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PATRICK YOUNG *v.* COMMISSIONER OF CORRECTION
(AC 44723)

Bright, C. J., and Clark and Seeley, Js.

Syllabus

The petitioner, who had been convicted of the crimes of assault in the first degree and carrying a pistol without a permit, appealed to this court from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner had enlisted the help of T and M to cash a check that his girlfriend, Z, had stolen. When M was able to obtain only a portion of the funds after depositing the check into an automated teller machine, the petitioner believed that M and T had cashed the check and kept its full amount. After the bank informed M that the check had been stolen and that she would be arrested if she did not repay the funds she had received, the petitioner and Z, under the guise of retrieving money to repay the bank, drove with T and M to a dark road where the petitioner shot T. Prior to trial, Z, who was charged as a coconspirator of the petitioner, entered into an agreement with the state under which, in exchange for her cooperation and truthful testimony against the petitioner at his criminal trial, the state agreed to inform the court at her sentencing proceeding of that cooperation. The habeas court rejected the petitioner's claims that the state had violated his right to due process under *Brady* v. *Maryland* (373 U.S. 83) by failing to disclose to him its agreement with Z and by failing to correct her false or substantially misleading testimony at his criminal trial regarding the agreement. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly concluded that the state had disclosed to his defense counsel its agreement with Z for her testimony at his criminal trial: the court's finding that the agreement was disclosed to the petitioner's defense counsel prior to Z's testimony was not clearly erroneous and thus supported the habeas court's determination that the petitioner had failed to establish a violation of his right to due process pursuant to *Brady*, as the court credited the testimony of the prosecutor that, at the petitioner's criminal trial, he had disclosed the agreement to defense counsel; moreover, disclosure of the agreement was evident from Z's testimony at the criminal trial that she had asked her attorney to approach the prosecutor about a cooperation agreement, that no promises had been made to her about her own criminal case in exchange for her testimony, and that she was motivated to cooperate by her desire to get out of jail sooner and return to her children, from whom she had been separated.
2. This court's careful review of the record led it to conclude that the habeas court had properly determined that the petitioner failed to establish that Z's testimony was false or substantially misleading: the petitioner's contention that the prosecutor had knowingly presented such testimony from Z and then failed to correct it in violation of his due process rights was unavailing, as Z had accurately testified that she was charged as a conconspirator, the state made no promises to her in exchange for her testimony, and she had asked her attorney to approach the prosecutor just before the start of the petitioner's criminal trial to provide assistance with the hope that it would be brought to the attention of the sentencing judge because she wanted to do the right thing, get out of jail and get home to her children; moreover, there was no reasonable likelihood that any false or substantially misleading testimony by Z could have materially affected the jury's verdict, as the petitioner's defense counsel had presented that issue to the jury and impeached Z's credibility by showing inconsistencies between her testimony and her prior statements to the police, the prosecutor, in his closing argument, also noted that her credibility was questionable when he stated to the jury that it should take Z's testimony for what it was worth, and the state's case was so overwhelming that there was no reasonable likelihood that Z's testimony could have affected the judgment of the jury, as it was T and M who had testified about the shooting, during which Z was not present, and

the petitioner's own testimony placed him at the crime scene with the firearm and a motive to injure T.

Argued September 15, 2022—officially released May 9, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the case was tried to the court, *Chaplin*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed*.

Daniel Fernandes Lage, assigned counsel, for the appellant (petitioner).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Craig P. Nowak*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. The petitioner, Patrick Young, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly concluded that his due process rights were not violated as a result of (1) the state's failure to disclose to the defense its agreement with a witness, Maria Zambrano, for her testimony in the petitioner's criminal trial, and (2) the state's knowing presentation of false and misleading testimony regarding this agreement. We disagree with the petitioner's claims, and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of this appeal. After a jury trial, the petitioner was convicted of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and carrying a pistol without a permit in violation of General Statutes § 29-35. Additionally, the court found the petitioner to be in violation of his probation. The court imposed a total effective sentence of thirty-one years of incarceration, execution suspended after twenty-four years, and five years of probation. In affirming the petitioner's conviction, we set forth the following facts that the jury reasonably could have found: "[Zambrano, the petitioner's] girlfriend . . . worked as a home health care aide and stole a $6500 check from one of her patients. After Zambrano told the [petitioner] about the stolen check, the [petitioner], who did not have a bank account, approached Diane Turner, his cousin, and Jessica McFadden, Turner's roommate, for assistance in cashing the check. Zambrano, Turner, McFadden, and the [petitioner] rode together in Zambrano's car in order to cash the check. McFadden was unable to cash the check at the first bank that she tried because the check was postdated; the [petitioner] then had Zambrano alter the date on the check. At a second bank, McFadden was able to obtain $200 by depositing the check into an automatic teller machine. The bank later informed McFadden that the check was stolen and that she would be arrested if she did not repay the bank $200. The [petitioner] became angry when he was told that the check would not be cashed for its entire amount. He thought that Turner and McFadden had lied to him, cashed the check, and kept for themselves the full amount of $6500.

"On the night of the following day, June 24, 2013, Zambrano and the [petitioner] picked up Turner and McFadden at their New Haven residence under the guise of driving to Hamden to retrieve $200 so that McFadden could repay the bank. While Zambrano drove, the [petitioner] repeatedly questioned Turner and McFadden about what they did with the $6500 and why they had not given it to him. Zambrano stopped the vehicle on a dark road near a wooded area. The

[petitioner] again asked Turner and McFadden about the location of the money. The [petitioner] reached into the car's glove compartment, retrieved a silver revolver, waved the revolver in the direction of the backseat where Turner and McFadden were seated, and again asked where the money was.

"The [petitioner] forced Turner to exit the car. The [petitioner] pointed the revolver at Turner's head, and she pleaded for her life. At some point, Turner ran into the woods and yelled for McFadden to follow. The [petitioner] then returned to the car, pointed the revolver at McFadden, told her to exit the car, and he and Zambrano drove away. McFadden found Turner in the woods, and they hid. They then left the wooded area and walked down the road to search for help. The [petitioner] jumped out from behind bushes and pointed the gun at Turner's head; Turner raised her hands. The [petitioner] said that Turner was throwing him under the bus. He then shot Turner in her left palm, and the bullet exited by her wrist. The [petitioner] fired more shots, and one bullet hit Turner under her right arm near her rib cage. The [petitioner] then ran away, and McFadden and Turner hid in the woods before flagging down a work crew for assistance.

"Turner was taken to Yale-New Haven Hospital and treated for her injuries. Doctors were unable to remove a .38 caliber bullet at that time, but it was surgically removed months later when it migrated near her spine. Zambrano informed the police that she had accompanied the [petitioner] to a marina where he threw the revolver off the dock. A police dive team recovered the revolver, which was a .38 caliber stainless steel Smith & Wesson revolver." *State* v. *Young*, 174 Conn. App. 760, 762–64, 166 A.3d 704, cert. denied, 327 Conn. 976, 174 A.3d 195 (2017).

During her testimony at the petitioner's criminal trial, Zambrano acknowledged that she had made an agreement with the state but had not received any promise from the state, a prosecutor, or the police. She replied in the negative to the following inquiry from the prosecutor, John P. Doyle, Jr.: "Have you been made any promises in regards to your pending [criminal] matters as to how they will be disposed of or what will happen with your charges?"[1] During cross-examination by the petitioner's attorney, Thomas Farver, Zambrano admitted that she had been charged as a coconspirator with the petitioner and had been incarcerated for approximately eighteen months during which time she was separated from her two young children. She further admitted that she hoped, as a result of having reached out to the prosecution through her lawyer, that she would receive some consideration and be released from prison sooner. Zambrano also stated that she had not received any guarantees regarding the length of her incarceration and that "[n]o dates" had been promised

to her. In conclusion, Zambrano noted that her motivation for testifying was to "do what was right," to get out of jail, and "to see her children again . . . ."[2]

Subsequent to the petitioner's conviction, Zambrano pleaded guilty, pursuant to the *Alford* doctrine,[3] to conspiracy to commit assault in the first degree and conspiracy to commit larceny in the third degree for her actions in the matter involving the petitioner.[4] At that proceeding, Doyle informed the court, *Clifford*, *J.*, that Zambrano had agreed to cooperate with the state in the petitioner's trial a few days before the evidence had commenced and that no agreement or promises had been made to her in exchange for her testimony. At Zambrano's sentencing hearing on February 4, 2015, Doyle informed Judge Clifford of the following: "Prior to her testimony, [Zambrano] was not made any promises. It was made clear during both direct and cross-examination at the [petitioner's] trial that she had larceny cases pending. It was very clear that she had her part of the assault case pending there. And it came out, the fact that what she was facing was, she was exposed to, but that she had been made no promises by the state or any court for that matter. And that is correct, and it wasn't until we entered and worked a plea agreement out in front of Your Honor with [Zambrano's counsel] in this court that we came up with the plea arrangement." (Internal quotation marks omitted.) Judge Clifford ultimately sentenced Zambrano to ten years of incarceration, execution suspended after thirty months, and five years of probation.

The petitioner subsequently commenced the present action and, on May 18, 2018, filed an amended petition for a writ of habeas corpus. In count one, the petitioner alleged that his incarceration was illegal because the state had failed to disclose exculpatory material pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In count two, the petitioner claimed that he received ineffective assistance of counsel during his criminal trial from Farver. Prior to the habeas trial, the petitioner withdrew his ineffective assistance of counsel claim. The habeas court, *Chaplin*, *J.*, conducted a one day trial on December 6, 2019.

At the habeas trial, Doyle testified that he had not planned on calling Zambrano as a witness in the petitioner's criminal case because she previously had refused to cooperate. Doyle indicated that Zambrano had made an initial statement to the police shortly after her arrest, and, at that time, she did not divulge the location of the gun used in the shooting or act in a cooperative manner. Doyle subsequently was provided with information obtained from a recorded telephone conversation from the Department of Correction in which Zambrano stated, "they ain't gonna find [the revolver], it's in the ocean, that's where he threw it."

Doyle further testified that, at or about the start of

evidence in the petitioner's criminal trial, he was contacted by Zambrano's attorney, who indicated that she wanted to cooperate with the prosecution. Doyle met with Zambrano, who disclosed the location of the gun the petitioner used. In response to the question of whether he had made any promises to Zambrano in exchange for her testimony, Doyle stated: "I don't think I made any particular promises in exchange for her testimony . . . ." He further testified that he would not have told Zambrano that he would "assist her at sentencing if she had provided helpful testimony" but, rather, would have stated that he "would meet with her attorney and discuss some kind of plea arrangement in regard to her case and that we would let the court know that she had cooperated."

During cross-examination by counsel for the respondent, the Commissioner of Correction, Doyle recalled that he had emphasized to Zambrano the importance of testifying truthfully. Doyle next explained what information he had provided to Farver regarding Zambrano's testimony. First, Doyle stated: "I mean, I did tell [Farver] at some point prior to the trial that [Zambrano] had now agreed to cooperate and she is going to testify, and that [her attorney] had approached us and that she had now given a statement, and I would have turned that statement over to . . . Farver . . . ." Doyle confirmed that he would have informed Farver that, if Zambrano testified truthfully, Doyle would apprise the court of that fact at Zambrano's sentencing. In response to further questioning, Doyle repeated that he had told Farver that Zambrano had agreed to cooperate and testify against the petitioner in his criminal trial and that, if she testified truthfully, Doyle would inform Judge Clifford of these facts.

On May 5, 2020, the petitioner filed his posttrial brief. Therein, he identified the two issues presented: "Did the prosecution's failure to inform defense counsel of exculpatory impeachment evidence against . . . Zambrano constitute a violation of *Brady* v. *Maryland*, [supra, 373 U.S. 83, and did] the failure to correct Zambrano's testimony during trial about not expecting consideration from the prosecution constitute a violation of due process?" With respect to the former, the petitioner argued that the informal understanding between the state and Zambrano regarding her testimony against the petitioner at his criminal trial in exchange for her own favorable treatment constituted *Brady* material and that the failure to disclose it violated the petitioner's due process rights. As to the latter, the petitioner claimed that a conviction based on false or misleading evidence knowingly presented by the prosecution also amounts to a due process violation. See *Giglio* v. *United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

On March 9, 2021, the habeas court issued its memorandum of decision denying the petition for a writ of habeas corpus. Specifically, the court concluded that the petitioner had failed to prove his claims that, at his criminal trial, (1) the state had failed to disclose the incentive it had provided to Zambrano in exchange for her testimony (*Brady* claim), and (2) the state had failed to correct Zambrano's false and misleading testimony regarding her motivation to testify (*Giglio/Napue* claim).[5]

At the outset of its analysis, the court set forth the following facts: "Zambrano was charged as a coconspirator of the petitioner in the underlying incident for which the petitioner was charged. On June 27, 2013, she provided her first statement to the police, in which she indicated that it was Turner who stole the check and was in possession of a firearm that evening. Zambrano remained incarcerated while awaiting trial. After jury selection was completed in the petitioner's criminal trial, Zambrano's attorney approached . . . Doyle and indicated that she would like to cooperate with the state. Zambrano then gave a second statement in which she indicated that the petitioner threatened Turner and McFadden. Zambrano also revealed the location of the firearm used in the assault, and assisted law enforcement with finding it. The state [forensics] lab conducted a ballistics test and determined that the recovered firearm was the weapon used in the shooting."

In its analysis of the petitioner's *Brady* claim, the habeas court, citing *Turner* v. *Commissioner of Correction*, 181 Conn. App. 743, 758–59, 187 A.3d 1163 (2018), determined that, although the state had not made Zambrano a specific promise regarding a particular sentence in exchange for her testimony, its agreement to inform the sentencing court of her cooperation fell within the scope of *Brady* material, and, therefore, the state was required to disclose it to the defense.[6] The habeas court further concluded: "The evidence before this court, however, fails to demonstrate that evidence of this agreement or consideration was inadvertently or wilfully suppressed by the state. . . . *Doyle credibly testified that he informed . . . Farver that the state would make Zambrano's cooperation known to the sentencing judge in her case*. The record also reveals that the testimony provided at the petitioner's criminal trial indicated that Zambrano was charged as a coconspirator with the petitioner. The record also reveals that, while the state had offered no specific guarantees or promised dates regarding her own sentencing, Zambrano testified on behalf of the state for purposes of getting out of jail sooner to see her children again. As a result of the foregoing, the court finds that the petitioner failed to demonstrate that the state suppressed evidence of an agreement as required for a due process violation under *Brady*." (Emphasis added.)

With regard to the *Giglio/Napue* claim that the petitioner's right to due process was violated based on Doyle's failure to correct Zambrano's false or substantially misleading testimony regarding her motivation to testify, the court explained: "[T]he evidence before the court indicates that there were no promises or guarantees made by the state to Zambrano regarding the disposal of her pending criminal charges, and she testified to that effect at the petitioner's trial. Zambrano was never asked whether she expected that her cooperation would be made known to the sentencing judge, and she did not testify on that issue. In the context of the entire record, the court finds that Zambrano's testimony at the petitioner's criminal trial was not substantially misleading."

The court, therefore, denied the petition for a writ of habeas corpus. On March 18, 2021, it granted the petition for certification to appeal. This appeal followed.

I

We first address the petitioner's claim that the habeas court improperly concluded that the state did not violate his right to due process by failing to disclose to the defense its agreement with Zambrano to inform the sentencing judge in her criminal case of her testimony and cooperation against the petitioner, contrary to the principles set forth in *Brady* v. *Maryland*, supra, 372 U.S. 87, and its progeny.[7] We disagree.

We first set forth the relevant legal principles. "The fourteenth amendment to the United States constitution demands that [n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law . . . . Due process principles require the prosecution to disclose to the defense evidence that is favorable to the defendant and material to his guilt or punishment. . . . In order to obtain a new trial for improper suppression of evidence, the petitioner must establish three essential components: (1) that the evidence was favorable to the accused; (2) that the evidence was suppressed by the state—either inadvertently or wilfully; and (3) that the evidence was material to the case, i.e., that the accused was prejudiced by the lack of disclosure. . . .

"The state's failure to disclose an agreement with a cooperating witness may be deemed to be the withholding of exculpatory evidence. Impeachment evidence falls within *Brady*'s definition of evidence favorable to an accused. . . . Impeachment evidence is broadly defined in this context as evidence that could potentially alter the jury's assessment of a witness' credibility. . . . Specifically, we have noted that [a] plea agreement between the state and a key witness is impeachment evidence falling within the . . . *Brady* doctrine. . . . An undisclosed agreement for benefits between [a wit-

ness] and the state falls within the broad definition of impeachment evidence." (Citations omitted; internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 591–92, 198 A.3d 562 (2019); see also *Ayuso* v. *Commissioner of Correction*, 215 Conn. App. 322, 341–42, 282 A.3d 983, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). Stated differently, "[b]ecause 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." *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 370, 71 A.3d 512 (2013).

Next, we identify the applicable standard of review. "The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . [T]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . . Moreover, [w]hether the petitioner was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Citation omitted; internal quotation marks omitted.) *Robinson* v. *Commissioner of Correction*, 204 Conn. App. 560, 566, 253 A.3d 1040, cert. denied, 337 Conn. 903, 252 A.3d 363 (2021); see also *Holbrook* v. *Commissioner of Correction*, 189 Conn. App. 108, 117, 206 A.3d 246, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019); *Hines* v. *Commissioner of Correction*, 164 Conn. App. 712, 724, 138 A.3d 430 (2016).

In the present case, the habeas court concluded that the petitioner had failed to establish that the state inadvertently or wilfully suppressed its agreement with Zambrano to inform the sentencing judge in her criminal case of her testimony and cooperation against the petitioner. This conclusion was supported by its finding that Doyle disclosed the agreement[8] with Zambrano to Farver prior to her testimony at the petitioner's criminal trial. Specifically, the court stated: "Doyle testified credibly that he informed . . . Farver that Zambrano was now willing to cooperate with the state, and the state would make her cooperation known to the sentencing judge in her case, and gave him a copy of Zambrano's second statement."[9] It is well established that "it is not the role of this court to second-guess the credibility determinations made by the trial court." *Smith* v. *Commissioner of Correction*, 215 Conn. App. 167, 188, 282 A.3d 1036, cert. denied, 345 Conn. 921, 284 A.3d 983 (2022); see also *Kaddah* v. *Commissioner of Correction*, 211 Conn. App. 823, 829, 274 A.3d 115 (reviewing court ordinarily affords deference to credibility determination of habeas court based on its firsthand observations of conduct, demeanor and attitude of witness),

cert. denied, 343 Conn. 928, 281 A.3d 1188 (2022).[10]

Additionally, Zambrano's direct testimony and the questions posed to Zambrano by Farver during cross-examination at the petitioner's criminal trial made it evident that Farver had been informed of her agreement with the state.[11] During Doyle's direct examination of her,[12] Zambrano acknowledged that she was charged as a coconspirator, that she had made an agreement with the prosecution to testify in the petitioner's criminal trial, and that she had not received any promises in regard to this testimony. Later, however, in her testimony on direct examination, Zambrano explicitly acknowledged that she was "hoping" that her attorney would inform the judge presiding over her sentencing hearing of her cooperation with the state.

During cross-examination,[13] Zambrano confirmed that she had been charged as a coconspirator in this case, and stated that she had been incarcerated for approximately eighteen months. She also testified that, during this time, she had been separated from her two young children and wanted to get home to them. Zambrano acknowledged that she had her attorney approach the prosecution about a cooperation agreement with the hope that she would receive some consideration. Farver inquired whether she had anticipated that her agreement to testify would "help [her] get out of jail sooner," and she responded: "I would hope so, but . . . they didn't guarantee me anything." He also asked her if the state had promised any "dates" regarding the period of incarceration and about her motivation for agreeing to cooperate with the state. On the basis of Zambrano's testimony and the questions asked during cross-examination, it is apparent that Farver was aware of Zambrano's agreement with the state, including her hope of receiving consideration in exchange for her testimony.

Thus, the record supports the court's finding that Doyle informed Farver of the agreement with Zambrano.[14] It is axiomatic that "[e]vidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*." (Internal quotation marks omitted.) *State* v. *Gray*, 212 Conn. App. 193, 225–26, 274 A.3d 870, cert. denied, 343 Conn. 929, 281 A.3d 1188 (2022). Simply stated, "[t]he prerequisite of any claim under the *Brady*, *Napue* and *Giglio* line of cases . . . is the existence of an *undisclosed* agreement or understanding between the cooperating witness and the state." (Emphasis in original; internal quotation marks omitted.) *Gomez* v. *Commissioner of Correction*, 336 Conn. 168, 180, 243 A.3d 1163 (2020). We conclude, therefore, that the court's finding that Doyle had disclosed the agreement between the state and Zambrano in exchange for her testimony at the petitioner's criminal trial was not clearly erroneous and supports the court's

ultimate determination that the petitioner did not establish a *Brady* violation.[15] Accordingly, the petitioner's *Brady* claim must fail.

II

We next address the petitioner's claim that the habeas court improperly concluded that his due process rights were not violated by Doyle's knowing presentation of false and substantially misleading testimony from Zambrano at the criminal trial. In particular, the petitioner asserts that Zambrano testified inaccurately that no promises had been made to her in exchange for her cooperation and that she had agreed to testify because she wanted "to do the right thing." The petitioner further argues that Doyle had an obligation to correct Zambrano's false or substantially misleading testimony and failed to do so in violation of his due process rights. The respondent counters, inter alia, that Zambrano's testimony was accurate and, therefore, not false or substantially misleading. Additionally, as an alternative basis for affirming the judgment of the habeas court, the respondent contends that there is no reasonable likelihood that any false or substantially misleading testimony affected the verdict. We agree with the respondent as to both of his arguments.

We start by setting forth the applicable standard of 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." *Greene* v. *Commissioner of Correction*, supra, 330 Conn. 14; see also *State* v. *Johnson*, 345 Conn. 174, 204, 283 A.3d 477 (2022).

Next, we identify the relevant legal principles. Our Supreme Court has recognized that "[t]he teaching of [*Brady*, *Napue* and *Giglio*] . . . is that the state's knowing presentation of false testimony regarding the benefits that have been afforded to a cooperating witness may implicate two related but distinct rights protected by the due process clause of the fourteenth amendment. First, under *Brady* and its progeny, the state may not suppress material, exculpatory evidence, including evidence that tends to undermine the credibility of the state's witnesses. Second, under *Napue* and its progeny, *the state may not knowingly rely on the presentation of false or substantially misleading evidence to the jury, including evidence regarding the benefits that have been afforded to cooperating witnesses, to obtain a criminal conviction*. . . . [S]ee also, e.g., *Long* v. *Pfister*, 874 F.3d 544, 549 (7th Cir. 2017) (*Napue* and *Brady* are *cousin*[*s*] *representing distinct manifestations of principle that prosecutors must expose material weakness in their cases*), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 777 (2018) . . . ." (Citation omitted; emphasis added;

footnote omitted; internal quotation marks omitted.) *Gomez* v. *Commissioner of Correction*, supra, 336 Conn. 182–83; see also *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 592–93. Thus, a *Brady* claim is concerned primarily with disclosure of exculpatory material *to the defendant*, whereas the "essence of [a] *Napue/Giglio* violation is [the] lack of disclosure of [the] truth *to* [*the*] *jury* . . . ." (Emphasis added.) *Gomez* v. *Commissioner of Correction*, supra, 182; see id., 181, citing *Gaskin* v. *Commissioner of Correction*, 183 Conn. App. 496, 543–44 and n.30, 193 A.3d 625 (2018).

As our Supreme Court has recognized, "[d]ue 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, *Giglio* [v. *United States*, supra, 405 U.S. 153] and *Napue* [v. *Illinois*, supra, 360 U.S. 269–70] require the prosecutor to apprise the court when he or she knows that the witness is giving testimony that is substantially misleading." (Internal quotation marks omitted.) *Gomez* v. *Commissioner of Correction*, supra, 336 Conn. 175;[16] see also *State* v. *Johnson*, supra, 345 Conn. 204–205. As this court has stated, "[t]he state has a duty to correct the record if it knows that a witness has testified falsely." *Turner* v. *Commissioner of Correction*, supra, 181 Conn. App. 754; see also *Gomez* v. *Commissioner of Correction*, supra, 186 (more fundamental insult to due process occurs when state knowingly attempts to secure conviction based on falsehoods and fabrications). Our appellate courts have identified the rationale underlying this duty. "When a witness gives false testimony . . . the prosecutor and witness himself are the keepers of the truth. Without evidence of the falsity of the statement through admission by the witness, disclosure to the defendant or his counsel of any consideration the state offers to a cooperating witness is useless unless the jury gets to hear it." *Gaskin* v. *Commissioner of Correction*, supra, 183 Conn. App. 544 n.30; see also *Gomez* v. *Commissioner of Correction*, supra, 183 (harm associated with *Napue* violation is not limited to specific defendant but also undermines credibility of entire criminal justice system).

In order to prevail on this type of claim, the petitioner must demonstrate that (1) the state's witness provided *false or substantially misleading testimony* that was *material* and (2) the prosecutor failed to correct such testimony. *Gomez* v. *Commissioner of Correction*, supra, 336 Conn. 176. After a careful review of the record, we agree with the habeas court that the petitioner failed to establish that Zambrano's testimony was false or substantially misleading, and, therefore, his

Napue claim fails. We further conclude that, even if Zambrano had provided false or substantially misleading testimony regarding her agreement with Doyle, there is no reasonable likelihood that it could have affected the jury's verdict.

As we previously noted in this opinion, during direct examination by Doyle at the petitioner's criminal trial, Zambrano stated that, although she had an agreement with the state, she had not been made any promises by the police or the prosecution in regard to her testimony.[17] Further, Zambrano agreed with the prosecutor that she had not "been made any promises in regards to [her] pending matters as to how they will be disposed of or what will happen with [her] charges . . . ." Zambrano later acknowledged that she was hoping that her cooperation would be brought to the attention of her sentencing judge. During cross-examination, Zambrano admitted that she had been incarcerated for approximately eighteen months and had been separated from her children.[18] She further acknowledged that she wanted "to get home to them . . . ." Zambrano's testimony informed the jury that she had her attorney reach out to Doyle about testifying in the petitioner's criminal trial with the possibility of some consideration for her by doing so. She agreed with Farver that she "hoped" to be released from jail sooner as a result of her testimony, but explained that the state had not guaranteed her anything and that no "dates" had been promised to her. Finally, she stated that her motivation was "to do what was right," to get out of jail, and to see her children again. The context of her agreement with the state was presented to the jury in its entirety. See *Greene* v. *Commissioner of Correction*, supra, 330 Conn. 12, 17, 22.

At the habeas trial, Doyle testified that he had informed Zambrano that he would not make any specific promises or guarantees in exchange for her testimony, only that he would inform her sentencing judge of her cooperation and assistance. Doyle also informed Farver of Zambrano's willingness to cooperate and his intention to present this cooperation at her sentencing hearing. As the habeas court stated in its memorandum of decision: "Doyle further testified that he would not have felt obligated to correct Zambrano's testimony at the petitioner's trial because her statement that she was not guaranteed anything by the state in exchange for her testimony was accurate." The habeas court credited Doyle's testimony and specifically found that no specific promise was made to Zambrano.

The habeas court, therefore, properly concluded that Zambrano's testimony at the petitioner's criminal trial was not substantially misleading. Zambrano's testimony, viewed in its entirety, made clear to the jury that she (1) was charged as a coconspirator, (2) had made an agreement with the state to testify against the petitioner, and (3) had her attorney approach the state

just before the start of the petitioner's trial to provide assistance with the hope that it would be brought to the attention of her sentencing judge and help her get out of jail sooner so that she could be with her children.[19] The jury in the petitioner's criminal trial was made aware that Zambrano had testified with the aspiration, but not the guarantee or specific promise, of receiving consideration in the form of a reduced period of incarceration.[20] See, e.g., *Greene* v. *Commissioner of Correction*, supra, 330 Conn. 12, 17, 22; id., 12 (statements regarding cooperation agreement described by habeas court as " 'not a model of clarity' " may sufficiently and accurately describe agreement when considered in entire context, and denial of knowledge of specific benefit or promise do not relate to broader question of whether witness received any benefit in exchange for testimony); cf. *State* v. *Jordan*, 314 Conn. 354, 366–67, 102 A.3d 1 (2014) (witness' testimony was "potentially misleading" where prosecutor informed court he would bring cooperation to attention of sentencing court and witness subsequently testified he did not expect "any kind" of benefit or consideration (internal quotation marks omitted)). Accordingly, we reject the petitioner's claim that his due process rights were violated.

Additionally, we agree with the respondent that, even if Zambrano had provided false or substantially misleading testimony regarding her agreement with Doyle, there is no reasonable likelihood that it could have affected the jury's verdict.[21] See, e.g., *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 593 (court assumed, without deciding, that state had improperly failed to disclose impeachment evidence concerning alleged agreement reached with witness and considered whether lack of disclosure to defense and failure to correct testimony were material). Compared to a traditional *Brady* claim, "the standard for materiality [in a *Napue/Giglio* claim] is significantly more favorable to the defendant than it is with other forms of exculpatory evidence. . . . A conviction obtained through uncorrected false testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . In other words, reversal is virtually automatic . . . *unless the state's case is so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury*." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 594; *Turner* v. *Commissioner of Correction*, supra, 181 Conn. App. 754–55; see also *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 372 (this standard "is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt").

"This calls for a careful review of that testimony and

its probable effect on the jury, weighed against the strength of the state's case and the extent to which [the defendant was] otherwise able to impeach [the witness]. . . . [E]vidence that may first appear to be quite compelling when considered alone can lose its potency when weighed and measured with all the other evidence, both inculpatory and exculpatory. Implicit in the standard of materiality is the notion that the significance of any particular bit of evidence can only be determined by comparison to the rest." (Citation omitted; internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 594; see also *State* v. *Jordan*, supra, 314 Conn. 371.

As we have noted in this opinion, Farver challenged the credibility of Zambrano during cross-examination and presented this issue to the jury. Her credibility was impeached further as a result of her testimony that was inconsistent with her initial statements to the police regarding the assault.[22] See, e.g., *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 599–600 (impeachment of witness constitutes factor in determining whether elevated standard for materiality has been met). Farver highlighted these inconsistencies in his closing argument to the jury: "Why suddenly last week does [Zambrano] flip her story? She told you she gave a different—an inconsistent story and then lied when she was interviewed by the [police] because she's charged, she said. That's when she changes her story. Because she hopes to have something for the cooperation, that she get some consideration, that she's been in jail for a year and a half, hasn't seen her kids, wants to go back and see them. But yet, there's nothing in her story that gives her any responsibility. Everyone else who testified with knowledge of those events said [Zambrano] stole the check. She denied it." Further, Doyle recognized that Zambrano's credibility was questionable when, in his closing argument, he stated that the jury should "[t]ake her testimony for what it's worth . . . ."[23]

We next consider the strength of the state's case. The key issue was whether the petitioner had pointed the revolver at Turner and pulled the trigger, as Turner and McFadden testified at the criminal trial, or whether the revolver accidentally discharged when Turner grabbed the barrel of the revolver as the petitioner waved it around with his finger on the trigger, as the petitioner testified. Zambrano was not present at the specific time and location of the shooting, and, therefore, her testimony did not address the petitioner's actions and intention at that particular moment.[24] See *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 600 (even if jury believed allegedly false testimony from witness regarding lack of deal with state, that impression was harmful only to extent witness' testimony provided unique value to state's case).

The petitioner's own testimony at the criminal trial placed him at the crime scene with the firearm and a motive for injuring Turner, namely, that she had absconded with proceeds from the stolen check. The petitioner admitted that he was "pissed off that . . . Turner had screwed [him] out of [his] half of that $6500 . . . ." The petitioner testified that, after stopping on a dark road near a wooded area, he removed the revolver from the glove compartment to "scare" Turner. He admitted that he was not permitted to possess the revolver due to his prior felony convictions. The petitioner further testified that he told Turner to get out of the vehicle and then questioned her about the money from the stolen check. He acknowledged having his finger on the trigger of the revolver in the moments before Turner was shot. The petitioner admitted to transporting the revolver to Milford and dropping it in the water with the intention of discarding it in the hope that it would never be found. Finally, the petitioner admitted that he had initially lied to the police when he told them that Turner had brought the revolver and held him at gunpoint before a struggle ensued.[25]

Furthermore, both Turner and McFadden testified that the petitioner accused Turner of withholding money from him, removed the revolver from the glove box, ordered Turner to exit the vehicle, and then forced her to her hands and knees. Both McFadden and the petitioner testified that he drove off with Zambrano and then returned.[26] Turner and McFadden testified that he pointed the revolver at Turner and shot her twice. See, e.g., *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 595–98 (little question petitioner was present at scene of criminal activity and had held weapon used in murder; primary issue, if petitioner's statement was credited, was whether he participated in robbery that led to victim's murder; ample evidence presented that petitioner not only participated in robbery but fired fatal gunshots, *including testimony from two eyewitnesses who presented persuasive and consistent testimony*, selected petitioner's photograph from photographic array and identified him in court, consciousness of guilt evidence, and petitioner's confession to fellow inmate). The state's case as to the petitioner's intent, therefore, did not depend on the testimony of Zambrano, who was not present when Turner was shot, but, instead, was based on the testimony of Turner and McFadden, who were present when the shooting occurred.[27]

In light of the evidence the state presented, particularly the testimony of Turner and McFadden regarding the petitioner's actions at the time of the shooting, coupled with the petitioner's own testimony, we are not persuaded that Zambrano's testimony materially affected the jury's verdict. The state's case was so overwhelming that there is no reasonable likelihood that Zambrano's testimony could have affected the judgment

of the jury, even if we were to conclude that her testimony as to her agreement with the state was false or substantially misleading. After weighing Zambrano's testimony, its probable effect on the jury, the strength of the state's case, and the extent to which defense counsel impeached Zambrano, we conclude that Zambrano's allegedly misleading testimony and Doyle's purported failure to correct it were immaterial under *Napue* and *Giglio*.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] Specifically, the following colloquy occurred between Doyle and Zambrano:

"Q. Okay. Prior—I want to ask you about your current status right now. Is it correct that you are currently held in custody awaiting charges in a state prison facility?

"A. Yes.

"Q. And is it correct that you are currently charged with offenses related to the events of June 24th, 2013?

"A. Yes.

"Q. And is it true that you've been charged as a coconspirator with [the petitioner]?

"A. Yes. . . .

"Q. Okay. Now, I want to talk about your current situation just for a moment then. Like I said, you're charged as a coconspirator in this matter.

"A. Yes.

"Q. Okay. And you recognize that you've been called to the [witness] stand here to testify by the state of Connecticut.

"A. Yes.

"Q. Okay. And you recognize that you have the right not to have to testify here; is that correct?

"A. Yes.

"Q. And, however, you have made an agreement with the state of Connecticut with your attorney to testify here in regards to the events of June—in June, pardon me, of June 24th of 2013; is that correct?

"A. Yes.

"Q. All right. Have any promises been made to you by the state of Connecticut, by myself or any prosecutor or representative—

"A. No.

"Q. —or police officer?

"A. No.

"Q. In regards to your testimony here today?

"A. No.

"Q. Have you been made any promises in regards to your pending matters as to how they will be disposed of or what will happen with your charges?

"A. No. . . .

"Q. Okay. And you have actually been incarcerated and held on bond since June 27th of 2013 up until today [October 29, 2014]?

"A. Yes. . . .

"Q. Now, I just want to step back in regards to your—your understanding with the state of Connecticut and your attorney here. No promises have been made to you in regards to what your case is; correct?

"A. No.

"Q. But you are at some point hoping that it'll be brought to the attention of the judge that has handled your matter that you have cooperated with the state of Connecticut; is that correct?

"A. Yes.

"Q. All right. And your lawyer will obviously bring that to the attention of the court; is that correct?

"A. Yes."

[2] During Farver's cross-examination of Zambrano at the petitioner's criminal trial, the following colloquy occurred:

"Q. All right. Ma'am, you are charged as a coconspirator in this case, correct?

"A. Yes.

"Q. And you've been in jail for approximately a year and a half?

"A. Yes.

"Q. And at no time during—well, let me ask you, you have two young children?

"A. Yes.

"Q. You've been separated from them?

"A. Yes.

"Q. You want to get home to them?

"A. Yes.

"Q. And you had your attorney approach the state to volunteer last week, interview?

"A. Yes.

"Q. Now, was this with the hope that there'd be some consideration for you?

"A. Yes. . . .

"Q. Do you have any anticipation that this is going to help you get out of jail sooner?

"A. *I would hope so*, but I don't have any—they didn't guarantee me anything.

"Q. There's no—[n]o dates promised to you?

"A. No.

"Q. Right. But that certainly—that's your motivation, to come in here and testify, is to try to get over this quicker.

"A. Not to get over it, but just to do what was right.

"Q. To get out of—[t]o get out of jail?

"A. Yes.

"Q. And to see your children again?

"A. Yes." (Emphasis added.)

[3] "See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against [her] is so strong that [she] is prepared to accept the entry of a guilty plea nevertheless. . . . A defendant often pleads guilty under the *Alford* doctrine to avoid the imposition of a possibly more serious punishment after trial." (Internal quotation marks omitted.) *Smorodska* v. *Commissioner of Correction*, 217 Conn. App. 171, 173 n.1, 287 A.3d 1117 (2022), cert. denied, 346 Conn. 907, 288 A.3d 628 (2023).

[4] Zambrano also pleaded guilty to a charge of larceny in the fifth degree, which arose from a separate matter.

[5] In his appellate brief, the respondent notes that the petitioner specifically did not plead a *Giglio/Napue* claim in his amended habeas petition. During the habeas trial, the court permitted the petitioner's counsel, over the respondent's objections, to present evidence regarding the *Giglio/Napue* claim. In his posttrial brief, the petitioner addressed the *Giglio/Napue* claim. The habeas court considered the merits of the petitioner's *Giglio/Napue* claim in its memorandum of decision, and the respondent did not move to correct or to rectify that aspect of the decision. Under these facts and circumstances, the respondent does not contest review by this court of the petitioner's *Giglio/Napue* claim.

[6] "Our case law is clear . . . that the petitioner need not establish the existence of a formal plea agreement in order to prove a *Brady* violation. [E]vidence that merely suggests an informal understanding between the state and a state's witness may constitute impeachment evidence for the purposes of *Brady*. . . . Such evidence is by no means limited to the existence of plea agreements." (Emphasis omitted; internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, supra, 181 Conn. App. 758.

[7] The petitioner mentions in his brief that his right to due process is protected by the fifth and fourteenth amendments to the United States constitution and under article first, §§ 8 and 9, of the Connecticut constitution. We note that the petitioner did not brief a separate state constitutional claim in accordance with *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), or argue that the state constitution provides him greater protection than does the federal constitution. See, e.g., *State* v. *Taupier*, 197 Conn. App. 784, 787 n.1, 234 A.3d 29, cert. denied, 335 Conn. 928, 235 A.3d 525 (2020), cert. denied, U.S. , 141 S. Ct. 1383, 209 L. Ed. 2d 126 (2021). We therefore limit our review of the petitioner's claim to the federal constitution. See *Ham* v. *Commissioner of Correction*, 187 Conn. App. 160, 192 n.10, 201 A.3d 1074, cert. denied, 331 Conn. 904, 202 A.3d 373 (2019).

[8] Doyle testified at the habeas trial that Zambrano assisted the prosecution, inter alia, by revealing the location of the weapon and guiding law enforcement to its location. In exchange for her testimony and assistance, Doyle agreed to discuss a plea agreement with her attorney and to inform the

sentencing judge in her criminal case of her cooperation.

[9] At the habeas trial, the following colloquy occurred between the respondent's counsel and Doyle during cross-examination:

"A. . . . I mean, I did tell [Farver] at some point prior to the trial that [Zambrano] had now agreed to cooperate, and she was going to testify . . . that she had now given a statement, and I would have turned that statement over to Attorney Farver and, you know . . . I probably would have informed Attorney Farver generally what, what she indicated or what she was going to [testify] to now. . . .

"Q. Okay. And do you recall telling Attorney Farver that you may, in the future, if she's, if she's truthful, go to her sentencing and just tell the judge what she had done?

"A. I, I would have told that. Any, any time there is a codefendant or even a witness with something else pending, I would have indicated, as part of their plea arrangement and probably in their plea canvass, too, that there's a certain range or a certain recommendation and that the state will let their sentencing court . . . know about their cooperation.

"Q. Right. Well, that's what I'm, I'm getting at.

"A. Yes.

"Q. I want to know what you told Attorney Farver.

"A. That I'm—yes. That I would tell Attorney Farver that, like I said, I can't remember off the top of my head; I'm assuming that she had entered pleas by the time that we—she testified. Okay? And that I would have, as part of her plea canvass . . . would have indicated that, when she is coming back for sentencing, I will let the court know about her cooperation and her truthfulness or lack thereof at sentencing.

"Q. So, did you tell Attorney Farver before she testified in the [petitioner's criminal] case, hey, Attorney Farver, she's going to cooperate now? When she goes to sentencing, I'm going to, if she's truthful, I'm going to go to [her sentencing judge] and tell her—

"A. Yes.

"Q. —what she did? So, you would, you—

"A. Yes.

"Q. —remember telling Attorney Farver that?

"A. Yes.

"Q. Okay.

"A. And I believe Attorney Farver would have cross-examined her about that as well.

"Q. Okay. Well, and that—the transcript will reflect that.

"A. Yes.

"Q. But I just want to know, specifically, if you recall what you told Attorney Farver with regards to her cooperation.

"A. Yes. I did tell him that.

"Q. You did tell him that. Okay. And this was all transpiring either right when evidence was starting or the day or two before?

"A. Yes. . . .

"Q. All right. And again, I want to be clear, at that point, you would agree with me, you would have to tell Attorney Farver she's going to now cooperate and, if she does cooperate, we're going to, I don't know, want to assist her, go through her sentencing or we're going to make this known to the sentencing judge in her case?

"A. Yes.

"Q. And you did that?

"A. Yes."

[10] We note that the habeas court specifically discredited "Zambrano's testimony that she did not initiate the meeting with the state to discuss cooperation, given the evidence to the contrary, including her own testimony at the petitioner's criminal trial . . . Doyle's representations to the court at Zambrano's sentencing and . . . Doyle's credible testimony at the habeas trial. In light of the foregoing, the court also does not credit Zambrano's testimony that the state used the phone recordings to pressure or threaten her into cooperating and testifying on behalf of the state."

[11] Doyle testified that he learned of Zambrano's intention to cooperate either on the eve of the petitioner's criminal trial or on the first day of evidence. He further testified that he informed Farver of the state's agreement with Zambrano before she testified in the criminal trial. The habeas court found Doyle to be a credible witness. Additionally, we note that "[e]vidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*. . . . Even if evidence is not deemed suppressed under *Brady*

because it is disclosed during trial, however, the defendant nevertheless may be prejudiced if he is unable to use the evidence because of the late disclosure. . . . Under these circumstances, the defendant bears the burden of proving that he was prejudiced by the state's failure to make the information available to him at an earlier time." (Internal quotation marks omitted.) *State* v. *Gray*, 212 Conn. App. 193, 225–26, 274 A.3d 870, cert. denied, 343 Conn. 929, 281 A.3d 1188 (2022); see also *State* v. *Washington*, 155 Conn. App. 582, 597, 110 A.3d 493 (2015). In the present case, the petitioner has not raised any argument that he was prejudiced as a result of a purported late disclosure.

[12] See footnote 1 of this opinion.

[13] See footnote 2 of this opinion.

[14] "[A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Jaynes* v. *Commissioner of Correction*, 216 Conn. App. 412, 423, 285 A.3d 412 (2022), cert. denied, 345 Conn. 972, 286 A.3d 906 (2023).

[15] The petitioner argues in his principal appellate brief that the state's agreement with Zambrano was disclosed partially. Specifically, he contends that Doyle did not inform Farver that Zambrano had approached him at the start of the petitioner's criminal trial and that she sought to receive some consideration. The petitioner also appears to claim that Doyle failed to tell Farver that Zambrano had agreed to testify in the criminal trial only after Doyle told her that he would alert her sentencing judge of her cooperation. In his reply brief, the petitioner specifically claims that Doyle was required to inform Farver of Zambrano's specific motivation to cooperate with the prosecution in the petitioner's criminal case.

The record does not support the petitioner's contentions. As previously noted, during Farver's cross-examination of Zambrano at the petitioner's criminal trial, she admitted that she had her attorney reach out to the prosecution with the hope or anticipation of obtaining some consideration with respect to the disposition of her pending criminal charges in exchange for her testimony. Additionally, we are not persuaded that Doyle's obligation to inform the petitioner or Farver of his agreement with Zambrano applies to her specific motivations to assist the prosecution. In this case, given the information provided to Farver, he certainly could have deduced or inferred that Zambrano's decision to testify was the result of Doyle's offer to inform her sentencing judge of her cooperation. In other words, it was implicit that Zambrano's decision to testify was based on hearing that Doyle would alert her sentencing judge of her cooperation in the criminal case against the petitioner. Finally, the petitioner could have raised these matters in the direct examinations of Doyle or Zambrano during the habeas trial, but he failed to do so. We conclude, therefore, that this argument is unavailing.

[16] Approximately five years after the petitioner's criminal trial, our Supreme Court noted: "To its credit . . . the Division of Criminal Justice voluntarily adopted a new policy, entitled '515 Cooperating Witnesses,' that is intended to ensure the vindication of defendants' rights under *Napue* and *Brady*. Of particular relevance to the present appeal, the policy provides: 'The prosecutorial official trying the case shall ensure that any testimony that is given by the cooperating witness concerning the cooperation agreement is true, accurate and not misleading. False, inaccurate or misleading testimony may be corrected with the use of leading questions, as permitted by the trial court.' " *Gomez* v. *Commissioner of Correction*, supra, 336 Conn. 189–90 n.10.

In a letter sent to our Supreme Court following oral argument in *Gomez*, the prosecutor represented that Policy 515 had been adopted on October 1, 2019, and transmitted to all prosecutors on October 25, 2019. This policy required, inter alia, that cooperation agreements be reduced to a writing either in the form of an agreement signed by all parties, including the prosecutor, the cooperating witness, and counsel for the cooperating witness, or a memorandum prepared by the prosecutor. The policy also defined a cooperating witness as a person who "1. Provides information to a law enforcement agency regarding the commission of a crime, or concerning a person suspected of, or charged with, committing a crime; and 2. Agrees to testify for the State in the trial of a criminal matter; and 3. Might reasonably expect to obtain, or has sought, been offered or obtained, a benefit from the State in exchange for his or her testimony."

[17] See footnote 1 of this opinion.

[18] See footnote 2 of this opinion.

[19] We emphasize that Zambrano testified that she had agreed to cooperate with the prosecutor "to do what was right . . . [t]o get out of jail . . . [a]nd to see her children again . . . ." We therefore disagree with the petitioner's contention that her testimony was false or substantially misleading in that she had agreed to testify only because "she just wanted to do the right thing."

[20] The facts of the present case distinguish it from *Smith* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-16-4008338-S (September 20, 2021), a case cited by the petitioner in his principal appellate brief. In that case, the prosecutor at the criminal trial argued to the jury that certain witnesses had nothing to gain from their testimony and that they did not come willingly to testify but had been subpoenaed. Furthermore, defense counsel in *Smith* did not cross-examine the witness about his agreement with the state. "Finally, and most importantly, the jury never got to hear that [the witness] had an agreement with the prosecution that his cooperation with them would be made known to the sentencing judge and potentially [be] taken into consideration by the prosecutor when fashioning an appropriate offer. It was entitled to have that information." In light of these distinguishing facts, we conclude that the petitioner's reliance on *Smith* is misplaced.

[21] The issue of whether Zambrano's testimony, even if determined to be false or substantially misleading, would have materially affected the jury's verdict presents a question of law that was addressed by both parties in their appellate briefs. See, e.g., *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 591 n.3; *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 136 n.10, 7 A.3d 911 (2010). Both parties had the opportunity to discuss this issue, and, therefore, the petitioner is not prejudiced by our discussion of materiality.

[22] The habeas court set forth the following in its memorandum of decision: "On June 27, 2013, [Zambrano] provided her first statement to the police, in which she indicated that it was Turner who stole the check and was in possession of a firearm that evening. . . . Zambrano [subsequently] gave a second statement in which she indicated that the petitioner threatened Turner and McFadden. Zambrano also revealed the location of the firearm used in the assault . . . ." Farver cross-examined her regarding this inconsistency, and she admitted that "portions" of her first statement were untruthful.

[23] Specifically, Doyle argued: "There's no doubt that . . . Zambrano's testimony is what it is. She made a request to testify on behalf of the state. She led the police to the gun. You could see it here in evidence. I agree with Mr. Farver on this fact. She's minimized her culpability in this. Perhaps in some idea that one day she'll be able to go back out there and be a visiting nurse. I agree with him. Minimize her responsibility in regards to that stolen check. Minimize her responsibility in regards to knowing what [the petitioner] was going to do when he pulled out there. . . . Take her testimony for what it's worth . . . ."

Additionally, the court provided the jury with the following instruction regarding Zambrano's testimony: "In weighing the testimony of an accomplice in this case, [Zambrano], who has not yet been sentenced or whose case has not yet been disposed of, you should keep in mind that she may in her own mind be looking for some favorable treatment in the sentence or disposition of her own case. Therefore, she may have such an interest in the outcome of this case that her testimony may have been colored by that fact. Therefore, you must look with particular care at the testimony of an accomplice and scrutinize it very carefully before you accept it. . . . There are many offenses that are of such a character that only the person capable of giving useful testimony are those who are themselves implicated in the crime. It is for you to decide what credibility you will give to a witness who has admitted her involvement and criminal wrongdoing and whether you will believe or disbelieve the testimony of a person who, by her own admission, has committed or contributed to the crime charged by the state here. Like all other questions of credibility, this is a question you must decide based on all the evidence presented to you."

[24] As the respondent correctly noted in his appellate brief: "Thus, while Zambrano was both a witness to and participant in the events surrounding the shooting, the jury's determination of guilt on the sole contested issue at trial—namely, the petitioner's intent—rested primarily on its evaluation of the testimony offered by Turner, McFadden and the petitioner himself."

[25] The petitioner testified that Turner reached for the revolver and, during their struggle, it discharged twice. He denied intentionally pulling the trigger and intentionally shooting Turner.

The court instructed the jury as follows: "In deciding what the facts are you must consider all the evidence. In doing this you must decide which testimony to believe and which testimony not to believe. You may believe or disbelieve all, none, or part of a witness' testimony. In making that decision you may take into account a number of factors, including the following: number one, was the witness able to see or hear or know things about what the witness testified to; number two, how well was the witness able to recall and describe those events; three, what was the witness' manner or demeanor while testifying; four, *did the witness have any interest in the outcome of this case* or any bias or prejudice concerning any party or any matter involved in this case; five, how reasonable was the witness' testimony considered in the light of all the evidence in this case; six, *was the witness' testimony contradicted by what the witness had said or done at another time or by the testimony of other witnesses or by other evidence.* If you conclude that a witness has deliberately testified falsely in some respect you should carefully consider whether you should rely on any of that person's testimony." (Emphasis added.)

[26] Turner testified that she ran into the woods, where McFadden found her. She further testified that, after staying there for a few minutes, they left the woods because she thought the petitioner and Zambrano were gone. According to Turner, she and McFadden were walking on a road when the petitioner jumped out of some bushes and pointed the revolver at her head.

[27] We disagree with the petitioner's argument that "Zambrano's testimony was the only witness testimony that was in direct conflict with the [defense] case, which was a lack of intent on the assault charge. . . . Zambrano's damaging testimony regarding the [petitioner's] preshooting anger and postshooting actions to conceal evidence undoubtedly conflicted with the defense." (Citation omitted.) As discussed previously in this opinion, the petitioner himself testified regarding his efforts to conceal evidence by throwing the revolver in a body of water. Additionally, although Zambrano testified that the petitioner was "in a rage" about Turner a day or two before the shooting, there was other evidence regarding his anger toward his cousin. As noted, the petitioner stated he was "pissed off" at Turner, and McFadden recounted that he spoke to Turner with an assertive, raised and accusatory voice during the car ride to the remote location.