LIES BEHIND BARS: AN ANALYSIS OF THE PROBLEMATIC RELIANCE ON JAILHOUSE INFORMANT TESTIMONY IN THE CRIMINAL JUSTICE SYSTEM AND A TEXAS-SIZED ATTEMPT TO ADDRESS THE ISSUE

INTRODUCTION

The advent of DNA technology in the late 1980s led to a wave of exonerations in the United States, shedding light on major problems with the U.S. criminal justice system.[1] Many of these wrongful convictions were traced back to criminal informants, colloquially referred to as "snitches," who provided incriminating testimony in exchange for a sentence reduction, leniency, inmate privileges, or some other perk.[2] Notably, criminal informants are the leading cause of wrongful convictions in capital cases, accounting for 45.9% of death row exonerations.[3] The correlation between wrongful convictions and informant testimony is a cause for concern, especially in Texas, where more people have been executed and exonerated than anywhere else in the country.[4] This Note analyzes the use of criminal informants with a particular focus on jailhouse informants—inmates that come forward with the "confessions" of fellow inmates.[5] First, this Note discusses the broad use of criminal informants throughout history and the

1. *See DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/9YP6-FH2K]. Since the first DNA exoneration in 1989, over 2000 wrongful convictions in the United States have been overturned. NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx [https://perma.cc/FY5L-NGH3].

2. NAT'L REGISTRY EXONERATIONS, *supra* note 1; INNOCENCE PROJECT, *supra* note 1. *See* Alexandra Natapoff, *The Shadowy World of Jailhouse Informants: Explained*, THE APPEAL (July 11, 2018), https://theappeal.org/the-shadowy-world-of-jailhouse-informants-an-explainer/ [https://perma.cc/2UJ5-BS42] [hereinafter Natapoff, *The Shadowy World*].

3. NORTHWESTERN UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004), https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf [https://perma.cc/6H64-4EL9].

4. *Exonerations by State*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Sept. 25, 2019); *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 [https://perma.cc/2CAV-3FNV]. In fact, Texas accounts for over one-third of the total executions that have taken place in the United States. *Id.*

5. "A jailhouse informant is an inmate, usually awaiting trial or sentencing, who claims to have heard another prisoner make an admission about his case." Jana Winograde, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 CALIF. L. REV. 755, 755 (1990).

problems that have arisen therefrom.[6] Second, it examines *Nolley v. State*,[7] the Texas Court of Criminal Appeals case that inspired legislative change in Texas.[8] Third, this Note assesses Texas House Bill 34,[9] which is Texas's latest legislative effort to regulate the use of jailhouse informants and has been referred to as "the most comprehensive effort yet to rein in the dangers of transactional snitching."[10] Finally, this Note proposes a solution to address the problem of unreliable jailhouse informant testimony that requires judges to serve a "gatekeeping role" through which they could filter out unreliable testimony before trial.[11] As part of this solution, this Note recommends giving judges and defense attorneys access to a statewide database containing information on every jailhouse informant ever used so that they do not have to rely on the prosecution to produce that information. Though this solution will add to the workload of judges, it is necessary to prevent prosecutorial misconduct and ensure the integrity of the U.S. criminal justice system.

I. INFORMANT USE THROUGHOUT HISTORY

The criminal informant system dates back to 18th century Great Britain.[12] In old England, Parliament offered monetary rewards in exchange for incriminating information.[13] This "blood money" cultivated lies and fear within the society and created a "cycle of betrayal," where snitches sold out other people only to be later sold out themselves.[14] This reality is exemplified by the case of Charles Cane, who "provided evidence that sent two men to their deaths in 1755. A few months later, a snitch did unto him as he had done unto others. . . . Cane was hanged at Tyburn in 1756 . . . ."[15]

6. *See infra* Part I.

7. Nolley v. State, No. 02-98-00253-CR (Tex. App.—Fort Worth Sept. 23, 1999), *aff'd sub nom. Ex parte* Nolley, No. WR-46,177-02 (Tex. Crim. App. Jan. 10, 2001), *vacated sub nom. Ex parte* Nolley, No. WR-46,177-03, 2018 WL 2126318 (Tex. Crim. App. May 9, 2018).

8. *See infra* Part II.

9. H.B. 34, 85th Leg., Reg. Sess. (Tex. 2017).

10. *See infra* Part III. Editorial, *Texas Cracks Down on the Market for Jailhouse Snitches*, N.Y. TIMES (July 15, 2017), https://www.nytimes.com/2017/07/15/opinion/sunday/texas-cracks-down-on-the-market-for-jailhouse-snitches.html [https://perma.cc/65HX-47GA]. Innocence Project legislative strategist Michelle Feldman recognizes Texas as "the gold standard in innocence reform." Jolie McCullough & Justin Dehn, *How Some See Texas as the "Gold Standard" Against Wrongful Convictions*, TEX. TR. (Sept. 20, 2017, 12:00 AM), https://www.texastribune.org/2017/09/20/texas-lawmakers-hope-prevent-wrongful-convictions/ [https://perma.cc/2JP9-UFU7].

11. *See infra* Part IV. The solution set forth herein is applicable not only in Texas but in all states.

12. NORTHWESTERN UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, *supra* note 3, at 2. "The history of the snitch is long and inglorious, dating to the common law." *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

The criminal informant system likely came to the New World aboard the *Mayflower*.[16] In fact, the first known wrongful conviction in the United States—the 1819 conviction of Jesse Boorn in Manchester, Vermont—can be traced back to a jailhouse informant.[17] The informant, Silas Merrill, shared a jail cell with Jessee Boorn and would later testify that Jessee confessed to a murder.[18] Luckily, Boorn was saved from the noose when the "murder victim" turned up alive in New Jersey.[19]

Though the "blood money" of the 1700s has been replaced by sentencing leniency and other perks that are more hidden from the public eye, the informant system remains prevalent in modern America.[20] Every year, the government offers thousands of informants lighter sentences or leniency in exchange for incriminating testimony.[21] The U.S. Sentencing Commission reports that defendants across all categories of federal offenses receive sentence reductions for cooperation with police and prosecutors.[22] Additionally, the Commission reports that at least half of all defendants facing federal drug charges cooperate with agents in some way.[23] While this federal data points to widespread informant use, criminology studies at the state and local levels indicate that informant use is even more prevalent than federal data suggests.[24]

Perhaps the most glaring statistics that evidence informant use in modern America are those that relate to exonerations. Criminal informants are the leading cause of wrongful convictions in capital cases, playing a role in about fifty percent of death row exonerations.[25] Furthermore, jailhouse informant testimony is involved in about twenty percent of all DNA-based

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. Alexandra Natapoff, *Secret Justice: Criminal Informants and America's Underground Legal System*, PRISON LEGAL NEWS (June 15, 2010), https://www.prisonlegalnews.org/news/2010/jun/15/secret-justice-criminal-informants-and-americas-underground-legal-system/ [https://perma.cc/8N6Z-MECY] [hereinafter Natapoff, *Secret Justice*].
21. *Id.* According to scholar Alexandra Natapoff, "[t]he practice of trading information for guilt is so pervasive that it has literally become a thriving business." Natapoff describes a "for-profit snitch ring" at a federal prison where "prisoners were buying and selling information about pending cases to offer to prosecutors in order to reduce their own sentences." *Id.*
22. *Id.*
23. This cooperation could include coming forward with incriminating information or making a controlled purchase. *See id.* A "controlled purchase" is defined as "[t]he purchase of contraband by an undercover officer or an informant for the purpose of setting up an arrest of the seller." *Controlled Purchase*, BLACK'S LAW DICTIONARY (11th ed. 2019).
24. Natapoff, *Secret Justice*, *supra* note 20.
25. NORTHWESTERN UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, *supra* note 3, at 3. *See also* Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543–44 (2005).

exonerations.[26] Though the data on informant use is somewhat limited,[27] these reports and findings confirm that the informant system remains a pervasive reality.[28]

A. An Incentive-Fueled System

The informant system is fueled and perpetuated by incentives. On one side of the table, prosecutors and law enforcement officials face immense pressure to secure convictions. Informants provide them with a relatively simple way to solve complicated crimes. One scholar explains that "[i]n some instances, such as white-collar or gang crime, criminal activity is so secretive, complex, or hard to detect, or involves such ever-present threats of violence against co-conspirators straying from the criminal fold, that prosecution is impracticable without informants."[29] Another writes:

> There is a cold brutality and inherent risk of unreliability in the way we use the threat of vastly greater prison time to squeeze information out of culpable defendants. But no equally effective tool for prying closely held information about corrupt dealings or other, less genteel forms of organized crime, has been devised.[30]

Prosecutors have wide discretion and many resources at their disposal when it comes to dealing with informants.[31] They can drop charges, refrain from arresting someone, or recommend a lower sentence in exchange for information.[32] In sum, informant bargaining serves as an invaluable tool in the prosecutor's briefcase—one that is used in thousands of cases every year.[33]

On the opposite side of the table, becoming an informant serves as an appealing alternative to facing mandatory minimums, overcrowded prisons,

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26. *Informing Injustice: The Disturbing Use of Jailhouse Informants*, INNOCENCE PROJECT, https://www.innocenceproject.org/informing-injustice/ [https://perma.cc/774X-8U8Z] [hereinafter *Informing Injustice*].

27. Data on informant use is limited due to the fact that most state and local governments do not keep track of informant use. Natapoff, *Secret Justice*, *supra* note 20.

28. As stated by the Tenth Circuit, "[t]his ingrained practice of granting lenience in exchange for testimony has created a vested sovereign prerogative in the government." United States v. Singleton, 165 F.3d 1297, 1301 (10th Cir. 1999).

29. Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1080 (2011). Natapoff notes that "[t]he FBI's use of mafia informants—some of them murderers—helped dismantle organized crime." Natapoff, *The Shadowy World*, *supra* note 2.

30. Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 LAW & CONTEMP. PROBS. 53, 67–68 (2013).

31. Natapoff, *The Shadowy World*, *supra* note 2.

32. *Id.* Notably, officials have been known to lie, break rules, and even commit crimes to reward or protect their criminal informants. *Id.*

33. *Id.*

and serious criminal charges. The U.S. Sentencing Guidelines allow for a departure from a mandatory minimum sentence when an offender has offered "substantial assistance" in investigating or prosecuting another wrongdoer.[34] Federal Rule of Criminal Procedure 35 allows for the reduction of a sentence if a defendant provides "substantial assistance" after having already received the sentence.[35] While the most common benefit informants receive is sentencing leniency, other possible benefits include improved conditions of confinement, drugs, money, and even legal immigration status for family members or themselves.[36] These strong incentives on both sides of the table ultimately work together to perpetuate the informant system.

B. Jailhouse Informants

Jailhouse informants merit special consideration, as they are notoriously unreliable.[37] Indeed, since the U.S. Supreme Court ruled the use of jailhouse informants constitutional in 1966, over 140 people have been exonerated in murder cases that involved jailhouse informant testimony.[38] Because they are already behind bars, jailhouse informants have a greater incentive to lie and are highly motivated to cooperate with law enforcement officials.[39] As one researcher puts it, "they have so little to lose and so much to gain . . .

34. 18 U.S.C. § 3553(e) (2018); Taslitz, *supra* note 29, at 1078–79. Whether a mandatory minimum applies or not, the U.S. Sentencing Guidelines permit the court to depart downward from the sentence specified by the guidelines only upon a motion by the government stating that the defendant has substantially assisted the investigation or prosecution of another person. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5K1.1 (2018). Although the Supreme Court made the guidelines advisory rather than mandatory through a series of decisions, courts still give them substantial weight. Taslitz, *supra* note 29, at 1079.

35. FED. R. CRIM. P. 35; Taslitz, *supra* note 29, at 1079. Taslitz notes that "[t]his provision incentivizes jailhouse snitches to lie even after their conviction." *Id.*

36. Natapoff, *The Shadowy World*, *supra* note 2.

37. *See* Taslitz, *supra* note 29, at 1077. Ellen Reasonover, who served seventeen years before being exonerated, stated, "I lost my child, my freedom, and nearly my life because of false jailhouse informant testimony." *Informing Injustice*, *supra* note 26. Martin Reeves, who was wrongfully convicted and imprisoned for twenty-one years based on false jailhouse informant testimony, stated, "It was just way too easy for the state to use the [jailhouse informant] . . . against me . . . and then they just let him out." *Id.*

38. Katie Zavadski & Moiz Syed, *30 Years of Jailhouse Snitch Scandals*, PROPUBLICA (Dec. 4, 2019), https://projects.propublica.org/graphics/jailhouse-informants-timeline [https://perma.cc/47EY-49PK].

39. There are a number of immediate jail-related benefits that inmates can gain from providing information, such as dropped charges (release), cash that can be spent at the jail commissary, visiting privileges, food, cigarettes, cell assignments, and phone access. Natapoff, *The Shadowy World*, *supra* note 2. "In jail, it is widely understood that helping prosecutors and the police can earn extraordinary benefits, from reduced sentences to dismissed charges." Pamela Colloff, *How This Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row*, N.Y. TIMES (Dec. 4, 2019), https://www.nytimes.com/2019/12/04/magazine/jailhouse-informant.html [https://perma.cc/3XCH-P49N].

."[40] Moreover, living in close quarters with other inmates awaiting trial makes it easier for them to fabricate testimony based on details that they overhear and more likely that they will be solicited for testimony from officials. In the words of researcher Alexandra Natapoff, they are "surrounded by a ready-made supply of vulnerable targets who are already suspected of criminal conduct."[41] Among this "ready-made supply of vulnerable targets" are veteran informants who educate other inmates on how to convincingly fabricate information.[42] They learn to craft information that sounds accurate by stealing other inmates' legal papers, finding news reports, and colluding with others both on the inside and the outside.[43] The ease with which a jailhouse informant can convincingly fabricate testimony thanks to their unique position is illustrated by the case of Leslie White:

> [White] demonstrated for the Los Angeles Sherriff's Department that he could convincingly fabricate a fellow inmate's murder confession. White proved that a jailhouse informant can gather enough information about a particular crime to testify against a defendant at trial without ever having met the defendant. Indeed, White and several other informants regularly used by the District Attorney's office have admitted to giving false testimony about various defendants' jailhouse confessions in order to obtain lenient treatment in their own cases.[44]

Given that the unique position of jailhouse informants increases their propensity and ability to fabricate testimony, any reliance on jailhouse informant testimony in court is a serious cause for concern. Randy Arledge, who spent more than fourteen years in prison for a murder he did not commit thanks to the false testimony of a jailhouse informant, summed up this reality in simple, yet foreboding, language: "There'll always be somebody in jail that will lie for you . . . . If you don't stop the jailhouse inform[ants] . . . the wrongful convictions ain't ever gonna stop."[45]

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40. Jack Call, *Judicial Control of Jailhouse Snitches*, 22 JUST. SYS. J. 73, 74 (2001).
41. Natapoff, *The Shadowy World*, supra note 2.
42. *Id.*
43. *Id.*
44. Winograde, *supra* note 5, at 756 (footnotes omitted).
45. McCullough & Dehn, *supra* note 10. Arledge was sentenced to ninety-nine years in prison for the brutal murder of a Texas woman. Maurice Possley, *Randolph Arledge*, NAT'L REGISTRY EXONERATIONS (Aug. 11, 2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.asp x?caseid=4114 [https://perma.cc/M3C3-MSBR]. After DNA evidence linked another man to the crime, jailhouse informant Bennie Lamas admitted to lying at Arledge's trial to get revenge on Arledge for having sex with his girlfriend. *Id.*

C. Judicially-Imposed Constraints on the Use of Jailhouse Informants

There are some judicially-imposed constraints on the use of jailhouse informants in criminal proceedings. In 1964, the Supreme Court held in *Massiah v. United States* that the Sixth Amendment prohibits the government from "deliberately elicit[ing]" information from a suspect that has been formally charged with a crime in the absence of counsel.[46] In other words, the government may not strategically use a jailhouse informant to elicit incriminating information from a formally charged suspect.[47] More than a decade later, the Court clarified what it means to "deliberately elicit information" in *Brewer v. Williams*.[48] The *Brewer* court held that a detective's use of subtle, psychological pressure—e.g., suggesting to a mentally ill defendant that the police needed to find the murder victim's body to "give her a proper Christian burial"—constituted deliberate elicitation and, therefore, violated the defendant's Sixth Amendment right to counsel.[49]

The contours of the "deliberate elicitation" standard are harder to define in the context of jailhouse informants due to the day-to-day atmosphere, relations, and pressures within a given jail cell, but the Supreme Court has made several attempts to do so.[50] In *United States v. Henry*, Billy Henry was charged in connection with a bank robbery and incarcerated in a jail in Virginia.[51] The government contacted an informant jailed in the same cell block as Henry and instructed him to listen for any incriminating statements made by Henry but not to question Henry regarding the charges he faced.[52] The informant later provided testimony that would result in Henry's conviction, stating that "he had 'an opportunity to have some conversations with Mr. Henry while he was in the jail'" and that Henry described to him in detail the events surrounding the bank robbery.[53] The court of appeals vacated Henry's sentence and the Supreme Court affirmed, holding that "[b]y intentionally creating a situation likely to induce Henry to make

46. Massiah v. United States, 377 U.S. 201, 205–06 (1964). *See also* Call, *supra* note 40, at 75.
47. *Massiah*, 377 U.S. at 205–06.
48. Brewer v. Williams, 430 U.S. 387, 399–400 (1977).
49. *Id.* at 399; Matthew J. Merritt, *Jailhouse Informants and the Sixth Amendment: Is the U.S. Supreme Court Adequately Protecting an Accused's Right to Counsel?*, 44 B.C. L. REV. 1323, 1332 (2003).
50. Merritt, *supra* note 49, at 1324–25.
51. United States v. Henry, 447 U.S. 264, 265–66 (1980).
52. *Id.* at 266.
53. *Id.* at 267.

incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel."[54]

The Court reconsidered the Sixth Amendment in the context of jailhouse informants in *Kuhlmann v. Wilson*.[55] There, the defendant, Joseph Wilson, was charged with robbery and murder.[56] While awaiting trial, Wilson was incarcerated with an inmate named Benny Lee.[57] Unbeknownst to Wilson, Lee had previously agreed to act as an informant for authorities, who instructed him to simply "keep his ears open."[58] Shortly after Wilson's arrival, Wilson detailed his crime to Lee, who secretly took notes on the conversation.[59] Lee went on to testify about the conversation at trial, and Wilson was convicted of murder.[60] Soon thereafter, Wilson sought federal habeas corpus relief, citing *United States v. Henry* and asserting that his statements to Lee were obtained by measures that violated his Sixth Amendment rights.[61] The Supreme Court held that Wilson's Sixth Amendment rights had not been violated because the police and the informant did not take "action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."[62] In other words, according to the *Kulmann* court, a jailhouse informant can be used to collect information from another inmate as long as the informant is passively listening and not initiating conversation regarding the charges an inmate faces.[63]

In addition to imposing constraints on the ways that informants can collect information, the Constitution imposes certain trial-related obligations on prosecutors seeking to use informant testimony. In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[64] In the context of informants,

54. *Id.* at 274. The Court found deliberate elicitation by looking at conduct of both the government and the informant. *Id.*

55. Kuhlmann v. Wilson, 477 U.S. 436, 457–59 (1986).

56. *Id.* at 438–39.

57. *Id.* at 439.

58. *Id.*

59. *Id.* at 439–40.

60. *Id.* at 440–41.

61. *Id.* at 441–43.

62. *Id.* at 459.

63. *Id.*; Merritt, *supra* note 49, at 1350–51.

64. Brady v. Maryland, 373 U.S. 83, 87 (1963). Evidence is considered "material" when there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433–34 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). The Supreme Court has clarified that the accused need not request the materially impeaching information for the *Brady* duty to arise. United States v. Agurs, 427 U.S. 97, 106–07 (1976).

this means that a prosecutor must turn over to the defense information that could be used to impeach the jailhouse informant, such as promises made to the informant in exchange for information or the informant's cooperation with law enforcement in other cases.[65] Scholars have noted that the *Brady* rule lacks sufficient teeth to influence many cases.[66] Specifically, "the *Brady* requirements allow too much risk that a prosecutor who has impeachment information that he or she knows the defense does not have will think it is unlikely that . . . the defense will ever discover the information on its own . . . and, therefore, will decide not to disclose it."[67] Another shortcoming of the *Brady* requirement in the context of jailhouse informants is that deals between the prosecution and an informant are often implicit, rather than express, and, therefore, there is nothing for the prosecution to disclose at trial.[68]

Given the weaknesses in the parameters identified by the Supreme Court for the use of jailhouse informants, state legislatures must implement additional restrictions.[69] Texas is among a small number of states that have enacted jailhouse informant laws within the past three years.[70] The wrongful conviction of John Nolley in *Nolley v. State* spurred legislative action in

65. *See* Giglio v. United States, 405 U.S. 150, 153–55 (1972) (applying *Brady* and holding that information that could be used to impeach the credibility of a witness, such as an immunity deal offered to the witness in exchange for testimony, must be disclosed to the defendant where the reliability of that witness may be determinative of the defendant's innocence or guilt); Call, *supra* note 40, at 81. Scholars have noted that "*Brady* marked a potentially revolutionary shift from traditionally unfettered adversarial combat toward a more inquisitorial, innocence-focused system." Stephanos Bibas, *The Story of* Brady v. Maryland: *From Adversarial Gamesmanship Toward the Search for Innocence?* 1 (U of Penn Law School, Public Law Working Paper No. 06-08, July 29, 2005), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1076&context=faculty_scholarship [https://perma.cc/TG7L-6T2A].

66. Call, *supra* note 40, at 81. "Judges are too weak, prosecutors are too partisan, enforcement is too difficult, discovery is too limited, and plea bargains are too widespread for *Brady* to influence many cases. *Brady* remains an important symbol but in some ways a hollow one." Bibas, *supra* note 65, at 21.

67. Call, *supra* note 40, at 81. "[T]o establish a *Brady v. Maryland* claim, the defendant must initially show that the government possessed material favorable to the defense that the government did not disclose." United States v. Price, 566 F.3d 900, 910 (9th Cir. 2009).

68. NORTHWESTERN UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, *supra* note 3, at 15. "Even absent a formal understanding, the reward inevitably comes—because failing to deliver in one case would chill prospective future snitches." *Id.*

69. Natapoff notes that state law "imposes almost no restraints on police and prosecutorial authority to create and reward informants." Natapoff, *Secret Justice*, *supra* note 20. She further writes that prosecutors have nearly "unre-viewable [sic] discretion to make charging decisions, and can make those decisions based on a defendant's cooperativeness or lack thereof." *Id.*

70. *See Lying Prisoners: New Laws Crack Down on Jailhouse Informants*, SPECTRUM NEWS (Sept. 15, 2019, 2:36 PM), https://spectrumlocalnews.com/tx/san-antonio/news/2019/09/15/lying-prisoners--new -laws-crack-down-on-jailhouse-informants [https://perma.cc/8RB6-PGR9].

Texas aimed at solving the problem of jailhouse informants once and for all.[71]

II. *NOLLEY V. STATE*

On May 26, 1998, John Nolley was convicted of murder and sentenced to life in prison.[72] The Texas Second District Court of Appeals affirmed his conviction.[73] His case would ultimately inspire Texas legislation that many view as the "gold standard" against wrongful convictions based on unreliable jailhouse informant testimony.[74] The facts of the case are as follows:

On Saturday, December 14, 1996, Sharon McLane's partially nude body was found face down in a pool of blood in the kitchen of her apartment.[75] Two knives and a piece of paper containing a partial handprint imprinted in blood were found underneath her body.[76] A third knife was found near her feet.[77] A pathologist reported thirty-seven puncture wounds and twenty slash wounds on her body.[78] Her spinal cord and trachea had been severed.[79]

McLane's neighbors reported hearing the "blood-curdling screams" of an adult woman around 3:00 p.m. on Thursday, likely the same day McLane had died.[80] One neighbor also reported seeing a tall, white man in a black cowboy hat walk from the breezeway adjacent to McLane's apartment about thirty minutes later.[81] A maintenance worker also saw the man in the cowboy hat and stated that the man looked nervous and suspicious.[82]

During the investigation, police linked John Nolley, a twenty-two-year-old black man, to McLane through voice messages left on her answering machine.[83] Police discovered that Nolley and his girlfriend had been good friends of McLane and that the three had eaten Thanksgiving dinner

71. Nolley v. State, No. 02-98-00253-CR (Tex. App.—Fort Worth Sept. 23, 1999), *aff'd sub nom. Ex parte* Nolley, No. WR-46,177-02 (Tex. Crim. App. Jan. 10, 2001), *vacated sub nom. Ex parte* Nolley, No. WR-46,177-03, 2018 WL 2126318 (Tex. Crim. App. May 9, 2018).

72. Maurice Possley, *John Nolley*, NAT'L REGISTRY EXONERATIONS (Oct. 5, 2018), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5386 [https://perma.cc/C2B8-CWMK] [hereinafter Possley, *John Nolley*].

73. Nolley v. State, No. 02-98-00253-CR (Tex. App.—Fort Worth Sept. 23, 1999).

74. *See* McCullough & Dehn, *supra* note 10; Grissom, *infra* note 111.

75. Possley, *John Nolley*, *supra* note 72.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* Mclane's "precise time of death was not determined, although the pathologist estimated she was killed prior to 10 a.m. on Friday, December 13." *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

together a few weeks prior to the incident.[84] In an initial interview, Nolley told police he had not seen McLane the week that her body was found.[85] However, in a later interview, he admitted that he had seen her that Wednesday night.[86] He stated that he had brought her beer and marijuana and then drank and smoked with her at her apartment.[87] He explained that he had lied in his initial interview because smoking and selling marijuana were violations of his parole.[88] Investigators found a beer bottle in McLane's trash can with Nolley's fingerprint on it.[89] In August 1997, Nolley was arrested, charged with murder, and booked into the Tarrant County Jail, where he would remain until trial.[90]

The prosecution relied on the testimony of jailhouse informant John O'Brien, an inmate at Tarrant County Jail.[91] O'Brien testified that in October 1997, he was chatting with Nolley in the jail library when Nolley confessed that he had killed McLane;[92] "[h]e told me that he went to this lady's house with the intentions to rob her and during the robbery, that the lady resisted. He claimed there was blood on his shoes and that she put up a fight and that's why he had to kill her."[93]

O'Brien had nine previous felony convictions, numerous parole revocations, and was in jail on a charge of theft of farm equipment worth over $75,000.[94] One month after O'Brien told investigators of Nolley's "confession," O'Brien was released on parole.[95] O'Brien testified that he had already entered a plea agreement when he came forward with information on Nolley and that the agreement was in no way related to his testimony.[96] He further testified that he had never before acted as an informant.[97] With O'Brien as the star witness for the prosecution, Nolley was convicted and sentenced to life.[98]

In 2000, two years after his conviction, Nolley reached out to the Innocence Project for help.[99] The non-profit legal organization eventually

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

looked into his case and, in 2008, filed a request for DNA testing, which had become much more advanced since the trial.[100] In 2015, the Tarrant County District Attorney arranged for DNA testing and fingerprint analysis and formed a conviction integrity unit to re-investigate the case.[101] The test results indicated that the blood on one of the knives belonged to a male other than Nolley.[102] They also revealed that the partial handprint on the piece of paper did not belong to Nolley or McLane.[103] Shockingly, in reviewing the prosecution's files, the conviction integrity unit discovered a note written by the grand jury prosecutor that stated, "How can we indict Nolley if bloody palm is not his?"[104] The word "not" had been underlined twice.[105]

Further investigation revealed records indicating that O'Brien had, in fact, been used as an informant in prior cases, including another murder case.[106] The investigators also discovered documents showing that the trial prosecutor had known of O'Brien's involvement in other cases and that O'Brien had received favorable treatment in exchange for his testimony in Nolley's case.[107] The Innocence Project used this information in a petition for a writ of habeas corpus filed on behalf of Nolley, stating that at trial, the prosecutor, "stood mute when O'Brien falsely swore to Mr. Nolley's jury that at no time had he so much as attempted 'to work any deal' in exchange for serving as a State informant."[108]

Based on all of this evidence, the Texas Court of Criminal Appeals vacated Nolley's conviction in 2018.[109] The judge signed the order dismissing the case and turned to face Nolley, stating, "I want to apologize for what happened to you. I realize that cannot take back 21 years, but to

100. *Id.*

101. *Id.* Investigators had performed DNA tests in the original case on bloodstains, a black briefcase, and a bloodstained sock, but DNA technology was rudimentary at the time. *Id.* The original test results were inconclusive and in no way linked Nolley to the crime. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* Though his sentence was not vacated until 2018, Nolley was released from prison in May of 2016. *Id.* Tarrant County's conviction integrity unit began looking into Nolley's case in 2015 after DNA tests produced no evidence that Nolley was ever at the scene of the crime. *Id.* This unit discovered that O'Brien had testified in another murder trial and had received a reduced sentence after testifying in Nolley's case. *Id.* Upon learning of the suppression of this evidence in May of 2016, the district court ordered Nolley's release. *Id.*

the extent that words can express our sorrow, I apologize for what happened."[110]

The facts of Nolley's case, from the prosecutorial misconduct to the nineteen years an innocent man spent in prison, exemplify the problems surrounding the use of jailhouse informants.

III. THE TEXAS LEGISLATURE'S ATTEMPT TO SOLVE THE PROBLEM

John Nolley's case inspired legislative change in Texas aimed at tracking and regulating the use of jailhouse informants.[111] About a month after Nolley's release from prison, the chief of Tarrant County's conviction integrity unit created a database that would allow prosecutors to document their use of jailhouse informants, including any benefit the informant received, and share this information with other prosecutors in the county in order to alert them of the possibility that a particular inmate is providing false information in exchange for benefits in multiple cases.[112] This database became the central feature of a larger policy enacted by the Tarrant County District Attorney's Office to regulate the use of jailhouse informants.[113]

The steps taken by Tarrant County's conviction integrity unit served as a blueprint for a Texas state commission charged with recommending new laws to prevent wrongful convictions.[114] The commission's

110. *Id.* "Today marks the end of an incredibly painful journey for John Nolley, who wrongly served 19 years for a murder he didn't commit," said Nina Morrison, staff attorney for the Innocence Project. Press Release, Innocence Project, Tarrant County District Attorney Dismisses Murder Charges Against John Nolley Based on Actual Innocence, Ending His 21 Year Quest for Justice (Oct. 3, 2018), https://www.innocenceproject.org/tarrant-county-district-attorney-dismisses-murder-charges-against-john-nolley/. Morrison commended Tarrant County's conviction integrity unit for "put[ting] hundreds of hours into a joint effort to reinvestigate this case and seek the truth." *Id.* Since his release from prison, Nolley has gotten married and opened up his own business. *Id.*

111. Brandi Grissom, *Snitch Testimony Sent Innocent Man to Prison for 18 Years. Texas Lawmakers Hope He's the Last*, DALLAS MORNING NEWS (Sept. 20, 2017, 12:09 PM), https://www.dallasnews.com/news/politics/2017/09/20/snitch-testimony-sent-innocent-man-to-prison-for-18-years-texas-lawmaker s-hope-he-s-the-last/ [https://perma.cc/2E4H-3MQ7].

112. *Id.* The chief explained that "there was no process in place at the time of Nolley's trial to alert prosecutors to jailhouse snitches who had testified in other cases. Because O'Brien's deals were made with others in the prosecutor's office, attorneys in Nolley's case were unaware of the inmate's tattling proclivity." *Id.*

113. *Texas Prosecutors Rethink the Use of Incentivized Witnesses in Light of Innocence Project Case*, INNOCENCE PROJECT (Sept. 19, 2017), https://www.innocenceproject.org/innocence-project-case-changes-policy-regarding-incentivized-witnesses/ [https://perma.cc/YBQ5-3V92].

114. *See* Grissom, *supra* note 111. The commission, known as the Timothy Cole Exoneration Review Commission, was formed in the name of a twenty-six-year-old Texas Tech student who was wrongfully convicted and died before DNA evidence led to his exoneration. *Id.*

recommendations were carried out through House Bill 34,[115] which went into effect on September 1, 2017, amending the Texas Code of Criminal Procedure.[116] The provisions of the Bill that relate to the use of informants are summarized as follows: First, prosecutors shall track the use of jailhouse informant testimony, regardless of whether the testimony is presented at trial, as well as any benefits offered in exchange for the testimony.[117] Second, evidence of prior offenses committed by a jailhouse informant may be admitted for the purpose of impeachment, regardless of whether the informant was actually convicted of the offense, if the informant received a benefit with respect to the offense.[118] Stated differently, not only are previous charges that resulted in convictions admissible for impeachment, but previous charges that were dismissed in exchange for informant testimony are also admissible.[119] Finally, if the state intends to use the testimony of a jailhouse informant at trial, the state must disclose to the defendant any information that is relevant to the informant's credibility, including: (1) the informant's criminal history, including charges that were dismissed; (2) any grant or offer of immunity, sentencing reduction, leniency, or special treatment from the state in exchange for the informant's testimony; and (3) information concerning other criminal cases in which the informant has testified as a jailhouse informant.[120]

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115. TEX. JUDICIAL BRANCH, TIMOTHY COLE EXONERATION REVIEW COMMISSION REPORT 16 (2016), https://www.txcourts.gov/media/1436589/tcerc-final-report-december-9-2016.pdf. [https://perma.cc/7M5B-6TQP]; H.B. 34, 85th Leg., Reg. Sess. (Tex. 2017).

116. H.B. 34; Grissom, *supra* note 115.

117. H.B. 34. The Bill provides, in relevant part:

> An attorney representing the state shall track: (1) the use of testimony of a person to whom a defendant made a statement against the defendant's interest while the person was imprisoned or confined in the same correctional facility as the defendant, if known by the attorney representing the state, regardless of whether the testimony is presented at trial; and (2) any benefits offered or provided to a person in exchange for testimony described by Subdivision (1).

Id.

118. *Id.* The Bill provides, in relevant part, that, "[e]vidence of a prior offense committed by a person who gives testimony . . . may be admitted for the purpose of impeachment if the person received a benefit . . . with respect to the offense, regardless of whether the person was convicted of the offense." *Id.*

119. *Id.*

120. The Bill provides, in relevant part:

> [I]f the state intends to use at a defendant's trial testimony of a person to whom the defendant made a statement against the defendant's interest while the person was imprisoned or confined in the same correctional facility as the defendant, the state shall disclose to the defendant any information in the possession, custody, or control of the state that is relevant to the person's credibility, including: (1) the person's complete criminal history, including any charges that were dismissed or reduced as part of a plea bargain; (2) any grant, promise, or offer of immunity from prosecution, reduction of sentence, or other leniency or special treatment, given by the state in exchange for the person's testimony; and (3) information concerning other criminal

This law has received national recognition. Criminal justice advocates have lauded it as "the strongest anti-snitch measure in the nation"[121] and "the gold standard for jailhouse informant laws."[122] Alexandra Natapoff, leading scholar on jailhouse informants, stated, "[t]his legislation is an important step in pulling back the curtain of secrecy and unreliability that has long surrounded the use of criminal informants. It will help reduce wrongful convictions, and it will strengthen the integrity of the Texas criminal process. Other states should take careful note."[123]

A. A Closer Analysis of Texas House Bill 34

Texas House Bill 34 appears to be a significant step toward reigning in unreliable jailhouse informant testimony and, thereby, reducing the number of wrongful convictions in Texas. The first provision requiring prosecutors to document their use of jailhouse informants should provide attorneys with the information necessary to rule out testimony from repeat jailhouse informants, the most unreliable class of jailhouse informants. The second and third provisions should ensure that this information is disclosed at trial, where the jury can use it to detect untrustworthy informants. All three provisions seem to work together to ensure that information that bears upon the reliability of a jailhouse informant is recorded and disclosed at trial, giving the Bill the appearance of a comprehensive solution to the jailhouse informant problem. However, while the law is certainly a step in the right

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cases in which the person has testified, or offered to testify, against a defendant with whom the person was imprisoned or confined, including any grant, promise, or offer as described by Subdivision (2) given by the state in exchange for the testimony.

Id. The Bill also includes safeguards regarding interrogations and eyewitness identification. *Id.* More specifically, it requires that custodial interrogations of suspects facing serious charges be electronically recorded unless good cause exists. *Id.* It further provides that the Texas Commission on Law Enforcement shall establish a training program on eyewitness identification and each law enforcement agency shall require their peace officers to complete the training. *Id.*

121. *See* Grissom, *supra* note 111.

122. Marc Levin, *Levin: More Criminal Justice Reform for Texas in 2018*, HOUS. CHRON. (Jan. 16, 2018, 12:10 AM), https://www.houstonchronicle.com/opinion/outlook/article/Levin-More-criminal-justice-reform-for-Texas-in-12499603.php [https://perma.cc/QRU8-PD4S]. Innocence Project legislative strategist Michelle Feldman said, "Texas at this point is the gold standard in innocence reform. There's always more to be done . . . but I think this law is putting Texas really as a leader." McCullough & Dehn, *supra* note 10. Feldman further stated, "It's going to shed light on this secretive system that leads to so many wrongful convictions, and we really hope it'll be a model for other states in the country to follow." *Id*.

123. *Texas Governor Signs Landmark Comprehensive Legislation to Prevent Wrongful Convictions*, INNOCENCE PROJECT, https://www.innocenceproject.org/texasgovernorsignslandmarkbill/ [https://perma.cc/P8CM-FUDK]. Michael Morton, who was wrongfully convicted of the murder of his wife and spent twenty-five years in prison, stated, "Thank you, Governor Abbot, for signing HB34 into law." *Id.*

direction, a closer analysis reveals that the Bill is far from a complete solution.

A hypothetical application of Texas's law to *Nolley* reveals its practical limitations. The first provision discussed above would have required all prosecutors to document their use of O'Brien as an informant and therefore would have provided the prosecutor who tried Nolley's case with the knowledge that O'Brien had been used as an informant in other criminal proceedings. However, the investigation following the trial revealed that the prosecutor already had this knowledge.[124] Thus, the first provision would not have given the prosecutor information on O'Brien that he did not already possess. The second provision allows certain evidence to be admitted for the purposes of impeachment and does not require anything of the prosecutor. The third provision, on the other hand, requires that the state disclose to the defendant any information that is relevant to the informant's credibility; however, this obligation is already encompassed by the *Brady* requirement, which compels the state to turn over materially impeaching evidence. Given that the prosecutor in *Nolley* was aware of O'Brien's prior work as an informant and, despite a constitutional obligation to disclose that information,[125] "stood mute when O'Brien falsely swore to Mr. Nolley's jury that no time had he so much as attempted to 'work any deal' in exchange for serving as a State informant," it is unlikely that a similar obligation rooted in state law would have motivated the prosecutor to take a different course of action.[126] Considering these facts, even if House Bill 34 had been in effect at the time Nolley was tried for murder, it likely would not have changed the outcome of the case. The law ultimately depends on prosecutors—who face immense pressure to secure convictions and stand to gain from informant testimony regardless of its reliability—to regulate jailhouse informants and lacks the oversight and teeth necessary to ensure that unreliable informant testimony is detected and excluded from the criminal justice system.

Moreover, while the Bill requires prosecutors to document informant use,[127] it does not establish or even require a database, such as the one in Tarrant County, through which information on jailhouse informants can be

124. Possley, *John Nolley*, supra note 72.

125. Courts have held that that the suppression of evidence concerning a witness's prior work as an informant constitutes a *Brady* violation if prejudice ensues from that suppression. *See, e.g.*, United States v. Lopez-Rivas, 614 F. App'x 918, 919–20 (9th Cir. 2015) (implying that a *Brady* violation would have occurred if the government had suppressed information about a witness's prior work as an informant and prejudice had ensued); People v. Wright, 658 N.E.2d 1009, 1011–12 (N.Y. 1995) (holding that a witness's prior history as a police informant constituted *Brady* material).

126. Possley, *John Nolley*, *supra* note 72.

127. H.B. 34, 85th Leg., Reg. Sess. (Tex. 2017).

shared. Thus, while a prosecutor may have documented his or her use of a particular informant, that information may be stored away in a desk drawer in a rural part of South Texas, unavailable to a prosecutor in North Texas who later uses the same informant. In fact, that information would likely be unavailable to a prosecutor even within the same region of Texas. Shannon Edmonds, the staff attorney and director of governmental relations for the Texas Association of County and District Attorneys, stated that "it could be a challenge for prosecutors in small counties to implement the policy because lawmakers provided no funding to help counties create systems like the one Tarrant County has established."[128] Edmonds further stated that "[i]ndividual prosecutors' offices will have to build something from the ground up, and in most places it will probably be kept in filing cabinets or binders or something like that."[129]

With all of that being said, the provisions of the Bill might help to discourage prosecutorial misconduct. The requirement that prosecutors track informant testimony will, in many counties, bring the use of informants under the supervision of other attorneys, thereby increasing the oversight and accountability of prosecutors.[130] For example, the prosecutor in *Nolley* may have disclosed O'Brien's history as an informant if he had known that that information, as well as his own use of O'Brien as an informant, would be available to other prosecutors. Furthermore, while constitutional requirements overlap with the disclosure requirements in the Bill, the incorporation of these requirements into the Texas Code of Criminal Procedure places them more directly in the line of sight of Texas judges and prosecutors, where they are more likely to influence prosecutorial action. Nonetheless, House Bill 34 leaves the responsibility of recording and disclosing informant information to the prosecution and, thereby, leaves open the possibility that prosecutors will suppress this information, as was the case in *Nolley*.

IV. A NEEDED SOLUTION THAT WOULD ENABLE JUSTICE

Additional solutions are needed to prevent the use of false jailhouse informant testimony. The *Brady* disclosure requirements discussed above lack the teeth necessary to safeguard against false informant testimony, and House Bill 34 does nothing to prevent the prosecution from suppressing

128. Grissom, *supra* note 111.

129. Grissom, *supra* note 111.

130. This will not be the case in counties where records on informant use are kept in the prosecutor's desk drawer.

impeaching information about an informant.[131] Both problematically depend on the prosecution to function properly and thereby result in the detection of unreliable informant testimony. One practical solution that would close the door on prosecutorial misconduct would be to impose upon judges a "gatekeeper" function in determining the admissibility of all informant testimony. This solution was explored in *Dodd v. State*, an Oklahoma Court of Criminal Appeals case.[132] In the original *Dodd* opinion, the court held that before a jailhouse informant can testify, the judge must hold a "reliability hearing" to filter out informant testimony that is likely to be false.[133] At these hearings, the prosecution must disclose any benefits ever offered to the informant, the informant's complete criminal history, the statements made by the defendant about which the informant agrees to testify, and any other cases in which the informant has cooperated with the prosecution.[134] According to scholar Jack Call, "[n]o court in United States history had ever gone so far to protect against the danger of perjury presented by testimony from jailhouse informants."[135] Despite the feasibility of this solution, the Oklahoma Court of Criminal Appeals later

131. As discussed earlier, the *Brady* rule requires only that materially impeaching evidence be turned over to the other side. Brady v. Maryland, 373 U.S. 83, 87 (1963). Evidence is considered "material" only when there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433–34 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). "In the context of jailhouse informant testimony, this definition of materiality does not provide enough incentive to ensure that prosecutors will provide defendants the information required . . . ." Call, *supra* note 40, at 81. It is far too likely that appellate courts will "decide that, even if the defense had used the evidence withheld by the prosecution to impeach the testimony of the jailhouse informant, there is not a 'reasonable probability' that the defendant would have been found not guilty." *Id.*

132. Dodd v. State, No. F-97-26, 1999 WL 521976 (Okla. Crim. App. July 22, 1999), *reh'g granted*, *opinion vacated and withdrawn*, 993 P.2d 778 (Okla. Crim. App. 2000).

133. *Id. Cf.* Steven Clark, *Procedural Reforms in Capital Cases Applied to Perjury*, 34 J. MARSHALL L. REV. 453, 460 (2001) (noting that the Illinois House of Representatives Special Committee on Prosecutorial Misconduct recommended that the Illinois legislature mandate reliability hearings in all cases where jailhouse informant testimony is to be used).

134. Call, *supra* note 40, at 79. *See also* Emily Jane Dodds, *I'll Make You a Deal: How Repeat Informants Are Corrupting the Criminal Justice System and What to Do About It*, 50 WM. & MARY L. REV. 1063, 1079 (2008) ("At these hearings, the court would weigh factors bearing on an informant's credibility, including cooperation or benefits received in *other* cases, and would determine whether the informant was reliable enough to testify."). *See, e.g.*, George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 63–64 (2000) (noting that a jailhouse informant's "history of repeated cooperation for compensation" should "create a presumption of insufficient reliability").

135. Call, *supra* note 40, at 79.

vacated the opinion and issued a new decision that excluded the original opinion's mandate of a reliability hearing.[136]

Legislatures should build on the solution set forth in *Dodd* by not only imposing upon judges a "gatekeeper" function with regard to jailhouse informant testimony but also by ensuring that judges have the information necessary to thoroughly assess an informant's reliability without having to depend on the prosecution for that information. This could ultimately be done by providing trial judges, in addition to defense attorneys and prosecutors, with access to a statewide database similar to the one developed in Tarrant County. This database would provide judges with information that is vital to a reliability assessment, such as a jailhouse informant's cooperation in other cases and the benefits the informant was offered or received.[137] Legislation should further require that judges, rather than prosecutors, document informant use in order to ensure the objectivity of the data and informant tracking system.[138] While it would impose a financial burden on taxpayers to develop such a database, it (1) would be much more feasible to pool state resources to create a single statewide database rather than requiring each county to develop its own independent database and (2)

136. Dodd v. State, 993 P.2d 778 (Okla. Crim. App. 2000). In her concurring opinion, Judge Strubhar persuasively called for the reliability hearing mandate prescribed in the original opinion, writing:

> This case illustrates the problems associated with the use of jailhouse informants who often play a pivotal role in an accused's conviction. While I recognize the need to use jailhouse informants' testimony, we must take certain precautions to ensure a citizen is not convicted on the testimony of an unreliable professional jailhouse informant, or snitch, who routinely trades dubious information for favors. The use of such untrustworthy witnesses carries considerable costs, especially in death-penalty cases, by undermining the foundation of cases where the stakes are the highest. The misuse of such informants also adds financial costs to taxpayers when convictions based on their testimony are reversed to be retried. Therefore, to ensure the utmost reliability in the admission of jailhouse informant testimony, I would also mandate the reliability hearing prescribed in the original opinion in this matter. As with the use of *Daubert* hearings to ensure the relevance and reliability of novel scientific expert testimony, this reliability hearing will allow the trial court to perform its gatekeeping function and filter out prejudicial jailhouse informant testimony that is more probably false than true.

Id. at 785 (Strubhar, P.J., concurring) (citation omitted). In another concurring opinion, Judge Craig countered Judge Strubhar's argument, writing, "[A]dequate protection is afforded by the discovery procedure and the use of cautionary jury instructions as mandated in the majority opinion. Many witnesses, in addition to jailhouse informants, may have a motive to lie. That is not a sufficient reason to remove the trier of fact from making a determination of the credibility of such witness." *Id.* at 787 (Craig, M.C., concurring). Based on the great number of exonerations that have recently been traced back to jailhouse informants, Judge Craig was clearly mistaken in his belief that adequate protection against false jailhouse informant testimony is afforded by discovery and jury instructions alone.

137. In Nolley's case, this database would have shown that O'Brien had previously testified in a murder trial in exchange for a reduced sentence. *See supra* note 19 and accompanying text.

138. Legislatures should require that judges, or judicial clerks, record the name and testimony of every jailhouse informant that testifies at trial. They should further require that judges, or judicial clerks, monitor the database and ensure that prosecutors input or provide information that only they would have, such as the benefits offered to a given informant.

is at least as practical as other solutions that have been proposed, such as requiring the electronic recording of jailhouse informants.[139] Moreover, preventing wrongful convictions should be a top priority when it comes to allocating taxpayers' dollars. Beyond this critical public policy rationale, it is incredibly costly in the long run for a state to wrongfully convict an individual. In the past quarter century, Texas taxpayers have paid nearly $100 million to wrongfully convicted individuals.[140] Implementing such a database would be much less expensive than the ultimate cost of wrongfully convicting individuals based on unreliable jailhouse informant testimony.[141] Another counterargument to this solution is that requiring judges to serve as gatekeepers with regard to jailhouse informant testimony would impose too large a burden on judges. While it is true that this solution would create additional work for judges, it would almost eliminate the possibility that prosecutors would suppress impeaching information about jailhouse informants,[142] and the first Canon of the Code of Conduct for U.S. Judges is that judges must do whatever is necessary to uphold the integrity of the judiciary.[143]

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139. *See* NORTHWESTERN UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, *supra* note 3, at 15. In *Massiah v. United States*, the Supreme Court held that, under the Sixth Amendment, the government cannot "deliberately elicit" information from a suspect that has been formally charged with a crime in the absence of counsel. 377 U.S. 201, 205–06 (1964). To satisfy *Massiah*, a jailhouse informant must obtain information "passively" and, therefore, cannot be placed in a particular inmate's cell for the purpose of obtaining evidence. Call, *supra* note 40, at 75. Thus, to comply with a law requiring that confessions made to jailhouse informants be recorded, informants could not be temporarily wired and placed in a cell to immediately elicit information from an inmate, but, rather, would have to wear a recorder for long periods of time (until the suspect happens to make a confession). Jailhouse informants would be unlikely to agree to such extended surveillance, and it would be burdensome for prosecutors to operate recorders for long periods of time. *See* Brian Frazier, *Best Hidden Voice Recorders of 2020 Review*, SPYCENTRE SECURITY (Jan. 1, 2020), https://spycentre.com/blogs/news/top-5-hidden-voice-recorders-of-2017-review [https://perma.cc/K5UJ-FFS6] (explaining that top-of-the-line hidden recording device must be recharged for two hours every ten hours it is in use).

140. Scott Rodd, *What Do States Owe People Who Are Wrongfully Convicted?*, PEW CHARITABLE TR. (Mar. 14, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/14/what-do-states-owe-people-who-are-wrongfully-convicted [https://perma.cc/KU4J-Y9KA].

141. *See How Much Does a Database Design Service Cost?*, COSTOWL, https://www.costowl.com/b2b/design-services-database-cost.html [https://perma.cc/DZB3-SNT8] ("Small businesses can expect to spend anywhere from $2,000 to $10,000 for database design, while larger companies might spend anywhere from $10,000 to half a million dollars.").

142. Given that the suppression of impeaching information by prosecutors is a recurring theme in cases involving wrongful convictions based on false informant testimony, judges must shoulder this burden in order to preserve the integrity of the criminal justice system. *See, e.g.*, Possley*, John Nolley*, *supra* note 72 (explaining that prosecutor in *Nolley v. State* suppressed information regarding jailhouse informant's participation in other cases, as well as the plea deal informant received for testifying).

143. JUDICIAL CONFERENCE OF THE U.S., CODE OF CONDUCT FOR UNITED STATES JUDGES 2 (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/76ZJ-SPMR]. The commentary to Canon 1 states that adherence to this responsibility helps to maintain public confidence in the judiciary, while "violation of

This solution would ultimately build upon House Bill 34's data-gathering requirements and the *Dodd* court's judicial gatekeeping scheme, while filling the major hole in both by eliminating the dependency on the prosecution to gather and come forward with information on informants.[144] Moreover, by requiring a statewide database, legislatures would address the issue of compartmentalizing information between the 254 different counties in Texas, which is one of the greatest limitations on the potential efficacy House Bill 34.[145]

Alternatively, if legislatures do not want to saddle judges with such a big responsibility, they could provide prosecutors and defense attorneys with access to the statewide database, require that both sides record any use of a jailhouse informant in any case (to ensure that recording is accomplished), and then rely on the disclosure requirements in *Brady* and state law.[146] This would ensure that information on informant use is documented and that both sides have access to that information, thereby greatly reducing the ability of prosecutors to suppress impeaching information. That being said, this alternative would take the recording and disclosure process outside of the purview of judges, making it less likely that prosecutors would comply,[147] and would leave the door open for prosecutors to hide certain information that only they would have, such as the benefits offered to an informant in exchange for testimony. Given that the stakes are so high in capital cases,[148] legislatures could cut a balance between these two versions of the database solution and require judges to serve a gatekeeper role only in capital cases, leaving database recording and disclosure to prosecutors and defense attorneys in all other cases.

Some scholars have argued against any and all use of the reliability hearings proposed in *Dodd*, pointing out that they increase the burden and

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this Code diminishes public confidence in the judiciary and injures our system of government under law." *Id.* at 3. On a related note, the American Judges Association points out that "[work] volume of courts is a management challenge for judges, not an excuse for deemphasizing procedural fairness." KEVIN BURKE & STEVE LEBEN, AM. JUDGES ASS'N, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION 17 (2007), http://www.amjudges.org/pdfs/AJAWhitePaper9-26-07.pdf [https://perma.cc/A6R7-BWQ7].

144. The *Dodd* solution relied on prosecutors to produce information regarding informants at reliability hearings, while House Bill 34 relied on prosecutors to track and document informant use. Both solutions faultily depended on the prosecution to function properly and left the door open to prosecutorial misconduct.

145. *See supra* notes 127–129 and accompanying text.

146. If there are no disclosure requirements in state law, such as those in H.B. 34, legislatures could introduce them. *See, e.g.,* H.B. 34, 85th Leg., Reg. Sess. (Tex. 2017).

147. In theory, a prosecutor would be more likely to record or produce information requested by a judge than required by state law, because, without the judge looking over his or her shoulder, the only person likely to detect the suppression of information would be the defense attorney—the very person from whom the information is being suppressed.

148. *See supra* note 3 and accompanying text.

expense of criminal trials.[149] One critic writes that "[c]alling the informant to testify [at a reliability hearing], subjecting him to direct- and cross-examination, calling and examining other character witnesses, and presenting evidence bearing on the informant's credibility would significantly encumber courts."[150] She goes on to state that "[t]he strain that reliability hearings would impose on the court is obvious when considering the sheer scope of information supporters suggest should be presented."[151] Another critic suggests that reliability hearings could stall proceedings to such an extent as to deprive criminal defendants of their Sixth Amendment right to a speedy trial.[152] Though the solution proposed above builds on the *Dodd* court's notion of imposing upon judges a "gatekeeper role," it would not necessarily require a reliability hearing as was recommended by the original *Dodd* court. By (1) creating a statewide database containing details about every jailhouse informant ever used and (2) providing judges, criminal defense attorneys, and prosecutors with access to that database before trial, there would be less need for a reliability hearing to determine the credibility of a given jailhouse informant.[153] In reviewing the database, judges and defense attorneys would already have the information they need on a given informant prior to trial.[154] Such a solution would maximize the utilization of modern-day technology and in turn maximize judicial efficiency.[155] Moreover, even if a reliability hearing was mandatory, the entire hearing would be streamlined because the database would give the judge access to much of the information that would otherwise need to be presented by the parties. This would avoid the problems critics point to concerning the burden of reliability hearings and their potential to infringe on criminal defendants' Sixth Amendment rights.[156]

149. Dodds, *supra* note 134, at 1080 ("[R]eliability hearings would undoubtedly increase the burden and expense of the criminal trial, particularly if the hearings were fully adversarial.").

150. *Id.*

151. *Id.* at 1080 n.100. Dodds notes that the "sheer scope of information that supporters suggest should be presented" would include "the informant's criminal history, any inducement for the informant's testimony, the testimony expected, the circumstances of the alleged incriminating statement to the informant, whether the informant has ever recanted the testimony, and other cases in which the informant has testified." *Id.*

152. Clark, *supra* note 133, at 461. *See also* Dodds, *supra* note 134, at 1080.

153. Legislatures should give prosecutors limited access to the databases and require them to input information that would not otherwise be available to the judge, such as the testimony that the jailhouse informant will offer, the circumstances in which the alleged incriminating statement was made, and whether the informant has ever recanted his or her testimony.

154. Prosecutors could electronically input this information from the comfort of their homes. There would be no need to convene for a hearing.

155. This solution is also more economically feasible than House Bill 34, which requires all counties to develop their own databases or systems to track informant use. With a statewide database, only one database would need to be created and maintained.

156. *See supra* notes 149–152 and accompanying text.

In addition to the database solution, state legislatures and courts could mandate special jury instructions any time jailhouse informant testimony is presented at trial.[157] Though this is more of an ancillary solution, it would ensure that jurors are put on notice that judicial informant testimony deserves extra scrutiny and would call to their attention the special considerations that must be taken into account when assessing the credibility of an informant, such as: (1) any other case in which the informant testified or offered statements against a defendant; (2) whether the witness has ever received any pay, leniency in prosecution, immunity, or other benefit in exchange for testimony; (3) whether the informant's testimony has ever changed; and (4) the informant's criminal history.[158] Such instructions would provide an additional safety net underneath the database solution, increasing the likelihood that the jury will detect any unreliable jailhouse informant testimony that makes it past the judge. Notably, the *Dodd* court's second opinion included the mandate of special jury instructions set forth in the original opinion.[159]

CONCLUSION

The use of informant testimony in trial proceedings poses a serious threat to the fairness and integrity of the criminal justice system. Texas's House Bill 34 represents a significant step toward addressing this issue. However, an application of the law to *Nolley* reveals its practical shortcomings and demonstrates the need for further regulatory measures. The solution proposed herein addresses these shortcomings, utilizing modern-day

157. Scholar Jack Call acknowledged this as a possible solution, writing that "[t]his could be a rather neutral instruction, which would simply remind jurors that the jailhouse informant had received a benefit from the state in return for his testimony . . . . Or the instruction could be a little stronger, directing jurors to be more skeptical about the credibility of the jailhouse informant's testimony . . . ." Call, *supra* note 40, at 80.

158. *See* Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000).

159. The *Dodd* court stated that in all cases where a court admits informant testimony, the following instructions must be given:

> The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) 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; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.

Id.

technology to address the age-old problem of unreliable jailhouse informant testimony. By requiring judges to serve as the "gatekeepers" of jailhouse informant testimony and providing them with access to a statewide database that contains information critical to their assessment, legislatures can ensure that unreliable informants are detected before their testimony even makes it before the jury. As an additional safety net, legislatures should mandate special jury instructions that inform the jury of the special considerations that must be taken into account when assessing the credibility of a jailhouse informant. It is possible that this database-centered solution would occasionally result in the exclusion of reliable jailhouse informant testimony, but a fundamental, time-honored principle of the U.S. criminal justice system is that it is "better that ten guilty persons escape, than that one innocent suffer."[160]

Luke G. Allen

160. *Blackstone's Ratio: Is It More Important to Protect Innocence or Punish Guilt?*, CATO INST., https://www.cato.org/policing-in-america/chapter-4/blackstones-ratio [https:// perma.cc/J7PE-MQLF]. *See also* Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 628 (2007) ("[O]ur criminal justice system operates on the precautionary principle that 'better that ten guilty persons escape than that one innocent suffer.' When false testimony is introduced into evidence . . . the justice system is derailed.").