PALMER, J., concurring. I agree with the result that the majority reaches and much of its opinion. I write separately only to express the view that this court should exercise its inherent supervisory authority to ensure that trial courts ordinarily give a special credibility instruction in any case in which a government informer has a potential interest in the outcome of the case sufficient to give that witness a motive to falsify his or her testimony to the benefit of the state. A special credibility instruction, which cautions the jury to review the testimony of such an informer with particular scrutiny and to weigh his or her testimony with greater care than the testimony of an ordinary witness, is important in such circumstances because a defendant has a strong interest in ensuring that the jury appreciates the potential that exists for false testimony due to the informer's self-interest.[1]

In *State* v. *Patterson*, 276 Conn. 452, 886 A.2d 777 (2005), this court acknowledged that, as a general rule, "a . . . defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely." (Internal quotation marks omitted.) Id., 467. This court also has recognized only two exceptions to this rule, namely, the complaining witness exception and the accomplice exception. Id. In *Patterson*, however, the defendant, Anthony E. Patterson, claimed that we should also recognize an exception for jailhouse informants who provide testimony for the state in return for consideration from the state. "In essence, [Patterson] contend[ed] that the rationale underlying the requirement of a special credibility instruction in cases involving accomplice or complainant testimony, namely, the fact that the accomplice or complaining witness has a powerful motive to falsify his or her testimony, applies with equal force to an informant who has been promised a reduction in his sentence or other valuable consideration by the state in return for his testimony against the accused." Id., 469.

We agreed with Patterson that a special credibility instruction is warranted in such cases. We explained: "[A]n informant 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. Consequently, the testimony of such an informant, like that of an accomplice, is inevitably suspect. As the United States Supreme Court observed more than fifty years ago, [t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are dirty business may raise serious questions of credibility. *On Lee* v. *United States*, 343 U.S. 747, 757, 72 S. Ct. 967, 96 L. Ed. 1270 (1952). The United States Supreme Court therefore has allowed

defendants broad latitude to probe [informants'] credibility by cross-examination and ha[s] counseled submission of the credibility issue to the jury *with careful instructions*. . . . *Banks* v. *Dretke*, 540 U.S. 668, 702, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004), quoting *On Lee* v. *United States*, supra, 757; see *Hoffa* v. *United States*, 385 U.S. 293, 311–12, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966). Indeed, the court recently has characterized such instructions as one of the customary, truth-promoting precautions that generally accompany the testimony of informants. *Banks* v. *Dretke*, supra, 701. Because the testimony of an informant who expects to receive a benefit from the state in exchange for his or her cooperation is no less suspect than the testimony of an accomplice who expects leniency from the state . . . [Patterson] was entitled to an instruction substantially in accord with the one that he had sought." (Emphasis in original; internal quotation marks omitted.) *State* v. *Patterson*, supra, 276 Conn. 469–70.

Thereafter, in *State* v. *Arroyo*, 292 Conn. 558, 567, 973 A.2d 1254 (2009), cert. denied, U.S. , 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010), we extended our holding in *Patterson* to apply to the testimony of all jailhouse informants, regardless of whether they have been promised a benefit or merely have an expectation of a benefit. In reaching our conclusion, we observed that one study had "found that a particularly clever informant realizes that a successful performance on the witness stand is enhanced if it appears [that] he or she is not benefiting from the testimony. . . . These informants wait until after they've testified to request favors—a request that is generally answered. . . . And, because the reward is not offered before the testimony, the jury has no way to measure the informant's motivation to fabricate testimony, as the prosecutor . . . is under no obligation to disclose nonexisting exculpatory evidence. . . . R. Bloom, ['Jailhouse Informants,' 18 Crim. Just. 20, 24 (2003)]. Thus, the expectation of a [r]eward for testifying is a systemic reality; id.; even [when] the informant has not received an explicit promise of a reward." (Internal quotation marks omitted.) *State* v. *Arroyo*, supra, 568.

As we also noted in *Arroyo*, other commentators have made similar observations about the manner in which the state often deals with informers. See id., 568–69 and nn. 8–10. "[T]he snitch [or informer] system sometimes operates on implicit promises." Center on Wrongful Convictions, Northwestern University School of Law, "The Snitch System" (2004) p. 15, available at www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf (last visited August 3, 2011). Indeed, "[t]he [police] handler has no desire and sees little benefit in formalizing the informant relationship." C. Zimmerman, "Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform," 22

Hastings Const. L.Q. 81, 144 (1994). This is so because, "[o]nce the informant has finished testifying that he has not been promised anything . . . the prosecutor *must* go about getting the informant what he wants or 'risk' the informant 'recanting' his testimony." (Emphasis in original.) V. Wefald, "Watch Out! How Prosecutors and Informants Use Winking and Nodding to Try to Get Around *Brady* and *Giglio*," 58 Guild Prac. 234, 239–40 (2001). In other words, "[e]ven [in the absence of] a formal understanding, the reward inevitably comes . . . because failing to deliver in one case would chill prospective future snitches." Center on Wrongful Convictions, supra, p. 15.

In the present case, the defendant, Luis Diaz, claims that these same concerns militate in favor of a special credibility instruction whenever an informer expects or seeks a benefit from the state for his testimony, even if he or she has not received an express promise of such a benefit. In the defendant's view, the reasoning of our decisions in *Patterson* and *Arroyo* is equally applicable even when the witness is not a jailhouse informer. The majority agrees that "some of the same concerns" that gave rise to our decisions in those two cases are present "whenever a witness is in a position to receive a benefit from the government." Specifically, the majority acknowledges that "it is difficult for the defendant to ensure that the jury is fully aware of such a witness' potential motivations for testifying because both the witness and the government have an incentive not to enter into an explicit agreement before the witness testifies, even though there is frequently an implicit understanding that the witness will receive some consideration in exchange for testifying." The majority nevertheless rejects the defendant's invitation to extend the requirement of a special credibility instruction beyond jailhouse informers on the ground that the concerns that animated our decisions in *Patterson* and *Arroyo* are not "as weighty in cases [in which] the witness is not testifying about a jailhouse confession . . . but is testifying about events concerning the crime that the witness observed." In support of this assertion, the majority explains that testimony by a jailhouse informer is "inherently suspect because of the ease with which such testimony can be fabricated, the difficulty in subjecting witnesses who give such testimony to meaningful cross-examination and the great weight that juries tend to give to confession evidence." Finally, the majority also states that adopting a special credibility instruction for all witnesses who seek a benefit for their testimony because of their involvement in the criminal justice system "would be creating an exception that would swallow the rule that the trial court generally is not required to give such an instruction for the state's witnesses."

Although I agree with the majority that a special credibility instruction may be especially important in

cases involving jailhouse informers, I do not agree that it follows that such an instruction is unnecessary or unwarranted in other cases in which an informer seeks a benefit from the state. On the contrary, I believe that a special credibility instruction is appropriate in all such cases. In fact, in *Patterson*, this court addressed this very point in rejecting the state's argument that a special credibility instruction "is necessary in the case of an accomplice who has been promised leniency in return for his cooperation, but not in the case of an informant who has been promised a benefit for his cooperation, because the testimony of the former is likely to be more powerful and persuasive than that of the latter." *State* v. *Patterson*, supra, 276 Conn. 470 n.11. The court responded that the state's argument "misse[d] the point." Id. We explained: "The primary reason why a special credibility instruction is necessary with respect to both categories of witnesses is because both such witnesses have an unusually strong motive to implicate the accused falsely." Id. The same holds true for purposes of the present analysis.

Moreover, as the majority concedes, it is difficult for a defendant to demonstrate the existence of an "implicit understanding" between the state and an informer that the latter will, in fact, receive a benefit for his or her testimony. In fact, it is likely to be *impossible* for the defendant to demonstrate the existence of such an understanding between the state and its witness. It is not surprising, therefore, that the sometimes murky relationship between the state and a witness seeking a benefit from the state in return for his or her cooperation previously has caused this court to express its concern about the extent to which the true nature of that relationship has been disclosed to the defendant.[2] See, e.g., *State* v. *Ouellette*, 295 Conn. 173, 189–90, 989 A.2d 1048 (2010).

This court recently has noted that it is "cognizant of the exhortation of the United States Supreme Court that it is [on] 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)]." (Internal quotation marks omitted.) *State* v. *Ouellette*, supra, 295 Conn. 190. "[Indeed] [a]s one court has noted, [i]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence . . . . *United States* v. *Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987), cert. denied sub nom. *Nelson* v. *United States*, 484 U.S. 1026, 108 S. Ct. 749, 98 L. Ed. 2d 762 (1988); see also *Williamson* v. *United States*, 512 U.S. 594, 601, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994) ([d]ue to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence . . .); *Washington* v. *Texas*, 388 U.S. 14, 22–23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019

(1967) ([t]o think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large); *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 [for] the [s]tate, and the existence of such an understanding is important for purposes of impeachment)." (Internal quotation marks omitted.) *State* v. *Ouellette*, supra, 190–91. The present case highlights this point. Each of the state's witnesses came forward only after developments in that witness' relationship with the criminal justice system prompted him to seek to use his testimony as leverage to obtain a favorable resolution of the matter or matters pending against him.

Because informers seeking a benefit from the state have a strong motive to falsely inculpate the accused, and because the state has a strong incentive not to enter into an express or explicit agreement with such witnesses, preferring, instead, to keep any such understanding unstated, I agree with those courts that require a special credibility instruction whenever a government informer hopes or expects to receive a benefit from the prosecution. As the Second Circuit Court of Appeals has stated, "a defendant who makes [a request for a special credibility instruction] is entitled to a charge that identifies the circumstances that may make one or another of the government's witnesses particularly vulnerable to the prosecution's power and influence . . . and that specifies the ways (by catalog or example) that a person so situated might be particularly advantaged by promoting the prosecution's case." *United States* v. *Prawl*, 168 F.3d 622, 628 (2d Cir. 1999). In other words, the defendant is entitled to a charge that "invite[s] focus on individual predicaments of the witnesses" and contains "mention [of] the incentives that follow from certain transactions with the government."[3] Id., 628–29; see also *State* v. *Patterson*, supra, 276 Conn. 470 n.12 (citing cases requiring special credibility instruction); 1A K. O'Malley et al., Federal Jury Practice and Instructions (5th Ed. 2000) § 15.02, pp. 363–78 (same). I see no persuasive reason why such an instruction should not be given, and strong reason to do so. Accordingly, I agree with the defendant that we should exercise our supervisory authority over the administration of justice to require a special credibility instruction whenever an informer seeks a benefit from the state in return for his or her testimony.

[1] I agree with the majority that the defendant, Luis Diaz, is not entitled to plain error review of his claim. I also agree with the majority's affirmance of the trial court's judgment. I disagree with the majority only insofar as it rejects the defendant's contention that this court should exercise its supervisory authority to adopt the rule that he seeks for application in future cases.

[2] To the extent that the majority rejects the defendant's claim because to accept it would "swallow the rule" that a trial court generally is not required

to instruct on the credibility of the state's witnesses, I disagree with the majority's reasoning. The state does not use informers in all criminal trials, but, when it does, and when those informers hope or expect to receive a benefit from the state in return for their testimony, the state cannot complain that a special credibility instruction is inappropriate because such an instruction is important to ensure that jurors are aware that such informers have a strong motive to falsify or to tailor their testimony.

[3] The majority asserts that *Prawl* does not "squarely" support the defendant's contention that a special credibility instruction should be required in cases involving an informer who seeks a benefit from the state because, in *Prawl*, the court "decline[ed] to decide whether [the] failure to give [an] individual special credibility instruction for government witnesses was [improper] . . . ." (Citation omitted.) Footnote 12 of the majority opinion. I disagree. A careful reading of *Prawl* reveals that the court did conclude that the District Court's failure to give the requested charge was improper. See *United States* v. *Prawl*, supra, 168 F.3d 628. The court in *Prawl* did not need to decide whether the error was harmful, however, because the court already had concluded, for another reason, that the defendant in that case was entitled to a new trial. See id., 629 ("[w]e need not decide whether the [court's failure to give the requested charge] is error that would *alone* justify vacating the judgment" [emphasis added]).