No. 06-52

IN THE

Supreme Court of the United States

MICHAEL SKAKEL,

Petitioner,

V.

STATE OF CONNECTICUT,

Respondent.

On Petition for a Writ Of Certiorari to the
Supreme Court of Connecticut

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. SHOULD THIS COURT DENY THE WRIT OF CERTIORARI BECAUSE PETITIONER FAILED TO PRESENT HIS FEDERAL QUESTION TO THE STATE COURTS IN A TIMELY MANNER, AND, AS A CONSEQUENCE, THE CONNECTICUT SUPREME COURT NEVER ADDRESSED HIS DUE PROCESS CLAIM?

II. SHOULD THIS COURT DENY THE WRIT OF CERTIORARI BECAUSE THE PREMISE OF PETITIONER'S FEDERAL CLAIM REMAINS AN OPEN QUESTION UNDER CONNECTICUT LAW?

III. DOES A JUDICIAL DECISION OVERRULING A 1983 PRECEDENT AND APPLYING A 1976 STATUTE OF LIMITATION TO A 1975 MURDER VIOLATE PETITIONER'S RIGHT TO NOTICE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

STATEMENT OF THE CASE

Prior to 1973, all intentional murders committed in Connecticut were punishable by death. Since at least 1821, Connecticut's statute of limitations exempted "crimes punishable by death" from any time limit on prosecution.

In response to *Furman v. Georgia*, 408 U.S. 238 (1972), the Connecticut legislature re-wrote the state's murder and capital sentencing provisions in 1973. Under the new provisions, only some intentional murders were designated capital felonies subject to the death penalty.

Petitioner committed the crime of murder pursuant to Connecticut General Statutes § 53a-54a (Rev. to 1975) in October 1975. In April 1976, the Connecticut legislature eliminated any confusion, occasioned by its 1973 revision of Connecticut's death penalty, regarding the period of repose for murder by explicitly exempting the crimes of murder and capital felony from any limitation period. In 1983, in a case unrelated to the petitioner, (*State v. Paradise,* 189 Conn. 346, 456 A.2d 305 (1983)) the Connecticut Supreme Court held that the 1976 amendment to the statute of limitations should not be applied retroactively, but did not decide whether murder had been subject to a five year limitation period prior to the amendment.

Petitioner was arrested for this murder in January 2000. Relying on Connecticut's 1975 statute of limitations, General Statutes § 54-193 (Rev. to 1975), which imposed a five year time limit on the prosecution of serious offenses other than those "punishable by death", petitioner moved to dismiss the prosecution as time-barred. The trial court (*Kavanewsky, J.*) denied petitioner's motion to dismiss. A jury found petitioner guilty of murder in June 2002.

In light of the 1973 revision of Connecticut's murder

and capital sentencing provisions, one question confronting the Connecticut Supreme Court on petitioner's appeal was whether all intentional murders remained exempt from any limitation period following the revision, or whether the legislature had silently altered the historic meaning of the limitation statute while amending a different provision of the General Statutes.

Connecticut's high court affirmed petitioner's conviction without resolving this issue, however. Instead, it overruled *State v. Paradise* and applied the 1976 amendment to Connecticut's statute of limitations to petitioner's 1975 crime.

In his Motion for Reargument and Reconsideration *en banc,* petitioner claimed for the first time that by overruling *Paradise* and applying the 1976 amendment to the statute of limitations to his offense, the Connecticut Supreme Court violated the Due Process Clause of the Fourteenth Amendment.

a) Facts Supporting the Conviction

As to the facts supporting the conviction, the respondent incorporates herein the facts contained in the decision below. *State v. Skakel*, 276 Conn. 633, 888 A.2d 985 (2006) reproduced in Petitioner's Appendix (hereinafter P. App.) at a.[1]

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[1] The respondent relies not only the facts set forth at the outset of the opinion; P. App. at 3a-16a, but also as discussed in connection with various claims on appeal; P. App. 89a-91a (reviewing various incriminatory admissions made by petitioner while at Elan); P. App. 97a-98a, 101a (discussing petitioner's admission to his father, in 1980 or 1981, that he may have murdered victim); P. App. at 121a-126a (discussing state's argument that petitioner claimed to have masturbated in tree under which victim's body was found in order to explain presence of semen should any be

(continued...)

Suffice it to say, a careful review of the record reveals overwhelming evidence of petitioner's guilt. That evidence proved that on October 30, 1975, the petitioner, enraged by his brother Tommy's flirtation with their fifteen-year-old neighbor, Martha Moxley, with whom petitioner was also infatuated, followed her home, accosted her in her driveway and struck her numerous times in the head with a golf club. When the club broke, he stabbed her through the neck with the broken shaft.

At the crime scene the following day, police found the head and broken pieces of shaft from the golf club. Investigation revealed that the club belonged to the petitioner's deceased mother. The handle of the club, which would have contained a label identifying it as a "Skakel" golf club and possibly fingerprints, was never found.

In addition to strong evidence of motive, opportunity, and access to the murder weapon, thirteen separate witnesses testified to incriminatory admissions petitioner made in the years following the murder. Included in these were three outright confessions to three different, unrelated persons. None of petitioner's admissions or confessions was made to law enforcement.

A strong inference of guilt also arose from the ever-

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[1](...continued)
found as technology advanced); P. App. 126a-128a (discussing state's argument that evidence supported inference that petitioner's family orchestrated his alibi); P. App. at 129a-32a (discussing state's argument that petitioner's family placed him at Elan, a private residential school, from 1978-80 because they were aware he had committed this murder and wanted to remove him from purview of police); P. App. at 134a-137a (discussing state's evidence indicating petitioner masturbated on victim's body and how his admission to Coleman that he had done so was supported by condition of body and by his later claims to have masturbated in a tree).

shifting nature of petitioner's alibi, which changed from his initial contention that 1) he left the area of the murder at about 9:30, returned about 11:00 pm, went to bed and never left the house again that night (1975); to 2) he was so drunk, he may have blacked out, cannot remember what happened, cannot remember if he killed the victim, the killer was either he or his brother (1978-80); to 3) he left the house after returning home at eleven to go get a kiss from the victim and masturbated in the tree under which her body was found. (1987-97). Petitioner's alibi was further undermined by testimony of a Skakel family friend that petitioner remained at the house during the time he claims to have left the area.

b) Petitioner's Motion to Dismiss and the Trial Court's Ruling Thereon

Pursuant to an arrest warrant dated January 14, 2000, petitioner was arrested and charged with the October 30-31, 1975 murder of Martha Moxley. Petitioner moved to dismiss. He argued that the statute of limitations in effect on the date of the offense, General Statutes §54-193 (Rev. to 1975), barred his prosecution because it was not commenced within five years of the homicide. *See* Respondent's App. at A1 (hereinafter R. App.).

After considering the state's objection and supporting memorandum, the trial court (*Kavanewsky, J*), denied the motion in a written Memorandum of Decision. R. App. at A1-A9. The trial court carefully considered to a trilogy of Connecticut cases: *State v. Paradise*, 189 Conn. 346, 456 A.2d 305 (1983), *State v. Ellis*,197 Conn. 436, 497 A.2d 974 (1985) and *State v. Golino*, 201 Conn. 435, 518 A.2d 57 (1986). The court relied on the teaching of *Ellis* and *Golino* that Connecticut's statute of limitations "`as a whole, represents a system, a classification scheme whereby the allowable period of prosecution *is related to the gravity of the offense*.'" R. App. at A8, *quoting State v. Golino*, 201 Conn. at 444 (emphasis

supplied in Memorandum). The court further relied on *Golino's* conclusion that the "'legislature used the phrase 'punishable by death' in [Connecticut's] limitations statute as a shorthand reference to a category of crimes which, because of their atrocious nature, would always be amenable to prosecution.'" R. App. at A8; *quoting Golino,* 201 Conn. at 446. The court concluded that the gravity of the offense at issue, murder, has been "historically unquestioned." Accordingly, the trial court denied petitioner's motion to dismiss. R. App. at A9.

c) Proceedings Before the Connecticut Supreme Court

On appeal to the Connecticut Supreme Court, petitioner renewed his contention that his prosecution was time-barred under Connecticut General Statutes § 54-193 (Rev. to 1975) and *State v. Paradise*, 189 Conn. 346, 456 A.2d 305 (1983). Petitioner argued that *Paradise* was "both factually and legally indistinguishable" from his situation. P. App. at 31. In *Paradise*, the Connecticut Supreme Court had refused to apply an amendment to the statute of limitations, P.A. 76-35 § 1, which expressly exempted murder from any period of repose, retroactively. P. App. at 28a.

The state asked the court to overrule *Paradise.* P. App. at 31a. Alternatively, the state argued that *Paradise* rested on a faulty assumption, namely, that the five year limitation period of the pre-1976 version of § 54-193 applied to murder. P. App. at 31a-32a.

Connecticut's high court began its analysis by reviewing the pertinent statutes. The murder statute under which petitioner was convicted, Connecticut General Statutes § 53a-54a (Rev. to 1975), provides in part: "(a) A person is guilty of murder when, with intent to cause the death of another, he causes the death of such other person or a third person . . . . (c) Murder is punishable as a class A felony unless

it is a capital felony and the death penalty is imposed, as provided by Section 53a-46a."

The Court noted that, at the time of this offense, Connecticut General Statutes §54-193 (Rev. to 1975) "prescribed a five year limitation period on prosecutions 'for treason . . . or for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers . . .'" P. App. at 28a . As explained in *State v. Golino*, 201 Conn. at 438, "[t]he second clause of the statute provided a one year period of limitation on prosecutions `for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment at Somers.'" *Id*. "Implicit in this statutory scheme is that 'crimes punishable by death' were outside any limitation period, and thus always amenable to prosecution." *Id*.

Prior to 1973, all intentional murders were punishable by death. Because, following the 1973 revision of Connecticut's murder statute, only those murders designated capital felonies were eligible for the death penalty, the question confronting the Connecticut Supreme Court in *Skakel* was whether all intentional murders remained exempt from any limitation period, or whether the legislature had silently changed the historic meaning of the limitation statute while amending a different provision of the General Statutes.

The Connecticut Supreme Court resolved petitioner's appeal without deciding this question, however. It did so in reliance on P.A. 76-35, § 1, a 1976 amendment to the statute of limitations which expressly exempts murder from any period of repose. The Connecticut court explained that in *Paradise*, when it had been asked to apply P.A. 76-35, §1 to a murder committed before its effective date, it had declined to do so. The court noted the infirmity in its prior decision, and held:

> Upon reconsideration, we are persuaded that *Paradise* was wrongly decided. In particular, we conclude that we were misguided in establishing a presumption that, in the absence of a contrary indication of legislative intent, an amendment to a criminal statute of limitations is not to be applied retroactively. As we explain more fully hereinafter, we are convinced that, with respect to those offenses for which the preamendment limitation period has not expired, it is far more likely that the legislature intended for the amended limitation period to apply to those offenses. In view of the fact that 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 to that statutory provision became effective, we conclude that P.A. 76-35, §1, is the operative statute of limitations for purposes of this case. . . . Because, under P.A. 76-35, §1, there is no time period within which murder and other class A felonies must be prosecuted, the trial court properly denied the defendant's motion to dismiss the information.

P. App. at 32a-33a.

The court also noted that in light of its decision to overrule *Paradise* and apply P.A. 76-35, §1 retrospectively, it had no occasion to consider the state's alternate argument that murder in Connecticut had never been, and thus was not at the time of this homicide, subject to a time limit for prosecution. P. App. at 32a, n. 31.

Following affirmance, petitioner filed a motion for reargument and reconsideration *en banc.* In this motion, he

claimed for the first time that the retrospective application of P.A. 76-35, §1 violated the Due Process Clause of the United States Constitution. P. App. at 260a-287a. The state opposed the motion, and the Connecticut Supreme Court denied it without opinion. P. App. at 158a.

REASONS FOR DENYING THE WRIT

Petitioner claims that the Connecticut Supreme Court, by overruling a 1983 decision and permitting the retroactive application of a 1976 statute of limitation to a 1975 offense, violated his right to notice under the Due Process Clause of the Fourteenth Amendment. Underlying his due process claim is the assertion that the Connecticut court revived a time-barred prosecution.

Despite petitioner's protestations, the facts of this case do not implicate, much less violate, petitioner's due process rights. As an initial matter, before any consideration of petitioner's federal claim is possible, petitioner must overcome two obstacles to review. The first is his failure to raise his federal claim in a timely manner in the state courts and the resultant failure of the Connecticut Supreme Court to consider this issue. The second is the fact that the assumption underlying his claim – that his prosecution was at one point time-barred – rests on an unsettled question of state law.

Even if petitioner is able to overcome these impediments, however, the question presented herein is not worthy of this Court's consideration. Properly viewed, the decision of Connecticut's highest court is in accord with this Court's ex post facto and due process precedent. Under *Stogner v. California*, 539 U.S. 607 (2003), for instance, the Connecticut court was free to apply its 1976 statute to a 1975 murder. This is so because, even if a 1975 murder carried a five year limitation on prosecution, as petitioner contends, that time had not expired when the amendment took effect. Further,

petitioner cannot establish a due process violation under *Bouie v. City of Columbia*, 378 U.S. 347 (1964) and *Rogers v. Tennessee*, 532 U.S. 451 (2001), because, in overruling a 1983 decision, the Connecticut Supreme Court did not enlarge the offense of murder beyond what it was in 1975. Thus, because the Connecticut Supreme Court did not depart, to the detriment of the petitioner, from an interpretation of a penal statute that was settled at the time of his offense, petitioner's due process claim fails at an elementary level.

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE PETITIONER FAILED TO RAISE THE FEDERAL QUESTION IN A TIMELY MANNER AND, AS A CONSEQUENCE, THE CONNECTICUT SUPREME COURT NEVER DECIDED THE ISSUE

As petitioner appears to acknowledge, the first and only time he raised his due process claim in the Connecticut courts was in his motion for reconsideration and reargument *en banc*. See Pet. Cert. at 10; P. App. at 260a. Consequently, neither the trial court nor the Connecticut Supreme Court addressed the due process issue petitioner now presents. See R. App. at A1-A9 (Trial Court's Memorandum of Decision); P. App. at 1a-157a.

This court should deny certiorari due to petitioner's failure to raise his claim in a timely manner in the Connecticut courts. Under 28 U.S.C. § 1257 (a), this court has jurisdiction to review "final judgments or decrees from the highest court of a State . . . where any . . . right . . . .is *specially set up or claimed* under the Constitution . . . . of the United States." (emphasis added).[2] This court has "almost unfailingly";

[2] § 1257. State courts; certiorari

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Howell v. Mississippi, 543 U.S. 440, 443 (2005) (per curiam); refused to consider a federal claim "unless it was either addressed by, or properly presented to, the state court that rendered the decision [this court is asked to review]." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam). Where, as here, the state court is silent on the federal question at issue, this Court assumes that the issue was not properly presented. *Id*. at 86. The petitioner can overcome that presumption only by showing that the state court had a fair opportunity to address the federal question under consideration. *Id*. at 86-87.

Petitioner's failure to raise his federal due process claim at trial or on appeal deprived the Connecticut courts of an opportunity to address it. It is well settled that "[r]aising the federal question for the first time in a petition for rehearing . . . is generally insufficient unless the court actually entertains the petition and expressly decides the question . . . .To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and accordingly is denied . . . . There must be language indicating the federal question was considered and

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(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

disposed of." Stern, R. L., Gressman, E., Shapiro, S.M., Geller, K.S., *Supreme Court Practice* (8th Ed. (2002) (hereinafter, Stern and Gressman) p. 181 (citations omitted).

No such language appears in the order of the Connecticut Supreme Court denying the request for reconsideration. The order states simply: "The Motion of the Defendant, filed February 14, 2006, for Reconsideration, to Reargue and for Reconsideration and Reargument en banc, having been presented to the court, it is hereby ordered denied." P. App. at 158a (emphasis omitted).

Thus, because petitioner failed to raise his due process claim in a timely manner, and because the Connecticut Supreme Court never passed on the claim in any meaningful way, this Court should deny the writ.

Undoubtedly, petitioner will argue that his assertion below was timely because his first opportunity to protest the effect of abandoning *Paradise* was after the court issued its decision. Although this Court has recognized a narrow exception to the timely presentation requirement where the "question is created by an *unexpected* decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question"; Stern and Gressman p. 183 (emphasis added); that is not the situation here. The demise of *Paradise* was not unexpected in light of the shaky foundations of the original decision, subsequent Connecticut cases which moved away from the rote retroactivity analysis that decision employed; 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, 372-3, 376, 678 A.2d 462 (1996); and additional decisions casting doubt on the assumptions underlying *Paradise. State v. Ellis*, 197 Conn. 436, 497 A.2d 974 (1985); *State v. Golino*, 201 Conn. 435, 518 A.2d 57 (1986). Moreover, because the state's brief attacked *Paradise* on several fronts and expressly

asked the court to overrule it, petitioner had an opportunity to anticipate and assert the federal question in his reply brief. See P. App. at 237a-259a.

Petitioner thus was on notice that *Paradise* was under siege and ripe for reconsideration. At least by his reply brief, petitioner could have raised the due process concerns he now expresses. Because petitioner failed to present his federal question to Connecticut's highest court in a timely manner, his petition should be denied.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE CORNERSTONE OF PETITIONER'S CLAIM – THAT *SKAKEL* REVIVED A TIME-BARRED PROSECUTION – INCORRECTLY ASSUMES THAT THE PROSECUTION WAS AT ONE POINT TIME-BARRED, WHEN IN FACT THAT REMAINS AN OPEN QUESTION UNDER CONNECTICUT LAW AND ONE ON WHICH PETITIONER WAS, AT ALL TIMES, UNLIKELY TO PREVAIL

The cornerstone of petitioner's argument – that the Connecticut Supreme Court revived a time-barred prosecution – incorrectly assumes that the prosecution was at one point time-barred. Petitioner asserts that murder carried a five year statute of limitation at the time of his offense. In fact, as is clear from both *Skakel* and *Paradise*, the issue of whether Connecticut ever had a five year limitation period for murder has been explicitly left open by Connecticut's highest court. Because this Court is without authority to decide an unsettled issue of state law, this is an inappropriate case for review by certiorari.

The holding in *Paradise* is expressly limited to the issue of retroactivity. *State v. Paradise*, 189 Conn. at 347 ("This consolidated appeal presents the sole issue of whether or not

the current criminal statute of limitations . . . is to be applied retroactively."); *State v. Ellis*, 197 Conn. at 463 ("The only issue actually litigated and decided in *Paradise I* was whether the amended statute of limitations would receive retrospective application"). *Paradise* thus never decided whether the 1975 version of the statute of limitations exempted murders.

In *Skakel,* moreover, the Connecticut court stated: "In light of our conclusion that P.A. 76-35, § 1, applies to the offense in the present case, we have no reason to address the state's alternate contention that the legislature never intended to establish a limitation period for murder and, consequently, that the five year limitation period of the pre-1976 amendment version of 54-193 . . . does not bar the state's prosecution of the [petitioner] for the murder of the victim." *State v. Skakel*, P. App. at 32a, n.31. The only opinion directly addressing the issue – the concurrence (*Katz, J.*) – would have found no impediment to petitioner's prosecution under the 1975 version of the statute. P. App. at 144a. ("In my view, the crime of murder was not subject to the statute of limitations in effect in 1975, and, indeed, there never has been a limitations period on the prosecution of murder").

The foundation of petitioner's due process claim -- that *Skakel* revived a time-barred prosecution – thus rests on an unsettled issue of Connecticut law. Further, as summarized briefly below, the better arguments prove the Connecticut legislature never intended to enact a time limit on the state's ability to prosecute murders, and, in fact, never did so.

In order to understand why there is any question regarding the time limit for prosecuting a 1975 murder, some background is necessary. As the Connecticut Supreme Court explained in *Ellis*, the Connecticut statute of limitations dates back to 1821. *State v. Ellis*, 197 Conn. at 441. The language of the statute, with a few inconsequential exceptions, remained constant from the time of its enactment until its amendment in

1976. Throughout Connecticut's long history, the crime of murder, or at least intentional murder as proven here, had always been a crime punishable by death. Connecticut's high court interpreted the phrase "crimes punishable by death" found within the limitation statute, as a "shorthand reference to a category of crimes which, because of their atrocious nature, would always be amenable to prosecution." *State v. Golino*, 201 Conn. at 446. Thus, in an unbroken line from at least 1821 to 1973, there was no question regarding the period of prosecution for murder.

What changed in 1973 was that the Connecticut legislature enacted Connecticut Public Act 73-137 (hereinafter P.A. 73-137). R. App. at A10-20. That Act repealed the former murder statute, Connecticut General Statutes §53a-54 (Rev. to 1972), retained the old statute's definition of murder as the intentional killing of another, and added a provision which designated certain murders capital felonies. *See* P.A. 73-137, §2(a); P.A. 73-137, §3. The Act also provided that "murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed by Section 53a-46a." P.A. 73-137, §2(c).

The genesis of P.A. 73-137 is *Furman v. Georgia*, 408 U.S. 238 (1972), which Connecticut interpreted as invalidating its capital sentencing statutes. *State v. Aillon*, 164 Conn. 661, 662, 259 A.2d 666 (1972). In the wake of *Furman*, the Connecticut legislature struggled to pass capital sentencing provisions that would comply with the constitution. Our murder statute was amended in 1973 with a view toward bringing our capital procedures into compliance with constitutional mandates. H-136, 1973 H.P., Vol. 16, Part 6, p. 2925; *see State v. Ross*, 269 Conn. 213, 343 n. 77, 849 A.2d 648 (2004), *cert. denied sub. nom Ross ex rel Dunham v. Lantz*, 544 U.S. 1028 (2005).

As is clear from the legislative history of the 1973 act,

the legislature designated some murders as capital felonies to comply with *Furman*; the lines so drawn do not reflect the legislature's diminished abhorrence for other intentional murders. Moreover, nothing in either the extensive legislative history or the text of the act suggests the legislature intended to impose a time limit on the prosecution of murder.

Connecticut law recognizes that "'[i]n the interpretation of a statute, a radical departure from an established policy cannot be implied. It must be expressed in unequivocal language.'" *State v. Ellis*, 197 Conn. at 459. No language expressing a clear break with 150 years of Connecticut history appears in P.A. 73-137. Therefore, it is unreasonable to find, as petitioner contends, that when the legislature separately defined capital murders, it silently imposed a time limit on the prosecution of all other intentional murders.

As Justice Katz noted in her concurrence:

> It simply runs counter to reason to conclude that the legislature intended to impose, *for the first time in the state's history*, a statute of limitations on all murders [except those designated capital felonies]. . . without a discussion or any expression of opposition.

State v. Skakel, P. App. at 154a.

Importantly, when the Connecticut legislature actually addressed the issue of the allowable period of prosecution for murder, it made clear that murder was, and should remain, exempt from any limitation period. In 1976, the legislature amended the statute of limitations to state expressly that there is no statute of limitations for class A felonies, a category which includes murder and other serious offenses, and capital felonies. *See* Connecticut General Statutes §54-193 (Rev. to 1977). As the Connecticut Supreme Court noted in *Ellis*, the

legislative history of the 1976 Act makes clear that this provision was intended to "clarify" rather than to change existing law. *See State v. Ellis,* 197 Conn. at 459-60 *citing* 19 S. Proc.; Pt 1, 1976 Sess., p. 341 (Remarks of Senator David H. Neiditz). Under Connecticut law, "a clarifying act, which 'in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act.'" *State v. Blasko*, 202 Conn. 541, 557, 522 A.2d 753 (1987). Accordingly, in *Golino*, Connecticut's high court viewed the 1976 amendment as a "clear indication that the pre-1976 statute of limitations was not intended to bar a prosecution for murder[.]" *State v. Golino*, 201 Conn. at 445.

There are thus strong arguments to be made that, at the time of this offense, as had been true throughout Connecticut's history, no time limit existed on the prosecution of murder. At the very least, it remains an open and debatable question under Connecticut law. Because this Court has no authority to decide this issue in order to reach petitioner's due process claim, certiorari must be denied. *See e.g. Harman v. Forssenius*, 380 U.S. 528, 534 (1965) ("Where resolution of the federal constitutional question is dependent upon . . . the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication").

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE CONNECTICUT SUPREME COURT'S APPLICATION OF AN AMENDMENT TO THE STATUTE OF LIMITATIONS TO A CRIME FOR WHICH THE ORIGINAL PERIOD OF LIMITATION, IF ANY, HAD NOT EXPIRED IS IN FULL ACCORD WITH *STOGNER, ROGERS, BOUIE,* AND THE TREATMENT OF SIMILAR ISSUES THROUGHOUT THE

COUNTRY

a) Because the Original Period of Limitation, If Any, Had Not Expired When the Connecticut Legislature Amended the Statute of Limitations, Applying That Amendment to this Offense Poses No Ex Post Facto Problem

In *Stogner v. California*, 539 U.S. 607 (2003), this Court held that the legislative revival of a previously time-barred prosecution violates the ex post facto clause of Article I, section 10 of the United States Constitution. *Stogner* reasoned that legislation which attempts to do so falls within the second category of ex post facto law described in *Calder v. Bull,* 3 Dall. 386, 1 L. Ed. 648 (1798), that is, a law that "aggravates a crime, or makes it greater than it was, when committed." *Stogner v. California*, 539 U.S. at 613 quoting *Calder*, supra,. at 390, 1 L. Ed. 648 (emphasis omitted). As this Court explained:

> After (but not before) the original statute of limitations had expired, a party such as Stogner was not 'liable to any punishment.' California's new statute therefore 'aggravated' Stogner's alleged crime, or made it 'greater than it was, when committed,' in the sense that, and to the extent that, it 'inflicted punishment' for past criminal conduct that (when the new law was enacted) did not trigger any such liability.

Stogner v. California, 539 U.S. at 613.

Central to this Court's reasoning in *Stogner,* therefore, was the fact that the petitioner's liability for the crime had been

extinguished at the time the new law was enacted. As argued above, the question of whether the crime of murder carried *any* limitation period in 1975 is an open question under Connecticut law. Assuming, however, that petitioner is correct in asserting a five year statute of repose for a 1975 murder, that time had assuredly not expired when the legislature enacted P.A.76-35, expressly eliminating any such time period. Therefore, under the reasoning of *Stogner*, and consistent with the weight of authority throughout the country; *see State v. Skakel,* P. App. at 55a-56a, citing *People v. Sample*, 161 Cal. App.3d 1053, 1058, 208 Cal.Rptr. 318 (1984); *State v. O'Neill*, 118 Idaho 244, 248, 796 P.2d 121 (1990); *People v. Isaacs*, 37 Ill.2d, 205, 229, 226 N.E.2d 38 (1967); *State v. Schultzen*, 522 N.W.2d 833, 835 (Iowa 1994); *State v. Nunn*, 244 Kan. 207, 217, 768 P.2d 268 (1989); *Commonwealth v. Bargeron*, 402 Mass. 589, 593-94, 524 N.E.2d 829 (1988); *People v. Russo*, 439 Mich. 584, 594-97, 487 N.W.2d 698 (1992); *Christmas v. State*, 700 So.2d 262, 266-67 (Miss.1997); *State v. Hirsch*, 245 Neb. 31, 43-44, 511 N.W.2d 69 (1994); *State v. Hamel*, 138 N.H. 392, 395-96, 643 A.2d 953 (1994); *State v. Nagle*, 226 N.J.Super. 513, 516, 545 A.2d 182 (1988); *People ex rel. Reibman v. Warden of County Jail*, 242 A.D. 282, 284-85, 275 N.Y.S. 59 (1934); *People v. Pfitzmayer*, 72 Misc.2d 739, 741-42, 340 N.Y.S.2d 85 (1972); *State v. Buchholz*, 678 N.W.2d 144, 149 (N.D.2004); *State v. Dufort*, 111 Or.App. 515, 519, 827 P.2d 192 (1992); *Commonwealth v. Johnson,* 520 Pa. 165, 170, 553 A.2d 897 (1989); *State v. Wolfe*, 61 S.D. 195, 199, 247 N.W. 407 (1933); *Rose v. State*, 716 S.W.2d 162, 165 (Tex. App.1986, pet.ref'd), cert. denied, 486 U.S. 1055 (1988); *State v. Lusk,* 37 P.3d 1103, 1109-10 (Utah 2001); *State v. Petrucelli*, 156 Vt. 382, 383-84, 592 A.2d 365 (1991); *State v. Hodgson,* 108 Wash.2d 662, 665-68, 740 P.2d 848 (1987); the Connecticut Supreme Court's application of a 1976 amendment to a 1975 murder poses no ex post facto problems.

b) Because Statutes of Limitation Do Not Define or Regulate Criminal Conduct, They

Do Not Come under *Bouie*'s Due Process Rubric

In *Bouie v. City of Columbia*, 378 U.S. 347 (1967), this Court held that a state court decision upholding petitioner's conviction by construing a criminal trespass statute to include the act of remaining on another's property after being asked to leave, when the statute had previously been limited to the unlawful entry onto the property of another, violated due process. *Bouie* determined that neither the plain language of the statute, nor prior judicial constructions, gave petitioners fair warning at the time of their conduct, that the act for which they were convicted was included in the statute. *Id*. at 355.

Bouie thus established that "limitations on ex post facto decisionmaking are inherent in the notion of due process"; *Bouie v. City of Columbia*, 378 U.S. 347, 349 n.1. Subsequent cases have made clear, however, that the scope of those limitations are referenced to the "'basic [due process] principle that a criminal statute must give fair warning of the conduct that it makes a crime.'" *Rogers v. Tennessee,* 532 U.S. 451, 457 (2001).

In *Rogers*, this Court dispelled any notion that *Bouie* intended to apply ex post facto limitations to the judiciary "jot for jot." *Id*. at 459. Instead, it clarified *Bouie* and it progeny as resting on "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 previously had been innocent conduct."* Id. (Emphasis added).

A fundamental aspect of the due process analysis in *Bouie*, therefore, and one that petitioner attempts to obscure through his argument, is that the notice to which an accused is entitled concerns the criminality of his contemplated conduct under the statute defining the crime:

> 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'

Bouie v. Columbia, 378 U.S. 347, 351 (1964) quoting *United States v. Harris*, 347 U.S. 612, 617 (1954).

The due process restraints imposed on the judiciary, therefore, are more limited than those imposed on the legislature under the ex post facto clause. Due process is concerned solely with the judicial application of "novel construction[s] of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope[.]" *United States v. Lanier*, 520 U.S. 259, 266-67 (1997) *see Marks v. United States*, 430 U.S. 188, 191-92 (1977) (due process prohibits retroactive application of judicially created obscenity standards to conduct that would have gone unpunished under previous standards); *Rabe v. Washington*, 405 U.S. 313 (1972) (per curiam); (conviction under an impermissibly vague statute violated due process where accused did not have fair warning that criminal liability under obscenity statute is dependent on place where film is shown); *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (unforeseeable judicial enlargement of a criminal statute could not be applied retroactively to make an act, innocent when done, criminal); *Douglas v. Bader*, 412 U.S. 430, 432-33 (1973) (*per curiam*) (unforeseeable interpretation of traffic violation as an arrest and hence a basis for revoking petitioner's probation deprived petitioner of due process).

Skakel did not expand petitioner's criminal liability by

adopting a novel construction of a criminal statute. The elements of murder were clear at the time of the offense and were unaffected by the *Skakel* decision. Unlike the situations in which this Court has found a due process violation, then, the Connecticut court's reinterpretation of the 1976 statute of limitations did not expand the offense of murder beyond what it had been at the time of the offense. As the Connecticut Supreme Court noted, statutes of limitation do not "purport to define or regulate criminal conduct in any way." P. App. at 58a. Rather, they represent expressions of legislative grace which inure to the benefit of criminal defendants. P. App. at 50a. Because *Bouie* and its progeny are limited to the interpretation of criminal statutes and seek to ensure that "a person of ordinary intelligence has fair notice that his contemplated conduct is forbidden;" *Bouie v. Columbia*, 378 U.S. at 351; a decision applying a statute of limitation retroactively simply does not fit within *Bouie*'s due process framework.[3]

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[3] State courts that have considered the due process implications of judicial reversals seem to share a similarly narrow view of *Bouie*. *See e.g. People v. Mendoza*, 23 Cal. 4th 896, 925, 4 P.3d 265, 286 (2000) (applying its decision overruling precedent to petitioners "as is customary of judicial case law" because holding neither expands criminal liability nor enhances punishment for conduct previously committed; further, at time they committed their crimes, petitioners acquired no "cognizable reliance interest" on previous precedent); *Proctor and Lemell v. Texas*, 967 S.W.2d 840 (Tex. Ct of Criminal Appeals 1998) (decision overruling precedent which had required state to prove beyond a reasonable doubt that offense fell within the allowable period of prosecution did not deprive petitioner of fair warning of what conduct will give rise to which criminal penalties); *Selsor v. Turnbull*, 947 P. 2d 579, 583 (Oklahoma Ct of Crim. App. 1997) (judicial decision overturning precedent does not violate due process clause or ex post facto principles, because it does not change crime with which petitioner is charged, increase punishment prescribed therefore, or increase

(continued...)

c) Even If the Extension of a Statute of Limitation Is Considered an Expansion of Criminal Liability, Notice must Be Assessed at the Time of the Criminal Conduct; Petitioner's Reliance on *Paradise*, Decided Eight Years after This Murder, Is Therefore Misplaced

As stated previously, the elements of murder and the scope of petitioner's liability for that offense were unaffected by *Skakel*. Even if one assumes, however, that the period of prosecution for an offense is an essential aspect of liability to which a person is entitled to notice, petitioner cannot claim the state of the law in 1975 led him to believe there was a five year limit. At the time of this murder, Connecticut's long history of exempting murder from any limitation period, and the general understanding of the phrase "crimes punishable by death" as referring to a category of offenses that had always included murder, would have led a reasonable person to conclude that no repose was possible. See Section II, *supra*. Rather than rely on settled law at the time of this offense, therefore, petitioner stakes his claim on *Paradise*, a judicial decision coming eight years after his crime. Unfortunately for petitioner, any misapprehension he may have acquired in 1983 is without constitutional significance.

d) Petitioner Posits a False Conflict

The above discussion serves to explain why the decisions petitioner contends are in conflict with *Skakel* are not truly at odds. In fact, all three of the cases petitioner cites in support of a supposed "conflict" involve a straightforward application of *Bouie* which, as demonstrated above, this case

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[3](...continued)
quantity or degree of proof necessary to establish guilt).

does not.

In *Moore v. Wyrick*, 766 F.2d 1253, 1258-59 (8th Cir. 1985), *cert denied sub. nom Armontrout v. Moore*, 475 U.S. 1032 (1986), for instance, the Eighth Circuit held that Missouri's conviction of the petitioner under a theory of felony murder that was excluded by a prior decision violated the petitioner's right to notice under due process. As the Eighth Circuit explained, a 1922 Missouri decision had limited Missouri's felony murder statute to situations in which a petitioner or accomplice commits the killing. *Id.* at 1254. In the petitioner's direct appeal, however, the Missouri Supreme Court overruled the earlier decision and upheld Moore's conviction for a killing by an uninvolved bystander. *Id*.; see *State v. Moore*, 580 S. W. 2d 747 (Mo. 1979) (en banc). Not surprisingly, the Eighth Circuit held that "[b]ecause the Missouri Supreme Court's decision . . . effected a change in the law, which if applied retroactively would materially expand Moore's criminal liability, this change cannot, consistent with *Bouie* . . . be applied retroactively if this change in the law was constitutionally unforeseeable." *Moore v. Wyrick*, 766 F.2d at 1257. Finding it was unforeseeable under Missouri law, the court reversed.

Moore therefore presents a much different issue than *Skakel*. In *Moore*, the challenged decision expanded the petitioner's criminal liability beyond what it was at the time he committed the offense. *Skakel*, as argued above, did not expand the elements of murder beyond what they were in 1975.

The two other cases on which petitioner relies, *United States v. Potts*, 528 F.2d 883 (9th Cir. 1975) and *People v. Martinez*, 20 Cal. 4th 225, 973 P. 2d 512, 83 Cal. Rpt. 2d 533 (1999) are similarly inapposite. In both, the state of the law at the time of the offense would not have given a person of ordinary intelligence fair warning that his or her contemplated conduct was criminal. In *Potts*, the Ninth Circuit overruled its

prior decision that held that a person whose prior conviction had been expunged under state law was no longer a prior felon for purposes of a federal statute making it a crime for a felon to possess explosives. Although it determined that the prior case was wrongly decided, the court noted that while the prior decision stood "a person such as Potts, whose sole prior felony conviction had been expunged pursuant to Washington statute, could not reasonably have suspected that his possession of a firearm . . .would constitute a [violation of federal law]. As Potts lacked notice of our subsequently revised view of the statute, 'due process fairness bars the retroactive judgment of his conduct using the expanded definition.'" *Unites States v. Potts*, 528 F.2d at 886.

Likewise in *Martinez*, California's high court recognized that it could not apply its newly expanded definition of asportation for the crime of kidnaping to the defendant, reasoning:

> 'Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed'. . . . At the time of defendant's crime, the line for simple kidnapping (sic) asportation was laid down in [our prior decisions]. Defendant's conduct did not cross it, and he had no fair warning it would be redrawn.

People v. Martinez, 20 Cal. 4th at 240- 41, 973 P. 2d at 522-23, 83 Cal. Rptr. at 543-44.

All three decisions, therefore, involved the extension of criminal liability to conduct that was not criminal at the time of

the offense. Petitioner's claim, by contrast, does not rely on an expansion of criminal liability and does not take the time of the offense as its touchstone. For these reasons, petitioner fails to establish a claim under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Writ of Certiorari.

Respectfully submitted,

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