****

The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the advance release version of an opinion and the latest version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest version is to be considered authoritative.

****

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

However, I would affirm on the alternative ground advanced by the respondent, the Commissioner of Correction.[1] Specifically, I conclude that the prosecutor in this case discharged his duty under *Napue* v. *Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), *Brady* v. *Maryland*, 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), by disclosing to the petitioner's criminal trial counsel, prior to the petitioner's criminal trial, the full extent of any agreement or understanding he had with the cooperating witness, Markeyse Kelly. See *Beltran* v. *Cockrell*, 294 F.3d 730, 736 (5th Cir. 2002) ("[g]overnment fulfilled its duty of disclosure by supplying [the defendants] with its recollection of the true circumstances of the negotiations with the witness at a time when recall [to the witness stand] and further exploration of these matters was still possible" [internal quotation marks omitted]); *United States* v. *Decker*, 543 F.2d 1102, 1105 (5th Cir. 1976) (same), cert. denied sub nom. *Vice* v. *United States*, 431 U.S. 906, 97 S. Ct. 1700, 52 L. Ed. 2d 390 (1977); see also *State* v. *Ouellette*, 295 Conn. 173, 186, 989 A.2d 1048 (2010) (prerequisite of any *Brady*, *Napue*, and *Giglio* claim is existence of *undisclosed* agreement or understanding between cooperating witness and state); *State* v. *Floyd*, 253 Conn. 700, 736–37, 756 A.2d 799 (2000) (undisclosed, implied plea agreement first predicate to due process claim regarding nondisclosure of agreement); *Hines* v. *Commissioner of Correction*, 164 Conn. App. 712, 725, 138 A.3d 430 (2016) ("agreement by a prosecutor with a cooperating witness to bring the witness' cooperation to the attention of the [sentencing] judge . . . must be disclosed to the defendant against whom he testifies, even if the deal does not involve a specific recommendation by the prosecutor for the imposition of a particular sentence"). Accordingly, although I agree with parts II and III of the majority opinion, I do not join in part I.

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

However, as both the prosecutor and the petitioner's

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

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

Instead, Kelly answered the prosecutor's first question about his "understanding" by denying, accurately, that there was an agreement concerning what his actual sentence would be. He answered the prosecutor's next question by stating, also accurately, that he was facing a maximum of twenty-five years incarceration on the charges to which he pleaded guilty.[4] The prosecutor then asked, "[a]nd do you have any understanding as to what could happen if you came in here and testified?" Kelly responded, "[n]ope." Unsolicited, Kelly then expounded: "When I gave that statement [to the police implicating the petitioner], I ain't make no deal. They were trying to make a deal with my life. When I gave

that statement, I ain't make no deals, no lawyer, no nobody, no nothing, just the cop. I ain't got no deal. I ain't got to hear [anybody] saying anything. I ain't got no deal. I could have sat here. It ain't really matter." The prosecutor then dropped this line of questioning.

The "context"[5] in which this testimony arose was that the prosecutor asked Kelly, his own cooperating witness, whether there was any understanding about his sentence or about "what could happen if you came in here and testified." Cf. *United States* v. *Harris*, 498 F.2d 1164, 1169 (3d Cir.) ("[t]his is not to say that the prosecutor must play the role of defense counsel, and ferret out ambiguities in his witness' responses *on cross-examination*" [emphasis added]), cert. denied sub nom. *Young* v. *United States*, 419 U.S. 1069, 95 S. Ct. 655, 42 L. Ed. 2d 665 (1974). As the respondent's counsel admitted candidly in oral argument before this court, the usual purpose for this line of questioning by the prosecution is to "anticipatorily . . . take the sting out of" any agreement the state has with a witness or, in other words, to preemptively expose the bias of its own witness. Considering the "probable effect on the jury"; *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 373; Kelly's responsive denials ("no understanding" and "no deal") could well have been interpreted to *bolster* his credibility rather than to take the "sting" out of any agreement or to preemptively expose his bias. It is doubtful this was the prosecutor's intent,[6] but, the prosecutor, having decided to wade into this area of inquiry, could have led a reasonable jury to understand that Kelly did not "[have] any incentive to testify favorably for the state." *State* v. *Jordan*, supra, 135 Conn. App. 667.

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

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

[2] A case in which a witness has clearly testified falsely or committed perjury, whether on direct or cross-examination, may pose a different due process question, which is not implicated here. See *United States* v. *Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) ("[d]ue process is violated when the prosecutor, although not soliciting false evidence from a [g]overnment witness, allows it to stand uncorrected when it appears"); 6 W. LaFave et al., Criminal Procedure (4th Ed. 2015) § 24.3 (d), p. 471 ("[i]f the prosecutor knows or should have known that the [witness'] statement is untrue, it has a duty to correct it").

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

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

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

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

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

"A. Twenty-five years."

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

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