No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

_____

Mashawn Greene — PETITIONER

VS.

Scott Semple, Commissioner, Connecticut Department of Correction— RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

CONNECTICUT SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Joshua Grubaugh
Pieszak-Miller & Brodeur, LLC
Assigned Counsel for the Petitioner
P.O. Box 173
West Mystic, CT 06388
(860) 535-1989

QUESTIONS PRESENTED

Whether the due process clause of the United States Constitution requires that prosecutors bear the burden of preventing and correcting false or misleading testimony by cooperating government witnesses at criminal trials.

Whether a prosecutor is relieved of his duty to correct the false or misleading testimony of his witnesses if the defense is aware that the testimony is false or misleading.

LIST OF PARTIES

The caption of the case contains the name of the petitioner, Mashawn Greene, and the respondent, Scott Semple, Commissioner, Connecticut Department of Correction.

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PETITION FOR WRIT OF CERTIORARI

In *Napue v. Illinois,* 360 U.S. 264, 269 (1959), this Court plainly stated that "a conviction obtained through use of false evidence, known to be such by representatives of the State," runs afoul of due process, and that the government must refrain from "soliciting false evidence" and must correct such false evidence "when it appears." In the nearly 60 years since this Court laid out its guidance in *Napue*,[1] trial courts and the lower appellate courts have sometimes found ways to dilute the key principles set forth by this Court in *Napue* and its progeny[2]. This case presents the unfortunately not completely unusual scenario where a prosecutor presents inaccurate testimony from a cooperating witness, fails to correct that testimony, and the lower courts find ways to parse the record for exceptions and excuses for the prosecutor's conduct. Meanwhile, criminal defendants continue to be faced with the harmful scenario where the jury is unaware of the true nature of a key government witness' motive to testify favorably to the state.

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[1] Of course, *Napue* was not this Court's first examination of the special ills that arise from the presentation of false testimony by the government during a criminal prosecution. *See, e.g. Mooney v. Holohan*, 294 U.S. 103 (1935) (knowing use of perjured testimony "to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."); *Berger v. United States,* 295 U.S. 78 (1935) (identifying principle that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones."); *see also Hysler v. Florida*, 315 U.S. 411 (1942) (whenever the government "obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law.").

[2] This progeny includes *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Augurs*, 473 U.S. 667 (1976); and *United States v. Bagley*, 473 U.S. 667 (1985).

This petition does not present a circuit split as the exclusive basis for certification, as the lower courts routinely produce decisions that decide cases in ways that undercut the due process rights of criminal defendants. While this Court has spoken in broad and clear language about the nature of a prosecutor's duty to correct false testimony from government witnesses when it appears, the lower courts clearly need more guidance, and this case presents the opportunity for this Court to provide such clear guidance, including: whether the due process clause of the United States Constitution requires that prosecutors bear the burden of preventing and correcting false or misleading testimony by government witnesses at criminal trials, and whether suppression is a prerequisite to a due process violation related to the presentation of false testimony by a government witness. These questions are of great public importance because they drive at the basic fairness of our criminal justice system, and because constitutional due process protections are at the core of our treasured rule of law.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 190 A.3d 851, and reproduced at App. A-1. The habeas court's unpublished memorandum of decision denying the petitioner's petition for a writ of habeas corpus is reproduced at App. A-27.

JURISDICTION

The Connecticut Supreme Court issued its opinion on August 28, 2018. On September 26, 2018, the Connecticut Supreme Court granted the petitioner's late motion for reconsideration or reargument, but denied the relief requested therein. App. A-40. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual Background

On October 20, 2001, the petitioner was arrested and charged in *State of Connecticut v. Mashawn Greene*, CR-01-0506511, in the Judicial District of New Haven. Prior to the start of the petitioner's criminal trial, the petitioner pleaded guilty to three counts of theft of a firearm, in violation of Conn. Gen. Stat. §53a-212(a) .

The facts as presented by the prosecuting authority at the petitioner's criminal trial that the jury could reasonably have found, as summarized and recited by the Connecticut Supreme Court on the petitioner's direct appeal are as follows:

> On the evening of October 10, 2001, the defendant purchased the following stolen firearms: a Smith & Wesson Daniels Cobray M-11 nine millimeter submachine gun (Cobray M-11); a Braco Arms .38 caliber pistol; and a Mossberg 500A shotgun. At the same time, the defendant purchased stolen ammunition for the Cobray M-11 consisting of eight full thirty-five round magazines loaded with nine millimeter Luger Subsonic bullets. A Cobray M-11 is a semiautomatic or automatic assault weapon capable of emptying a thirty-five round magazine in under two seconds.
>
> On October 12, 2001, the defendant, Franki Jones, Markeyse Kelly, Shaunte Little and Marquis Mitchell learned that individuals from the area of New Haven known as "the Tre" were planning to "shoot up" the area of New Haven known as "West Hills" in retaliation for a shooting that had occurred the night before. The Tre area includes Elm Street and Orchard Street and the West Hills area includes the McConaughy Terrace projects. Rather than wait for the retaliation, the defendant, Jones, Kelly, Little and Mitchell decided to "go through the Tre first."
>
> The defendant drove the four men to Jones' house where those who were not armed already retrieved guns and those with lighter colored clothing changed into darker attire. The defendant armed himself with the Cobray M-11. All five men got into Jones' grey Lincoln Town Car and drove to the Tre. After they saw a group of people on the corner of Edgewood Avenue and Orchard Street, Jones parked the car next to a vacant house on Orchard Street. The defendant, Jones, Kelly, Little and Mitchell walked to the corner of Orchard Street and Edgewood Avenue, opened fire on the people on the street corner, then ran back to the Lincoln Town Car and fled the scene. Six people were shot and one of the victims died from his wounds. The victims had no connection to the shooting that had occurred the evening before and were targeted merely because of their presence in the Tre area. After the shooting, the defendant, Jones, Kelly, Little and Mitchell returned to Jones' house. The five men then returned to the scene of the shooting in the defendant's rental car in order to retrieve an empty magazine clip that the defendant had left behind. Discovering a heavy police presence, however, they left the area and went their separate ways.

State v. Greene, 274 Conn. 134, 138-140 (2005).

Following a jury trial, the petitioner was found guilty of: intentional manslaughter in the first degree with a firearm as an accessory, in violation of Conn. Gen. Stat. §§

53a-55a(a) and 53a-48; conspiracy to commit manslaughter in the first degree with a firearm, in violation of Conn. Gen. Stat. §§ 53a-55a and 53a-48; five counts of assault in the first degree as an accessory, in violation of Conn. Gen. Stat. §§ 53a-59(a)(5) and 53a-8(a); conspiracy to commit assault in the first degree, in violation of Conn. Gen. Stat. § 53a-48(a) and 53a-59(a)(5); and, possession of an assault weapon, in violation of Conn. Gen. Stat. § 53-202c. On October 3, 2003, in *State of Connecticut v. Mashawn Greene*, CR-01-0506511, the Court, *Thompson, J.*, sentenced the petitioner to a term of imprisonment of 65 years.

In *State of Connecticut v. Mashawn Greene*, S.C. 17101, the petitioner appealed from the judgment in *State of Connecticut v. Mashawn Greene*, CR-01-0506511. On June 21, 2005, in *State of Connecticut v. Mashawn Greene*, S.C. 17101, the Connecticut Supreme Court reversed the judgment of the trial court in part, finding that the defendant's conviction for manslaughter deprived him of his sixth amendment right to notice and, accordingly, modified the judgment of the trial court to manslaughter in the first degree as an accessory, in violation of Conn. Gen. Stat. § 53a-8(a) and 53a-55(a)(1). *State of Connecticut v. Mashawn Greene*, 274 Conn. 134 (2005). On October 7, 2005, the Court, *Thompson, J.*, in light of the Connecticut Supreme Court's decision in *State of Connecticut v. Mashawn Greene*, 274 Conn. 134 (2005), re-sentenced the petitioner to a total effective sentence of 60 years.

On November 24, 2008, the Court, *Santos, J.*, denied the petitioner's petition for a writ of habeas corpus in *Mashawn Greene v. Warden*, CV-04-0004560.On December 19, 2008, the petitioner appealed from the judgment in *Mashawn Greene v. Warden*, CV-04-0004560, to this Court. On August 10, 2010, this Court dismissed the petitioner's

appeal in part and reversed the judgment of the habeas court in part in *Mashawn Greene v. Commissioner of Correction*, 123 Conn. App. 121 (2010). On November 1, 2010, the habeas court, *Santos, J.*, vacated the petitioner's convictions for three counts of theft of a firearm, in violation of Conn. Gen. Stat. §53a-212(a).

On or around June 28, 2013, the petitioner filed a *pro se* petition for a writ of habeas corpus, initiating the instant matter, and collaterally attacking the judgment in *State of Connecticut v. Mashawn Greene*, CR-01-0506511. On October 21, 2015, the petitioner filed an amended petition for a writ of habeas corpus. On February 24, 2016, the parties appeared before the habeas court, *Oliver, J.*, and presented evidence. On June 20, 2016, the habeas court issued its memorandum of decision denying the petitioner's petition for a writ of habeas corpus. On July 5, 2016, the habeas court, *Oliver, J.*, granted the petitioner's petition for certification to appeal. This appeal followed.

B. Markese Kelly's Plea Hearing

On May 12, 2003, in *State of Connecticut v. Markese Kelly*, CR-01-506190, Markese Kelly,[3] a co-defendant of the petitioner, pleaded guilty to conspiracy to commit assault in the first degree, in violation of Conn. Gen. Stat. §§ 53a-48 and 53a-59(a)(5), and carrying a pistol without a permit, in violation of the Conn. Gen. Stat. § 29-28. The factual basis for the charges were Kelly's involvement in the incident that the petitioner

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[3] Mr. Kelly's name is spelled in a number of ways throughout the record, but the petitioner, like the Connecticut Supreme Court below, adopts this spelling for the sake of clarity and simplicity.

was charged for and convicted. At the plea hearing, the prosecutor, Attorney Christopher Alexy, the same attorney that prosecuted the petitioner, stated

> There is no agreed sentence in this case. I believe that the defendant understands that his continued cooperation in the cases of the co-defendants will be made known to the Court at the time of the sentencing and that the ultimate sentence will be up to Court. [5/12/2003 Tr. 2; A45.]

Attorney Alexy also noted that there was no agreement related to a case pending in the G.A. or Kelly's pending violation of probation hearing. The trial court noted that Kelly's maximum exposure was twenty-five years of incarceration. *Id.* at 4; A-47. The trial court further canvassed Kelly:

> Do you understand the agreement is only this: The sentencing court, at the time of sentencing, will consider any cooperation and truthful testimony in the cases of the co-defendants as an element of consideration in sentencing you. In other words, it will be up to the Court to sentence you at the time of the sentencing and we'll consider any cooperation and truthful testimony in the cases of the co-defendants.

Id. at 4-5; A-47-A-48. Mr. Kelly indicated that he understood this was the agreement. The parties then agreed to schedule the sentencing at a "long date" "given the circumstances." *Id.* at 6; A-49.

C. Markese Kelly's Criminal Trial Testimony

At the petitioner's criminal trial, Markese Kelly testified about the day of October 12, 2001. He testified that the petitioner, Marquise Mitchell, Franki Jones, and Shaunte Little planned and executed a shooting in the Tre neighborhood of New Haven. This testimony was mostly consistent with the criminal trial testimony of Jones and Little, who testified at the petitioner's criminal trial that they had a cooperation agreement with the State and that they were hoping for additional consideration in exchange for their testimony at the petitioner's criminal trial. Kelly, unlike Jones and Little, gave specific

details about the shooting, including Kelly's personal urging that they not commit a "drive by" shooting, and that they instead park the car and approach the individuals they intended to shoot. Kelly also explained that they were seeking to murder "D-Mack" from the Trey neighborhood.

Unlike Jones and Little, Kelly did not disclose to the jury that he had an understanding that his criminal trial testimony in favor of the State would be viewed favorably by the sentencing judge. Kelly testified that was arrested later on after the others and that he told the police what happened when he was arrested. He knew what he was arrested for because the others had gotten arrested before and he went to court for them and they told him to leave. He could tell that they had told on him. He told the police the true story right away because everyone else was lying. The police showed him statements with the names blocked out, and he assumed that everyone had told on him. He decided then that they would all sit in jail together. He gave a statement. He pleaded guilty to assault first and carrying a pistol. He had no understanding of what his sentence would be. He knew that that the maximum was 25 years. There was no understanding concerning his testimony. There was no deal. He only told the truth because everyone else told. During cross-examination Kelly denied having any deal related to his testimony. He denied that he expected anything in exchange for his testimony.

D. Markese Kelly's Sentencing

Markese Kelly was sentenced on September 12, 2003. Despite the indication on the record at Kelly's plea hearing that Kelly's sentence would be left up to the discretion of the sentencing judge, Attorney Alexy recommended, and the trial court imposed, a

sentence of ten years incarceration for Kelly's admitted involvement in a shooting that left one victim dead and five others seriously injured. Attorney Alexy indicated that "[s]ince the pleas were entered on May 12th Mr. Kelly complied with all the conditions of the plea agreement very satisfactorily. He was instrumental in solving a very brutal shooting." 9/12/2003 Tr. 1; A-66. Attorney Alexy also nolled Kelly's two files that were pending in G.A., including a violation of probation file. *Id.* Before imposing the ten year sentence on Mr. Kelly, the sentencing court stated to Kelly "by cooperating you took -- you saved yourself from many many years more of incarceration that you would have served." *Id.* at 10; A-75.

E. The Habeas Court Proceedings

At the habeas trial, the petitioner presented the testimony of Christopher Alexy, the prosecutor responsible for the prosecution of the petitioner and his co-defendants, Paul Carty, the petitioner's trial counsel, and Erik Eichler, an investigator working on behalf of the petitioner.

Attorney Alexy testified that he was responsible for the prosecution of the petitioner and his co-defendants Markese Kelly, Franki Jones, Shaunte Little, and Marquis Mitchell. He did not consider the understanding that existed before Kelly's testimony to be an "agreement." Alexy testified that he and Kelly had an understanding that Kelly's cooperation would be made known to the sentencing judge. Alexy agreed that Kelly denied receiving any consideration in exchange for his testimony. Kelly testified that there was no agreement for a specific sentence.

Alexy stated that he had a "legal and ethical obligation to disclose . . . to the defense" that Kelly had an incentive to testify at the petitioner's criminal trial. He had

met that obligation in the petitioner's case. He disclosed that Kelly had pled, that there was no specific plea agreement, that any sentence would determined by Judge Fasano after the trial if Kelly testified at the petitioner's criminal trial. Alexy believed that Kelly's testimony accurately reflected the understanding.

Kelly's incentive to testify was outlined in Kelly's plea transcript. Alexy admitted that during his testimony at the petitioner's criminal trial, Kelly did not use the words that Alexy used at Kelly's plea proceeding to describe the parameters of the understanding he had with the prosecuting authority.

Alexy understood that he had a duty to correct false testimony, but he had never done so at a criminal trial. Alexy explained that Kelly denied that he had an agreement with the prosecuting authority, but that an agreement was different from having an incentive. Alexy believed that Kelly's incentive to testify was brought out on cross-examination.

Alexy testified about his decision about how to charge Kelly. Alexy agreed that there were things that he could have charged Kelly with that he chose not charge him with. He denied that he could have charged Kelly with murder as an accessory or assault in the first degree. Alexy then agreed that a judge had signed the arrest warrant for Kelly indicating that there was probable cause to charge Kelly with murder, conspiracy to commit murder, assault in the first degree, conspiracy to commit assault in the first degree, criminal use of a firearm, criminal possession of a firearm by a convicted felony, unlawful discharge of a firearm, and reckless endangerment in the first degree.

Alexy testified that it was fairly typical for defendants to enter into open pleas. He declined to answer how often defendants would enter open pleas in cases that there was a high exposure without an expectation how a defendant's inculpatory testimony in another proceeding would benefit that defendant.

Alexy explained that Kelly was not sentenced the day that he pled because as a prosecutor, Alexy had an interest in actually procuring Kelly's helpful testimony before he was sentenced. Alexy had reviewed the September 12, 2003, sentencing transcript for Markese Kelly's case. He denied that his specific recommendation at the sentencing hearing that Kelly receive a 10 year sentence was inconsistent with his testimony that Kelly's cooperation would merely be brought to the sentencing court's attention. He explained that there were off the record discussions between Alexy, Kelly's counsel, and Judge Fasano, that resulted in Alexy making the 10-year recommendation. Judge Fasano was free to disagree with Alexy's recommendation. Alexy agreed that his specific recommendation of 10 years was imposed on Kelly. Alexy was unaware of anything else that Alexy was referring to during his remarks at Kelly's sentencing hearing when he referred to Kelly's satisfactory performance under the plea agreement.

While discussing the arrangement that Alexy had with Franki Jones, another one of the petitioner's co-defendant's, Alexy stated that he felt he had an ethical duty to disclose the understanding to the defense, but he believed it was a matter of trial tactics whether he would introduce that information to the jury. Alexy did not have a clear recollection of the testimony of the petitioner's other co-defendants or the understanding that was in place concerning their testimonies.

During cross-examination, Alexy discussed his experience as a prosecutor. Alexy reviewed the substance of aspects of the testimony from the petitioner's criminal trial. He explained the factors that contributed to proceeding to trial against the petitioner and offering consideration to the co-defendants.

Alexy testified that his testimony that he "ain't got no deal, I could have sat here, it didn't really matter," was a fair and accurate representation of the "plea agreement with Mr. Kelly." Alexy explained that Kelly could have been silent or he could have lied.

Alexy agreed that the charges listed in the arrest warrant for Markese Kelly represented significantly more exposure for Kelly than 25 years. Alexy stated that he had no factual basis to charge any of the defendants in the October 12th shooting with murder.

Alexy stated that Kelly "had his own vernacular" and that he did not describe things the way that Alexy would have described them. Alexy recalled having the same "deal" with the petitioner's co-defendants as he had with Kelly. Alexy testified that during in chambers discussions before Kelly's sentencing, Fasano would have wanted to know if Kelly "fulfilled the terms of the plea."

During re-direct examination, Alexy testified that if Kelly had sat silently on the witness stand at the petitioner's criminal trial, Alexy would have recommended a much higher sentence for Kelly. Alexy's recommendation would have been higher if Kelly had come to the petitioner's criminal trial and told the jury that the petitioner was somewhere else at the time of the shooting.

Alexy agreed that a witness not being forthcoming about an agreement that he had with the prosecuting authority could be false testimony that he would have the duty

to correct. Alexy believed that the discussions that occurred off the record in chambers with Judge Fasano were adequately summarized on the record.

Paul Carty testified about his representation of the petitioner at his criminal trial. He was not aware of any agreement between the state and Mr. Kelly during his representation of the petitioner. He did know that the codefendants' testimonies were going to be made known to the courts at the time of their respective sentencings. Carty did not believe that Kelly identified his motive to testify at the petitioner's criminal trial during his testimony. Kelly did not testify that he was expecting to get a lighter sentence.

During cross-examination, Carty stated that he had brought Kelly's motive to testify to the attention of the jury. He explained that it was the standard practice in New Haven for a cooperating codefendant to plead guilty prior to their codefendants' trial, then testify at the trial, and then be sentenced subsequent to their testimony. The reasons for this were to secure the actual helpful testimony, and because the witness is more helpful to the State if he has not been sentenced as a result of his cooperation at the time of the trial.

During re-direct examination, Carty testified that he had represented cooperating witnesses with pending criminal matters as clients. If he did not think that having them testify would be helpful, he would not have them plea under an open plea. Carty understood the practice in New Haven in these types of situations, and he believed that this system was in place because these witnesses were more helpful to the prosecution if there was ambiguity in the sentences the cooperating witnesses would ultimately receive.

Erik Eichler, an investigator working for habeas counsel, testified about his dealings with Markese Kelly before the habeas trial. Eichler took a statement from Kelly where Kelly stated that he knew that he would be receiving consideration in exchange for his testimony at the petitioner's criminal trial. Eichler also served a subpoena on Kelly to appear at the habeas trial. Kelly did not appear at the habeas trial as instructed by the subpoena.

Habeas counsel asked the habeas court to issue a capias for Kelly, or in the alternative, to enter his sworn statement into evidence under the residual hearsay exception. In an offer of proof, habeas counsel represented that the interview with Kelly and his statement indicated that he was aware that he would receive consideration for his favorable testimony at the petitioner's criminal trial. Kelly's statement was entered as an exhibit for identification.

During questioning from the habeas court, Eichler testified that he did not attempt to contact Kelly to remind him about the court appearance or offer him transportation after serving him with the subpoena. Eichler did not attempt to determine whether Kelly was incarcerated on the day of the habeas trial. He did not confirm that Kelly was alive on the day of the habeas trial. He estimated that he spoke to Kelly for approximately 45 minutes when he located and interviewed him. He did not add any words that were not said by Kelly to the statement. Eichler knew that Kelly was able to read because Kelly started to read the statement out loud to him before he signed the statement. After serving Kelly with the subpoena, Eichler told Kelly that he could contact habeas counsel if Kelly needed help with transportation to the habeas trial. Habeas counsel's contact information was on the subpoena.

The habeas court made the finding that Kelly was not unavailable at the habeas trial. The habeas court also found that the written statement of Kelly offered by Kelly did not "bear the equivalent guarantees of trustworthiness and reliability." The habeas court did not issue a capias, and the statement was not admitted as a full exhibit.

F. The Habeas Court's Memorandum of Decision

In its memorandum of decision denying the petitioner's petition for a writ of habeas corpus, the habeas court made the following findings of fact and conclusions of law:

- The prosecutor "credibly took exception to the term 'agreement'" and instead indicated that there was "mutual understanding that the prosecuting authority would make Mr. Kelly's cooperation known to the Court at the time of his sentencing, after having given testimony in the underlying matter." A-36.
- The prosecutor "properly disclosed to the defense that Kelly would testify against the petitioner, that Kelly had entered guilty pleas before trial, that there was no specific sentencing agreement for Mr. Kelly, and that his cooperation would be made known to the sentencing judge after trial." A-37.
- The habeas court implicitly credited the prosecutor's opinion that Kelly's testimony was accurate, "especially in light of the cross-examination." *Id.*
- Defense counsel testified that he felt Kelly's trial testimony made clear for the jury his motive to testify. *Id.*
- Defense counsel used his knowledge Kelly's motive to testify to "effectively impeach" Kelly's credibility. A-37-38.
- Markese Kelly's trial testimony was not false or misleading. A-38.
- There are no "magic words" that a witness must use to express his motive to testify. *Id.*
- It is the duty of "reasonable competent counsel" to "draw the fact-finder's attention to the witness' motive to testify, falsely in some cases, through proper-cross examination and closing argument." A-38.

G. The Connecticut Supreme Court Decision

In reviewing the factual background that placed the context on Kelly's criminal trial testimony, the Connecticut Supreme Court focused on the prosecuting authority's comments at Kelly's *sentencing*, that occurred after the petitioner's criminal trial. App. A-

10-11. However, Kelly's *guilty plea* hearing transcript was also evidence, and that transcript including the prosecuting authority's own recitation of the understanding between Kelly and the prosecuting authority: that Kelly understood that the level of his cooperation would be made known to the sentencing judge after Kelly testified at the petitioner's criminal trial. App. A-45.

Nonetheless, the Connecticut Supreme Court "agree[d] with the respondent" Commissioner of Correction that "there was no false or misleading testimony to correct." App. A-12. The Connecticut Supreme Court thereafter accepted the respondent's invitation to recast Kelly's testimony in an unjustifiably benign light, justifying Kelly's answers as simply "denying that he knew what *specific sentence* he would receive or whether he would receive any leniency at all." *Id.*

After correctly reviewing this Court's longstanding jurisprudence about the due process violation that results from the government's presentation of false testimony, the Connecticut Supreme Court concluded that the petitioner had taken Kelly's testimony, where Kelly had flatly and falsely denied he had any understanding or deal with the government about his testimony, "out of context." *Id.* The Connecticut Supreme Court explained that Kelly's answer to the direct question about whether he had "*any* understanding of what *could* happen if you came in here and testified," which was a flat "nope" was not misleading when taken in context, despite the guilty plea transcript that included the prosecutor's statement that Kelly understood that his cooperation would be brought to the attention of the sentencing court. *Id.* In other words, Kelly's plainly false answer to a general question from the prosecutor was not false because it was bunched together with other more specific questions from the prosecutor that Kelly answered

accurately. The Connecticut Supreme Court then reviewed the testimony of the prosecutor, delivered at the habeas trial, that he understood that Kelly was answering the question about whether he had an expectation of a specific question when he answered "nope" to the general question of whether he had any understanding about what could happen as a result of his testimony. *Id.* at A-13. Next, the majority cherry picked from Kelly's plea hearing, where the record made clear that there was no specific understanding or agreed upon sentence to support the respondent's position, reasoning "[i]ndeed, Alexy never asked Kelly whether he expected that his cooperation would be made known to the sentencing judge, and Kelly never testified on that precise issue." The majority then stated its conclusion that "Kelly's testimony on direct examination was not substantially misleading." *Id.*

The majority then turned to the cross-examination of Kelly, where, contrary to the record from Kelly's plea agreement, Kelly testified repeatedly that he did not "know nothing about no deals." *Id.* The majority then filtered the plain record through the rigors of "context" and concluded that this testimony was also not "substantially misleading" despite the fact that the record from Kelly's guilty plea did reflect that he had an understanding of the "deal" he had with the government. The majority then conflated the charge bargaining that took place before Kelly testified, which Kelly did acknowledge in his testimony, with the continuing incentive to testify favorably for a benefit at his sentencing, which Kelly did not acknowledge in his testimony. Finally, where the record clearly displays Kelly denying having *any* expectation for his testimony, the Connecticut Supreme Court majority accused the petitioner of taking the record of context for arguing that this testimony was inconsistent with the record from Kelly's plea hearing.

The conclusion of the majority was that Kelly's challenged cross-examination testimony "simply does not suggest that Kelly was denying that he had any expectation regarding whether the state would make his cooperation known to the sentencing judge, as the petitioner suggests" as it noted that Kelly was not specifically asked that question on cross-examination. *Id.* The majority used the word "certainly" to describe its level of confidence in its conclusion that Kelly had not denied an expectation that his cooperation would be made known to the sentencing judge. *Id.*

The majority noted that the plea agreement had been disclosed to the defense and that the defense never objected to Kelly's testimony as "misleading or inconsistent with the terms of the agreement." App. at A-13-14.The majority noted this was "not dispositive" but nonetheless was a factor to consider in determining whether the testimony was false or misleading.

The majority then sought to distinguish a case relied upon by the petitioner in his reply brief, *United States v. Bigeleisen*, 625 F.2d 203 (8th Cir. 1980), where the cooperating witness flatly denied that there was anything he "was supposed to get in relation to testifying?" to which the witness answered "No, there is not." *Id.* at 206; App. at A-14. The supposed distinguishing came from the majority's conclusion that the witness in *Bigeleisen*, unlike in the petitioner's case had "categorically denied that he was expecting receive *any* benefit in exchange for his testimony. *Id.* The majority recited the logic in *Bigeleisen* that "in light of [the witness'] complete denial of any benefit, the jury could have concluded that no agreement existed at all." To gloss over that Kelly had also made a blanket denial of any continuing expectation, the majority reasoned that the jury at the petitioner's criminal trial was apprised that Kelly had been allowed to

plea to nonhomicide charges with a maximum of twenty-five years incarceration, and that he did not know what his sentence would be. The majority admitted that the habeas court was correct in stating that Kelly's testimony was "not a model of clarity" but that the habeas court had reasonably concluded the testimony was not false or "substantially misleading." In concluding its review of the petitioner's claim, the majority drew from the respondent's appellate brief to recommend that

> to ensure that the jury is accurately and fully informed of the nature of a cooperating witness' plea agreement and any potential benefits that the witness may receive in exchange for his or her testimony, we believe that it is the better practice, although not constitutionally required, for the prosecutor to ask fact-specific, leading questions of a cooperating witness instead of open-ended questions that may evoke incomplete or ambiguous responses.

App. at A-15. The majority "urge[d]" the State to follow its suggested procedure. *Id.*

REASONS FOR GRANTING THE PETITION

I. This Case Involves an Issue That, Without Further Guidance, Has the Potential to Be Routinely Mishandled By the Lower Courts.

The Connecticut Supreme Court's decision displays where a lack of clear and unambiguous guidance about how key constitutional rights are to be enforced can lead to unjust and unacceptable results. This petition does not present a circuit split as the exclusive basis for certification, but rather the Connecticut Supreme Court has decided the petitioner's case in such a way as to embolden prosecutors to be less cautious with the protection of the due process rights of criminal defendants. This case presents an opportunity for this Court to flesh out the contours of the due process in relation to the issue of the presentation of false testimony by the government at a criminal trial.

Fortunately, there is a sense that the most obvious and egregious cases of prosecutorial misconduct or impropriety will be handled appropriately by the lower courts. However, a system exists wherein prosecutors are well equipped to act in less

egregious but still harmful ways, where they know that their convictions will not be seriously threatened because they will likely be given the benefit of every possible doubt by the lower courts, acting within some of the vagueness that still exists in this particular area of the law. This Court can and should step in to further speak on how courts should deal with false and misleading testimony in criminal trials. In this case, this Court should grant review because a key piece of information was clearly withheld from the jury about the incentive of a key government witness to testify on behalf of the State's theory. Simple actions from the prosecuting authority could have prevented this problem, as the majority of the Connecticut Supreme Court acknowledged but failed to give any meaningful force of law. The Connecticut courts have recast this Court's guidance in such a way as to largely dilute the protections that this Court has identified must exist for criminal defendants.

A system of rules that provides a clear roadmap for prosecutorial gamesmanship that involves the undermining of the truth-seeking function of a jury trial is not a good system. This is not a good system in principle or in practice. In principle, the rules should seek to protect the norms that we hold valuable in our system of laws, which, for decades, this Court has stated includes the principle that "a conviction obtained through the use of false evidence, known to be such by representatives of the State," runs afoul of due process. *Napue v. Illinois,* 360 U.S. 264, 269 (1959). In practice, by presenting this roadmap to prosecutors, and continuing to recast records in the light most favorable to the government, courts will only encourage government officials to push the margins further of what level of misdeeds they can undertake before they are called "substantial" or otherwise disapproved by reviewing courts. This is the opposite of justice.

Operating at a time of lower than usual faith in our institutions, it is hard to imagine that there are many government actions that serve to undermine faith in government more than the government knowingly presenting false evidence to secure the deprivation of liberty of citizens. Such practices shock the conscience of the legal layman. Yet our courts find ways to condone exactly such practices. The process by which the lower courts find ways to excuse these actions further undermine faith in our institutions because it seems the deck is doubly stacked: prosecutors are not living up to their duty to justice, and the courts are failing to hold those prosecutors accountable. The Connecticut Supreme Court expends considerable ink to protect the State's conviction and avoid the obvious and clear truth: Kelly falsely testified that he did not have a deal, expectation, or understanding of how his testimony would benefit him at sentencing, the prosecutor knew this was false, did not correct it, and the jury never had crucial information relevant to the judging Kelly's credibility and the petitioner's guilt.

II. The Connecticut Supreme Court's Decision Is Wrong

Markese Kelly falsely told the jury at the petitioner's criminal trial that he had no understanding of what could happen if he came to court and testified against the petitioner at the petitioner's criminal trial. He insisted during cross examination that there was no deal or expectation about his testimony against the petitioner. This was false. Several weeks before Kelly's testimony at the criminal trial, the same prosecutor that prosecuted the petitioner stood before another judge that took Kelly's plea and informed the court that Kelly understood that his cooperation in the petitioner's matter would be brought to the attention of the sentencing court in Kelly's matter. At that same hearing, Kelly himself acknowledged that he had this understanding.

A majority of the Connecticut Supreme Court concluded that Kelly's testimony was not "substantially misleading" and that, therefore, the petitioner's constitutional rights were not violated. Two justices, writing a concurrence, agreed with the petitioner that the testimony was misleading, but concluded that there was no constitutional deprivation because the petitioner's counsel had been informed of the understanding between Kelly and the State. App. at A-17.

None of the justices reached the issue of materiality. None of the justices seriously examined how the false testimony of Kelly actually impacted the fairness of the petitioner's trial. Both the majority and concurrence from the Connecticut Supreme Court are plain wrong. The majority takes a tortured approach to the record in order to justify the conclusion that Kelly's testimony was not "substantially misleading." The concurrence took the incorrect position that it is the defense's duty to challenge false testimony that the prosecutor has knowingly presented through its own witnesses. None of these approaches adequately protects the due process rights of criminal defendants.

The record is abundantly clear that the true nature of Kelly's motive to testify favorably for the prosecution was obscured from the jury, and that the prosecutor did nothing to clarify the contours of that understanding. The majority of the Connecticut Supreme Court, after minimizing the egregiousness of the conduct during Kelly's testimony, set forth the "substantially misleading" standard and concluded that the testimony of Kelly was not substantially misleading. This conclusion, as tortured as it is, relies entirely on a view of what the prosecutor may have intended and what Kelly may

have meant in his testimony, without taking any consideration into how the jury would almost certainly view this testimony.[4]

Further, the Connecticut Supreme Court's approach to the record, to cast it in the light most favorable to the government's arguments, is inconsistent with the goal of meaningfully protecting the rights of criminal defendants on a topic that this Court has repeatedly stated is a basic and foundational right in our criminal justice system. In this way, the majority's view is also inconsistent with this Court's holding in *Alcorta v. Texas*, 355 U.S. 28 (1957), where this Court reversed the denial of a prisoner's habeas petition where the witness' testimony "taken as a whole, gave the jury the false impression" that the witness did not have a romantic relationship with the defendant's wife, where the defendant was making a heat of passion defense claim at trial. *Id.* at 30-32. In *Alcorta*, the witness was specifically instructed by the prosecutor to not mention his romantic affair with the victim unless the witness was specifically asked about it by the defense. The defense did not ask the specific question, but this Court reviewed an exchange where the prosecutor asked questions that clearly gave the impression that there was no relationship between the witness and the victim. Unlike the majority decision, this Court did not quibble with the irrelevant question of whether the witness had actually committed perjury or if the specific answers were correct. Rather, this Court correctly concluded that the testimony as a whole gave the jury a false impression about a

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[4] The petitioner does not concede the correctness of the majority's conclusion, as it defies common sense and logic that a prosecutor would ask whether a cooperating witness had "any" understanding about what "could" happen when he meant to elicit whether that witness had a specific understanding of what would happen in exchange for his testimony. In other words, the majority uses "context" to give the clear record the exact opposite of its clear meaning.

material fact. A review of that case reflects that the false testimony in the petitioner's case was much more egregious, where Kelly was specifically asked, and flatly denied, that he had any expectation about what could happen if he came to court and testified on behalf of the government, despite Kelly and the prosecuting authority's knowledge that Kelly had recently been advised of the understanding that his cooperation would be made known to his sentencing judge.

Finally, the conclusion that the testimony was not false, and that the petitioner simply took the questions out of context at the petitioner's criminal trial, further contradicts the record in that the other cooperating witnesses both explained the details of their similar agreements when asked by the prosecuting authority. Again, it defies logic and common sense to review this record and conclude anything other than Kelly falsely denied an understanding and expectation between himself and the State, and the prosecuting authority did nothing to correct it. Nonetheless, even assuming that the testimony was not "false" and was simply "misleading" that distinction should make no serious difference in addressing the question of whether the petitioner's due process rights were violated. The prosecutor knew that Kelly was not revealing to the jury that he was on notice that his testimony at the petitioner's trial would be brought to the attention of the sentencing judge, and that his helpful testimony would potentially lead to a more favorable sentence in his own criminal matter. The prosecutor did nothing to clarify this for the jury.

III. This Case Is an Appropriate Vehicle To Address A Common Issue That Plagues Our Criminal Justice System.

This case presents this Court with the opportunity to clarify a prosecutor's duties when his own witness presents testimony that the prosecutor knows, or should have

known, is false. This case is an appropriate vehicle for this Court to clarify whether the culpability of the prosecutor is relevant to a determination of whether a criminal defendant's due process rights are violated. This case is an appropriate vehicle for this Court to clarify whether the prosecuting authority bears the burden of clearly placing the existence and general terms of any agreement or understanding between a government witness and the government. The petitioner submits that this Court should conclude, on this record, that the jury was presented with false testimony that the prosecuting authority knew was false, and that the prosecutor's intentions are irrelevant to a determination of whether a defendant's due process rights have been violated. Further, this Court should find that the prosecuting authority bears the burden of clearly placing the existence and terms of any agreement or understanding between the government and its witnesses before the jury, even where the government has disclosed the existence of such to defense counsel. This Court should find, in clear and absolute terms, that where a prosecutor has presented false testimony through his witness, a criminal defendant's due process rights are violated, unless the government can show that there is no reasonable likelihood that the false testimony impacted the jury's verdict. *United States v. Bagley*, 473 U.S. 667, 679 n. 9 (1985) (citing *Napue*).

The majority decision is so close to setting forth a meaningful and appropriate rule for prosecutors in dealing with the testimony of cooperating witnesses. In its epilogue to denying the petitioner's due process claim resulting from Kelly's false testimony, the majority stated

> Nevertheless, in reaching our conclusion in the present case, we are mindful of the difficulties that defendants face when attempting to provide jurors with the information that they need to make a reliable credibility determination regarding the testimony of a cooperating accomplice. We

> find those difficulties especially acute when the accomplice has pleaded guilty, has not yet been sentenced at the time of the defendant's trial, and has no express agreement with the state as to a specific sentence. Accordingly, to ensure that the jury is accurately and fully informed of the nature of a cooperating witness' plea agreement and any potential benefits that the witness may receive in exchange for his or her testimony, we believe that it is the better practice, although not constitutionally required, for the prosecutor to ask fact-specific, leading questions of a cooperating witness instead of open-ended questions that may evoke incomplete or ambiguous responses. App. at A-15.

The majority, in accurately setting forth the very real problem faced by many defendants in criminal trials where the government offers the testimony of cooperating witnesses, offered no explanation for why it decided to make this pronouncement a "not constitutionally required" advisory request to prosecutors. This Court should consider whether to adopt the guidance set forth by the majority with the caveat that this procedure *is* constitutionally required in that where it is not followed, and the result is that the jury is misled about the true nature of a cooperating government witness' incentive to testify favorably to the government, a defendant's due process rights are violated if the defendant can show that the false or misleading testimony was material. The policy justification for such a rule is intuitive: a system where prosecutors are incentivized to overprotect the rights of defendants is superior to a system that encourages these government actors to play at the margins of the acceptable. This Court should take the petitioner's case to consider refocusing those incentives to strengthen the due process protections afforded criminal defendants.

Having any situation where a prosecutor presents uncorrected false or misleading testimony subjected to the "reasonable likelihood" materiality standard will adequately protect the rights of criminal defendants without providing them unnecessary or inappropriate windfalls. Under an absolute application of this standard, prosecutors

will know that anytime they present false or misleading testimony, their convictions will be in jeopardy. This is a very real and meaningful incentive for them to act appropriately in fulfilling their constitutional duties. Reviewing courts will be tasked with weighing whether the evidence is so overwhelming that reversal is inappropriate. However, application of this standard will serve the policy purpose of calling a spade a spade in all instances where false testimony is knowingly presented. This will, at least hopefully, create some deterrent effect on prosecutors, who will be subject to this non-deferential standard of review. While the purpose of the law is not to punish prosecutors, but to protect defendants, it is clear that clear and meaningful consequences for failure to faithfully execute their duties will almost certainly encourage prosecutors to act appropriately. The alternative, which is what currently exists, is that prosecutors know that they operate in a current system that is likely to excuse all but the most egregious violations. Obviously, this knowledge does not incentivize faithful execution of a prosecutor's duty to "do justice." *See United States v. Carroll*, 26 F.3d 1380, 1389 (6th Cir. 1994) (citing *Berger v. United States*, 295 U.S. 78 (1935)). This Court should clarify that the government bears the burden of ensuring that false testimony is not knowingly presented by government witnesses. Here, even accepting the prosecutor's view that he only intended to ask Kelly's about whether he had a specific understanding of a specific sentencing outcome, that is not the question that he actually asked, and the answer that he actually elicited was false. It is not the job of reviewing courts to find a context for the clear record in order to avoid the uncomfortable conclusion that a petitioner's due process rights have been violated. In order to uphold a criminal defendant's due process rights, a reviewing court should look at the record as it exists

to ascertain the clear meaning reasonably ascertained by the jury, and to move to the materiality analysis from there. This Court should review the decision of the Connecticut Supreme Court to clarify the procedure and substance of determining whether a petitioner's due process rights have been violated.

Applying this correct standard to the facts of the petitioner's case, here there is a reasonable likelihood that the petitioner would not have been convicted but for the false testimony of Kelly. First, Kelly was a key witness for the State. The prosecuting authority acknowledged during closing arguments that there were no eyewitnesses implicating the petitioner other than the codefendants. The forensic evidence did not directly implicate the petitioner in the shootings. Kelly's denial that he had a motive to testify in favor of the prosecution not only bolstered the reliability of his own testimony; it also bolstered the reliability of the testimony of Jones and Little. Jones and Little both disclosed their incentive to testify favorably to the prosecution during their respective testimonies before the jury at the petitioner's criminal trial. Without the ability to impeach Kelly on his own motive to testify, he undermined the defense's ability to argue that all of the supposed co-conspirators had a strong motive to implicate the petitioner as the most culpable shooter. This inability also undermined defense counsel's main theory during closing argument: that Kelly, Mitchell, Jones, and Little were the only individuals involved with the shooting, and that they all pointed to the petitioner as the most culpable shooter because that allowed them to escape their own culpability. Without the ability to reveal to the jury the true depth of Kelly's motive to testify at the trial, this argument was severely weakened.

Second, there was no physical evidence linking the petitioner to the crime. The clothing found in the trunk of the Lincoln did not directly link the petitioner to the shooting, it only connected the petitioner to his codefendants, a link that was not in dispute. Third, the petitioner's trial counsel's cross-examination of Kelly does not substitute for evidence concerning his expectation of leniency. Counsel brought to the jury's attention Kelly's criminal history and lifestyle, and the cold-blooded manner in which he proposed to conduct the killings. However, Kelly adamantly denied that he had an agreement, deal, or that he was otherwise expecting leniency. Finally, while the prosecuting authority did not specifically rely on Kelly's lack of motivation to testify, the prosecuting authority did discuss the important status that the testimony of each of the codefendants had in the prosecution's case. Additionally, a review of the prosecuting authority's closing argument reveals that the prosecutor relied heavily on Kelly's testimony to guide the narrative that the prosecuting authority offered to the jury. The prosecuting authority did not discuss Kelly's motive to testify or lack thereof. Collectively, all of these factors show that there is a reasonable likelihood that the petitioner would not have been convicted had Kelly's false and misleading testimony been corrected.

IV. This Case Potentially Involves an Issue That Is the Subject of a Deep and Persistent Split on an Important Issue.

The central reason that the petitioner seeks this Court's review is so that this Court may speak further on a crucial issue that is central to our criminal justice system and the rule of law. However, this Court may also find this case to be an appropriate vehicle to resolve an outstanding circuit split on a crucial issue of national importance: whether a prosecutor is relieved of the duty to correct false testimony where the

defense is on notice that the testimony is false. The majority did not rest its decision on this issue, but the concurrence, which found that Kelly had offered misleading testimony about his cooperation agreement with the government, nonetheless found that there was no due process violation because the petitioner was on notice about the nature of the plea agreement.[5]

Depending on how the Court addresses the central issue in this case, this case may also present the opportunity for this Court to consider this issue cited by the concurrence. The issue is the subject of a deep and enduring split between circuits and state supreme courts. At least three federal courts of appeals and two state supreme courts have taken the absolute view of this Court's false testimony precedent: that a defendant's due process rights are violated when the government secures a conviction

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[5] The petitioner also raised a due process claim directly under *Brady v. Maryland*, 373 U.S. 83 (1963), because the prosecuting authority's disclosure to the petitioner was only that Kelly's cooperation would be made known to the sentencing judge in Kelly's matter, while the record reflected that the prosecutor later appeared at Kelly's sentencing and asked for a specific sentence of 10 years of incarceration based upon Kelly's satisfactory performance under the plea agreement. The substance of this claim was that the prosecuting authority should have disclosed that he might ask for a specific sentence that was extremely favorable to Kelly, so that defense counsel could inquire about that possibility during cross-examination. This alternative claim was presented as a counter to the view that the responsibility of correcting false testimony rests entirely upon the defense when the existence of an agreement is disclosed. The Connecticut Supreme Court's rejection of this claim was based upon the Second Circuit's decision in *Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003) holding ("[t]he government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony."). The petitioner suggests that if this Court considers whether the disclosure of a plea agreement is sufficient to relieve a prosecutor of his duty to correct false testimony about that agreement, it may also examine the scope of that duty of disclosure, and whether it includes a disclosure of the *entire* range of potential favorable treatment possible as a result of a cooperator's testimony.

through the knowing use of false testimony, even where the defendant knew the testimony was false. Recently in *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 2010), the Fifth Circuit noted that the prosecutor's disclosure to the defense that a witness had agreement with the prosecution to cooperate in exchange for consideration did not obviate the need for prosecutor to correct false testimony, stating "[t]he defendant gains nothing, by knowing that the Government's witness has a personal interest in testifying unless he is able to impart that knowledge to the jury." *Id.* This is in line with other Fifth Circuit cases addressing the issue. *See United States v. Brown*, 86 Fed. Appx. 749 (5th Cir. 2004); *United States v. Mason*, 293 F.3d 826, 829 (5th Cir. 2002).

Similarly, in *United States v. Foster*, 874 F.2d 491 (8th Cir. 1988), the Eighth Circuit stated that a defendant's inability or failure "to correct the prosecutor's misrepresentation … d[oes] not relieve the prosecutor of her overriding duty to the court, and to seek justice rather than convictions." *Id.* at 495.

In *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000), the Ninth Circuit succinctly stated that "the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false." *Id; see also Soto v. Ryan*, 760 F.3d 947, 968 (9th Cir. 2014) (same). It can hardly be disputed that, as the Ninth Circuit stated in *LaPage* "[a]ll perjury pollutes a trial, making it hard for jurors to see the truth." *LaPage* 231 F.3d at 492.

The Michigan and New Hampshire Supreme Courts have both held that a defendant is denied due process of law when the government presents uncorrected

false testimony, even where the defense has information that the testimony is false. In *People v. Smith,* 870 N.W. 2d 299 (Mich. 2015), the Michigan Supreme Court state that the government's "obligation to avoid presenting false or misleading testimony of its own witness begins and ends with the prosecution . . . ." *Id.* at 306 n.7. In *State v. Yates*, 629 A.2d 807, 809-810 (N.H. 1983), the New Hampshire Supreme Court clarified that where government witnesses give false testimony, "the final responsibility rest[s] with the prosecutor, not [the defendant], to bring [false testimony] to the attention of the court and the jury." *Id.* at 810.

At least three federal courts of appeals and two state supreme courts, including Connecticut, have suggested that the duty and the burden of bringing false testimony of government witnesses to the attention of the jury falls on the defense when the defense is aware that the witness is lying. *United States v. Stein*, 846 F.3d 1135 (11th Cir. 2017) (defendant cannot establish a due process violation related to government presentation of false testimony unless he also can "identify evidence the government withheld that would have revealed the falsity of the testimony" or where the government "capitalizes" on the false testimony); *United States v. Crockett,* 435 F.3d 1305, 1318 (10th Cir. 2006) (holding that "[t]he government had disclosed th[e] impeachment evidence and hence *Napue* is inapposite."); *Ross v. Heyne*, 638 F.2d 979, 986 (7th Cir. 1980) (concluding no due process violation "[w]hen a criminal defendant, during his trial, has reason to believe that perjured testimony was employed by the prosecution" and fails to "impeach the testimony at the trial."); *DeVoss v. State*, 648 N.W.2d 56, 63-64 (Iowa 2002) (same); Appendix at A-18 (concurring opinion).

The opportunity to address this deep divide on a central issue relating to the fundamental fairness of our criminal justice system is another factor that weighs in favor of reviewing this case. The lower courts await a definitive answer on this question, and certification is warranted to consider providing that answer in this case.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

Mashawn Greene
The Petitioner

December 24, 2018

By _____

Joshua G. Grubaugh
Pieszak-Miller & Brodeur, LLC
Assigned Counsel
P.O. Box 173
West Mystic, CT 06388
Tel (860) 535-1989
Fax (860) 535-3919
Email jgg@ctpostconviction.com

HIS ATTORNEYS

Table of Contents for the Appendix to the Petitioner's Petition for Writ of Certiorari

Decision of the Connecticut Supreme Court in *Mashawn Greene v. Commissioner of Correction*, 330 Conn. 1 (2018).

August 28, 2018

Document:Greene v. Comm'r of Corr., 330 Conn. 1

Greene v. Comm'r of Corr., 330 Conn. 1

Supreme Court of Connecticut

November 9, 2017, Argued; August 28, 2018, Officially Released

SC 19961

Reporter

330 Conn. 1 * | 2018 Conn. LEXIS 271 ** | 2018 WL 3977155

MASHAWN GREENE v. COMMISSIONER OF CORRECTION

Prior History: [**1] Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, Oliver, J.; judgment denying the petition, from which the petitioner, on the granting of certification, appealed.

Greene v. Warden, 2016 Conn. Super. LEXIS 1823 (Conn. Super. Ct., June 20, 2016)

Disposition: Affirmed.

Core Terms

sentence, misleading, cooperation, plea agreement, criminal trial, guilty plea, twenty-five, witness', charges, expecting, questions, no deal, responded, false testimony, recommend, capias, first degree, cross-examination, subpoena, present case, imprisonment, assault, direct examination, credibility, shooting, marks, accurately, cases, sentencing judge, quotation

Case Summary

Overview

HOLDINGS: [1]-The prisoner was not entitled to a writ of habeas corpus on due process grounds following the prosecutor's alleged failure to correct false testimony from a key witnesses because the prosecution had no duty to correct the witness where the witness did not testify falsely that he did not understand what would happen in his own prosecution if he cooperated; [2]-The state did not violate petitioner's due process rights with a Brady violation because, inter alia, there was no showing the prosecutor knew prior to testimony what specific sentence he would recommend for the witness; [3]-The trial court did not abuse its discretion by denying petitioner's request for a capias for the witness's arrest during the habeas trial, Conn. Gen. Stat. Ann. § 52-143, because, inter alia, that court could have reasonably concluded petitioner was party responsible for the witness's failure to appear.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > Trials > Examination of Witnesses

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Use of False Testimony

HN1 **Brady Materials, Brady Claims**
The state's failure to correct false testimony violates due process, and suppression by the prosecution of evidence favorable to accused violates due process. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

Criminal Law & Procedure > ... > Review > Specific Claims > Prosecutorial Misconduct

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Counsel > Prosecutors

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Use of False Testimony

HN2 **Standards of Review, Clear Error Review**
Whether a prosecutor knowingly presented false or misleading testimony presents a mixed question of law and fact, with the habeas court's factual findings subject to review for clear error and the legal conclusions that the court drew from those facts subject to de novo review. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Use of False Testimony

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials >

Duty of Disclosure

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury >

Credibility of Witnesses

HN3 **Brady Materials, Brady Claims**
The rules governing a court's evaluation of a prosecutor's failure to correct false or misleading testimony are derived from those first set forth by the United States Supreme Court in Brady v. Maryland, which held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor. The United States Supreme Court also has recognized that the jury's estimate of the truthfulness and reliability of a witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. Accordingly, the Brady rule applies not just to exculpatory evidence, but also to impeachment evidence; which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Use of False Testimony

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials >

Duty of Disclosure

HN4 **Brady Materials, Brady Claims**
Due process is offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. If a government witness falsely denies having struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception. Regardless of the lack of intent to lie on the part of the witness, this requires the prosecutor to apprise the court when he or she knows that the witness is giving testimony that is substantially misleading. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct >

Prohibition Against Improper Statements

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN5 **Prosecutorial Misconduct, Prohibition Against Improper Statements**
Where a defendant fails to object to a prosecutor's improper remarks, that demonstrates that defense counsel presumably did not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Use of False Testimony

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials >

Duty of Disclosure

HN6 **Brady Materials, Brady Claims**
The substantially misleading standard appears to have been first adopted by the United States Court of Appeals for the Third Circuit, which stated, without citation to authority, that the prosecutor is required to apprise the court when he knows that his witness is giving testimony that is substantially misleading. The Third Circuit has used the phrase substantially misleading to distinguish the situation in which the prosecutor knows that the state witness was committing perjury from the situation in which it should be obvious to the government that the witness' answer, although made in good faith, is untrue. The fact that testimony must be untrue, and not merely misleading, in order for the prosecutor to have an obligation to correct it is borne out by the seminal cases in this area. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Use of False Testimony

HN7 **Prosecutorial Misconduct, Use of False Testimony**
Due process is violated if the state obtains a conviction on the basis of false evidence, but any expansion of the false evidence standard beyond testimony that is, in fact, false, should be undertaken carefully. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Trials > Direct Examinations

Criminal Law & Procedure > Trials > Witnesses

HN8 **Trials, Direct Examinations**
To ensure that the jury is accurately and fully informed of the nature of a cooperating witness' plea agreement and any potential benefits that the witness may receive in exchange for his or her

testimony, the Supreme Court of Connecticut believes that it is the better practice, although not constitutionally required, for the prosecutor to ask fact-specific, leading questions of a cooperating witness instead of open-ended questions that may evoke incomplete or ambiguous responses. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials >

Duty of Disclosure

Criminal Law & Procedure > ... > Duty of Disclosure > Witness Lists >

Government Witnesses

HN9 **Brady Materials, Brady Claims**

In Brady v. Maryland, the United States Supreme 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. The United States Supreme Court has identified the three essential components of a Brady claim, all of which must be established to warrant a new trial: 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 wilfully or inadvertently; and prejudice must have ensued. Under the last Brady prong, the prejudice that the defendant suffered as a result of the impropriety must have been material to the case, such that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. A plea agreement between the state and a key witness is impeachment evidence falling within the definition of exculpatory evidence contained in Brady. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Duty of Disclosure > Witness Lists >

Appellate Review & Judicial Discretion

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials >

Duty of Disclosure

Criminal Law & Procedure > ... > Duty of Disclosure > Witness Lists >

Government Witnesses

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN10 **Witness Lists, Appellate Review & Judicial Discretion**

The existence of an undisclosed plea agreement is an issue of fact for the determination of the trial court. Furthermore, the burden is on the defendant to prove the existence of undisclosed exculpatory evidence. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record. When a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, and the credibility of witnesses is not the primary issue, the appellate court's customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Discovery & Inspection ▾ > Brady Materials ▾ > Brady Claims ▾

Criminal Law & Procedure > ... > Duty of Disclosure ▾ > Witness Lists ▾ >

Government Witnesses ▾

HN11 **Brady Materials, Brady Claims**
A prosecutor's intention to recommend a specific sentence for a cooperating witness is not subject to Brady if the intention has not been disclosed to the witness. The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, provided that it does not promise anything to the witnesses prior to their testimony. Any understanding or agreement between any state's witness and the state police or the state's attorney clearly falls within the ambit of Brady principles. An unexpressed intention by the state not to prosecute a witness does not. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Discovery & Inspection ▾ > Brady Materials ▾ > Brady Claims ▾

Criminal Law & Procedure > ... > Duty of Disclosure ▾ > Witness Lists ▾ >

Government Witnesses ▾

Criminal Law & Procedure > ... > Discovery & Inspection ▾ > Brady Materials ▾ >

Exceptions to Disclosure ▾

HN12 **Brady Materials, Brady Claims**
In the context of Brady claims, the fact that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony. More like this Headnote

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Criminal Law & Procedure > ... > Witnesses ▾ > Subpoenas ▾ > Scope ▾

HN13 **Subpoenas, Appellate Review & Judicial Discretion**
The standards governing the issuance of a capias are well established. If one is not warranted in refusing to honor a subpoena and it is clear to the court that his absence will cause a miscarriage of justice, the court should issue a capias to compel attendance. Conn. Gen. Stat. § 52-143 does not, however, make it mandatory for the court to issue a capias when a witness under subpoena fails to appear; issuance of a capias is in the discretion of the court. The court has the authority to decline to issue a capias when the circumstances do not justify or require it. In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. More like this Headnote

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Syllabus

The petitioner, who had been convicted of first degree manslaughter, among other crimes, in connection with a deadly shooting, sought a writ of habeas corpus, claiming, inter alia, that his right to due process was violated during the underlying criminal trial. The petitioner claimed that the prosecutor had failed to correct allegedly false testimony regarding a plea agreement from the state's key witness, K, who had pleaded guilty to nonhomicide offenses in connection with the same shooting but had not yet been sentenced at the time of the petitioner's criminal trial. Specifically, the petitioner claimed that K had reached an agreement for leniency at his own sentencing in exchange for testimony and falsely testified that he had no "deal" with the state. In addition, the petitioner claimed that the prosecutor had known before the petitioner's criminal trial, but failed to disclose, that he would ultimately recommend a favorable [**2] sentence for K. Prior to the habeas trial, the petitioner's private investigator, E, located K and issued a subpoena to compel his attendance at that trial. After K subsequently failed to appear, the habeas court denied the petitioner's request to issue a capias for K's arrest. Following the presentation of evidence, the habeas court found that K's testimony regarding his agreement was not false or misleading, that the prosecutor had sufficiently described to the petitioner the agreement between K and the state before the criminal trial, and that the terms of that agreement included no specific sentence. The habeas court, accordingly, rendered judgment denying the habeas petition, from which the petitioner appealed. *Held*:

1. The petitioner could not prevail on his claim that his right to due process was violated when the prosecutor failed to correct K's testimony, as the habeas court reasonably could have concluded that K's testimony was neither false nor substantially misleading and, therefore, that the prosecutor had no duty to correct it: this court's review of the challenged portions of K's testimony at the petitioner's criminal trial, when read in the context of questions pertaining [**3] to, inter alia, the length of the sentence K expected to receive, indicated that K neither denied the existence of his agreement with the state nor mischaracterized its terms, as K's testimony related to the expectations regarding the specific sentence he would receive rather than whether he was receiving any benefit in exchange for his testimony, and as K, in other portions of his testimony, clearly stated that he had pleaded guilty to nonhomicide charges, faced up to twenty-five years of incarceration, had not yet been sentenced, and did not know what sentence he would ultimately receive; moreover, the habeas testimony of the prosecutor, which the habeas court credited, indicated that he believed that K was denying that he had an expectation with respect to a specific sentence, transcripts from K's plea hearing demonstrated the absence of a prior, agreed on sentence, and the petitioner's trial counsel, who had been informed about the agreement between K and the state before the petitioner's criminal trial, failed to object during K's testimony; furthermore, this court indicated that it would be the better practice, although not constitutionally required, for the prosecutor to ask [**4] a cooperating witness fact-specific, leading questions that accurately embody the nature of any agreement between the witness and the state in order to ensure that a jury is accurately and fully informed of the nature of such an agreement and any potential benefits that such witness may receive in exchange for his or her testimony.

(*Two justices concurring separately in one opinion*)

2. The petitioner could not prevail on his claim that the state had violated his right to due process on the ground that the prosecutor knew before his criminal trial, but failed to disclose, that he would ultimately recommend a sentence for K that was considerably lower than the maximum twenty-five year sentence to which K was exposed; the petitioner failed to cite any evidence to indicate that the prosecutor promised a specific sentence in exchange for K's testimony or knew before K testified what specific sentence he would recommend and, therefore, failed to establish the necessary factual predicate for his claim.

3. The habeas court did not abuse its discretion in denying the petitioner's request to issue a capias for K's arrest after K failed to comply with the subpoena compelling his attendance at the [**5] petitioner's habeas trial; the petitioner submitted no evidence that K's failure to comply with the subpoena was not warranted, and, on the basis of the evidence before it, the habeas court reasonably could have concluded that the petitioner, who made no effort to contact K in the weeks preceding the habeas trial to ensure his attendance, was partially responsible for K's failure to appear.

Counsel: Michael W. Brown, with whom was Desmond Ryan, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom were Rebecca A. Barry, assistant state's attorney, and, on the brief, Patrick J. Griffin, state's attorney, for the appellee (respondent).

Judges: Palmer, McDonald, Robinson, D'Auria, Mullins and Vertefeuille, Js. [*] MULLINS, J. In this opinion PALMER, ROBINSON and VERTEFEUILLE, Js., concurred.

Opinion by: MULLINS

Opinion

[*3] MULLINS, J. In this appeal, we must decide whether the habeas court erred in denying the petition for a writ of habeas corpus filed by the petitioner, **Mashawn Greene**.[1] The two primary issues are whether the habeas court properly determined that the petitioner's due process rights were not violated during the underlying criminal trial when the prosecutor failed: (1) to correct certain [**6] allegedly false testimony from one of the state's key witnesses, Markeyse Kelly,[2] and (2) to disclose certain evidence favorable to the petitioner. The third **[*4]** issue, which arose during the habeas trial, is whether the habeas court abused its discretion by denying the petitioner's request for a capias after Kelly failed to comply with a subpoena commanding his attendance at the habeas trial. We conclude that the habeas court properly determined that the state had not violated the petitioner's due process rights and that the habeas court did not abuse its discretion by denying the petitioner's request for a capias. Accordingly, we affirm the judgment of the habeas court.

The jury in the underlying criminal case reasonably could have found the following facts, as set forth in this court's decision in *State v.* ***Greene***, 274 Conn. 134, 139-40, 874 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006). "On the evening of October 10, 2001, the [petitioner] purchased the following stolen firearms: a Smith & Wesson Daniels Cobray M-11 nine millimeter submachine gun (Cobray M-11); a Braco Arms .38 caliber pistol; and a Mossberg 500A shotgun. At the same time, the [petitioner] purchased stolen ammunition for the Cobray M-11 consisting of eight full thirty-five round magazines [**7] loaded with nine millimeter Luger Subsonic bullets. A Cobray M-11 is a semiautomatic or automatic assault weapon capable of emptying a thirty-five round magazine in [less than] two seconds.

"On October 12, 2001, the [petitioner], Franki Jones . . . Kelly, Shaunte Little and Marquis Mitchell learned that individuals from the area of New Haven known as 'the Tre' were planning to 'shoot up' the area of New Haven known as 'West Hills' in retaliation for a shooting that had occurred the night before. The Tre area includes Elm Street and Orchard Street and the West Hills area includes the McConaughy Terrace projects. Rather than wait for the retaliation, the [petitioner], Jones, Kelly, Little and Mitchell decided to 'go through the Tre first.'

[*5] "The [petitioner] drove the four men to Jones' house where those who were not armed already retrieved guns and those with lighter colored clothing changed into darker attire. The [petitioner] armed himself with the Cobray M-11. All five men got into Jones' grey Lincoln Town Car and drove to the Tre. After they saw a group of people on the corner of Edgewood Avenue and Orchard Street, Jones parked the car next to a vacant house on Orchard Street. The [**8] [petitioner], Jones, Kelly, Little and Mitchell walked to the corner of Orchard Street and Edgewood Avenue, opened fire on the people on the street corner, then ran back to the Lincoln Town Car and fled the scene. Six people were shot and one of the victims died from his wounds." Id.

The petitioner was arrested and charged with various offenses in connection with the shooting. The petitioner elected a jury trial, at which his accomplices, Little, Jones, and Kelly all testified for the state against him. In particular, with respect to his own involvement in the shooting, Kelly testified that he had pleaded guilty to conspiracy to commit assault in the first degree and carrying a pistol without a permit.[3] Kelly further testified **[*6]** that, with respect to his guilty plea to those charges, it was his understanding that he was facing a maximum sentence of twenty-five years in prison, but that he did not know what his ultimate sentence would be. When the prosecutor, Christopher Alexy, asked Kelly if he had "any understanding as to what could happen if you came in here and testified," Kelly replied, "[n]ope."

Then, without any question pending from Alexy, Kelly began to explain the circumstances [**9] around a statement that he gave to the police after his arrest in connection with the shooting.[4] Specifically, Kelly testified that, "[w]hen I gave that statement, I ain't make no deal. They were trying to make a deal with my life. When I gave that statement, I ain't make no deals, no lawyer, no nobody, no nothing, just the cop, I ain't got no deal. I ain't got to hear saying anything. I ain't got no deal. I could have sat here. It ain't really matter."

On cross-examination, the petitioner's trial counsel, Paul Carty, further questioned Kelly about his "deal" with the state. Specifically, Carty asked Kelly if he would have spent the rest of his life behind bars had he not worked out a deal to plead to the charges of conspiracy to commit assault in the first degree and carrying a pistol without a permit. Kelly responded, "I don't know nothing about no deals, none. I don't know nothing about no deals." Immediately thereafter, however, Kelly admitted that his lawyer did, in fact, work out a plea agreement with the state. Kelly acknowledged that the terms of that agreement required that he plead guilty to conspiracy to commit assault in the first degree and carrying a pistol without a permit. [**10] Kelly further admitted that, even though his purpose in going to Edgewood Avenue on the night of this incident was to commit **[*7]** homicide, his plea agreement did not involve, nor did he plead guilty to, any homicide charges. Finally, Kelly explained that, pursuant to his plea agreement, the maximum sentence he could receive was twenty-five years of imprisonment.

Carty then asked Kelly whether he had been informed that he could be sentenced to as little as one year in prison, which was the mandatory minimum sentence. Kelly responded that he did not know what the actual sentence would be, but that he did not expect that he would receive a sentence of one year. Rather, Kelly worried that he could receive the maximum twenty-five year sentence.

During closing arguments, Carty stated the following to the jury: "[Kelly] claims he is not looking for a deal, but, think about it, he got the best deal of them all. His deal, he didn't even cop to a homicide [charge]. What did he plead to? Conspiracy to commit assault in the first degree and [carrying a] pistol without a permit. He claims not to be expecting anything in exchange for his testimony, but he knows good and well, as a veteran of the criminal [**11] justice system, which he told you he was, that he is going to be treated favorably at sentencing time. He knows how the system works. Give us your testimony, we'll take care of you. He didn't want to deal, but he was already treated favorably by not pleading to a homicide . . . ."

The jury ultimately returned a verdict finding the petitioner guilty of manslaughter in the first degree with a firearm as an accessory in violation of General Statutes §§ 53a-8 (a) and 53a-55a, conspiracy to commit manslaughter in the first degree with a firearm in violation of General Statutes §§ 53a-48 (a) and 53a-55a, five counts of assault in the first degree as an accessory in violation of General Statutes §§ 53a-8 (a) and 53a-59 (a) (5), conspiracy to commit assault in the first degree **[*8]** in violation of §§ 53a-48 (a) and 53a-59 (a) (5), and possession of an assault weapon in violation of General Statutes § 53-202c. In addition, the petitioner pleaded guilty to three counts of theft of a firearm in violation of General Statutes § 53a-212 (a). See *State v.* ***Greene***, supra, 274 Conn. 136-38. The trial court rendered judgment in accordance with the jury's verdict and sentenced the petitioner to sixty-five years of imprisonment.

The petitioner appealed from the judgment of conviction to this court. Id. In that appeal, this court reversed the conviction of manslaughter in the first degree with a firearm as an accessory. Id., 174. Consequently, this court [**12] directed the trial court to modify the judgment to reflect a conviction of manslaughter in the first degree as an accessory in violation of §§ 53a-8 (a) and 53a-55 (a) (1) and to resentence the petitioner accordingly. Id. This court also reversed the judgment of conviction of conspiracy to commit manslaughter in the first degree with a firearm and directed the trial court to render a judgment of acquittal on that charge. Id. Thereafter, the trial court resentenced the petitioner to sixty years of imprisonment. See ***Greene*** *v. Commissioner of Correction*, 123 Conn. App. 121, 126, 2 A.3d 29, cert. denied, 298 Conn. 929, 5 A.3d 489 (2010), cert. denied sub. nom ***Greene*** *v. Arnone*, 563 U.S. 1009, 131 S. Ct. 2925, 179 L. Ed. 2d 1248 (2011).

In 2008, the petitioner filed his first petition for a writ of habeas corpus claiming, among other things, that he was denied the effective assistance of counsel in connection with his guilty plea on the three counts of theft of a firearm. The habeas court denied that petition. The petitioner then appealed to the Appellate Court, which ultimately concluded that the petition should have been granted with respect to these counts and, accordingly, reversed in part the judgment of the habeas court. Id., 136. Thereafter, the habeas court, *Santos, J.*, **[*9]** vacated the petitioner's convictions on those three counts.

In 2013, the petitioner filed his second petition for a writ of [**13] habeas corpus, which is the subject of the present appeal. That petition alleged, among other things, that the state violated the petitioner's due process rights during his criminal trial by failing to correct false testimony given by Kelly and by failing to disclose evidence favorable to him. See *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) ***HN1*** (state's failure to correct false testimony violates due process); see also *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (suppression by prosecution of evidence favorable to accused violates due process). The habeas court held a trial on his petition.

At the habeas trial, the petitioner presented the transcript of Kelly's sentencing hearing as an exhibit. That transcript indicated that Kelley had pleaded guilty to conspiracy to commit assault in the first degree and carrying a pistol without a permit in connection with the shooting incident. The trial court, *Fasano, J.*, noted at that hearing that "[t]here was no recommendation at the time of plea, and the understanding is that . . . the ultimate sentencing would depend in part on another trial that was to take place in the interim."[5] Alexy, who was also the prosecutor in that proceeding, then stated that, "

[s]ince the pleas were entered . . . Kelly complied with all the conditions of [**14] the plea **[*10]** agreement very satisfactorily. He was instrumental in helping [to] solve a very brutal shooting." Alexy recommended a sentence of ten years imprisonment for the charges to which Kelly had pleaded guilty. Alexy then noted that there were two additional charges pending against Kelly in an unrelated matter and that it was the state's intention to nolle those charges. The trial court imposed the recommended sentence of ten years imprisonment.

At the habeas trial, Alexy testified that the state's plea agreement with Kelly provided that he could receive a maximum penalty of twenty-five years imprisonment for the two charges to which he pleaded guilty. Alexy acknowledged that it was possible that he could have charged Kelly with being an accessory to murder and conspiracy to commit murder. Alexy also acknowledged that, if Kelly had refused to testify at the petitioner's trial, or had testified falsely, Alexy would have recommended a higher sentence than ten years imprisonment. Alexy further testified that, before the criminal trial had commenced, he told Carty the terms of the state's plea agreement with Kelly. In particular, Alexy told Carty that Kelly would be testifying, [**15] that Kelly had entered a guilty plea, that "there was no specific plea agreement"[6] and that "any sentence would be determined by Judge Fasano, subsequent to the trial, if, in fact . . . Kelly did cooperate and testify at the petitioner's trial."

Alexy also testified about his own recollection of Kelly's testimony at the criminal trial. Specifically, when counsel for the petitioner asked Alexy whether Kelly had "denied that he was receiving any consideration in exchange for his testimony," Alexy responded, "[t]hat's **[*11]** correct." Counsel then asked whether Kelly had testified that "there was not an agreement," and Alexy responded, "[a]n agreement for a specific sentence, correct." When counsel asked whether Alexy believed that Kelly's testimony "fully summarizes the understanding that [Alexy] had with . . . Kelly about his testimony," Alexy responded, "Yes, it says right here that there '[wasn't] no understanding [about] what I was getting sentence[d] to,' which is . . . absolutely accurate."[7] Counsel then asked Alexy specifically: "Does . . . Kelly's testimony accurately [reflect] the understanding that you had with him?" Alexy responded: "To the extent that—yeah. Yeah." Counsel then asked: [**16] "What did [Kelly] say about what was going to happen at sentencing?" Alexy responded: "He said he didn't know what he was going to be getting."

The petitioner's attorney at the criminal trial, Carty, also testified at the habeas trial. He explained that Alexy had told him before the criminal trial that all of the petitioner's codefendants, including Kelly, "were going to have their cooperation made known to the court at the sentencing of them on their respective cases." Carty further testified that, even though Kelly did not admit that he was hoping to benefit from his testimony, Carty still argued to the jury that Kelly was expecting to receive some benefit. Carty explained that "it's kind of disingenuous for someone who is looking at a lot of time to say, well, I amnot expecting anything. Of course he is expecting something." Carty further testified that it is standard practice for a cooperating codefendant to plead guilty prior to the trial of a codefendant, to testify at trial, and then to be sentenced. Sentencing is **[*12]** delayed in order to ensure that the cooperating codefendant actually testifies.[8]

The habeas court, *Oliver J.*, found that "Alexy testified credibly that he properly disclosed [**17] to the defense that Kelly would testify against the petitioner, that Kelly had entered guilty pleas before trial, that there was no specific sentencing agreement for . . . Kelly, and that his cooperation would be made known to the sentencing judge after trial." The court concluded that Kelly's testimony at the petitioner's criminal trial "was not false or misleading. Though not a model of clarity, it sufficiently and accurately describes the . . . 'agreement' [between Kelly and the state]." The habeas court stated that it was aware of no authority "that supports the proposition that a cooperating witness must use or agree to certain 'magic words' in describing the nature of the cooperation agreement. As, in this court's experience as the fact-finder, cooperating witnesses come from all walks of life and have various levels of education and proficiency with the English language, this court declines the invitation to require a cooperating witness to use certain words, including: 'consideration,' 'incentive,' 'agreement,' 'understanding' or 'motive.' Reasonabl[y] competent counsel can draw the fact finder's attention to the witness' motive to testify, falsely in some cases, through proper [**18] cross-examination and closing argument, as in the instant matter." Accordingly, the habeas court denied the petitioner's second petition for a writ of habeas corpus. Thereafter, the habeas court granted the petitioner's petition for certification to appeal. This appeal followed.

[*13] I

We first address the petitioner's claim that the habeas court incorrectly concluded that his due process rights were not violated at his criminal trial when Alexy failed to correct Kelly's testimony. In particular, the petitioner asserts that Kelly and the state had reached an agreement that Kelly's testimony at the petitioner's criminal trial would benefit him—namely, that Kelly would receive leniency at his own sentencing in exchange for testifying against the petitioner. Thus, the petitioner claims, Kelly testified

falsely when he stated that he had no "deal" with the state and was expecting nothing in return for his testimony at the petitioner's criminal trial. As a result, the petitioner argues that Alexy had an obligation to correct Kelly's false testimony. 9

[*14] The respondent, the Commissioner of Correction, counters that there was no false or misleading testimony to correct. Specifically, the respondent [**19] argues that the context surrounding Kelly's testimony makes it clear that, when he testified that he had no "deal," he was not broadly denying that he had received *any* benefit in exchange for his testimony. Rather, the respondent contends that Kelly's testimony related only to the sentencing component of his agreement with the state, and that Kelly only denied that he knew what *specific sentence* he would receive or whether he would receive any leniency at all. This, the respondent contends, was not false. We agree with the respondent.

We begin with the standard of review. ***HN2*** Whether a prosecutor knowingly presented false or misleading testimony presents a mixed question of law and fact, with the habeas court's factual findings subject to review for clear error and the legal conclusions that the court drew from those facts subject to de novo review. See *Hafdahl v. Johnson*, 251 F.3d 528, 533 (5th Cir. 2001), cert. denied sub nom. *Hafdahl v. Cockrell*, 534 U.S. 1047, 122 S. Ct. 629, 151 L. Ed. 2d 550 (2001).

HN3 "The rules governing our evaluation of a prosecutor's failure to correct false or misleading testimony are derived from those first set forth by the United States Supreme Court in *Brady v. Maryland*, [supra, 373 U.S. 86-87], and we begin our consideration of the [petitioner's] claim with a brief review of those principles. In *Brady*, the court held that 'the [**20] suppression by the prosecution of evidence favorable to an accused upon request violates due process [when] the evidence is material either to guilt or to punishment, irrespective of the good **[*15]** faith or bad faith of the [prosecutor].' Id., 87; accord *State v. Cohane*, 193 Conn. 474, 495, 479 A.2d 763, cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984). The United States Supreme Court also has recognized that '[t]he jury's estimate of the truthfulness and reliability of a . . . witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.' *Napue v. Illinois*, [supra, 360 U.S. 269]. Accordingly, the *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence; e.g., *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); which, broadly defined, is evidence 'having the potential to alter the jury's assessment of the credibility of a significant prosecution witness.'" (Footnote omitted.) *Adams v. Commissioner of Correction*, 309 Conn. 359, 369-70, 71 A.3d 512 (2013).

HN4 "[D]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. *Napue v. Illinois*, supra, [360 U.S.] at 269. If a government witness falsely denies having struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception. [**21] *Giglio v. United States*, supra, [405 U.S. at 153]; *Napue v. Illinois*, supra, 269-70. Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require the prosecutor to apprise the court when he or she knows that the witness is giving testimony that is substantially misleading. *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir.), cert. denied sub nom. *Young v. United States*, 419 U.S. 1069, 95 S. Ct. 655, 42 L. Ed. 2d 665 (1974)." (Internal quotation marks omitted.) *State v. Ouellette*, 295 Conn. 173, 186, **[*16]** 989 A.2d 1048 (2010); see also *State v. Satchwell*, 244 Conn. 547, 560-61, 710 A.2d 1348 (1998).

Our review of Kelly's testimony during the underlying criminal trial reveals that the petitioner has taken Kelly's testimony about his agreement with the state out of context. 10 We first look to the statements Kelly made during direct examination.

On direct examination, Alexy asked Kelly "what was your understanding *of what your sentence would be*?" (Emphasis added.) Kelly responded, "[i]t wasn't no understanding; what I was getting sentenced to . . . was just that." Then, after acknowledging that he faced a maximum of twenty-five years of imprisonment, Alexy asked whether Kelly had "any understanding as to what could happen if you came in here and testified?" Kelly responded: "Nope." 11

[*17] The petitioner highlights Kelly's answer of "[n]ope" in connection with the question of whether he had any understanding of what could happen if he testified against the petitioner as evidence of false testimony. [**22] At first blush, this isolated response by Kelly could appear to be a blanket denial of any deal or agreement whatsoever. Kelly's statement, however, cannot be divorced from the context surrounding it. Indeed, immediately before this testimony, Alexy asked whether Kelly knew *what sentence* he would receive. In response to that question, Kelly explained that he was looking at a maximum sentence of twenty-five years of imprisonment, but that he did not know what his sentence would be. It only was at that point that Kelly responded "[n]ope" to the question regarding his understanding of what could happen if he came in and testified.

It is clear to us, therefore, that Kelly's claim that he had no understanding of what would happen if he cooperated with the state related to whether he had an understanding of the specific sentence that he

expected to receive and was not substantially misleading. This testimony neither denies the existence of Kelly's plea agreement with the state nor mischaracterizes its terms.

The evidence adduced at the habeas trial further bolsters our conclusion that Kelly's testimony on this issue was not substantially misleading. First, Alexy gave testimony—which the habeas [**23] court credited—indicating that when he heard Kelly say "[n]ope," and represent that he "had no understanding" of what would happen if he testified, Alexy understood that he was referring to the fact that he did not know what specific sentence he would receive.[12] This is entirely reasonable given the **[*18]** fact that the line of questioning at that juncture related only to Kelly's understanding of the sentence he expected to receive.

Second, the transcript from Kelly's plea hearing, which was introduced as an exhibit at the habeas trial, further demonstrates that there was no agreed upon sentence, only a maximum exposure of twenty-five years of imprisonment. See footnote 5 of this opinion. Indeed, Alexy never asked Kelly whether he expected that his cooperation would be made known to the sentencing judge, and Kelly never testified on that precise issue.[13] Thus, when viewed in the context of the questions that were asked and the responses given, Kelly's testimony on direct examination was not substantially misleading. This conclusion also is consistent with the other evidence at the habeas trial.

To the extent that the petitioner's claim involves statements Kelly made during his cross-examination, [**24] those statements also cannot be evaluated in isolation, unconnected to the context in which they were made. Specifically, Carty asked Kelly the following question: "Had you not worked that deal out [to plead to nonhomicide charges, you were] looking at basically spending the rest of your life behind bars." In response to that inquiry, Kelly testified as follows: "I don't know nothing about no deals, none. I don't know nothing about no **[*19]** deals." Carty then sought to clarify this testimony, and asked Kelly directly: "You worked out a plea, right?" Kelly responded: "My lawyer, I guess, I don't know. I know he told me what I was copping out to, and I took it." This testimony was not substantially misleading.

Again, when evaluated in context, specifically with respect to the questions asked, Kelly's statements did not categorically deny any deal with the state. Kelly's response and, more particularly, his clarification demonstrate that he was denying that he had worked out a plea agreement directly with the state *himself*, but that it was his lawyer who had worked out the deal. To be sure, immediately following his admission that his lawyer worked out a plea deal, Kelly admitted that he did, [**25] in fact, plead guilty to nonhomicide charges for his part in the shooting incident, rather than homicide.[14] This obviously was not a denial of any deal with the state or a mischaracterization of his plea agreement.

Finally, at another point during cross-examination, Carty asked Kelly about his expectations regarding his sentence. Kelly responded: "I ain't expecting nothing, but I know that I could do the time." As with Kelly's previous testimony, the petitioner takes these statements out of context in an attempt to claim that Kelly denied receiving any benefit for his testimony.

Just before Kelly made these statements, Carty had asked him if he knew that he could receive a sentence requiring as little as one year of imprisonment. Kelly responded that he was not expecting a sentence of only one year but, rather, was thinking about having to serve the full twenty-five years, and potentially more, given **[*20]** that he had other charges pending. In response to this testimony, Carty asked the following: "That's not what are you expecting out of this?" Kelly answered: "I don't know what I'm getting." Carty then stated "that's not what I'm asking you," and repeated his question: "What are you expecting?" [**26] Kelly responded: "I ain't expecting nothing, but I know that I could do the time."[15]

It is evident that Kelly was responding to questions regarding the length of the sentence he expected to **[*21]** receive, not whether he expected any benefit whatsoever. His response that he could "do the time" further shows that Kelly understood the question to be directed at the sentence he expected to receive. Because there was no agreement with respect to his specific sentence, Kelly's testimony was not substantially misleading.

This testimony, when considered in context, simply does not suggest that Kelly was denying that he had any expectation regarding whether the state would make his cooperation known to the sentencing judge, as the petitioner suggests. We note that Carty never specifically asked Kelly whether he was aware that the state intended to bring his cooperation to the attention of the sentencing court, and Kelly certainly never denied that he had such an expectation.

We further note that the plea agreement had been disclosed to Carty, and he never objected to Kelly's testimony on the ground that it was misleading or inconsistent with the terms of the agreement. Although Carty's failure to object [**27] is not dispositive, we conclude that, because he had the full agreement, it is a factor that we may consider when determining whether Kelly's testimony was false or substantially misleading. Cf. *State v. Fauci*, 282 Conn. 23, 51, 917 A.2d 978 (2007)***HN5*** (defendant's "failure to object [to prosecutor's improper remarks] demonstrates that defense counsel presumably

[did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial" [internal quotation marks omitted])." To be sure, given that Carty had the full agreement, his failure to object bolsters our conclusion that Kelly's testimony was not substantially misleading.

In summary, evaluating each of Kelly's various statements regarding his agreement, understanding or expectation in the context in which he made them, we conclude that his testimony was not substantially **[*22]** misleading. His testimony related to his expectations regarding the specific sentence he would receive, and not to the broader question of whether he was receiving *any* benefit in exchange for his testimony. Indeed, Alexy testified at the habeas trial that his understanding of Kelly's testimony was that he did not expect to receive any particular sentence, and the habeas [**28] court found Alexy to be a credible witness. Furthermore, Kelly's testimony made clear that he had received some benefit, namely, that he had pleaded to nonhomicide charges, which carry a significantly reduced sentence.

In addition, the jury was aware that Kelly had not yet been sentenced and that he was exposed to a twenty-five year prison sentence. Finally, at no point did Kelly ever expressly deny that he expected his cooperation to be made known the sentencing judge. As the respondent points out, under these circumstances, it would require "no great leap of logic for the jury to appreciate and, indeed, expect, that Kelly's . . . cooperation in the case against the petitioner would be brought to the attention of his sentencing judge, at the very least by his own counsel, if not by the state itself . . . ." Accordingly, we conclude that the habeas court reasonably determined that Kelly's testimony was not substantially misleading and, therefore, that Alexy had no duty to correct Kelly's testimony.

In support of his claim to the contrary, the petitioner relies on *United States v. Bigeleisen*, 625 F.2d 203 (8th Cir. 1980). In that case, the defendant and his accomplice, John Paul Moore, sold drugs together. Id., 205. Moore was arrested and sentenced [**29] before the defendant was apprehended. Id. Initially, Moore refused to implicate the defendant. Id. Moore and the defendant agreed that Moore would remain silent so long as the defendant paid Moore $500 every month. Id. When the defendant missed a payment, Moore contacted the government and agreed to testify against the defendant. Id. Moore **[*23]** agreed to testify only on the condition that the government would bring his cooperation to the attention of the sentencing judge and to the United States Parole Commission. Id. The government agreed to do so. Id.

During the defendant's trial, the prosecutor asked Moore whether he had an agreement with the government concerning his cooperation. Id., 206. Moore replied: "'No, I do not.'" Id. The prosecutor then asked: "'[I]s there anything that you are supposed to get in relation to testifying?'" Id. Moore replied: "'No, there is not.'" Id. The United States Court of Appeals for the Eighth Circuit concluded that this testimony was false, and that the prosecutor's failure to correct it violated *Napue*. Id., 208.

We conclude that *Bigeleisen* is distinguishable from the present case. In *Bigeleisen*, the cooperating witness categorically denied that he was expecting to receive [**30] *any* benefit in exchange for his testimony. Id., 206. The court concluded that, in light of Moore's complete denial of any benefit, the jury could have concluded that no agreement existed at all. Id., 208. Thus, the jury could not properly evaluate his credibility.[16] The present **[*24]** case, however, is not one in which there has been a complete denial of any agreement with the state. To the contrary, Kelly admitted that he had pleaded guilty to certain nonhomicide charges, that the maximum sentence was twenty-five years of imprisonment, that he had not yet been sentenced in connection with those charges, and that he did not know what his sentence would be.

Thus, unlike in *Bigeleisen*, the jury in the present case was made aware that Kelly already had received favorable treatment from the state by being allowed to plead guilty to nonhomicide crimes—after it also had heard that Kelly and his cohorts killed a person after they fired guns into a crowd of people—and that the state was in a position to reward Kelly further at sentencing. Therefore, although Kelly's testimony was, as the habeas court observed, "not a model of clarity," the habeas court reasonably could have concluded that it was neither false [**31] nor substantially misleading. Accordingly, we reject the petitioner's claim that his due process rights were violated when Alexy failed to correct Kelly's testimony.

The concurring justices disagree with this analysis and would assume that Kelly's testimony was misleading. They stop short, however, of calling it false or even substantially misleading. The concurring justices also conclude that, when testimony regarding a plea agreement is misleading—but apparently not false or substantially misleading—the prosecutor has no obligation to correct the testimony if the plea agreement was disclosed to the petitioner before the criminal trial. We agree with this conclusion, but not because compliance with *Brady* excuses the prosecutor's failure to correct "misleading" testimony that is neither false nor *substantially* misleading. Indeed, the prosecutor has no duty to correct because *Giglio* and *Napue* do not apply to merely "misleading" testimony in the first instance. **[*25]** Rather, those cases require the prosecutor to correct *only* testimony that is substantially misleading or false. Of course, if there was no prior disclosure of the plea agreement pursuant to *Brady*, that would be a due process violation [**32] in and of itself, regardless of the degree to which the testimony had the potential to mislead the jury.

In this regard, we note that ***HN6*** the "substantially misleading" standard appears to have been first adopted in *United States v. Harris*, supra, 498 F.2d 1169, in which the United States Court of Appeals for the Third Circuit stated, without citation to authority, that "*Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading." See also *State v. Paradise*, 213 Conn. 388, 400, 567 A.2d 1221 (1990) (quoting *Harris*), overruled in part on other grounds by *State v. Skakel*, 276 Conn. 633, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006). In *Harris*, the court used the phrase "substantially misleading" to distinguish the situation in which the prosecutor knows that the state witness was committing *perjury* from the situation in which "it should be obvious to the [g]overnment that the witness' answer, although made in good faith, is *untrue* . . . ." (Emphasis added.) *United States v. Harris*, supra, 1169. The fact that testimony must be untrue, and not merely misleading, in order for the prosecutor to have an obligation to correct it is borne out by the seminal cases in this area. See, e.g., *Giglio v. United States*, supra, 405 U.S. 151-52 (witness testified that no one told him that he would not be prosecuted if he testified for government when government [**33] had, in fact, promised him that he would not be prosecuted); *Napue v. Illinois*, supra, 360 U.S. 266-67 (witness testified that state had not promised him any consideration in exchange for testifying when, in fact, prosecutor had promised consideration); **[*26]** *Adams v. Commissioner of Correction*, supra, 309 Conn. 363 (witness testified that he had not been promised any consideration in exchange for his testimony and that he faced maximum sentence of thirty-eight years when, in fact, judge who had accepted his guilty pleas had placed four year limitation on sentence, with possibility of more lenient sentence based on cooperation).[17]

To the extent that the concurring justices believe that Kelly's testimony *was* substantially misleading, we disagree with that conclusion for the reasons that we have already stated. The small, decontextualized snippets of Kelly's testimony, upon which the petitioner and the concurring justices seize, namely, his denial that he had "any understanding as to what could happen" if he testified, was not substantially misleading or untrue. It certainly was not received that way by Alexy or Carty. Accordingly, we have no reason to believe that the jury would have interpreted the testimony differently and concluded that Kelly, who had admitted firing a gun [**34] **[*27]** into a crowd of people, one of whom was killed, and who had pleaded guilty to nonhomicide offenses for which he had not yet been sentenced, expected to receive no benefit in exchange for his testimony.

Nevertheless, in reaching our conclusion in the present case, we are mindful of the difficulties that defendants face when attempting to provide jurors with the information that they need to make a reliable credibility determination regarding the testimony of a cooperating accomplice. We find those difficulties especially acute when the accomplice has pleaded guilty, has not yet been sentenced at the time of the defendant's trial, and has no express agreement with the state as to a specific sentence. Accordingly, ***HN8*** to ensure that the jury is accurately and fully informed of the nature of a cooperating witness' plea agreement and any potential benefits that the witness may receive in exchange for his or her testimony, we believe that it is the better practice, although not constitutionally required, for the prosecutor to ask fact-specific, leading questions of a cooperating witness instead of open-ended questions that may evoke incomplete or ambiguous responses. Indeed, the respondent in [**35] the present case has acknowledged that "a prosecutor's better, but not constitutionally mandated practice, might be to ask a cooperating witness a fact-specific, leading question that accurately embodies the nature of the agreement between the witness and the state."[18] We therefore urge the state to follow this procedure.[19] Cf. *State v. Ouellette*, supra, 295 Conn. 191 **[*28]** ("we urge the state to ensure that sentencing recommendations for cooperating witnesses conform to both the letter and the spirit of any plea agreements disclosed at trial").

II

Wenext address the petitioner's claim that the habeas court improperly determined that the state did not violate his constitutional right to due process by failing to disclose material favorable evidence to him before his criminal trial. More specifically, the petitioner claims that the state knew, and failed to disclose before his trial, that it was going to recommend a sentence for Kelly that was considerably lower than the maximum twenty-five year sentence to which Kelly was exposed.[20] We disagree.

As we have indicated,***HN9*** "[i]n [*Brady v. Maryland*, supra, 373 U.S. 87], the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process [**36] where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . In *Strickler v.* ***Greene***, [527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)], the United States Supreme Court identified the three essential components of a *Brady* claim, all of which must be established to warrant a new trial: The evidence at issue must be favorable to **[*29]** the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [s]tate, either [wilfully] or inadvertently;

and prejudice must have ensued. . . . Under the last *Brady* prong, the prejudice that the defendant suffered as a result of the impropriety must have been material to the case, such that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Internal quotation marks omitted.) *State v. Ortiz*, 280 Conn. 686, 717, 911 A.2d 1055 (2006). "A plea agreement between the state and a key witness is impeachment evidence falling within the definition of exculpatory evidence contained in *Brady*." (Internal quotation marks omitted.) Id.

HN10 "The existence of an undisclosed plea agreement is an issue of fact for the determination of the trial court. . . . Furthermore, the burden is [**37] on the defendant to prove the existence of undisclosed exculpatory evidence." (Citation omitted; internal quotation marks omitted.) *State v. Floyd*, 253 Conn. 700, 737, 756 A.2d 799 (2000). "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence." (Internal quotation marks omitted.) *Barlow v. Commissioner of Correction*, 150 Conn. App. 781, 791, 93 A.3d 165 (2014).

It is well established that ***HN11*** a prosecutor's intention to recommend a specific sentence for a cooperating witness is not subject to *Brady* if the intention has not **[*30]** been disclosed to the witness. See, e.g., *Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003) ("[t]he government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony" [emphasis [**38] in original]); *Diaz v. Commissioner of Correction*, 174 Conn. App. 776, 798, 166 A.3d 815 ("Any . . . understanding or agreement between any state's witness and the state police or the state's attorney clearly falls within the ambit of *Brady* principles. . . . An unexpressed intention by the state not to prosecute a witness does not." [Internal quotation marks omitted.]), cert. denied, 327 Conn. 957, 172 A.3d 204 (2017).

The petitioner in the present case claims that Alexy violated *Brady* because he knew, and failed to disclose, that he "would ask the sentencing court in Kelly's pending related criminal matter for a specific sentence considerably lower than Kelly's exposure under the open plea . . . ." The petitioner, however, has cited no evidence whatsoever that would support a finding that Alexy knew before Kelly testified what specific sentence he would recommend. All he has done is point to the fact that Alexy recommended a lower sentence at Kelly's sentencing hearing and ask this court to infer that Alexy knew that he would make such a recommendation and failed to disclose this intention. The fact that Alexy recommended a lower sentence, standing alone, does not establish the existence of a preexisting promise of leniency in exchange for testimony. See *Shabazz v. Artuz*, supra, 336 F.3d 165 ("[w]e hold only that ***HN12*** the fact [**39] that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony") To be sure, if Alexy had no intention to recommend a specific sentence **[*31]** before the petitioner's criminal trial—and there has been no evidence to establish that he had such an intention—he obviously had nothing to disclose to the petitioner.

Moreover, even if Alexy had an *unexpressed* intention to ask for a specific sentence if Kelly cooperated with the state, the habeas court found that "the nature of the 'agreement' was properly disclosed" to Carty. The habeas court also found that Alexy credibly testified that "there was no specific sentencing agreement for [Kelly] . . . ." The petitioner has not demonstrated that these findings are clearly erroneous. Accordingly, we conclude that the petitioner has failed to establish the necessary factual predicate for his claim—namely, that Alexy did, in fact, promise Kelly that he would recommend a specific sentence at Kelly's sentencing hearing considerably lower than his exposure under the plea in exchange for his testimony at trial. We therefore reject this claim. [**40]

III

Finally, we address the petitioner's claim that the habeas court abused its discretion when it denied his request to issue a capias for Kelly's arrest during the habeas trial. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. At the habeas trial, the petitioner called Erik Eichler, a private investigator, as a witness. Eichler testified that he had been retained by the petitioner's counsel to locate and interview Kelly. Eichler located Kelly and interviewed him in December, 2015. Eichler discussed the interview with the petitioner's counsel, who then instructed Eichler to obtain a written statement from Kelly and to issue a subpoena to him to attend the habeas trial. In February, 2016, Eichler met again with Kelly and presented him with a written

statement that Eichler had prepared **[*32]** based on his interview of Kelly. Kelly signed the statement under oath. Eichler also served Kelly with a subpoena directing him to appear at the habeas trial.

Notwithstanding service of the subpoena, Kelly did not appear at the habeas trial as directed. As a result, counsel for the petitioner asked that the habeas court either issue a capias [**41] for Kelly's arrest or declare Kelly to be unavailable. The petitioner's counsel argued that Kelly's testimony was necessary because his written statement and his statements during his interview with Eichler indicated that Kelly "was aware that he would receive consideration for favorable testimony at [the] trial of the petitioner." Thereafter, the subpoena was marked as a full exhibit at the habeas trial, but the written statement was marked for identification only.

The habeas court then questioned Eichler about Kelly's unavailability. Eichler testified that he had had no contact with Kelly between the date of his last interview, February 11, 2016, and the date of the habeas trial, February 24, 2016. Eichler tried to call Kelly on the day of trial, but his cell phone was "off." Eichler made no attempt to go to Kelly's home address or to determine whether he was incarcerated or had a court date in another court. The court then questioned Eichler about the details of his interviews of Kelly and the procedure by which he had created the written statement. The court stated on the record that it was not reading Kelly's written statement.

On the basis of the evidence before it, the habeas [**42] court concluded that Kelly was not unavailable to testify, but "he [was] simply not [t]here . . . ." Accordingly, the court denied the petitioner's request to issue a capias to compel Kelly to attend the trial.

HN13 The standards governing the issuance of a capias are well established. "If one is not warranted in refusing to honor a subpoena and it is clear to the court that **[*33]** his absence will cause a miscarriage of justice, the court should issue a capias to compel attendance. General Statutes § 52-143 [21] does not, however, make it mandatory for the court to issue a capias when a witness under subpoena fails to appear; issuance of a capias is in the discretion of the court. The court has the authority to decline to issue a capias when the circumstances do not justify or require it. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Citations omitted; footnote added; internal quotation marks omitted.) *Di Palma v. Wiesen*, 163 Conn. 293, 298-99, 303 A.2d 709 (1972).

We conclude that the habeas court did not abuse its discretion when it denied the petitioner's request to issue a capias for Kelly's arrest. First, the petitioner presented no evidence that Kelly's failure to comply with the [**43] subpoena was not warranted. Second, the court reasonably could have concluded that the petitioner was partially responsible for Kelly's failure to appear because the petitioner made no effort during the two weeks between Eichler's last interview with Kelly and the date of the habeas trial to contact Kelly to ensure that he would be present in court to testify on the petitioner's behalf. Under these circumstances, we cannot **[*34]** say that the habeas court abused its discretion in declining to issue the capias. Accordingly, we reject this claim.

The judgment is affirmed.

In this opinion PALMER ▾, ROBINSON ▾ and VERTEFEUILLE ▾, Js., concurred.

Concur by: D'AURIA ▾

Concur

D'AURIA ▾, J., with whom McDONALD, J., joins, concurring in the judgment. Like the majority, I conclude that the petitioner, **Mashawn Greene**, was not deprived of due process of law as guaranteed by the fifth and fourteenth amendments to the federal constitution. I therefore concur in the judgment affirming the habeas court's denial of the petition for a writ of habeas corpus.

However, I would affirm on the alternative ground advanced by the respondent, the Commissioner of Correction. [1] Specifically, I conclude that the prosecutor in this case discharged his duty under *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), *Brady v. Maryland*, 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), by disclosing to the [**44] petitioner's criminal trial counsel, prior to the petitioner's criminal trial, the full extent of any agreement or understanding he had with the cooperating witness, Markeyse Kelly. See *Beltran v. Cockrell*, 294 F.3d 730, 736 (5th Cir. 2002) ("[g]overnment fulfilled its duty of disclosure by supplying [the defendants] with its recollection of the true circumstances of the negotiations with the witness at a time when recall [to the witness stand] and further exploration

of these matters was still possible" [internal quotation marks omitted]); *United States v. Decker*, 543 F.2d 1102, 1105 (5th Cir. 1976) (same), cert. denied sub nom. *Vice v.* **[*35]** United States, 431 U.S. 906, 97 S. Ct. 1700, 52 L. Ed. 2d 390 (1977); see also *State v. Ouellette*, 295 Conn. 173, 186, 989 A.2d 1048 (2010) (prerequisite of any *Brady, Napue*, and *Giglio* claim is existence of *undisclosed* agreement or understanding between cooperating witness and state); *State v. Floyd*, 253 Conn. 700, 736-37, 756 A.2d 799 (2000) (undisclosed, implied plea agreement first predicate to due process claim regarding nondisclosure of agreement); *Hines v. Commissioner of Correction*, 164 Conn. App. 712, 725, 138 A.3d 430 (2016) ("agreement by a prosecutor with a cooperating witness to bring the witness' cooperation to the attention of the [sentencing] judge . . . must be disclosed to the defendant against whom he testifies, even if the deal does not involve a specific recommendation by the prosecutor for the imposition of a particular sentence"). Accordingly, although I agree with parts II and III of the majority opinion, [**45] I do not join in part I.

I differ with the majority in that, after "careful review" of Kelly's testimony, with an eye toward "its probable effect on the jury"; *Adams v. Commissioner of Correction*, 309 Conn. 359, 373, 71 A.3d 512 (2013); I cannot conclude that Kelly's answers to the prosecutor's questions on direct examination were not misleading.[2]

However, as both the prosecutor and the petitioner's criminal trial counsel testified at the habeas trial, and as the habeas court found, the petitioner's counsel "was **[*36]** made aware of the . . . understanding by [the prosecutor] prior to trial." The petitioner does not contest this finding on appeal. He was therefore able to use this information during cross-examination to attempt to impeach Kelly's credibility. To the extent that he refrained from doing so,[3] or refrained from asking the prosecutor, through the court, to clarify any understanding the witness had with the state, the petitioner also does not challenge those omissions in this appeal. Cf. *United States v. Iverson*, 648 F.2d 737, 738, 208 U.S. App. D.C. 364 and n.5 (D.C. Cir. 1981) (prosecutor has obligation to disclose exculpatory information when "defense counsel, although possibly aware of the relevant information, was unable, as a practical matter, to use it to cast doubt upon contrary evidence proffered by the government or its witnesses").

On [**46] this record, I would simply assume Kelly's testimony was misleading, but, then, I would conclude that no due process violation resulted. My choice to make this assumption stems from my concern that, after Kelly's testimony on direct examination, "jurors could well have been left with the impression . . . that [he did not have] any incentive to testify favorably for the state." *State v. Jordan*, 135 Conn. App. 635, 667, 42 A.3d 457 (2012), rev'd in part on other grounds, 314 Conn. 354, 102 A.3d 1 (2014). A review of Kelly's direct examination reveals that he testified only that, after giving a statement implicating the petitioner, he later pleaded guilty to assault in the first degree and carrying a pistol without a permit. The jurors were provided with no **[*37]** context during Kelly's direct examination that allowed them to assess or determine whether he had actually faced greater charges or whether permitting him to plead guilty to only those charges constituted a "'sweetheart deal,'" as the respondent refers to it. Nor was there, during Kelly's direct examination, any mention of the understanding, made explicit at Kelly's plea hearing, that "his continued cooperation in the cases of the codefendants [including the petitioner] will be made known to the court at the time of [Kelly's] [**47] sentencing . . . ."

Instead, Kelly answered the prosecutor's first question about his "understanding" by denying, accurately, that there was an agreement concerning what his actual sentence would be. He answered the prosecutor's next question by stating, also accurately, that he was facing a maximum of twenty-five years incarceration on the charges to which he pleaded guilty.[4] The prosecutor then asked, "[a]nd do you have any understanding as to what could happen if you came in here and testified?" Kelly responded, "[n]ope." Unsolicited, Kelly then expounded: "When I gave that statement [to the police implicating the petitioner], I ain't make no deal. They were trying to make a deal with my life. When I gave that statement, I ain't make no deals, no lawyer, no nobody, no nothing, just the cop. I ain't got no deal. I ain't got to hear [anybody] saying anything. I ain't got no deal. I could have sat here. It ain't really matter." The prosecutor then dropped this line of questioning.

[*38] The "context"[5] in which this testimony arose was that the prosecutor asked Kelly, his own cooperating witness, whether there was any understanding about his sentence or about "what could happen if you came in [**48] here and testified." Cf. *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir.) ("[t]his is not to say that the prosecutor must play the role of defense counsel, and ferret out ambiguities in his witness' responses *on cross-examination*" [emphasis added]), cert. denied sub nom. *Young v. United States*, 419 U.S. 1069, 95 S. Ct. 655, 42 L. Ed. 2d 665 (1974). As the respondent's counsel admitted candidly in oral argument before this court, the usual purpose for this line of questioning by the prosecution is to "anticipatorily . . . take the sting **[*39]** out of" any agreement the state has with a witness or, in other words, to preemptively expose the bias of its own witness. Considering the "probable effect on the jury"; *Adams v. Commissioner of Correction*, supra, 309 Conn. 373; Kelly's responsive denials ("no understanding" and "no deal") could well have been interpreted to *bolster* his credibility rather than to take the "sting" out of any agreement or to preemptively expose his bias. It is doubtful this was the prosecutor's intent,[6] but, the prosecutor, having decided to wade into

this area of inquiry, could have led a reasonable jury to understand that Kelly did not "[have] any incentive to testify favorably for the state." *State v. Jordan*, supra, 135 Conn. App. 667.

Because, in my view, there was no undisclosed agreement or understanding in the present case, I conclude that the petitioner's due [**49] process rights were not jeopardized. See *State v. Ouellette*, supra, 295 Conn. 186. As a result, I respectfully concur in the judgment.

Footnotes

*

The listing of justices reflects their seniority status on this court as of the date of oral argument.

1

The petitioner appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

2

We note that Kelly's name is spelled in various ways in the record. We use this spelling for the sake of consistency with prior decisions. See *State v.* ***Greene***, 274 Conn. 134, 139, 874 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006).

3

The transcripts of the petitioner's criminal trial were not introduced as an exhibit in the present case and were not filed as part of the record in this appeal. Portions of the transcript containing Kelly's testimony concerning his plea agreement with the state were reproduced, however, in the petitioner's appendix to his brief. Selected portions of the transcripts also are quoted in the parties' briefs, and neither party challenges the accuracy of the other party's representations. After oral argument, this court ordered the parties to submit supplemental briefs on the question of whether the transcripts were before the habeas court and, if not, whether this court properly could consider them. Thereafter, the parties filed a joint statement indicating that the habeas court took judicial notice of the entire file in a previous habeas action brought by the petitioner; see ***Greene*** *v. Commissioner of Correction*, 123 Conn. App. 121, 123, 2 A.3d 29, cert. denied, 298 Conn. 929, 5 A.3d 489 (2010), cert. denied sub nom. ***Greene*** *v. Arnone*, 563 U.S. 1009, 131 S. Ct. 2925, 179 L. Ed. 2d 1248 (2011); which included transcripts from the underlying criminal trial. We conclude that, under these circumstances, we may consider these excerpts from the transcripts in the petitioner's underlying trial.

4

In his statement to the police, Kelly identified the petitioner as being involved in the shooting. He also admitted his own involvement in the shooting.

5

The transcript of Kelly's plea hearing also was introduced as an exhibit in the underlying habeas proceedings. At that hearing, Alexy, who was also the prosecutor in that proceeding,

stated that "[t]here is no agreed sentence . . . . I believe that [Kelly] understands that his continued cooperation in the cases of the codefendants will be made known to the court at the time of the sentencing and that the ultimate sentence will be up to the court." During its canvass of Kelly, the trial court, *Fasano, J.*, stated that "[t]he sentencing court, at the time of sentencing, will consider any cooperation and truthful testimony in the cases of the codefendants as an element of consideration in sentencing you."

6 Although Alexy said there was no specific "plea agreement," the context makes clear that he was referring to the fact that there was no specific sentencing agreement. Indeed, the parties do not dispute that Kelly had entered into a plea agreement with the state.

7 Alexy was referring to the underlying criminal transcript, which counsel for the petitioner had asked Alexy to read to refresh his recollection of Kelly's testimony.

8 The petitioner subpoenaed Kelley to testify at the habeas trial. Kelly did not, however, appear. As we explain in part III of this opinion, the habeas court denied the petitioner's corresponding request for a capias directing Kelly's arrest.

9 The petitioner also contends that the habeas court incorrectly concluded that, because the agreement between the state and Kelly was disclosed to the petitioner before Kelly testified, even if Kelly's testimony was false or misleading, it was the duty of Carty, not Alexy, to make that fact known to the jury. We are not convinced that this is an accurate characterization of the habeas court's decision.

Although the habeas court noted that Kelly's testimony was not a "model of clarity," the court found specifically that Kelly's testimony was not false or misleading. The court made no alternative finding that, if the testimony was false, it was then the petitioner's obligation to correct it. Thus, the decision reasonably can be interpreted as holding only that, when the state has disclosed all the terms of a plea agreement to the defense and a witness' testimony is not a model of clarity, but also is *not* false or misleading for purposes of governing due process principles, defense counsel can attempt to clarify the testimony through cross-examination.

Consequently, because we conclude that the habeas court properly determined that Kelly's testimony was not false or misleading, we need not address the question of whether a prosecutor has an obligation to correct false or misleading testimony in cases in which the prosecutor has fully and accurately disclosed a plea agreement to defense counsel. Compare *Hines v. Commissioner of Correction*, 164 Conn. App. 712, 728, 138 A.3d 430 (2016) (state not required under *Napue v. Illinois*, supra, 360 U.S. 269, to correct witness' allegedly perjured testimony regarding agreement with state because agreement was disclosed to petitioner's counsel before criminal trial), with *State v. Jordan*, 135 Conn. App. 635, 666-67, 42 A.3d 457 (2012) (when prosecutor fully and accurately disclosed cooperation agreements to defendant before trial, prosecutor still had duty to correct witnesses' false testimony denying existence of agreements), rev'd in part on other grounds, 314 Conn. 354, 102 A.3d 1 (2014). We note that

this court expressly declined to resolve this issue in *Jordan*. See *State v. Jordan*, 314 Conn. 354, 369 n.7, 102 A.3d 1 (2014).

10 Although the petitioner has cited the transcript pages where he claims Kelly testified falsely, he has not identified the specific statements in Kelly's testimony that he claims were false. Rather, he has simply made the general claim that Kelly's testimony was false because he testified at various points on direct examination and cross-examination that he had no deal, that he had no understanding of what would happen as a result of his testimony and that he was not expecting anything in exchange for his cooperation. Accordingly, we assume for purposes of this opinion that the petitioner is contending that each instance in which Kelly denied having any deal or any understanding of what would happen in his criminal case if he cooperated with the state was false and that the state's obligation to correct that testimony was triggered upon each occurrence. We therefore analyze each instance independently to ascertain whether the testimony was false or substantially misleading and, concomitantly, whether the prosecutor's obligation to correct that testimony arose.

11 The following colloquy took place between Alexy and Kelly:

"Q. Now, what was your understanding of what your sentence would be?

"A. It wasn't no understanding; what I was getting sentenced to, it was just that.

"Q. Well, what was the maximum that you are looking at?

"A. Twenty-five years.

"Q. And do you have any understanding as to what could happen if you came in here and testified?

"A. Nope."

12 The concurring justices believe that Alexy's testimony is irrelevant. Although we do not consider Alexy's testimony to be dispositive of whether Kelly's testimony was untrue or substantially misleading, we consider it probative regarding whether Kelly's testimony related to the specific sentence that he would receive. See footnote 5 of the concurring opinion.

13 Kelly also testified at various points on direct examination and cross-examination about the statement he gave to the police shortly after the shooting. In his explanation, he repeatedly stated that when he gave that statement, he had no deal. This testimony was not false, as there is no evidence whatsoever that Kelly had any deal when he gave his statement to the police. The petitioner does not appear to challenge Kelly's representation that he had no deal at that point in time. It is important, however, in analyzing the petitioner's claims, that we distinguish between Kelly's testimony regarding any deals he had, or did not have, when he gave his statement to the police and his testimony regarding any deal he had with the state related to his plea agreement.

Only his testimony regarding his deal with the state relating to his plea agreement is at issue in the present appeal.

14 The following colloquy took place between Carty and Kelly:

"Q. So, you are not even pleading to a homicide, right?

"A. I don't know.

"Q. Nothing to do with homicide, right?

"A. No."

15 The following colloquy took place between Carty and Kelly:

"Q. Except [you're] going to be sitting in jail for perhaps a lot less time, isn't that right?

"A. Twenty-five years.

"Q. All right. Well, when you entered your plea, weren't you informed that the minimum time that you could get is as little as one year, the maximum is [twenty-five] years, but there is only one year which is mandatory?

"A. I ain't know nothing about that.

"Q. Well, were you present when you entered your plea?

"A. Yeah, but I ain't know nothing about one year, I know the maximum is [twenty-five] years.

"Q. Were you listening to what the Judge told you?

"A. Whole bunch of things was in my head at the time. I was thinking about the whole [twenty-five] years, I wasn't thinking about no year, I ain't getting no year, I wasn't thinking about one year, I was thinking about the whole [twenty-five years] plus the other charges I got pending. They trying to get me five more for that.

"Q. That's not what you are expecting out of this?

"A. Who me?

"Q. Yeah.

"A. I don't know what I'm getting.

"Q. Well, that's not what I'm asking you. What are you expecting?

"A. I ain't expecting nothing, but I know that I could do the time. I know they can't. They ain't strong enough, they ain't built. I know I could do the time. That up to them if they could do the time, which I know they can't, they weak. If they wasn't weak, they never would have told in the first place. . . .

"Q. Okay, but the time that you are going to be doing is just for an assault, conspiracy to commit an assault.

"A. I guess.

"Q. Right?

"A. I guess.

"Q. Have nothing to do with homicide, correct?

"A. Nope."

16 In *United States v. Bigeleisen*, supra, 625 F.2d 208, the government asserted that Moore's false testimony was inconsequential because the government had disclosed its agreement with Moore in its opening statement. The Eighth Circuit rejected this argument, reasoning as follows: (1) the prosecutor had not explained the entire agreement in the opening statement, namely, that "[t]he government did not mention its undertaking to intercede with the [United States] Parole Commission, and that body will often be able to do an inmate more good than a sentencing judge"; and (2) the opening statement is not evidence. Id. The court concluded that the jury did not have the evidence necessary to evaluate Moore's credibility as a witness. Id. After reaching that conclusion, the court explained that the prosecutor impermissibly capitalized on the witness' false testimony during closing argument and implied that the government had no agreement with the witness. Id. These factors are not an issue in the present case. To the contrary, in the present case, the petitioner makes no claim that the state attempted to capitalize on any ambiguity in Kelly's testimony in his closing argument. Indeed, in the present case, Carty argued to the jury that Kelly had a deal with the state and would receive a benefit in exchange for his testimony at the petitioner's criminal trial. Accordingly, we conclude that the rationale in *Bigeleisen* is inapplicable to the present case.

17 Furthermore, we conclude that, given that the rationale underlying *Napue* and *Giglio* is that HN7 due process is violated if the state obtains a conviction on the basis of false evidence, any expansion of the "false evidence" standard beyond testimony that is, in fact, false, should be undertaken carefully. See *People v. Smith*, 498 Mich. 466, 489, 870 N.W.2d 299 (2015) (Kelly, J., concurring) (After agreeing with the majority that the defendant was entitled to a new trial because certain testimony from a state's witness was false, Justice Kelly cautioned that "[t]he majority expands the 'false evidence' standard by allowing a new trial on the basis of 'substantially misleading' evidence in the form of testimony. This standard is unworkable [because] it allows a reviewing court to '[pick and choose] small snippets of testimony' to determine the 'overall impression' that those small snippets create. I would simply examine whether the prosecutor knowingly proffered false testimony. By attempting to decipher the 'overall impression' particular snippets of testimony made on the jury, and by potentially requiring prosecutors to correct testimony that might not actually be false, the majority creates an ambiguous standard that will be difficult to apply in practice." [Footnotes omitted.]); see also *United States v. Harris*, supra, 498 F.2d 1169 (rejecting proposition that "the prosecutor must play the role of defense counsel, and ferret out ambiguities in his witness' responses on cross-examination").

18 The state has previously made the same acknowledgment in at least one other case. See *State v. Jordan*, Conn. Appellate Court Records & Briefs, January Term, 2012, State's Brief p. 34 n.34 ("a best, but not constitutionally mandated, practice might have been to follow up each response with a fact-specific question that accurately embodied the nature of the state's agreement with the witness").

19 We recognize that a prosecutor has no duty to inform the jury that a cooperating witness may have a motive to testify favorably for the state, but is obligated only to provide such information to the defendant and to ensure that the witness does not testify falsely. If the prosecutor chooses to present evidence about a plea agreement in order to preempt a potentially damaging cross-examination, however, the prosecutor should endeavor to ensure that the evidence is accurate and complete.

20 The petitioner also claims that the state failed to disclose its intent to nolle charges in two other, unrelated files. Although the petitioner referred in passing to these nolles in his pretrial brief to the habeas court, the petitioner presented no evidence at the habeas trial as to whether Alexy disclosed the existence of those charges, or their intended disposition, to the petitioner before his criminal trial. Additionally, the habeas court made no findings and issued no ruling with respect to them. Thus, we decline to review any claim relating to these two charges.

21 General Statutes § 52-143 (e) provides: "If any person summoned by the state, or by the Attorney General or an assistant attorney general, or by any public defender or assistant public defender acting in his official capacity, by a subpoena containing the statement as provided in subsection (d) of this section, or if any other person upon whom a subpoena is served to appear and testify in a cause pending before any court and to whom one day's attendance and fees for traveling to court have been tendered, fails to appear and testify, without reasonable excuse, he shall be fined not more than twenty-five dollars and pay all damages to the party aggrieved; and the court or judge, on proof of the service of a subpoena containing the statement as provided in subsection (d) of this section, or on proof of the service of a subpoena and the tender of such fees, may issue a capias directed to some proper officer to arrest the witness and bring him before the court to testify."

---

1 I agree with the majority's recitation of the facts and procedural history.

2 A case in which a witness has clearly testified falsely or committed perjury, whether on direct or cross-examination, may pose a different due process question, which is not implicated here. See *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) ("[d]ue process is violated when the prosecutor, although not soliciting false evidence from a [g]overnment witness, allows it to stand uncorrected when it appears"); 6 W. LaFave et al., Criminal Procedure (4th Ed. 2015)

§ 24.3 (d), p. 471 ("[i]f the prosecutor knows or should have known that the [witness'] statement is untrue, it has a duty to correct it").

3 As the respondent points out in his brief to this court, the petitioner's criminal trial counsel did not specifically ask Kelly about any understanding he had with the state that his cooperation would be made known to the sentencing judge. Kelly's cross-examination instead focused on the reduced charge to which he had pleaded guilty.

4 The following colloquy occurred between the prosecutor and Kelly at the petitioner's criminal trial:

"Q. Now, what was your understanding of what your sentence would be?

"A. It wasn't no understanding [of] what I was getting sentenced to; it was just that.

"Q. Well, what was the maximum [sentence] that you are looking at?

"A. Twenty-five years."

5 The respondent contends, including in oral argument before this court, that, when understood "in context" from Kelly's point of view, Kelly clearly believed the prosecutor was asking him only whether there was an agreement about his particular sentence, and he answered accordingly. However, our examination of whether the testimony was misleading is undertaken not from Kelly's point of view but from the perspective of the jurors; *Adams v. Commissioner of Correction*, supra, 309 Conn. 369-73; who are not well versed in the nuanced vagaries of leniency agreements or the "'wink and nod'" nature of such promises. See, e.g., *Gilday v. Callahan*, 59 F.3d 257, 269 (1st Cir. 1995) (disclosure of "understanding" between defense counsel and prosecutor "would have permitted the jury reasonably to infer that, even if the 'wink and nod' deal had not been explicitly communicated to [the witness], he must have been given some indication that testimony helpful to the government would be helpful to his own cause"), cert. denied, 516 U.S. 1175, 116 S. Ct. 1269, 134 L. Ed. 2d 216 (1996); see also Note, "Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice," 51 Duke L.J. 1333, 1334-35 (2002) (describing witnesses'"rational expectation of leniency" notwithstanding absence of formal plea agreement). Although it is possible the jury understood all three questions to relate only to the length of any ultimate sentence Kelly might receive, the jury might have considered the first two questions to relate only to promises of a specific sentence, but they might have understood the last question to relate more generally to "*any* understanding" or benefit that might flow from Kelly's decision to "[come] in here and testif[y]." (Emphasis added.) For similar reasons, I do not agree that testimony—even credible testimony—more than a decade later about what the prosecutor understood from Kelly's answers (or even what the prosecutor intended by his questions) is probative of what jurors might have reasonably understood.

6 To be clear, I do not conclude that any misimpression about Kelly's incentive to testify, elicited on direct examination, was the product of the prosecutor's attempt to deceive the jury. As the respondent's counsel candidly admitted in his brief and in oral argument before this court, the prosecutor's questions were "ambiguous" and "inartful," resulting in "equally ambiguous" answers. But the obligations of *Brady* apply "irrespective of the good faith or bad faith of the [prosecutor]." *Brady v. Maryland*, supra, 373 U.S. 87; see also *State v. Jordan*, 314 Conn. 354, 370, 102 A.3d 1 (2014) (applying *Brady* principle that prosecutor's good faith intent is similarly irrelevant in *Napue* and *Giglio* cases, including when prosecutor fails to correct witness' potentially misleading testimony). To attempt to avoid any ambiguity and potential misimpression, I agree with both the majority and the respondent that, when a prosecutor seeks to expose an understanding or agreement between the state and a cooperating witness, the better practice is for the prosectuor to ask leading questions that accurately describe the nature of any agreement between the witness and the state. See text accompanying footnote 18 of the majority opinion.

Content Type: Cases

Terms: MAshawn Greene

Narrow By: Court: Connecticut

Date and Time: Sep 17, 2018 01:30:53 p.m. EDT

Decision of the Habeas Court in *Mashawn Greene v. Warden*, CV-13-4005678-S

June 20, 2016

STATE OF CONNECTICUT
SUPERIOR COURT

STATE OF CONNECTICUT

DOCKET NO. CV13-4005678-S	:	SUPERIOR COURT
GREENE, MASHAWN (#286222)	:	TOLLAND JUDICIAL DISTRICT
V.	:	AT ROCKVILLE
WARDEN	:	JUNE 20, 2016

MEMORANDUM OF DECISION

The petitioner, Mashawn Greene, initiated this second petition for a writ of habeas corpus, claiming that his underlying criminal counsel, direct appeal counsel and first habeas counsel provided him ineffective legal representation. He further claims due process (false trial witness testimony) and Brady violations. He seeks an order of this court vacating his convictions and returning the matter to the criminal court for further proceedings. The respondent denies the claims and asserts the special defense of res judicata as to the claim against underlying trial counsel. The petitioner withdrew the three claims related to ineffective assistance of underlying counsel, direct appeal counsel and prior habeas counsel. The court finds the issues for the respondent and denies the petition.

I

Procedural History

In the criminal matter State v. Mashawn Greene, CR01-0506511, in the New Haven Judicial District, the petitioner was ultimately, after appellate review, convicted of Manslaughter in the first degree with a firearm as an accessory, in violation of Connecticut General Statutes §§ 53a-55(a)(1) and 53a-8(a), five counts of assault in the first degree as an accessory, in violation of General Statutes §§ 53a-59(a)(5) and 53a-8(a), conspiracy to commit assault in the first degree, in violation of General Statutes §§

53a-59(a)(5) and 53a-48(a); and possession of an assault weapon, in violation of General Statutes §§53-202c. The petitioner appealed his underlying conviction. State v. Greene, 274 Conn. 134 (2005). As a result, on October 7, 2005, the Court, Thompson, J., imposed a total effective sentence of sixty years to serve. The petitioner has also had the benefit of a court trial on a prior petition for a writ of habeas corpus, assigned docket number CV04-0004560, as well as appellate review of that decision. Greene v. Commissioner of Correction, 123 Conn. App. 121, cert. denied, 298 Conn. 929 (2010). On June 28, 2013, the petitioner filed this second pro se writ, giving rise to the instant matter.

II

Law / Discussion

A. Civil Matters-Generally

Standard of Proof

The standard of proof in civil actions, a fair preponderance of the evidence, is "properly defined as the better evidence, the evidence having the greater weight, the more convincing force in your mind." (Internal quotation marks omitted.) Cross v. Huttenlocher, 185 Conn. 390, 394 (1981).

Burden of Proof

"While the plaintiff is entitled to every favorable inference that may be legitimately drawn from the evidence, and has the same right to submit a weak case as a strong one, the plaintiff must still sustain the burden of proof on the contested issues in the

complaint and the defendant need not present any evidence to contradict it." Lukas v. New Haven, 184 Conn. 205, 211 (1981). The general burden of proof in civil actions is on the plaintiff, who must prove all the essential elements of their cause of action by a fair preponderance of the evidence. Gulycz v. Stop & Shop, 29 Conn. App. 519, 523, cert. denied, 224 Conn. 923 (1982). Failure to do so results in judgment for the defendant. Id.

The Proceedings

"The fact-finding function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of the circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties." (Internal quotation marks omitted.) Cavoli v. DeSimone, 88 Conn. App. 638, 646, cert. denied, 274 Conn. 906 (2005). "It is well established that in cases tried before courts, trial judges are the sole arbiters of the credibility of witnesses and it is they who determine the weight to be given specific testimony... it is the quintessential function of the factfinder to reject or accept certain evidence...." (citations omitted; internal quotation marks omitted.) In re Antonio M., 56 Conn. App. 534, 540 (2000). "The sifting and weighing of evidence is peculiarly the function of the trier [of fact]." Smith v. Smith, 183 Conn. 121, 123 (1981). "[N]othing in our law is more elementary than that the trier [of fact] is the final judge of the credibility of witnesses and of the weight to be accorded to the testimony." (Citation omitted; internal quotation marks omitted.) Toffolon v. Avon, 173 Conn. 525, 530 (1977). "The trier is free to accept or reject, in whole or in part, the testimony offered by either party." Smith v. Smith, supra, 183 Conn. 123. "The

determination of credibility is a function of the trial court." Heritage Square, LLC, v. Eoanou, 61 Conn. App. 329, 333 (2001).

Credibility

It is well established that "[i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) State v. Lawrence, 282 Conn. 141, 155, 920 A.2d 236 (2007) (See also Dadio v. Dadio, 123 Conn. 88, 92-93, 192 A. 557 (1937)). Such observation may include all genuine and spontaneous reactions of the witness in the courtroom, whether or not on the stand, but only to the extent that they bear on the witness's credibility. State v. McLaughlin, 126 Conn. 257, 264-265, 10 A.2d 758 (1939). It is generally inappropriate for the trier [of fact] to assess the witness's credibility without having watched the witness testify under oath. Shelton v. Statewide Grievance Committee, 277 Conn. 99, 111, 890 A.2d 104 (2006).

B. Habeas Corpus Matters-Generally

"The principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness. . . . To mount a successful collateral attack on his conviction, a prisoner must demonstrate a miscarriage of justice or other prejudice and not merely an error which might entitle him to relief on appeal. . . . In order to demonstrate such a fundamental unfairness or miscarriage of justice, the petitioner should be required to show that he is burdened by an unreliable conviction." (Citations omitted; internal quotation marks omitted.) Summerville v. Warden, 229 Conn. 397, 419, 641 A.2d 1356 (1994).

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they clearly erroneous ... Historical facts constitute a recital of external events and the credibility of their narrators ... Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given their testimony ..." Mahon v. Commissioner of Correction, 157 Conn. App. 246, cert. denied, 317 Conn. 917 (2015). "It is well established that a reviewing court is not in the position to make credibility determinations ... This court does not retry the case or evaluate the credibility of witnesses ...Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) Lewis v. Commissioner of Correction, 117 Conn. App. 120, 126. 117 Conn. App. 120, 126, cert. denied, 294 Conn. 904 (2009).

1. Brady Violation

The petitioner asserts that the prosecuting authority improperly withheld exculpatory evidence favorable to him at his criminal trial in violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, the petitioner claims that the prosecution failed to disclose an agreement with the petitioner's co-defendant Markese Kelley to "reduce the charges and/or sentence in Kelley's pending criminal matter as the petitioner's co-defendant, and/or any other pending criminal matters, in exchange for Kelley's testimony at the petitioner's criminal trial." The petitioner describes the aforementioned "evidence" as exculpatory or otherwise material favorable evidence subject to disclosure.

2. False Trial Testimony of Markese Kelley

The petitioner asserts that the testimony of Markese Kelley as to the nature of his "understanding" with the prosecuting authority and the sentencing court was false, in that Mr. Kelley testified that he received no "consideration" from the prosecuting authority in exchange for his truthful trial testimony.

The constitutional violation claimed by the defendant is the failure to disclose potentially exculpatory evidence by the state. "In Brady v. Maryland, supra, 373 U.S. at 87, 83 S.Ct. 1194, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused ... 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." (Internal quotation marks omitted.) State v. Rivera, 152 Conn.App. 248, 255, 96 A.3d 1285, cert. denied, 314 Conn. 934, 102 A.3d 85 (2014).

"To 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].... Impeachment evidence as well as exculpatory evidence falls within Brady's definition of evidence favorable to an accused." (Citation omitted; internal quotation marks omitted.) State v. Richard W., 115 Conn.App. 124, 137, 971 A.2d 810, cert. denied, 293 Conn. 917, 979 A.2d 493 (2009); State v. Giovanni P., 155 Conn. App. 322, 342, 110 A.3d 442, 456-57 (2015)

"[E]vidence 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.... Documents that are part of public records are not deemed suppressed if defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation." (Citations omitted; internal quotation marks omitted.) United States v. Payne, 63 F.3d 1200, 1208 (2d Cir.1995).

"The rules governing our evaluation of a prosecutor's failure to correct false or misleading testimony are derived from those first set forth by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 86–87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and we begin our consideration of the respondent's claim with a brief review of those principles. The United States Supreme Court also has recognized that "[t]he jury's estimate of the truthfulness and reliability of a ... witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Accordingly, the *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence; e.g., United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Giglio v. United States, 405 U.S. 150, 154–55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); which, broadly defined, is evidence "having the potential to alter the jury's assessment of the credibility of a significant prosecution witness." (Internal quotation marks omitted.) United States v. Rivas, 377 F.3d 195, 199 (2d Cir.2004). Because a plea agreement is likely to bear on the motivation of a witness who has agreed to testify for the state, such agreements are potential impeachment evidence that the state must disclose. See, e.g., State v. McIntyre, 242 Conn. 318, 323, 699 A.2d 911 (1997)." Adams v. Commissioner of Correction, 309 Conn. 359, 369-70, 71 A.3d 512, 519 (2013).

"Not every failure by the state to disclose favorable evidence rises to the level of a Brady violation. Indeed, a prosecutor's failure to disclose favorable evidence will constitute a violation of Brady only if the evidence is found to be material. "The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial...." United States v. Bagley, supra, 473 U.S. at 675, 105 S.Ct. 3375. "In a classic Brady case, involving the state's inadvertent failure to disclose favorable evidence, the evidence will be deemed material only if there would be a reasonable probability of a different result if the

evidence had been disclosed. Bagley's touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)." Adams v. Commissioner of Correction, supra, 309 Conn. 370-71.

Additionally, separate from the Brady violation, the petitioner claims a due process violation asserting the trial prosecutor's failure to correct the alleged false testimony deprived the petitioner of his constitutional right to a fair trial.

A. Attorney Christopher Alexy

Christopher Alexy, the underlying trial prosecutor, testified in the instant matter. When asked about the existence of an "agreement" for consideration between himself and Markese Kelley, in exchange for his trial testimony, counsel credibly took exception to the term "agreement". Counsel described the pre-trial posture not as an "agreement" for a particular disposition, instead indicating the mutual understanding that the prosecuting authority would make Mr. Kelley's cooperation known to the Court at the time of his sentencing, after having given testimony in the underlying matter.

Attorney Alexy testified credibly that he properly disclosed to the defense that Kelley would testify against the petitioner, that Kelley had entered guilty pleas before trial, that there was no specific sentencing agreement for Mr. Kelley, and that his cooperation would be made known to the sentencing judge after trial.

When asked his opinion as to whether Kelley's trial testimony accurately reflected to the jury the understanding between Kelley, Alexy and the trial court, Alexy testified that, although Kelley did not use the same words as Alexy ("...I ain't got no deal."), his testimony was accurate, especially in light of the cross-examination.

Alexy credibly described the reduction in charges as those which he felt he could prove beyond a reasonable doubt in the event of a trial.

B. Attorney Paul Carty

Paul Carty, an experienced criminal defense attorney, who represented the petitioner at the underlying trial, testified at the instant habeas trial. Attorney Carty, who was present for the habeas trial testimony of Attorney Alexy, agreed with Alexy's testimony that he does not consider the understanding between Kelley, Alexy and the sentencing court a specific "agreement". Counsel testified that he was made aware of the aforementioned understanding by Alexy prior to trial.

Attorney Carty testified that he felt Kelley's trial testimony made clear for the jury his motive to testify. After reading relevant portions of Kelley's trial testimony on the witness stand, attorney Carty testified that, on cross-examination, he used his

knowledge of Kelley's motive to testify to effectively impeach his credibility before the jury. This Court, upon review of the trial transcripts, concurs with this assessment.

C. Markese Kelley

During his direct and cross-examination at the underlying trial, Markese Kelley testified to his understanding of the post-testimony "agreement" between himself, the prosecuting authority and the sentencing court. This court finds that the trial testimony of Mr. Kelley was not false or misleading. Though not a model of clarity, it sufficiently and accurately describes the aforementioned "agreement", both on direct and cross-examination.

There is no authority, of which this court is aware, that supports the proposition that a cooperating witness must use or agree to certain "magic words" in describing the nature of the cooperation agreement. As, in this court's experience as the fact-finder, cooperating witnesses come from all walks of life and have various levels of education and proficiency with the English language, this court declines the invitation to require a cooperating witness to use certain words, including: "consideration", "incentive", "agreement", "understanding" or "motive". Reasonable competent counsel can draw the fact-finder's attention to the witness' motive to testify, falsely in some cases, through proper cross-examination and closing argument, as in the instant matter.

Here, taken as a whole and in the context of the entire record, this court finds that the testimony of Mr. Kelley was not false and that the nature of the "agreement" was properly disclosed and properly utilized at trial by defense counsel. There is

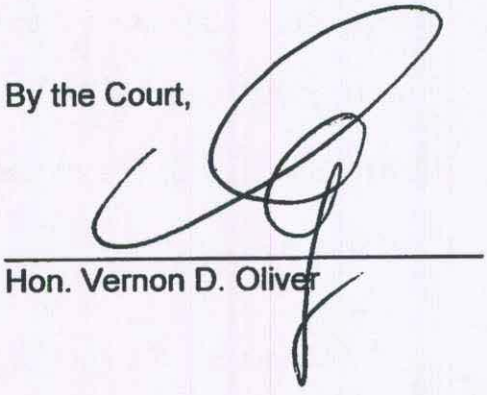
nothing in evidence which compels this court to find that the petitioner was deprived of a fair trial related to these claims. Accordingly, the petitioner's claims fail.

III

Conclusion

For the foregoing reasons, the petition is denied. Judgment shall enter for the respondent.

By the Court,



Hon. Vernon D. Oliver

Order Granting Petitioner's Motion for Reconsideration or Reargument, But Denying Relief Requested in *Mashawn Greene v. Commissioner of Correction*, S.C. 19961

September 26, 2018

SUPREME COURT

STATE OF CONNECTICUT

SC 19961

MASHAWN GREENE

v.

COMMISSIONER OF CORRECTION

SEPTEMBER 26, 2018

O R D E R

THE MOTION OF THE PETITIONER-APPELLANT, FILED SEPTEMBER 17, 2018, FOR RECONSIDERATION OR REARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **O R D E R E D** GRANTED, BUT THE RELIEF REQUESTED THEREIN IS DENIED.

BY THE COURT,

/S/
RENE L. ROBERTSON
ASSISTANT CLERK-APPELLATE

NOTICE SENT: September 26, 2018
HON. VERNON OLIVER
COUNSEL OF RECORD
CLERK, SUPERIOR COURT, TSR CV13-4005678-S
REPORTER OF JUDICIAL DECISIONS

180106

Guilty Plea Hearing Transcript for Markese Kelly from *State of Connecticut v. Markese Kelly,* CR-01-506190

May 12, 2003

DOCKET #CR98-469229
CR01-506190

STATE OF CONNECTICUT	*	SUPERIOR COURT
VS.	*	NEW HAVEN COUNTY
MARKESE KELLEY	*	MAY 12, 2003

BEFORE:

The Honorable Roland D. Fasano, Judge

APPEARANCES:

FOR THE STATE OF CONNECTICUT:

Christopher Alexy,
Assistant State's Attorney

FOR THE DEFENDANT:

Avery Chapman, Esq.

Jo-Anne L. Case
Court Recording Monitor

THE COURT: All right. Mr. Kelley, counsel is indicating you are prepared for a change of plea, is that right? You've got to speak up.

MR. KELLEY: Yes.

THE COURT: All right. Counsel wish to withdraw prior pleas and elections?

MR. CHAPMAN: Yes, your Honor.

THE COURT: And we have the substituted information.

THE CLERK: I have a substitute information, Judge.

THE COURT: Okay. Would you put the defendant to plea?

THE CLERK: Yes, Judge. Markese Kelley, how old are you?

MR. KELLEY: Twenty-four.

THE CLERK: What is your date of birth?

MR. KELLEY: 6/2/78.

THE CLERK: And what was your address prior to incarceration? Where did you live before you were in jail?

MR. KELLEY: Oh. 655 Fitch, Hamden.

THE CLERK: Thank you. In docket number CR01-506190 you are charged in the first count of the substitute information with Conspiracy to Commit Assault in the First Degree in violation of Connecticut General Statute number 53a-48 and 53a-59(a)(5). Do you plead guilty or not guilty?

MR. KELLEY: Guilty.

THE CLERK: And in the second count of the same substitute information you are charged with Carrying a Pistol without a Permit in violation of Connecticut General Statute number 29-28. Do you plead guilty or not guilty?

MR. KELLEY: Guilty.

THE CLERK: Thank you.

THE COURT: All right. The facts, please.

MR. ALEXY: Your Honor, shortly after Mr. Kelley's arrest he gave a statement to police describing how on October 12th of 2001 he, Marquise Mitchell, Mashawn Greene, Shante Little and Franki Jones parked their car near Saint Raphael's Hospital and proceeded on foot to the area of Elm and Orchard Streets in New Haven where they proceeded to fire a number of shots. Mashawn Greene had a Mack 11 machine gun and ballistic evidence showed that there were approximately perhaps more than sixty shell casings that were fired from that gun alone. As a result of this, five people were struck by projectiles and one person was killed. There is no agreed sentence in this case. I believe that the defendant understands that his continued cooperation in the cases of the co-defendants will be made known to the Court at the time of the sentencing and that the ultimate sentence will be up to the Court. There is no agreement regarding a disposition of his cases pending in GA23 or his Violation of Probation.

THE COURT: All right. Mr. Kelley, I'm going to ask you some questions. I want you to listen to my questions and answer as best you can. Okay? And you have to--any time I ask you a question you have to answer out loud so the Reporter can record your responses. Okay?

MR. KELLEY: All right.

THE COURT: Have you had enough time to discuss this matter with your attorney?

MR. KELLEY: Yes.

THE COURT: Are you satisfied with his advice and counsel?

MR. KELLEY: Yes.

THE COURT: As you stand before the Court right now, are you under the influence of drugs, alcohol, medication, any substance right now?

MR. KELLEY: No.

THE COURT: Do you understand by pleading to these charges you are giving up your right to try the cases to the Court or the jury with the assistance of your attorney, giving up your right to confront and cross examine witnesses against you, your right against self incrimination, your right to put on evidence in your own behalf and your right to continue to plead not guilty? In other words, you are giving up your trial rights. Do you understand that?

MR. KELLEY: Yes.

THE COURT: Are you pleading voluntarily and of your own free will?

MR. KELLEY: Yes.

THE COURT: Anybody force or threaten you in any respect to compel you to enter these pleas?

MR. KELLEY: No.

THE COURT: Have you had a chance to discuss with your attorney the elements of these charges and the evidence the State claims to have in connection with each of the elements?

MR. KELLEY: Yes.

THE COURT: So you understand the elements and the evidence. Attorney Chapman, are you satisfied the defendant understands the elements of the offenses and the evidence the State claims to have in connection with each of the elements?

MR. CHAPMAN: Yes, your Honor.

THE COURT: Sir, are you currently on any probation or parole? You have a probation out of the GA, right?

MR. KELLEY: Yeah. I have probation.

THE COURT: Any other probation or parole out there?

MR. KELLEY: Nah.

THE COURT: All right. Do you understand the maximum penalties you could get for these charges? On the Conspiracy to Commit Assault in the First Degree you could get from one to twenty years and up to fifteen thousand dollars in fines. Pistol without a Permit you could get one to five years and up to five thousand dollars in fines. One year of the Pistol without a Permit is mandatory absent evidence of mitigation for the Courts consideration. Do you understand that? So that if you receive maximum consecutive sentences you could receive up to twenty-five years and twenty thousand dollars in fines. Excuse me. Twenty-five years and twenty thousand dollars in fines. Do you understand that?

MR. KELLEY: Yes.

THE COURT: Now you heard the facts recited by the prosecutor. Were those facts substantially accurate, that is accurate for the most part?

MR. KELLEY: Yes.

THE COURT: Do you understand the agreement here is only this. The sentencing court, at the time of sentencing, will consider any cooperation and truthful testimony in the cases of the co-defendants as an element of consideration in sentencing you. In other words, it will be up to the Court to sentence you at the time of the sentencing and we'll consider any cooperation and truthful testimony in the cases of the

co-defendants. Is that your understanding?

MR. KELLEY: Yes.

THE COURT: Is that yours, counsel?

MR. CHAPMAN: Yes, it is, your Honor..

THE COURT: Is that yours, counsel?

MR. ALEXY: Yes, your Honor.

THE COURT: Have there been any other promises made to you to induce you to enter these pleas?

MR. KELLEY: Nah. No.

THE COURT: All right. Do you understand that if I accept your pleas you are not going to be allowed to withdraw your pleas except with the permission of the Court? Do you understand that?

MR. KELLEY: Yes.

THE COURT: Do you still wish to enter these pleas?

MR. KELLEY: Yes.

THE COURT: Either counsel know of any reason why the pleas should not be accepted?

MR. ALEXY: No, your Honor.

MR. CHAPMAN: No sir.

THE COURT: All right. Pleas are found to be voluntary and understandingly made with the assistance of competent counsel. There is a factual basis for each of the pleas. Pleas are accepted. Findings of guilty may enter. The matter is going to be continued. We should get a pre-sentence investigation. Do you want a PSI?

MR. ALEXY: That's up to--

MR. CHAPMAN: Yes. Why don't we, your Honor?

THE COURT: I think that might be helpful ultimately.

MR. CHAPMAN: I think we should give it a long date given the circumstances.

THE COURT: All right. I should indicate one of the co-defendants trial will be starting shortly, tomorrow, is that right?

MR. ALEXY: Correct.

THE COURT: All right. Let's continue the matter eight weeks.

THE CLERK: How's the 11th of July?

MR. CHAPMAN: One second, please. Yes. The 11th of July is fine, your Honor.

THE COURT: All right. Okay. Thank you, gentlemen.

MR. ALEXY: Your Honor, if I may--

THE COURT: Yes.

MR. ALEXY: There's one other matter that Mr. Chapman discussed with me before you came out on the bench with regard to the defendants bond. I believe the defendant would like to have the bond reduced to four hundred and ninety thousand dollars cash only. The State has no objection to that based on the fact that that would keep him at the Whalley Avenue facility as opposed to being transferred to one of the other facilities where the co-defendants are currently incarcerated.

THE COURT: All right and that's your position, Attorney Chapman?

MR. CHAPMAN: Yes, your Honor.

THE COURT: All right. Under the circumstances I think that's appropriate. Cash only. Four hundred and ninety thousand dollars.

MR. CHAPMAN: Okay.

MR. ALEXY: It's my understanding that he's not able to make

that bond but that would be the purpose for it.

THE COURT: All right.

MR. CHAPMAN: Yes, your Honor.

THE COURT: The record may so reflect. Okay. We'll take a recess. Thank you, gentlemen.

(Whereupon, the hearing was adjourned)

DOCKET #CR98-469229
CR01-506190

STATE OF CONNECTICUT

VS.

MARKESE KELLEY

SUPERIOR COURT

AT NEW HAVEN

CERTIFICATION

I hereby certify that the foregoing is a true and correct transcript of the tape of the statements given at the hearing in the above-entitled case heard before the Honorable Roland D. Fasano in Superior Court for New Haven County, Connecticut on the 12th day of May, 2003.

Dated this 29th day of May 2003 at New Haven, Connecticut.

Jo-Anne L. Case,
Court Recording Monitor

Excerpt of the Transcript of the Direct Examination of Markese Kelly, from the Criminal Trial, Called by the Prosecuting Authority, from *State of Connecticut v. Mashawn Greene*, CR-01-0506511

July 8, 2003

Q But at that point in time, when you left the courthouse, when they told you to leave the courthouse, what did you think had happened?

A I already knew I was going to jail.

Q Why?

A Because I knew I was going to jail for the shooting case, I knew that already. So, it was like, I ain't running nothing, I knew I was going to jail, but I still ain't run, I stayed in the projects. I getting high, getting drunk every night, always stay high, always stay drunk, I knew I was going to jail. But when they finally did come, I just put my hands up, you know what I'm saying? I tell my little nephew to get out the store and go home and they arrested me.

Q When they arrested you, did you have a chance to talk to the police and tell them what happened?

A I told them, first they telling me what happened, I said, I already know what I'm arrested for, you

know what I'm saying? You got to -- you ain't got to tell me, I just discharged for three years, so I know I got no warrants, I ain't violate probation, so I knew what I'm in jail for, you know what I'm saying? As a matter of fact, I already know what you got, it's bullshit anyway because when they told me basically they ain't even told me who tell, but I seen the statement, but they ain't got no names. But if

you look on the front page, you could see. So, I was like, that story bullshit. I already know they lying.

Q Now, the police --

A I give them the real story off the rip.

Q The police showed you some statements?

A Yeah.

Q Who did you think those statements were from?

A They showed me three statements, I thought it was from all three of them, I come to find out it was only from two of them.

Q Which two?

A Mitchell and Jones.

Q So, after the police showed you those statements, part of those statements?

A They threw them in my face, you know what I'm saying? I'm sitting there, they talking to me, I'm telling them the usual, don't be with nobody, this and that, and that's when they were like, they threw the statements on the table and I grab them and look, I just threw them down, like, like them bullshit statements. They just gave them

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statements to get out of the case that they have, all the robberies and shooting cases, they gave them statements to give them statements, just to get out of what the situation they were in; I'm going to give you the real story, the

whole story.

Q What did you tell the police then?

A I told them everything. I told them everything. I told them that ain't nobody could make no deals on my life, you know, when I just came home. They didn't care about me when they gave the statements, why should I care about them? What they gave you is bullshit. Here, here is the truth right here. We all going to sit in jail together.

Q How long had you known Mashawn Greene up to that time?

A A long time.

Q A long time?

A I knew him but I ain't really hanging with him until like seven, in the seventh grade, eighth grade.

Q So, you knew him since at least seventh and eighth grade?

A Yeah.

Q How about Marquise Mitchell, how long had you known him?

A I know him since he was little. He used to live next door to me, he used to live next door, then he moved.

Q How about Frankie Jones, how long had you known him?

A I met him in high school.

Q And Shaunte Little, how long had you known him?

A I known him since like '85.

Q Now, you gave your statement to the police, did you tell them that you had fired a gun?

A Yeah.

Q Now, at some point later, you pled guilty to some charges regarding this incident?

A Yeah.

Q And do you recall what the charges were?

A I think it was assault first and carrying a pistol, a firearm, something like that.

Q Okay.

A You know what I'm saying?

Q You had a lawyer at that time?

A Yeah.

Q You had a chance to talk to your lawyer before you pled guilty?

A Yeah.

Q Now, what was your understanding of what your sentence would be?

A It wasn't no understanding; what I was getting sentenced to, it was just that.

Q Well, what was the maximum that you are looking at?

A Twenty-five years.

Q And do you have any understanding as to what

could happen if you came in here and testified?

A Nope.

Q Okay.

A When I gave that statement, I ain't make no deal. They were trying to make a deal with my life. When I gave that statement, I ain't make no deals, no lawyer, no nobody, no nothing, just the cop, I ain't got no deal. I ain't got to hear saying anything, I ain't got no deal, I could have sat here. It ain't really matter.

MR. ALEXY: One moment please.

BY MR. ALEXY:

Q One last question. At some point in time did you live at 655 Fitch Street?

A Still do.

Q That's still your address?

A (Indicating yes.)

Q Okay. And which apartment?

A C2 now.

Q C2 now?

A Yeah, C2 now.

Q Okay. Was it a different apartment?

A Yeah.

Q Which apartment was that?

A It was, I think it was C7.

Q Did you ever receive any mail from Mashawn

Excerpt of the Transcript of the Cross Examination of Markese Kelly, from the Criminal Trial, Called by the Prosecuting Authority, from *State of Connecticut v. Mashawn Greene*, CR-01-0506511

July 8, 2003

A Yes.

Q Yet, you have only pled guilty to conspiracy to commit assault in the first degree and pistol without a permit, is that right?

A Yeah.

Q Isn't it a fact that had you not worked that deal out --

A I don't know nothing about it.

Q Had you not worked that deal out, you know, the murder charge and associated charges, you're looking at basically spending the rest of your life behind bars?

A I don't know nothing about no deals, none. I don't know nothing about no deals.

Q You worked out a plea, right?

A My lawyer, I guess, I don't know. I know he told me what I was copping out to and I took it.

Q So, you are not even pleading to a homicide, right?

A I don't know.

Q Nothing to do with homicide, right?

A No.

Q Even though that was the whole purpose of you going around Edgewood and Orchard, isn't it?

A Yes.

Q And at the time that you spoke to the police, you knew that Mr. Mitchell and Mr. Jones had already talked

to the police, right?

A Yeah, I seen it. I seen three statements.

Q You seen three statements?

A I didn't know whose they were at the time, but it came in my mind, when I first seen the statement, I thought all three of them told. To tell you the truth, I thought all three of them told.

Q But it was Mitchell and Jones?

A I didn't have no lawyer or nothing when I gave that statement, I made no deals, no nothing. What deals could I make? I have no lawyer present, no nothing.

Q But, by the same token, by the same token, Mr. Kelly, you knew that they had told something their way and you wanted to tell it your way, right?

A Yes.

Q Right. Because you felt, uh-huh, they are going to, you know, make themselves look good and you want to make yourself look good too, right?

A No, I knew because if everybody told on each other, nobody is going to get no deals, everybody going to be stuck in jail. So, if I just sit here and don't give no statement, I'll be the only one sitting on there going to trial while everybody testify against me, and I be the only one in jail. So, if everybody told a statement, who you going to give a deal to? Everybody told on their self, we

all stay in jail regardless of the fact, that's why I gave the statement. Then I knew they were only giving them statements because they had mad robberies and mad other

charges, that's the only reason they gave those statements in the first place because the cops ain't got no clue to what happened, nobody had no clue to what happened but us. I knew if we told, each other, we was our own downfall. We knew that from the rip, we knew that right out the car; we all stick together, don't say nothing, we ain't going to go to jail because they ain't got no witnesses from the street. They went to jail, told, got into a whole bunch of little frenzy, now we all sit in jail.

Q Except you going to be sitting in jail for perhaps a lot less time, isn't that right?

A Twenty-five years.

Q All right. Well, when you entered your plea, weren't you informed that the minimum time that you could get is as little as one year, the maximum is 25 years, but there is only one year which is mandatory?

A I ain't know nothing about that.

Q Well, were you present when you entered your plea?

A Yeah, but I ain't know nothing about one year, I know the maximum is 25 years.

Q Were you listening to what the Judge told you?
A Whole bunch of things was in my head at the time, I was thinking about the whole 25 years, I wasn't thinking about no year, I ain't getting no year, I wasn't thinking about one year, I was thinking about the whole 25 plus the other charges I got pending, they trying to get me

five more for that.
Q That's not what you are expecting out of this?
A Who me?
Q Yeah.
A I don't know what I'm getting.
Q Well, that's not what I'm asking you. What are you expecting?
A I ain't expecting nothing, but I know that I could do the time. I know they can't. They ain't strong enough, they ain't built, I know I could do the time. That's up to them if they could do the time, which I know they can't, they weak. If they wasn't weak, they never would have told in the first place.
Q There is no question pending.
A Uh?
Q There is no question.
THE COURT: Wait for another question.
THE WITNESS: Oh.
BY MR. CARTY:

Q Okay. But the time that you are going to be doing is just for an assault, conspiracy to commit an assault?

A I guess.

Q Right?

A I guess.

Q Have nothing to do with homicide, correct?

A Nope.

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MR. CARTY: Can I have a moment please?

BY MR. CARTY:

Q Did you have an opportunity to see Mr. Little after October 12th of 2001?

A Yeah.

Q And Mr. Mitchell?

A I seen Mr. Mitchell probably one time.

Q How about Jones?

A I seen him with Mitchell, they always together, Mitchell and Jones.

Q How about you and Shaunte?

A We always was together.

Q And how about Mr. Greene, he hang with them regularly?

A Who him?

Q Yeah.

Sentencing Hearing Transcript for Markese Kelly from *State of Connecticut v. Markese Kelly,* CR-01-506190

September 12, 2003

NO: N06N CR01-0506190S	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF NEW HAVEN
v.	:	AT NEW HAVEN, CONNECTICUT
KELLEY, MARKESE	:	SEPTEMBER 12, 2003

BEFORE THE HONORABLE ROLAND FASANO, JUDGE

A P P E A R A N C E S :

Representing the State of Connecticut:

ATTORNEY CHRISTOPHER ALEXY
Office of the State's Attorney

Representing the Defendant:

ATTORNEY AVERY CHAPMAN

Recorded By:
Jo-Anne Case

Transcribed By:
Sarah Burke
Court Recording Monitor
New Haven Superior Court
235 Church Street
New Haven, Connecticut 06510

WITH COURT IN SESSION THE AFOREMENTIONED CASE WAS CALLED AND HEARD AS FOLLOWS:

THE COURT: This is the matter of State versus Markese Kelley. Plea -- pleas were entered on May 12th of this year. This is to one count of Conspiracy to Commit Assault in the 1st degree, one court of Pistol Without a Permit. There was no recommendation at the time of plea and the understanding is that -- that the ultimate sentencing would depend in part on another trial that was to take place in the interim. State ready to proceed?

ATTY. ALEXY: Yes, Your Honor.

THE COURT: Okay.

ATTY. ALEXY: Since the pleas were entered on May 12th Mr. Kelley complied with all the conditions of the plea agreement very satisfactorily. He was instrumental in helping solve a very brutal shooting.

He also has two files that were pending in GA23 one of which was brought over today and that is docket number CR01-506189. The other GA file was a Violation of Probation. That is docket number CR98-469229.

It's the State's intention to nolle the charges in both of those files. I will contact the appropriate people at GA23 with regard to the file that's not here today to let them know that.

But I'm prepared to recommend to the Court that

on the charges in this case; the Conspiracy to Commit Assault 1st degree and Carrying a Pistol Without a Permit that the Court impose a sentence of ten -- a total effective sentence of ten years to serve without suspended portion for probation.

THE COURT: Attorney Chapman.

ATTY. CHAPMAN: Thank you, Your Honor, and I will note for the record I'm going to be filing appearances in the two GA23 matters; just for the record docket CR98-469229 the VoP and docket CR01-506189.

THE COURT: All right. And just to clarify the issue of representation. These are files that have been transferred over to this court for disposition here. Attorney Chapman is now entering his appearance, right?

ATTY. CHAPMAN: Yes, Your Honor.

THE CLERK: One of them is here.

THE COURT: One of them is here?

THE CLERK: The YO to be disposed of. The YO VoP is still across the street.

THE COURT: All right. Is the other to the transferred?

ATTY. ALEXY: That can be disposed of --

THE COURT: Over there.

ATTY. ALEXY: -- over in GA23.

THE COURT: Well, the problem with that -- and

who represents him over there?

ATTY. ALEXY: At present Attorney Michael Alevy still has an appearance in that file.

ATTY. CHAPMAN: Which one is this?

THE COURT: This is a Violation of Probation in the GA. You'll be in touch with Attorney Alevy in connection with the --

ATTY. CHAPMAN: Perhaps then I won't file an appearance then if it's not here.

THE COURT: No. No, just the one that's here then.

ATTY. CHAPMAN: Okay, that sounds --

THE CLERK: That was ending 229, Attorney Chapman.

ATTY. CHAPMAN: Sorry?

THE CLERK: That was the one ending 229.

ATTY. CHAPMAN: Right. So the one ending 189 is just the Possession that is here.

THE CLERK: Correct.

ATTY. CHAPMAN: Okay, I'll be doing that in a second. Mr. Kelley, Your Honor, from the get-go and I think refreshingly so as far as everybody is concerned with this case, Mr. Kelley accepted responsibility and gave what I think everybody is concerned -- was concerned with this case seem to agree is the most truthful and accurate account of what happened that night.

His statement is somewhat lengthy, does not couch or mince words as to what his involvement was. He explains what happened, explains why it happened from his perspective in terms of what the other actors did and never waivered from his acceptance of responsibility and his willingness to do whatever it took to accept responsibility and demonstrate that he made a horrific mistake in acting as he did.

As far as we can tell he was not the person who is responsible for the victim who died but he understands that his conduct was absolutely wrong. He has expressed nothing but remorse to me every time he has spoken about this matter and -- a kind of remorse -- not remorse "Gee, I wish I'm not here in jail" but remorse as in "I did something very stupid, reckless and dangerous and I should have never done it" and I think that's different and I think a lot of people sometimes express remorse for the situation they're in but not for the acts that got them there. I think that Mr. Kelley has expressed remorse for the acts that he did.

His family is here and will want to speak. His mother and father have been very supportive of him and they will tell you as I will tell you, you know, the reckless conduct he undertook stupid as it was reflects more a lapse than an indication of his character.

He had I think in that end of 2001 a difficult month. I'm not sure if you could really understand what was going on in his life but it clearly is something that he has come to grips with and understands was a wrong wrong conduct.

We want to thank the State for its willingness to speak with us about Mr. Kelley. At this point I'd like the -- with the Court's permission for the family to address the Court.

THE COURT: Just indicate your name and your relationship.

MS. EVANS: My name is Bessie Kelley Evans and I'm Markese's mother.

THE COURT: Mother? Okay.

MS. EVANS: First of all I wanted to say to my son that I admire him for accepting responsibility for your part in this. Markese has always been the type of son that cared a lot about people, that's how I believe he got in this situation because of another situation that happened to some people that he cared about.

I did the best I could. My mother, she did the best she could and my sister. But by Markese accepting his part in this has showed me that he is a man now. If he was a child he wouldn't have did it, he would have fought it but he was a man.

The only thing I can do is ask the Court to be

lenient with him and just tell him that I love him --

THE COURT: All right.

ATTY. CHAPMAN: I believe his father would like to address the Court, Your Honor.

THE COURT: Yes, sir.

MR. KELLEY: How are you doing, Your Honor?

THE COURT: Good.

ATTY. CHAPMAN: Identify your name.

MR. KELLEY: My name is Marcine Kelley (ph), father.

THE COURT: Yes.

MR. KELLEY: And my son, he's a very -- he's a very nice kid, you know, he grew up and -- with the right kind of guys but the guys that, you know, that he -- got mixed up with, you know, later on in the future. You know, he wasn't like that. You know, he's a good guy. I mean, he's mostly to himself, you know, he always stayed to himself.

He was a good guy in school. He played basketball. I wish he had stayed with the basketball, you know. He was real good in school, you know, and I'm trying to get really close with him, you know, trying to be a father to him. He's a really good guy. I love him very much, you know. I wish he wasn't in this situation, you know, it's the wrong crowd he got in with. He's not -- he's not that type of person. I

know this for a fact.

I don't want to see him out on the street, you know. I want to see him working, doing good, like he told me what he was going to do, that's where he was headed before that, you know, to have that. He was headed in the right direction and that's what -- I know he's a good guy. He meant to do good and he's going to do good, I know that.

THE COURT: Thank you, sir.

ATTY. CHAPMAN: One -- one more.

MS. ANDERSON: Hi. My name is Macie Anderson (ph) Kese's cousin. I would just like to ask the Court not to take my cousin away for too long because he's a strength to my family. I have two boys who look up to him, you know, he took them out to play basketball and things.

When the family has problems a lot of people look for Kese to me there because he's strong and he holds a lot of the family together and I just want to ask the Court please don't take him away from us, please not too long.

Let him come home to us please. He does a lot, you know, for the family, he's stronger than a lot of our family. You know, we always want Kese to be there because he's always helping us.

When days get rough he's the one who to keep the family together. He's the one to do the cookouts,

parties and things for the kids. He's the one to take them to the ballpark to play ball and show them, you know, better ways of living. He does that for the kids, his nephews.

I just want to see him come home. I don't want him to be in there forever because he doesn't deserve to be there. He took the responsibility of saying he had a part but he still has a part in our hearts and our family and I want him to come home to our family.

I just want to tell Kese I love you and I'm sorry I haven't been there for you but it's hard, it's real hard out there without you. I just want you to come home.

THE COURT: All right. Thank you, ma'am.

MS. ANDERSON: Thank you.

ATTY. CHAPMAN: Thank you, Your Honor.

THE COURT: Mr. Kelley, did you want to say anything?

THE DEFENDANT: Yeah. I just wanted -- I really wanted his family just to be here today because they lost somebody in this so I really wanted to speak to them and say -- and let them know like I wasn't in the right state of mind and -- none of that was supposed to happen, it wasn't even -- he was just at the wrong place at the wrong time. Things that happened led up to that. I was just fed up.

THE COURT: Did you know the victim?

THE DEFENDANT: Yeah, personally. I went to school with him from since second grade. I knew him and tried to prevent it but I was too late and I'm just sorry I had to take your time up, my family time, prosecutor, lawyer for my stupidity knowing I wasn't supposed to be there in the first place and I'm sorry; boy, I'm sorry.

THE COURT: Well, I've reviewed the PSI in this matter and I followed these cases from the beginning when they first came in and for you -- personally for you this is totally out of character and -- number one the involvement with these extremely dangerous individuals in the first instance and the active involvement in the -- the deadly incident itself. Both of these things for you as opposed to a number of the other co-defendants it was certainly out of character but you were -- once it happened you were the first to take responsibility, the first one in the group.

You were the first to cooperate fully. You were the one who when you testified it was obvious to a jury you were telling the truth, that you were an honest individual; that you could tell the truth and I wonder if some of the other co-defendants in this case could under any circumstances be honest and truthful but you could and it's a shame that you got involved with the people you did originally.

It's a shame for you, it's a shame for your very supportive family who have all come out here to be behind you and I hope they continue to support you through the period of incarceration but by taking responsibility and by cooperating you took -- you saved yourself from many many years more of incarceration that you would have served. Ultimately you did the right thing.

I hope that when you get out -- and you'll still be a young man when you get out, I hope you take responsibility for your own life, for who you associate and what you do in the future and make something of it. You clearly have the intelligence and you have the ability, the potential, to do something for your community.

So then on the charge of Assault in the 1st degree the Court will impose a sentence of ten years to serve. On the charge of Pistol Without a Permit five years. Each of those sentences are to run concurrently. Total effective sentence is ten years to serve. Any cost and fees are waived. Nolles are noted in connection with outstanding charges on these files and with respect to the files noted by the State, both the Violation of Probation and the charge -- charges pending here. So this should complete any outstanding matters for Mr. Kelley.

THE CLERK: A stay, Judge --

ATTY. CHAPMAN: Your Honor, a stay --

THE CLERK: -- until 09/19.

THE COURT: You're looking for a stay to what date?

THE CLERK: 09/19.

THE COURT? All right, there's going to be a stay of execution until 09/19. The defendant need not be here on that date, we'll simply lift the stay and that's an order that he have that week and remain in Bridgeport to see his relatives. All right, good luck.

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NO: N06N CR01-0506190S	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF NEW HAVEN
v.	:	AT NEW HAVEN, CONNECTICUT
KELLEY, MARKESE	:	SEPTEMBER 12, 2003

C E R T I F I C A T I O N

I hereby certify the foregoing pages are a true and correct transcription of the audio recording of the above-referenced case, heard in Superior Court, Judicial District of New Haven, New Haven, Connecticut, before the Honorable Roland Fasano, Judge, on the 12th day of September, 2003.

Dated this 15th day of December, 2015 in New Haven, Connecticut.

Sarah Burke

Sarah Burke
Court Recording Monitor