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Erratum

An earlier publication of Volume 49, Issue 2, contained pagination errors that have since been corrected.

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SNITCHES CAUSE STITCHES: THE NEED FOR LEGISLATIVE REFORM ON JAILHOUSE INFORMANT TESTIMONY LAWS

*Jennifer Sutterer**

INTRODUCTION

Four years after the body of a young girl was discovered in a garbage bag in Philadelphia, police coerced a mentally-disabled man named Walter Ogrod into confessing to the murder.[1] Even though Ogrod did not match the physical description of the suspect and his signed "confession" was in the handwriting of a detective on the case, the judge admitted it into evidence at his 1993 trial.[2] The twelve jurors voted to acquit but after the verdict was announced, one juror raised doubts and a mistrial was granted.[3] Prior to Ogrod's retrial, prosecutors disclosed that two inmates, John Hall and Jay Wolchansky, were prepared to testify that Ogrod discussed his role in the murder with them in prison.[4] Wolchansky was brought forward at trial and stated that while in prison, Ogrod confessed to killing the victim with a weight bar after the victim refused to engage in oral sex.[5] Without any additional evidence, the jury voted to convict Ogrod and sentenced him to death.[6]

By 2011, Ogrod obtained new evidence proving his innocence.[7] Before his death, John Hall signed an affidavit admitting that he fed information to Wolchansky, who never heard a confession from Ogrod.[8] An affidavit from Hall's widow confirmed this information and admitted that she sent newspaper clippings about the young girl's murder to Hall in prison to assist him in fabricating a confession from

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1. Walter Ogrod *Exonerated After 23 Years on Pennsylvania's Death Row*, DEATH PENALTY INFO. CTR. (June 9, 2020), https://deathpenaltyinfo.org/news/walter-ogrod-freed-after-23-years-on-pennsylvania-death-row. In this instance, the Philadelphia police interrogated Ogrod for fourteen hours straight. *Id.*

2. Rob Warden & John Seasly, Walter Ogrod: Mentally-Disabled Man Gives Confession to Detectives with Tainted Record, Innocence Watch (Nov. 4, 2019), https://www.injusticewatch.org/projects/unrequited-innocence/2019/walter-ogrod-mentally-disabled-man-gives-confession-to-detectives-with-tainted-record/.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

Ogrod.[9] Further, she stated that her husband was handed information in multiple cases by detectives and the district attorney in order to fabricate confessions and testify to them.[10] As Hall's widow said, "[h]e would get some of the truth and he would sit in his cell and make up stories–-and he was darned good at it."[11] After twenty-three years spent on death row because of Hall's actions and Wolchansky's testimony, Ogrod was finally exonerated on June 5, 2020.[12]

Known infamously as "The Monsignor" for his apparent ability to obtain confessions from other inmates, John Hall obtained name recognition in the Philadelphia criminal legal system for his role as a jailhouse informant in high-stakes cases.[13] Throughout the 1980s and 1990s, Hall was a regular informant and witness in homicide cases.[14] When the body of a twenty-one year old girl was found under a bridge, Hall claimed that the victim's boyfriend privately told him that he molested the victim on the bridge and then "karate chopped" her off, leading to the conviction of the boyfriend.[15] Additionally, in 1987, Hall's claims that numerous inmates were planning a prison escape also resulted in convictions across the board.[16] In exchange for his information, Hall was given leniency by the state on his own sentences[17] for theft, portraying himself as a doctor, and child neglect.[18] However, it was not long before Hall's unreliability became too egregious to ignore. For example, in one homicide case, Hall told state officials that two inmates confessed to him and "then tried to bolster his story by planting a necklace in a defendant's prison cell."[19] Instead of refusing to use him as an informant, however, officers simply did not call Hall to testify at trial and allowed Hall to pass information to other inmates, who would testify to hearing the confessions firsthand.[20]

The cases of Walter Ogrod, or John Hall for that matter, are not unique. Since 1974, at least 212 individuals have been wrongfully convicted in part due to jailhouse informant testimony, one of the principal causes of wrongful convictions in the

9. Will Bunch, *Walter Ogrod's 22-Year Fight to Escape Death Row Gains Hope from Krasner*, Documentary, PHILA. INQUIRER (Apr. 5, 2018), https://www.inquirer.com/philly/columnists/will_bunch/walter-ogrod-death-row-stories-hln-larry-krasner-dna-testing-philadelphia-20180405.html.

10. *Id.*

11. *Id.*

12. DEATH PENALTY INFO. CTR., *supra* note 1.

13. Bunch, *supra* note 10.

14. Matt Coughlin, *Convicted Murderer Fights to Clear Name in Girlfriend's Death*, NBC 10 PHILA. (May 31, 2013, 11:24 AM), https://www.nbcphiladelphia.com/news/local/convicted-murderer-fighting-to-clear-name/1983260/.

15. *Id.*

16. Gay Elwell, *Informant Had Lots of Practice Snitch in Ernest Murder Case Warned of Planned Northhampton Prison Break*, MORNING CALL (Dec. 2, 1995, 12:00 AM), https://www.mcall.com/news/mc-xpm-1995-12-02-3060649-story.html.

17. Warden & Seasly, *supra* note 3.

18. Elwell, *supra* note 17. There, Hall was charged with child neglect after his twelve-year-old stepdaughter was left home alone for three months. *Id.*

19. Coughlin, *supra* note 15.

20. *See* Warden & Seasly, *supra* note 3.

United States.[21] In combination, this has resulted in the loss of 3,248 years of freedom for innocent citizens.[22] These wrongful convictions are not confined geographically, either, as they have occurred in at least forty states.[23]

The National Registry of Exonerations defines a jailhouse informant, also referred to as a "snitch,"[24] as "a witness who was in custody with the exonerated defendant and who testified that the defendant confessed to him."[25] Jailhouse informants are distinct from other government informants because they are already incarcerated for a separate crime and live in near proximity to defendants with pending charges. Because they know that prosecutors can and routinely do provide jailhouse informants with assistance in reducing their time in prison, in exchange for providing incriminating information, jailhouse informants have a strong incentive to provide prosecutors with such information without regard for its truth.[26] This incentive, combined with the inability in most cases to corroborate statements made between inmates in a prison cell, makes for "a particularly risky and unreliable category of criminal informant."[27]

The primary issue with jailhouse snitches is that their testimony is inherently unreliable because many snitches are given significant benefits in exchange for providing statements or testimony against a defendant, usually in the form of sentence modifications, dismissals, or favorable pleas by the prosecution.[28] Clarence Zacke, for example, was a jailhouse informant sentenced to 180 years for murder and conspiracy to commit murder.[29] In exchange for testifying that a defendant confessed to raping a victim in another case, Zacke received a reduction on his own sentence to "sixty years or less with good behavior."[30] While sentence modifications offered in exchange for testimony should be encompassed under "The *Brady* Rule,"[31] which requires prosecutors to disclose "materially exculpatory evidence" to the defense,[32] the numerous cases of exonerees reveal a disturbing pattern of prosecutors making prison-time-for-testimony deals in secret and not disclosing them at trial.[33] This, in

21. *Detailed View*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=JI (last visited May 22, 2022) [hereinafter "National Registry Detailed View"].

22. *See id.*

23. *See id.* According to the National Registry of Exonerations, only Arkansas, Delaware, Hawaii, Maine, Montana, Nebraska, New Hampshire, New Mexico, South Dakota, Utah, and Vermont have not yet reported any exonerations stemming originally from jailhouse informant testimony. *Id.*

24. For the purposes of this Note, the terms "informant" and "snitch" will be used interchangeably.

25. Samuel Gross & Kaitlin Jackson, *Snitch Watch*, NAT'L REGISTRY OF EXONERATIONS (May 13, 2015), https://www.law.umich.edu/special/exoneration/Pages/Features.Snitch.Watch.aspx.

26. Alexandra Natapoff, *The Shadowy World of Jailhouse Informants: Explained*, APPEAL (July 16, 2018), https://theappeal.org/the-lab/explainers/the-shadowy-world-of-jailhouse-informants-explained/.

27. *Id.*

28. *Id.*

29. JUST. PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW, 11–12 (2007).

30. *Id.* Ultimately, the defendant was exonerated in 2004, and Zacke was given five additional life sentences after it was discovered that he was raping his adopted daughter. *Id.*

31. *Brady Rule*, LEGAL INFO. INST. (Oct. 2017), https://www.law.cornell.edu/wex/brady_rule.

32. *Id.* (citing Brady v. Maryland, 373 U.S. 83 (1963)).

33. *See* Gross & Jackson, *supra* note 26. For example, in the case of Cameron Todd Willingham, faulty forensic science and jailhouse informant testimony led to the wrongful conviction and eventually the wrongful

turn, prevents defense counsel from presenting evidence of the deals during cross examination and impeaching the trustworthiness of the informants or, at the very least, posing a question on their credibility to the jury.[34] Without a concrete reason to doubt the reliability of the informant's testimony, the jury is at risk of taking the informant at their word and believing that the defendant confessed to the crime in the privacy of a prison cell, thus giving the jury a reason to convict.[35]

Even with these dangers, the vast majority of states have no mechanisms for ensuring the reliability of jailhouse informant testimony prior to them taking the stand.[36] Rather, only a handful of states have passed any type of regulation on the use of jailhouse informants.[37] These legislative reforms range from specifying what information prosecutors must turn over on the informants to the defense, to requiring jury instructions on the reliability of jailhouse informant testimony, to holding a pretrial hearing on the reliability of the informant's testimony.[38] Notably, several states require the jailhouse informant's testimony to be independently corroborated prior to its admission at trial.[39] While some states such as Connecticut have comprehensively enacted all of these reforms into their code,[40] others like Utah have only passed one piece.[41] Although the number of states that have passed legislative reforms is small, they have been enacted within the past fifteen years,[42] which shows a national trend progressing towards reforming jailhouse informant laws. This trend is further supported by the fact that at least one additional state has recently proposed similar legislation, although the bill has not yet officially been passed into law.[43]

Given the loss of life and limb resulting from current regulations, there is a crucial need for legislation restricting the admissibility of jailhouse informant testimony in criminal trials. Further, it is imperative that legislative reforms encompass at least two key provisions: (i) pretrial hearings in which the state bears the burden of proving by clear and convincing evidence that the informant's testimony is both reliable and independently corroborated, and (ii) required disclosures concerning the informant and deals given now or in the future, based off of a statewide record system, with a mechanism for enforcement. This Note seeks to analyze the strengths and weaknesses of various existing state regulations on the admissibility of jailhouse informant

execution of an innocent man in 2004. *Id.* In recent years, the jailhouse informant spoke out and admitted "that his testimony was false and was procured by a secret deal with the prosecutor." *Id.*

34. Innocence Project Staff, *Informing Injustice: The Disturbing Use of Jailhouse Informants*, INNOCENCE PROJECT (Mar. 6, 2019), https://innocenceproject.org/informing-injustice/.

35. Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1390 (2014).

36. Ariel Rothfield, *Kansas Bill Regulating Jailhouse Witness Testimony Unlikely to Become Law This Year*, KSHB (Apr. 16, 2021, 8:41 PM), https://www.kshb.com/news/crime/kansas-bill-regulating-jailhouse-witness-testimony-unlikely-to-become-law-this-year.

37. *Id.*

38. *Id.*

39. *See e.g.,* CAL. PENAL CODE § 111.5 (West 2011); CONN. GEN. STAT. § 19-131 (2019).

40. *See* CONN. GEN. STAT. § 19-131 (2019).

41. SUP. CT. ADVISORY COMM. ON THE MODEL UTAH JURY INSTRUCTIONS–CRIM., JAILHOUSE INFORMANT (Aug. 7, 2013).

42. *See* INNOCENCE PROJECT, *supra* note 35.

43. Rothfield, *supra* note 37.

testimony, including Illinois Law 100-1119[44] and Connecticut Public Act No. 19-131,[45] and to advocate for the adoption of strict jailhouse informant bills across the nation, in order to prevent further wrongful convictions.

Section I of this Note describes the problem and dimensions of wrongful convictions in the United States and abroad. Section II discusses the specific contribution jailhouse informants make to this broader issue and lays out studies of some of the most egregious cases involving jailhouse informants. Section III proposes a solution to the danger of jailhouse informant testimony by advocating for legislative reform. This Section presents a comprehensive description and comparison of current state laws and directives, as well as a recent proposal that is pending in committee. Additionally, it analyzes the various state enactments and evaluates the essential provisions that should be included in nationwide legislative reform. Section IV addresses counterarguments often raised in response to proposed jailhouse informant legislation and explains why those counterarguments are unpersuasive. Section V provides a brief conclusion.

I. THE SCOPE OF WRONGFUL CONVICTIONS

The wrongful conviction of innocent persons has been a problem for decades, although the depth of this problem has only recently come to light, likely in part to increased reforms and technological advances. Between 1989 and 2017, over 2,100 individuals were exonerated in the United States after being wrongfully convicted.[46] This breaks down to "6 exonerations per month for 29 years ([or] 1 every 5 days)."[47] More recently, in 2019 alone, 155 innocent United States citizens were exonerated.[48] One year later, in 2020, 143 wrongful convictions were overturned.[49] In 2021, 142 individuals were exonerated.[50] Taken in combination, these individuals lost thousands of years of their lives in prison for crimes they did not commit.[51]

Not only are these numbers staggering, but they also reflect deep racial disparities in the United States criminal justice system. Of the 2,100 individuals exonerated between 1989 and 2017, "[f]orty-seven percent of these victims of wrongful conviction were African American, even though African Americans make up only 13 percent of the U.S. population."[52] Further, African-Americans staggeringly comprised

44. *See* 725 ILL. COMP. STAT. ANN. 5/115-21 (2019).

45. *See* CONN. GEN. STAT. § 19-131 (2019).

46. DAVID T. JOHNSON, THE CULTURE OF CAPITAL PUNISHMENT IN JAPAN 64 (Bill Hebenton et al. eds., 2020).

47. *Id.*

48. *Exonerations by Year: DNA and Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (last visited May 22, 2022).

49. *Id.*

50. *Id.*

51. Andriana Moskovska, *33 Startling Wrongful Conviction Statistics [2021 Update]*, HIGH CT. (Oct. 13, 2021), https://thehighcourt.co/wrongful-convictions-statistics/. In 2019, the exonerees together spent 1,908 years in prison. *Id. See also 2021 Annual Report*, NAT'L REGISTRY OF EXONERATIONS (Mar. 30, 2021), https://www.law.umich.edu/special/exoneration/Documents/2021AnnualReport.pdf [hereinafter 2021 Exoneration Report]. In 2020, the exonerees spent 1,737 years in prison. *Id.*

52. JOHNSON, *supra* note 47, at 64.

sixty-seven percent of DNA exonerations between those years.[53] The Innocence Project details even more recent data, noting that there have been at least 375 DNA exonerations in the United States since 1989.[54] Of these exonerations, more than sixty-nine percent were African-American, Latinx, Asian American, Native American, or self-identified as "Other."[55] In contrast, the Caucasian demographic made up only thirty-one percent of DNA exonerations,[56] despite Caucasians making up seventy six point three percent of the United States population as of 2019.[57]

While DNA exonerations have allowed the scope of wrongful convictions to be largely revealed, modern scientific advances have not eradicated past wrongful convictions or the present risk, nor fixed the issues of racial inequality in the United States criminal justice system.[58] In addition, even though DNA and forensic technologies have advanced, they may later prove to be faulty or overly subjective, and the cause of numerous wrongful convictions in the United States. [59] Since 1989, one in four exonerees was wrongfully convicted based on faulty forensic evidence, including bite mark analysis, which was considered a legitimate and trustworthy science until recent years.[60]

Moreover, the problem of wrongful convictions is not simply a domestic problem. For example, courts in China "overturned" 1,821 convictions in 2018 and 1,774 convictions in 2019.[61] In western Germany, between the years 1951 and 1964, there were 1,415 wrongful convictions.[62] In Japan, there were 162 wrongful convictions between 1910 and 2010.[63] While this number may seem comparatively low, Japan also boasts, troublingly, "conviction rates higher than ninety-nine percent," that are obtained primarily through "confessions rather than thorough investigations."[64] Russia, too, claims a ninety-nine percent conviction rate, which raises obvious questions about the accuracy of these verdicts.[65] A Moscow Professor of Law explained this rate, saying that "[u]nfortunately a judge in Russia can lose his job for too many acquittals. If there are too many acquittals—not incorrect acquittals, mind you—a

53. Matthew Clarke, *Racism and Wrongful Convictions*, CRIM. LEGAL NEWS (May 15, 2020).

54. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited May 22, 2022).

55. *Id.*

56. *Id.*

57. QUICK FACTS: UNITED STATES, U.S. CENSUS BUREAU (2019), https://www.census.gov/quickfacts/fact/table/US/PST045221.

58. *See DNA Exonerations in the United States*, *supra* note 55.

59. Daniele Selby, *Why Bite Mark Evidence Should Never Be Used in Criminal Trials*, INNOCENCE PROJECT (Apr. 26, 2020), https://innocenceproject.org/what-is-bite-mark-evidence-forensic-science/.

60. *Id.* In 2009, The National Academy of Science released a report that stated that the forensic field of bite mark analysis was subject to "substantial rates of erroneous results." *Id.*

61. Paul Mozur, *He Spent 26 Years in a Chinese Prison. Then He Was Cleared of Murder.*, N.Y. TIMES (Aug. 6, 2020), https://www.nytimes.com/2020/08/06/world/asia/china-inmate-murder-zhang-yuhuan.html.

62. JOHNSON, *supra* note 47, at 66.

63. *Id.* at 67.

64. Carl Schreck, *Russia's 99% Conviction Rate Thrown Into Question*, NAT'L (Feb. 18, 2010), https://www.thenationalnews.com/world/europe/russia-s-99-conviction-rate-thrown-into-question-1.563824.

65. *Id.*

suspicion arises that the judge may be corrupt, and reasons will be found to fire him. This creates fear among judges."[66]

Wrongful convictions are pervasive even in cases involving the ultimate stakes of life and death. In 2016, at least sixty individuals across the globe were exonerated after being wrongfully convicted and sentenced to death.[67] Between 1973 and 2017, 161 individuals in the United States were exonerated after being given a death sentence.[68] Although many modernized countries, like Canada, Italy, the United Kingdom, and France have abolished capital punishment,[69] the United States and other countries who have maintained their death penalty laws can apply it as punishment to severe crimes, for which wrongful convictions are prevalent.[70]

These statistics, while shocking, only account for those cases of innocence that have been proven. Many others who are innocent of the crimes for which they were convicted are still sitting in prison and will never leave. The National Registry of Exonerations 2019 report shares a shocking estimate: "[b]etween 2% and 10% of convicted individuals in US prisons are innocent."[71] Given that over two million individuals are incarcerated in the United States,[72] this estimates that approximately 200,000 incarcerated individuals are actually innocent. While those who face decades in prison may have their lifetime to fight to prove their innocence, those condemned to death do not.

II. THE ROLE OF JAILHOUSE INFORMANTS

Jailhouse informants are a primary cause and contributor to the problem of wrongful convictions.[73] In the United States alone, the use of jailhouse snitch testimony has led to the incarceration of at least 212 innocent individuals.[74] Of the DNA exonerations reported by the Innocence Project, seventeen percent of the cases used the testimony of jailhouse snitches.[75] The use of jailhouse informants has historically been higher in more serious crimes, especially murder.[76] In addition, of the 123

66. *Id.*

67. CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, JUSTICE DENIED: A GLOBAL STUDY OF WRONGFUL DEATH ROW CONVICTIONS, 6 (Jan. 2018), https://files.deathpenaltyinfo.org/legacy/files/pdf/innocenceclinicreport2018R4final.pdf.

68. *Id.*

69. *Countries That Have Abolished the Death Penalty Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976 (last visited May 22, 2022).

70. 2021 Exoneration Report, *supra* note 49. In 2020, there were 129 exonerations. *Id.* Of these, ninety-three were of "violent felonies, including 64 homicides, nine child sex abuse convictions, and four sexual assaults on adults. Six of the homicide exonerees had been sentenced to death." *Id.*

71. Moskovska, *supra* note 52 (citing NAT'L REGISTRY OF EXONERATIONS, 2019 ANNUAL REPORT (Mar. 31, 2020)).

72. *Incarcerated Rates in Selected Countries 2021,* STATISTA (June 2, 2021), https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/. The United States is "home to the largest number of prisoners" in the world. *Id.* When comparing the number of incarcerated individuals to the national U.S. population, this breaks down to "639 prisoners per 100,000 of the national population." *Id.*

73. INNOCENCE PROJECT, *supra* note 35.

74. *See* National Registry Detailed View, *supra* note 22.

75. INNOCENCE PROJECT, *supra* note 35.

76. Gross & Jackson, *supra* note 26.

exonerees who were sentenced to death, twenty-one percent of their cases included jailhouse informant testimony.[77]

The motivation of jailhouse informants contributing to this problem is best explained through the lens of self-interest. First, inmates facing decades in prison have incentives to lie about having important information, such as a confession, from a defendant in order to secure a sentence reduction or modification on their own charges from the courts.[78] As one author explained, "[t]he state is allowed to offer extraordinary benefits to people behind bars if they offer testimony that is favorable to the state's case. These rewards may include reduced sentences, the dismissal of charges and even cash payments."[79] Second, police and prosecutors have the incentive to persuade jailhouse informants to lie about overhearing a confession from the defendant, or at least to suborn their testimony without regard for its accuracy, in order to obtain a conviction.[80] In the most extreme cases, members of law and enforcement and prosecutors have been caught feeding information to snitches, such as giving them police reports, case records, photographs, and "even escorting them to crime scenes so they could better shape their testimony to fit the evidence."[81] Moreover, prosecutors have the incentive not to disclose critical evidence about the informant to the defense, which could lead to a successful cross examination and subsequent acquittal.[82] Prosecutors may be incentivized to engage in this behavior in order to campaign on high conviction rates while running for public office and to appease the public in charge of their re-elections.[83] This is not a broad theory based on the prisoner's dilemma; instead, it is a proven statement that "[i]n many wrongful convictions, defendants were not given key information related to the credibility of the jailhouse informants who testified against them, including the benefits they received, previous cases in which they acted as jailhouse informants, and their criminal history."[84] Lacking this impeachment evidence, the only avenue to refute the informant's testimony is by waiving the defendant's right not to testify and taking the stand, given that the alleged confession occurred during a private conversation.[85]

Regardless of their obvious conflicts of interest, jailhouse informants are extremely effective in persuading jurors to convict.[86] A 2007 study revealed that jurors

77. INNOCENCE PROJECT, *supra* note 35.

78. Gross & Jackson, *supra* note 26.

79. Pamela Colloff & Katie Zavadski, *Convicted Based On Lies*, PROPUBLICA (Mar. 9, 2020), https://features.propublica.org/jailhouse-informant-exonerees/jailhouse-informant-false-testimony-exoneree-portraits/.

80. Covey, *supra* note 36, at 1384–85.

81. Pamela Colloff, *He's a Liar, a Con Artist and a Snitch. His Testimony Could Soon Send a Man to His Death*, PROPUBLICA (Dec. 4, 2019, 5 a.m.), https://www.propublica.org/article/hes-a-liar-a-con-artist-and-a-snitch-his-testimony-could-soon-send-a-man-to-his-death.

82. *Id.*

83. Andrew Novak, *It's Too Dangerous to Elect Prosecutors*, DAILY BEAST (Apr. 14, 2017, 9:50 a.m.), https://www.thedailybeast.com/its-too-dangerous-to-elect-prosecutors.

84. INNOCENCE PROJECT, *supra* note 35.

85. *See* Covey, *supra* note 36, at 1400–03. This, of course, presents further problems for the defense in opening the defendant up for cross examination. *Id.* Moreover, the defendant's denial of the snitch's testimony is unlikely to even be effective with the jury, as "many criminal defendants—especially defendants with a criminal history—go into a jury trial with their own credibility highly suspect and will often be unlikely to come out on top in any swearing contest." *Id.* at 1401–02.

86. *Id*.

faced with a very weak and circumstantial case against a defendant would typically acquit (only twenty-six percent voted to convict), but jurors given the identical case with a jailhouse informant overwhelmingly found the defendant guilty (between sixty-six and seventy-six percent voted to convict).[87] When sampled, the jurors in favor of conviction stated that they were most heavily influenced by the jailhouse informant's testimony.[88] Further, the study found that jurors would convict a defendant at equal rates based on circumstantial evidence and the testimony of a jailhouse informant, even though one group was also told that the informant received a direct benefit in exchange for testifying.[89]

One egregious use of jailhouse informants occurred in the case of Nicholas Yarris in Pennsylvania, who was wrongfully convicted and sentenced to death after jailhouse informant testimony was admitted in his criminal trial.[90] There, the body of a woman who had been stabbed and raped was found in the snow.[91] After a heated encounter with police at a traffic stop, Yarris was brought into the station and became a suspect.[92] Serological testing did not implicate or exclude Yarris, which was presented at his 1982 trial alongside circumstantial evidence, such as the fact that the victim had physical similarities to Yarris' ex-girlfriend.[93] However, the State relied heavily on the testimony of a jailhouse informant who testified that Yarris confessed to committing the crime to him while in a nearby cell.[94] This was sufficient for the jury, who convicted Yarris and sentenced him to death.[95] He remained on death row for over twenty-one years until 2003, when new DNA testing excluded him from the crime; then, Yarris was officially exonerated.[96]

In another case, a man named Harold Hall was convicted in California in 1990 for murder.[97] This conviction was based exclusively on jailhouse informant testimony and a false confession, given after a grueling seventeen hour interrogation without an attorney present or breaks.[98] One jailhouse snitch, who was promised a reduction on his own murder charge, passed handwritten notes to Hall's cell, asking innocent questions.[99] Once Hall passed the notes back with his answers, the snitch would erase the original, innocent questions and inscribe questions about the murder

87. Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, AM. PSYCH.-LAW SOC'Y (2007), https://scholarworks.utep.edu/cgi/viewcontent.cgi?article=1031&context=christian_meissner/.

88. *Id.* at 11.

89. *Id.* at 6.

90. Simon Cole et al., NAT'L REGISTRY OF EXONERATIONS (Jan. 15, 2021), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3771.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Yarris v. Cnty of Del., 465 F.3d 129, 132–33 (3d Cir. 2006).

96. Cole et al., *supra* note 91.

97. Stephanie Denzel, *Harold Hall*, NAT'L REGISTRY OF EXONERATIONS (Aug. 2, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3270.

98. *Id.*

99. Colloff & Zavadski, *supra* note 80.

in their place.[100] These handwritten notes were presented at Hall's trial as proof of Hall's confession.[101] An additional jailhouse snitch testified against Hall in exchange for only "$25 and a pack of cigarettes."[102] In 1995, Hall was granted a new trial due to expert testimony that there was evidence "that the notes had been partly erased," and in 2004, Hall was fully exonerated.[103]

In addition, prosecutors do not always use a jailhouse informants for just one case. Instead, if they find a willing snitch who is successful on the stand, they may use them as an informant in multiple cases.[104] Being a "career" or "serial snitch" can also be a tempting role for individuals facing decades of incarceration.[105] Referred to as "one of the most prolific jailhouse informants in U.S. history,"[106] Paul Skalnik's testimony as a career jailhouse snitch resulted in dozens of prison sentences and four death sentences in Florida.[107] Skalnik began his newfound career in prison in 1983 and after successfully snitching in two cases that resulted in the death penalty, was given the protection of a single cell secure from other inmates.[108] From this cell, Skalnik testified that he heard the confession of James Dailey, who had been charged after a fourteen-year-old girl had been stabbed thirty-one times and left naked in a river to drown.[109] It was a case without DNA, forensic evidence, or a murder weapon.[110] Another man, Jack Pearcy, admitted to driving the victim to her last location and stabbing her once, but originally put the rest of the blame on Dailey in exchange for a life sentence.[111]

Wanting a conviction and death sentence, detectives began questioning Dailey's neighboring inmates and even provided them with newspaper clippings that detailed the crime, but they all denied Dailey giving a confession until Skalnik came forward.[112] Even though Pearcy refused to testify, Skalnik's story at trial was enough for the jury, who sentenced Dailey to death.[113] Prior to testifying, Skalnik had been charged with grand theft—a charge worth twenty years—but five days after Dailey's conviction, Skalnik was released from prison.[114] When asked by the prosecutor at Dailey's trial, Skalnik told the jury that "he had not been promised anything in return for his testimony."[115] Over the years, Skalnik's role as a career snitch earned him

100. *Id.*
101. *Id.*
102. *Id.*
103. Denzel, *supra*, note 98.
104. Colloff, *supra* note 82.
105. *Id.*
106. *Id.*
107. Daniele Selby, *This Man's Lies Sent 4 People to Death Row and Dozens to Prison—Here's What You Need to Know*, INNOCENCE PROJECT (Dec. 16, 2019), https://innocenceproject.org/jailhouse-informant-nytimes-paul-skalnik/.
108. Colloff, *supra* note 82.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

plea deals, probation, and release to work for multiple crimes.[116] In just six years, Skalnik worked as a jailhouse snitch in thirty-seven cases, eighteen of which involved murder charges.[117]

Skalnik's legacy remains intact. On September 23, 2021, the Florida Supreme Court denied a post-conviction motion for James Dailey, even though Pearcy gave an affidavit that "he alone had committed the murder" and attorneys produced evidence that Skalnik lied on the stand during the original trial about his criminal history.[118] To this day, Dailey remains on death row.[119]

III. HOW TO ADDRESS THE PROBLEM OF JAILHOUSE SNITCHES

Some readers may be wondering why the problem of jailhouse informants is still relevant, given that it has already been addressed by the Supreme Court in *Brady v. Maryland*.[120] There, the Court held that if the finder of fact knows that an informant has been given a benefit in exchange for testifying, they can factor that into their determination of credibility and whether to believe the claim over the defendant's presumption of innocence. After all, "[d]isclosure of impeachment evidence is constitutionally required under *Brady v. Maryland*—if it is material."[121] Although what qualifies as "material" has been a subject of discussion, the Supreme Court elaborated in *Giglio v. United States* that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this [Brady] rule."[122]

However, prosecutors continued to defy their *Brady* and *Giglio* obligations after these Supreme Court rulings in pursuit of convictions. One such defiance occurred in the case of Ellen Reasonover, a woman in Missouri who was convicted in 1983 of robbing a gas station and killing an attendant.[123] The State's case was weak, as there was no murder weapon, no fingerprints were found at the scene, no witnesses could testify to Reasonover's presence at the gas station, and worst of all, the cash register showed that no money was stolen.[124] According to *The Washington Post*, "[t]he jury relied almost entirely on the testimony of two inmates, Rose Jolliff and Mary Ellen Lyner, both of whom testified that Reasonover confessed to them."[125]

116. *Id.*

117. *Id.*

118. *Florida Supreme Court Denies Challenge to Death-Row Prisoner James Dailey's Conviction, Finds Evidence of Innocence 'Immaterial' or 'Inadmissible,'* DEATH PENALTY INFO. CTR. (Oct. 5, 2021), https://deathpenaltyinfo.org/news/florida-supreme-court-denies-challenge-to-death-row-prisoner-james-daileys-conviction-finds-evidence-of-innocence-immaterial-or-inadmissible#:~:text=Calling%20his%20evidence%20of%20innocence,murder%20of%20a%20teenage%20girl.

119. *Id.*

120. 373 U.S. 83 (1963).

121. Paul C. Giannelli, Brady *and Jailhouse Snitches*, 57 CASE W. RSRV. L. REV. 593, 599 (2007) (discussing how modern prosecutors apply *Brady* in disclosing information on jailhouse informants).

122. *Id.* (quoting Giglio v. United States, 405 U.S. 150, 154–55 (1972)).

123. Athelia Knight, *1983 Murder Conviction Overturned*, WASH. POST (1999), at A-2; *see also* INNOCENCE PROJECT, *supra* note 35.

124. Knight, *supra* note 124.

125. *Id.*

Prosecutors made deals with the jailhouse informants to reduce their sentences; however, these deals, along with the informants' extensive history of breaking the law, were not disclosed to the jury.[126] Because of the admission of the jailhouse informants' testimony, Reasonover was sentenced to fifty years without parole.[127] In 1999, Reasonover was exonerated after two taped conversations were uncovered.[128] The first was a phone call between Reasonover and one of the jailhouse snitches after the alleged confession took place, in which Reasonover maintained her innocence.[129] The second was a recording in prison between Reasonover and her boyfriend where again, they maintained their innocence of the crime.[130] Although the police had possession of these tapes prior to the original trial, and they certainly constituted impeachment evidence under *Brady* and *Giglio*, the tapes were not disclosed to the defense.[131] Reasonover served seventeen years in prison for a crime she did not commit based exclusively off of the testimony of the jailhouse snitches and the prosecution's failure to disclose required impeachment evidence.[132]

In 2004, the Supreme Court heard another case on the application of *Brady,* this time regarding the use of paid informant testimony at trial.[133] There, the testimony of two informants conveyed that the defendant confessed to "kill[ing a] white boy," obtained a gun to commit robberies, and stated that he would "take care of" any trouble.[134] The subsequent conviction resulted in a death sentence.[135] However, the State failed to disclose that both witnesses were informants whose testimony was prepared by the State, that one witness was paid $200 to cooperate, and the other witness was threatened with life in prison if he did not testify.[136] In its decision, the Court quoted *Brady*, explaining that under the due process clause of the Federal Constitution's Fourteenth Amendment, "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."[137] Applying this standard, the Court found that the nondisclosure of the status and incentives of the informants "qualifi[ed] as evidence advantageous" to the accused and "[was] 'material' for *Brady* purposes."[138] In this way, the Court clarified that state officials must disclose any benefits to the defense that are given to informants in exchange for their testimony.[139]

While *Banks* may imply that defendants have been given adequate protections against the dangers of jailhouse informant testimony, reality paints a different and far

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *See* Banks v. Dretke, 540 U.S. 668 (2004).
134. *Id.* at 668.
135. *Id.* at 669.
136. *Id*.
137. *Id.* at 691.
138. *Id.* at 671–72.
139. *Id.*

more troubling picture. Even though prosecutors are explicitly and constitutionally required to disclose material impeachment evidence regarding jailhouse informants,[140] they often choose not to do so in practice. In 2020, the Orange County District Attorney's Office released a report detailing the failure of prosecutors to fulfill their obligations when using jailhouse informants in court.[141] The fifty-seven page report detailed how prosecutors in the Scott Dekraai mass shooting case used a career jailhouse snitch, but "failed to disclose to Dekraai's defense team the full history of the veteran informant in a timely manner, as required by law."[142] These *Brady* failures caused the court to extend a plea deal to Dekraai, allowing him to avoid the otherwise expected death sentence.[143] In addition, the report noted that the "prosecutors, sheriff's deputies and police had for years systemically used jailhouse informants to coax confessions out of inmates who had lawyers. That is a violation of the federal right-to-counsel law . . . . The investigation concludes the malpractice warrants severe internal discipline . . . ."[144] However, these prosecutors were allowed to step down from their position and form their own private firm and were never pursued by the state Attorney General.[145] Similarly, the Fair Punishment Project published a report in 2017 on the "Epidemic of Brady violations" across the nation.[146] The report noted that since 2015, New Orleans exonerated thirty-six individuals who were wrongfully convicted due to prosecutorial misconduct and *Brady* violations.[147] Nine of these exonerees served time on death row.[148] One individual, Cameron Todd Willingham, was convicted for the death of his children based on faulty arson science and a jailhouse informant.[149] In 2004, Willingham was executed by the state.[150] Recently, evidence emerged that the prosecutor in his case gave benefits to the jailhouse snitch in exchange for testimony.[151] This evidence was never disclosed to Willingham's defense team.[152]

If prosecutors cannot be trusted to uphold the constitutional rights of defendants, it is near impossible to believe that they would take the initiative on considering factors other than the quickest route to a conviction. Disclosing evidence of deals made with jailhouse informants for testimony is a bare constitutional minimum under

140. *See id.*

141. Tony Saavedra, *Prosecutors in Orange County Snitch Scandal Were Intentionally Negligent, DA Probe Concludes*, ORANGE CNTY. REG. (July 20, 2020, 11:59 AM), https://www.ocregister.com/2020/07/20/prosecutors-in-orange-county-snitch-scandal-were-intentionally-negligent-da-probe-concludes/.

142. *Id.*

143. *Id.*

144. *Id.* The report finishes by concluding that prosecutors "obfuscated and failed to accept responsibility for their lapses, trampled defendant rights and denied the full imposition of justice for victims and families." *Id.* It also noted that five other criminal cases were exposed by the informant scandal. *Id.*

145. *Id.*

146. Christopher Zoukis, *The Fair Punishment Project Details an "Epidemic of Brady Violations*," HUM. RTS, DEF. CTR. (Jan. 19, 2018), https://www.criminallegalnews.org/news/2018/jan/19/fair-punishment-project-details-epidemic-brady-violations/.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

Brady,[153] and the previously discussed cases prove that many prosecutors completely disregard their affirmative obligation. Considering this, it is not realistic to believe that prosecutors will take the time to evaluate the reliability of informant testimony before putting a snitch on the stand. Further, it is just as unlikely that prosecutors will share details of the circumstances under which the alleged confession occurred with the defense or choose to only introduce informant testimony that is independently corroborated.

In light of the lack of a constitutional framework in practice that adequately guards against the introduction of false jailhouse informant testimony, several states over the past fifteen years have passed legislation to provide additional safeguards.[154] One such state is Connecticut, which codified its regulations in Public Act No. 19-131 and that went into effect on October 1, 2019.[155] In this law, upon a motion of the defendant, the state must disclose if it intends to use a jailhouse informant at trial.[156] In addition, the state must provide the defendant with "[t]he complete criminal history of any such jailhouse witness," any promises for benefits that has been offered or given or that the state "may offer in the future," information about statements between the informant and the defendant and the informant relaying such information to the state, all information about "any time the jailhouse witness recanted any testimony subject to the disclosure," and the history of the inmate's role as an informant.[157] While outlining these specific disclosures, the law also adds that the state must provide this information to the defense "not later than forty-five days after the filing of the motion."[158] Additionally, at the request of the defendant prior to trial, Connecticut courts must hold a pretrial hearing to "determine whether any jailhouse witness's testimony is reliable and admissible."[159] The burden to show that the testimony is reliable and should be admitted falls on the state.[160] Factors that the courts consider in determining reliability are outlined as follows:

> (1) The extent to which the jailhouse witness's testimony is confirmed by other evidence; (2) The specificity of the testimony; (3) The extent to which the testimony contains details known only by the perpetrator of the alleged offense; (4) The extent to which the details of the testimony could be obtained from a source other than the defendant; and (5) The circumstances under which the jailhouse witness initially provided information supporting such testimony to a sworn member of a municipal police department, a sworn member of the Division of State Police within the Department of Emergency Services and Public Protection or a prosecutorial

153. *See* Brady v. Maryland, 373 U.S. 83 (1963).
154. *See* INNOCENCE PROJECT, *supra* note 35.
155. CONN. GEN. STAT. § 19-131(1) (2019).
156. *Id.*
157. *Id.* §§ 19-131(1)(a)(1)–(5).
158. *Id.* § 19-131(1)(a).
159. *Id.* § 19-131(2)(a).
160. *Id.* § 19-131(2)(b).

official, including whether the jailhouse witness was responding to a leading question.[161]

Finally, the legislation requires that the State create a records system to track which cases jailhouse informants testify in and what deals they are given.[162] This information is required to be sent to the "Criminal Justice Policy and Planning Division within the Office of Policy and Management" to be maintained across the state.[163]

Another state that has regulated the use of jailhouse informants through legislation is Illinois, which passed Public Act 100-1119 to go into effect on January 1, 2019.[164] There, the law requires that the State automatically disclose to the defense if they plan on calling a jailhouse informant to speak at trial.[165] Additionally, the law requires the disclosure of "[t]he complete criminal history of the informant;" any promises for benefits that have been offered or given or that the state "will make in the future;" information about statements which the informant made to the state; all information about "any time the informant recanted that testimony or statement;" the history of the inmate's role as an informant, and "any other information relevant to the informant's credibility."[166] While outlining these specific disclosures, the law adds that the State must provide this information to the defense "at least 30 days prior to a relevant evidentiary hearing or trial."[167] Illinois also includes a provision for the automatic hosting of a pretrial hearing "to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing."[168] Similar to Connecticut, the burden is on the State to show that the jailhouse informant's testimony is reliable at the pretrial hearing.[169] However, unlike Connecticut, Illinois does not provide new factors to consider at the pretrial hearing; rather, it instructs the court to consider the required disclosures, as well as "any other factors relating to reliability."[170]

Although it is currently pending in the Senate Judiciary Committee, Kansas recently proposed House Bill No. 2366 to regulate the admissibility of jailhouse informant testimony at trial.[171] This bill is distinct from the Illinois and Connecticut laws in that its strictest requirements only apply to cases of murder and rape.[172] That said, in any case, the State is required to automatically disclose its plan to use a jailhouse informant at trial to the defense, as well as "[t]he criminal history of the jailhouse witness;" any promises for benefits that has been offered or given or that "will

161. *Id.* §§ 19-131(2)(a)(1)–(5).
162. *Id.* §§ 19-131(3)(a)(1)–(2).
163. *Id.* § 19-131(3)(b).
164. *See* 725 ILL. COMP. STAT. 5/115-21 (2019).
165. *Id.* 5/115-21(b)–(c).
166. *Id.* 5/115-21(c)(1)–(7).
167. *Id.* 5/115-21(c).
168. *Id.* 5/115-21(d).
169. *Id.*
170. *Id.*
171. *See* H.B. NO. 2366, 2021 Leg. (Kan. 2021).
172. *Id.* (1)(b)(1).

be provided in the future;" information about statements between the informant and the defendant and the informant relaying such information to the state; all information "regarding the jailhouse witness recanting testimony or statements;" and the history of the inmate's role as an informant.[173] Additionally, in cases of murder or rape and at the request of the defendant, Kansas courts must hold pretrial hearings to "determine whether the jailhouse witness's testimony exhibits reliability and is admissible."[174] In this determination, the courts consider factors including "[t]he extent to which the jailhouse witness's testimony is confirmed by other evidence."[175] As in the previous cases, the burden is on the state to prove reliability "by a preponderance of the evidence."[176] Although an identical bill died in committee in May 2020,[177] this session's bill passed the House chamber with bipartisan support and without a single "nay" vote.[178]

Rules of the admissibility of jailhouse informant testimony in other states is varying. In November 2020, the Attorney General of New Jersey promulgated a directive that prosecutors cannot introduce a jailhouse informant at trial without the approval of the County Prosecutor, and notes that this approval can only be given if "independent, credible evidence corroborating the informant's testimony" exists.[179] This directive also discusses specific disclosures that prosecutors must automatically give to the defense.[180] Current California[181] and Texas[182] laws also require independent corroboration, and a proposed bill in Washington in 2016 did the same.[183] Other states, like Nebraska,[184] list specific disclosure requirements and record requirements, but have not codified provisions relating to pretrial hearings. Still other states, like Indiana,[185] have no legislative provisions related to the admissibility of jailhouse informants.

Further, although this Note focuses on the regulation by states on the admissibility of jailhouse testimony, there is also a need for federal legislative reform. As noted by the National Registry of Exonerations, jailhouse informants "are much more likely to testify in federal than in state cases."[186] Unlike state exonerations, which show a pattern of jailhouse informants being used in more serious cases involving murder

173. *Id.* (1)(a)(1)(A)–(E).

174. *Id.* (1)(b)(1).

175. *Id.* (1)(b)(1)(A).

176. *Id.* (1)(b)(2).

177. *See H.B. No. 2544, Bill. Hist.*, KAN. 2019–2020 LEGIS. SESSIONS, http://www.kslegislature.org/li_2020/b2019_20/measures/hb2544/ (last visited May 22, 2022).

178. *See* KAN. H.B. NO. 2366, Hist. (last visited May 22, 2022).

179. Directive 2020-11 from Gurbir S. Grewal, N.J. Att'y Gen., to Cnty. Prosecutors (Oct. 9, 2020), https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2020-11_Jailhouse-Informants.pdf [hereinafter N.J. Law Enforcement Directive].

180. *Id.*

181. CAL. PENAL CODE § 1111.5 (West 2019).

182. TEX. CODE CRIM. PROC. ANN. art. 38.075 (West 2017).

183. H.B. 2654, 62d. Leg., Reg. Sess. (Wash. 2012).

184. NEB. REV. STAT. §29-4704 (2019).

185. *Fighting Against In-Custody Witnesses, Flipping Co-Defendants, and Jailhouse Snitches*, BANKS & BROWER LLC (Oct. 3, 2019), https://banksbrower.com/2019/10/03/fighting-against-in-custody-witnesses-flipping-co-defendants-and-jailhouse-snitches/.

186. Gross & Jackson, *supra* note 26.

and the death penalty, statistics from federal exonerations suggest a pattern of jailhouse informants also being used in less serious crimes, such as drug prosecutions.[187] In 2006, Ann Colomb and her sons were convicted of crack cocaine distribution and purchasing over fifteen million dollars-worth of cocaine after thirty jailhouse informants testified against them.[188] While the family sat in prison with sentences ranging from a minimum of ten years to a maximum of life imprisonment, the "for-profit snitching ring" in which informants could pay for information about the federal case was exposed after an inmate paid over two thousand dollars for the case file, did not receive it, and wrote a letter to his prosecutor that led to an investigation being called by the judge.[189] However, even with the additional use of jailhouse informants in less serious crimes, Congress has failed to pass any legislation that governs the admissibility of jailhouse informant testimony in federal courts.

Instead, some federal courts have created a low level of regulation on the use of jailhouse informants in criminal proceedings by implementing a requirement of jury instructions "regarding the special unreliability of compensated criminal witnesses."[190] In the standard jury instructions on this issue, juries are told to weigh the credibility and interest of the informant by weighing the following factors:

> (1) [W]hether the witness has received or hopes to receive anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) the extent to which the informant's testimony is corroborated by other evidence; (3) the extent to which the details of the testimony could be obtained from a source other than the defendant; (4) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (5) whether the informant has ever changed his or her testimony; (6) the criminal history of the informant; and (7) any other evidence relevant to the informant's credibility.[191]

While these factors are thorough and important to consider in determining whether the informant's testimony is credible and reliable—especially independent corroboration as described in the second factor—the jury instructions leave too much room for error by giving this power of consideration to the jury. Instead, fabricated testimony by jailhouse informants would be better prevented if the above factors were considered by the court in a pretrial hearing and unsatisfactory testimony not admitted into trial.

187. *Id.* ("About 10% of federal exonerations in non-murder cases included jailhouse informant testimony (8/81), compared to 1% of non-murder exonerations in state courts (9/819)").

188. Natapoff, *supra* note 27.

189. *Id.* U.S. District Judge Tucker Melacon stated, "The problem wasn't just this case. We potentially have a huge problem with this network in the federal prison system." *Id.*

190. *Id*.

191. *Id.*

The strongest existing state provisions on regulating jailhouse informant testimony relate to (i) robust pretrial hearings where specific enumerated factors are considered by the court prior to admitting the jailhouse informant testimony; and (ii) required disclosures regarding any benefits that have been or may be provided in exchange for the testimony. Pretrial hearings are a critical protection in jailhouse informant legislation because they prevent unreliable testimony from ever entering the trial. This, in turn, takes the burden off of the defendant to waive his or her constitutional right to remain silent and defend themselves from the claim in front of a fact finder. Reforms from Connecticut,[192] Washington,[193] Illinois,[194] and Kansas[195] all contain provisions to hold pretrial hearings on the reliability of the informant testimony. Unfortunately, Connecticut[196] and Kansas[197] place the burden on the defendant to request the pretrial hearing; only Illinois requires its courts to automatically schedule the hearing when the state announces its intent to call an informant.[198] At these pretrial hearings, it is imperative that the state hold the burden of showing reliability, rather than the defendant bearing the burden of proving the opposite. Additionally, Illinois[199] and Connecticut[200] both note that the prosecution must show reliability by a preponderance of the evidence, or it will not be admitted at trial.

Relatedly, the most effective type of pretrial hearing is one in which the court considers codified factors inclusive of independent corroboration of the informant's story. Requiring independent corroboration of the informant's testimony is crucial because, without verifying evidence, the testimony is barred from entering the trial. In effect, this prevents instances where a self-motivated informant's testimony, either through fed information or a fabricated story, is the only evidence putting an innocent person behind bars. Further, this diminishes any incentive or avenue for a prosecutor to pursue a conviction by suborning perjury from a jailhouse informant. Reforms from Connecticut,[201] Washington,[202] and Kansas[203] require their courts to consider independent corroboration in the pretrial hearing. In contrast, because the Attorney General only has power over prosecutors, the New Jersey directive cannot force the hand of the courts and therefore, there is no provision for pretrial reliability hearings.[204] In Illinois, unlike Connecticut and Kansas, courts are instructed to consider

192. *See* CONN. GEN. STAT. § 19-131(2) (2019).

193. H.B. 2654(3), 64th Leg., 2016 Reg. Sess. (Wash. 2016).

194. 725 ILL. COMP. STAT. 5/115-21(d) (2019).

195. H.B. 2366(1)(b)(1), 2021 Leg., Reg. Sess. (Kan. 2021). However, this bill only applies in criminal rape or murder cases.

196. CONN. GEN. STAT. § 19-131(1)(a) (2019).

197. H.B. 2366(1)(b)(1), 2021 Leg., Reg. Sess. (Kan. 2021).

198. 725 ILL. COMP. STAT. 5/115-21(d) (2019).

199. *Id.*

200. CONN. GEN. STAT. § 19-131(2)(b) (2019).

201. *Id.* § 19-131(2)(a)(1).

202. H.B. 2654(3)(1)(i), 64th Leg., 2016 Reg. Sess. (Wash. 2016).

203. H.B. 2366(b)(1)(A), 2021 Leg., Reg. Sess. (Kan. 2021).

204. *See* N.J. Law Enforcement Directive, *supra* note 180. Without these hearings to block unreliable testimony from entering trial, this directive provides less protections than the other pieces of legislation discussed. That said, the New Jersey Law Enforcement Directive has some strength in its ability to condition approval for prosecutors to use jailhouse informants on the independent corroboration of the informant testimony. Additionally, because prosecutors in New Jersey are not allowed to move forward in cases involving jailhouse

the required disclosure factors, as well as "any other factors relating to reliability," during these hearings.[205] However, independent corroboration is not a required factor.[206] Although the previously quoted provision serves essentially as a blanket statement, its breadth also gives courts the discretion to not consider important factors, such as the independent corroboration of the informant's story.

The second robust protection is codifying specific, mandatory disclosures about the informant that the state must provide to the defense, including the informant's criminal history, past testimony as an informant, and benefits offered in exchange for testifying. Connecticut,[207] Illinois,[208] Kansas,[209] Nebraska,[210] and New Jersey[211] all include provisions on required disclosures in their reforms. Although technically this information should already be disclosed under *Brady*,[212] history shows a chilling pattern of prosecutors openly circumventing their obligations.[213] However, by codifying specifically which disclosures are required, prosecutors may be less inclined to break state law and may be more easily held accountable if they do. Nebraska's statute, for example, grants discretion to the court to sanction non-complying prosecutors by ordering the disclosure of withheld materials, granting a continuance, denying the admission of undisclosed evidence or witnesses, or acting within a blanket statement to "[e]nter such other order as it deems just under the circumstances."[214] Additionally, these disclosures aid the defense in establishing that the informant's story is false on cross examination or during a pretrial hearing.

One noteworthy provision which is tied to required disclosures and should be included in any legislative reform is the affirmative obligation to report any benefits or deals that may be given to the informant "in the future." Kansas,[215] Nebraska,[216] New Jersey,[217] Connecticut,[218] and Illinois[219] include this obligation in their respective bills, while Washington proposed its required consideration by the court during the pretrial hearing.[220] This provision is critical to block the loophole in which a prosecutor could seek to circumvent their responsibilities by implying before trial that favorable treatment would be given in exchange for incriminating testimony, but

informants without approval from the County Prosecutor, the likelihood that they will engage in misconduct or knowingly suborn unreliable testimony at trial is lessened.

205. 725 ILL. COMP. STAT. 5/115-21(c)(7) (2019). This is a weakness in the Illinois law and could lead to innocent persons being locked up solely on the testimony of informants that is not corroborated by any other evidence.

206. *See id.*

207. CONN. GEN. STAT. § 19–131(1)(a)(1–5) (2019).

208. 725 ILL. COMP. STAT. 5/115-2(c)(1–7) (2019).

209. H.B. 2366(1)(a)(1)(A–E), 2021 Leg., Reg. Sess. (Kan. 2021).

210. NEB. REV. STAT. §29-1912(1)(a–e) (2019).

211. N.J. Law Enforcement Directive, *supra* note 180.

212. Giannelli, *supra* note 122, at 599 (citing Brady v. Maryland, 373 U.S. 83 (1963)).

213. *See, e.g.,* Saavedra, *supra* note 142; Zoukis, *supra* note 147.

214. NEB. REV. STAT. §29-1919(4) (2019).

215. H.B. 2366(1)(a)(1)(B), 2021 Leg., Reg. Sess. (Kan. 2021).

216. NEB. REV. STAT. §29-1912(1)(h) (2014).

217. N.J. Law Enforcement Directive, *supra* note 180.

218. CONN. GEN. STAT. § 19-131(1)(a)(2) (2019).

219. 725 ILL. COMP. STAT. 5/115-21(c)(2) (2019).

220. H.B. 2654(3)(1)(b), 64th Leg., 2016 Reg. Sess. (Wash. 2016).

not providing the favorable treatment until the trial is over. By implying to informants that helpful testimony could result in benefits in the future, prosecutors can take the position that they did not need to disclose the suggestion of a future benefit, as it did not constitute a deal or promise. Requiring any future favorable treatment to be disclosed prior to trial would resolve this issue and provide a potential avenue for appellate or post-conviction relief in cases in which the prosecution sought to circumvent their obligations.

In addition to future benefits, a necessary precursor to prosecutorial transparency and full compliance with the required disclosures is maintaining statewide recording systems that track which cases informants have testified in, what benefits or deals they were offered, and any benefits given subsequent to the conclusion of trial. Oklahoma,[221] New Jersey,[222] Nebraska,[223] Kansas,[224] and Connecticut[225] all include reforms to require that the state maintain records of jailhouse informants. Without these record systems, it is unlikely that even good faith efforts to comply with the required disclosures would be adequate, as jailhouse informants may obtain agreements with different prosecutors' offices and testify in various jurisdictions within the state. While these record systems are necessary, they are not sufficient protections on their own.[226]

Although each state listed above is certainly more progressive than the rest of the nation in their codification or possession of *any* provision limiting the automatic admission of jailhouse informant testimony, Connecticut and Illinois currently lead the nation's reforms. With its provision on pretrial hearings containing required consideration of independent corroboration and list of specific, required disclosures about the informant that the state must provide to the defense, Connecticut's 2019 statute is a step above those in other states by its quantity and quality of protections

221. Dale Chappell, *Oklahoma Enacts Jailhouse Informant Law, Joins Other States,* CRIM. LEGAL NEWS (July 15, 2020), https://www.criminallegalnews.org/news/2020/jul/15/oklahoma-enacts-jailhouse-informant-law-joins-other-states/.

222. N.J. Law Enforcement Directive, *supra* note 180.

223. NEB. REV. STAT. §29-1912 (2019).

224. H.B. NO. 2366(2), 2021 Leg., Reg. Sess. (Kan. 2021).

225. CONN. GEN. STAT. § 19–131(3)(a) (2019).

226. An additional provision which exists, albeit less commonly, in jailhouse reform legislation is for the safety of the jailhouse informants themselves. Being labeled a snitch in prison can lead to physical beatings, shank stabbings, or even death by the hands of another inmate. Mark Abadi, *7 regular people who went to jail undercover for 2 months learned how dangerous it can be to break the most important rule of life behind bars*, INSIDER (Feb. 7, 2019), https://www.insider.com/60-days-in-undercover-inmates-snitching-in-jail-2019-2. If identifying information of those who testify is easily found in the public domain, then actual informants who could provide legitimate information on a case may be too afraid to step forward. While witness protection is important and should be included, it is not contrary or mutually exclusive to the idea of protecting defendants against wrongful convictions. In fact, it has been addressed by states such as Connecticut, Kansas, and Nebraska in their acts of legislative reform. CONN. GEN. STAT. § 19-131(1)(c) (2019); H.B. 2366(1)(a)(3), 2021 Leg., Reg. Sess. (Kan. 2021); NEB. REV. STAT. §29-1912(4) (2019). For example—although as of April 2022 the Kansas bill is pending in the Senate Judiciary Committee—the Kansas bill contains the following provision in connection with the specific disclosures required by the State:

(3) If the court finds that disclosing the information described in paragraph (1) is likely to cause bodily harm to the jailhouse witness, the court may: (A) Order that such evidence be viewed only by the defense counsel and not by the defendant or others, or (B) Issue a protective order. H.B. NO. 2366(1)(a)(3), 2021 Leg., Reg. Sess. (Kan. 2021).

offered.[227] However, one drawback to the Connecticut statute is that the burden is placed on the defendant to ask for the listed disclosures and for a pretrial hearing.[228]

The 2019 Illinois Public Act stands second to Connecticut's statute for listing required disclosures, including promises or benefits that "will be made in the future,"[229] and automatically requiring courts to hold pretrial hearings on the admission and reliability of the jailhouse informant's testimony.[230] Although Illinois places the burden on the state rather than the defendant,[231] the lack of consideration factors and the requirement of independent corroboration places Illinois behind Connecticut on having the strongest law on the admissibility of jailhouse informant testimony. If the Illinois statute was amended to list additional factors for the courts to consider during the pretrial hearings, especially independent corroboration, the law would be stronger, potentially more so than Connecticut. This is particularly important because Illinois was the state with the highest number of exonerations in 2019.[232]

Some have suggested that these reforms have not gone far enough. For example, Professor Russell Covey at Georgia State University has argued that because of the various incentives and conflict of interests involving jailhouse informants, jailhouse informants' testimony will always be inherently unreliable; thus, their use in criminal prosecutions should be banned altogether.[233] There is some merit to Covey's idea, as the above-discussed reforms can at best mitigate the problem of unreliability of jailhouse informants, not cure it entirely. However meritorious his proposal may be, though, it is very unlikely to come to fruition, at least in the near term. Given that only a handful of states have passed any lesser regulations on jailhouse informant testimony,[234] it is unrealistic to expect that any state would go so far as an outright ban. As even Professor Covey recognized, his proposal is "perhaps a radical suggestion."[235]

Others have suggested capping the monetary benefits and/or sentence reductions that jailhouse informants can receive, while still others have proposed a total ban on such incentives or deals.[236] Such proposals could help correct the misalignment of incentives that underlies the problem of jailhouse informants by minimizing or removing entirely the incentive to come forward with information without regard for its truth.[237] Put otherwise, a jailhouse informant would be less likely to testify falsely at a criminal trial if the potential benefits of doing so were less significant or

227. CONN. GEN. STAT. § 19–131(1–2) (2019).

228. *Id.* § 19–131(2)(a)).

229. 725 ILL. COMP. STAT. 5/115–21(c) (2019).

230. *Id.* 5/115–21(d).

231. *Id.*

232. Daniele Selby, *These 8 States Had the Most Exonerations in 2019*, INNOCENCE PROJECT (Apr. 2, 2020), https://innocenceproject.org/these-8-states-had-the-most-exonerations-in-2019/.

233. Covey, *supra* note 36, at 1429. "[I]t is increasingly clear that nothing less than a total ban can protect innocent criminal defendants from the substantial risk of wrongful conviction as a result of the use, and abuse, of jailhouse snitch testimony." *Id.* at 1422.

234. Rothfield, *supra* note 37.

235. Covey, *supra* note 36, at 1422.

236. Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 367 (2006).

237. *Id.* at 368.

nonexistent. Although such proposals are more moderate than Professor Covey's, they would still almost certainly lack political support at this time. Further, unless paired with robust disclosure requirements and a method for enforcing those requirements, such proposals could have the opposite of their intended effect by motivating prosecutors to conceal arrangements with jailhouse informants.

Although grand proposals to bar jailhouse informant testimony outright or bar incentives are unlikely to garner sufficient political support, more limited reforms that still go beyond those passed across the country may be more realistic. First, states should expand the scope of independent corroboration to require consideration of whether corroborating evidence shows that an incriminating statement was in fact made. Currently, many states do not define independent corroboration in their statutes.[238] Instead, snitches are able to testify successfully by providing details matching the crime itself or the crime scene.[239] However, this is not an effective measure of reliability because jailhouse informants can be easily fed information about the crime by detectives or prosecutors. Additionally, snitches may find information on their own from newspapers, television programs, or accessing the Internet at prison, which gives them the necessary material to fabricate a confession by the defendant.[240]

To prevent this, the corroboration requirement of jailhouse informant legislation should be expanded to require courts to consider not just whether other evidence corroborates the statement, but also whether corroborating evidence shows that the statement was actually made by the defendant to the jailhouse informant. One of the critical underlying problems with jailhouse informant testimony is that there are very few ways to dispute false testimony by a jailhouse informant, and the most common way forces a criminal defendant to waive his right against self-incrimination.[241] Requiring courts to consider whether any evidence corroborates the jailhouse informant's claim that a defendant made an incriminating statement would help distinguish between cases where a jailhouse informant fabricated a statement and those where the incriminating statement was in fact made.

The method of proof of such corroboration need not be restricted. Police and prosecutors cannot, of course, constitutionally record conversations between wired jailhouse informants and criminal defendants in the absence of their counsel.[242] But other forms of direct or indirect corroboration could include, for example: (1) testimony of other inmates who heard the conversation; (2) testimony of prison guards who heard the conversation; (3) prison video footage of the defendant and the jailhouse informant regularly conversing; (4) prison records showing that the jailhouse informant was housed with the criminal defendant at the time in question and for a significant time beforehand, such that it is more likely that they shared a genuine, transparent relationship. Although conclusive evidence that a statement was made

238. *See* CONN. GEN. STAT. § 19–131(2)(1) (2019); H.B. 2654(3)(1)(i), 64th Leg., 2016 Reg. Sess. (Wash. 2016); H.B. 2366(1)(b)(1)(A), 2021 Leg., Reg. Sess. (Kan. 2021).

239. Covey, *supra* note 36, at 1383.

240. *Id.* at 1380–81.

241. *See id.* at 1400–03.

242. *See generally* Massiah v. United States, 377 U.S. 201 (1964).

may rarely exist, the absence of such evidence would not be fatal to the admission of jailhouse informant testimony; rather, this absence would simply be a factor that weighs against evidence's admissibility. This thumb on the scale would be appropriate in light of the inherent unreliability of such testimony and the evidentiary challenges in refuting false testimony.

Second, states should increase the standard of proof placed on the state at the pretrial hearings to require "clear and convincing evidence" that a jailhouse informant statement is reliable before admitting such testimony. Illinois and Connecticut, which currently place the burden of proof on the prosecution, impose a "preponderance of the evidence" standard of proof.[243] However, this only requires the judge to find that "there is greater than 50% chance that the claim [of the informant] is true" based off of the prosecution's evidence.[244] Given the inherent unreliability of jailhouse informant testimony, the high risk that such testimony will prejudice the jury,[245] and the extremely high stakes of serious criminal prosecutions for a criminal defendant, the prosecution's standard of proof for showing that such testimony is reliable should be higher the preponderance of the evidence, which is only point one percent higher than the odds of flipping a coin and it landing on heads. Instead, the presumption should be that testimony of a jailhouse informant is unreliable and this presumption can only be overcome by clear and convincing evidence, which courts and commentators sometimes describe as closer to seventy-five percent certainty.[246] This higher standard of proof will help limit the jailhouse informant testimony that makes it to the jury to only that testimony which a court has already found to be clearly reliable.

Third, to ensure that jurors clearly understand the inherent risks of admitted jailhouse informant testimony, states should codify a provision for jury instructions. If an informant testifies, the courts should automatically read a jury instruction both before the informant testifies and again before jury deliberations. In the instruction, jurors should be informed that jailhouse informants have significant conflicts of interest and should be told which factors to consider in weighing the testimony. For example, Utah provides the following instruction:

> A witness who believes [he/she] may be able to obtain [his/her] own freedom or receive a lighter sentence by giving testimony favorable to the prosecution, has motive to testify falsely. Therefore, you must examine that testimony with caution and weigh it with great care. Whether the

243. 725 ILL. COMP. STAT. 5/115–21(d) (2019); CONN. GEN. STAT. § 19–131(2)(b) (2019).

244. *Preponderance of the Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited May 22, 2022).

245. *See generally* Neuschatz et al., *supra* note 88.

246. *The State's Burden of Proof – What is Beyond a Reasonable Doubt?*, JUST CRIM. L. (Dec. 29, 2016), https://www.justcriminallaw.com/criminal-charges-questions/2016/12/29/proof-beyond-a-reasonable-doubt/ (last visited May 22, 2022).

> informer's testimony has been affected by interest or prejudice against the defendant is for you to determine.[247]

The Utah instructions then list factors for the jury to consider, including any benefits given in exchange for testifying, the criminal history and past informant testimony, any inconsistent testimony, and "any other evidence related to the informer's credibility."[248]

Fourth, states should codify a fallback provision by which proof of the prosecution's failure to disclose all information concerning deals, either explicit or implied, made with jailhouse informants by the time of trial, or at any time in the future, to the defendant, results in automatic grounds for a new trial. This aids in solving the difficulty of enforcing *Brady* requirements because it incentivizes the prosecution to disclose all information. Moreover, even though states have passed legislation requiring certain disclosures,[249] they have not provided an effective enforcement mechanism, without which the statutes are unlikely to make any significant difference.

Given the national trend of regulating the admission of jailhouse informant testimony in the past fifteen years,[250] it is critical for state legislators to understand which regulatory provisions are the most effective in preventing wrongful convictions. The following reflects the ideal language for jailhouse informant legislation, using both existing and new provisions, that can be proposed and adopted by state legislatures. Existing language from other states' statutes is denoted by quotation marks.

An Act

Concerning The Admission of Jailhouse Informant Testimony in Criminal Trials.

Be it enacted by the General Assembly convened:

> Sec. 1. "The legislature finds that evidence and testimony from accomplices and criminal informants are inherently suspect because a system in which accomplices and criminal informants are rewarded by the state produces dangerous incentives to manufacture or fabricate evidence. The purpose of this act is to prevent unreliable accomplice and informant testimony from being admitted as evidence in the courts of our state by informing the court, to the maximum extent possible, of the circumstances surrounding such evidence and testimony before the court determines its

247. SUP. CT. ADVISORY COMM. ON THE MODEL UTAH JURY INSTRUCTIONS–CRIM., JAILHOUSE INFORMANT (Aug. 7, 2013).

248. *Id.*

249. *See, e.g.*, CONN. GEN. STAT. § 19–131(1)(a)(1–5) (2019); 725 ILL. COMP. STAT. 5/115–21(c)(1–7) (2019); H.B. 2366(1)(a)(1)(A–E), 2021 Leg., Reg. Sess. (Kan. 2021); NEB. REV. STAT. §29–1912(1)(a–e) (2019).

250. *See* INNOCENCE PROJECT, *supra* note 35.

admissibility."[251] Questions of legislative intent and other provisions should be interpreted consistently with the purpose of this provision.

Sec. 2. (a) "In a criminal prosecution . . . in which the prosecuting attorney intends to introduce the testimony of a jailhouse witness,"[252] "[t]he court shall conduct a hearing to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing. If the prosecution fails to show,"[253] by clear and convincing evidence, "that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial."[254] "The court shall make such determination concerning the reliability of the witness after evaluation of the information or material disclosed"[255] in the following subsections:

> (1) "The extent to which the jailhouse witness's testimony is confirmed by other evidence,"[256] including both independent corroboration of the substance of the statement and that the statement was in fact made by the defendant to the informant;
>
> (2) "The specificity of the testimony;
>
> (3) The extent to which the testimony contains details known only by the perpetrator of the alleged offense;
>
> (4) The extent to which the details of the testimony could be obtained from a source other than the defendant; and"[257]
>
> (5) "[T]he circumstances under which the jailhouse witness provided the information to the prosecuting attorney or a law enforcement officer, including whether the jailhouse witness was responding to leading questions."[258]

(b) "If the prosecuting attorney fails to show by"[259] clear and convincing evidence "that a jailhouse witness's testimony is reliable, the court shall exclude the testimony at trial."[260]

251. H.B. 2654(1), 64th Leg., 2016 Reg. Sess. (Wash. 2016).
252. H.B. NO. 2366(1)(b)(1), 2021 Leg., Reg. Sess. (Kan. 2021).
253. 725 ILL. COMP. STAT. 5/115-21(d) (2019).
254. *Id.*
255. CONN. GEN. STAT. § 19-131(2) (2019).
256. *Id.* § 19-131(2)(a)(1).
257. *Id.* § 19-131(2)(a)(2–4).
258. H.B. 2366(b)(1)(E), 2021 Leg., Reg. Sess. (Kan. 2021).
259. *Id.* 2366(b)(1)(2).
260. *Id.*

Sec. 3. (a) "In any case under this Section, the prosecution shall disclose at least 30 days prior to a relevant evidentiary hearing or trial:

(1) [T]he complete criminal history of the informant,"[261] "including any pending or dismissed criminal charges;"[262]

(2) "[A]ny deal, promise, inducement, or benefit that the offering party has made or will make <u>in the future</u> to the informant,"[263] explicit or implied, or such that has been requested by the informant;

(3) "[T]he statements made by the accused;

(4) [T]he time and place of the statements, the time and place of their disclosure to law enforcement officials, and the names of all persons who were present when the statements were made;

(5) [W]hether at any time the informant recanted that testimony or statement and, if so, the time and place of the recantation, the nature of the recantation, and the names of the persons who were present at the recantation;

(6) [O]ther cases in which the informant testified, provided that the existence of such testimony can be ascertained through reasonable inquiry and whether the informant received any promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; and

(7) [A]ny other information relevant to the informant's credibility."[264]

(b) "The court may permit the prosecuting attorney to comply with the provisions of this section after the time period provided in paragraph (1) if the court finds that the jailhouse witness was not known, or the information described in paragraph (1) could not be discovered or obtained by the prosecuting attorney exercising due diligence within such time period."[265]

(c) "Each prosecuting attorney's office shall maintain a central record containing information regarding:

(1) Any case in which testimony by a jailhouse witness is introduced or is intended to be introduced by a prosecuting attorney

261. 725 ILL. COMP. STAT. 5/115-21(c)(1) (2019).
262. H.B. 2366(1)(a)(1)(A), 2021 Leg., Reg. Sess. (Kan. 2021).
263. 725 ILL. COMP. STAT. 5/115-21(c)(2) (2019) (emphasis added).
264. 725 ILL. COMP. STAT. 5/115-21(c)(3-7) (2019).
265. H.B. 2366(1)(a)(2–3), 2021 Leg., Reg. Sess. (Kan. 2021).

regarding statements made by a suspect or defendant and the substance of such testimony; and

(2) [A]ny benefit that has been requested by, provided to, or will be provided in the future to a jailhouse witness in connection with testimony provided by such witness.

(3) Each prosecuting attorney's office shall forward the information described in paragraph ([2])"[266] to a single designated state bureau or department, which "shall maintain a statewide database containing the information forwarded pursuant to this section."[267]

(d) "If the court finds that disclosing the information described in paragraph (1) is likely to cause bodily harm to the jailhouse witness, the court may:

(1) Order that such evidence be viewed only by the defense counsel and not by the defendant or others; or

(2) [I]ssue a protective order."[268]

Sec. 4. "If, at any time during the course of the proceedings, it is brought to the attention of the court that the prosecutor has failed to comply with Section [IV] of this act, or an order issued pursuant to this section, the court may:

(a) Order the prosecutor to disclose materials not previously disclosed;

(b) Grant a continuance;

(c) Prohibit the prosecutor from calling a witness not disclosed or introducing in evidence the material not disclosed; or

(d) Enter such other order as it deems just under the circumstances."[269]

Sec. 5. If the testimony of a jailhouse informant is admitted before a jury, the jury shall be instructed that "[a] witness who believes [he/she] may be able to obtain [his/her] freedom, or receive a lighter sentence by giving testimony favorable to the prosecution, has motive to testify falsely. Therefore, you must examine that testimony with caution and weigh it with great care. Whether the informer's testimony has been affected by interest or

266. *Id.* H.B. 2366(c)(1–2).
267. *Id.*
268. *Id.* H.B. 2366(1)(a)(3).
269. NEB. REV. STAT. §29-1912(6)(1-4) (2019).

> prejudice against the defendant is for you to determine. In making that determination, you should consider"[270] the following factors:
>
> (a) "[A]ny benefit that has been requested by, provided to, or will be provided in the future to the jailhouse witness in connection with providing such testimony."[271]
>
> (b) "[O]ther cases, and the number of other cases, in which the informant testified or offered statement against another, whether those statements are being used, and whether the informer received any deal, promise, inducement, or benefit in exchange for that testimony or statement, or believed he was likely to receive some benefit for his cooperation;
>
> (c) [W]hether the informant has ever changed his or her testimony;
>
> (d) [T]he criminal history of the informant, not just limited to number of convictions, but also the level of sophistication gained through the informer's experience in the criminal justice system; and
>
> (e) [A]ny other evidence related to the informer's credibility."[272]
>
> Sec. 6. If "the defendant shows by newly discovered evidence that an informant's trial testimony included a false material statement that potentially affected the outcome of the trial;"[273] or that the prosecution failed to disclose all information set forth in Sec. 3 concerning deals made with jailhouse informants by the time of trial, or at any time in the future, either explicit or implied, "the court shall <u>order a new trial</u>."[274]

IV. COUNTERARGUMENTS

Even knowing the role that jailhouse informants play in wrongful conviction statistics, members of the legal, political, and legislative communities may argue that additional protections against the admission of their testimony are either unnecessary or unwarranted. First, because prosecutors are obligated to disclose exculpatory material to defense teams under *Brady*, there is no need to additionally regulate these disclosures through state statutes. [275]

270. SUP. CT. ADVISORY COMM. ON THE MODEL UTAH JURY INSTRUCTIONS–CRIM., JAILHOUSE INFORMANT (Aug. 7, 2013).

271. H.B. 2366(1)(e), 2021 Leg., Reg. Sess. (Kan. 2021).

272. SUP. CT. ADVISORY COMM. ON THE MODEL UTAH JURY INSTRUCTIONS–CRIM., JAILHOUSE INFORMANT (Aug. 7, 2013).

273. H.B. 2654(4) 64th Leg., 2016 Reg. Sess. (Wash. 2016).

274. *Id.* (emphasis added).

275. Giannelli, *supra* note 122, at 599 (discussing how modern prosecutors apply *Brady* in disclosing information on jailhouse informants (citing Brady v. Maryland, 373 U.S. 83 (1963)).

However, as addressed previously, prosecutors still violate these obligations in practice and are rarely punished.[276] One major issue is that *Brady* violations are difficult to identify by the defense and require the good faith and honor of the prosecutors. In *United States v. Olsen*, the Ninth Circuit noted in its dissent that *Brady* violations are a "systemic problem" and "[s]ome prosecutors don't care about *Brady* because courts don't *make* them."[277] When courts fail to punish prosecutors who in fact did not engage in good faith and did not disclose what they needed to, a dangerous precedent or norm is set. The dissent continued, stating that rather than being the rare exception, "*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend" and noted that "some prosecutors turn a blind eye to such misconduct because they're more interested in gaining a conviction than achieving a just result."[278] Even though disclosures are currently regulated under *Brady*, we cannot leave the system as is because it has proven itself to be ineffective. In the words of the Ninth Circuit, "[w]e must send prosecutors a clear message: Betray *Brady*, give a short shrift to *Giglio*, and you will lose your ill-gotten conviction."[279] Codifying required disclosures in state statutes is the first step to prosecutorial accountability. By detailing exactly what information needs to be disclosed, statute regulations ensure in theory that all important materials are handed over to the defense. More importantly, the recommended reforms add a weighty incentive for prosecutors to follow *Brady*. If any benefit information is not disclosed as required, the regulations provide mechanisms for punishment, namely, in throwing out the conviction and automatically granting the defendant a new trial.

Second, in recent years, some states have created "Conviction Integrity Units" in their prosecutorial offices, which conduct "extrajudicial fact-based review of secured convictions to investigate plausible allegations of actual innocence."[280] These units aim to check the reliability of prior convictions, as well as the methodology used by their counterparts, and to recommend overturning any incorrect conviction.[281] In this way, opponents could argue that CIUs eradicate the need for further legislative reform, as they would simply recommend overturning any conviction which used a suspect or seemingly unreliable jailhouse informant. However, although CIUs have overturned wrongful convictions, there are simply not enough in the country. As noted by the Equal Justice Initiative, "[o]nly 1.5% of the prosecutor's offices in the U.S. have conviction integrity units."[282] Further, in 2015, only half of the nation's established CIUs had been involved in any exoneration proceeding.[283] State-wide

276. Saavedra, *supra* note 142.

277. 737 F.3d 625, 631 (9th Cir. 2013).

278. *Id.* at 631–32.

279. *Id.* at 633.

280. *Conviction Integrity Units*, INNOCENCE PROJECT, https://leg.mt.gov/content/Committees/Interim/2015-2016/Law-and-Justice/Meetings/Jun-2016/Exhibits/innocence-project-conviction-integrity-doc-june-2016.pdf (last visited May 22, 2022).

281. *Id.*

282. *Wrongful Convictions*, EQUAL JUST. INITIATIVE, https://eji.org/issues/wrongful-convictions/ (last visited May 22, 2022).

283. *Exonerations in 2015*, NAT'L REGISTRY OF EXONERATIONS (Feb. 3, 2016) http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf.

legislative reform on the admission of jailhouse informant testimony would not only become effective more quickly, but it would also have the significant benefit of being proactive, rather than reactive, in preventing wrongful convictions.

Third, reform is unnecessary because the defense can adequately show the unreliability of an informant's testimony through cross examination.[284] In fact, many would argue that the job of the fact-finder is to determine the "credibility and reliability" of witnesses.[285] Even the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* stated that "'[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[286] However, while this standard may hold for regular witnesses, it does not prove accurate when applied to jailhouse informant testimony, and therefore should not be the standard. As noted by the Ohio State Supreme Court, "'traditional' methods of testing reliability–like cross-examination–can be ineffective at discrediting unreliable or inaccurate . . . evidence."[287] Specifically regarding the testimony of jailhouse informants, "[j]urors are almost certain to give extraordinary weight to evidence that a defendant has confessed."[288] Simply denying the confession or attempting to poke holes in it on cross examination has not shown to be necessarily effective with jurors.[289]

Further, this counterargument presupposes effective defense representation, which is often not the case. As of 2019, 366 cases of exonerations involved a contributing factor of Inadequate Legal Defense.[290] Ineffective assistance of counsel is especially a concern for low-income individuals who cannot afford private defense attorneys. Instead, they are typically given public defenders who are often understaffed, overworked, and have minimal investigative resources. In 2017, for example, a group of low-income defendants facing prison time filed a petition for class certification in a suit against Louisiana officials and the Louisiana Public Defender office for "structural issues" and failure "to provide effective representation to the poor."[291] Although the class certification was ultimately denied, the petition brought forward unfavorable facts about the Louisiana public defender system, including that many defendants were not afforded "a confidential meeting with their attorney," others "met their attorneys only in passing," and none of the attorneys had substantive conversations about the case with their client, "identified and secured favorable witnesses and evidence, filed appropriate pretrial motions, or provided a voice for their

284. Covey, *supra* note 36, at 1397–1400.

285. *Id.* at 1398.

286. *Id.* (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993)).

287. *Id.* at 1399 (citing State v. Lawson, 291 P.3d 673, 695 (Or. 2012)).

288. *Id.*

289. *Id.* In Arizona v. Fulminante, the Court emphasized the near-absolute power of an alleged confession against all warnings or attacks by stating that "a defendant's confession is 'probably the most probative and damaging evidence that can be admitted against him,' so damaging that a jury should not be expected to ignore it even if told to do so." 499 U.S. 279, 292 (1991) (citing Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting)).

290. Rosa Greenbaum, Investigating Innocence: Comprehensive Pre-trial Defense Investigation to Prevent Wrongful Convictions (2019) (Master of Arts Thesis, University of California, Irvine) (ProQuest).

291. Allen v. Edwards, 322 So. 3d 800, 804 (La. Ct. App. 2021).

clients in court."[292] Without effective representation, which cannot be presumed, cross-examination is not an effective protection against jailhouse informants.

One final argument against additional regulation by state governments is a popular complaint: the price tag. The proposed Kansas bill shares a fiscal note with the bill that failed in May 2021, which may have been, at least in part, due to its estimated cost: $182,180 per year.[293] Of that amount, the Kansas legislature stated that it could not provide an estimate for the pretrial hearings, but noted that "courts would have more motions to consider and would make additional rulings, which could increase the length of cases and increase the time spent by district court judicial personnel in researching and hearing cases."[294] Similarly, the Kansas Attorney General noted that the proposed change would lead to increased hours of travel and in attending hearings on cases, but could not provide an estimate of these costs.[295] The Department of Corrections and League of Kansas Municipalities stated that the proposed bill would not affect them fiscally.[296] Instead, the total costs arose from the Kansas Bureau of Investigation's estimation of costs associated with the bill's provisions on record retention.[297] The fiscal note states that "$165,000 would be for concurrent user licensing, $12,410 for training and installation, and $4,770 for maintenance for the first year. For future fiscal years, the agency estimates on-going expenditures for system maintenance of $29,520."[298]

However, the cost of these legislative reforms varies state-to-state. The state of Connecticut, for example, passed a nearly identical bill in 2019 with recording and pretrial provisions,[299] and ordered its Office of Fiscal Analysis to conduct a study on the price tag prior to the legislation being passed.[300] There, the office published a one page report which stated that the bill "does not result in a fiscal impact."[301] For states which already have modern recording systems, infrastructure, and training in place, the costs to implement these reforms may be little to none. Certainly, these costs are significantly less than what a city may face in a civil lawsuit following a wrongful conviction based in part on unreliable jailhouse informant testimony.[302] The comprehensive national price tag on injustices stemming from jailhouse

292. *Id.*

293. Letter from Adam Proffitt, Dir. of Budget, to Fred Patton, Chairperson on House Comm. on Judiciary, Kan. Div. of Budget, (Mar. 1, 2020), http://kslegislature.org/li/b2021_22/measures/documents/fisc_note_hb2366_00_0000.pdf.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. CONN. GEN. STAT. § 19-131 (2019).

300. S. 1098 FISCAL NOTE, OFF. OF FISCAL ANALYSIS, 2019 Leg., Gen. Assembly (Conn. 2019).

301. *Id.*

302. *See* INNOCENCE PROJECT, *supra* note 35. In a case of arson in 1984, a man named James Kluppelberg was wrongfully convicted and imprisoned for 25 years in Chicago primarily due to the testimony of a jailhouse informant who testified that Kluppelberg confessed to him. *Id.* After the informant admitted to lying on the stand in exchange for a sentence reduction on his own charges, and a police report in which a woman admitted to committing the crime was unearthed, Kluppelberg was exonerated and filed a civil suit against the City of Chicago and its Police Department, which resulted in a nine point three million dollar settlement in 2018. *Id.*

informants, as calculated by the Innocence Project, for "restitution through statutory compensation and civil settlements" totals a whopping $295,598,794.[303]

More importantly, although these proposed costs for states like Kansas are not insignificant, they simply cannot compare to the alternative of allowing innocent human beings to waste away in prison for decades for crimes they did not commit. These failures are not merely a lack of progressive reform, but a deprivation of constitutional due process rights explicitly mandated by the Fifth Amendment and incorporated to the states by the Fourteenth Amendment.[304] Criminal defendants further possess specific protections under *Brady* to access any exculpatory materials possessed by the state[305] and under *Giglio* to be informed of any promises made to informants testifying for the government.[306] Rather than creating new burdens, codifying these required disclosures simply increases state officials' awareness of their current responsibilities, establishes an avenue to pursue insubordinate officials who violated their affirmative legal obligations, and provides a mechanism to grant new trials to affected defendants. Moreover, although adding pretrial hearings may impose some burden on the state and court resources, the protections are far more effective than the specific disclosures alone. Unlike required disclosures, which are effectively an unsupervised honor system unless a prosecutor is caught, pretrial hearings put the question of the informant's reliability in the objective hands of the court, thereby lessening the risk of prosecutorial misconduct. Considering the risk of wrongful incarceration, the rights of criminal defendants should be given greater protections than the ambitions of prosecutors, self-interest of informants, and financial reservations of legislatures.

CONCLUSION

"[B]etter that ten guilty persons escape, than that one innocent suffer."[307]

Jailhouse informant testimony is inherently unreliable because the vast majority of informants are given considerable benefits connected to their freedom in exchange for testifying against criminal defendants.[308] This creates an enormous incentive to fabricate stories of confessions made inside prison cells, or to repeat information fed to them by state officials.[309] Prosecutors are not an effective measure of protection against this conflict of interest, as many disregard their *Brady* obligations in favor of obtaining easy convictions.[310]

303. *Id.* (citing Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongfully Convicted*, 82 MO. L. REV. 369 (2017)).

304. U.S. CONST. amends. V, XIV.

305. *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

306. *See* Giglio v. United States, 405 U.S. 150, 154 (1972).

307. *Blackstone's Ratio: Is it more important to protect innocence or punish guilt?* CATO INST., (quoting William Blackstone) https://www.cato.org/policing-in-america/chapter-4/blackstones-ratio (last visited May 22, 2022).

308. Natapoff, *supra* note 27.

309. Gross & Jackson, *supra* note 26.

310. Saavedra, *supra* note 142; Zoukis, *supra* note 147.

The problem of wrongful convictions goes beyond politics, and legislative action is vital to creating proactive rather than reactive solutions. A handful of states have passed reforms to address the issues inherent to jailhouse informant testimony.[311] While these reforms are progress, more is needed to help protect against unreliable jailhouse informant testimony. Critical provisions to implement at a minimum include: (i) rights to a pretrial hearing in which the state must show reliability by clear and convincing evidence, and (ii) required disclosures that encompass benefits given in the future and are based on a statewide records system. In addition, states should codify specific jury instructions to be used in the case of an informant testifying and should be explicit with the jury about their inherent conflicts of interest and unreliability. Finally, states should codify provisions to automatically grant a new trial to defendants if it is discovered that prosecutors failed to disclose all information concerning deals with jailhouse informants.

Since 1989, jailhouse snitches have been responsible for wrongfully imprisoning 212 innocent individuals,[312] and causing at least twenty-five eventual exonerees to be sentenced to death in the United States.[313] It is probable that many more have been executed and died,[314] or remain in prison without hope of ever clearing their name.

While the popular phrase surrounding informants is that "snitches get stitches" for coming forward with information, the unknown truth is that many informants receive significant sentence reductions or benefits for their testimony. I propose a new phrase that more accurately reflects the reality of our criminal justice system – "snitches cause stitches" – because the unregulated admission of jailhouse informant testimony at criminal trials allows the self-interest of snitches and prosecutors to overcome truth, and to take away the freedom and lives of innocent citizens.

311. *See* INNOCENCE PROJECT, *supra* note 35.

312. *See* National Registry Detailed View, *supra* note 22.

313. INNOCENCE PROJECT, *supra* note 35.

314. *See* Zoukis, *supra* note 147.