No. 21-70010

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRITTANY MARLOWE HOLBERG,
Petitioner-Appellant,

v.

ERIC GUERRERO, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee,

On Appeal from the United States District Court
Northern District of Texas, Amarillo Division
USDC No. 2:15-cv-00285

BRIEF OF FAIR AND JUST PROSECUTION (FJP) AND FORMER PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLANT

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INTEREST STATEMENT OF AMICI CURIAE[1]

Amici Curiae Fair and Just Prosecution ("FJP"), which is a project of the Tides Center, along with Former Prosecutors Corinna Barrett Lain, Rudolph J. Gerber, Gregory Nolan, Carol A. Siemon, William Nettles, Taylor Ferguson, and John Hummel (collectively, the "Former Prosecutors"), respectfully seek leave to submit this brief in support of Petitioner-Appellant Brittany Holberg's habeas petition.

Although the Former Prosecutors joining this brief have a diverse set of political beliefs, they are united by a commitment to the fair administration of criminal law. This commitment reaches both to providing transparency about the strength supporting—and undermining—the cases they prosecute as well as confessing error where the law or facts no longer support the integrity of a conviction. A full list of the individual Amici Former Prosecutors, as well as their past prosecutorial positions, dates held, and jurisdictions, is attached at the conclusion of this brief at Attachment A.

FJP is a nonprofit organization that works with elected prosecutors as part of a broad network of leaders committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. FJP has a deep understanding of the important role prosecutors play in the criminal justice system, the importance

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *Amici* states that counsel for all parties have consented to the filing of this brief.

of prosecutors adhering to their constitutional obligations, and the serious risks that come with allowing unchecked criminal informant testimony at trial. Prosecutors must acknowledge when errors have been made. They must also speak out when they determine that a conviction is unsupported by evidence or patently unjust. Indeed, the prosecutor's role in our criminal justice system is "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Amici FJP and the former prosecutors believe that the failure to disclose details of informant testimony renders a conviction constitutionally dubious. Many of the prosecutors that support FJP, or currently work with FJP, have a significant interest in ensuring the integrity of our criminal justice system; no group of professionals have more experience facilitating the administration of justice than prosecutors. Moreover, *Amici* are concerned that issuing an *en banc* decision which waters down or makes it easier for prosecutors to circumvent their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), promotes unjust outcomes that undermine public safety.

This case presents issues of national importance. *Amici* have an interest in preserving prosecutorial obligations to both the courts and criminal defendants. *Amici* further seek to protect the integrity of the legal system itself, and, therefore, respectfully offers its views here, as they may be of assistance to the Court.

STATEMENT OF ARGUMENT

A prosecutor's primary obligation is to ensure that justice is done. *See Berger*, 295 U.S. at 88. Accordingly, prosecutors wield significant discretion in pursuing this mandate, and that discretion must be exercised with scrupulous fairness. Central to the obligation to pursue justice is the prosecutor's duty under *Brady* to provide criminal defendants with all material evidence the prosecutor—a representative of the state—possesses. *See Strickler v. Greene*, 527 U.S. 263, 281 (1999) (explaining that the disclosure duty applies to evidence "known to the others acting on the government's behalf . . . including the police") (citation omitted). *Brady* evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching," and a *Brady* violation occurs when such evidence is "suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Id.* at 281–82. The failure to provide material evidence not only runs afoul of the criminal defendant's Fourteenth Amendment rights, but also undermines society's faith in the criminal justice system.

Confession testimony is particularly material in criminal prosecutions because of their disproportionate impact on juries. Indeed, studies have indicated that juries give significant weight to confession evidence, even while jurors acknowledge such evidence may not be reliable. *See* Section II *infra*. These dangers are magnified when addressing jailhouse confessions, which are notoriously unreliable. *See People v.*

Belknap, 23 N.E.3d 325, 338 (Ill. 2014) (noting that "the testimony of jailhouse informants must be viewed with caution"). Jailhouse informant testimony is frequently discredited because jailhouse informants are often incentivized to provide law enforcement with the information most likely to result in the informant receiving the offered benefit. *See Benn v. Lambert*, 283 F.3d 1040, 1059 (9th Cir. 2002) (discussing an informant and labeling him "completely unreliable, a liar for hire, [and] ready to perjure himself for whatever advantage he could squeeze out of the system") (alterations in original). After all, "[g]iven that the unique position of jailhouse informants increases their propensity and ability to fabricate testimony, any reliance on jailhouse informant testimony in court is a serious cause for concern." Luke G. Allen, Student Note, *Lies Behind Bars: An Analysis of the Problematic Reliance on Jailhouse Informant Testimony in the Criminal Justice System and A Texas-Sized Attempt to Address the Issue*, 98 WASH. U.L. REV. 257, 262 (2020). To that end, courts and states around the country have imposed significant safeguards and restraints on the use of jailhouse confession testimony due to its unreliability. *See* Section IV *infra*.

In this case, the State's suppression of impeachment evidence about Vickie Kirkpatrick, a key prosecution witness, was material because it would have provided Defendant Brittany Holberg with information to impeach Kirkpatrick's motives. Kirkpatrick's testimony directly undermined Holberg's affirmative defense that

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Towery's death resulted from self-defense, and, instead, was foundational to the state's theory that Holberg intended to rob the decedent before or during the homicide. Accordingly, the State's suppression of this information violated Holberg's Fourteenth Amendment rights. For the reasons outlined below, the *en banc* court should recognize the materiality of informant testimony and reverse the District Court's denial of Ms. Holberg's petition for habeas relief.

ARGUMENT

I. TRUST IN THE CRIMINAL JUSTICE SYSTEM DEPENDS ON ADHERENCE TO *BRADY*.

a. Prosecutors hold a powerful and unique role which demands faithful adherence to *Brady*.

The prosecutor's role in our criminal justice system is to "search for truth." *Strickler*, 527 U.S. at 681. As the representative of their community, prosecutors must depart from a "pure adversary model" because they "transcend[ ] that of an adversary." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985). Indeed, a prosecutor's duty is not to win at all costs but to ensure "that justice shall be done." *Id.*; *see also* ABA Criminal Justice Standards for the Prosecution Function 3-1.2(f) ("[t]he prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system"); *United States v. Persico*, 339 F. Supp. 1077, 1089 (E.D.N.Y. 1972) ("the prosecutor owes a duty to advise the defendant of certain information that the prosecutor has in his possession, which is favorable to the accused, and which the accused, due to his inferior resources, is unlikely to possess").

To ensure that justice is achieved, the state accords prosecutors with significant resources, powers, and discretion in the prosecution of criminal defendants. These tools cannot be misused, and prosecutors must "refrain from improper methods calculated to produce a wrongful conviction." *Berger*, 295 U.S. at 88. Nonetheless, these powers can be guilelessly or intentionally abused, particularly if courts do not impose consequences for the resulting Constitutional violations.

Prosecutors abdicate their responsibility and violate the Fourteenth Amendment's Due Process Clause when they withhold material evidence from a defendant in a criminal proceeding. *Brady*, 373 U.S. at 86-97; *see also McGee v. McFadden*, 139 S. Ct. 2608, 2609 (2019) (Sotomayor, J., dissenting from denial of *certiorari*) (highlighting "the prosecutor's constitutional duty to disclose material evidence favorable to the defense"); *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (per curiam) ("[T]he 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") (citing *Brady*, 373 U.S. at 87).

Material evidence includes information that a defendant might use to impeach a witness. *See Strickler*, 527 U.S. at 280 (explaining that "the duty [imposed by *Brady*] encompasses impeachment evidence") (citing *Bagley*, 473 U.S. at 676 (holding that impeachment evidence "falls within the *Brady* rule")). Because materiality is an "inevitably imprecise standard," a "prudent prosecutor" should "resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108 (1976); *see also Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.").

The *Brady* safeguards—a "constitutional mandate" that "exacts the minimum that a prosecutor . . . must do" are not only necessary to protect a defendant's constitutional rights, but also serve to maintain the integrity of the criminal justice system. *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978). The "administration of justice suffers when any accused is treated unfairly," including when the prosecution "withholds evidence" that, if made available, would "tend to exculpate him or reduce the penalty." *Brady*, 373 U.S. at 87-88. Indeed, *Brady* is "not a discovery rule, but a rule of fairness and minimum prosecutorial obligation." *Beasley*, 576 F.2d at 630 (citing *Agurs*, 427 U.S. at 107).

While prosecutors "may strike hard blows, [they are] not at liberty to strike foul ones." *Berger*, 295 U.S. at 88. This Circuit has long emphasized the importance of "faithful and ethical exercise of power by those who bear the mantle of public trust," *Dickson v. Quarterman*, 462 F.3d 470, 480 (5th Cir. 2006), particularly because courts, litigants, defendants, and the general public "presume that public officials have properly discharged their official duties." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

b. Faith and trust in our nation's criminal justice system has and will decline without firm adherence to *Brady*.

Despite the long-held acknowledgement that *Brady* is paramount to our criminal justice system, "nondisclosure of *Brady* material is still a perennial problem." *United States v. Tavera*, 719 F.3d 705, 708 (6th Cir. 2013).[2] *Brady* violations threaten "the very integrity of the judicial system and public confidence in the system," which "depend on full disclosure of all the facts, within the framework of the rules of evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974). When authorities conceal evidence, actors both inside the criminal justice system (defendants and lawyers), as well as the public, are likely to perceive said system as unreliable and unpredictable. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980) ("To work effectively, it is important that society's

[2] Ridolfi et al., National Ass'n of Crim. Def. Lawyers, *Material Indifference: How Courts Are Impeding Fair Disclosure In Criminal Cases* 15-23 (2014) (study concluding that courts apply materiality standard in arbitrary manner that favors government), https://www.nacdl.org/discoveryreform/materialindifference/.

criminal process satisfy the appearance of justice . . .") (internal citation and quotation omitted).

Justice William Brennan emphasized that "[f]or a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably." *Id*. at 594 (Brennan, J., concurring). Nonetheless, a recent national poll by Gallup found that only 35% of Americans had "confidence" in the United States judicial system, a concerning result that is notably less than other wealthy nations. *See* Benedict Vigers and Lydia Saad, *Americans Pass Judgment On Their Courts*, *Gallup* (December 16, 2024), https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx (distinguishing America from other wealthy nations where a majority still express trust in their judicial institutions).

The erosion of the public's trust in the justice system is consequential. When people trust legal authorities and view the police, the courts, and the law as legitimate, they are more likely to report crimes, cooperate as witnesses, and accept police and judicial system authority. *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 263 (2008); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 PSYCH., PUB. POL'Y & L. 78, 78-79

(2014). In contrast, when the public does not trust the criminal legal system, community members may be less willing to participate in that system. This reluctance hampers the ability of the courts, police, and prosecutors to fulfill their public safety obligations. Without cooperating victims and witnesses, police are unable to investigate, prosecutors are unable to bring charges, and juries are unable to convict the guilty or free the innocent. *See, e.g.*, Giffords Law Center to Prevent Gun Violence, *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence* (Sept. 9, 2021). Thus, *Brady* violations and concealment of impeachment evidence erode trust in the criminal legal system, resulting in communities that are less safe.

II. PROSECUTORS MUST FAITHFULLY ADHERE TO *BRADY* AS IT PERTAINS TO CONFESSION EVIDENCE, DUE TO ITS POTENT INFLUENCING NATURE.

Prosecutors' adherence to *Brady* is of particular importance with confession evidence.[3] Judicial experience and academic studies have shown that the mere presence of a confession increases the likelihood of a conviction.[4] Indeed, cases

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[3] *See* Jennifer Mason McAward, *Understanding* Brady *Violations*, 78 VAND. L. REV. 875, 888 (2025) (a significant number of successful *Brady* claims involve the suppression of "Witness Statements"; "Witness Compensation and Informant History" comprise an additional 12%).

[4] *See* Amelia Mindthoff *et al.*, *The Effect of Confession Evidence on Jurors' Verdict Decisions: A Systematic Review and Meta-Analysis*, Law and Hum. Behav., Vol. 43, No. 3, 6–8 (June 2024), https://psycnet.apa.org/doiLanding?doi=10.1037%2Flhb0000563.

involving confession evidence are more likely to result in convictions than those involving other highly probative types of evidence, such as eyewitness identification or character witnesses.[5] The United States Supreme Court has expressed concern for this bias because a criminal justice system which relies on a "confession will, in the long run, be less reliable and more subject to abuses" than one focused on evidence secured through skillful investigation. *Escobedo v. Illinois,* 378 U.S. 478, 488–89 (1964) (internal citations and quotations omitted); *see also Michigan v. Tucker*, 417 U.S. 433, 449 n.23 (1974) ("The Court in *Escobedo*, for example, stated that a system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses' than a system relying on independent investigation") (citation omitted).

Indeed, confession evidence is so persuasive to a jury and its deliberations that the U.S. Supreme Court created protections against law enforcement's use of unconstitutional methods to procure confessions from criminal defendants. *See Escobedo,* 378 U.S. at 492 (extending right to counsel to custodial questioning); *Miranda v. Arizona*, 384 U.S. 436, 462, 498 (1966) (establishing that a suspect must be apprised of his or her rights against self-incrimination due to the constitutional

[5] *See* Saul M. Kassin and Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, Law and Hum. Behav., Vol. 21, No. 5, 481 (1997), https://saulkassin.org/wp-content/uploads/2024/07/Kassin_Neumann_1997.pdf.

requirement that confessions be voluntarily made); *Jackson v. Denno*, 378 U.S. 368, 385–86 (1964) ("[i]t is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions…").

Even jurors have recognized the detrimental effect that situational factors, such as coercion, can have on confession reliability; yet many concede that they will not fully discount an unreliable confession.[6] That is why criminal defendants must have an opportunity to inform jurors of the underlying details of the alleged confession. A robust and thorough cross-examination of an informant witness permits the defendant, as well as jurors, to understand the material facts surrounding the informant's testimony. Scholars recommend providing jurors with insight into the details of the confession.[7] This insight may include interrogation videos, or

[6] Mindthoff, *supra* note 4, at 8.

[7] *See id.* at 10; Evan Haglund, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, 1441 (1990) (reviewing proposed amendments to the Federal Rules of Evidence and noting that "[c]ross-examination regarding an informant's present and prior informant agreements would enable the jury to determine whether the informant had become dependent on the rewards of informing"); Melanie B. Fessinger, Brian H. Bornstein, Jeffrey S. Neuschatz, Danielle Deloach, Megan A. Hillgartner, Stacy A. Wetmore & Amy Bradfield Douglass, *Informants v. Innocents: Informant Testimony and Its Contribution to Wrongful Convictions*, 48 CAP. U. L. REV. 149, 170 (2020) ("Cross examination and disclosure of incentives serve similar functions as proposed safeguards against unreliable informant testimony. The thought is that if jurors are aware that an informant is receiving an incentive for testifying or are aware that an informant has a questionable past, they would be more likely to discount his testimony").

safeguards at trial, such as targeted jury instructions or expert testimony on confession psychology.[8]

Given the prejudicial and persuasive nature of confession evidence, it is clear that evidence of a confession and the circumstances surrounding the confession will almost always be material. Therefore, it is of the utmost importance that prosecutors disclose *Brady* evidence when it relates to an alleged confession, so that a defendant may fully probe such material testimony in front of the jury.

III. CONFESSION EVIDENCE FROM JAILHOUSE INFORMANTS IS UNIQUELY PERSUASIVE AND DANGEROUS.

The dangers of confession evidence are magnified when presented through a jailhouse informant. Indeed, these informants may have strong personal incentives to be seen providing helpful incriminating evidence about a peer.

Jailhouse informants are among the least reliable witnesses. They routinely receive implicit or explicit promises of reduced sentences, dismissed charges, or even cash payments in exchange for testimony.[9] As of October 2024, based on the National Registry of Exonerations database, jailhouse informants have testified

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[8] Mindthoff, *supra* note 4, at 10.

[9] Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* 115–118 (2nd ed. 2022).

against 7% of all exonerees nationwide.[10] Informants have likewise testified in 15% of cases resulting in murder exonerations.[11]

Critically and concerningly, jailhouse informants are involved in convictions with the harshest punishments: 25% of murder exonerations involving death sentences, 17% with life sentences, and 11% where the defendant received less than life. In all, 36 people have been wrongfully sentenced to death before being exonerated, at least in part because jurors credited unreliable, or in some cases, outright false jailhouse testimony.[12] A survey by Northwestern University's Center on Wrongful Convictions, reviewing capital exonerations dating back to the 1970s, found that testimony from jailhouse informants was the leading cause of wrongful

[10] The National Registry of Exonerations collects cases where a convicted person is later exonerated. The database contains cases going back to 1989. The Registry notes that "[t]he Registry generally codes conservatively, so most codes should be considered undercounts. Applying a code to a certain case means that we are aware that the case has that attribute. Not applying the code to a case, does not mean it does not have that attribute—only that we lack affirmative evidence that it does." National Registry of Exonerations. Understanding the Registry. Exoneration Registry, 2025, https://exonerationregistry.org/understanding-registry.

[11] National Registry of Exonerations, Jailhouse Informant Testimony: A Report on the Use of Jailhouse informants in U.S. Criminal Cases (Oct. 2, 2024), available at https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/NRE.JailHouseInformantReport.10.2.24%20(1)%20(1).pdf

[12] *Id.*

convictions in U.S. death penalty cases, appearing in nearly 46% of the exonerations examined.[13]

There is a significant correlation between confessions that never occurred, or fabricated confessions, and false informant testimony, as jailhouse confessions can be "induced, generated, and insulated from close inspection or challenge."[14] Indeed, there is "overwhelming evidence of the link between the use of jailhouse informants and patterns of [police and prosecutorial] corruption and misconduct." *Id.* Even jurisdictions that require cautionary instructions to jurors have found those instructions inadequate. Cognitive biases, especially the "truth-default" tendency, whereby humans naturally evaluate "incoming messages as truthful," combined with the persuasive weight of confession-like statements, the perceived neutrality of a supposed "stranger," and prosecutorial reinforcement, often combine to overwhelm jurors' skepticism.[15] The inclusion of specific, non-public crime details (often provided by law enforcement) further enhances perceived credibility, even when the

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[13] *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row: A Center on Wrongful Convictions Survey* (Winter 2004-05), Center on Wrongful Convictions, Northwestern Univ. Sch. of Law, Bluhm Legal Clinic.

[14] Covey, Russell D., *Manufacturing False Convictions: Lies and the Corrupt Use of Jailhouse Informants*, 96 U. COLO. L. REV. FORUM 131, 131 (2025).

[15] Neuschatz, Jeffrey S., et al., *The Truth about Snitches: An Archival Analysis of Informant Testimony*, 28 PSY., PSY'Y & Law 508, 524 (2020).

testimony is demonstrably false. *Id*. The only effective check is full disclosure of the informant's incentives and their background to the criminal defendant and their counsel, precisely what *Brady* commands.[16]

This principle resonates here. In Holberg's case, the State's jailhouse informant, Vickie Kirkpatrick, provided the sole direct account contradicting Holberg's self-defense narrative. The Fifth Circuit panel emphasized that Kirkpatrick's testimony was the *only* testimonial account of the violent encounter. *Holberg v. Guerrero*, 130 F.4th 493, 503 (5th Cir. 2025).

As the panel noted, "Kirkpatrick's confidential informant status is classic favorable impeachment evidence." *Id.* By concealing both Kirkpatrick's status as a paid informant for the State and Corporal Stallings, as well as the benefits she received by testifying, the State deprived jurors of the opportunity to evaluate her credibility with a full and complete picture regarding the facts about her purported evidence. Allowing such concealment would invite future miscarriages of justice in cases where a single, uncorroborated jailhouse "confession" tips the scales between life and death.

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[16] Professor Robert Bloom has emphasized that "jurors should be aware of two factors– first, jurors should know that prosecutors are not better at discovering truth than an average citizen, and secondly, there is an adversarial process going on in the courtroom, where sometimes prosecutors get blinded by their desire to win." Robert M. Bloom, *What Jurors Should Know About Informants: The Need for Expert Testimony*, 2019 MICH. ST. L. REV. 345, 370 (2019).

IV. STATE LEGISLATURES AND COURTS ACROSS THE COUNTRY ARE LIMITING THE USE OF JAILHOUSE CONFESSIONS IN CRIMINAL TRIALS.

This Court should issue an *en banc* decision reversing the District Court's denial of Holberg's petition for habeas relief. A reversal would place this Court in lockstep with courts from across the country, many of whom recognize the materiality and attendant unreliability of jailhouse informant testimony.

Courts in countless states have recognized the dangers inherent to informant testimony. These courts often delineate disclosure obligations for prosecutors, or, in some cases, enact procedural guardrails to ensure that jurors have a full picture of the informant's background prior to admitting their testimony.

Courts across the country have acknowledged that jailhouse confessions in criminal proceedings are highly unreliable. *See State v. Jones*, 254 A.3d 239, 252–53 (Conn. 2020) ("The inherent unreliability of jailhouse informant testimony, combined with the endemic problems of proof, has prompted at least eighteen states to require some corroboration of jailhouse informant testimony to support a conviction") (citation omitted); *Moore v. State*, 787 So. 2d 1282, 1287 (Miss. 2001) (discussing "the unreliability of jailhouse informant or 'snitch' testimony"); *People v. Shendaj*, No. 370866, 2025 WL 38876, at *5 (Mich. Ct. App. Jan. 6, 2025) ("Jailhouse snitch testimony is arguably the single most unreliable type of evidence currently used in criminal trials") (quotation omitted); *see also Kansas v. Ventris*, 556 U.S. 586, 597 n.2 (2009) ("The likelihood that evidence gathered by self-interested jailhouse informants may be false cannot be ignored").

As a result, Courts have established safeguards surrounding the use of such testimony in criminal proceedings. *See, e.g.*, *Dodd v. State*, 992 P.2d 778, 784 (Okla. Crim. App. 2000) (requiring extensive pretrial disclosures relating to informant witnesses to ensure witness can be adequately cross-examined); *State v. Liggins*, 978 N.W.2d 406, 425 (Iowa 2022) (surveying states and finding that, among others, Nevada and Oklahoma require "pretrial hearings and other disclosures" before jailhouse informant testimony is admissible, and that Montana and Oklahoma have specific jury instructions cautioning juries of the "danger of undue reliance upon jailhouse informant testimony"); *see also State v. Laforge*, 2025 MT 209, ¶ 29 (noting that judges should "instruct the jury to determine the credibility of each informant, including their knowledge, how they gained that knowledge, their self-interest, criminal records, the extent to which each witness was supported or contradicted by other evidence,' and to view testimony about [a defendant's] unrecorded confessions and admissions with caution") (cleaned up).

The Supreme Court of Nevada's decision in *D'Agostino* is instructive. Nevada charged the defendant with robbing and murdering a woman in Las Vegas; he was subsequently convicted. *See D'Agostino v. State*, 823 P.2d 283, 284 (Nev. 1991). A Nevada jury sentenced him to death. *See id.* At the penalty phase of the trial, the prosecution called only one witness to testify: Michael Gaines, the defendant's former cellmate. *See id.* Gaines told the jury that the defendant, while in prison, admitted to several other unrelated killings. *Id.* The Supreme Court of Nevada reversed the jury's imposition of the death penalty, holding that informant testimony as to past homicidal conduct is not admissible until the trial judge determines the admission has "a sufficient indicia of reliability" or there is credible corroborating evidence to conclude the defendant "committed the crimes which are the subject of the admission." *See id.* at 285. Noting the unreliability of informant testimony, the Court explained that "[i]t is up to the trial judge to see that there are sufficient assurances of reliability prior to admitting the kind of amorphous testimony presented [,] to keep this kind of unreliable evidence out of the hands of the jury." *Id.* at 284.

State legislatures have likewise accounted for the potential prejudice to criminal defendants and enacted stringent safeguards. Illinois enacted the "toughest test for snitch testimony" by requiring prosecutors to inform defendants at least 30 days prior to any evidentiary hearing or trial of its intent to utilize jailhouse confession evidence. *See* 725 Ill. Comp. Stat. Ann. 5/115-21(d).[17] Even then,

[17] *See* John O'Connor, *Illinois adopts nation's toughest test for snitch testimony*, ASSOCIATED PRESS (Dec. 8, 2018) https://apnews.com/general-news-5a41098570fa40d2b08f96680bae866e.

prosecutors must convince the trial judge that the informant testimony would be reliable by a preponderance of the evidence to utilize such evidence in a trial.

In Connecticut, prosecutors must provide defendants with material information surrounding any intended jailhouse informant testimony, including "any cooperation agreement with a prosecutorial official or any benefit provided or offered to such witness by a prosecutorial official." Conn. Gen. Stat. Ann. § 54-86o(a)(1)-(5). In prosecutions for murder or rape, courts must hold a hearing to assess the reliability of a jailhouse informant's testimony. *See* Conn. Gen. Stat. Ann. § 54-86p. Maryland, Nebraska, Florida, and Minnesota also have similar procedural requirements strictly mandating disclosure of such evidence to a defendant. *See also* Md. Code Ann., Cts. & Jud. Proc. § 10-924(d)(1), (e) (Maryland laws requiring prosecutorial disclosure of material information about jailhouse informants, as well as potential hearing to ensure prosecution has disclosed all "material and information related to the in-custody witness"); Neb. Rev. Stat. Ann. § 29-4703 (Nebraska law requiring each prosecutor's office to "maintain a searchable record" of any "benefit requested or offered or provided to a jailhouse informant" when informant's testimony is to be used against criminal defendant); Fla. Stat. Ann. § 914.28(5) (Florida enacted "Rachel's Law" requiring law enforcement agencies to establish "policies and procedures to assess the suitability of using a person as a confidential informant"); Minn. Stat. Ann. § 634.045 (Minnesota law requiring the maintenance of informant benefit database). State legislatures, like state courts, have taken concrete steps to protect criminal defendants from the pitfalls attendant to jailhouse informant testimony.

Texas likewise recognizes that informant testimony is inherently prejudicial to criminal defendants. To that end, legislators passed a law requiring prosecutors to "track . . . any benefits offered or provided to a person in exchange" for jailhouse informant testimony. Tex. Code Crim. Proc. Ann. Art. 2A.111(b)(2). Texas law also provides that "[a] defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant *unless* the testimony is corroborated by other evidence tending to connect the defendant with the offense committed." Tex. Code Crim. Proc. Ann. Art. 38.075(a) (emphasis added). The Court of Appeals of Texas accordingly explained that "[t]o evaluate the sufficiency of corroboration evidence, we must eliminate all of the accomplice/jailhouse-informant testimony from consideration and then examine the remaining portions of the record to see if there is any evidence that tends to connect the accused with the commission of the crime." *Ruiz v. State*, 358 S.W.3d 676, 681 (Tex. App. 2011); *see also Phillips v. State*, 463 S.W.3d 59, 66 (Tex. Crim. App. 2015) ("Jailhouse-witness testimony is inherently unreliable due to the inmate's incentive to better his circumstances.").

Additionally, Texas requires, as part of discovery, that "if the state intends to use at a defendant's trial testimony of a person to whom the defendant made a statement against the defendant's interest while the person was imprisoned or confined in the same correctional facility as the defendant, the state shall disclose to the defendant any information in the possession, custody, or control of the state that is relevant to the person's credibility." Tex. Code Crim. Proc. Ann. Art. 39.14 (h-1). The statute denotes that information relevant to a witnesses' credibility includes, among other things, "the person's complete criminal history, including any charges that were dismissed or reduced as part of a plea bargain" as well as "any grant, promise, or offer of immunity from prosecution, reduction of sentence, or other leniency or special treatment, given by the state in exchange for the person's testimony." Tex. Code Crim. Proc. Ann. Art. 39.14 (h-1) (1) and (2).

Across the country, legislators and courts alike are skeptical of informant testimony and have established concrete safeguards to protect criminal defendants.[18]

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[18] Another important example comes from the state of New Jersey. In 2020, then New Jersey Attorney General Gurbir S. Grewal, in a directive, mandated prophylactic policies to ensure that prosecutors diligently probe prospective jailhouse informant witnesses for reliability. Most notably, General Grewal instructed that jailhouse informant testimony should not be introduced into evidence unless prosecutors also had "independent, credible evidence corroborating the informant's testimony." Attorney General Law Enforcement Directive No. 2020-11 (Oct. 9, 2020), *Directive Regarding Testimony of Jailhouse Informants*, https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2020-11_Jailhouse-Informants.pdf; *see also* Cal. Penal Code § 1111.5(a) (California statute providing that "[a] jury or judge may not convict a defendant, find a special circumstance true,

After all, "the testimony of jailhouse informants is readily fabricated and otherwise particularly suspect for a number of reasons not generally apparent to jurors." *State v. Leniart*, 215 A.3d 1104, 1151 (Conn. 2019) (Palmer, J., concurring in part and dissenting in part). On a basic level, it is well-recognized that "an informant's testimony, by its nature, is looked upon with suspicion and distrust," *Hilliard v. State*, 42 So. 3d 653, 657 (Miss. Ct. App. 2010) (internal quotation omitted). To that end, given the frequency with which such testimony is relied upon by prosecutors, this Court should reiterate the materiality of jailhouse informant testimony. Doing so would strengthen *Brady*'s core purpose: to ensure that criminal defendants receive due process.

CONCLUSION

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. The integrity of the criminal justice system is best protected when prosecutors stringently adhere to their *Brady* obligations. This is particularly true in the context of jailhouse confessions, which are highly unreliable and often acquired through law enforcement's own devices and tactics. Neglecting this obligation undermines society's confidence in the criminal justice

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or use a fact in aggravation based on the uncorroborated testimony of an in-custody informant").

system and thwarts prosecutors in the faithful execution of their duty to secure justice.

In order to protect the integrity of our system of justice, and for all the reasons outlined herein, *Amici* urge the Court to grant Ms. Holberg habeas relief.

Dated: October 14, 2025

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Attachment A

List of Former Prosecutors Included as *Amici Curiae* in Their Individual Capacities

1. William (Bill) Nettles
   United States Attorney for the District of South Carolina, 2010-2016

2. Gregory T. Nolan
   District Attorney's Office, Santa Barbara County 2020-2022
   Assistant United States Attorney, Middle District of Florida 2015-2020

3. Hon. Rudolph (Rudy) J. Gerber
   Appellate Judge on the Arizona Court of Appeals 1988-2021
   Trial Judge for the Superior Court of Maricopa County, Arizona 1979-1988
   Deputy County Attorney for Maricopa County, Arizona 1976-1979

4. Corinna Barrett Lain
   George E. Allen Chair in Law
   University of Richmond School of Law
   Assistant Commonwealth's Attorney, Henrico County, Virginia 1997-2000

5. Taylor Scott Ferguson
   Prosecutor, Tarrant County District Attorney's Office, Texas 2006 - 2015

6. Carol A. Siemon
   Michigan Prosecutor's Office, Ingham County
   Elected Prosecutor 2016-2022
   Assistant Prosecutor 1983-1995

7. John Hummel
   District Attorney, Deschutes County, Oregon 2015-2023

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* certifies that no counsel for any party authored this brief in whole or in part, and that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, and its counsel made such a monetary contribution to its preparation or submission.

s/ *Katherine S. Barrett Wiik*
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Fair and Just Prosecution and Former Prosecutors

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court for the Unite States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Katherine S. Barrett Wiik*
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of the Fed. R. App. P. 29(a)(5) because it contains 5,494 words (including Attachment A), excluding the parts of the brief exempted by Fed. R. App. P.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

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