SEAN ADAMS *v.* COMMISSIONER
OF CORRECTION
(SC 18810)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Harper, Js.*

Argued November 2, 2012—officially released July 23, 2013

Robert J. Scheinblum, senior assistant state's attorney, with whom were *Kevin T. Kane*, chief state's attorney, and, on the brief, *Michael Dearington*, state's attorney, *Linda N. Howe*, former senior assistant state's attorney, and *David Clifton*, assistant state's attorney, for the appellant (respondent).

Damon A. R. Kirschbaum, for the appellee (petitioner).

Opinion

PALMER, J. This petition for habeas corpus arises from the state's failure to correct the false and misleading testimony of one of its key witnesses in the trial of the petitioner, Sean Adams, who, following that trial, was convicted of murder and other offenses, and sentenced to 100 years in prison. The respondent, the commissioner of correction, appeals from the judgment of the Appellate Court, which reversed the judgment of the habeas court denying the petitioner's amended petition for a writ of habeas corpus. See *Adams* v. *Commissioner of Correction*, 128 Conn. App. 389, 399, 17 A.3d 479 (2011). We granted the respondent's petition for certification, limited to the following issue: "Did the Appellate Court properly conclude that the state deprived the petitioner of a fair trial by failing to disclose [a key witness'] plea agreement or to correct misleading testimony [by that witness]?" *Adams* v. *Commissioner of Correction*, 301 Conn. 930, 930–31, 23 A.3d 725 (2011). Because the respondent has conceded that the state was required but failed to correct false and misleading testimony, the only remaining question concerns materiality: Is there any reasonable likelihood that the testimony could have affected the judgment of the jury? We agree with the Appellate Court that the testimony was material and, consequently, that the petitioner is entitled to a new trial.

The following facts and procedural history are not in dispute. The petitioner, Darcus Henry, Johnny Johnson and Carlos Ashe, all identified as members of a street gang known as the Island Brothers, were arrested and charged in connection with a shooting that occurred on December 14, 1996, at approximately 2 a.m., in a courtyard at the Farnam Courts housing project in the city of New Haven. The three victims of the attack were Jason Smith, Andre Clark (Andre) and Marvin Ogman, all members of a rival street gang known as the Ghetto Boys. Each of the three victims was shot multiple times and suffered serious wounds, and Smith, who was Andre's cousin, died from those wounds. Andre and Ogman were the state's primary witnesses at the ensuing jury trial of the petitioner and his three codefendants, Henry, Johnson and Ashe. At the conclusion of that trial, the petitioner was found guilty of all charges, that is, murder, conspiracy to commit murder and two counts of assault in the first degree.[1]

At trial, Andre testified falsely that he had not been promised any consideration on his then pending charges in two unrelated criminal cases in exchange for his testimony against the petitioner and the petitioner's codefendants.[2] Andre also testified that he faced a possible maximum sentence of thirty-eight years imprisonment for those pending charges, even though the judge who accepted his pleas, *Fasano*, *J.*, had placed a four year limitation on Andre's sentence, with the possibility

of a more lenient sentence, conditioned on Andre's cooperation with the state.[3] Assistant State's Attorney James G. Clark (prosecutor),[4] who tried the petitioner's case for the state, did not correct Andre's false testimony, apparently because he was unaware of Andre's plea agreement as Andre's cases were being handled by another prosecutor, namely, Assistant State's Attorney Roger Dobris. Following his conviction, the petitioner appealed to the Appellate Court, which affirmed the judgment of the trial court.[5] *State* v. *Adams*, 72 Conn. App. 734, 736, 806 A.2d 111, cert. denied, 262 Conn. 916, 811 A.2d 1292 (2002).

The petitioner subsequently filed this petition for a writ of habeas corpus, claiming, inter alia, that the state had deprived him of a fair trial by failing to correct Andre's false testimony.[6] At the habeas trial, the prosecutor testified that he was aware that Andre had pending charges at the time of the petitioner's trial and that he also knew that Dobris was handling Andre's cases. The prosecutor and Dobris had agreed not to share any details with each other about Andre's pending cases and the petitioner's trial, effectively setting up a "firewall" between them.[7] The evidence also established that, on December 16, 1998, Andre entered *Alford*[8] pleas in two separate cases on one count of carrying a pistol without a permit and two counts of possession of narcotics with intent to sell. Andre accepted the court's plea offer of a sentence of no more than four years imprisonment, with the right to argue for less, conditioned on his cooperation with the state.[9] Although the court originally set sentencing for February 19, 1999, Andre was not sentenced until September 14, 2001, after he had testified in all three trials stemming from the December 14, 1996 shooting, including the petitioner's trial.[10] At Andre's sentencing hearing, Dobris recommended that the court vacate Andre's pleas on two of the charges and impose an unconditional discharge on the third charge. In support of this request, Dobris observed that Andre "ha[d] testified [in] three trials that I know of in which he was a gunshot victim and also an eyewitness. He's being shown consideration for his truthful cooperation and testimony. . . . He's been enormously cooperative."[11] The court, *Fasano*, *J.*, followed Dobris' recommendations, and Dobris dropped the two charges to which Andre had entered the subsequently vacated pleas.

The habeas court assumed without deciding that Andre's testimony at the petitioner's trial was false and misleading but concluded that, notwithstanding the state's failure to correct that testimony, the petitioner had not demonstrated materiality. The court reasoned that, even if the jury had been informed of any consideration that Andre may have expected to receive in exchange for his testimony, there was only a slight probability that such information would have affected the outcome of the petitioner's trial. The habeas court

also observed that the court, *Fasano*, *J.*, rather than the state, had offered to limit Andre's sentence to four years imprisonment in return for his trial testimony, thereby "further weakening [the] probability" of a different outcome and "further abating the petitioner's theory of the case."[12]

The petitioner appealed, on the granting of certification, to the Appellate Court, which reversed the judgment of the habeas court. *Adams* v. *Commissioner of Correction*, supra, 128 Conn. App. 399. The Appellate Court observed the respondent's concession on appeal that the state improperly had failed to correct Andre's false testimony. Id., 396. The court explained that, because Andre's false testimony related directly to his credibility on the issue of his motivation for cooperating with the state, there was a reasonable likelihood that the testimony could have affected the jury's judgment; id., 399; thereby entitling the petitioner to a new trial. This certified appeal followed.

On appeal, the respondent concedes, as he did in the Appellate Court, that the state had a constitutional duty to correct Andre's false and misleading testimony with respect to the terms on which Andre's plea agreement were predicated.[13] The respondent maintains, however, that, contrary to the conclusion of the Appellate Court, the state's failure to correct Andre's false testimony was not material because (1) the jury knew about Andre's pending charges and his interest in demonstrating to the state that, in light of his cooperation with the state, he was deserving of its assistance in obtaining a favorable disposition of those charges, (2) Andre had a strong incentive to testify truthfully, both as a victim of the shooting and as a witness to his cousin's murder, (3) Andre was cross-examined extensively and thoroughly impeached by defense counsel at the criminal trial of the petitioner and his codefendants, and (4) there was strong, independent evidence corroborating the petitioner's guilt, in particular, the testimony of Ogman and Charles Clark. The petitioner responds that, in light of the dearth of physical evidence tying him to the shooting, the fact that Ogman, one of the state's key witnesses, lacked credibility, and the effectiveness with which Andre thwarted every effort by defense counsel to suggest that he was motivated by the prospect of leniency rather than the desire for justice, the state's failure to correct Andre's false testimony was material. We agree with the petitioner.[14]

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. In *Brady*, the court 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].”[15] 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*, 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).

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. 675. 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).

When, however, a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, the materiality standard is significantly more favorable to the defendant. "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[16] *United States* v. *Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); accord *State* v. *Ouellette*, 295 Conn. 173, 186, 989 A.2d 1048 (2010). This standard, which the state acknowledges is the proper test for purposes of the present case,[17] applies whether the state solicited the false testimony or allowed it to go uncorrected; e.g., *Napue* v. *Illinois*, supra, 360 U.S. 269; and 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. See *United States* v. *Bagley*, supra, 473 U.S. 679–80 n.9 (equating *Napue* materiality standard and harmless error standard of *Chapman* v. *California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967]); see also *Guzman* v. *Secretary, Dept. of Corrections*, 663 F.3d 1336, 1348 (11th Cir. 2011); *Elmore* v. *Ozmint*, 661 F.3d 783, 829–30 (4th Cir. 2011). This "strict standard of materiality" is appropriate in such cases "not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." *United States* v. *Agurs*, supra, 104; see also *Shih Wei Su* v. *Filion*, 335 F.3d 119, 126 (2d Cir. 2003) (noting "fundamental nature of the injury to the justice system caused by the knowing use of perjured testimony by the state"). In light of this corrupting effect, and because the state's use of false testimony is fundamentally unfair, prejudice sufficient to satisfy the materiality standard is "readily shown"; *Shih Wei Su* v. *Filion*, supra, 127; such that "reversal is virtually automatic"; (internal quotation marks omitted) *Hayes* v. *Brown*, 399 F.3d 972, 978 (9th Cir. 2005); accord *United States* v. *Stewart*, 433 F.3d 273, 297 (2d Cir. 2006); 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." (Internal quotation marks omitted.) *Shih Wei Su* v. *Filion*, supra, 129.

In accordance with these principles, our determination of whether Andre's false testimony was material under *Brady* and its progeny requires 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 petitioner and his codefendants were otherwise able to impeach Andre. We therefore begin with a review of the state's evidence, which may be summarized as follows. According to testimony of

Richard Pelletier, a New Haven police detective with expertise about local gangs, Andre, Smith and Ogman were members of the Ghetto Boys. The petitioner, Henry, Johnson and Ashe were all members of a rival gang, the Island Brothers. During the relevant time period, relations between the Island Brothers and the Ghetto Boys were "[e]xtremely hostile," and the gangs "were shooting at each other on a regular basis." One such incident, in August, 1996, resulted in the death of Tyrese Jenkins, a member of the Island Brothers. Subsequently, two members of the Ghetto Boys, Charles Green and Dwayne Clark,[18] were arrested and charged with his murder. The Island Brothers had resolved to avenge Jenkins' murder.

At approximately 10 p.m. on December 13, 1996, the petitioner and two of his codefendants met at the Melebus Club in New Haven, a nightclub that is only a short walk from Farnam Courts. The men left the nightclub around 2 a.m. and arrived in the courtyard located in Farnam Courts between Franklin Street and Hamilton Street. Shortly after 2 a.m., Andre, Ogman, Smith and Terence Davis,[19] who were gathered in the courtyard, were fired on by men wielding semi-automatic weapons. Ogman testified that he saw the petitioner and his codefendants firing guns. Andre identified the petitioner, Henry and Ashe as being present at the shooting and carrying guns, but he could not be certain whether the fourth shooter was Johnson or Johnson's brother, Gaylord Salters. Andre further testified that the petitioner was wearing a bright yellow jacket. Andre's brother, Charles Clark, who was fifteen years old at the time of the shooting, testified that he arrived at the scene after the initial volley of gunfire and saw a person standing over another person whom he later learned was Smith. Although he could not identify the person standing over Smith, he heard him say, "[D]o you want to die? I'm from the Island." The person then fired his weapon down toward Smith. Charles Clark also saw someone wearing a yellow jacket with the letter "P" on the back running toward a tunnel that served as an exit from the courtyard. The next day, the petitioner, who was wearing a yellow jacket and a bulletproof vest, was arrested in the company of Johnson and Ashe.

No weapons ever were recovered. The only physical evidence that connected the petitioner and his codefendants to the scene was the yellow jacket that the petitioner was wearing when he was arrested, the significance of which depended on the credibility of Andre and Charles Clark, both of whom testified that the petitioner had been wearing a yellow jacket at the time of the shooting. A fair assessment of the state's case, therefore, is that it depended largely on the credibility of two eyewitnesses, namely, Andre and Ogman.[20]

Ogman, arguably the state's main witness, was mostly consistent in identifying the petitioner as one of the

shooters. The only exception was when he initially was brought into the emergency department at Yale-New Haven Hospital (hospital) following the shooting. Officer John Velleca of the New Haven Police Department accompanied Ogman in the ambulance on the way to the hospital. At the hospital, Velleca asked Ogman whether there was anyone with whom "he had problems recently," and Ogman responded that he was having problems with the Island Brothers. A note in Ogman's medical records reflects that, when he arrived at the hospital, he told a surgical resident that he was unable to recall the events of the shooting. While hospital staff were treating Ogman, however, he told Velleca that the shooters were Salters, Johnson, Ashe and Henry. Ogman indicated that he would give additional details to John Dalton, a New Haven police officer who knew the Ogman family. Dalton was summoned immediately and found Ogman awaiting surgery, at which time Ogman told him that the shooters were the petitioner, Henry and Johnson. Ogman also indicated that, although he had not seen Salters, Ogman knew that he was there as well. Shortly afterward, upon being questioned by Detective Edwin Rodriguez of the New Haven Police Department, Ogman for the first time named the petitioner and all three of the petitioner's codefendants as the shooters, and he did not thereafter waver in his identifications.

On almost every other issue, however, Ogman's testimony was so inconsistent, both with respect to his own prior statements and testimony, and with respect to the testimony of other witnesses, that his overall veracity was, at best, highly suspect. The tenor of his testimony is best captured by an exchange between him and the petitioner's counsel[21] following one of the many occasions on which Ogman was confronted with his own prior, contradictory testimony. The petitioner's counsel asked Ogman: "Is it true that your concept, your understanding of the concept of truth, is that it's fluid, that is to say, that it changes with the situation that you are in or the audience that you have?" Ogman answered simply: "Yes."

A few examples illustrate the point. Ogman repeatedly denied that he was a member of the Ghetto Boys and also denied that Andre, Smith, Green and Dwayne Clark were members of that gang. At one point, however, seemingly unaware that he already had testified to the contrary, Ogman openly acknowledged that both Andre and Dwayne Clark, as well as Smith and Green, were members of the Ghetto Boys. Regarding the nature and extent of his own "association" with the Ghetto Boys, at one time he claimed that he found out only after the shooting that persons with whom he associated were members of the gang, but, at another point, he claimed that he had worn a bulletproof vest on the night of the shooting because he knew that his close association with the Ghetto Boys might lead others to

mistake him for a member of the gang. Ogman never admitted that he was a member of the Ghetto Boys. His denials directly contradicted the testimony of Pelletier, the state's expert witness on gang activity who was assigned to the state police gang task force from 1995 to 1999. Not only did Pelletier have extensive training in the area of gang activity, he also was personally familiar with the Ghetto Boys, and he testified unequivocally that Andre, Green, Dwayne Clark, Smith and Ogman were all members of the Ghetto Boys.

Ogman also gave varied accounts of his drug use, both on the night of the shooting and in general. Peter Angood, an associate professor of surgery and the director of the surgical intensive care unit at the hospital, was supervising the trauma service at the hospital on December 14, 1996. He testified that, on that date, Ogman tested positive for both phencyclidine, also known as PCP, and marijuana. Because the active chemical component of both of those drugs remains in a person's circulatory system for a period of time, the tests established only that Ogman had used PCP up to a few days prior to the shooting and that he had used marijuana up to one week before the shooting. A preoperative note in Ogman's medical record reflects that, when questioned, Ogman admitted using marijuana, although it was unclear from the note whether he had admitted using it generally or on that night in particular. Another portion of the medical record reflects that, at some point during his hospital stay, he indicated to a social worker that he did not use *any* illicit substances, although it was unclear whether that interview took place before or after surgery.

Ogman testified that he had not used any drugs on the night of the shooting, but he acknowledged that he had been informed of the results and significance of the drug test and admitted that he had used drugs at some point during the week before the shooting. He also admitted that, in 1996, he was using a drug called "wet," or "illy," which consists of smoking material dipped in PCP and formaldehyde. When he was reminded that he was on parole for much of 1996, and that using "illy" would have violated the conditions of his parole, he qualified his admission, stating that he only had begun using "illy" after October 30, 1996, when his period of parole had ended. Ogman appeared much more reluctant, at least at times, to acknowledge his marijuana use. At first, very shortly after he acknowledged that he was aware that he had tested positive for marijuana on the night of the shooting, he categorically denied any use of marijuana in December, 1996. Subsequently, when he again was asked whether he smoked marijuana, he replied that he did, but not on the night of the shooting. On a third occasion, he admitted that he smoked a marijuana blunt[22] to ingest "illy" but refused to concede that he therefore also ingested marijuana. The next day, while still refusing to concede that he used

marijuana when he smoked "illy," he acknowledged that he previously testified that he had used marijuana. At one point, Ogman even stated that he falsely had denied to hospital personnel immediately prior to surgery that he had used illicit substances, despite his awareness of the importance of informing them of any drugs that might be in his system prior to undergoing surgery. When the prosecutor, in an attempt to rehabilitate Ogman, reminded him on redirect examination that he had admitted to the anesthesiologist who interviewed him prior to surgery that he had used marijuana, Ogman initially denied making that statement and only conceded that he had done so after being shown his medical record.

Ogman also gave contradictory statements as to whether he had ever been shot at prior to December 14, 1996, or had ever heard the sound of gunshots before that incident. He initially denied that he had ever been shot at before that night and denied that he had told hospital personnel that he had been shot at on prior occasions. In his statement to police, he even claimed that, when he first heard the gunshots on the night of the shooting, he did not realize that it was gunfire because he had never before heard that sound. Ogman's subsequent testimony, however, was irreconcilable with both statements. Specifically, he thereafter admitted that he had told a social worker at the hospital that he had been shot at on two prior occasions and that those incidents occurred during his childhood. When he subsequently was confronted with his inconsistent answers, Ogman explained that he did not understand the relevant time frame when he initially denied that he had been shot at previously. The testimony was then read back to Ogman: Defense counsel asked Ogman: "[W]as this the first occasion in which you were shot, December 14, 1996?" Ogman responded: "What [do] you mean?" Defense counsel then asked: "Had you ever been shot at prior to that?" Ogman responded: "No." Defense counsel asked: "Never?" Ogman responded: "Never."

As to his claim that he had never heard the sound of gunfire before the night of December 14, 1996, that statement directly conflicted with his testimony regarding the childhood incidents and his admission that he had been present at shootings on at least two prior occasions. Even his account of those events was not consistent. Regarding the two prior shootings, he later stated that when he alluded to the two prior shootings, he intended to include the December 14, 1996 shooting as one of the shootings. At other points, he equivocated, suggesting that he was not present at *any* prior shootings and was merely "aware" of the ongoing conflict between the Island Brothers and the Ghetto Boys because he had read "literature" about it and because others had told him about the shootouts between the gangs. Finally, when Ogman was confronted with his

conflicting testimony, he testified that, when he had told the police that he had never heard gunshots, he meant that he had never heard them fired *at* him, and that gunfire aimed toward oneself sounds quite different from gunfire aimed at others. He was not asked how that distinction accounted for the two occasions on which he was fired at.

Some of Ogman's falsehoods defy explanation. For example, early in his testimony, he denied without qualification knowing a person by the name of Terence Blow or Terence "Bones," whose real name is Terence Davis. See footnote 19 of this opinion and accompanying text. Yet, when he was asked the following day if he knew someone by the name of "Bones," he replied, "[y]es" and that he is also known as "Terence." He also admitted that he had seen Davis on the day of the shooting but denied that Davis was present immediately prior to the shooting. By contrast, Andre testified that Davis was with Andre, Ogman and Smith when the shooting began but escaped unscathed.

Ogman testified inconsistently that he was lying either facedown or faceup after he was shot. This fact is particularly significant because Ogman stated that he recognized the faces of the shooters only after he fell. He initially told Detective Thomas Trocchio of the New Haven Police Department, who took Ogman's statement following surgery, that he was lying facedown after he was shot. On direct examination, Ogman claimed that he just remembered that he was lying on his back and then agreed when the prosecutor suggested that he might have been facedown and then rolled over. Shortly thereafter, while still on direct examination, he again claimed that he had been lying facedown. The next time he was asked, he stated that he had been lying faceup, but when he was reminded that he had told Trocchio that he had been lying facedown, he did not dispute the truth of his statement. When he testified yet again that he had been lying faceup, and was reminded, once again, of his statement to the police, he claimed that the statement he had given to the police was incorrect.

Charles Clark's testimony adds only two significant pieces of evidence to the state's case. Charles Clark was at his girlfriend's apartment on Franklin Street in New Haven in the early morning hours of December 14, 1996. Hearing gunfire, he left the apartment to look for Andre, his brother. When he arrived at the courtyard at Farnam Courts, he saw three persons, two on the ground and one standing over one of the persons on the ground. The person standing over the other person on the ground said, "[D]o you want to die? I'm from the Island," and then started firing down at him. Charles Clark fell and stayed down for about forty-five seconds to one minute. When he stood up, he saw a person running toward the tunnel. The person, whom Charles

Clark could see only from behind, was wearing a yellow jacket with the letter "P" on the back.[23]

Viewed in the context of the testimony of the other state's witnesses, Andre's testimony was significant and, therefore, so was any evidence that could cast doubt on his credibility. Andre is the only witness other than Ogman who identified the petitioner as one of the shooters. He also is the only witness other than Charles Clark who testified that the petitioner was wearing a yellow jacket on the night of the shooting. Police questioned Andre immediately following the shooting, while he was being treated at the hospital, but he told them that he did not know who had shot him, stating only that he knew that the assailants were members of the Island Brothers because of a "beef" between the two gangs. In fact, he did not provide a statement to police until more than two years later, on March 3, 1999. His testimony at trial, which was largely consistent with his police statement, was that, shortly before 2 a.m. on December 14, 1996, he was smoking marijuana with Davis by the tunnel in the courtyard at Farnam Courts. At some point, Ogman and Smith joined them. Andre then walked to a friend's nearby apartment on Franklin Street to make a telephone call, accompanied by Davis, with Ogman and Smith walking a short distance behind them. After he completed his telephone call, the four men walked back to the courtyard, heading toward the tunnel. As they approached the tunnel, gunmen came running out of the tunnel, firing at them. Andre turned immediately and ran toward Franklin Street. As he was running, he was struck by multiple bullets. He fell to the ground and pushed himself behind a utility box, where he hid. As the gunfire stopped momentarily, he managed to push himself back toward a corner in the apartment building, under a stairway. He then proceeded to bang on apartment doors for help, when he heard the gunfire resume and become louder. He thereafter observed four individuals run past him. As they did, he looked in their direction and observed their faces, and also saw that all four were carrying guns. In addition, Andre noticed that the petitioner was wearing a bright yellow jacket, which he identified at trial. He also heard someone say, "come on, 'Leet,' " which Andre understood to be a reference to Ashe.[24] At that point, Andre, who had suffered nine gunshot wounds,[25] slipped in and out of consciousness.

Cross-examination of Andre was extensive and focused on the limited nature of the view he had of the shooters, his criminal record and his delay in coming forward to authorities. He also was questioned about the relation between his eventual decision to testify and his pending criminal charges. Although the cross-examination was aggressive, Andre effectively rebuffed efforts by defense counsel to demonstrate that he was motivated to testify against the petitioner and his codefendants by any promise or expectation of leniency.

Perhaps the most effective cross-examination was the line of inquiry that focused on Andre's limited ability to view and accurately identify the shooters. Andre testified that he smoked approximately one blunt of marijuana on the night of the shooting. He turned and ran immediately when the shooting started, so, initially, he could not see the shooters, who were behind him. After he hid behind the utility box and pushed himself back into the corner of the apartment building, the only view he had of the shooters as they ran past his hiding place was from the side, not the front. Additionally, all four of the shooters were wearing hats that Andre called "skullies,"[26] and he was able to view the shooters only through a gap between the stairway under which he was lying and a brick column. The width of that gap, together with the speed with which the shooters were moving, called into question how long and how well Andre had been able to observe them. Moreover, as the shooters ran by Andre, they were "[i]n a bunch," casting further doubt on whether Andre could see their faces clearly enough to identify them.[27] Defense counsel also highlighted Andre's weakened condition, establishing that, at some point before medical personnel arrived, he fell in and out of consciousness. Finally, defense counsel elicited an admission from Andre that, shortly after the shooting, while he was visiting Ogman at Gaylord Hospital, Ogman told him who the shooters were.

Cross-examination also underscored Andre's extensive criminal record, including convictions in 1991 for possession of narcotics, in 1992 for larceny in the second degree, criminal impersonation, failure to appear, and sale of narcotics, in 1996 for possession of narcotics, and in 1998 for interfering with an officer by resisting arrest.[28] Andre also acknowledged that he was incarcerated at the time of trial. Further cross-examination explored the length of his career as a drug dealer and the type of drugs that he sold, including testimony that Andre, who was twenty-five years old at the time of trial, began selling drugs when he was thirteen years old. Defense counsel also highlighted Andre's lack of moral values, focusing on his belief that selling drugs was not wrong. One of the more heated exchanges focused on Andre's prior conviction for criminal impersonation, which resulted from his giving a false name to the police following his arrest on larceny charges, a ruse that resulted in his release on bond until the police learned of his true identity. During the exchange, defense counsel emphasized Andre's willingness to lie to the authorities to avoid prison time.

Defense counsel also attempted to impeach Andre's credibility by suggesting that he gave his March 3, 1999 statement in an effort to gain a favorable disposition of his pending criminal charges. On cross-examination, defense counsel elicited the following information. On January 5, 1998, Andre was arrested and charged with

illegal possession of a firearm and carrying a pistol without a permit. Shortly thereafter, on March 10, 1998, Andre was arrested on various drug charges. After posting bond for both the drug charges and the firearms charges, Andre was arrested on February 23, 1999, on an extradition warrant charging him with being a fugitive from New York authorities. At that time, and at the time of trial, both the firearms and drug charges remained pending. While Andre was still incarcerated on the extradition warrant, his attorney arranged for him to give a statement to police regarding the December 14, 1996 shooting, and he did so on March 3, 1999. Andre denied, however, that his attorney had told him that he would receive consideration on his pending firearms and drug charges if he provided the police with a statement about the December 14, 1996 shooting.

Andre also emphatically and repeatedly denied that he had been offered or promised any consideration in exchange for his cooperation. He stated that he only sought justice and denied that he expected any leniency in return for his testimony. When Andre was asked whether he anticipated facing the full thirty-eight years that the charges carried, he replied that it was possible and stated: "[Y]ou do the crime, you got to do the time, if they give me [thirty-eight years], they give me [thirty-eight], that's what I say." On redirect examination, the prosecutor reinforced Andre's false testimony by pointedly asking him whether he was aware of the maximum sentence that he could face on his pending charges, as well as the minimum, which was one year. Andre also was asked on redirect examination why he had waited so long to give a statement to police. Andre responded that he was afraid for his mother's safety because the shooters knew where she lived, and that he was concerned that, if he came forward, he would be labeled a "snitch." Finally, Andre claimed that he initially remained silent because he wanted the opportunity to take revenge personally against the shooters. He stated that he ultimately came forward because he decided that he did not want to create further hardship for his family by risking his life in the pursuit of revenge against his assailants. At no time did Andre acknowledge that his decision to cooperate had anything to do with his pending charges.

We now turn to the issue of harm, which ultimately is determinative of whether the petitioner has satisfied the strict materiality standard applicable when, as in the present case, the state has failed to correct testimony that it knew or should have known was perjurious. It is difficult, of course, to gauge precisely the extent to which the petitioner was unfairly prejudiced by the state's failure to correct Andre's false testimony. In seeking to discern that prejudice, however, we acknowledge that, both as a victim of the December 14, 1996 attack and as a witness to the fatal shooting of Smith, his cousin, Andre most certainly had reason

to testify against his assailants wholly apart from any promise of leniency. We also acknowledge that Andre's veracity as a witness was tested by the vigorous cross-examination of defense counsel. But it is highly probable that Andre's credibility would have been further undermined, and most likely seriously so, if the jury knew, first, that he had been promised leniency on his pending charges in return for his cooperation and, second, that he was lying when he denied that he had been promised consideration for such cooperation. Because a witness' motivation to avoid prison time is invariably a strong one, the fact that Andre's credibility otherwise had been called into question was not a substitute for cross-examination about the relationship that in fact existed between the leniency that he had been promised and his testimony on behalf of the state.[29] See, e.g., *Napue* v. *Illinois*, supra, 360 U.S. 270 ("we do not believe that the fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against [the] petitioner turned what was otherwise a tainted trial into a fair one"). This is especially true in the present case, because Andre did not identify the petitioner as one of the shooters until more than two years after the incident, when, following his arrest and incarceration in connection with the New York extradition warrant, he was looking to reduce the potential prison time to which he would have been exposed for his pending firearms and drug charges. Indeed, although "[t]he credibility of [any] witness who testifies as to substantive facts is critical in the trial of a case"; *United States* v. *White*, 972 F.2d 16, 20 (2d Cir.), cert. denied, 506 U.S. 1026, 113 S. Ct. 669, 121 L. Ed. 2d 593 (1992); Andre not only testified to substantive facts, he also concededly was a key state witness. In such circumstances, the inability of the petitioner's counsel to demonstrate the extent to which that testimony may have been the product of self-interest cannot be discounted because, as this court previously has observed, a witness "who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused." *State* v. *Patterson*, 276 Conn. 452, 469, 886 A.2d 777 (2005).

The harm to the petitioner from the false testimony was to some degree compounded by certain comments that the prosecutor had made in his rebuttal argument concerning Andre's credibility. For example, the prosecutor argued that, although Andre had admitted to being a drug dealer, a gang member and even capable of murder, "being in court under oath is different," and Andre "sat up there and answered hundreds of questions . . . . Never once that I remember, possibly once in the four days of his testimony, did he add stuff or did he avoid [the] question and answer it [in] a different way that would make things look different [from] what he said. He simply answered the questions." The prose-

cutor also suggested that Andre was to be believed when he said, in effect, that he "wouldn't lie in this situation," that certain testimony by Andre that was not particularly helpful to the state "cannot come from the [mouth] of somebody who is a liar," and that Andre was "not [t]here just to nail the guys we have on trial." Finally, in arguing that the state's witnesses, including Andre, were credible, the prosecutor stated: "Look at the evidence. Look at what you know they all actually said here. Look at the context in which they say it. Does it make sense? Does it come across to you? When you saw them on the stand, was it believable? Are the mistakes they made mistakes or lies? And when you do all of that, you are going to believe those witnesses." Although, ordinarily, such an argument would be unexceptional, the statements must be viewed in the context of Andre's false testimony and the state's failure to correct that testimony—a failure that the jury undoubtedly understood as an endorsement of Andre's testimony, in which Andre adamantly denied the existence of any promise of consideration in return for his testimony. To the extent that the prosecutor's remarks conveyed the state's view that Andre's testimony was accurate and truthful in all important respects, those comments no doubt exacerbated the prejudice and unfairness to the petitioner.

As the Second Circuit Court of Appeals recently observed, the evidence of guilt may be "so overwhelming" as to render immaterial even a knowing failure by the state to correct perjured testimony. *Shih Wei Su* v. *Filion*, supra, 335 F.3d 129; see also *State* v. *Mitchell*, 296 Conn. 449, 460, 996 A.2d 251 (2010) ("[t]his court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt" [internal quotation marks omitted]). The state's evidence, however, although certainly sufficient to support the petitioner's conviction, was not particularly strong, let alone overwhelming. The state's case rested almost entirely on the credibility of its witnesses, and even the single piece of physical evidence that the state produced, namely, the yellow jacket, proved nothing without the credible testimony of Andre and Charles Clark. Andre's testimony was significant because it supported key aspects of both Ogman's and Charles Clark's accounts of the December 14, 1996 shooting. Andre and Ogman were the only two witnesses who identified the petitioner as being one of the shooters, and Andre and Charles Clark were the only two witnesses who testified that one of the shooters wore a yellow jacket. As we noted, Ogman's testimony was so inconsistent that it was difficult to determine whether he was capable of discerning the difference between truth and fiction. By contrast, Andre was relatively consistent in his testimony, and his identification of the petitioner lent a significant measure of credibility

to Ogman's testimony that otherwise might have been lacking. Although there were fewer questions about the credibility of Charles Clark, the jury may have been less apt to credit his testimony that he saw a person wearing a yellow jacket running away from the scene if Andre's credibility had been called further into question.

Finally, the fact that the evidence against the petitioner was hardly overwhelming is borne out by the apparent difficulty that the jury had in deciding the case. The jury deliberated for ten days before reaching a verdict on the petitioner's charges. Moreover, the jury could not reach a unanimous verdict on any of the charges against two of the petitioner's three codefendants, resulting in a mistrial as to them, and before reaching its guilty verdicts as to the petitioner and Henry, the jury requested that the testimony of Ogman, Andre, and Charles Clark be read back. Although not necessarily dispositive of the issue of the strength of the state's evidence, the foregoing considerations support the conclusion that the jury viewed the case as a relatively close one.

For all these reasons, we are unable to conclude that Andre's perjurious testimony was so relatively insignificant that the state's failure to correct it does not warrant relief under the strict materiality standard applicable in this case. We therefore conclude, contrary to the conclusion of the habeas court, that the petitioner is entitled to a new trial.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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

[1] Henry also was found guilty on all of the charges. Because the jury could not reach a unanimous verdict on any of the charges against Johnson and Ashe, the trial court declared a mistrial as to them. Johnson and Ashe subsequently were retried separately and found guilty of murder, conspiracy to commit murder, and assault in the first degree, and their convictions were affirmed on appeal. See *State* v. *Johnson*, 82 Conn. App. 777, 798, 848 A.2d 526 (2004); *State* v. *Ashe*, 74 Conn. App. 511, 527, 812 A.2d 194, cert. denied, 262 Conn. 949, 817 A.2d 108 (2003).

[2] The respondent has conceded that Andre testified falsely regarding the terms of his plea agreement, his expectation of leniency and his exposure to prison time. The respondent also acknowledges that the state improperly failed to disclose Andre's plea agreement to the petitioner.

[3] We note that the court, *Fasano*, *J.*, advised Andre, before he entered his pleas, that the charges carried a total possible maximum term of thirty-five years of imprisonment, not thirty-eight years. That disparity is not at issue in this appeal.

[4] We refer to James G. Clark as the prosecutor and Andre Clark as Andre.

[5] As we noted previously, the trial court sentenced the petitioner to a term of imprisonment of 100 years.

[6] Although the petitioner's amended habeas petition alleges only that the state improperly concealed favorable evidence from the petitioner by failing to disclose the promise on which Andre's pleas were conditioned, it is evident from the petitioner's posttrial brief and the habeas court's memorandum of decision that the petitioner also claimed that the state's failure to correct Andre's false testimony violated the petitioner's right to due process and a fair trial as guaranteed by the fourteenth amendment to the United States constitution.

[7] The prosecutor explained the purpose of this arrangement: "Because

[Andre] was a key witness and had . . . pending case[s] in the jurisdiction, I intentionally set myself apart from [those] case[s]. . . . Dobris handled [Andre's cases], and I told him that I did not want to know what was going on and that I didn't want any input into [those cases] of any kind. . . . I want[ed] to be clear that we haven't made any agreements with [Andre] concerning his pending cases. And the easiest way to make that clear is if [Dobris] handle[s] this, and don't tell me what's going on with it."

[8] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[9] According to Dobris' testimony at the petitioner's habeas trial, Judge Fasano had conducted the plea discussions with Andre and offered him a maximum of four years imprisonment with the right to argue for less, subject to his cooperation with the state. Although there is nothing in the record to suggest that Dobris objected to Judge Fasano's offer, it appears that Dobris did not play an active role in the plea negotiations with Andre. See *State* v. *Revelo*, 256 Conn. 494, 506–508 and n.25, 775 A.2d 260 (approving active role of judge in conducting plea negotiations, subject to constitutional limitations), cert. denied, 534 U.S. 1052, 122 S. Ct. 639, 151 L. Ed. 2d 558 (2001).

[10] As we indicated previously, two of the petitioner's codefendants, Johnson and Ashe, were retried separately after the court declared a mistrial as to them. See footnote 1 of this opinion.

[11] In the habeas court, the primary focus of the petitioner's claim was that the state improperly had failed to disclose to the petitioner its promise of leniency to Andre in return for his testimony against the petitioner and the petitioner's codefendants. The respondent disputed the petitioner's contention, asserting, rather, that the court, *Fasano*, *J.*, not the state, had conducted the plea discussions with Andre and had promised him leniency in return for his cooperation. Consistent with this position, the prosecutor testified that he had no expectation or belief that the state would make any promises to Andre concerning his then pending charges to induce him to cooperate with the state. According to the prosecutor, he believed that Andre had agreed to cooperate with the state solely because he and his cousin were victims of that attack, and not for any other reason. For his part, Dobris testified that he had not, in fact, made any such promises to Andre, who, Dobris explained, had elected to enter his pleas entirely on the basis of the nature of the charges and the strength of the state's evidence. Dobris' testimony that he had not made any promises to Andre was corroborated by the defense attorney who represented Andre at his plea and sentencing hearings. Dobris acknowledged, however, that he had told Andre's attorney that the state might agree to more favorable treatment for Andre if he cooperated with the state. Indeed, Dobris testified that, although he had made no promises as to the specific consideration Andre would receive from the state for his cooperation, "it's clear that it was contemplated in the minds of the parties, [that is, Andre's defense attorney], myself and the court, that something good would happen to . . . [Andre] if he testified truthfully and cooperated with the state, in the cases against . . . [the petitioner and the petitioner's] codefendants . . . ."

More important, however, Dobris did not inform the prosecutor or the petitioner of the plea agreement between Judge Fasano and Andre even though that agreement expressly provided that Andre's sentence would not exceed four years imprisonment, with the possibility of a lesser sentence, conditioned on Andre's cooperation with the state. The record indicates that Dobris believed that the state had no such disclosure obligation because Andre's plea agreement was the product of negotiations between Andre and Judge Fasano, without the state's active participation. Of course, as the respondent now concedes, the state certainly did have a duty to disclose Andre's plea agreement, no less than it had a duty to correct Andre's false testimony denying its existence, because the prospect of a lenient sentence gave Andre an incentive to curry favor with the state and the sentencing judge, an incentive that the petitioner and his codefendants were entitled to explore on cross-examination. See, e.g., *State* v. *Ouellette*, 295 Conn. 173, 190, 989 A.2d 1048 (2010) ("[i]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence" [internal quotation marks omitted]); see also *DuBose* v. *Lefevre*, 619 F.2d 973, 979 (2d Cir. 1980) ("[u]nquestionably, agreements . . . to reward testimony by consideration create an incentive on the witness' part to testify favorably to the [s]tate and the existence of such an understanding is important for purposes of impeachment"). Furthermore, in his testimony at the habeas trial, Dobris acknowledged that he had been in the courtroom for "part of" Andre's

testimony "in at least one" of the three trials in which Andre had testified for the state. Dobris was not asked, however, and his testimony does not reflect, whether he was present for any of Andre's false testimony about the terms and conditions of his plea agreement.

[12] The habeas court reasoned: "The fact that Andre . . . was a victim of the crimes attributed to the petitioner and [was also] a witness to the murder of his cousin [Smith], and testified accordingly at trial, suggests that any benefit the petitioner might have derived from the jury's knowledge of a possible alternative motive for [Andre's] cooperation and testimony was minimal at best. It is quite reasonable that [Andre's] main motivation for testifying on behalf of the state was to seek justice for the harm done to him and his family, rather than his own desire for more lenient sentencing in his pending criminal cases, and . . . the jury would have also determined as much based on the evidence presented. . . .

"Assuming that the [petitioner] had knowledge of and thus had utilized evidence showing that [Andre] received consideration for his cooperation in order to impeach his testimony, it is reasonable that a jury, [although] aware of the consideration, would have nonetheless been unmoved by its production. Although disclosure of [Andre's] expecting or receiving consideration in exchange for his testimony might have affected the outcome of the case, such probability was only slight and therefore not reasonable enough to satisfy the requirements of the materiality test.

"Further weakening such probability is that [Andre's] sentence cap, according to the record, was *court-indicated* at four years. From such evidence, it is clear that the *court* was intending to use [Andre's] level of cooperation with the state as a guide to determining his sentence. Therefore, the consideration that [Andre] might have received in exchange for his testimony was not within the control of the state but, rather, in the hands of the sentencing court, *Fasano*, *J.*, thus further abating the petitioner's theory of the case." (Emphasis in original.)

[13] As we have explained; see footnote 11 of this opinion; in the habeas court, the petitioner's claim was founded on the allegation that Andre's pleas were the product of an agreement between Andre and the state, a premise that the respondent disputed because Andre's plea agreement was based on promises that the court, *Fasano*, *J.*, rather than the state, had made to Andre. The habeas court, however, denied the petition without making any finding as to whether the state had made any promises to Andre in return for his cooperation. In this court, however, as in the Appellate Court, the respondent concedes that, irrespective of whether there was such an agreement between the state and Andre, the state had an obligation to correct Andre's false testimony that he had received no promises in return for his cooperation with the state. The state's failure to do so apparently stems from the fact that Dobris did not inform the prosecutor about the promises that Judge Fasano had made to Andre during plea discussions. This failure is legally indefensible, and, on appeal, the respondent does not attempt to defend it. In any event, we, like the Appellate Court, commend the respondent for his forthrightness on appeal, as his concession, correct in law, advances the interests of justice. Unfortunately, the same cannot be said of the conduct that the concession addresses.

[14] We note, preliminarily, the well established standard of review for appeals arising out the denial of a petition for a writ of habeas corpus. "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008). A habeas court's factual finding will be deemed to have adequate support in the record, and thus will not be disturbed on appeal, unless the reviewing court determines that the finding is clearly erroneous. See, e.g., *Ham* v. *Commissioner of Correction*, 301 Conn. 697, 706, 23 A.3d 682 (2011).

[15] Although the United States Supreme Court at one point considered it significant whether the defendant had requested disclosure of the exculpatory material, the court no longer applies a different standard of materiality depending on whether such a request has been made. See, e.g., *Kyles* v. *Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); see also *State* v. *Esposito*, 235 Conn. 802, 813, 670 A.2d 301 (1996).

[16] It is clear that this more stringent standard applies whether a prosecutor knew or should have known that the testimony was false. See, e.g., *United*

States v. *Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (identifying test as whether "the prosecution knew, or should have known, of the perjury"); *State* v. *Cohane*, supra, 193 Conn. 496 (same); see also *Shih Wei Su* v. *Filion*, 335 F.3d 119, 126–27 (2d Cir. 2003) (*Agurs* materiality test applies "when a prosecutor elicits testimony he or she knows or should know to be false, or allows such testimony to go uncorrected").

[17] At the least, the state should have known that Andre's testimony was false. Although Dobris knew of the promises that had been made to Andre in return for his cooperation with the state, Dobris did not convey that information to the prosecutor or to counsel for the petitioner and his codefendants. As the court explained in *Giglio*, the government cannot avoid its obligation to disclose promises that have been made to a witness to induce the witness' cooperation merely because the prosecutor handling the witness' case and the prosecutor handling the case in which the witness testifies do not communicate with one another. "The prosecutor's office is an entity and as such it is the spokesman for the [g]overnment. A promise made by one attorney must be attributed, for these purposes, to the [g]overnment." *Giglio* v. *United States*, supra, 405 U.S. 154; see also *Shih Wei Su* v. *Filion*, 335 F.3d 119, 127 (2d Cir. 2003) ("[because a] promise [to a cooperating witness] by one [prosecutor is] attribut[able] . . . to the [g]overnment" generally, "[i]t follows that, before a prosecutor puts to the jury evidence that a witness has made no deal with the government, he or she has a fundamental obligation to determine whether that is so"); *Demjanjuk* v. *Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993) ("The [c]ourt [in *Giglio*] has . . . made plain that the prosecution cannot escape its disclosure obligation by compartmentalizing information or failing to inform others in the office of relevant information. In *Giglio* . . . the government made the same 'the-right-hand-did-not-know-what-the-left-hand-was-doing' argument as it makes here. The [c]ourt was quick to reject this excuse as a justification for withholding exculpatory material. . . . The [c]ourt held that the prosecutor's office . . . is responsible as a corporate entity for disclosure." [Citation omitted.]), cert. denied sub nom. *Rison* v. *Demjanjuk*, 513 U.S. 914, 115 S. Ct. 295, 130 L. Ed. 2d 205 (1994).

[18] Dwayne Clark is Andre's brother and Smith's cousin.

[19] Davis also was known as "Terence Bones" or "Terence Blow."

[20] Indeed, during closing arguments, the prosecutor expressly acknowledged that, "[o]bviously, [Ogman and Andre] are the key to this case . . . ."

[21] We note that the petitioner and his codefendants were represented by separate counsel at trial. We refer to the petitioner's defense counsel as the petitioner's counsel whereas we refer to any individual counsel other than the petitioner's counsel or counsel for the petitioner and his codefendants collectively as defense counsel.

[22] A marijuana blunt is rolled with cigar paper rather than cigarette paper.

[23] Immediately following the shooting, Charles Clark told a school counselor that he had tried to revive Smith, and while Charles Clark was bent over him, Smith spoke to him and cried tears of blood. By contrast, Malka Shah, an associate medical examiner for the chief medical examiner's office, testified that the gunshot wound to Smith's head immediately rendered him unconscious.

[24] Carlos Ashe's fellow gang members referred to him as "Carlito," and "Leet" apparently was a shorthand reference for Carlito.

[25] Andre suffered gunshot wounds to his wrist, elbow, pelvis and leg.

[26] It is not entirely clear what kind of hat Andre was referring to by his use of the term "skullies." When Andre was asked for clarification, he stated merely that the hats were "[r]egular hats, like skullies, like you pull them down."

[27] In fact, although Andre stated at trial that he saw all four of their faces, he had told police in his original statement that he had not seen Ashe. At that time, he instead explained that he knew Ashe was one of the shooters because " 'he down,' " that is, because Ashe was associated with the other defendants, and because Andre had heard one of the shooters say, "come on, 'Leet,' " which was shorthand for Ashe's nickname, Carlito. See footnote 24 of this opinion.

[28] Andre also was arrested in August, 1997, for forgery, criminal impersonation and possession of narcotics, but those charges were dropped in May, 1999.

[29] Despite their concerted efforts to challenge Andre's assertion that he was testifying solely because he wanted to seek justice, defense counsel were seriously handcuffed in their ability to do so. As we indicated, Andre denied that his attorney had told him that he might receive consideration

in exchange for his original statement, and he insisted that he had been given no promise of leniency on his pending charges, explaining that he faced the maximum possible sentence for those offenses. He even responded with righteous indignation at one point, when defense counsel questioned him yet again as to whether he was testifying with an expectation of leniency, retorting: "That was my cousin that got murdered; you talking about I'm lying?" In fact, he was lying, and the state did nothing to correct his lies. Indeed, the state's failure to correct Andre's false testimony gave the jury all the reason it needed to believe that his explanation accurately reflected the true state of affairs.