible if (1) the declarant was unavailable to testify, and (2) the statement bore adequate indicia of reliability." State v. Skakel, 276 Conn. at 712, citing Roberts, 448 U.S. at 66, Appendix D. The court noted, however, that "the United States Supreme Court overruled Roberts to the extent that it applied to testimonial hearsay statements" in Crawford v. Washington, 541

U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The court observed that under Crawford, "such testimonial hearsay may be admitted as evidence against an accused at a criminal trial only when (1) the declarant is unavailable to testify, and (2) the defendant had a prior opportunity to cross-examine the declarant . . . ." Skakel, supra, 712, Appendix D. Accordingly, the court held that admission of the Coleman's prior testimony at trial did not violate the petitioner's constitutional right to confrontation. Id., at 715-16.[24]

In this court, the petitioner claims that admission of the transcript of Coleman's probable cause hearing testimony violated his Sixth Amendment right to confrontation. Habeas Corpus Petition, paragraph 19, Ground Five. Specifically, the petitioner contends that Coleman's prior testimony was inadmissible because it "lacked the required indicia of reliability . . . ." Id.

In this case, the Connecticut Supreme Court correctly identified the principles announced in Crawford v. Washington, supra, as governing the analysis of the petitioner's claim. See State v. Skakel, 276 Conn. at 713-15, Appendix D. The only "remaining issue, then, is whether [the petitioner] can obtain relief on the ground that the state court's adjudication of his claim involved an 'unreasonable application of [those principles].'" Bell v. Cone, 535 U.S. at 698. Review of the state supreme court's decision in this case makes clear that the court reasonably applied the governing principles of Crawford.

In Crawford v. Washington, the United States Supreme Court concluded that the "reliability" standard of the second prong of the test set forth in Ohio v. Roberts was too amorphous to prevent adequately the improper admission of "core testimonial statements

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[24] The Connecticut Supreme Court's resolution of the petitioner's confrontation claim is described in greater detail in the respondent's statement of material facts. See Respondent's Local Rule 56(a)1 Statement at 43-46.

that the Confrontation Clause plainly meant to exclude." Crawford, 541 U.S. at 63. The court held, therefore, that such testimonial hearsay statements may be admitted against an accused at a criminal trial only when (1) the declarant is unavailable to testify, and when the defendant has had a prior opportunity to cross-examine the declarant. Id., at 68. While the court declined to define the terms "testimonial" and "nontestimonial," it considered three "formulations of th[e] core class of 'testimonial' statements . . . ." Id., at 51. The second formulation consists of "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, *prior testimony,* or confessions . . . ." (Emphasis added.) Id., at 51-52.

The Connecticut Supreme Court applied precisely these principles when ruling on the petitioner's confrontation claim on his direct appeal. The court concluded that "[t]he testimony at issue in the present case . . . falls squarely within Crawford's core class of testimonial evidence" and that the confrontation clause, therefore, "bars the state's use of that testimony unless Coleman was unavailable to testify at trial and the [petitioner] had a full and fair opportunity to cross-examine Coleman at the probable cause hearing." State v. Skakel, 276 Conn. at 714, Appendix D. The court noted that, as a result of Coleman's death, his unavailability at trial was undisputed. Id. After reviewing the record, the court found that the petitioner's trial defense counsel "fully availed himself of the opportunity to attack Coleman's credibility at the probable cause hearing." Id., at 714-15.

The state supreme court rejected the petitioner's contention that the trial court should, nevertheless, have excluded Coleman's prior testimony because it was inherently unreliable. The court noted that while the "ultimate goal [of the confrontation clause] is to ensure reliability of evidence . . . it is a procedural rather substantive guarantee." State v.

Skakel, 276 Conn. at 715, quoting Crawford v. Washington, 541 U.S. at 61, Appendix D. The court stated, therefore, that the confrontation clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Id. The court observed that "[w]ith respect to testimonial evidence . . . Crawford, makes clear that the *opportunity* for cross-examination satisfies the requirements of the confrontation clause." Skakel, supra, 715, Appendix D. The court, therefore, concluded that "[t]o the extent that Coleman's probable cause hearing testimony was not worthy of belief . . . the [petitioner] had ample opportunity to challenge Coleman's credibility at that hearing." Id.

It is clear, therefore, that the Connecticut Supreme court reasonably applied the principles of the controlling United States Supreme Court precedent when it rejected the petitioner's claim on direct appeal. Accordingly, the petitioner is not entitled to federal habeas corpus relief on his claim. 28 U.S.C. § 2254(d)(1).

6. The petitioner is not entitled to habeas corpus relief because the trial court admitted statements that he made while a student at the Elan School

From 1978 to 1980, the petitioner attended the Elan School, a residential school for troubled adolescents located in Poland Springs, Maine. Evidence adduced at trial indicated that the atmosphere at the school was extremely harsh and oppressive. Residents at the school were subjected to a behavior modification program that was based on ridicule and fear. State v. Skakel, 276 Conn. at 717, Appendix D. Residents at Elan were required to attend "general meetings" the purpose of which was to confront and humiliate residents whom the Elan staff believed to be in need of discipline. At the general

meetings, the residents who were being disciplined were subjected to physical and psychological abuse from the staff and other residents. Id.

While a student at Elan, the petitioner made statements to other residents of the school in which he implicated himself in the victim's murder. State v. Skakel, 276 Conn. at 718, Appendix D. At trial, the former Elan students to whom the petitioner had made these inculpatory statements testified regarding his admissions. Id., at 718-19. John Higgins, a former Elan resident, testified that the petitioner told him that he had taken a golf club from his garage and that he remembered running through the woods with it. Higgins testified that the petitioner eventually admitted that he had committed the murder. Id., at 718. Gregory Coleman, another former resident of the school, testified that the petitioner said that he was going to "get away with murder because [he was] a Kennedy." Id. Coleman also testified that the petitioner told him that he had made romantic advances toward the victim, that she had spurned his advances and that he had beaten her to death with a golf club. Id. Dorothy Rogers, another former Elan resident, testified that the petitioner told her that he had been drinking on the night of the victim's murder and could not remember what he had done. She also testified that the petitioner told her that his family had sent him to Elan because they believed that he had committed the murder. Id., at 718-19. Finally, two other former residents, Elizabeth Arnold and Alice Dunn, testified that the petitioner told them that he had been drinking on the night of the victim's murder and that he did not know whether he or his brother had committed the murder. Id., at 718-19.

At trial, the petitioner raised no claim that the inculpatory statements that he made while a student at Elan were inadmissible because they were involuntary. State v. Skakel, 276 Conn. at 716, Appendix D. On appeal, however, the petitioner claimed that admission

of the testimony regarding those statements violated his right to due process under the United States Constitution. Petitioner's Supreme Court brief at 67-68, Appendix A.[25] The petitioner argued that admission of the statements violated due process because "they were extracted while [he] was subjected to "an atmosphere of physical and psychological torture and intimidation." Id., at 72. The Connecticut Supreme Court rejected the petitioner's due process claim. Skakel, supra, 719-22, Appendix D.[26]

In his petition for a writ of habeas corpus, the petitioner claims that admission of the testimony regarding the statements that he made while a student at the Elan School violated his right to due process of law because the statements were the product of coercion. Habeas Corpus Petition, paragraph 19, Ground Six.

In this case, the Connecticut Supreme Court correctly identified the principles announced in Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed. 473 (1986), as governing the analysis of the petitioner's claim. See State v. Skakel, 276 Conn. at 699, Appendix D. The only "remaining issue, then, is whether [the petitioner] can obtain relief on the ground that the state court's adjudication of his claim involved an 'unreasonable application of [those principles].'" Bell v. Cone, 535 U.S. at 698. Review of the state

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[25] Because the petitioner did not raise this claim at trial, he sought review under the Connecticut Supreme Court's ruling in State v. Golding, 213 Conn. 233, 567 A.2d 823 (1989). In Golding, the court held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless to analysis, the state has failed to demonstrate harmlessness of alleged of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original.) Id., at 239-40.

[26] The Connecticut Supreme Court's resolution of the petitioner's due process claim is described in greater detail in the respondent's statement of material facts. See Respondent's Local Rule 56(a)1 Statement at 46-48.

supreme court's decision in this case makes clear that the court reasonably applied the governing principles of Connelly.

In Colorado v. Connelly, supra, the United States Supreme Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Id., 479 U.S. at 167. The Connecticut Supreme Court applied precisely this principle in ruling on the petitioner's claim on direct appeal.

In rejecting the petitioner's claim, the state supreme court noted that "[u]nder the due process clause of the fourteenth amendment . . . in order for a confession to be deemed involuntary and thus inadmissible at trial, [t]here must be police conduct, or official coercion, causally related to the confession . . . ." State v. Skakel, 276 Conn. at 720, quoting State v. Reynolds, 264 Conn. 1, 54, 836 A.2d 224 (2003), Appendix D. "Therefore, 'the most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause . . . [because] suppressing [such] statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the [federal] [c]onstitution is to substantially deter future violations . . . .'" Skakel, supra, 720, quoting Colorado v. Connelly, 479 U.S. at 166, Appendix D.

It is clear, therefore, that the Connecticut Supreme court reasonably applied the principles of the controlling United States Supreme Court precedent when it rejected the petitioner's claim on direct appeal. Accordingly, the petitioner is not entitled to federal habeas corpus relief on his claim. 28 U.S.C. § 2254(d)(1).

II. CONCLUSION

For all of the foregoing reasons, this court should grant the respondent's motion for summary judgment and deny the relief requested by the petitioner in his habeas corpus petition.

Respectfully submitted,

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CERTIFICATION

I hereby certify that a copy of the foregoing document was mailed, first class postage prepaid, to counsel for the petitioner: Attorney Hope C. Seeley, Attorney Hubert J. Santos and Attorney Sandra L. Snaden, Santos and Seeley, P.C., 51 Russ Street, Hartford, Connecticut, 06106, Tel. No. (860) 249-6548, Fax No. (860) 724-5533, on October 27, 2008.

/s/ Michael E. O'Hare
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