

Law, Research, and Recommendations Regarding Jailhouse Informant Witnesses

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ABSTRACT

Jailhouse informant witnesses have been utilized within criminal trials in America since the early 1800s. However, jailhouse informants often provide false secondary confession evidence within their testimonies, and because it can be difficult for jurors to accurately assess the reliability of these witnesses, jailhouse informants have contributed to a growing number of wrongful convictions. This article outlines factors behind the continued use of jailhouse informants. Parts I and II discuss the existing case law regarding jailhouse informants. Part III describes characteristics of the typical jailhouse informant and the contents of their testimony. Parts IV and V summarize the legal decision-making research focusing on jailhouse informants and their influence on jurors. Parts VI and VII discuss recommendations for regulating jailhouse informant usage in the future and provide concluding thoughts.

INTRODUCTION

On the morning of July 16, 1996, the owner and three employees of Tardy Furniture Company in Winona, Mississippi were shot and killed.¹ Detectives quickly focused their investigative efforts on a former employee of the store: 26-year-old Curtis Flowers. Despite the absence of physical evidence linking him to the crime, Flowers was charged with all four murders, and over the course of the next 24 years, Flowers' case went to trial a total of six times, resulting in four convictions that were

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¹ Maurice Possley. *Curtis Flowers*, The National Registry of Exonerations (September 4, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5808>. [<https://perma.cc/FFG3-BEGU>].

all ultimately overturned.² Flowers was officially exonerated, and all charges were dismissed on September 4, 2020.³ Several factors contributed to the numerous convictions of this innocent man, including the use of jailhouse informants who testified in multiple trials. In his first trial, Frederick Veal and Maurice Hawkins both testified that Flowers had confessed to the murders while they were imprisoned alongside him.⁴ However, after the first conviction was overturned, both jailhouse informants admitted that their testimonies were false.⁵ In his second trial, Odell Hallmon was called to testify for the defense. Odell was an inmate with Flowers and the brother of Patricia Hallmon—an eyewitness that had testified in the first trial and claimed to have seen Flowers on the day of the murder.⁶ Odell testified that he convinced his sister to lie in her testimony to receive the reward money.⁷ Despite this testimony, Odell Hallmon was called as a witness for the prosecution in all of Flowers' subsequent trials, where he served as a jailhouse informant and testified that Flowers had confessed to the murders.⁸ Years later, Odell recanted this testimony and admitted he had made everything up. All three jailhouse informants not only admitted Flowers had never confessed to them, but they all also revealed that they were offered incentives by the prosecution to testify against Flowers. For his troubles Curtis Flowers was awarded \$50,000 a year for the next 10 years from the state.⁹

The present report serves to outline the existing case law regarding jailhouse informants, characteristics of the typical jailhouse informant, and psychological research concerning these witnesses. We will also examine current reforms and explore other recommendations to regulate jailhouse informant use.

I. JAILHOUSE INFORMANTS

In the American justice system, the Flowers' case is not unique in its use of jailhouse informant witnesses. In fact, the use of jailhouse informants in the United States dates to the early 1800s, and their use in criminal trials has increased over

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See Parker Yesko, *Mississippi is to pay Curtis Flowers \$500,000 for his decades behind bars*, APMREPORTS, <https://www.apmreports.org/story/2021/03/02/mississippi-to-pay-curtis-flowers-500000-settlement-for-decades-behind-bars>. [https://perma.cc/6CD3-HT6Z].

time.¹⁰ Jailhouse informants are convicted criminals who testify against a defendant by providing information that they allegedly obtained from the defendant while incarcerated together.¹¹ Typically, their testimonies contain secondary confession evidence, in that the jailhouse informant asserts that they heard the defendant confess to committing the crime. This differs from a primary confession, when a defendant confesses to their own crimes.

While secondary confession evidence may be beneficial if accurate, false secondary confession evidence has proven to be detrimental to the efficacy of the criminal justice system. The problem is that typically it is difficult to ascertain if jailhouse informants are telling the truth. In 2004, the Center for Wrongful Convictions identified false jailhouse informant testimony as the leading cause of wrongful convictions in capital cases.¹² Specifically, jailhouse informant testimony was present in 45.9% of the trials of the first 111 death row exonerations that occurred since the reinstatement of capital punishment in the 1970s.¹³ Additionally, according to the Innocence Project, one in five of the first 367 DNA-based exoneration cases contained jailhouse informant testimony.¹⁴ The National Registry of Exonerations reported that jailhouse informant testimony was present in 8% of all exoneration cases in the registry.¹⁵ However, because of the inability to quantify the exact number of unreliable informant witnesses, these statistics likely underestimate their true impact on wrongful convictions.¹⁶

¹⁰ JEFFREY S. NEUSCHATZ & JONATHAN M. GOLDING, *JAILHOUSE INFORMANTS: PSYCHOLOGICAL AND LEGAL PERSPECTIVES* 17 (NYU Press, 2022); Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, NORTHWESTERN UNIV. SCH. L. CNTR WRONGFUL CONVICTIONS, 2004–2005, at 2.

¹¹ Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32(2) *APA L. HUM. BEHAV.* 137, 138 (2008).

¹² Warden, *supra* note 10, at 3.

¹³ *Id.*

¹⁴ Innocence Staff, *Informing injustice: The disturbing use of jailhouse informants*, INNOCENCE PROJECT (March 6, 2019), <https://innocenceproject.org/informing-injustice-the-disturbing-use-of-jailhouse-informants/> [<https://perma.cc/EC2D-LQN3>].

¹⁵ Samuel Gross & Kaitlin Jackson, *Snitch Watch*, NATIONAL REGISTRY OF EXONERATIONS (May 13, 2015), <https://www.law.umich.edu/special/exoneration/Pages/Features.Snitch.Watch.aspx>. [<https://perma.cc/XF7M-YEYM>].

¹⁶ Pamela Heath et al., *Sometimes the Snitch Recants: A Closer Look at the Use of Jailhouse Informants in DNA Exoneration Cases*, 4 *Wrongful Conviction L. Rev.* 71, 71, 84 (2023); NEUSCHATZ & GOLDING, *supra* note 10, at 80.

II. HOW THE LAW VIEWS JAILHOUSE INFORMANTS

Informants have been relied on for information from as far back as the time of ancient civilizations¹⁷. The cost of potentially receiving false information versus the benefit of gaining valuable intel has been a point of contention throughout the existence of jailhouse informants. Courts and legislatures have recognized the need for regulating the use of jailhouse informants.¹⁸ However, a consensus on the best method has not been reached with policy makers, and at times courts have even vacated decisions and provided a new majority opinion on particular issues.¹⁹ We will now offer a brief review of the most prominent regulations and court cases surrounding the use of jailhouse informant testimony in the United States.

A. *Federal Rules of Evidence: Jailhouse Informant Testimony is not Hearsay.*

The Federal Rules of Evidence define “hearsay” in Rule 801 as a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.²⁰ In other words, hearsay occurs when the testifying witness attempts to use a statement made by another party as evidence to prove what the statement asserts is true. For example, in a court case involving a car accident, a testifying witness states, “I didn’t see the accident, but my friend told me that the SUV ran the stop sign and struck the sedan.” In this example, the testifying witness did not observe the event, and the friend is not present to provide direct testimony. At first glance, jailhouse informant testimony applies to the definition of “hearsay,” in that a jailhouse informant is attempting to use a statement uttered outside of court made by another party to prove the truth of the matter depicted in the statement. The Federal Rules of Evidence, however, stipulate that statements do not qualify as hearsay if they are offered against an opposing party (the party against whom the evidence is being presented) and the statement was originally made by the party. Applied to the testimony of jailhouse informants, the opposing party is typically the defendant, and the statement is an admission of guilt made by the defendant either to or in the presence of the informant. Informant testimony, therefore, is not considered hearsay and admissible under Rule 801.

¹⁷ For a detailed history of jailhouse informants, see NEUSCHATZ & GOLDING, *supra* note 10, at 17–36.

¹⁸ NEUSCHATZ & GOLDING, *supra* note 10, at 34–35.

¹⁹ *United States v. Singleton*, 144 F.3d 1343, 1361 (10th Cir. 1998); *United States v. Singleton*, 165 F.3d 1297, 1302 (10th Cir. 1999).

²⁰ FED. R. EVID. 801.

B. *Hoffa v. United States, 1966: Informant Testimony Does Not Violate 4th, 5th, or 6th Amendments.*

In 1962, James “Jimmy” Hoffa was on trial for violating the Taft-Hartley Act.²¹ The trial, known as the “Test Fleet trial,” ended in a hung jury.²² Hoffa was a member of the International Brotherhood of Teamsters and throughout the 1962 trial, he was often accompanied in his hotel suite by other members of the union, including an individual by the name of Edward Partin.²³ On occasion, Hoffa would be consulting with his attorney in the presence of Partin.²⁴ Unbeknownst to Hoffa, Partin was cooperating with federal law enforcement officials. Partin revealed to federal agents that Hoffa and others disclosed intentions to bribe members of the jury.²⁵ Hoffa was subsequently tried and convicted in 1964 for the efforts to bribe jury members. Partin’s reports to federal agents and testimony at trial contributed to Hoffa’s conviction.²⁶

On appeal, Hoffa asserted that his Fourth, Fifth, and Sixth Amendment rights were violated when evidence was obtained by the government by way of placing a secret informer in his quarters.²⁷ The United States Supreme Court held that Hoffa’s Fourth Amendment Rights for protection against unreasonable searches and seizures were not violated because Hoffa invited Partin to the hotel and willingly disclosed information both to Partin and in front of Partin.²⁸ The Court stated the Fourth Amendment did not protect against a misplaced belief that a person to whom he voluntarily confides wrongdoing will not reveal it.²⁹ The court also held that there was no Fifth Amendment violation against self-incrimination.³⁰ The statements Hoffa made were entirely voluntary and not coerced.³¹

Regarding Hoffa’s Sixth Amendment right to counsel, the court held that because the incriminating statements Partin testified to were not related in either

²¹ The Taft-Hartley Act of 1947 is a federal law that placed restrictions on labor unions. For information on the specific regulations, see Labor Management Relations Act, 1947 ch. 120, 61 Stat. 134; *Hoffa v. United States*, 385 U.S. 293, 294, 87 S. Ct. 408, 409 (1966).

²² *Hoffa*, 385 U.S. at 294.

²³ *Id.* at 296.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 300, 303–04.

²⁸ *Id.* at 302.

²⁹ *Id.*

³⁰ *Id.* at 303.

³¹ *Id.* at 304.

time or subject matter to conversations Partin may have overheard between Hoffa and his attorney, Hoffa's right to counsel was not violated.³² The Court further established that the use of a secret informer was not unconstitutional.³³ While the Court agreed Partin had motive to lie, Partin was subjected to cross-examination and the jury received what was deemed as proper trial court instructions.³⁴ *Hoffa v. United States* established the precedent that secret informants, including jailhouse informants, are legal resources, and if incriminating statements to informants are given voluntarily and without coercion, the statements were admissible in court. Further, when information is gathered by an informant without coercion, the informant's testimony is admissible.

C. *Kuhlmann v. Wilson, 1986: Jailhouse Informant Testimony and Right to Counsel.*

This case applied the question of the Sixth Amendment right to counsel specifically to jailhouse informants. Wilson was arrested on robbery and murder charges that took place in 1970; therefore, the Sixth Amendment right to counsel had been applied regarding the specific charges.³⁵ While awaiting trial, Wilson shared a cell with fellow prisoner, Benny Lee.³⁶ Police asked Lee to listen to Wilson with the purpose of determining Wilson's accomplices. Lee was instructed not to ask Wilson any questions about the crimes.³⁷ Wilson made incriminating statements that Lee reported to police and that were used against Wilson during his trial.³⁸ Wilson was convicted of murder and felonious possession of a weapon.³⁹

Wilson appealed his conviction on the grounds that the statements he made to Lee were acquired using investigative tactics that violated his Sixth Amendment right to counsel.⁴⁰ The Court determined that Lee followed instructions and did not ask Wilson any questions regarding the charges, and Wilson's statements were "spontaneous" and "unsolicited".⁴¹ Therefore, the Court held that Wilson's Sixth Amendment right to counsel was not violated by the jailhouse informant merely

³² *Id.* at 309.

³³ *Id.* at 311.

³⁴ *Id.* at 311–12.

³⁵ *Kuhlmann v. Wilson*, 477 U.S. 436, 439, 106 S. Ct. 2616, 2619 (1986).

³⁶ *Kuhlman v. Wilson*, 477 U.S. at 439.

³⁷ *Id.*

³⁸ *Id.* at 440.

³⁹ *Id.* at 441.

⁴⁰ *Id.*

⁴¹ *Id.* at 460.

listening. Under this ruling, if a jailhouse informant does not ask the defendant about the crime in question, and the defendant's incriminating statements were voluntary, the right to counsel is not violated.

D. Illinois v. Perkins, 1990: Fifth Amendment Rights when Incarcerated.

In 1986, Donald Charlton told police that his cellmate at the Graham Correctional Facility, Lloyd Perkins, confessed to details of a 1984 murder in East St. Louis that was at the time unsolved.⁴² By the time police received this information, Perkins had already been released from Graham and was being held in Montgomery County, Illinois, while awaiting trial for an unrelated battery charge.⁴³ To find out more about Perkins' involvement in the murder, police decided to place Charlton and an undercover agent, John Parisi, in the same cellblock with Perkins.⁴⁴ Charlton introduced Perkins to Parisi, and the three men arranged a meeting to plan an escape.⁴⁵ During the meeting, Parisi asked Perkins, "You ever do anyone?" to which Perkins responded yes and proceeded to provide specifics of his involvement in the 1984 murder.⁴⁶ Parisi would ask additional questions to elicit more details such as the type of gun used and when the murder occurred.⁴⁷ Perkins was subsequently charged with the murder.⁴⁸

Perkins filed a motion to suppress his statements on the ground that he was not read his Miranda warnings prior to being questioned by the undercover agent.⁴⁹ The trial court granted the motion, and the Appellate Court of Illinois affirmed.⁵⁰ The Supreme Court granted certiorari to decide whether an undercover agent must provide Miranda warnings to incarcerated suspects prior to asking questions.⁵¹ The Court held that because an inmate conversing voluntarily with someone they believed to be a fellow inmate did not involve the pressures of a "police-dominated atmosphere" for which Miranda was designed as a safeguard, Miranda warnings

⁴² *Illinois v. Perkins*, 496 U.S. 292, 294 110 S. Ct. 2394, 2395 (1990).

⁴³ *Illinois v. Perkins*, 496 U.S. at 294.

⁴⁴ *Id.* at 294–95.

⁴⁵ *Id.* at 295.

⁴⁶ *Id.*

⁴⁷ *Id.* at 304.

⁴⁸ *Id.* at 295.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 295–96.

were not required for incriminating statements against Perkins to be admissible.⁵² In their opinion, the Court relied on *Hoffa*, citing the only difference in this case was that Perkins was incarcerated.⁵³ Incarceration, whether or not for the crime in question, does not justify the assumption that a statement made to an undercover agent was involuntary. Just because a person is in jail does not mean any inculpatory statements made to informants were involuntary. Under this ruling, jailhouse informants are allowed to ask specific questions about the crime, and as long as the defendant responds voluntarily, the Fifth Amendment right against self-incrimination is not violated.

E. *US v. Singleton, 1999: Incentivized Informant Testimony.*

Sonya Singleton was convicted of money laundering and conspiracy to distribute cocaine.⁵⁴ A co-defendant testified against Singleton in exchange for leniency related to his involvement in the crimes in question. Singleton's conviction was reversed in 1998 by a three-judge panel that held the co-defendant's testimony should have been suppressed due to the offer of leniency in exchange for the testimony.⁵⁵ This decision was vacated in 1999 for the case to be reheard en banc, by all the judges of the court, rather than the smaller panel.

The question considered by the Court was whether the "anti-gratuity statute,"⁵⁶ had been violated by offering the co-defendant leniency in a plea agreement in exchange for his testimony against Singleton. The statute states, "Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . before any court . . . shall be fined under this title or imprisoned for not more than two years, or both."⁵⁷ To determine whether the statute applied to the government's prosecutorial duties in criminal cases, the term "whoever" was examined. The en banc court concluded that the government operates only through its officers and agents, and the United States' authority to prosecute can only be carried out by the United States Attorney, his or her assistants, or officers of the Department of Justice.⁵⁸ Thus, the United States and its agents cannot be separated. The en banc court held that "whoever" denotes a being, and the

⁵² *Id.* at 298.

⁵³ *Id.* at 298–99.

⁵⁴ *United States v. Singleton*, 165 F.3d 1297, 1298.

⁵⁵ See *United States v. Singleton* 144 F.3d 1343 (10th Cir. 1998) for more details regarding the 1998 court decision.

⁵⁶ 18 U.S.C. § 201(c)(2).

⁵⁷ *Id.* at §201(b).

⁵⁸ *Singleton*, 165 F.3d at 1300.

United States is not a being, but rather an inanimate entity.⁵⁹ Therefore, the statute does not apply to the government or agents of the government, including prosecutors, who are fulfilling governmental duties. The Court stipulated offers of leniency must be those that are traditionally given; however, a list of acceptable incentives was not provided.⁶⁰ In essence, attorneys are legally allowed to provide incentives to jailhouse informants in exchange for testimony.

III. LEGAL SAFEGUARDS

Federal Rules of Evidence: A Witness's Character for Truthfulness or Untruthfulness. The Federal Rules of Evidence allow a witness's credibility to be attacked under certain situations.⁶¹ An opposing attorney who believes an informant's testimony to be deceptive may be able to address the issue using Rule 608.⁶² This rule allows for the use of opinion and reputation evidence to argue truthfulness of a witness.⁶³ During cross examination, specific instances of a witness's conduct may be used to prove their character for truthfulness or untruthfulness.⁶⁴ This rule could be invaluable, particularly when an attorney has knowledge of previous deception by the informant.

A. *Giglio v. United States, 1972: Disclosure of Incentives.*

In 1966, authorities discovered that Robert Taliento, a bank teller, was cashing forged money orders.⁶⁵ Upon questioning, Taliento confessed to providing Giglio with a bank signature card so Giglio could forge the money orders.⁶⁶ Taliento agreed to testify against Giglio, and during cross-examination, denied receiving any type of incentive in exchange for his testimony.⁶⁷ Giglio was convicted of passing forged money orders and received a five-year prison sentence.⁶⁸ During the appeal process, Giglio's attorneys discovered the Assistant United States Attorney who presented the case to the grand jury had made a promise of leniency to Taliento in exchange

⁵⁹ *Id.*

⁶⁰ *Id.* at 1301–02.

⁶¹ FED. R. EVID. 607.

⁶² FED. R. EVID. 608.

⁶³ *Id.* at 608(a).

⁶⁴ *Id.* at 608(b).

⁶⁵ *Giglio v. United States*, 405 U.S. 150, 151, 92 S. Ct. 763, 764 (1972).

⁶⁶ *Id.*

⁶⁷ *Id.* at 151–52.

⁶⁸ *Id.* at 150.

for his testimony.⁶⁹ The prosecuting attorney who tried the case did not have knowledge of the incentive.⁷⁰

The question before the Court was whether Giglio should receive a new trial based on the discovery of the promise made to Taliento. The Court determined the prosecution's case relied heavily on the testimony of Taliento.⁷¹ His credibility was therefore an important factor in the trial, and the jury was entitled to know of any promises made to Taliento. The Court held a violation of due process occurred when the prosecution did not present all relevant evidence to the jury.⁷² Giglio's conviction was reversed, and he was granted the opportunity for a new trial.⁷³ *Giglio* established that all promises or incentives given to an informant in exchange for testimony must be disclosed prior to the trial in question.

B. Arizona v. Fulminante, 1991: Coerced Secondary Confessions Inadmissible.

In 1982, Fulminante's young daughter was murdered in Arizona and Fulminante became a suspect.⁷⁴ Fulminante moved to New Jersey where he was convicted of unrelated federal charges and incarcerated in a federal prison in New York.⁷⁵ While in prison, he befriended Anthony Sarivola, an informant for the Federal Bureau of Investigation (FBI).⁷⁶ Sarivola learned that Fulminante was suspected of murdering his own daughter and attempted to gain information from him.⁷⁷ Fulminante initially denied involvement.⁷⁸ Sarivola then offered to protect Fulminante from other inmates who had ill intent toward Fulminante after they also heard the rumor regarding his daughter.⁷⁹ Sarivola stipulated that to receive his protection, Fulminante had to tell him what happened to his daughter. Fulminante confessed to murdering his daughter and was subsequently indicted, tried, and convicted of first-degree murder, in part based on Sarivola's testimony.⁸⁰

⁶⁹ *Id.* at 152.

⁷⁰ *Id.* at 153.

⁷¹ *Id.* at 154–55.

⁷² *Id.* at 155.

⁷³ *Id.*

⁷⁴ *Arizona v. Fulminante*, 499 U.S. 279, 282, 111 S. Ct. 1246, 1250 (1991).

⁷⁵ *Id.*

⁷⁶ *Id.* at 283.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 283–84.

On appeal, Fulminante stated Sarivola's testimony should have been inadmissible due to the confession being coerced. The Arizona Supreme Court agreed and remanded the case for a new trial.⁸¹ The United States Supreme Court affirmed the state's decision, declaring Fulminante's fear of violence motivated him to confess to Sarivola in exchange for protection.⁸² Under this ruling, a jailhouse informant's testimony is inadmissible if the incriminating statements made by the defendant were coerced.

C. Burns v. Martuscello, 2018: Prisoners' Right not to Snitch.

In all the court cases described above that involve jailhouse informants, the jailhouse informants willingly disclosed information they received to authorities and testified against defendants. However, there have been situations in which prisoners were reluctant informants. In 2010, Burns was working in the Coxsackie Correctional Facility commissary in New York when a can fell from a shelf above him, striking him in the face and neck, causing minor injuries.⁸³ The incident was reported, and Burns signed a medical waiver. The next day, Burns was approached by two police officers (Noeh and Shanley) who told him his wife had called complaining that he had been cut by another inmate.⁸⁴ Burns assured Noeh and Shanley that he had not been cut by anyone, and the only injuries he had were the bruise and scratch from the can that fell on him.⁸⁵ Shanley then informed Burns of his intent to place him in "Involuntary Protective Custody" (IPC) due to the threat to his safety, but he could avoid IPC if he agreed to be a snitch.⁸⁶ If he refused to cooperate, Burns was told he would be in IPC indefinitely. Burns refused and Noeh wrote an IPC recommendation.⁸⁷ Prior to the IPC hearing, Shanley and another officer (Martuscello) approached Burns again, saying he could agree to be a snitch or transfer to IPC.⁸⁸ He again refused. At the hearing, despite testimony from an officer who witnessed the can fall on Burns, the hearing officer approved Burns' placement in IPC. While in IPC, Burns had to remain in his cell 23 hours a day and his prison resources, including access to the library and religious services, were

⁸¹ *Id.* at 284.

⁸² *Id.* at 312.

⁸³ *Burns v. Martuscello*, 890 F.3d 77, 81–82 (2d Cir. 2018).

⁸⁴ *Id.* at 82.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 83.

greatly reduced.⁸⁹ Shanley and Martuscello would repeatedly come by his cell demanding that he become a snitch if he wanted out of IPC. Burns remained in IPC for over six months, only being released from restricted status upon transfer to another prison.⁹⁰

Burns filed a suit claiming his First Amendment rights had been violated. The Court decided that the First Amendment protects the “right to decide what to say and what not to say” and “to force a person to speak, and compel participation, is a severe intrusion on the liberty and intellectual privacy of the individual[.]”⁹¹ The Court held that prisoners retain a First Amendment right to not serve as informants and to decline commands by authorities to provide both truthful and false information.⁹²

While many prisoners become willing jailhouse informants, others have no desire to do so, perhaps out of fear of being labeled a snitch or because they simply do not wish to get involved in another’s affairs. *Burns v. Martuscello* established that prisoners cannot be compelled to act as informants. Further, when a prisoner rejects a demand by authorities to become an informant, any retaliation against the prisoner by authorities would also be a violation of the prisoner’s First Amendment rights.

IV. CHARACTERISTICS OF THE TYPICAL JAILHOUSE INFORMANT AND THEIR TESTIMONY

The unreliable nature of jailhouse informants was initially exposed through newspaper articles and a subsequent interview in 1989 on the television show, *60 Minutes*. The interview focused on Leslie Vernon White, an inmate and experienced jailhouse informant, who had been in and out of juvenile detention and prison since he was 8 years old.⁹³ During the interview, White admitted to lying as an informant, and demonstrated his ability to assume the identity of a police officer on the phone to obtain accurate crime details, arrange to be moved closer to the defendant, and have the interaction recorded to testify against a defendant for an incentive.⁹⁴ These elements allowed for his testimonies to be believable, as they included details that only the perpetrator would have known.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 84.

⁹² *Id.* at 89.

⁹³ NEUSCHATZ & GOLDING, *supra* note 10, at 30–31.

⁹⁴ *Id.*

The White interview fueled an extensive investigation and the subsequent release of the Los Angeles Grand Jury Report in 1990.⁹⁵ The comprehensive review of court documents, as well as interviews of 120 witnesses and 25 jailhouse informants within the Los Angeles County Jail revealed an underlying, systemic process that permitted and encouraged the use of unreliable informants.⁹⁶ All the jailhouse informants interviewed for the Grand Jury Report were convicted of serious offenses, including murder, kidnapping, and rape.⁹⁷ Like White, jailhouse informants are often repeat offenders, with extensive criminal histories, and are serving long prison sentences.⁹⁸ They often testify as an informant multiple times, typically for the prosecution,⁹⁹ and they frequently testify against defendants who are tried for serious crimes when there is little to no additional evidence available.¹⁰⁰ They also often desire an incentive in exchange for their testimony.¹⁰¹

Despite the findings and concern generated from the Los Angeles Grand Jury Report (1990), similar misconduct has continued in the United States, indicating a lack of large-scale reform. Orange County, California, for instance, recently released an official report that unveiled the prison system's improper use of jailhouse informants between 2007 and 2016, and specifically exposed repeat violations of defendants' Sixth Amendment right to counsel and Fourteenth Amendment's Due Process Clause in cases using custodial informants.¹⁰² Jailhouse informants were used to elicit information from defendants about conduct in which the defendants were charged and represented, and prosecutors failed to disclose evidence favorable to the defense concerning the jailhouse informants.

Cases containing verifiable false jailhouse informant testimony have been analyzed to identify patterns in the testimonies of dishonest jailhouse informants. Neuschatz et al. (2021) analyzed a total of 43 jailhouse informant testimonies within

⁹⁵ *Id.* at 31.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ LOS ANGELES COUNTY GRAND JURY, REPORT OF THE 1989–1990 LOS ANGELES COUNTY GRAND JURY- INVESTIGATION OF THE INVOLVEMENT OF JAILHOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 10 (1889–1990); Jeffrey S. Neuschatz et al. *The Truth About Snitches: An Archival Analysis of Informant Testimony*, 28 PSYCH., PSYCHOLOGY & L. 508, 518 (2021).

⁹⁹ LOS ANGELES GRAND JURY, *supra* note 98, at 23; Neuschatz et al., *supra* note 98, at 518; *Justice Department Finds Civil Rights Violations by Orange County, California, District Attorney's Office and Sheriff's Department in Use of Jailhouse Informants*, U.S. DEP'T OF JUST. (Oct. 13, 2022), <https://www.justice.gov/opa/pr/justice-department-finds-civil-rights-violations-orange-county-california-district-attorney-s>. [https://perma.cc/B6WL-6PDG].

¹⁰⁰ Gross & Jackson, *supra* note 15; Heath et al., *supra* note 16, at 71; NEUSCHATZ & GOLDING, *supra* note 10, at 7.

¹⁰¹ LOS ANGELES GRAND JURY, *supra* note 98, 10–11.

¹⁰² U.S. DEPARTMENT OF JUSTICE, *supra* note 99.

22 rape trial transcripts involving DNA evidence in which the defendant was later exonerated by the Innocence Project.¹⁰³ While the circumstances within these cases were not representative of all cases involving jailhouse informants, the analysis, as well as cases within the Los Angeles Grand Jury (1990) and Orange County reports, assist in providing insight into characteristics of the testimonies of these witnesses.¹⁰⁴ Neuschatz et al. (2021) determined that 21.88% of 32 jailhouse informants testifying for the prosecution had been convicted of only violent offenses, 68.75% were incarcerated for only non-violent crimes, and the remainder were serving a sentence for a combination of violent and non-violent crimes.¹⁰⁵ Additionally, 18.75% of non-violent offenders committed a crime involving deceit, such as perjury or fraud. Out of 29 jailhouse informants, 79.31% were questioned about their criminal history by both the prosecution and defense.¹⁰⁶

Out of the 43 testimonies, Neuschatz et al. (2021) identified 33 testimonies where the informant testified for the prosecution, and found 93.94% of testimonies contained secondary confession evidence, and 32 of the testimonies included, on average, 4.5 details about the crime, such as specifics regarding the crime scene or weapon used.¹⁰⁷ An average of 66.67% of each informant's details were accurate and 12.81% were inaccurate.¹⁰⁸ Out of the 28 testimonies with accurate details, 14.29% contained details that were not available to the public.¹⁰⁹ The majority (85.00%) of this sample who were asked (n = 20), denied having prior knowledge of the crime.¹¹⁰ However, jailhouse informants, like White, have historically utilized extensive methods to obtain crime details from external sources, such as fabricating false identities or working with law enforcement.¹¹¹ Neuschatz et al. also discovered that 64.29% of 28 available testimonies contained inconsistencies, either between the testimony and a previous statement (50.00%), between the testimony and the facts of the case (55.56%), or both.¹¹²

¹⁰³ Due to missing data (i.e., missing transcript pages, nested variables), the variables of interest are not present in all 43 transcripts but are instead measured from the available sample size.

¹⁰⁴ U.S. DEPARTMENT OF JUSTICE, *supra* note 99.

¹⁰⁵ Neuschatz et al., *supra* note 98, at 514.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 516–17.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 101, 107 (2014); LOS ANGELES GRAND JURY, *supra* note 98, at 27.

¹¹² Neuschatz et al., *supra* note 98, at 516–17.

While some jailhouse informants claim that prosecutors coerced or threatened them into obtaining secondary confession evidence,¹¹³ other jailhouse informants are eager to work with authorities, often in exchange for an incentive.¹¹⁴ For example, Los Angeles and Orange County records indicated that jailhouse informants would be strategically housed near certain inmates for the purpose of collecting incriminating information, whereas other accounts indicated that law enforcement provided jailhouse informants information about cases. In exchange for being placed near certain defendants and/or receiving information about certain cases, jailhouse informants receive various incentives.

Out of 28 prosecution jailhouse informants in Neuschatz et al.'s (2021) sample who were questioned about incentives, 12.50% admitted they had received an incentive in exchange for their testimony.¹¹⁵ Although 75.00% explicitly denied receiving an incentive when testifying, the Los Angeles Grand Jury Report (1990) revealed that jailhouse informants often expect to receive benefits for their work, and incentives may be offered implicitly or following the trial.¹¹⁶ Not only can these incentives take the form of favorable treatment, money, or even extra phone calls, but they also frequently manifest as reduced sentences or lenient charges for the jailhouse informants' own crimes.¹¹⁷ Alternatively, 77.79% of 18 informants claimed they were testifying for some moral imperative, and 37.93% indicated they were hesitant to come forward out of fear for their own safety.¹¹⁸ Despite the confirmation that all these witnesses provided false testimony, jailhouse informants rarely suffer from legal consequences or prosecution for perjury for fabricating their statements.¹¹⁹

V. LEGAL DECISION-MAKING RESEARCH REGARDING JAILHOUSE INFORMANTS

Considering that the court has determined that jailhouse informant testimony is admissible in many instances, psychological research has investigated mock jurors' perceptions of secondary confession evidence within their testimonies. Typically, researchers ask participants to assume the role of a juror and evaluate a trial where a jailhouse informant either testifies and provides secondary confession evidence, or

¹¹³ Heath et al., *supra* note 16, at 84.

¹¹⁴ LOS ANGELES GRAND JURY, *supra* note 98, at 13–15; U.S. DEPARTMENT OF JUSTICE, *supra* note 99.

¹¹⁵ Neuschatz et al., *supra* note 98, at 516.

¹¹⁶ ALEXANDRIA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE*, 22 (NYU Press, 2009).

¹¹⁷ *Id.* at 28; Christopher T. Robertson & D. Alex Winkelman, *Incentives, Lies, and Disclosure*, 20:1 J. CONST. L. 33, 33, (2017).

¹¹⁸ Neuschatz et al., *supra* note 98, at 519.

¹¹⁹ Covey, *supra* note 111, at 109; Heath et al., *supra* note 16, at 84.

where a jailhouse informant witness is not present. In the first psychological study of jailhouse informants, Neuschatz et al. (2008), asked participants in two experiments to read a trial transcript that either included secondary confession evidence or did not include secondary confession evidence.¹²⁰ When secondary confession evidence was present, it was presented by an accomplice witness, a jailhouse informant, or a community member witness. Half the witnesses were offered incentives for their testimony. Participants were asked to evaluate the trial and provide a verdict decision as though they were a juror. In both studies, the researchers found mock jurors in any of the secondary confession conditions rendered more guilty verdicts than those whose trial did not contain a secondary confession. Most studies since have revealed similar findings—mock jurors provide higher conviction rates when secondary confession evidence is present in the trial as opposed to when it is absent.¹²¹

Research has also demonstrated that confession evidence has a greater impact on mock jurors than other forms of evidence. Wetmore et al., (2014, Experiment 3) directly investigated the influence of either a defendant confessing (primary confession) or a jailhouse informant providing confession evidence (secondary confession) on mock jurors. They asked participants to read four trial summaries depicting a murder, assault, rape, and theft, and evaluate each of the cases as a juror. Each trial contained either a primary confession, a secondary confession, an eyewitness testimony, or no evidence (control) as the key form of evidence, where each key form of evidence was isolated within a single case.¹²² They found that, in three out of the four trials, the conditions with either the primary or secondary confession produced higher conviction rates than the eyewitness and control conditions.¹²³ The difference in conviction rates between primary and secondary confessions, however, was not significant, demonstrating that mock jurors not only perceive primary confessions as a strong indicator of guilt, but that they also view secondary confessions as equally influential.¹²⁴

¹²⁰ Neuschatz et al., *supra* note 11, at 141.

¹²¹ Johnathan M. Golding et. al., *The Influence of Jailhouse Informant Testimony on Jury Deliberation*, 28 PSYCH., PUB. POL'Y, & L. 560, 563 (2022); Baylee D. Jenkins et al., *Testing Confirmation Bias: How Jailhouse Informants Violate Evidentiary Independence*, 38 J. POLICE & CRIM. PSYCH. 38, 93 (2021); Evelyn M. Maeder & Susan Yamamoto, *Attributions in the Courtroom: The Influence of Race, Incentive, and Witness Type on Jurors' Perceptions of Secondary Confessions*, 23 PSYCH., CRIME & L. 361, 368 (2016); Jeffrey S. Neuschatz et al., *Secondary Confessions, Expert Testimony, and Unreliable Testimony*, 27 J. POLICE CRIM. PSYCH., 179, 183 (2012); Stacy Ann Wetmore et al., *On the Power of Secondary Confession Evidence*, 20 PSYCH., CRIME & L., 339, 346 (2014); Stacy A. Wetmore et al., *Do Judicial Instructions Aid in Distinguishing Between Reliable and Unreliable Jailhouse Informants?*, 47 CRIM. JUST. BEHAV. 582, 590 (2020).

¹²² Wetmore et al. 2014, *supra* note 121, at 342–43.

¹²³ *Id.* In the fourth trial—the rape trial—primary and secondary confession evidence did not significantly differ from the control group.

¹²⁴ *See also* Jenkins et al., *supra* note 121, at 93.

Not only is jailhouse informant testimony persuasive, but it has also been found to influence participants' perceptions of other evidence. In Jenkins et al. (2021), participants read a trial summary depicting a robbery case in which the researchers manipulated a handwriting sample that was said to have come from a note the perpetrator left at the scene of the crime.¹²⁵ They were presented with one of three pairs of handwriting samples: matching, mismatching with high similarity, or mismatching with low similarity, and participants were to compare the note with handwriting on the suspect's *Miranda* waiver.¹²⁶ The researchers also manipulated whether a jailhouse informant witness was present, absent, or if the defendant provided a recanted primary confession.¹²⁷ Additionally, the authors varied whether the jailhouse informant received an incentive, and they altered the reliability of the jailhouse informant, where reliable jailhouse informants provided accurate crime details and unreliable jailhouse informants provided details that were inconsistent with the facts of the crime.¹²⁸ Participants were asked to make a judgment on whether they believed the handwriting from the note matched the handwriting from the *Miranda* waiver. The results showed that when participants encountered a reliable jailhouse informant, or the recanted primary confession, they rated the handwriting samples as a match more often than when the jailhouse informant was unreliable or when there was no confession evidence.¹²⁹

Another study found that jailhouse informant testimony had the ability to influence participant eyewitness identification selections.¹³⁰ Participants were asked to select a perpetrator from a lineup after reading a police report and viewing a surveillance video depicting a robbery.¹³¹ Following the lineup, participants either received no feedback, or they received confirming or disconfirming feedback in the form of either a jailhouse informant's testimony or from the defendant's primary confession.¹³² They were then asked to view the same lineup again and make a second identification. They found that 80% of participants who made an initial selection changed their identification after receiving disconfirming feedback from the jailhouse informant, and these participants were 20 times more likely to change

¹²⁵ *Id.* at 93.

¹²⁶ *Id.* at 97–98.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 98–99.

¹³⁰ Preston M. Mote et al., *Secondary Confessions as Post-identification Feedback: How Jailhouse Informant Testimony Can Alter Eyewitnesses' Identification Decisions*, 33 J. POLICE & CRIM PSYCH. 375, 381 (2018).

¹³¹ *Id.* at 375.

¹³² *Id.* at 377–78.

their identification than those who did not receive any feedback.¹³³ Of the participants who did not make a selection in the first lineup, 51.5% made an identification in the second lineup after a jailhouse informant testified, whereas 31.8% of participants in the no feedback condition made a selection in the second lineup.¹³⁴ In both cases, the informant feedback condition did not differ from the primary confession feedback. Thus, jurors not only appear to believe jailhouse informant testimony, but they also use the information to form or change their judgements about other evidence.

While jailhouse informant testimony has been found to be influential to jurors, it cannot always be trusted, especially when the jailhouse informant was offered an incentive for testifying. Researchers have found that incentives increase the likelihood for individuals to lie and falsely implicate others. Robertson and Winkelman (2017) asked participants to imagine they were incarcerated and had been asked for information about a fellow inmate by detectives.¹³⁵ The participants were told there was evidence against this inmate, but additional evidence was needed to ensure the conviction.¹³⁶ The researchers manipulated whether the inmate did (true secondary confession) or did not (false secondary confession) confess to the participant, and then all participants were offered up to four possible incentives in succession: (a) a penalty reduction, (b) an additional prison time reduction and a full reduction of fines, (c) complete reduction of prison time and fines, or (d) full immunity and financial support.¹³⁷ Overall, when the confession occurred, 94% of participants were willing to testify against the defendant.¹³⁸ When the defendant did not confess, 7% of participants were willing to falsely testify against the defendant for the lowest incentive level, and by the fourth incentive level, 20% of participants were willing to falsely testify.¹³⁹ This indicates that the incentives increased the participants' willingness to provide a false secondary confession.

A similar paradigm to Robertson and Winkelman (2017) was used by Jenkins et al. (2021, Experiment 1), however they decided to manipulate whether detectives had evidence against a defendant, and whether the participants were told the incentive was just a possibility or that the incentive was guaranteed.¹⁴⁰ Again, all participants were offered up to four incentives in exchange for a secondary confession. Overall, 27.3% of participants indicated they would provide false

¹³³ *Id.* at 381.

¹³⁴ *Id.* at 380.

¹³⁵ Robertson & Winkelman, *supra* note 117, at 59.

¹³⁶ *Id.*

¹³⁷ *Id.* at 60.

¹³⁸ *Id.* at 61.

¹³⁹ *Id.* at 60.

¹⁴⁰ Jenkins et al. 2021, *supra* note 121, at 97.

secondary confession evidence, and most willing participants (40.7%) agreed to testify after the third incentive level (a full prison sentence and fine reduction) was offered.¹⁴¹ Neither the incentive guarantee or the presence or absence of evidence against the defendant was a significant indicator of the willingness to testify. In a second experiment, Jenkins et al. (2023, Experiment 2) randomized the possible incentive offers rather than offering them sequentially and discovered that 17.65% of participants were willing to falsely testify, and those that had been offered the largest incentive were more likely to testify than those offered the smallest incentive.¹⁴² Therefore, it is not unreasonable to assume that jailhouse informants might provide false testimony against another inmate, especially when incentivized.

VI. WHY JAILHOUSE INFORMANTS ARE BELIEVED

It is clear from the psychological research and exoneration cases that jailhouse informants are very influential to juries and jailhouse informants are willing to falsely testify. So why do jurors believe the testimony from jailhouse informants who have violated the law and are known liars? There are several reasons why this might be. First, people are poor at detecting lies and oftentimes rely on non-verbal cues (e.g., body language and gaze) that are not indicative of lying.¹⁴³ Second, lay people reflexively believe confession evidence.¹⁴⁴ Third, people accept jailhouse informant testimony at face value and ignore situational constraints, a phenomenon known as the fundamental attribution error.¹⁴⁵ Fourth, people seem to demonstrate an innate trust that the prosecutor vets a jailhouse informant's story.¹⁴⁶ We will discuss each of these in turn.

¹⁴¹ *Id.* at 98–100.

¹⁴² Baylee D. Jenkins et al., *A Snitching Enterprise: the Role of Evidence and Incentives on Providing False Secondary Confessions*, 38 J. POLICE & CRIMINAL PSYCH. 141, 144 (2023).

¹⁴³ Charles F. Bond & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCH. REV. 214, 222 (2006).

¹⁴⁴ Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 AM. PSYCH. SOC. 125, 125 (1996); Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 L. & HUM. BEHAV. 27, 42 (1997).

¹⁴⁵ See Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 L. HUM. BEHAV. 137, 146 (2008).

¹⁴⁶ See Wetmore et al. 2020, *supra* note 121, at 584.

A. *Limited Ability to Detect Deception.*

First, all individuals, regardless of training or expertise, have a limited ability to detect deception consistently and accurately.¹⁴⁷ Kassin (2005) for example, asked 10 inmates to provide a true videotaped and audiotaped confession for the crime in which they had been convicted.¹⁴⁸ The same inmates were also asked to lie and provide a false confession for a different crime that they were not involved in.¹⁴⁹ Samples of college students and police officers were then asked to randomly evaluate either the true or false confession in either audio or video format. Across all conditions, the overall accuracy rate was 53.9%, where 63.6% of the true confessions were correctly identified as true and 56.1% of the false confessions were incorrectly identified as true (i.e., a false alarm).¹⁵⁰ Those who listened to the confession statements were more accurate than those who watched the videos, and students were found to be more accurate than the police sample. Police, and those watching the videos were also found to provide more false alarms. Therefore, jurors may not have the ability to accurately discern whether a jailhouse informant is being honest. This task is made more difficult when the deception is couched in true facts. Testimony provided by jailhouse informants often fits the fact pattern of the crime, however, jurors must detect whether the way in which the information was acquired is a lie.

B. *People Believe Confessions.*

Second, as previously mentioned, both primary¹⁵¹ and secondary confession evidence¹⁵² lead to increased conviction rates. Research has also determined that mock jurors continue to be influenced by this evidence, despite the presence of incentives. As previously mentioned, Neuschatz et al. (2008) evaluated mock jurors' perceptions of witnesses who received incentives for their testimony. They discovered that mock jurors recognized that witnesses receiving an incentive were more interested in serving their own interest than witnesses who did not receive an incentive, however the presence of an incentive had no impact on verdict decisions or on the mock jurors' perception of the jailhouse informant witnesses' trustworthiness or truthfulness. A follow-up study asked participants to provide the

¹⁴⁷ Bond & DePaulo, *supra* note 143, at 214.

¹⁴⁸ Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocent at Risk?*, 60 AM. PSYCH. 215, 223 (2005).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Kassin & Kiechel, *supra* note 144, at 125.

¹⁵² Neuschatz et al., *supra* note 11, at 138; Neuschatz, *supra* note 98, at 519; Wetmore et al. 2014, *supra* note 121, at 339.

reason why they believed the witness testified, and regardless of the presence or absence of an incentive, the majority (73%) of participants indicated that the witness was motivated to testify for an intrinsic or dispositional reason, such as believing it was the morally right thing to do, rather than for a situational reason.¹⁵³ Subsequent research has replicated this finding, in that the explicit presence of an incentive failed to impact participant verdict decisions.¹⁵⁴

C. *Fundamental Attribution Error.*

The fundamental attribution error occurs when internal, or dispositional factors (i.e., related to a quality of one's character) are overestimated in comparison to external or situational factors when judging others' behavior.¹⁵⁵ In circumstances involving incentivized secondary confessions, mock jurors overlook the incentive, the situational factor, in favor of dispositional factors such as a belief the jailhouse informant was trying to do the right thing. Mock jurors have indicated a belief that the jailhouse informant testified out of guilt or sympathy for the victim's family more often than they indicated the jailhouse informant's receipt of an incentive.¹⁵⁶ Also, mock jurors who cited only dispositional attributions or both dispositional and situational attributions for a jailhouse informant testifying convicted significantly more often than those who only cited situational attributions.¹⁵⁷ Given that jailhouse informants in cases where the defendant was found to be innocent and was later exonerated often stated they were testifying for dispositional reasons, the fundamental attribution error offers an explanation as to why the mock jurors voted guilty despite the defendant's innocence.¹⁵⁸

¹⁵³ Danielle K. DeLoach et al., *The Role of Ulterior Motives, Inconsistencies, and Details in Unreliable Jailhouse Informant Testimony*, 26 PSYCH., CRIME & L. 667, 676–77 (2020); Jenkins et al., *supra* note 121, at 99; Neuschatz et al. *supra* note 11, 141.

¹⁵⁴ See Evelyn M. Maeder & Emily Pica, *Secondary Confessions: The Influence (or Lack Thereof) of Incentive Size and Scientific Expert Testimony on Jurors' Perceptions of Informant Testimony*, 38 L. & HUM. BEHAV. 560, 564 (2014) (identified an effect of incentive presence on participant verdict decisions, in that the presence of an incentive, regardless of the size, led to fewer guilty verdicts).

¹⁵⁵ Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173–220 (L. Berkowitz ed., 1977).

¹⁵⁶ Neuschatz et al., *supra* note 11, at 147; Neuschatz et al. *supra* note 98, 189.

¹⁵⁷ Maeder & Pica, *supra* note 154, at 565.

¹⁵⁸ Neuschatz et al., *supra* note 98, at 518.

D. Prosecutorial Vouching.

Prosecutorial vouching occurs when a prosecuting attorney attests to the reliability of a witness's testimony being truthful.¹⁵⁹ While prosecutorial vouching can be either explicit or implicit, explicit vouching, wherein the prosecutor makes a statement to the court that they believe the witness, is not allowed.¹⁶⁰ Implicit prosecutorial vouching occurs when jurors perceive that the prosecutor believes their witness to be truthful when no explicit vouching or confirmation was made. Implicit prosecutorial vouching may occur because jurors likely do not believe the prosecutor would put a witness on the stand who would knowingly provide false testimony. By simply calling a witness to the stand, whether it be an expert witness such as a medical examiner or a witness such as a jailhouse informant, the prosecutor is asserting a belief in the witness's testimony. Jurors may find jailhouse informants credible because they believe the jailhouse informant would not be allowed to testify if there was any doubt in the truthfulness of his statements.

VII. FUTURE RECOMMENDATIONS

Collectively, experts have provided recommendations for amending current safeguards and implementing further reforms. First, experts have emphasized the need for pretrial reliability hearings in cases with jailhouse informants to allow for the identification of issues with unreliable jailhouse informant testimony prior to the trial.¹⁶¹ Second, to expand on a current safeguard, *Brady v. Maryland* (1963), that mandates the disclosure to the defense of any exculpatory evidence about the defendant, experts recommend mandated tracking and disclosure of key information regarding jailhouse informants.¹⁶² This includes jailhouse informants' interactions with other inmates and law enforcement, as well as their criminal history, testifying history, and incentives they were offered.¹⁶³ Disclosure and tracking can also ensure the defense has sufficient information to conduct effective cross-examinations.¹⁶⁴ Videotaping or audiotaping all interactions with jailhouse informants has also been

¹⁵⁹ NEUSCHATZ & GOLDING, *supra* note 10, at 33; Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. R. 737, 781 (2016).

¹⁶⁰ *United States v. Molina Guevara*, 96 F.3d 698, 704 (3d Cir. 1996).

¹⁶¹ The Justice Project, *Jailhouse Snitch Testimony: A Policy Review* (2007) https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf [https://perma.cc/5H7Y-Z43R]; NATAPOFF, *supra* note 116, at 194; NEUSCHATZ & GOLDING, *supra* note 10, at 17.

¹⁶² *Brady v. Maryland*, 373 U.S. 83, 87–88, 83 S. Ct. 1194, 1197 (1963).

¹⁶³ The Justice Project, *supra* note 161; LOS ANGELES GRAND JURY, *supra* note 98, at 149; NEUSCHATZ & GOLDING, *supra* note 10, at 17; U.S. Department of Justice, *supra* note 99.

¹⁶⁴ The Justice Project, *supra* note 161, at 17.

recommended to provide valuable documentation, and to possibly prevent law enforcement from disclosing details of the case to jailhouse informants.¹⁶⁵ Third, researchers have recommended that experts implement specific jailhouse informant instructions to include additional information about factors related to jailhouse informant credibility, including incentives, inconsistencies, and the criminal and testifying history of the jailhouse informant.¹⁶⁶ Finally, additional reforms have been suggested, including acceptance of expert witnesses, and requiring the corroboration of jailhouse informant testimony.¹⁶⁷

Ultimately, there remains little agreement and few legal regulations in place. The American Legislative Exchange Council, however, published a model policy in 2018 to provide recommendations for law makers and attorneys utilizing jailhouse informant witnesses.¹⁶⁸ The policy aligns with researchers' suggestions, such as requiring prosecutors to promptly disclose their intent to use jailhouse informant witnesses, the jailhouse informant's testifying history, criminal history, and any past, present, or future incentives. Additionally, it requires thorough jailhouse informant documentation and tracking systems. Currently, over 20 states have active or proposed legislation regarding jailhouse informants, and Connecticut, Texas, and Illinois are among some of the states with the most significant reforms that align with the guidelines of the model policy.¹⁶⁹

CONCLUSION

As was seen in the initial case we presented about Curtis Flowers, false jailhouse informant testimony contributes to a growing number of wrongful convictions and threatens the effectiveness of the legal system.¹⁷⁰ Although laws and safeguards have been implemented to prevent false secondary confessions, the literature indicates that mock jurors are insensitive to many of these preventative measures.¹⁷¹ The present theories suggest that, because jailhouse informants provide testimonies that include a form of confession evidence that often aligns with the narrative of these cases, jurors have difficulty recognizing factors that threaten the jailhouse informants' reliability through processes like the fundamental attribution

¹⁶⁵ NEUSCHATZ & GOLDING, *supra* note 10.

¹⁶⁶ The Justice Project, *supra* note 161, at 3–5; NEUSCHATZ & GOLDING, *supra* note 10, at 33.

¹⁶⁷ Natapoff, *supra* note 116, at 196–197; NEUSCHATZ & GOLDING, *supra* note 10, at 17.

¹⁶⁸ *Jailhouse Informant Regulations*, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, (2018), <https://alec.org/model-policy/jailhouse-informant-regulations-2/> [<https://perma.cc/C3UV-ATQ8>].

¹⁶⁹ Alexandra Natapoff, *Legislation*, *snitching.org* (2024), <https://snitching.org/legislation/> [<https://perma.cc/NV9X-77VA>].

¹⁷⁰ Possley, *supra* note 1.

¹⁷¹ NEUSCHATZ & GOLDING, *supra* note 10, at 30.

error or implicit prosecutorial vouching.¹⁷² Ultimately, legal reform will be necessary to continue to combat the pervasiveness of false jailhouse informant testimony, provide justice for victims like Curtis Flowers, and prevent additional wrongful convictions in the future.

¹⁷² Ross, *supra* note 155, at 173; Roth, *supra* note 159, at 781–83.