CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

MASHAWN GREENE *v.* COMMISSIONER OF CORRECTION (SC 19961)

Palmer, McDonald, Robinson, D'Auria, Mullins and Vertefeuille, Js.*

Syllabus

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

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

of that agreement included no specific sentence. The habeas court, accordingly, rendered judgment denying the habeas petition, from which the petitioner appealed. *Held*:

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

(*Two justices concurring separately in one opinion*)

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

3. The habeas court did not abuse its discretion in denying the petitioner's request to issue a capias for K's arrest after K failed to comply with the subpoena compelling his attendance at the petitioner's habeas trial; the petitioner submitted no evidence that K's failure to comply with the

subpoena was not warranted, and, on the basis of the evidence before it, the habeas court reasonably could have concluded that the petitioner, who made no effort to contact K in the weeks preceding the habeas trial to ensure his attendance, was partially responsible for K's failure to appear.

Argued November 9, 2017—officially released August 28, 2018

Procedural History

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

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

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

Opinion

MULLINS, J. In this appeal, we must decide whether the habeas court erred in denying the petition for a writ of habeas corpus filed by the petitioner, Mashawn Greene.[1] The two primary issues are whether the habeas court properly determined that the petitioner's due process rights were not violated during the underlying criminal trial when the prosecutor failed: (1) to correct certain allegedly false testimony from one of the state's key witnesses, Markeyse Kelly,[2] and (2) to disclose certain evidence favorable to the petitioner. The third

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

[2] We note that Kelly's name is spelled in various ways in the record. We use this spelling for the sake of consistency with prior decisions. See *State* v. *Greene*, 274 Conn. 134, 139, 847 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006).

issue, which arose during the habeas trial, is whether the habeas court abused its discretion by denying the petitioner's request for a capias after Kelly failed to comply with a subpoena commanding his attendance at the habeas trial. We conclude that the habeas court properly determined that the state had not violated the petitioner's due process rights and that the habeas court did not abuse its discretion by denying the petitioner's request for a capias. Accordingly, we affirm the judgment of the habeas court.

The jury in the underlying criminal case reasonably could have found the following facts, as set forth in this court's decision in *State* v. *Greene*, 274 Conn. 134, 139–40, 847 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006). "On the evening of October 10, 2001, the [petitioner] purchased the following stolen firearms: a Smith & Wesson Daniels Cobray M-11 nine millimeter submachine gun (Cobray M-11); a Braco Arms .38 caliber pistol; and a Mossberg 500A shotgun. At the same time, the [petitioner] purchased stolen ammunition for the Cobray M-11 consisting of eight full thirty-five round magazines loaded with nine millimeter Luger Subsonic bullets. A Cobray M-11 is a semiautomatic or automatic assault weapon capable of emptying a thirty-five round magazine in [less than] two seconds.

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

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

The petitioner was arrested and charged with various offenses in connection with the shooting. The petitioner elected a jury trial, at which his accomplices, Little, Jones, and Kelly all testified for the state against him. In particular, with respect to his own involvement in the shooting, Kelly testified that he had pleaded guilty to conspiracy to commit assault in the first degree and carrying a pistol without a permit.[3] Kelly further testi-

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

fied that, with respect to his guilty plea to those charges, it was his understanding that he was facing a maximum sentence of twenty-five years in prison, but that he did not know what his ultimate sentence would be. When the prosecutor, Christopher Alexy, asked Kelly if he had "any understanding as to what could happen if you came in here and testified," Kelly replied, "[n]ope."

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

On cross-examination, the petitioner's trial counsel, Paul Carty, further questioned Kelly about his "deal" with the state. Specifically, Carty asked Kelly if he would have spent the rest of his life behind bars had he not worked out a deal to plead to the charges of conspiracy to commit assault in the first degree and carrying a pistol without a permit. Kelly responded, "I don't know nothing about no deals, none. I don't know nothing about no deals." Immediately thereafter, however, Kelly admitted that his lawyer did, in fact, work out a plea agreement with the state. Kelly acknowledged that the terms of that agreement required that he plead guilty to conspiracy to commit assault in the first degree and carrying a pistol without a permit. Kelly further admitted that, even though his purpose in going to Edgewood Avenue on the night of this incident was to com-

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

mit homicide, his plea agreement did not involve, nor did he plead guilty to, any homicide charges. Finally, Kelly explained that, pursuant to his plea agreement, the maximum sentence he could receive was twenty-five years of imprisonment.

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

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

The jury ultimately returned a verdict finding the petitioner guilty of manslaughter in the first degree with a firearm as an accessory in violation of General Statutes §§ 53a-8 (a) and 53a-55a, conspiracy to commit manslaughter in the first degree with a firearm in violation of General Statutes §§ 53a-48 (a) and 53a-55a, five counts of assault in the first degree as an accessory in violation of General Statutes §§ 53a-8 (a) and 53a-59 (a) (5), conspiracy to commit assault in the first degree

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

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

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

vacated the petitioner's convictions on those three counts.

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

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

[5] The transcript of Kelly's plea hearing also was introduced as an exhibit in the underlying habeas proceedings. At that hearing, Alexy, who was also the prosecutor in that proceeding, stated that "[t]here is no agreed sentence . . . . I believe that [Kelly] understands that his continued cooperation in the cases of the codefendants will be made known to the court at the time of the sentencing and that the ultimate sentence will be up to the court." During its canvass of Kelly, the trial court, *Fasano*, *J.*, stated that "[t]he sentencing court, at the time of sentencing, will consider any cooperation and truthful testimony in the cases of the codefendants as an element of consideration in sentencing you."

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

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

Alexy also testified about his own recollection of Kelly's testimony at the criminal trial. Specifically, when counsel for the petitioner asked Alexy whether Kelly had "denied that he was receiving any consideration in exchange for his testimony," Alexy responded, "[t]hat's

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

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

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

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

delayed in order to ensure that the cooperating codefendant actually testifies.[8]

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

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

I

We first address the petitioner's claim that the habeas court incorrectly concluded that his due process rights were not violated at his criminal trial when Alexy failed to correct Kelly's testimony. In particular, the petitioner asserts that Kelly and the state had reached an agreement that Kelly's testimony at the petitioner's criminal trial would benefit him—namely, that Kelly would receive leniency at his own sentencing in exchange for testifying against the petitioner. Thus, the petitioner claims, Kelly testified falsely when he stated that he had no "deal" with the state and was expecting nothing in return for his testimony at the petitioner's criminal trial. As a result, the petitioner argues that Alexy had an obligation to correct Kelly's false testimony.[9]

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

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

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

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

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

"The rules governing our evaluation of a prosecutor's failure to correct false or misleading testimony are derived from those first set forth by the United States Supreme Court in *Brady* v. *Maryland*, [supra, 373 U.S. 86–87], and we begin our consideration of the [petitioner's] claim with a brief review of those principles. In *Brady*, the court held that 'the 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

to defendant before trial, prosecutor still had duty to correct witnesses' false testimony denying existence of agreements), rev'd in part on other grounds, 314 Conn. 354, 102 A.3d 1 (2014). We note that this court expressly declined to resolve this issue in *Jordan*. See *State* v. *Jordan*, 314 Conn. 354, 369 n.7, 102 A.3d 1 (2014).

faith or bad faith of the [prosecutor].' Id., 87; accord *State* v. *Cohane*, 193 Conn. 474, 495, 479 A.2d 763, cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984). The United States Supreme Court also has recognized that '[t]he jury's estimate of the truthfulness and reliability of a . . . witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.' *Napue* v. *Illinois*, [supra, 360 U.S. 269]. Accordingly, the *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence; e.g., *United States* v. *Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Giglio* v. *United States*, 405 U.S. 150, 154–55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); which, broadly defined, is evidence 'having the potential to alter the jury's assessment of the credibility of a significant prosecution witness.' " (Footnote omitted.) *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 369–70, 71 A.3d 512 (2013).

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

173, 186, 989 A.2d 1048 (2010); see also *State* v. *Satchwell*, 244 Conn. 547, 560–61, 710 A.2d 1348 (1998).

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

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

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

[11] The following colloquy took place between Alexy and Kelly:

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

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

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

"A. Twenty-five years.

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

"A. Nope."

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

It is clear to us, therefore, that Kelly's claim that he had no understanding of what would happen if he cooperated with the state related to whether he had an understanding of the specific sentence that he expected to receive and was not substantially misleading. This testimony neither denies the existence of Kelly's plea agreement with the state nor mischaracterizes its terms.

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

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

fact that the line of questioning at that juncture related only to Kelly's understanding of the sentence he expected to receive.

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

To the extent that the petitioner's claim involves statements Kelly made during his cross-examination, those statements also cannot be evaluated in isolation, unconnected to the context in which they were made. Specifically, Carty asked Kelly the following question: "Had you not worked that deal out [to plead to nonhomicide charges, you were] looking at basically spending the rest of your life behind bars." In response to that inquiry, Kelly testified as follows: "I don't know nothing about no deals, none. I don't know nothing about no

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

deals." Carty then sought to clarify this testimony, and asked Kelly directly: "You worked out a plea, right?" Kelly responded: "My lawyer, I guess, I don't know. I know he told me what I was copping out to, and I took it." This testimony was not substantially misleading.

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

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

Just before Kelly made these statements, Carty had asked him if he knew that he could receive a sentence requiring as little as one year of imprisonment. Kelly responded that he was not expecting a sentence of only one year but, rather, was thinking about having to serve the full twenty-five years, and potentially more, given

[14] The following colloquy took place between Carty and Kelly:
"Q. So, you are not even pleading to a homicide, right?
"A. I don't know.
"Q. Nothing to do with homicide, right?
"A. No."

that he had other charges pending. In response this testimony, Carty asked the following: "That's not what are you expecting out of this?" Kelly answered: "I don't know what I'm getting." Carty then stated "that's not what I'm asking you," and repeated his question: "What are you expecting?" Kelly responded: "I ain't expecting nothing, but I know that I could do the time."[15]

It is evident that Kelly was responding to questions regarding the length of the sentence he expected to

[15] The following colloquy took place between Carty and Kelly:

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

"A. Twenty-five years.

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

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

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

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

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

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

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

"A. Who me?

"Q. Yeah.

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

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

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

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

"A. I guess.

"Q. Right?

"A. I guess.

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

"A. Nope."

receive, not whether he expected any benefit whatsoever. His response that he could "do the time" further shows that Kelly understood the question to be directed at the sentence he expected to receive. Because there was no agreement with respect to his specific sentence, Kelly's testimony was not substantially misleading.

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

We further note that the plea agreement had been disclosed to Carty, and he never objected to Kelly's testimony on the ground that it was misleading or inconsistent with the terms of the agreement. Although Carty's failure to object is not dispositive, we conclude that, because he had the full agreement, it is a factor that we may consider when determining whether Kelly's testimony was false or substantially misleading. Cf. *State* v. *Fauci*, 282 Conn. 23, 51, 917 A.2d 978 (2007) (defendant's "failure to object [to prosecutor's improper remarks] demonstrates that defense counsel presumably [did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial" [internal quotation marks omitted])." To be sure, given that Carty had the full agreement, his failure to object bolsters our conclusion that Kelly's testimony was not substantially misleading.

In summary, evaluating each of Kelly's various statements regarding his agreement, understanding or expectation in the context in which he made them, we conclude that his testimony was not substantially

misleading. His testimony related to his expectations regarding the specific sentence he would receive, and not to the broader question of whether he was receiving *any* benefit in exchange for his testimony. Indeed, Alexy testified at the habeas trial that his understanding of Kelly's testimony was that he did not expect to receive any particular sentence, and the habeas court found Alexy to be a credible witness. Furthermore, Kelly's testimony made clear that he had received some benefit, namely, that he had pleaded to nonhomicide charges, which carry a significantly reduced sentence.

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

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

agreed to testify only on the condition that the government would bring his cooperation to the attention of the sentencing judge and to the United States Parole Commission. Id. The government agreed to do so. Id.

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

We conclude that *Bigeleisen* is distinguishable from the present case. In *Bigeleisen*, the cooperating witness categorically denied that he was expecting to receive *any* benefit in exchange for his testimony. Id., 206. The court concluded that, in light of Moore's complete denial of any benefit, the jury could have concluded that no agreement existed at all. Id., 208. Thus, the jury could not properly evaluate his credibility.[16] The present

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

case, however, is not one in which there has been a complete denial of any agreement with the state. To the contrary, Kelly admitted that he had pleaded guilty to certain nonhomicide charges, that the maximum sentence was twenty-five years of imprisonment, that he had not yet been sentenced in connection with those charges, and that he did not know what his sentence would be.

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

The concurring justices disagree with this analysis and would assume that Kelly's testimony was misleading. They stop short, however, of calling it false or even substantially misleading. The concurring justices also conclude that, when testimony regarding a plea agreement is misleading—but apparently not false or substantially misleading—the prosecutor has no obligation to correct the testimony if the plea agreement was disclosed to the petitioner before the criminal trial. We agree with this conclusion, but not because compliance with *Brady* excuses the prosecutor's failure to correct "misleading" testimony that is neither false nor *substantially* misleading. Indeed, the prosecutor has no duty to correct because *Giglio* and *Napue* do not apply to merely "misleading" testimony in the first instance.

Rather, those cases require the prosecutor to correct *only* testimony that is substantially misleading or false. Of course, if there was no prior disclosure of the plea agreement pursuant to *Brady*, that would be a due process violation in and of itself, regardless of the degree to which the testimony had the potential to mislead the jury.

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

sideration); *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 363 (witness testified that he had not been promised any consideration in exchange for his testimony and that he faced maximum sentence of thirty-eight years when, in fact, judge who had accepted his guilty pleas had placed four year limitation on sentence, with possibility of more lenient sentence based on cooperation).[17]

To the extent that the concurring justices believe that Kelly's testimony *was* substantially misleading, we disagree with that conclusion for the reasons that we have already stated. The small, decontextualized snippets of Kelly's testimony, upon which the petitioner and the concurring justices seize, namely, his denial that he had "any understanding as to what could happen" if he testified, was not substantially misleading or untrue. It certainly was not received that way by Alexy or Carty. Accordingly, we have no reason to believe that the jury would have interpreted the testimony differently and concluded that Kelly, who had admitted firing a gun

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

into a crowd of people, one of whom was killed, and who had pleaded guilty to nonhomicide offenses for which he had not yet been sentenced, expected to receive no benefit in exchange for his testimony.

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

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

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

("we urge the state to ensure that sentencing recommendations for cooperating witnesses conform to both the letter and the spirit of any plea agreements disclosed at trial").

II

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

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

damaging cross-examination, however, the prosecutor should endeavor to ensure that the evidence is accurate and complete.

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

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

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

It is well established that a prosecutor's intention to recommend a specific sentence for a cooperating witness is not subject to *Brady* if the intention has not

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

The petitioner in the present case claims that Alexy violated *Brady* because he knew, and failed to disclose, that he "would ask the sentencing court in Kelly's pending related criminal matter for a specific sentence considerably lower than Kelly's exposure under the open plea . . . ." The petitioner, however, has cited no evidence whatsoever that would support a finding that Alexy knew before Kelly testified what specific sentence he would recommend. All he has done is point to the fact that Alexy recommended a lower sentence at Kelly's sentencing hearing and ask this court to infer that Alexy knew that he would make such a recommendation and failed to disclose this intention. The fact that Alexy recommended a lower sentence, standing alone, does not establish the existence of a preexisting promise of leniency in exchange for testimony. See *Shabazz* v. *Artuz*, supra, 336 F.3d 165 ("[w]e hold only that the fact that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony") To be sure, if Alexy had no intention to recommend a specific sen-

tence before the petitioner's criminal trial—and there has been no evidence to establish that he had such an intention—he obviously had nothing to disclose to the petitioner.

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

III

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

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

based on his interview of Kelly. Kelly signed the statement under oath. Eichler also served Kelly with a subpoena directing him to appear at the habeas trial.

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

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

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

The standards governing the issuance of a capias are well established. "If one is not warranted in refusing to honor a subpoena and it is clear to the court that

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

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

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

not say that the habeas court abused its discretion in declining to issue the capias. Accordingly, we reject this claim.

The judgment is affirmed.

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

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.

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

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

[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").

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

[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.

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.

[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."

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

[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.

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.

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[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.

STANDARD PETROLEUM COMPANY *v.* FAUGNO ACQUISITION, LLC, ET AL.
(SC 19874)

KENNYNICK, LLC, ET AL. *v.* STANDARD PETROLEUM COMPANY
(SC 19875)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

The defendant petroleum company appealed from the orders of the trial court certifying for class action status an action brought and a counterclaim asserted by the plaintiff service station operators and former franchisees, purportedly on behalf of themselves and others who had been supplied gasoline products by the defendant. The plaintiffs alleged in their complaint and counterclaim that the defendant violated, inter alia, the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.) when it failed to apply, during a certain time period, a credit to the federal gasoline tax that it charged class members and improperly charged class members the state gross receipts tax on purchases. The trial court granted the plaintiffs' motions for class certification as to all counts in the complaint and the counterclaim, and certified a class consisting of all entities or persons who purchased gasoline from the defendant during the relevant time period, did not receive the federal tax credit if they paid the federal gasoline tax, and improperly were charged the state gross receipts tax on gasoline purchases. The court also approved the plaintiffs as class representatives. The court noted that the plaintiffs had identified eighty-one of the defendant's customers during the relevant time period as potential members of the proposed class, and, of those customers, approximately one half had supply contracts with the defendant and the others purchased gasoline on an as invoiced basis. All of the potential class members had received form invoices from the defendant, which appeared to be identical. The trial court concluded that each requirement for class certification set forth in the applicable rule of practice (§ 9-7), numerosity, commonality, typicality, and adequacy of representation, had been satisfied, and that the policy considerations of predominance and superiority under the applicable rule of practice (§ 9-8 [3]) weighed in favor of class certification. On the defendant's appeal from the trial court's orders granting class certification, *held* that the defendant failed to establish that the trial court had abused its discretion in ordering class certification:

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

1. The trial court did not abuse its discretion in concluding that the four class certification requirements of Practice Book § 9-7 had been satisfied: the numerosity requirement was satisfied because, although certain potential class members were customers who had arbitration or jury waiver clauses in their contracts, it was premature for the court to decide whether those contractual provisions were enforceable until after the class was closed, and, even if those members were excluded, there still would be sufficient remaining members to which these provisions would not apply; the commonality requirement was satisfied because there were numerous factual and legal questions common to the class; the typicality requirement was satisfied because, although one half of the potential class was subject to oral agreements and not written contracts and thus could pursue only an unjust enrichment claim, proof of the plaintiffs' breach of contract claims and the other potential class members' unjust enrichment claims shared central disputed issues of law or fact; the requirement of adequacy of representation was satisfied because the plaintiffs, former customers and former franchisees of the defendant, were representative parties that could fairly and adequately protect the interests of the class, and, even though other potential class members were current customers or franchisees, that difference in status was not so substantial as to overbalance the common interests of the class members as a whole, under the facts of the case and at the point in time at which the trial court certified the class.
2. The trial court did not abuse its discretion in concluding that common issues of law or fact predominated with respect to proof of the elements of each of the plaintiffs' claims and that a class action was a superior mechanism to resolve the issues, as required by Practice Book § 9-8 (3): much of the proof necessary to establish class membership based on some form of agreement between the defendant and a potential class member and the proof necessary to establish certain elements of the various counts alleged in the plaintiffs' complaint and counterclaim were available through invoices and other contractual information that could be gleaned from the defendant's own records, which constituted class-wide and undisputed evidence, and any individualized proof necessary to establish certain elements of various counts and to supplement the common proof would not predominate over that common proof; moreover, the defendant's claim that it has or will assert special defenses that require individualized proof and that would predominate over the common issues was unavailing, the defendant having failed to provide the plaintiffs with a sufficient basis to be able to address how each alleged defense might bear on the class certification requirements and to provide facts to support its special defenses or even to indicate to which counts the special defenses were directed; furthermore, because this court determined that the trial court did not abuse its discretion in concluding that the other class certification requirements were satisfied, and because the predominance consideration is intertwined with the

superiority consideration, the defendant could not prevail on its claim that the totality of the trial court's purportedly improper rulings regarding the other class certification requirements indicated that a class action was not superior to other methods of adjudication.

Argued December 14, 2017—officially released August 28, 2018

Procedural History

Action, in the first case, to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield and transferred to the judicial district of Stamford-Norwalk, where the defendants filed a counterclaim, and action, in the second case, to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the cases were consolidated; thereafter, the court, *Heller*, *J.*, granted the motions for a determination of denial of class certification filed by the plaintiff in the first action and the defendant in the second action and denied the motions for class certification filed by the named defendant in the first action and the plaintiffs in the second action; subsequently, the court, *Heller*, *J.*, granted the motions for class certification filed by the named defendant in the first action and the plaintiffs in the second action, and the plaintiff in the first action and the defendant in the second action appealed; subsequently, the case was transferred to the judicial district of Hartford, Complex Litigation Docket. *Affirmed.*

Mary E. R. Bartholic, with whom was *Thomas W. Witherington*, for the appellant (plaintiff in Docket No. SC 19874 and defendant in Docket No. SC 19875).

John J. Morgan, for the appellees (named defendant in Docket No. SC 19874 and plaintiffs in Docket No. SC 19875).

McDONALD, J. Standard Petroleum Company, the counterclaim defendant and the defendant, respectively, in the two cases that comprise this consolidated action (defendant), appeals from the trial court's orders certifying class actions against it. The class actions are premised on allegations that the defendant overcharged service station operators and franchisees for gasoline products.[1] Generally, the defendant claims that the trial court abused its discretion in certifying the class[2] because it failed to apply the "rigorous analysis" that is required before such a certification may be granted. In particular, the defendant claims that the trial court's error is most clearly evidenced by its failure to address various elements of the causes of action and the special defenses when it determined that common issues predominated. We conclude that the defendant has failed to establish that the trial court abused its discretion in ordering class certification.

The record reveals the following facts, assumed to be true by the trial court for purposes of the certification issues or otherwise undisputed, and procedural history. Kennynick, LLC, and Faugno Acquisition, LLC

[1] The defendant appealed from the class certification orders to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Although an order granting class certification is usually not immediately appealable, because certain counts alleged a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., General Statutes § 42-110h authorizes an immediate appeal on the class certification orders as to those counts. Because the remaining counts are "inextricably intertwined" with the CUTPA counts, the trial court's orders granting class certification as to those counts also may be reviewed. See *Collins* v. *Anthem Health Plans, Inc.*, 266 Conn. 12, 29, 836 A.2d 1124 (2003); see also *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 287 Conn. 208, 210 n.3, 947 A.2d 320 (2008).

[2] The trial court certified identical classes in each of the actions by separate decisions. For convenience, we refer to both classes as the class.

(Faugno)[3] (collectively, plaintiffs),[4] are service station operators and were franchised dealers for gasoline products supplied by the defendant, which is a wholesale supplier. In 2009, the plaintiffs commenced an action against the defendant, purportedly on behalf of themselves and other persons who had been supplied with gasoline products by the defendant. The complaint alleged that the proposed class members had been overcharged in two respects. First, it alleged that the defendant had charged class members the federal gasoline tax at a rate of 18.4 cents per gallon without applying a federal tax credit that would have had the effect of reducing that rate and that had been effective between January 1, 2005 and December 31, 2011.[5] Second, it alleged that, at all relevant times since September 27, 2004, the defendant had charged class members the Connecticut gross receipts tax on the basis of the price of gasoline as delivered, and thus had improperly charged for state tax on the defendant's profit (including the federal tax overcharge) and delivery. In reliance on these allegations, the six count complaint set forth claims of (1) breach of contract, (2) unjust enrichment,

[3] Faugno is now known as Woodway Texaco, LLC.

[4] Kennynick, LLC, and Faugno are the plaintiffs in the first action filed, the appeal of which is Docket No. SC 19875. Kennynick, LLC, and Faugno also are the counterclaim plaintiffs in the second action filed, the appeal of which is Docket No. SC 19874. See footnote 6 of this opinion. Faugno is the named defendant in the second action. Because the class certification issues arise from their designations as plaintiffs, we refer to Kennynick, LLC, and Faugno as the plaintiffs in this opinion.

[5] The tax credit at issue was the volumetric ethanol excise tax credit (federal tax credit). The federal tax credit reduced the federal tax on gasoline that includes ten percent alcohol, which is the gasoline/alcohol mixture used in Connecticut. The federal tax credit reduced the tax rate from 18.4 cents per gallon to 13.3 cents per gallon from January 1, 2005 through December 31, 2008, and to 13.9 cents per gallon from January 1, 2009 through December 31, 2011, when the federal tax credit expired. The plaintiffs alleged that the defendant improperly charged its customers at the original tax rate of 18.4 cents per gallon throughout the time the federal tax credit was in effect, denying them its benefit.

(3) violation of the Connecticut Petroleum Franchise Act, General Statutes § 42-133j et seq., (4) violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., (5) violation of the good faith requirement under the Uniform Commercial Code, General Statutes § 42a-2-305 (2), and (6) misrepresentation.[6] The plaintiffs sought relief including money damages for past losses, injunctive relief prohibiting the defendant from conduct that would cause future losses, and punitive damages.

Shortly thereafter, the defendant commenced a separate action against one of the plaintiffs, Faugno, alleging breach of contract.[7] In response, Faugno filed a counterclaim, also styled as a proposed class action, which in all material respects mirrored the plaintiffs' complaint in the earlier action. Pursuant to the plaintiffs' motions, and in the absence of objection from the defendant, the trial court consolidated the two actions.[8]

In 2015, after the plaintiffs had obtained compliance with discovery requests, they moved for orders certifying the action as a class action pursuant to Practice Book § 9-9.[9] The defendant filed an opposition, which

[6] The plaintiffs filed amended complaints and counterclaims, which eliminated certain counts and requests for relief. For convenience, we limit our discussion to the operative amended pleadings and simply refer to them as the complaint and counterclaim. We note that, although both operative pleadings alleged violations of the Uniform Commercial Code under General Statutes §§ 42a-1-203 and 42a-2-103, the trial court expressly declined to address those sections because the plaintiffs did not refer to them in their motions for class certification. We presume that the alleged violations based on these sections have been abandoned.

[7] The defendant also named as plaintiffs Gene A. Faugno III and Michael A. Faugno, Sr. Those individuals are not parties to the class action.

[8] Because the two actions and the relevant filings are, for all intents and purposes, identical, for convenience, we refer to the consolidated actions as the action.

[9] This was a renewed motion. A few months earlier, the trial court had issued orders granting the defendant's motions for a determination of denial of class certification and denying the plaintiffs' motions for class certification on the ground that the plaintiffs had failed to produce sufficient evidence to demonstrate numerosity. The trial court issued the orders without prejudice,

included a supporting affidavit by its vice president. The trial court held a hearing on the motion and reserved decision. Thereafter, the trial court issued orders certifying a class action on all counts. The orders defined the class as "all entities or persons who: (i) purchased gasoline from [the defendant] during the period September 27, 2004 to date; (ii) were charged federal gasoline tax at a rate of 18.4 cents per gallon on such gasoline purchases; (iii) did not receive the federal . . . tax credit, while it was in effect, on such gasoline purchases; and (iv) were charged state gross receipts tax on such gasoline purchases based on the price of gasoline, as delivered." The orders also approved the plaintiffs as class representatives and their counsel as class counsel. The orders indicated that further articulation would follow.

The trial court thereafter issued a memorandum of decision setting forth that articulation, which we explore in fuller detail later in this opinion. In that decision, the trial court noted that the plaintiffs had identified at least eighty-one of the defendant's gasoline customers during the relevant time period as potential members of the proposed class: forty-four had supply contracts with the defendant and thirty-seven had purchased gasoline on an as invoiced basis. With regard to those with written contracts, there were four subclasses with varied arrangements, but all contracts contained an identical provision stating that the "prices include taxes . . . which [the defendant] may be required to collect or pay pursuant to any present or future laws . . . ." The court pointed to the fact that all of the potential class members had received invoices from the defendant. The court noted that the plaintiffs had reviewed "a 'substantial sampling' of the more than

citing the defendant's failure to comply with the plaintiffs' discovery requests. The trial court concurrently issued orders directing the defendant to comply with those requests.

14,000 invoices produced by [the defendant] in discovery" and had represented that "the invoices appear to be almost identical to the invoices that the [plaintiffs] received for payment." The court addressed separately each requirement for class certification under Practice Book § 9-7, concluding that each had been satisfied. Largely in reliance on the facts and legal issues cited in that analysis, the court also concluded that each of the policy considerations under Practice Book § 9-8 weighed in favor of allowing the action to proceed as a class action.

The defendant appealed from the orders certifying the class. See footnote 1 of this opinion. After the court issued its memorandum of decision, the defendant did not seek any further articulation.

On appeal, the defendant contends that the trial court abused its discretion in granting class certification because it failed to apply the requisite "rigorous analysis" to each class certification requirement. Instead, the defendant contends, the trial court merely required " 'some showing' " to support each requirement, engaged in a "cursory review of the claims and evidence," and disregarded certain evidence, elements, and defenses. We conclude that, in light of the claims and arguments advanced to the trial court, its grant of class certification was not an abuse of discretion.

I

Given the nature of the defendant's claims, a discussion of the applicable standards that guide our review takes on heightened significance. Therefore, clarifying certain aspects of these standards must be our starting point.

"[T]he rules of practice set forth a two step process for trial courts to follow in determining whether an action or claim qualifies for class action status. First,

a court must ascertain whether the four prerequisites to a class action, as specified in Practice Book § 9-7, are satisfied. These prerequisites are: (1) numerosity—that the class is too numerous to make joinder of all members feasible; (2) commonality—that the members have similar claims of law and fact; (3) typicality—that the [representative] plaintiffs' claims are typical of the claims of the class; and (4) adequacy of representation—that the interests of the class are protected adequately. . . .

"Second, if the foregoing criteria are satisfied, the court then must evaluate whether the certification requirements of Practice Book § 9-8 [3] are satisfied. These requirements are: (1) predominance—that questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) superiority—that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." (Internal quotation marks omitted.) *Neighborhood Builders, Inc.* v. *Madison*, 294 Conn. 651, 658, 986 A.2d 278 (2010).

It is the class action proponent's burden to prove that all of the requirements have been met. Id., 656–57. To determine whether that burden has been met, we have followed the lead of the federal courts; see *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982); directing our trial courts to undertake a " 'rigorous analysis.' " *Neighborhood Builders, Inc.* v. *Madison*, supra, 294 Conn. 656; *Marr* v. *WMX Technologies, Inc.*, 244 Conn. 676, 680, 711 A.2d 700 (1998); see also *Collins* v. *Anthem Health Plans, Inc.*, 275 Conn. 309, 322–23, 880 A.2d 106 (2005) ("[b]ecause our class certification requirements are similar to those embodied in rule 23 of the Federal Rules of Civil Procedure, and our jurisprudence governing class actions is relatively undeveloped, we look to federal case law for guidance in construing the provi-

sions of Practice Book §§ 9-7 and 9-8" [footnote omitted]).

We have not previously articulated with any specificity what a "rigorous analysis" by the trial court necessarily entails. Although some of the defendant's specific concerns are addressed in the sections that follow, there are certain overarching parameters that can be gleaned from the case law and other authoritative sources. "[A] 'rigorous analysis' ordinarily involves looking beyond the allegations of the plaintiff's complaint. The rigorous-analysis requirement means that a class is not maintainable merely because the complaint parrots the legal requirements of the class-action rule. . . .

"In applying the criteria for certification of a class action, the [trial] court must take the substantive allegations in the complaint as true, and consider the remaining pleadings, discovery, including interrogatory answers, relevant documents, and depositions, and any other pertinent evidence in a light favorable to the plaintiff. However, a trial court is not required to accept as true bare assertions in the complaint that class-certification prerequisites were met. . . . Class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." (Footnotes omitted.) 59 Am. Jur. 2d 542–43, Parties § 89 (2012); accord *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33–34, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013); *General Telephone Co. of the Southwest* v. *Falcon*, supra, 457 U.S. 160–61; *Collins* v. *Anthem Health Plans, Inc.*, supra, 275 Conn. 321.

Consequently, a rigorous analysis "frequently entail[s] overlap with the merits of the plaintiff's underlying claim." (Internal quotation marks omitted.) *Comcast Corp.* v. *Behrend*, supra, 569 U.S. 33–34; accord *In re Initial Public Offerings Securities Litigation*, 471

F.3d 24, 41 (2d Cir. 2006). "In determining the propriety of a class action, [however] the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [the class action rules] are met." (Internal quotation marks omitted.) *Collins* v. *Anthem Health Plans, Inc.*, supra, 275 Conn. 321.

For purposes of the present case, it is important to emphasize that although a rigorous analysis of these requirements may entail consideration of various factors, such an analysis "does not require the court to assign weight to any of the criteria listed, or to make written findings as to each factor, but merely requires the court to weigh and consider the factors and come to a reasoned conclusion as to whether a class action should be permitted for a fair adjudication of the controversy." 59 Am. Jur. 2d, supra, § 89, p. 543. "The trial court, [well positioned] to decide which facts and legal arguments are most important to each [rule's] requirement, possesses broad discretion to control proceedings and frame issues for consideration under [the rule]. . . . But proper discretion does not soften the rule: a class may not be certified without a finding that each . . . requirement is met." (Citation omitted.) *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 310 (3d Cir. 2008).

"Although no party has a right to proceed via the class mechanism . . . doubts regarding the propriety of class certification should be resolved in favor of certification." (Internal quotation marks omitted.) *Collins* v. *Anthem Health Plans, Inc.*, supra, 275 Conn. 321. Even if certification is granted, "the trial court is authorized to monitor developments bearing on the propriety of its class certification orders, and to amend those orders in light of subsequent developments. . . . In the event that evidence later demonstrates that [an] alleged conflict exists, the trial court may then revisit

the issue." (Citations omitted.) *Collins* v. *Anthem Health Plans, Inc.*, 266 Conn. 12, 40, 836 A.2d 1124 (2003).

Having clarified the standards that govern the trial court's class certification decision, we note that the standards that govern our review of that decision are well settled. "We apply an abuse of discretion standard both [to] the lower court's ultimate determination on certification of a class as well as to its rulings that the individual [class certification] requirements have been met. . . . While our review of the legal standards applied by the [trial] court and the court's other legal conclusions is de novo . . . the [trial] court's application of those standards to the facts of the case is again reviewed only for abuse of discretion . . . . This standard means that the [trial] court is empowered to make a decision—of *its* choosing—that falls within a range of permissible decisions, and we will only find abuse when the [trial] court's decision rests on an error of law . . . or a clearly erroneous factual finding, or . . . its decision . . . cannot be located within the range of permissible decisions."[10] (Citations omitted; emphasis in original; internal quotation marks omitted.) *Myers* v. *Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010), cert. denied, 565 U.S. 930, 132 S. Ct. 368, 181 L. Ed. 2d 234 (2011). Moreover, we afford "even greater deference when reviewing a [trial court's] decision to certify a class than when reviewing a decision declining to do

[10] "To illustrate . . . using the example of numerosity, review of the factual finding as to the size of the proposed class would be for clear error, review of the judge's articulation of the legal standard governing numerosity would be de novo, and review of the ultimate ruling that applied the correct legal standard to the facts as found would be for abuse of discretion. Thus a ruling on numerosity, based on a finding of fact that is not clearly erroneous and with application of a legal standard that is correct, could be affirmed as within allowable discretion, in some circumstances, whether the ruling determined that this [class action rule] requirement was met or not met." *In re Initial Public Offerings Securities Litigation*, supra, 471 F.3d 41.

so." (Internal quotation marks omitted.) *Collins* v. *Anthem Health Plans, Inc.*, supra, 266 Conn. 23–24.

With this legal backdrop in mind, we turn to the defendant's claims.

II

Although a secondary argument by the defendant, we first dispose of the defendant's broad contention that the trial court's grant of class certification is improper under all of the prerequisites found in Practice Book § 9-7: numerosity; commonality; typicality; and adequacy of representation.[11] We are largely in agreement with the plaintiffs that the defendant's analysis of these requirements is an "unfocused, scattershot attack" on the trial court's decision, effectively seeking de novo review. As this court previously has observed, "such wholesale attacks rarely produce results, tend to cloud the real issues, and in themselves cast doubts on the appellants' claims." *Scribner* v. *O'Brien, Inc.*, 169 Conn. 389, 391, 363 A.2d 160 (1975). Moreover, adequate briefing requires more than conclusory assertions untethered to any specific claim. See *State* v. *Buhl*, 321 Conn. 688, 726, 138 A.3d 868 (2016) (concluding that Appellate Court properly determined that claim was inadequately briefed because "the briefing of the defendant's claims was not only short, but confusing, repetitive, and disorganized"). Nonetheless, insofar as we can glean specific arguments directed at specific requirements, we address them and conclude that none merits reversal of the trial court's decision.

A

As noted previously, the requirement in Practice Book § 9-7 (1) is met where "the class is so numerous

[11] Three pages of the defendant's appellate brief are dedicated to its analysis of these four requirements, undifferentiated by reference to the particular requirement(s) to which the assertion is directed.

that joinder of all members is impracticable . . . .'' The defendant appears to contend that the trial court should have excluded from the certified class those customers who have arbitration or jury waiver clauses in their contracts. It contends that these customers either will be barred from participating in the action by these clauses or will be subjected to a stay of proceedings while the defendant's motions to compel arbitration are litigated.

The defendant's contention fails for two reasons. First, we agree with the trial court that it was ''premature for the court to decide on a motion for class certification whether such contractual provisions are enforceable.'' See *In re Titanium Dioxide Antitrust Litigation*, 962 F. Supp. 2d 840, 846, 863 (D. Md. 2013) (amending class definition to exclude class members with contracts containing mandatory arbitration provisions, forum selection clauses, and jury waiver provisions, after earlier decision had determined that issue was not ripe until opt out period lapsed, when it would be clear which putative class members have contracts containing such provisions, and until after it was determined whether those provisions would be enforceable against those members);[12] see also *Sokol Holdings, Inc.* v. *BMB Munai, Inc.*, 542 F.3d 354, 361 (2d Cir. 2008) (arbitration agreements cannot be enforced without consent to arbitrate). When the class is closed and the defendant is prepared to litigate that issue, it may ask the trial court to revisit the class certification issue. See *Collins* v. *Anthem Health Plans, Inc.*, supra, 266 Conn. 40 (''the court remains free to modify [class status] in the light of subsequent developments in the litigation'' [internal quotation marks omitted]). Indeed,

[12] See *In re Titanium Dioxide Antitrust Litigation*, Docket No. 10-0318 (RDB), 2012 WL 5947283, *4 (D. Md. November 27, 2012); *In re Titanium Dioxide Antitrust Litigation*, 284 F.R.D. 328, 350 (D. Md. 2012).

the plaintiffs contend that these provisions are enforceable for reasons broadly applicable to the class.

Second, the trial court concluded that, even if the defendant was correct as to this ground, there would still be sufficient remaining members to which these provisions would not apply to satisfy the numerosity requirement. The defendant's failure to contest this conclusion is fatal to any challenge to numerosity.

B

As best we can discern from the defendant's brief, there is no specific argument directed at Practice Book § 9-7 (2), which requires that "there are questions of law or fact common to the class . . . ." Perhaps this omission can be explained by the settled principle that commonality "is easily satisfied because there need only be one question common to the class . . . the resolution of which will advance the litigation." (Internal quotation marks omitted.) *Collins* v. *Anthem Health Plans, Inc.*, supra, 275 Conn. 323–24. As the trial court properly recognized, there are numerous factual and legal questions common to the class, which we explore further in our discussion of the predominance requirement in part III of this opinion.

C

Typicality, the third prerequisite under Practice Book § 9-7, is met where "the claims or defenses of the representative parties are typical of the claims or defenses of the class . . . ." The defendant contends that one half of the potential class is subject to oral agreements, not written contracts and, therefore, are entitled to pursue only an unjust enrichment claim and not a breach of contract claim.[13] By contrast, the plaintiffs

[13] Insofar as the defendant contends that the circumstances in which the agreements were made vary, requiring individualized proof, we note that it advances the same contention regarding the predominance requirement. We address this concern relating to the special defenses in our discussion of the predominance requirement in part III A of this opinion.

had written contracts and, therefore, are entitled to pursue only a breach of contract claim and not an unjust enrichment claim.[14] We disagree that these concerns render the trial court's conclusion that the typicality requirement was met an abuse of discretion.

Typicality "requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." (Internal quotation marks omitted.) *Collins* v. *Anthem Health Plans, Inc.*, supra, 266 Conn. 34; see also *In re Schering Plough Corp. ERISA Litigation*, 589 F.3d 585, 599 (3d Cir. 2009) ("[a] common thread running through the various components of typicality . . . is the interest in ensuring that the class representative's interests and incentives will be generally aligned with those of the class as a whole"). "[T]he mere existence of individualized factual questions with respect to the class representative's claim will not bar class certification . . . ." (Internal quotation marks omitted.) *Macomber* v. *Travelers Property & Casualty Corp.*, 277 Conn. 617, 629–30, 894 A.2d 240 (2006).

We also note that the defendant asserts that it has a $43,743.53 prejudgment remedy against Faugno, which creates a unique interest. The trial court reasonably rejected this argument because typicality does not require that the factual background be entirely identical between class representatives and the class at large. The defendant's brief appears to assert this same argument in the context of Faugno's suitability to be a class representative, contending that Faugno will be "distracted by its own unique issues." As this court has recognized, "[t]he adequacy-of-representation requirement tend[s] to merge with the commonality and typicality criteria . . . ." (Internal quotation marks omitted.) *Collins* v. *Anthem Health Plans, Inc.*, supra, 266 Conn. 54. We are not persuaded that this issue alters Faugno's suitability. In any event, none of these claims would defeat class certification because Faugno is not the only class representative.

[14] Although the defendant makes these arguments in the section of its brief attacking the trial court's predominance analysis, which precedes its analysis of typicality, because our analysis follows the reverse sequence of the defendant's, and these arguments also relate to typicality, we address those arguments in this part of the opinion.

As the trial court correctly noted, proof of the unjust enrichment claim will require resolution of the same common questions relating to the federal gasoline tax and the state gross receipts tax as those relating to the other claims. As these common issues occupy essentially the same degree of centrality to each of the claims made, the plaintiffs' pursuit of a breach of contract claim will share central " 'disputed [issues] of law or fact' " with those potential class members who have an unjust enrichment claim. *Collins* v. *Anthem Health Plans, Inc.*, supra, 266 Conn. 34. Resolving these shared issues will be at the crux of any litigation.

Moreover, as the trial court properly observed, it is permissible to allege alternative claims for breach of contract and unjust enrichment. See *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 238, 990 A.2d 326 (2010) (favorably citing Appellate Court case for proposition that "[p]arties routinely plead alternative counts alleging breach of contract and unjust enrichment, although in doing so, they are entitled only to a single measure of damages arising out of these alternative claims" [internal quotation marks omitted]); see, e.g., *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 447 and n.9, 970 A.2d 592 (2009) (plaintiffs asserted breach of contract and unjust enrichment claims); *Stein* v. *Horton*, 99 Conn. App. 477, 485, 914 A.2d 606 (2007) (acknowledging use of alternative claims). Therefore, typicality is established.

D

Adequacy of representation, the fourth prerequisite under Practice Book § 9-7, requires that "the representative parties will fairly and adequately protect the interests of the class." The defendant claims that the interests of the plaintiffs as class representatives are not aligned with those of the other potential class members because the plaintiffs are former customers, and osten-

sibly former franchisees, whereas many other potential class members are current customers or franchisees.[15] We disagree.

We are aware that many federal district court decisions, particularly of an older vintage, take the view that a conflict of interest renders former customers/franchisees per se inadequate representatives of current customers/franchisees.[16] These cases generally reason that the former's lack of a stake in the continued success of the defendant's business gives rise to the possibility of over vigorous representation, involving the pursuit of relief that will impair the business or impeding settlement. See, e.g., *Southern Snack Foods, Inc.* v. *J & J Snack Foods Corp.*, 79 F.R.D. 678, 680 (D.N.J. 1978); *Thompson* v. *T. F. I. Cos.*, 64 F.R.D. 140, 148–49 (N.D. Ill. 1974); *Free World Foreign Cars, Inc.* v. *Alfa Romeo, S.p.A.*, 55 F.R.D. 26, 29 (S.D.N.Y. 1972). However, the better reasoned authority takes a more nuanced view: "[P]erfect symmetry of interest is not required and not every discrepancy among the interests of class members renders a putative class action untenable. Only conflicts that are fundamental to the suit and that go

[15] The trial court acknowledged this argument, and noted its disagreement with it, but did not set forth its reasons for doing so. The defendant did not seek an articulation. Because the defendant's position appears to advocate a per se rule, we reject it as a matter of law.

[16] See, e.g., *Auto Ventures, Inc.* v. *Moran*, Docket No. 92-426-CIV, 1997 WL 306895, *5 n.5 (S.D. Fla. April 3, 1997); *Hewitt* v. *Joyce Beverages of Wisconsin, Inc.*, 97 F.R.D. 350, 354 (N.D. Ill. 1982), aff'd, 721 F.2d. 625 (7th Cir. 1983); *Southern Snack Foods, Inc.* v. *J & J Snack Foods Corp.*, 79 F.R.D. 678, 680–81 (D.N.J. 1978); *Aamco Automatic Transmissions, Inc.* v. *Tayloe*, 67 F.R.D. 440, 445–47 (E.D. Pa. 1975); *Thompson* v. *T. F. I. Cos.*, 64 F.R.D. 140, 149 (N.D. Ill. 1974); *DiCostanzo* v. *Hertz Corp.*, 63 F.R.D. 150, 151 (D. Mass. 1974); *Matarazzo* v. *Friendly Ice Cream Corp.*, 62 F.R.D. 65, 68–69 (E.D.N.Y. 1974); *Seligson* v. *Plum Tree, Inc.*, 61 F.R.D. 343, 345–46 (E.D. Pa. 1973); *Van Allen* v. *Circle K Corp.*, 58 F.R.D. 562, 564 (C.D. Cal. 1972); *Free World Foreign Cars, Inc.* v. *Alfa Romeo, S.p.A.*, 55 F.R.D. 26, 28–29 (S.D.N.Y. 1972). The defendant relies on one of our trial court's decisions following this line of cases. See *McNerney* v. *Carvel Corp.*, Docket No. CV-00-579244, 2001 WL 267653, *4 (Conn. Super. February 23, 2001).

to the heart of the litigation prevent a plaintiff from meeting the [rule's] adequacy requirement. . . . Put another way, to forestall class certification the intra-class conflict must be so substantial as to overbalance the common interests of the class members as a whole." (Citation omitted; internal quotation marks omitted.) *Matamoros* v. *Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012); see 1 A. Conte & H. Newberg, Newberg on Class Actions (4th Ed. 2002) § 3:35, pp. 487–91 (concluding that there is no support for irrebuttable presumption that plaintiffs who lack continuing relations with defendant would be inadequate representatives and noting advantage of class representative who is free from pressures and reprisals from defendant);[17] see also *Carder Buick-Olds Co.* v. *Reynolds & Reynolds, Inc.*, 148 Ohio App. 3d 635, 640–42, 775 N.E.2d 531 (2002) (distinguishing conflict when class is franchisees as compared to customers). Courts have recognized that the possibility of such a conflict is diminished when, as in the present case, class members have a right to opt out of the class. See *Matamoros* v. *Starbucks Corp.*, supra, 139; *Smilow* v. *Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32, 43 (1st Cir. 2003); *Carder Buick-Olds Co.* v. *Reynolds & Reynolds, Inc.*, supra, 643.

In the present case, the mere difference in status (former versus current) identified by the defendant as

[17] This treatise also discusses the situation in the present case, whereby the class representative occupies a terminated or former relationship with the defendant and seeks to represent a class including persons with a present relationship for both damages and prospective injunctive relief. 1 A. Conte & H. Newberg, supra, § 3:35, pp. 494–98. The treatise notes that courts have taken varied approaches, some deeming the representation proper as long as the particular conflict is outweighed by the efficiencies that would flow from class certification. We infer from the trial court's rejection of the defendant's general argument that it concluded that the balance weighed in favor of such efficiencies. We observe that the injunctive relief sought in the present case effectively would direct the defendant not to continue the same actions that gave rise to the claims for damages, not to undertake other actions.

an intraclass conflict cannot reasonably be deemed to be so substantial as to overbalance the common interests of the class members as a whole, under the facts of this case and at the present juncture. Cf. *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, Docket No. MDL 06-1770 (MHP), 2007 WL 3045995, *5 (N.D. Cal. October 18, 2007) (concluding that concerns raised in "decades-old cases" regarding former employee class action plaintiffs were not compelling given that record does not show that successful action will unduly affect current employment and compensation arrangements and that size of monetary award is unlikely to significantly hamper defendant's business, given its large size and prominence within financial industry), rev'd on other grounds, 571 F.3d 953, 959 (9th Cir. 2009). If, and when, such a conflict manifests or is established by further proof, the trial court would have options other than decertifying the class, such as redefining the class so that the class representative represents only those with like interests or permitting a current franchisee to join as a class representative. See *Carder Buick-Olds Co.* v. *Reynolds & Reynolds, Inc.*, supra, 148 Ohio App. 3d 642; *Shaver* v. *Standard Oil Co.*, 68 Ohio App. 3d 783, 796, 589 N.E.2d 1348 (1990).

Accordingly, none of the defendant's contentions persuades us that the trial court abused its discretion in concluding that the class certification requirements of Practice Book § 9-7 were met.

III

We turn next to the defendant's claim that the trial court abused its discretion in determining that the predominance and superiority requirements of Practice Book § 9-8 (3) had been met. We address each in turn.

A

The defendant contends that the trial court's predominance analysis most clearly demonstrates the court's failure to apply a rigorous analysis. The defendant asserts that the court performed only a cursory review of the claims and evidence in relation to the elements of the causes of action and disregarded its special defenses and uncontroverted evidence. The defendant claims that the trial court incorrectly "concluded and repeatedly emphasized that once the class members make a threshold showing . . . that they met the class definition, then proof of membership in the class will be substantially determinative of the elements of their claims . . . ." We conclude that the trial court's analysis was sufficiently rigorous and that its conclusion that the predominance requirement was met was not an abuse of discretion.

"[C]lass-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof. . . .

"In order to determine whether common questions predominate, [a court must] . . . examine the [causes] of action asserted in the complaint on behalf of the putative class. . . . Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action. . . . Common issues of fact and law predominate if they ha[ve] a direct impact on every class member's effort to establish liability and on every class member's entitlement to . . . relief. . . . [When], after adjudication of the [class-wide] issues, [the] plaintiffs must still introduce a great deal of individualized proof or argue a number

of individualized legal points to establish most or all of the elements of their individual[ized] claims, such claims are not suitable for class certification . . . .

"[When] cases [involve] individualized damages . . . [and those] damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification. . . . It is primarily when there are significant individualized questions going to liability that the need for individualized assessments of damages is enough to preclude [class] certification. . . .

"These standards inform us that a court should engage in a three part inquiry to determine whether common questions of law or fact predominate in any given case. First, the court should review the elements of the causes of action that the plaintiffs seek to assert on behalf of the putative class. . . . Second, the court should determine whether generalized evidence could be offered to prove those elements on a class-wide basis or whether individualized proof will be needed to establish each class member's entitlement to monetary or injunctive relief. . . . Third, the court should weigh the common issues that are subject to generalized proof against the issues requiring individualized proof in order to determine which predominate. . . . Only when common questions of law or fact will be the object of most of the efforts of the litigants and the court will the predominance test be satisfied." (Emphasis omitted; internal quotation marks omitted.) *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 287 Conn. 208, 215–17, 947 A.2d 320 (2008); see *In re Petrobras Securities*, 862 F.3d 250, 268 (2d Cir. 2017) ("predominance is a comparative standard"), petition for cert. filed sub nom. *Petroleo Brasileiro S.A.-Petrobras* v. *Universities*

Superannuation Scheme Ltd., 86 U.S.L.W. 3245 (U.S. November 3, 2017) (No. 17-664).

In the present case, the trial court's memorandum of decision set forth legal principles consistent with the preceding discussion. The court acknowledged the three part inquiry required for predominance. In separate sections, the court set forth the elements of each of the six causes of action alleged by the plaintiffs: (1) breach of contract; (2) unjust enrichment; (3) violation of the Connecticut Petroleum Franchise Act; (4) violation of CUTPA; (5) violation of the Uniform Commercial Code; and (6) misrepresentation. With respect to each action, it addressed whether generalized or individualized evidence would be required to prove the claim. Finally, it stated its ultimate conclusion that common issues predominate as to each cause of action.

The defendant's claims focus on the court's approach to the second part of the predominance inquiry. Insofar as the defendant essentially argues that the court's analysis under Practice Book § 9-8 failed to require the plaintiffs to do more than establish their satisfaction with Practice Book § 9-7 ("threshold inquiry"), we are compelled to point out that the trial court's findings under § 9-7 well exceeded those required. It is altogether proper, therefore, that those findings would inform the court's analysis under § 9-8. See *In re Target Corp. Customer Data Security Breach Litigation*, 309 F.R.D. 482, 486 (D. Minn. 2015) (The commonality requirement and the predominance requirement "are related and somewhat interdependent concepts. Rule 23 [a] [of the Federal Rules of Civil Procedure] requires that there are common questions of law or fact among class members' claims, and [r]ule 23 [b] [3] requires that those common questions predominate over individual issues."), appeal dismissed, Docket No. 15-8017 (8th Cir. June 23, 2016). Specifically, the court made the following findings in relation to § 9-7. The court

acknowledged differences between certain subclasses of customers with supply contracts, but noted key contractual language common to all. The court noted that the customers without such contracts had received form invoices, which appeared to be almost identical to the invoices received by the plaintiffs, who had supply contracts. With regard to commonality, although that consideration only requires "one question [of fact or law] common to the class . . . 'the resolution of which will advance the litigation' "; *Collins* v. *Anthem Health Plans, Inc.*, supra, 275 Conn. 323–24; the trial court identified numerous common questions. Common questions of fact regarding the purchase of gasoline from the defendant included (1) the price charged for each gallon of gasoline, (2) the lack of benefit from the federal tax credit, and (3) the charge of state gross receipts tax based on the price of gasoline as delivered, including the defendant's profit and delivery charges. Common legal questions included (1) whether the defendant charged its customers for federal gasoline tax at an incorrect rate because it did not apply the federal tax credit during the relevant period, and (2) whether the defendant improperly charged its customers the state gross receipts tax on the price of gasoline as delivered.

In its analysis of the requirements of Practice Book § 9-8, the second prong of the court's predominance analysis can be summarized as follows. With regard to each cause of action, the trial court essentially found that the threshold showing for class membership—the purchase of gasoline from the defendant during the relevant period—left common questions largely determinative of each of the causes of action, namely, whether the defendant (1) charged class members for federal gasoline tax at an incorrect rate because it did not give them the benefit of the federal tax credit, and (2) properly charged the state gross receipts tax on gasoline as delivered. Thus, for example, in considering

the bad faith element of a violation of the relevant provision of the Uniform Commercial Code, the court concluded that this element depended on those same common questions.

The court acknowledged that certain causes of action required additional elements that would not be subject to common proof. For example, the court found that the counts alleging a violation of the Connecticut Petroleum Franchise Act and a violation of CUTPA required an initial determination—that the potential class member is a franchisee of the defendant or suffered an ascertainable loss, respectively—but that the aforementioned threshold showing and common questions would then be applicable to prove the remaining elements of each such cause. With respect to the CUTPA violation, the court indicated that the individualized loss could be determined by a common mathematical equation. Ultimately, the trial court determined that common issues of fact and law predominated with respect to proof of the elements of each of the claims.

Our review of the trial court's analysis confirms the defendant's contention that the court did not expressly address whether every element of every cause of action would require individualized proof. However, we are not persuaded that these omissions render its decision less than the rigorous analysis called for or otherwise an abuse of discretion. The trial court is required to articulate a conclusion as to each requirement of the class certification rule, in this case, that common issues predominate. See 59 Am. Jur. 2d, supra, § 89, p. 543 (rigorous analysis "does not require the court to assign weight to any of the criteria listed, or to make written findings as to each factor, but merely requires the court to weigh and consider the factors and come to a reasoned conclusion as to whether a class action should be permitted for a fair adjudication of the controversy"); see also *In re Hydrogen Peroxide Antitrust Litigation*,

supra, 552 F.3d 310 ("The trial court, [well positioned] to decide which facts and legal arguments are most important to each [rule's] requirement, possesses broad discretion to control proceedings and frame issues for consideration under [the rule]. . . . But proper certification does not soften the rule: a class may not be certified without a finding that each . . . requirement is met." [Citation omitted.]); *Nissan Motor Co.* v. *Fry*, 27 S.W.3d 573, 591 (Tex. App. 2000) ("[i]n determining whether common issues predominate, the trial court need only identify substantive law issues that will control the litigation"). This inquiry is a comparative one based on a broader view of the case, not on the number of elements on either side. See *Sun Coast Resources, Inc.* v. *Cooper*, 967 S.W.2d 525, 533 (Tex. App. 1998) ("[t]he test for 'predominance' is not whether the common issues outnumber the individual issues; rather, it is whether the common issues will be the object of most of the efforts of the court and litigants"). As long as there is a basis to conclude that the trial court reached a reasoned conclusion that common issues will outweigh others, predominance is properly established. See *Neighborhood Builders, Inc.* v. *Madison*, supra, 294 Conn. 670, 672 (when trial court found "common issues subject to generalized proof predominate over the issues requiring individualized proof [because] the main issue in this case is whether [the defendant] assessed excessive building permit fees over a defined time period," which would be proven by "generalized evidence" from defendant's records, trial court's predominance analysis characterized as "thorough and appropriate"). This inquiry does not require an express acknowledgment of the proof relevant to every element, but instead an acknowledgment of any issue critical to liability that was not susceptible to common proof which, in and of itself or in combination with other

elements, would be sufficient to defeat predominance.[18] Compare *In re Initial Public Offerings Securities Litigation*, supra, 471 F.3d 42–44 (citing such elements), with *Tyson Foods, Inc.* v. *Bouaphakeo*, U.S. , 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016) ("[w]hen one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper . . . even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members" [internal quotation marks omitted]). If the defendant believed that the trial court overlooked individualized proof required for any particular element of any particular cause of action that was of such consequence that it outweighed those cited by the trial court, it was free to seek an articulation. See *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 379, 999 A.2d 721 (2010) ("[i]t is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of a decision . . . to clarify the legal basis of a ruling . . . or to ask the trial judge to rule on an overlooked matter" [internal quotation marks omitted]). It failed to do so.

We can glean a reasoned basis for the trial court's conclusion. The certified class consists "of all entities or persons who: (i) purchased gasoline from [the defendant] during the period September 27, 2004, to date; (ii) were charged federal gasoline tax at a rate of 18.4 cents per gallon on such gasoline purchases; (iii) did not receive the federal volumetric ethanol excise tax credit, while it was in effect, on such gasoline purchases; and (iv) were charged state gross receipts tax

[18] Although it is not always necessary to articulate the nature of proof required for each element of each cause of action, we note that it would be the better practice to do so to ensure a proper outcome and a sufficient record for appellate review.

on such gasoline purchases based on the price of gasoline, as delivered." Under that class definition, proof of class membership establishes that the defendant and the class member had some form of agreement for the sale and purchase of gasoline. Qualifying under the class definition requires significant proof, but, notably, proof arising from common sources. Specifically, we agree with the trial court that whether an entity or person qualifies under this definition appears to be provable by way of invoices and contractual information gleaned from the defendant's records, which is class-wide, undisputed evidence. See *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, supra, 287 Conn. 235 (upholding trial court's conclusion "that common questions predominated on the issue of liability because almost all of the proposed evidence on whether [the defendant] had engaged in unfair or deceptive acts or practices consisted of data and information provided by [the defendant's] own documents, records and employees" and that evidence necessary to prove causation and ascertainable harm likewise originated from defendant's "records and sources and, therefore, would be common to the class"); see also *Neighborhood Builders, Inc.* v. *Madison*, supra, 294 Conn. 672 ("individualized proof will not be necessary to identify class members and the fees they paid because the relevant information may be discovered by examining the [defendant town's] public records").

Having concluded that the trial court's decision, on its face, appears to have reached a reasoned conclusion, we turn to specific concerns raised by the defendant with regard to that decision. With respect to the count alleging breach of contract, the defendant contends that the elements of performance and breach require individualized proof.[19] We agree that whether the parties per-

[19] As the trial court correctly stated, plaintiffs seeking to prove breach of contract "must prove that: (1) the defendant and the class member formed an agreement; (2) the class member performed under the agreement; (3)

formed may require some individualized proof, specifically, to demonstrate that the potential class members actually paid for the invoiced gasoline. However, this question will largely be provable by common evidence, namely, the defendant's records, and does not clearly predominate over the other elements of the cause raising questions common to the class. With regard to the element of breach, we note that the plaintiffs contend that, because the defendant improperly charged federal and state tax fees to the class as a whole, this is a class-wide breach that can be established by common proof. Whether the plaintiffs actually can prove this, or whether the defendant will successfully defend against the allegation, goes to the merits and extends beyond ensuring that the class certification requirements are met. See *Collins* v. *Anthem Health Plans, Inc.*, supra, 275 Conn. 321 ("the question is not whether the . . . plaintiffs . . . will prevail on the merits, but rather whether the requirements of [the class action rules] are met" [internal quotation marks omitted]). Therefore, we are not persuaded that the trial court abused its discretion in finding that the predominance requirement had been met for this count.

With respect to the count alleging a violation of the Connecticut Petroleum Franchise Act, the defendant asserts that the trial court incorrectly determined that common proof could "establish a franchise relationship and a right to recovery under the franchise provi-

the defendant breached the agreement; and (4) the class member incurred damages . . . caused by the breach . . . ." *Collins* v. *Anthem Health Plans, Inc.*, supra, 275 Conn. 333. The defendant argues that individualized proof will be required to demonstrate each of these elements. We conclude that the trial court properly determined that proof that a potential class member qualifies for the class establishes that an agreement was formed between that entity and the defendant. We address the issue of damages later in this part of the opinion.

sions."[20] The relevant subsections of the act, General Statutes § 43-133*l* (f) (6), (7) and (9), respectively require good faith, fair and reasonable prices, and no discrimination between franchisees. Although the proof required to establish that potential class members are franchisees will mainly come from the defendant's contractual records, we acknowledge that proof may also be required from records of individual customers on their business models. Moreover, although the first two subdivisions at issue will require common proof, we acknowledge that the third, discrimination, will likely require individualized proof. Ultimately, we conclude that the trial court's implicit conclusion—that the individualized proof necessary to establish discrimination and to supplement the common proof to establish the franchise relationship would not predominate over the common proof required to prove this cause of action—was not an abuse of discretion.

With regard to the count alleging misrepresentation, the defendant contends that this claim must be proved by individualized oral conversations between the defendant and each customer. The plaintiffs' claim, as we understand it, however, is not that the defendant made

[20] As the trial court correctly stated, General Statutes § 42-133*l* (f) of the Petroleum Franchise Act provides in relevant part: "No franchisor, directly or indirectly, through any officer, agent or employee, shall do any of the following . . . (6) fail to deal in good faith with a franchisee; (7) sell, rent or offer to sell to a franchisee any product or service for more than a fair and reasonable price . . . (9) discriminate between franchisees in the charges offered or made for royalties, goods, services . . . ." The first step to any such claim is a determination that a franchise relationship exists. *Ackley* v. *Gulf Oil Corp.*, 726 F. Supp. 353, 367 (D. Conn.), aff'd, 889 F.2d 1280 (2d Cir. 1989).

We note that, in connection with its arguments relating to this count, the defendant appears to suggest that the trial court, on a finding that only one half of the potential class members could pursue this count, should have created subclasses, not a single class. This suggestion is insufficient to constitute an adequately briefed claim. Therefore, we decline to address it. See, e.g., *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

oral misrepresentations regarding the federal and state tax charges at issue, but, rather, that the invoices reflecting those charges misrepresented the actual taxes imposed by law, causing the injury alleged. Even if we assume direct conversations occurred between the defendant and individual customers, nothing in the evidence presented thus far indicates that those customers were provided with different information on the taxes assessed in their invoices. Instead, the uniformity in the charges recorded by the invoices presented to the trial court provides no basis to infer that discussions on these taxes would not have been substantially uniform as well. Thus, the trial court's conclusion as to this count was not an abuse of discretion.

In a more broadly applicable attack, the defendant also argues that damages calculations will require individualized proof, particularly for lost profit damages. The defendant disregards the fact, however, that the plaintiffs eliminated their request for lost profit damages when they amended their pleadings. Although the absence of a request for such relief may result in some class members exercising their right to opt out of the class and, in turn, impact the class' ability to satisfy numerosity, that issue is one that the trial court may revisit if, and when, it arises. See *Collins* v. *Anthem Health Plans, Inc.*, supra, 266 Conn. 40 (trial court may amend class certification orders "in light of subsequent developments . . . in the litigation" [internal quotation marks omitted]). With regard to the damages actually sought in the amended pleadings, the trial court properly determined that the plaintiffs had satisfied their burden by providing two common formulas for the calculation of individual class members' damages. See *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, supra, 287 Conn. 216 (fact that damages are calculated on individual basis does not impede class certification where common calculation method exists).

Finally, the defendant claims that it has or will assert special defenses that require individualized proof, which the trial court failed to address and which will predominate over the common issues. We are not persuaded that this omission was fatal under the circumstances.

Although "the existence of a defense potentially implicating different class members differently does not *necessarily* defeat class certification . . . it is . . . well established that courts must consider potential defenses in assessing the predominance requirement . . . ." (Citations omitted; emphasis in original.) *Myers* v. *Hertz Corp.*, supra, 624 F.3d 551. The existence of special defenses, which may or may not be subject to common proof, is merely another factor to be considered in that assessment. See *Vaccariello* v. *XM Satellite Radio, Inc.*, 295 F.R.D. 62, 73 (S.D.N.Y. 2013); see also *In re Nassau County Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006).

With regard to the effect of defenses on the propriety of class certification, there does not appear to be a uniform view as to whether the defendant should bear the burden of production while the plaintiff retains the ultimate burden of persuasion as to class requirements, or whether the plaintiff should bear the burden of both.[21]

[21] Compare 59 Am. Jur. 2d, supra, § 86, p. 537 ("[o]nce the proponent of the class has made a prima facie showing that the prerequisites of the class action statute or rule are met, the burden of producing evidence shifts to the opponent although the proponent retains the burden of persuasion"), and *In re Kosmos Energy Ltd. Securities Litigation*, 299 F.R.D. 133, 152–53 (N.D. Tex. 2014) ("Defendants, of course, bear the burden of proof on this affirmative defense and, as such, must submit evidence showing the existence of individual investor knowledge sufficient to preclude a finding by the [c]ourt that 'common liability issues predominate over individual knowledge issues.' This proof need not be at the level required to prove the affirmative defense on the merits but must be adequate to satisfy the court at the certification stage that 'individual knowledge inquiries might be necessary.' " [Emphasis omitted; footnote omitted.]), with *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321–22 (4th Cir. 2006) ("Our cases permit no exception to the rule that the plaintiff bears the burden of showing

We need not resolve this issue in the present case. At the very least, the defendant would have to provide the plaintiffs with a sufficient basis to be able to address how a defense might bear on class certification requirements. The defendant did not do so. Each of the special defenses states a summary legal conclusion, lacking any supporting facts or indication as to which counts they are directed. As such, they would not even meet our fact pleading requirements for special defenses as set forth in Practice Book § 10-50. See *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 718, 807 A.2d 968 ("[t]he purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action" [internal quotation marks omitted]), cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002); R. Bollier et al., 1 Stephenson's Connecticut Civil Procedure (3d Ed. 1997) § 83 (g), p. 249 ("the rules applicable to fact pleading in complaints are equally applicable to fact pleading in special defenses" [footnote omitted]); see also, e.g., *Polson* v. *Wargo*, Docket No. CV-09-4029659-S, 2010 WL 3961378, *1 (Conn. Super. September 7, 2010) (striking defenses alleging that plaintiffs' claims are barred in whole or in part by "doctrine of waiver" and "doctrine of estoppel" because they state mere legal conclusions); *Generalli* v. *Drive-O-Rama*, Docket No. CV-05-4006726-S, 2007 WL 2570344, *2 (Conn. Super. August 15, 2007) ("[T]he defendant alleges five special defenses, but does not plead any

compliance with [r]ule 23 [of the Federal Rules of Civil Procedure] . . . . Moreover, the standard justifications for allocating the burden of proving an affirmative defense to the defendant—efficiency and fairness—disappear when the thing to be proved is no longer the merit of the defense but compliance with [r]ule 23. . . . There is no reason to believe that the defendant is any better suited than the named plaintiffs to prove whether an issue is common to the class simply because the defendant bears the burden of proving the merits of that issue. We therefore continue, as we must, to allocate to the plaintiff the burden of proving compliance with [r]ule 23." [Citations omitted.]).

facts in support of those allegations showing how or why each of the alleged special defenses applies. The special defenses, as pleaded, do not comply with the Practice Book rules because Connecticut is a fact pleading state."); *Access America, LLC* v. *O'Connor*, No. CV-05-4004912-S, 2006 WL 1999443, *1 (Conn. Super. June 28, 2006) ("The special defenses, as pleaded, do not comply with the Practice Book rules . . . . [T]he defendant's special defenses do not allege facts to support the legal conclusions that the written agreement is unconscionable and/or violates public policy, that it is invalid or that it is void ab initio due to fraud.").

The defendant's memorandum of law in opposition to class certification does not illuminate these matters. The lone reference to special defenses in the predominance section of that memorandum makes the following broad, tentative statement in its discussion of the breach of contract claim: "Moreover, because [forty-three of the] putative class members had no written contracts, [the defendant's] special defenses may apply to them differently, depending on the facts and circumstances of each agreement to purchase motor fuel, each class member's understanding of the prices charged by [the defendant], and whether and when each class member came to believe that [the defendant's] pricing breached the parties' agreement." An appended footnote cites eight doctrines alleged as special defenses: "waiver; unclean hands; failure to mitigate damage[s]; breach of the covenant of good faith and fair dealing; estoppel; mutual mistake; unilateral mistake; and laches . . . ."

The defendant's position effectively would impose the burden on the plaintiffs to prove whether each conclusory defense includes common issues and/or are subject to common proof as to whichever counts they conceivably might be relevant. We are aware of no

authority that supports such a proposition, and we squarely reject it.[22]

In sum, the trial court's ultimate determination that predominance was met was not an abuse of discretion.

B

Superiority, the second prerequisite under Practice Book § 9-8 (3), is "intertwined" with the predominance requirement. See *Collins* v. *Anthem Health Plans, Inc.*, supra, 275 Conn. 347. "If the predominance criterion is satisfied, courts generally will find that the class action is a superior mechanism even if it presents management difficulties." Id.; see also *Grimes* v. *Housing Authority*, 242 Conn. 236, 244, 698 A.2d 302 (1997) (listing benefits to class actions).

Insofar as the defendant cites the absence of any other previously filed lawsuit regarding the alleged

[22] Even on appeal, the defendant largely fails to adequately brief its claims regarding the special defenses. Its sole, marginally adequately briefed claim relates to its contention that the uniform charges invoiced to its customers were known and either negotiated, ratified, or waived by those customers and that, accordingly, proof as to what individual customers knew at what time would be required. However, although this defense may require some individualized evidence, some of the evidence necessary to evaluate this defense will come from common proof, namely, the defendant's invoices and records. For instance, the defendant's invoices, which apparently reflect identical charges for the federal and state taxes at issue, will presumably serve to demonstrate in part that the purported waiver or ratification occurred as they would reflect when information was known to customers at various points in time. Similarly relevant would be the written contracts for approximately one half of the proposed class, which apparently contain nearly identical provisions relating to taxes. Accordingly, there is no basis to conclude that the issues necessary to resolve such defenses would predominate over the overarching common issues in the action. See *Brown* v. *Kelly*, 609 F.3d 467, 483 (2d Cir. 2010) ("Although a defense may arise and may affect different class members differently [this] does not compel a finding that individual issues predominate over common ones. . . . As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of a defense will not automatically foreclose class certification under [r]ule 23 [b] [3] [of the Federal Rules of Civil Procedure]." [Citation omitted; internal quotation marks omitted.]).

overcharges as significant, the defendant's point is unclear. It assumes that the potential damages are substantial enough to incentivize individual lawsuits but also argues that the absence of prior lawsuits suggests that an inconsequential number of lawsuits would be filed if class certification was not granted.

The defendant's additional argument, in effect, contends that the totality of the trial court's purportedly improper rulings regarding the other class action requirements evidences why a class action is not the superior mechanism to resolve this issue. In light of our prior determinations that the trial court's conclusions were not an abuse of discretion, no further response is required.

The orders granting class certification are affirmed.

In this opinion the other justices concurred.