OCTOBER TERM, 2026

IN THE SUPREME COURT OF THE UNITED STATES
No. _____

BRITTANY MARLOWE HOLBERG,
Petitioner,
v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

PETITIONER'S UNOPPOSED APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICE SAMUEL A. ALITO:

Petitioner Brittany Marlowe Holberg, through counsel, respectfully applies for an extension of thirty (30) days to prepare and file her Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, extending the deadline to Monday, December 14, 2026. In support of that application, Holberg submits as follows:

1. Brittany Marlowe Holberg was convicted by a jury of capital murder on March 13, 1998, in the 251st Judicial District Court of Randall County, Texas. The jury subsequently rendered additional findings that resulted in the imposition of a sentence of death pursuant to Texas law.

2. The Texas Court of Criminal Appeals affirmed Holberg's conviction and death sentence. *Holberg v. State*, 38 S.W.3d 137 (Tex. Crim. App. 2000).

3. Holberg sought post-conviction relief, which the trial court denied on May 14, 2012. The Texas Court of Criminal Appeals remanded Holberg's application for post-conviction relief to the trial court, ordering an evidentiary hearing on certain of her claims. *Ex Parte Holberg*, No. WR-68,994-01, 2013 WL 2120253 (Tex. Crim. App. May 15, 2013). On December 30, 2013, the trial court issued supplementary findings of fact and conclusions of law, again denying the application for post-conviction relief, and the Texas Court of Criminal Appeals affirmed that decision. *Ex Parte Holberg*, Nos. WR-68,994-01, WR-68,994-02, WR-68994-03, 2014 WL 5389907 (Tex. Crim. App. Sept. 17, 2014).

4. On September 16, 2015, Holberg filed her petition seeking a writ of habeas corpus in the United States District Court for the Northern District of Texas, Amarillo Division. The District Court denied that application and denied a certificate of appealability. *Holberg v. Davis*, No. 2:15-CV-285-Z, 2021 WL 3603347 (N.D. Tex. Aug. 13, 2021).

5. A panel of the Court of Appeals for the Fifth Circuit granted a certificate of appealability on two issues, with one judge dissenting. *Holberg v. Lumpkin*, No. 21-70010, 2023 WL 2474213 (5th Cir. March 13, 2023) (per curiam).

6. After briefing and oral argument, that panel granted the petition and vacated Holberg's conviction and death sentence, with one judge dissenting. *Holberg v. Guerrero*, 130 F.4th 493 (5th Cir. 2025).

7. The State moved for rehearing en banc, and the Fifth Circuit granted that motion and vacated the panel decision on July 30, 2025. On August 14, 2026, after additional briefing and argument, the en banc Court of Appeals affirmed, in an equally divided (9-9) ruling, the District Court's denial of habeas relief. *Holberg v. Guerrero*, 187 F.4th 262 (5th Cir. 2026) (per curiam). The opinions filed by various judges of the Fifth Circuit in connection with that per curiam decision are attached.

8. Pursuant to Rule 13 of the Supreme Court of the United States, Holberg may file a petition for a writ of certiorari within 90 days of the Fifth Circuit's en banc opinion, that is, on or before November 12, 2026.

9. Holberg intends to seek certiorari review of significant issues raised in her habeas proceedings, concerning the suppression of favorable evidence material to the jury's decision to convict Holberg and sentence her to death. This Court has jurisdiction to conduct that review under 28 U.S.C. § 1254(1).

10. David F. Abernethy, counsel of record in this matter, was Holberg's lead counsel in the Court of Appeals, and presented oral argument on her behalf to both the panel and en banc court. After the en banc argument, Abernethy retired from the private practice of law and accepted employment with a state court in Pennsylvania. After the per curiam decision by the en banc court, Abernethy left that government position and again became Holberg's lead counsel in this matter. He has made every reasonable effort to expedite his transition back into participation in this case but cannot prepare a professionally appropriate certiorari petition by the current due date.

11. Timothy Kane and Sonali Shahi also represent Holberg in this matter and also are working on the certiorari petition. Kane and Shahi practice in the Federal Community Defender Office in Philadelphia, Pennsylvania, where they have responsibility for dozens of capital cases that are being litigated in various jurisdictions throughout the country. Accordingly, they have had, and will continue to have, conflicts that impact their ability to participate in the preparation of Holberg's petition during the time before the current deadline.

12. D. Alexander Harrell also represents Holberg in this matter and also is working on the certiorari petition but has had a number of conflicts limiting his ability to devote time to Holberg's petition during the time before the current deadline. These include the preparation of (1) a petition for writ of mandamus in the Court of Appeals for the Fifteenth District of Texas (No. 15-26-00163-CV); (2) a merits brief in a matter currently pending before the Illinois Court of Appeals for the Fourth District (No. 4-26-0230); and (3) five motions for partial summary judgment in a matter currently pending in the 242nd Judicial District Court of Castro County, Texas (Cause No. B11103-2411). Harrell has additional conflicts ahead of the current November 12, 2026 deadline, which will continue to impact his ability to participate in the preparation of Holberg's petition, including the preparation of reply briefs in support of the five motions for partial summary judgment mentioned above, due October 26, 2026, and a reply in support of the petition for writ of mandamus, which will likely need to be filed on or before November 6, 2026.

13. An extension of thirty (30) additional days would allow counsel to participate fully in the preparation of Holberg's petition while accommodating their other responsibilities and conflicts. Since a 30-day extension would move the deadline to a date that falls on a weekend, the extension Holberg seeks would change the deadline to Monday, December 14, 2026.

14. This request for an extension is being filed and served more than ten (10) days in advance of the due date, as required by Supreme Court Rule 13(5).

15. This request is made in good faith and is not predicated on an intent to delay. Texas Deputy Solicitor General Ben Mendelson, counsel for Respondent, has confirmed that Respondent has no objection to this request.

PRAYER

For the reasons stated, Petitioner Brittany Marlowe Holberg respectfully requests that the Court extend her deadline to file her Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to Monday, December 14, 2026.

Dated: October 22, 2026

Respectfully submitted,

/s/ David F. Abernethy

David F. Abernethy
Counsel of Record
894 Andorra Road
Lafayette Hill, PA 19444
(215) 816-7220

D. Alexander Harrell
FAEGRE DRINKER BIDDLE & REATH LLP
2323 Ross Avenue
Suite 1700
Dallas, TX 75201
(469) 357-2500

Timothy Kane
Sonali Shahi
FEDERAL COMMUNITY DEFENDER OFFICE,
EASTERN DISTRICT OF PENNSYLVANIA
Capital Habeas Unit
601 Walnut Street
Suite 545 West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner

Parties to the Proceedings

Petitioner, Brittany Marlowe Holberg, is an inmate incarcerated at the Patrick O'Daniel Unit in Gatesville, Texas, under sentence of death.

Respondent is Eric Guerrero, the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice.

No party to this litigation is a publicly or privately held corporation.

187 F.4th 262
United States Court of Appeals, Fifth Circuit.

Brittany Marlowe HOLBERG, Petitioner—Appellant,
v.
Eric GUERRERO, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent—Appellee.

No. 21-70010
|
FILED August 14, 2026

Synopsis

Background: After affirmance, 38 S.W.3d 137, of state prisoner's murder conviction and death sentence, dismissal, 2011 WL 6102886, of appeal from denial of state postconviction relief, affirmance, 2013 WL 2120253 and 425 S.W.3d 282, of denial of state postconviction relief, and denial, 2014 WL 5389907, of state habeas relief, prisoner petitioned for federal habeas relief. The United States District Court for the Northern District of Texas, Matthew J. Kacsmaryk, J., 2021 WL 3603347, denied the petition and denied a certificate of appealability (COA). The Court of Appeals, 2023 WL 2474213, granted in part and denied in part prisoner's request for a COA, and a divided panel of the Court of Appeals, 130 F.4th 493, reversed, vacated, and remanded. Rehearing en banc was granted.

Holdings: For an equally divided court, the Court of Appeals, en banc, Oldham, Circuit Judge, held that:

[1] for guilt phase, state court's decision, that State's alleged suppression of impeachment evidence that testifying jailhouse informant had been paid by police officer in other cases, did not meet materiality element for *Brady* violation, was not unreasonable application of clearly established Supreme Court precedent;

[2] for punishment phase, state court's decision, that State's alleged suppression of the impeachment evidence did not meet materiality element for *Brady* violation, was not unreasonable application of clearly established Supreme Court precedent;

[3] state court's conclusion that prisoner was not prejudiced, as element of ineffective assistance of counsel, by counsel's allegedly deficient performance in investigating mitigation evidence, was not unreasonable application of clearly established Supreme Court precedent; but

[4] in an opinion for a majority of the court, Higginson, Circuit Judge, further held the state court unreasonably applied clearly established Supreme Court precedent to extent that it concluded that State had no disclosure obligation under *Brady* with respect to the impeachment evidence.

District Court affirmed.

Jones, Smith, Ho, Duncan, Engelhardt, and Wilson, Circuit Judges, joined, and Willett, Circuit Judge, joined in all but Parts II.A.1 and III.B.

Southwick, Circuit Judge, filed a concurring opinion, which Richman, Circuit Judge, joined in part.

Haynes, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Higginbotham, Circuit Judge, filed a dissenting opinion, in which Stewart, Graves, Higginson, Douglas, and Ramirez, Circuit Judges, joined.

Elrod, Chief Judge, filed a dissenting opinion, in which Richman and Ramirez, Circuit Judges, joined.

Higginson, Circuit Judge, filed a dissenting opinion, in which Higginbotham, Stewart, Richman, Graves, Douglas, and Ramirez, Circuit Judges, joined.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (42)

[1] Habeas Corpus Discovery and disclosure

Proper question, on state death-row inmate's petition for federal habeas relief, was not whether information about relationship between jailhouse informant who testified about inmate's confession, and police officer who had paid informant to help officer get warrants in robbery cases unrelated to inmate's case, was *Brady* impeachment material for which the State

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had a disclosure obligation under due process principles, but whether, under the Antiterrorism and Effective Death Penalty Act's (AEDPA) standard for granting federal habeas relief to a state prisoner, jurists of reason unanimously would conclude that the state court misapplied *Brady*. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[2] **Habeas Corpus** 🔑 Particular issues and problems

The Antiterrorism and Effective Death Penalty Act (AEDPA) did not require state courts to write reasoned opinions rejecting state death-row inmate's *Brady* due process claim concerning impeachment evidence about relationship between jailhouse informant who testified about inmate's confession to murder, and police officer who had paid informant to help officer get warrants in robbery cases totally unrelated to inmate's case, in order for AEDPA to apply to inmate's petition for federal habeas relief. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[3] **Habeas Corpus** 🔑 Review; Post-Conviction Relief and New Trial

Where a state court's decision denying postconviction relief to a state prisoner, with respect to a claim under federal law, is unaccompanied by an explanation, the Antiterrorism and Effective Death Penalty Act (AEDPA) requires the prisoner, in seeking federal habeas relief, to show that there was no reasonable basis for the state court to deny state postconviction relief. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d).

[4] **Habeas Corpus** 🔑 State Determinations in Federal Court

The Antiterrorism and Effective Death Penalty Act's (AEDPA) relitigation bar for state prisoners seeking federal habeas relief based on federal claims stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings, but it is close to a complete bar. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. §§ 2244, 2254(d).

[5] **Habeas Corpus** 🔑 Federal or constitutional questions

A state-court decision concerning a state prisoner's federal claim is "contrary to" clearly established Supreme Court precedent, as a basis under the Antiterrorism and Effective Death Penalty Act (AEDPA) for granting federal habeas relief to a state prisoner, only if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if it resolves a case differently than the Supreme Court has on a set of materially indistinguishable facts. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d)(1).

[6] **Habeas Corpus** 🔑 Discovery and disclosure

State death-row inmate's contention, that state court's denial of state habeas relief with respect to her *Brady* due process claim was contrary to circuit precedent, was not a contention that the state court's decision was contrary to a Supreme Court decision involving materially indistinguishable facts, as would provide a basis for federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA). (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d)(1).

[7] **Habeas Corpus** 🔑 Federal Review of State or Territorial Cases

Whether the state court decision concerning a state prisoner's claim under federal law involved an unreasonable application of clearly established Supreme Court holdings, as a basis for federal habeas relief under the Antiterrorism

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and Effective Death Penalty Act (AEDPA), is a legal inquiry. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d)(1).

[8] **Habeas Corpus** Federal Review of State or Territorial Cases

Whether the state court based its decision, on a state prisoner's claim under federal law, on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, as a basis for federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), is a factual inquiry. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d)(2).

[9] **Habeas Corpus** Federal Review of State or Territorial Cases

A state court decision is an "unreasonable application" of clearly established Supreme Court precedent, as a basis for granting federal habeas relief to a state prisoner under the Antiterrorism and Effective Death Penalty Act (AEDPA), only if the state court is so wrong that the error is well understood and comprehended in existing law beyond any possibility for fairminded disagreement; in other words, the unreasonable-application exception to AEDPA's relitigation bar asks whether it is beyond the realm of possibility that a fairminded jurist could agree with the state court. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d)(1).

1 Case that cites this headnote

[10] **Habeas Corpus** Federal or constitutional questions

The Antiterrorism and Effective Death Penalty Act (AEDPA), which allows federal habeas relief for a state prisoner if the state court's adjudication of a prisoner's federal claim is contrary to clearly established Supreme Court precedent, does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied, but even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d)(1).

1 Case that cites this headnote

[11] **Habeas Corpus** State Determinations in Federal Court

The Antiterrorism and Effective Death Penalty Act (AEDPA) does not authorize federal habeas courts to correct errors in state court proceedings, and it does not even authorize correction of clear errors; rather, it authorizes federal courts to reach only extreme malfunctions in the state courts' adjudication of federal constitutional claims. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d).

[12] **Habeas Corpus** Federal Review of State or Territorial Cases

Habeas Corpus State Determinations in Federal Court

If the standard under the Antiterrorism and Effective Death Penalty Act (AEDPA) for granting federal habeas relief to a state prisoner is difficult to meet, that is because it was meant to be. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d).

[13] **Habeas Corpus** Discovery and disclosure

Given that the Supreme Court has stated the *Brady* due-process disclosure requirement at a high level of generality, a state court has substantial leeway in deciding whether it is satisfied, for purposes of deferential federal habeas review under the Antiterrorism and Effective Death Penalty Act (AEDPA). (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[14] **Constitutional Law** Evidence

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Under the materiality element for a *Brady* due process claim, a defendant must show that, if trial counsel had possessed the suppressed evidence, there is a reasonable probability that the result of the trial would have been different. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14.

[15] **Constitutional Law** Evidence

Due process is not violated, under *Brady*, every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14.

[16] **Constitutional Law** Evidence

A State's due-process disclosure obligation under *Brady* does not require an open file policy, nor does it require the State to disclose any evidence tending to exculpate or mitigate; rather, the question is whether the cumulative effect of a non-disclosure destroys confidence in the trial's result. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14.

[17] **Habeas Corpus** Adequacy or effectiveness of state proceeding; full and fair litigation

Habeas Corpus Presumptive accuracy of state determination, and rebuttal of presumption

A state court need not cite or discuss the relevant rules, and need not cite federal law at all, for purposes of deferential federal habeas review, under the Antiterrorism and Effective Death Penalty Act (AEDPA), to be applicable to a state court's adjudication of a state prisoner's federal claim; rather, a federal habeas court reviews the state court's decision and gives it the benefit of the doubt. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d)(1).

[18] **Habeas Corpus** Discovery and disclosure

For guilt phase of state death-row inmate's capital murder trial, state court's decision, that State's alleged suppression of impeachment evidence that testifying jailhouse informant had been paid by police officer in other cases, did not meet materiality element for *Brady* violation, was not unreasonable application of clearly established Supreme Court precedent, as would provide basis for federal habeas relief; informant was far from State's key witness, her direct testimony was approximately 0.5% of trial transcript and 0.009% of overall record, State's closing argument discounted her testimony as "jailhouse talk," and a parade of evidence supported State's theory that murder was committed in course of robbery or attempted robbery and not in self-defense. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d)(1).

[19] **Habeas Corpus** Death sentence

For punishment phase of state death-row inmate's murder trial, state court's decision, that State's alleged suppression of impeachment evidence that testifying jailhouse informant had been paid by police officer in other cases, did not meet materiality element for *Brady* violation, was not unreasonable application of clearly established Supreme Court precedent, as would provide basis for federal habeas relief; while informant testified earlier at trial, i.e., at guilt phase, about inmate's reference to victim's "fountain" of blood from multiple stabbings and her statement that she would do it again to get drugs or drug money, it was rank speculation that the testimony was critical to jury's finding of future dangerousness, in contrast to the murder's grisly details and inmate's admission to being "involved in 76 other" past crimes. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d)(1); Tex. Crim. Proc. Code Ann. art. 37.071 § 2(b)(1).

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[20] **Habeas Corpus** 🔑 Issues and findings of fact; historical facts; credibility

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), federal habeas courts owe substantial deference to state-court findings of fact, and if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the state court's determination. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d)(2).

[21] **Habeas Corpus** 🔑 Federal Review of State or Territorial Cases

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), when a state-court decision is reasonable and supported by the record, a federal habeas court cannot replace the state court's evaluation of the facts with its own. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d)(2).

[22] **Habeas Corpus** 🔑 Discovery and disclosure

Federal habeas court could not replace state court's evaluation of the facts with its own evaluation that police department was corrupt and prosecutor's office was crooked, on habeas review of state court's fact-finding for state death-row inmate's *Brady* due process claim alleging that State suppressed impeachment evidence that testifying jailhouse informant had been paid by police officer in other cases, where state court flatly rejected a theory that State "bought and paid for" informant's testimony. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d)(2), (e)(1).

[23] **Habeas Corpus** 🔑 Federal Review of State or Territorial Cases

The Antiterrorism and Effective Death Penalty Act (AEDPA) allows a federal habeas court to grant relief to a state prisoner only when no fair-minded jurist could agree with the state court, not when the federal habeas court is "not confident" that a jury still would have convicted the prisoner of the same charge. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d).

[24] **Habeas Corpus** 🔑 Federal Review of State or Territorial Cases

Habeas Corpus 🔑 State Determinations in Federal Court

The Antiterrorism and Effective Death Penalty Act (AEDPA) allows a federal habeas court to grant relief to a state prisoner only when no fair-minded jurist could reach a conclusion opposite to the state court's conclusion denying habeas relief, in contrast to de novo review of the merits by the federal habeas court that reaches a conclusion opposite to the state court's conclusion, with a conclusory proclamation by the federal habeas court that any outcome contrary to its own conclusion is unreasonable. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d).

1 Case that cites this headnote

[25] **Habeas Corpus** 🔑 Discovery and disclosure

Proper question, on federal habeas review of state court's adjudication of state death-row inmate's *Brady* due-process claim alleging State's suppression of impeachment evidence concerning testifying jailhouse informant, was not whether there was a reasonable probability that at least one juror would not have found inmate guilty of murder knowing that the prosecution, in other cases, had compensated the informant, and instead was whether, under the Antiterrorism and Effective Death Penalty Act (AEDPA), the state court blundered so badly that every fairminded jurist would disagree. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[26] **Constitutional Law** 🔑 Witnesses

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When suppressed impeachment material is merely cumulative with already presented impeachment evidence, it is all the more immaterial for purposes of the prosecution's *Brady* due-process obligation to disclose material evidence. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14.

[27] **Constitutional Law** Evidence

A mere possibility that the undisclosed evidence would have helped the defendant does not establish the materiality element of a *Brady* due process claim. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14.

[28] **Constitutional Law** Fourteenth Amendment in general

Prosecutors may violate the Fourteenth Amendment if they either present known false evidence or allow false testimony to go uncorrected. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 14.

[29] **Criminal Law** Deficient representation and prejudice in general

Strickland's Sixth Amendment standard for a claim of ineffective assistance of counsel requires the defendant to show (1) counsel's representation fell below an objective standard of reasonableness, and (2) prejudice, meaning an effect on the judgment. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6.

[30] **Criminal Law** Presumptions and burden of proof in general

Judicial scrutiny of counsel's performance, on a claim of ineffective assistance of counsel, must be highly deferential, and courts considering *Strickland* claims must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6.

[31] **Criminal Law** Deficient representation in general

Counsel can make demonstrable errors without falling below the Sixth Amendment floor for effective assistance of counsel. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6.

[32] **Criminal Law** Adequacy of investigation of mitigating circumstances

To function as "counsel" as that term is used in the Sixth Amendment, which provides a right to effective assistance of counsel, lawyers in capital cases must perform a reasonable mitigation investigation. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6.

[33] **Criminal Law** Adequacy of investigation of mitigating circumstances

Counsel's duty to provide effective assistance under *Strickland* and *Wiggins v. Smith*, 123 S.Ct. 2527, with respect to investigating mitigation evidence in capital cases, has limits, and it does not require counsel to investigate every conceivable line of evidence no matter how unlikely the effort would be to assist the defendant, and instead, counsel has a duty to make reasonable professional investigations or to make a reasonable decision that makes particular investigations unnecessary. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6.

[34] **Criminal Law** Adequacy of investigation of mitigating circumstances

The ultimate question regarding counsel's duty to provide effective assistance under *Strickland* and *Wiggins v. Smith*, 123 S.Ct. 2527, with

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respect to investigating mitigation evidence in capital cases, is not whether the decision to forgo presenting certain mitigation evidence was unreasonable, but whether the investigation supporting that decision was itself reasonable. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6.

[35] **Criminal Law** Strategy and tactics in general

Once counsel functions as the "counsel" guaranteed by the Sixth Amendment, courts do not second-guess counsel's strategic decisions using 20/20 hindsight, on a claim of ineffective assistance of counsel. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6.

[36] **Criminal Law** Adequacy of investigation of mitigating circumstances

The principle that once counsel functions as the "counsel" guaranteed by the Sixth Amendment, courts do not second-guess counsel's strategic decisions using 20/20 hindsight, on a claim of ineffective assistance of counsel, is particularly true when it comes to decisions under *Wiggins v. Smith*, 123 S.Ct. 2527, with respect to investigating mitigation evidence in capital cases, because the sort of mitigation evidence contemplated by *Wiggins*—such as a defendant's family history, victimization by violent abuse, substance abuse, or mental illness—is inherently a two-edged sword because while it is true that such evidence can cause jurors to pity the defendant, it is also true that such evidence can cause jurors to find the defendant was simply beyond rehabilitation. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6.

[37] **Habeas Corpus** Post-trial proceedings; sentencing, appeal, etc

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal habeas court may grant relief to a state prisoner, based on a claim that counsel was ineffective with respect to investigating mitigation evidence in a capital case, only if every fairminded jurist would agree that every reasonable lawyer would have made a different decision. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[38] **Habeas Corpus** Post-trial proceedings; sentencing, appeal, etc

State court's rejection of state death-row inmate's claim, that counsel was ineffective in investigating mitigation evidence for punishment phase, was not unreasonable application of clearly established Supreme Court precedent concerning prejudice element of claim of ineffective assistance of counsel, though state court made statement that allegedly uninvestigated and unpresented mitigation evidence, even taken at face value, was not so remarkable that it would have offset the brutality and depravity of the murder; read with benefit of doubt, state court did not impose a standard more onerous than the outcome-determinative standards Supreme Court had rejected, and instead state court explained why inmate had not satisfied *Strickland*'s reasonable-probability standard for prejudice, i.e., aggravating evidence —most notably, brutality of the murder— overwhelmed mitigating evidence. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1); Tex. Crim. Proc. Code Ann. art. 37.071 § 2(e)(1).

[39] **Habeas Corpus** Federal Review of State or Territorial Cases

A state court's reading of Supreme Court precedent can hardly be unreasonable, as a basis under the Antiterrorism and Effective Death Penalty Act (AEDPA) for granting federal habeas relief to a state prisoner, when the Supreme Court later adopts that same reading. (Per Oldham, Circuit Judge, for an equally divided en banc court.) 28 U.S.C.A. § 2254(d)(1).

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[40] **Habeas Corpus** Post-trial proceedings; sentencing, appeal, etc

State court's rejection of state death-row inmate's claim, that counsel was ineffective in investigating mitigation evidence for punishment phase, was not unreasonable application of clearly established Supreme Court precedent concerning prejudice element of claim of ineffective assistance of counsel, though state court observed that majority of evidence that allegedly had not been presented actually was presented effectively; state court did not violate Supreme Court's command that courts consider totality of available mitigation evidence—both evidence adduced at trial and evidence adduced in habeas proceedings—and instead state court made familiar point that Supreme Court itself had made, i.e., most mitigating evidence that inmate presented in state habeas proceedings was not new. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1); Tex. Crim. Proc. Code Ann. art. 37.071 § 2(e)(1).

[41] **Habeas Corpus** Post-trial proceedings; sentencing, appeal, etc

State court's rejection of state death-row inmate's claim, that counsel was ineffective in investigating for punishment phase mitigation evidence concerning inmate's troubled family and social history, was not unreasonable application of clearly established Supreme Court precedent concerning prejudice element of claim of ineffective assistance of counsel, though unpresented mitigation evidence was serious, e.g., inmate had been exposed to drugs and alcohol in utero, she had been raped multiple times and sexually abused by her stepfather, and she had significant cognitive impairments, where counsel presented inmate's trial testimony about physical and sexual abuse beginning in early childhood, her long history of substance misuse, and traumatic effects of her aunt's murder. (Per Oldham, Circuit Judge, for an equally divided en banc court.) U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1); Tex. Crim. Proc. Code Ann. art. 37.071 § 2(e)(1).

[42] **Habeas Corpus** Discovery and disclosure

State court's rejection of state death-row inmate's *Brady* due process claim, to extent that it concluded that State had no disclosure duty, was unreasonable application of clearly established Supreme Court precedent, as to impeachment evidence that jailhouse informant, who testified at guilt phase about inmate's confession, inmate's reference to victim's "fountain" of blood from multiple stabbings, and inmate's statement that she would do it again to get drugs or drug money, had been paid by police officer in other cases. (Per Higginson, Circuit Judge, for a majority of the en banc court.) U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d)(1).

Appeal from the United States District Court for the Northern District of Texas USDC No. 2:15-CV-285, Matthew Joseph Kacsmaryk, U.S. District Judge

Attorneys and Law Firms

Nick Klinefeldt, Faegre Drinker Biddle & Reath, L.L.P., Des Moines, IA, Daniel Alexander Harrell, Esq., Faegre Drinker Biddle & Reath, L.L.P., Dallas, TX, Paul Edward Mansur, Seminole, TX, Sonali Shahi, Federal Defender Office for the Eastern District of Pennsylvania, Capital Habeas Unit, Philadelphia, PA, David F. Abernethy (argued), for Petitioner—Appellant.

William Francis Cole, Esq., Daniel Ortner, Counsel, Office of the Texas Attorney General, Office of the Solicitor General, Austin, TX, Travis Golden Bragg (argued), Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, Austin, TX, Cameron Fraser, Mohmed Idris Patel, Office of the Texas Attorney General, Austin, TX, Edward Larry Marshall, New Mexico Department of Justice, Government Litigation Bureau, Santa Fe, NM, Aaron Lloyd Nielson, Kirkland & Ellis, L.L.P., Austin, TX, for Respondent—Appellee.

Meaghan McLaine VerGow, O'Melveny & Myers, L.L.P., Washington, DC, Melissa Claire Cassel, O'Melveny & Myers,

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L.L.P., San Francisco, CA, for Amicus Curiae Gender Justice Organizations.

R. Trent McCotter, Catholic University of America Columbus School of Law, Washington, DC, for Amicus Curiae Separation of Powers Clinic.

Marshall Dworkin, Saul Ewing, L.L.P., New York, NY, for Amici Curiae Fair and Just Prosecution, Former Prosecutors.

Before Elrod, Chief Judge, and Higginbotham, Jones, Smith, Stewart, Richman, Southwick, Haynes, Graves, Higginson, Willett, Ho, Duncan, Engelhardt, Oldham, Wilson, Douglas, and Ramirez, Circuit Judges.

Per Curiam: *

The judgment is AFFIRMED by an equally divided en banc court.

Opinion

Andrew S. Oldham, Circuit Judge, joined by Judges Jones, Smith, Ho, Duncan, Engelhardt, and Wilson, and Judge Willett in all but Parts II.A.1 and III.B:

***271** On November 13, 1996, Brittany Holberg savagely murdered a "kind little old man" named A.B. Towery in Amarillo, Texas. ROA.8351. Towery was 80 years old, had no teeth, could barely walk, used a wheelchair, and shook when he ate. Holberg robbed Towery for drug money. And she stabbed him 58 times, bound him with an electrical cord, and shoved a lamp 5.5 inches down his throat while he was still alive and drowning in his own blood. Holberg stabbed Towery in the head, face, nose, lips, chin, neck, shoulder, chest, back, abdomen, forearms, wrists, and hands. Holberg continued stabbing Towery after he was already dead and left a paring knife protruding from his abdomen. She "pulverized" the old man's nose with blunt objects, including a steam iron. ROA.8319. After murdering Towery, Holberg showered and changed into his clothes, spent the night partying with drugs purchased with his stolen money, and then fled the State.

In the 30 years since Holberg's horrific crimes, she confessed to everything. Her only defense? That Holberg (a then-23-year-old able-bodied and cocaine-addled woman) was somehow acting in "self-defense" when she ferociously beat and stabbed an 80-year-old wheelchair-using invalid for 45 minutes, stabbed him 18 times in the back, continued stabbing him after he was dead, and then left to buy drugs with his money and party in his clothes. At Holberg's capital-murder trial, the jury obviously rejected her self-defense theory. So too did every state judge who ever looked at her case on direct appeal and in state-postconviction proceedings. So too did the federal district court, which denied postconviction relief under the relitigation bar of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) ("AEDPA").

But then a deeply divided panel of our court granted relief on subpart four of claim thirty-four in Holberg's thirty-five-claim postconviction petition. *Holberg v. Guerrero*, 130 F.4th 493 (5th Cir. 2025). The panel majority held that information completely unconnected to Holberg's case was nonetheless "exculpatory" under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The panel majority further held that information was "material" to Holberg's self-defense theory. The panel majority included precisely one citation to AEDPA's relitigation bar. *See* 130 F.4th at 499 n.13. Judge Duncan dissented. Our court granted en banc rehearing. 145 F.4th 625 (5th Cir. 2025) (mem.).

Today we affirm the district court and hold that AEDPA bars Holberg's claims.

***272** I

A

Three months after Holberg savagely murdered Towery, she was arrested in Memphis, Tennessee. Holberg confessed to killing Towery. She was indicted and tried for capital murder.

At trial, the State's theory was that Holberg murdered Towery as a crime of opportunity and to feed her drug addiction. The State presented 21 witnesses. Some of those witnesses saw Holberg shortly before she entered Towery's apartment. Some saw her when she left. One partied with her shortly after the murder. Several of the State's witnesses testified about Holberg's confession. For example, Holberg's mother testified about her daughter's confession. So too did three police officers. And so too did a woman named Vicki Kirkpatrick, who was a prostitute and Holberg's cellmate. But "[t]he climax of the State's case was ... the chief medical examiner's description of Towery's horrific injuries." *Holberg*, 130 F.4th at 513 (Duncan, J., dissenting).

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Vicki Kirkpatrick's testimony was a brief interlude at the trial, but it's central to this appeal. Kirkpatrick testified only during the guilt phase. Her direct testimony spanned only ten pages of 1,943-page trial transcript and the 111,617-page record. After cross and a brief redirect, the entirety of Kirkpatrick's testimony consumed 20 pages of transcript text. Kirkpatrick's testimony was cumulative insofar as she was one of *five* prosecution witnesses who told the jury that Holberg confessed to butchering Towery. But the jailhouse confession, as relayed by Kirkpatrick, had some additional details that Holberg apparently did not relay to her mother or police. For example, according to Kirkpatrick, Holberg said Towery's blood was "pretty," like a "fountain," that she "couldn't stop" stabbing Towery, and that "[t]he more she did it, the prettier it was to her." ROA.8623. Holberg allegedly said it was "fun and amazing." ROA.8623. Holberg allegedly said she "[s]tuck the lamp thing down his throat" to stop the "[g]urgling" and "pain" noises, because Holberg was "tired" of hearing Towery's death throes. ROA.8623–24. And Holberg allegedly said that she'd do it again because she'd do anything "to get drugs or drug money." ROA.8624. Far from emphasizing these details to the jury, at closing, the State discounted Kirkpatrick's gory details as just "jailhouse talk": "That's what you tell your roommate to let them know you're bad." ROA.9339.

The defense's trial theory centered on Holberg's decision to testify in her own defense. She told the jury that she had been high on crack cocaine for ten days. She testified that she went to Towery's apartment because he was one of her prostitution clients. She testified that, once inside Towery's apartment, she started smoking crack. This allegedly upset Towery so much that he "hit" Holberg "in the back of the head." ROA.9010. A 45-minute fight ensued. Holberg stabbed Towery 58 times, and 18 of those stab wounds were in Towery's back. And Holberg testified that she *unintentionally* shoved a lamp 5.5 inches down Towery's throat to "get him off" of her. ROA.9034, 9140–41. While Holberg initially told police that Towery bit her, she admitted at trial that was a lie because Towery had no teeth or dentures. It is unclear from the record whether Holberg suffered *any* injuries in her purported exercise of self-defense against her toothless octogenarian victim. What is clear is that, after the murder, Holberg showered, changed into Towery's pants and shirt, did not call police, and instead went out to buy drugs and party with the money she stole from the "kind little old man." ROA.8351, 9037–40.



The jury unanimously convicted Holberg of capital murder after finding that she did not act in self-defense. The jury unanimously concluded that Holberg intentionally caused Towery's death "in the course of committing or attempting to commit" burglary or robbery. ROA.21672.

At the sentencing phase, the jury considered two issues relevant to this appeal. The first was whether there was a "probability" that Holberg "would commit criminal acts of violence that would constitute a continuing threat to society." ROA.21456; *see* TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1) (1995). This is the so-called "future-dangerousness" issue. The second question was the existence *vel non* of "a sufficient mitigating circumstance or circumstances to warrant ... a sentence of life imprisonment rather than a death sentence." ROA.21451, 21457; *see* TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1) (1995). This is the so-called "mitigating-circumstances" issue. [1]

The jury found future dangerousness, and it found insufficient mitigating circumstances. So it unanimously recommended that Holberg be sentenced to death. The trial court adopted that recommendation.

B

On direct appeal, Holberg raised 50 points of error. The Texas Court of Criminal Appeals ("TCCA") rejected all of them. The Supreme Court of the United States denied certiorari. *Holberg v. Texas*, 534 U.S. 972, 122 S.Ct. 394, 151 L.Ed.2d 298 (2001) (mem.).

Holberg then filed a 35-claim petition for state postconviction relief. Two of those claims are relevant here.

***273**

Claim 28 alleged ineffective assistance of trial counsel in violation of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Holberg contended ***274** that her trial counsel exerted insufficient effort to investigate her troubled family and social history in violation of *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). The state habeas court conducted a two-week evidentiary hearing. Two highly experienced lawyers, two highly experienced investigators, and a mental-health expert collaborated on Holberg's case. Her trial team conducted dozens of interviews. They made multiple investigatory trips to find and corroborate sources. They collected and reviewed medical, school, employment, and criminal records. And they made a "strategic decision[ ]" to portray Holberg as an intelligent woman who got mixed up with drugs—rather than a woman who was 'damaged goods' by consequence of her past. ROA.98068. The state court thus rejected Holberg's 28th claim under *Strickland*-*Wiggins*.

Claim 34 in Holberg's state habeas petition alleged eight separate *Brady* violations. Subpart D of claim 34 alleged that the State failed to disclose information that could have been used to impeach Vicki Kirkpatrick. Crucially, Holberg pointed to zero evidence about Kirkpatrick that was related to her own case in any way. Rather, Holberg alleged that a man named Corporal Stallings, a member of the Amarillo Police Department's SWAT Team, paid Kirkpatrick up to $100 to help him get warrants in robbery cases totally unrelated to Holberg's case. Corporal Stallings testified about this arrangement during Kirkpatrick's separate and unrelated criminal trial. And later testimony suggests Holberg's defense counsel knew about Kirkpatrick's and Stallings's activities and chose not to impeach her with it. ROA.76006 (attacking Kirkpatrick's credibility would have been a "double edge[d] sword" because the State would have called in officers to testify that she "provided them truthful information to solve other crimes"). Still, Holberg contended that *Brady* required the State to somehow find the information and disclose it so Holberg could use it to cross-examine Kirkpatrick. The state habeas court rejected subpart D of Holberg's 34th claim under *Brady* in an order that included 128 pages of factual findings and legal conclusions.

Holberg then turned to federal district court. She filed a 19-claim federal habeas application. The district court rejected it in a 322-page order. And the district court rejected a certificate of appealability ("COA").

A divided panel of our court granted Holberg a COA on her *Strickland*-*Wiggins* claim and on the subpart of her *Brady* claim related to Vicki Kirkpatrick. Then, over JUDGE DUNCAN'S sharp dissent, the panel majority granted Holberg postconviction relief and vacated both her conviction and her death sentence. The panel majority announced its conclusion that the State violated *Brady* and then, almost as an afterthought, said any contrary conclusion was "an unreasonable application of clearly-established federal law." *Holberg*, 130 F.4th at 502 (quoting *Floyd v. Vannoy*, 894 F.3d 143, 163 (5th Cir. 2018) (per curiam)). The panel majority did not identify any case, let alone a Supreme Court case, that ever extended the State's disclosure obligations to information about a witness's providing aid to an officer whose affairs were entirely disconnected from the defendant's case. Having ordered the vacatur of Holberg's conviction and sentence under *Brady*, the panel majority did not reach her *Strickland*-*Wiggins* claim.

We granted en banc rehearing.

II

[1] **[2]** **[3]** The panel majority's most fundamental error was that it started and ended its analysis with *Brady*. The question in this case is *not* whether information about ***275** Kirkpatrick's relationship with Corporal Stallings was *Brady* material. The question is whether jurists of reason unanimously would conclude that the state court misapplied *Brady*. That is the AEDPA standard, and the panel majority did not even discuss it—let alone apply it. [2]

[4] The AEDPA standard is known as the "relitigation bar." 28 U.S.C. § 2254(d); *e.g.*, *Harrington v. Richter*, 562 U.S. 86, 100, 131 S.Ct. 770 (2011) (so calling it). AEDPA's relitigation bar "stops short of imposing a *complete* bar on federal-court relitigation of claims already rejected in state proceedings." *Richter*, 562 U.S. at 102, 131 S.Ct. 770 (emphasis added). But it's close to a complete bar. *Cf. Felker v. Turpin*, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). Once a claim is adjudicated on the merits in state court, AEDPA prohibits federal courts from granting postconviction relief unless one of three conditions is met: the state court decision was "contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); the state court decision "involved an unreasonable application of[ ] clearly established Federal

law, as determined by the Supreme Court of the United States," *ibid.*; or the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

[5] **[6]** **[7]** **[8]** Holberg does not contend that the state courts' decisions were contrary to the Supreme Court's clearly established law.[3] So we need only consider two exceptions ***276** to AEDPA's relitigation bar: (A) whether the state court decision "involved an unreasonable application" of clearly established Supreme Court holdings; and (B) whether the state court based its decision "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The first of these is a legal inquiry; the second is a factual one. We consider both in turn before turning to (C) the dissents' counterarguments.

A

[9] **[10]** Law first. A state court decision is an "unreasonable application of" clearly established Supreme Court precedent only if "the state court was *so* wrong that the error was 'well understood and comprehended in existing law beyond any possibility for fairminded disagreement.' " *Langley v. Prince*, 926 F.3d 145, 156 (5th Cir. 2019) (en banc) (quoting *Shoop v. Hill*, 586 U.S. 45, 48, 139 S.Ct. 504, 202 L.Ed.2d 461 (2019) (per curiam)). "In other words, the unreasonable-application exception asks whether it is 'beyond the realm of possibility that a fairminded jurist could' agree with the state court." *Ibid.* (quoting *Woods v. Etherton*, 578 U.S. 113, 118–19, 136 S.Ct. 1149, 194 L.Ed.2d 333 (2016) (per curiam)). Of course, AEDPA "does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.' " *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007) (quotation omitted). But "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102, 131 S.Ct. 770.

[11] **[12]** AEDPA thus does not authorize federal courts to correct errors in state court proceedings. It does not even authorize correction of *clear* errors. Rather, it authorizes federal courts to reach *only* "extreme malfunctions" in the state courts' adjudication of constitutional claims. *Ibid.* (quotation omitted). The Supreme Court recently explained the rule this way:

> [I]n order to obtain federal habeas relief, a state prisoner must show far more than clear error. The habeas claimant must instead establish that the state court blundered so badly that every fairminded jurist would disagree with the decision. Only then is a decision so lacking in justification that its error precludes even the possibility for fairminded dispute.

Klein v. Martin, 607 U.S. 213, 220–21, 146 S.Ct. 589, 223 L.Ed.2d 484 (2026) (per curiam) (quotations omitted). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102, 131 S.Ct. 770.

[13] Holberg argues that the state court unreasonably applied the Supreme Court's *Brady* precedents. The Court held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment." *Kyles v. Whitley*, 514 U.S. 419, 432, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *Brady*, 373 U.S. at 87, 83 S.Ct. 1194). "As we have previously explained, 'given that the Supreme Court has stated the *Brady* disclosure requirement at a high level of generality,' a state court has 'substantial leeway' in deciding whether it is satisfied." *Reeder v. Vannoy*, 978 F.3d 272, 279 (5th Cir. 2020) (per curiam) (quoting *Cobb v. Thaler*, 682 F.3d 364, 379 (5th Cir. 2012)); *see also Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.").

***277** Holberg argues that the state court exceeded its "substantial leeway" and unreasonably applied *Brady* in two ways. First, she contends the state court unreasonably applied *Brady* by finding the State did not suppress Kirkpatrick's informant status. Second, she contends the state court unreasonably applied *Brady* by finding Kirkpatrick's informant status was not material. We consider each contention—(1) suppression and (2) materiality—in turn.

1

We begin with suppression. Holberg contends that the State suppressed Kirkpatrick's status as a police informant in unrelated cases. She concedes such information appeared nowhere in the Holberg case file, and that the State's open-file policy therefore could not have disclosed it. *See* Holberg En Banc Br. at 31; *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555 (emphasizing the Supreme Court has "never held that the Constitution demands an open file policy"). She further concedes that to disclose this information, prosecutors first would have had to interview every person in the entire Amarillo Police Department—including people who had nothing to do with Holberg's case. Holberg En Banc Br. at 32. Finally, she concedes that no Supreme Court case ever has required prosecutors to interview police officers who are totally unconnected to the defendant's case. *Id.* at 30 (pointing only to circuit precedent in the Sixth and Ninth Circuits requiring that).

Holberg also acknowledges testimony in the state court record that undermines her suppression claim. *See* Holberg En Banc Reply Br. at 9–13. As the state court said, "it is axiomatic that the State cannot suppress information that the applicant actually possesses." ROA.97964; *see also Brady*, 373 U.S. at 87, 83 S.Ct. 1194; *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). And in the state court, Holberg's trial counsel Candace Norris testified under oath and penalty of perjury that she knew Kirkpatrick was a police informant. Norris testified that she intentionally did not challenge Kirkpatrick's "credibility"; did not tell the jury that Kirkpatrick "lied"; and did not tell the jury that Kirkpatrick was trying "to get something for herself." ROA.76005. Why? Because if trial counsel had done any of that, it would have opened the door for the State to prove Kirkpatrick's "reputation in the community for truth and veracity." ROA.76006. How would the State prove that reputation? "The State in all likelihood would ... call in law enforcement officers to testify that Kirkpatrick has a reputation in the community for truth and veracity because *she has provided them [that is, police] with truthful information to solve other crimes.*" ROA.76006 (emphasis added).

Ultimately, however, we need not decide whether jurists of reason unanimously would concur that the state court erred on suppression. That's because, as we discuss in the next subsection, jurists of reason would not unanimously conclude that the state court erred on materiality.

2

a

[14] **[15]** **[16]** Even assuming Holberg can establish suppression, she also must show that, if trial counsel had possessed the suppressed evidence, " 'there is a reasonable probability' that the result of the trial would have been different." *Strickler v. Greene*, 527 U.S. 263, 289, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quotation omitted); *see also Turner v. United States*, 582 U.S. 313, 324, 137 S.Ct. 1885, 198 L.Ed.2d 443 (2017) (same). "[T]he Constitution is ***278** not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Kyles*, 514 U.S. at 436–37, 115 S.Ct. 1555. And the Constitution does not require "an open file policy," nor does it require the State to disclose "any evidence tending to exculpate or mitigate." *Id.* at 437, 115 S.Ct. 1555. Rather, the question is whether the "cumulative effect" of a non-disclosure "destroy[s] confidence in [the trial's] result." *Id.* at 439–40, 115 S.Ct. 1555.

[17] And of course, we are not applying *Brady* or *Kyles* or *Strickler*; we are applying AEDPA. That means the state court need not cite or discuss the relevant rules—and need not cite federal law at all. *See Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam); *see also McCarthy v. Hernandez*, 608 U.S. 809, 146 S. Ct. 1873, 1881, 225 L.Ed.2d 342 (2026) (per curiam) (summarily reversing grant of AEDPA relief and upholding state court decision that cited no federal law). Rather, we review the state court's decision and give it "the benefit of the doubt." *Martin*, 607 U.S. at 220, 146 S.Ct. 589 (quotation omitted).

To illustrate the distinction between clear error (off limits under AEDPA) and extreme malfunctions (the AEDPA standard), *see ibid.*, consider the Supreme Court's summary reversal of the Fourth Circuit in *Martin.* That case also involved a *Brady* claim subject to AEDPA's relitigation bar, and it too hinged on materiality. But the *Martin* petitioner's materiality argument was much stronger than Holberg's.

Charles Brandon Martin was convicted of the attempted murder of one of his girlfriends. She was found in her home with a gunshot to the back of the head and a "peculiarly modified" Gatorade bottle lying nearby. *Id.* at 216, 146 S.Ct. 589 (describing the bottle as having tape on the top with a rectangular hole cut into it, and a "jagged hole" on the

bottom). The bottle had Martin's DNA on it. The prosecution sought to prove that the bottle was used as a makeshift suppressor, which would tend to show that Martin planned to murder the victim.

To prove this theory, the prosecution relied on the testimony of Sheri Carter, another of Martin's girlfriends. She testified that "she had seen Martin 'looking up gun silencers' " on a laptop "not long before the shooting," that he "took the laptop from her apartment after the shooting," and that he said he " 'got rid of it' 'in case [the] apartment got searched,' because he 'didn't want it found there.' " *Id.* at 218, 146 S.Ct. 589 (quotation omitted). After trial, Martin's counsel discovered an undisclosed forensic report that analyzed five computers found in Martin's home. One of them matched Carter's description of the laptop Martin allegedly used to research homemade silencers. "The report found no evidence that this laptop had been used since 2005, and it noted that a keyword search for words such as 'Handgun,' 'Gatorade,' 'silencer,' and 'Homemade silencer' had yielded no hits." *Id.* at 219, 146 S.Ct. 589 (quotations omitted). Martin claimed the State suppressed that forensic report in violation of *Brady.*

The state habeas court, the federal district court, and the Fourth Circuit all found that the nondisclosure was material under *Brady* and granted habeas:

- Fourth Circuit:
  - "[T]he forensic computer report was particularly valuable impeachment evidence because it provided the *only* means of undermining Carter's damaging testimony. While Carter's testimony was not the sole evidence for an essential element of Martin's conviction as ***279** an accessory before the fact to first degree murder, it was *by far the strongest.* Without Carter's testimony, the link between Martin and the construction of the alleged silencer is *exceedingly weak.*" *Martin v. Nines*, No. 24-6086, 2025 WL 215521, at *10 (4th Cir. Jan. 16, 2025) (emphases added).
  - "Carter's testimony played *a central role* in the Prosecution's closing argument and entire case. Any reasonable jurist would be compelled to find that evidence that successfully impeaches Carter's testimony, at the time touted by the Prosecution as airtight, would be material." *Id.* at *11 (emphasis added).
  - "Carter's testimony *fundamentally altered* the character of this case. It formed *the entire basis* for a *devastating* jury instruction, bolstered the State's weaker witnesses, and undermined the Defense's theories." *Id.* at *12 (emphases added).
- District of Maryland:
  - "The state's *only* evidence to meet its burden of proof as to the essential elements was Carter's testimony, which was *dramatically discredited and undermined* by the suppressed document. Further, the suppressed document provided the *only* basis for impeachment of Carter's testimony." *Martin v. Nines*, No. CV JRR-20-2602, 2023 WL 8650294, at *14 (D. Md. Dec. 14, 2023) (emphases added), *opinion vacated and superseded*, No. CV JRR-20-2602, 2024 WL 341174 (D. Md. Jan. 30, 2024).
  - "Without Carter's testimony, the jury would not have been instructed that there was evidence Martin concealed evidence and that such concealment may be viewed as consciousness of guilt." *Id.* at *13.
  - "Carter's testimony substantiated a mere theory from Detective Alban based on a Steven Seagal movie that a Gatorade bottle found in the victim's home was a homemade silencer. Without Carter's testimony, the Gatorade bottle is simply a Gatorade bottle, and the presence of Martin's DNA is completely innocuous." *Ibid.*
- Circuit Court for Anne Arundel County (State Habeas Court):
  - "Importantly, Carter was the only witness to testify that she saw Petitioner using the CSM computer to research gun silencers or that Petitioner 'got rid of' the laptop. Had this evidence been available, there is a reasonable probability that the jury would have decided this case differently, and a substantial probability that the jury instruction on concealment of evidence wou1d not have been given." *Martin v. Maryland*, No. 02-K-09-000831, at *11 (Md. Cir. Ct. Anne Arundel Cnty. Oct. 5, 2018) (mem. op.).
  - "The essential link between Petitioner and the victim was the silencer.... The two strongest links connecting Petitioner to the silencer were the DNA evidence and Carter's testimony. In that context, it would have been

significant for Petitioner to have questioned Carter about the inconsistencies between her testimony and the [report]." *Id.* at *12.

- "[C]arter's testimony [also] provided the only evidence suggesting ***280** that Petitioner concealed or destroyed evidence, for which a jury instruction was given. Notwithstanding the other evidence presented by the State, there is a 'reasonable probability' that disclosure of the Computer Analysis would have led to a different result in this case." *Ibid.*

Thus, the *Martin* forensic report obviously implicated *Brady*: It was (1) in the defendant's own case; (2) powerfully exculpatory; and (3) might have destroyed a key witness's credibility. *See, e.g., Strickler*, 527 U.S. at 280–81, 119 S.Ct. 1936 (listing the elements of a *Brady* claim). And as the state habeas court held, Martin's *Brady claim could even be a winning one.*

But none of that mattered under AEDPA because the Maryland Court of Appeals rejected the *Brady* claim on the merits. So when the claim arrived in federal court, the question was no longer whether the State should have disclosed the forensic report, and the question was not whether the forensic report would have fundamentally changed the trial. Rather, the question was whether the Maryland Court of Appeals acted so unreasonably that a federal court could accuse the state-court jurists of transcending the bounds of fairmindedness. Even on the facts of *Martin*, the state court's decision did not fall to that level. So the United States Supreme Court summarily reversed. Fairminded jurists of reason could have found alternate explanations for the Gatorade bottle "farfetched" and concluded that disclosure of the report "would not have made a difference." *Martin*, 607 U.S. at 224–25, 146 S.Ct. 589.

b

[18] As to the materiality of the allegedly suppressed evidence, ours is an *a fortiori* case from *Martin.* Unlike Carter, Kirkpatrick was far from the State's key witness; the latter's direct testimony consumed approximately 0.5% of the trial transcript and 0.009% of the overall record in this case. Far from emphasizing Kirkpatrick's testimony in closing, the State discounted it as "jailhouse talk." ROA.9339. So under *Martin*, it is enough to say that reasonable jurists could conclude that Kirkpatrick's testimony was relatively peripheral to the case, and impeaching her with her prior work as a confidential informant in other cases "would not have made a difference." *Martin*, 607 U.S. at 225, 146 S.Ct. 589.

Rather, the trial record in this case establishes beyond cavil that Kirkpatrick's testimony generally and the potential to impeach it specifically were immaterial to the jury's verdict on both guilt and punishment.

Start with the guilt phase. For the jury to convict Holberg of capital murder, it had to conclude that she murdered Towery "in the course of committing or attempting to commit" robbery or burglary. ROA.21672. Holberg argues that Kirkpatrick's testimony was critical to the jury's robbery finding. Holberg En Banc Br. at 36–42. But consider the parade of evidence presented to the jury that supported the prosecution's robbery theory:

- Towery's children testified that Towery was carrying over $1,000 in hundred-dollar bills in his wallet at the time he was murdered. ROA.8345–46, ROA.8362–63. And when police found his body, they found that someone had "gone through" his wallet and left it lying open on his chest, and his pants pockets were "pulled out" and "emptied of their contents." ROA.8210.

- Holberg had refused to pay the cab fare when she arrived at Towery's apartment but then paid two strangers ***281** $200 in hundred-dollar bills for a ride when she left. ROA.8556, ROA.8570.

- One of those strangers testified that blood had been found on one of the bills, ROA.8571, and that Holberg counted at least $1,000 worth of hundred-dollar bills in the backseat, ROA.8568, ROA.8583.

- After being arrested, Holberg asked officers why she would rob a man for $1,400 when she was making much more than that per day—without explaining how she knew the precise amount of money stolen from Towery. ROA.8459.

- Although Towery usually had up to ten bottles of prescription medication at a time in his apartment, ROA.8354–55, ROA.8359–60, only two bottles were found during the crime scene search, ROA.8125–29.

None of this evidence has anything to do with Kirkpatrick. Sure, Kirkpatrick testified that Holberg told her she would "do it again" to get "drugs or drug money." ROA.8624. But that

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statement only goes to Holberg's state of mind at the time she was in the county jail—not at the time she murdered Towery. Kirkpatrick's only testimony about Holberg's state of mind at the time of the murder was that Holberg told her Towery "had some money on him, she [Holberg] wanted it, [and] they started struggling." ROA.8621. That banal statement pales in comparison to the gory evidence supporting the prosecution's robbery theory.

True, the State's evidence of Holberg's intent to commit robbery included circumstantial evidence. But that does not mean impeaching Kirkpatrick's informant status would generate a reasonable probability of a different outcome. Holberg only presented one competing motive for why she killed Towery: self-defense. And a mountain of evidence contradicted that motive. Holberg's theory would have required the jury to believe that Towery—a feeble, wheelchair-bound octogenarian—withstood 58 stabbing attempts while continuing to fight a healthy twenty-three-year-old for 45 minutes. *See* ROA.8674, 8677–88, 9384. Holberg's theory would have required the jury to credit her claim that she unintentionally shoved a lamp 5.5 inches down his throat while she was trying to "get him off" her. ROA.9034. And Holberg's testimony would have required the jury to ignore that Holberg had no explanation for why Towery had eighteen stab wounds in his back; why the final stab in his abdomen was made after he was already dead; and why she was uninjured, "relaxed," and "laid back" as she drove away from after a nearly hour-long, life-threatening struggle and then proceeded to buy drugs and celebrate. ROA.8682–86, 9141; ROA.8128, 8184; ROA.8562, 8564, 8581–82; ROA.8593, 8602–03.

A fairminded jurist reasonably could conclude that no jury would credit such a far-fetched theory of self-defense—with or without knowledge that one of the State's witnesses was a paid informant in unrelated cases. And if the jury didn't believe Holberg's self-defense theory, no other rationale (other than money) explained Holberg's decision to kill Towery. Absent Kirkpatrick's testimony, the jury could easily infer that Holberg intended to rob Towery. In light of the bloodstained wad of $100 bills Holberg was carrying after the killing—and Holberg's preposterous self-defense theory—there is "no reasonable probability that impeaching Kirkpatrick would have made the tiniest bit of difference." *Holberg*, 130 F.4th at 514–15 (DUNCAN, J., dissenting).

[19] Next, the punishment phase. To sentence Holberg to death, the jury was required to find, beyond a reasonable ***282** doubt, a "probability" that Holberg "would commit criminal acts of violence that would constitute a continuing threat to society," ROA.21456, and that there were no "sufficient mitigating circumstance or circumstances to warrant ... a sentence of life imprisonment rather than a death sentence," ROA.21451, 21457; *see also* TEX. CODE CRIM. PROC. art. 37, § 2(d)(2). Holberg and the dissents claim that Kirkpatrick's testimony about the fountain of blood and Holberg's lack of remorse was critical to Holberg's likelihood of future violence. Holberg En Banc Br. at 43; *post*, at 312-13 (HIGGINBOTHAM, J., dissenting); *post*, at 330-31 (HIGGINSON, J., dissenting).

With respect, that is rank speculation. The State proved Holberg's future dangerousness with a "flood of vivid and gruesome evidence"—not through Kirkpatrick's testimony. *Holberg*, 130 F.4th at 514 (DUNCAN, J., dissenting). The grisly reality of this case is that Holberg stabbed Towery 58 times, including nearly 20 times in the back and nine times in his hands, wrists, and forearms. ROA.8677–88. Towery was found tied up with electrical cord, with a paring knife in his stomach (inserted after he was already dead, ROA.8128, 8184) and a lamp shade shoved 5.5 inches down his throat while he was still alive. ROA.8688–89. The dissents want to ignore all of this. *See, e.g., post*, at 305 (HIGGINBOTHAM, J., dissenting) (describing the murder with no more detail than "[t]he struggle turned deadly"); *post* at 325-26 (HIGGINSON, J., dissenting) (spending more time recounting that Towery was "in pretty good shape" and "paid [Holberg] for sex for years" than the fact that "[a] jury found Brittany Holberg guilty of capital murder" (quotation omitted)). But it's easy to understand why Holberg herself *concedes* the grisly nature of this murder posed "a 'virtually impossible battle' on the issue of future dangerousness." Holberg En Banc Br. at 50; *see also ibid.* ("[T]he crime itself was sufficient to show future dangerousness."). And it's easy to understand why the jury and the state courts reasonably saw the future danger posed by a drug-addled woman who so savagely murdered a toothless old man.

What's more, the State submitted overwhelming evidence of Holberg's past violent conduct and a "pattern of behavior of controlling others." ROA.9513. The jury heard testimony that Holberg beat another elderly man with a cane and "may have killed him," ROA.9944, "broke[ ] her husband's nose," ROA.9943, and "cut somebody else with a knife," ROA.9943. Holberg admitted to being "involved in 76 other" past crimes, ROA.9941, and would "manipulat[e] others" to commit violent acts for her, ROA.9945.

By contrast, Kirkpatrick's testimony—which occurred entirely at the guilt phase—"played virtually no role in the punishment phase." *Holberg*, 130 F.4th at 515 (DUNCAN, J., dissenting). As JUDGE DUNCAN observed, it surfaced only once during punishment testimony, when a separate witness said Holberg had asked her to kill Kirkpatrick to keep her from testifying. *Ibid.* And only the defense mentioned Kirkpatrick in punishment closing—once. *Ibid.* Even at guilt, the prosecution discounted Holberg's statement to Kirkpatrick as mere "jailhouse talk." ROA.9339. Holberg now casts Kirkpatrick as central to the State's case for death. The record does not.

In sum, a reasonable jurist could conclude the "cumulative effect" of non-disclosure did not "destroy confidence in [the trial's] result," *Kyles*, 514 U.S. at 439–40, 115 S.Ct. 1555, in light of the evidence of Holberg's future dangerousness, past crimes, use of deadly weapons, proclivity for breaking men's noses, and pattern of attacking old men before leaving them for ***283** dead. Whatever benefit Holberg could have derived from a different cross-examination of Kirkpatrick would have been modest by comparison. Especially after the jury listened to the prosecutor pound the table 58 times to reflect the gut-wrenching horrors of this drawn-out and gruesome killing. And even if we are wrong about that, the state courts' decision was—at the barest of bare minimums—reasonable. And we cannot say that all jurists of reason unanimously would conclude the state courts erred.

B

So much for Holberg's challenges to the state court's application of law. We next consider her challenge to the state court's determinations of fact.

[20] **[21]** AEDPA narrowly circumscribes the ability of federal courts to grant habeas relief based on their understanding of the facts. A federal court may grant habeas relief only if the state-court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Under this rule, federal courts owe "substantial deference" to state-court findings. *Brumfield v. Cain*, 576 U.S. 305, 314, 135 S.Ct. 2269, 192 L.Ed.2d 356 (2015). "If reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination." *Ibid.* (citation modified). When a state-court decision is "reasonable and supported by the record," a federal court cannot replace the state court's evaluation of the facts with its own. *Burt v. Titlow*, 571 U.S. 12, 24, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013). In this way, AEDPA's relitigation bar imposes twin barriers on reviewing state-court legal and factual determinations. While § 2254(d)(1) allows habeas relief only if the state-court decision was contrary to or unreasonably applied clearly established law, § 2254(d)(2) similarly restricts habeas relief only to when the state-court decision was based on an unreasonable determination of the facts. [4]

Holberg—and today's dissenting opinions—present an ugly picture of a corrupt police department and a crooked prosecutor's office. According to the dissents, Holberg is the *real* victim here. That's because, in their overzealous attempts to secure a conviction, the police and the DA "bought" and "paid for" Kirkpatrick's testimony with bail, dropped charges, and plea deals. *See post*, at 306-08 (HIGGINBOTHAM, J., dissenting); *post*, at 325-26 (HIGGINSON, J., dissenting). The corruption in Amarillo's law enforcement community ran so deep that everyone conspired to hide this information from Holberg—thus depriving her of a fair trial. This understanding of the facts appears to drive the dissents' desire to grant habeas relief. *See post*, at 305 (HIGGINBOTHAM, J., dissenting) (accusing the majority of "endors[ing] a death sentence resting on unimpeached, *compensated* ***284** witness testimony" (emphasis added)); *post*, at 324 (HIGGINSON, J., dissenting) ("[T]he state kept secret that it was *compensating* its 'key' accusing witness" (emphasis added)).

[22] The problem for Holberg and the dissents is that the state court reached the precise opposite conclusion based on unrebutted testimony in the state court record. And Holberg *never*—not in state court, not in the district court, and not in our court—pointed to a single fact that could undermine any of the state court's factual determinations. That means Holberg cannot meet § 2254(d)(2) and hence cannot push aside AEDPA's relitigation bar.

The state habeas court flatly rejected the dissents' theory that the State "bought and paid for" Kirkpatrick's testimony. The state habeas court instead agreed with the prosecuting DA. This is what the DA said:

> [T]here was no plea agreement reached between the State and

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> Kirkpatrick; ... Kirkpatrick testified truthfully at Holberg's trial; Kirkpatrick did not testify at Holberg's trial thinking that it would help her get a better deal on her own charges; Kirkpatrick did not ask for any kind of deal; the State did not come asking Kirkpatrick what she knew about the case; [and] Kirkpatrick is the one who initiated the contact with the State about Holberg.

ROA.97941–42. Then the state habeas court credited the DA's testimony and found as a matter of fact that Holberg's contrary bought-and-paid-for allegations "ha[d] no basis in fact." ROA.97943. The state habeas court further found that "Kirkpatrick did not testify at Holberg's trial thinking that it would help her get a better deal on her own charges" and "Kirkpatrick did not ask for any kind of deal." ROA.97941–43. The state habeas court found Kirkpatrick's testimony to the contrary was "not credible." ROA.97943.

Under AEDPA, these factual findings "shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). And Holberg must show that the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). Yet Holberg's *Brady* argument does not even mention these standards—let alone does Holberg attempt to meet them. The dissents cannot manufacture a bought-and-paid-for theory that the state court rejected as a matter of fact and that Holberg herself has never attempted to substantiate under AEDPA.

C

Today's dissenting opinions are long on rhetoric and short on law. Four legal errors merit emphasis: (1) the dissents all but ignore AEDPA; (2) the dissents misunderstand *Brady*'s materiality requirement; (3) the dissents draw all sorts of factual inferences that have no basis in the state court record (or the federal record for that matter) and hence cannot be the basis for relief under § 2254(d)(2); and (4) the dissents obfuscate which of Holberg's claims for relief are actually before us.

1

The dissents all but ignore AEDPA.

[23] **[24]** Start with CHIEF JUDGE ELROD, who is "not confident" that "a jury still would have convicted Holberg of the same charge without Kirkpatrick's testimony." *Post*, at 324. With deepest respect, this inverts the AEDPA standard. In the face of doubt, AEDPA requires us to deny relief. We can grant relief only when "no fair-minded jurist could agree with" the state court. *McCarthy*, 146 S. Ct. at 1880. The CHIEF JUDGE'S dissent reaches the opposite conclusion by reciting the statutory ***285** standard, *id.* at 318-19; performing a *de novo* analysis of the merits, *id.* at 319-24; and then conclusorily proclaiming that any contrary outcome is unreasonable, *id.* at 321-22, 322, 323-24.

This approach is (unfortunately) familiar. The Supreme Court has time and again reversed courts of appeals's taking it.[5] It's easy to see why. The question under AEDPA is not, "in my view, was there a *Brady* violation?" and, if the answer is yes, announce that no reasonable jurist could disagree. *See id.* at 321-22, 322, 323-24 (ELROD, C.J., dissenting). The question is whether the state court's *Brady* analysis was so erroneous that no reasonable jurist could ever agree with it. And that requires asking if there is any fair argument that supports the state court's rejection of Holberg's *Brady* claim. *See, e.g., Martin*, 607 U.S. at 221, 146 S.Ct. 589.

JUDGE HIGGINBOTHAM'S AEDPA discussion is similarly deficient. This dissent makes much of the "tendons supporting capital punishment" and the "sinew of the modern death penalty," but it says virtually nothing about AEDPA. *Compare post*, at 307-08, 308-09, 317-18 (repeatedly discussing the "sinew of the modern death penalty"), *with id.* at 73 (devoting three sentences to the AEDPA rule). And it provides the same level of AEDPA non-analysis as CHIEF JUDGE ELROD'S dissent, offering lip service to the statute, *id.* at 309-10, *de novo* merits analysis, *id.* at 310-14, and a conclusory declaration that any contrary decision is unreasonable, *id.* at 314. Tried, tested, and proven to fail, the formula fares no better a second time.

[25] Finally, JUDGE HIGGINSON'S dissent. That opinion principally addresses "whether there is a reasonable probability that at least one juror would not have found Holberg guilty knowing that the prosecution had compensated the relator of her alleged confession." *Post*, at 332; *see also*

id. at 330-34. That is not the controlling legal rule. The "only question that matters" here is whether, under AEDPA, the state court "blunder[ed] so badly that every fairminded jurist would disagree." *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003); *Mays v. Hines*, 592 U.S. 385, 392, 141 S.Ct. 1145 (2021) (per curiam). As with the other dissents, JUDGE HIGGINSON'S treats AEDPA as an afterthought—a standard to be confronted only after he decided that Holberg's *Brady* claim should succeed. *Post*, at 334-35.

2

Next materiality. First and foremost, the dissents incorrectly assert that all reasonable ***286** jurists would have found Kirkpatrick's informant status material. *See post*, at 322-24 (ELROD, C.J., dissenting); *post*, at 311-14 (HIGGINBOTHAM, J., dissenting); *post*, at 335-36 (HIGGINSON, J., dissenting). An abundance of evidence unrelated to Kirkpatrick supported the jury's guilt and punishment verdicts. *See supra*, Part II.A.2.b.

But the immateriality of Kirkpatrick's informant status is far from the only flaw in the dissents' logic. In the dissents' view, changing one variable—disclosure of the allegedly suppressed information—would have started a counterfactual chain reaction that would have changed everything. And the jury would've somehow acquitted Holberg for brutally stabbing an octogenarian invalid to death and then continuing to stab him after he was already dead. But there are at least five ways that the dissents' hypothetical change would either be irrelevant or hurtful to Holberg.

First, before the dissents begin guessing at what could have changed had Kirkpatrick's allegedly suppressed status been disclosed, they must confront the possibility that Kirkpatrick's informant status was not actually suppressed. In a sworn statement in the state habeas proceeding, trial counsel testified that she chose not to use other impeachment witnesses because doing so would have been a "double edge[d] sword." ROA.76006. Trial counsel chose not to use those witnesses because the "State [in response] in all likelihood" would have "call[ed] in law enforcement officers to testify that Kirkpatrick has a reputation in the community for truth and veracity because she has provided them truthful information to solve other crimes." ROA.76006. At a minimum, that raises the question of whether defense counsel knew about Kirkpatrick's dealings with police. While our holding ultimately rests on materiality grounds, *see supra*, at 277-78, the dissents must show both suppression and materiality. They also must show that every fairminded jurist would find suppression in light of contradictory record evidence. *See Martin*, 607 U.S. at 221, 146 S.Ct. 589.

Second, not only must the dissents show that trial counsel was unaware of Kirkpatrick's informant status in unrelated cases, they must also address the possibility that trial counsel might have chosen not to use the impeachment evidence because it would undermine other parts of her case. ROA.76006. Trial counsel's "strategic decision[s]" can "undermine[ ] the suggestion" that suppressed evidence would have been material to the result in light of counsel's overall strategy. *Wood v. Bartholomew*, 516 U.S. 1, 7, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) (per curiam). And here, Holberg's counsel called two confidential informants to testify on Holberg's behalf. *See* ROA.9312. During guilt-phase closing, counsel argued that those witnesses "must be pretty credible because they're confidential informants." ROA.9313. It would be surpassing strange to argue (a) confidential informants are reliable when they help Holberg, but (b) confidential informants are hired guns and feckless mercenaries when they hurt Holberg. Trial counsel made an informed judgment to pursue strategy (a), and that's obviously preclusive of (b). Thus, the dissents cannot speculate that Holberg would have "fiercely impeach[ed] Kirkpatrick" with the very same tactic Holberg used to bolster the credibility of her own witnesses. *Post*, at 311-12 (HIGGINBOTHAM, J., dissenting). And it strains credulity to doubt that "any ... juror would have convicted Brittany Holberg ... based on a severely discredited paid informant[ ]," *post*, at 334 (HIGGINSON, J., dissenting), when Holberg's very own counsel was telling the jurors that government informants were all the more credible, ***287** *see also post*, at 323-24 (ELROD, C.J., dissenting) (falling into this same trap).

Third, even if counsel used the impeachment evidence, the dissents must grapple with defense counsel's testimony that doing so could have unintentionally *bolstered* Kirkpatrick's testimony. In her state-court affidavit, Holberg's trial counsel explained that challenging Kirkpatrick's credibility would have been a "double edge[d] sword" because "[t]he State in all likelihood would then call in law enforcement officers to testify that Kirkpatrick has a reputation in the community for truth and veracity because she has provided them truthful information to solve other crimes." ROA.76006. And that would obviously have hurt Holberg's case by bolstering the testimony of her cellmate. It is awkward for

the dissents to contend that Kirkpatrick's informant status was somehow "indispensable" without addressing the possible consequences had counsel decided to use that evidence. *Post*, at 335-36 (HIGGINSON, J., dissenting); *cf. Cullen v. Pinholster*, 563 U.S. 170, 201, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (recognizing the double-edged nature of additional mitigating evidence in an ineffective-assistance-of-counsel claim).

Fourth, suppose Holberg's trial counsel lied under oath. Again, no one has ever suggested that. There is no allegation to that effect in the state court record; the state courts' decisions are uniformly to the contrary; Holberg never alleged it in federal court; and no member of the panel majority or today's dissenters can bring themselves to allege it now. *See, e.g.*, ROA.97999 (state court finding Norris's testimony "reliable and credible as to the historical events surrounding Holberg's trial and [her] thoughts and impressions at the time"). But assume it anyway. Assume all the nefarious speculation that the dissenters speculate—that somehow this was a crooked DA's office that knew Kirkpatrick was an informant for unrelated officers in unrelated cases and somehow suppressed that key fact to unjustly "get" the woman who confessed to brutally stabbing an octogenarian invalid. Even then, disclosure of the suppressed evidence would not reasonably lead to a different result for the obvious reason that the State easily could have chosen not to call Kirkpatrick.

That makes this *Brady* claim substantially weaker than a typical one. In the typical *Brady* case, the suppressed evidence is material precisely because it is the key to the State's case. *See, e.g., Banks*, 540 U.S. at 675–76, 124 S.Ct. 1256. The only way to prosecute Martin, for example, was to present evidence of his computer research on suppressors. *See Martin*, 607 U.S. at 218–19, 146 S.Ct. 589; *supra*, at 278. Here, by contrast, if the prosecution knew about Corporal Stallings' deals with Kirkpatrick, there is no guarantee that the State still would have called her to testify. Kirkpatrick's testimony played a small role in the prosecution's case. *See supra*, at 271-72. Rather, the keys to the prosecution's case were (1) Holberg's confession to killing Towery and (2) the medical examiner's vivid, gruesome, and stomach-churning description of the 58 stab wounds, which put paid to any suggestion of "self-defense." Had the prosecution known that calling Kirkpatrick would open its case to attack, the prosecution might have decided that the juice of her testimony was not worth the squeeze. [6]

***288** **[26]** *Fifth*, assume all of that is wrong. Assume the State still called Kirkpatrick; assume Holberg's counsel altered her trial strategy; and assume Holberg's counsel chose to impeach Kirkpatrick. Even then, the attack would have been cumulative. When suppressed material is merely "cumulative with already presented impeachment evidence," it is all the more immaterial for *Brady* purposes. *Murphy v. Davis*, 901 F.3d 578, 598 (5th Cir. 2018). Here, defense counsel thoroughly impeached Kirkpatrick in other ways that were consistent with their trial strategy. *See* ROA.9865 (Kirkpatrick and Holberg's cellmate testifying that she never heard Holberg mention Towery's murder); ROA.9055–56 (Holberg testifying that she never discussed her case with Kirkpatrick); ROA.9226 (Kirkpatrick's cellmate testifying that Kirkpatrick had a "bad" reputation for truthfulness); ROA.9319–20 (defense counsel insinuating to the jury that Kirkpatrick "had something to gain" by "saying something that would help the State"). Given that the jury twice heard that Holberg never discussed this case with Kirkpatrick and again heard that Kirkpatrick was a liar, there is no "reasonable probability" that telling the jury of Kirkpatrick's informant role in totally unrelated cases would have changed the outcome.

One dissent responds that impeachment would not have been cumulative because Kirkpatrick's testimony was the "sole confession evidence contradicting Holberg's own trial testimony that she killed Towery in self-defense." *Post*, at 326 (HIGGINSON, J., dissenting); *see also id.* at 324-25, 327-28, 331-33 (same). That is like saying, "Yes, the Dodgers lost 11–1—but the Astros' eleventh run was the only one they scored in the top of the ninth, so it was decisive." Perhaps it's true that Kirkpatrick was the "sole confession evidence contradicting Holberg's" self-defense theory. But it's also true that the State had a mountain of *other* evidence that contradicted the self-defense theory:

- No one has ever disputed that Holberg brutally killed A.B. Towery.
- Three police officers and Holberg's own mother testified to Holberg's confession to the killing. ROA.8246–54, 8452–59, 8479–80; ROA.8648–51, ROA.8655–58.
- Evidence totally unrelated to Kirkpatrick showed that Holberg attacked an 80-year-old, wheelchair-bound invalid for 45 minutes, stabbed him 58 times, including 18 times in the back, shoved a lamp shade 5.5 inches down his throat, continued stabbing him after he was

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dead, and then left to buy drugs with his money and party in his clothes.

Kirkpatrick's testimony was cumulative in that it told the jury what the other evidence already showed—that Holberg brutally murdered an old man and was so untroubled by it that she went to party. And even assuming Kirkpatrick's testimony was in some sense non-cumulative, impeaching it for a fifth time—over and above the four the jury already heard, ROA.9055–56; ROA.9226; ROA.9319–20; ROA.9865—plainly would have been cumulative. So at a minimum, we cannot say that all jurists of reason would unanimously ***289** condemn the state courts' adjudication of this *Brady* claim. [7]

[27] A final point on materiality. One dissent repeatedly surmises that, had Kirkpatrick not testified, Holberg would not have taken the stand to rebut Kirkpatrick's testimony, the prosecution would not have had the opportunity to conduct its devastating cross-examination, and "the entire trial may have [been] reconfigured." *Post*, at 332 (HIGGINSON, J., dissenting). But the dissent cannot point to a shred of record evidence to support the theory that Holberg only took the stand in response to Kirkpatrick and would not have taken the stand if Kirkpatrick had not testified. There is not one page of the state court record to support it. Holberg herself has never asserted it. And that's unsurprising given that Holberg's theory of the case was self-defense, and the linchpin of that theory was her own testimony. *See, e.g.*, ROA.9291–99 (defense counsel consistently relying on Holberg's testimony at closing). The dissent's lack of support also is unsurprising because numerous other witnesses testified to Holberg's confession to the killing, and myriad other evidence debunked Holberg's self-defense theory. And even if the dissenting opinion could take over the litigation of this case and reimagine it in ways that Holberg herself never has, we would not fault the state court for unreasonably rejecting a theory it never heard. That no one—not the state courts, the district court, or even Holberg herself—has embraced the dissent's speculative chain reaction suggests that jurists of reason could likewise decline to embrace it. Ultimately, the dissent points to only a "mere possibility" that the undisclosed evidence would have helped Holberg—and a "mere possibility ... does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109–10, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

3

What's more, some of the factual assertions in today's dissenting opinions are fantastical. The dissents posit a wide-ranging conspiracy between police unconnected to Holberg's case and the DA's office. The dissents point to fact *X* and unconnected fact *Y* and then proclaim "Aha—a conspiracy to convict an innocent woman!"

The problem for today's dissents is two-fold. First, AEDPA does not allow this sort of factual reimagination. *See supra*, Part II.B; 28 U.S.C. § 2254(d)(2).

And second, record evidence rebuts the dissents' every inferential leap. Kirkpatrick was arrested shortly after Holberg, and they were placed in the same jail cell. "A 'short time' later," the dissents theorize, Kirkpatrick "signed an affidavit" describing her conversation with Holberg about Towery's murder, and "[p]olice thanked Kirkpatrick by releasing her from jail that very day." *Post*, at 306-07 (HIGGINBOTHAM, J., dissenting); *post*, at 325-26– (HIGGINSON, J., dissenting). But Sergeant Arnold Hudson, the officer who notarized Kirkpatrick's affidavit, wrote in his police report that she "had *just been released* from the Randall County Jail" when he ***290** met with her to take her statement on the Towery murder. ROA.21595 (emphasis added). Later testimony from Corporal Stallings corroborates the fact that Kirkpatrick was not let out of jail because of her affidavit. Stallings was the one who "ma[de] arrangements for her" pre-trial release so she could help him recover stolen property. ROA.21562–64; *see also Holberg v. Davis*, No. 2:15-CV-285-Z, 2021 WL 3603347, at *57 (N.D. Tex. Aug. 13, 2021) (sharing the same view of the record). And again, Stallings's work as the SWAT Team leader for the County had *nothing* to do with Holberg's case. So the idea that everyone was conspiring against Holberg—including police officers who had nothing to do with her case—is based on nothing but speculation.

Next, the dissents point to a document detailing Kirkpatrick's criminal record, which reflects various dropped charges. Both suggest that the dropped charges reflect some sort of foul play. *See post*, at 325-26 (HIGGINSON, J., dissenting). The sentencing-phase dissent even adopts that single document as conclusive evidence that the prosecution dropped all but one burglary charge to keep Kirkpatrick "on a short leash" and persuade her to testify at Holberg's trial, "sensing the impact her gripping testimony would have on an Amarillo

jury." *Post*, at 307 (HIGGINBOTHAM, J., dissenting). But Corporal Stallings has an answer to this too. Stallings was the one who "got a trespass warrant dismissed and ... some traffic tickets dismissed" in exchange for Kirkpatrick's help "recover[ing] [ ] stolen merchandise." ROA.21562–63. The dissents cite zero evidence to connect Corporal Stallings' activities to the Holberg prosecution.

The sentencing-phase dissent also relies on Kirkpatrick's letter asking for probation to claim that the State persuaded Kirkpatrick to testify in Holberg's trial in exchange for leniency in her burglary case. *Post*, at 307 (HIGGINBOTHAM, J., dissenting). But the record shows the State's five-year plea offer to Kirkpatrick had zero connection whatsoever to her Holberg testimony. At Kirkpatrick's sentencing hearing, the district attorney testified under oath that the prosecution's offer "had absolutely nothing to do with —with her testifying in the Holberg case." ROA.21525. Three times, he emphasized that Kirkpatrick "never asked [them] to cut her a deal," and that the office would never change her deal because of the concern of impropriety it might cause in the Holberg case. ROA.21523–25. And there is not one document or assertion *anywhere* in the state court record to suggest the DA was lying.

Finally, the sentencing-phase dissent claims that the State "floated the possibility of an even sweeter deal for three years," Kirkpatrick "testified against Holberg incentivized by this better deal," and the office later "reneged" on the offer because it "might create an appearance of impropriety if [the State] changed [its] offer." *Post*, at 307-08 (HIGGINBOTHAM, J., dissenting) (quotation omitted). The record, again, says the *precise opposite.* The district attorney testified that the office never changed its offer because "it might create an appearance of impropriety if [the office] changed [its] offer." ROA.21525. And there is zero evidence the State "reneged" on its offer after Kirkpatrick testified at Holberg's trial. *Post*, at 307-08 (HIGGINBOTHAM, J., dissenting). In fact, the dissent conveniently omits the fact that *Kirkpatrick* was the one who rejected the plea deal—not the State. ROA.97941. Kirkpatrick instead entered an open plea, and the State urged the court to give Kirkpatrick more than five years. ROA.21571. Far ***291** from "compensating" Kirkpatrick for her testimony, the prosecution threw the book at her. [8]

AEDPA forbids federal courts from granting habeas relief based on our own version of the facts. 28 U.S.C. § 2254(d)(2). In this case, there are unreasonable versions of facts—but they all belong to the dissents. Those dissenting opinions are based on speculation at best and demonstrable inversions of the state court records at worst. In all events, they do not come close to establishing an AEDPA violation.

4

Finally, the dissents' rendition of the facts is so divorced from the *Brady* claim before us that it is often unclear which of Holberg's claims they are purporting to adjudicate.

[28] Prosecutorial misconduct claims come in two relevant flavors. First, prosecutors violate *Brady* by failing to disclose material evidence favorable to the defendant. *United States v. Bagley*, 473 U.S. 677, 679–80, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). District Attorney James Farren's alleged failure to reveal Kirkpatrick's confidential-informant status is the *Brady* claim on which Holberg obtained a COA and is therefore jurisdictionally before us. *See* ECF 111, at 6–8. Second, prosecutors may also violate the Fourteenth Amendment if they either "present[ ] ... known false evidence" or "allow[ ]" false testimony "to go uncorrected." *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). This second, distinct constitutional error is called a *Giglio*-*Napue* violation. But Holberg's *Giglio*-*Napue* theory is barred by the law of the case: She brought a *Giglio*-*Napue* claim in her state and federal habeas petitions. ROA.1905–07 (state); ROA.29506–12 (federal). But our court denied a COA on that claim, so it is not jurisdictionally before us. *See* ECF 111, at 6; 28 U.S.C. § 2253(c).

While Holberg's *Brady* claim is before us and her *Giglio*-*Napue* claim is not, the dissents' conception of this case often sounds more in the latter than the former. The dissents repeatedly suggest that DA Farren actively or potentially induced Kirkpatrick to provide false testimony. One dissent, for example, emphasizes the State's "potential leverage over" Kirkpatrick's testimony. *See post*, at 325 (HIGGINSON, J., dissenting); *see also id.* at 326-27 (referring to the State's supposed "leverage"). Another believes that the State "kept [Kirkpatrick] on a short leash until ***292** Holberg's trial ... to assure [Kirkpatrick] would perform again." *Post*, at 307 (HIGGINBOTHAM, J., dissenting). In this way, the dissents paint a lurid picture of DA Farren as Kirkpatrick's puppeteer, manipulating every jot and tittle of her trial testimony—*knowing* that the testimony

was false. These accusations are taken almost verbatim from Holberg's *Giglio*-*Napue* claim. *See, e.g.*, ROA.1905 (alleging that Kirkpatrick "had been induced to testify against Holberg through threats and promises"); ROA.29507 (describing Kirkpatrick's testimony as "fabricated, authored and coerced").

That the dissents want to adjudicate a claim not before us shows how divorced from the law and facts their position really is. We have no basis to say that Kirkpatrick lied on the stand because the state court found as a matter of fact that she testified truthfully. ROA.97941–43. And no one—other than the dissents—has ever suggested otherwise in our court. That presumably explains why no one—including the dissents—thought the *Giglio*-*Napue* claim was even debatable enough to warrant a COA.

*

Brittany Holberg admitted to the savage killing of an 80-year-old invalid. She claimed self-defense. Unsurprisingly, the jury did not buy it. Today, the dissents claim the mantle of defending the jury as the "ultimate decisionmaker." *Post*, at 308 (HIGGINBOTHAM, J., dissenting). Yet the dissents undermine the jury in two ways.

First, the jury—not the dissenters—sat through the trial, listened to the testimony, and assessed the credibility of everyone involved. They heard a mountain of evidence on Holberg's guilt, including Holberg's confession to stabbing Towery 58 times. And the jury recommended a death sentence in conformance with the law and the values of the Amarillo community in the late 1990s. According to the dissents, federal judges have the power to undo the jury's conscience three decades later from the safety of our chambers in New Orleans—without seeing a single witness or understanding a single thing about the affected community. And we can do it, the dissents say, using impeachment evidence that trial counsel swore under penalty of perjury she had and strategically chose not to use against a peripheral witness.

Second, without seeing a single witness or assessing anyone's credibility 30 years ago, the dissents simply assert that *four* people lied to get Holberg: Holberg's trial counsel, Corporal Stallings, DA Farren, and of course Kirkpatrick. That is quite the perjurious conspiracy. It is unsupported by the record. And the dissents' efforts to speculate it into existence are prohibited by AEDPA.

III

Finally, we turn to Holberg's ineffective-assistance-of-counsel claim. We (A) explain the legal rules; (B) describe the state court's reasons for rejecting Holberg's claim; and (C) hold Holberg cannot surmount AEDPA.

A

[29] **[30]** **[31]** *Strickland*'s Sixth Amendment standard requires the defendant to show (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) prejudice, meaning an "effect on the judgment." *Strickland*, 466 U.S. at 688, 691, 104 S.Ct. 2052. "Judicial scrutiny of counsel's performance must be highly deferential," *id.* at 689, 104 S.Ct. 2052, and courts considering *Strickland* claims "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance," *Richter*, 562 U.S. at 104, 131 S.Ct. 770 ***293** (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Counsel can make "demonstrable errors" without falling below the Sixth Amendment floor. *United States v. Cronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *see also id.* at 656 n.18, 104 S.Ct. 2039 (collecting cases).

[32] **[33]** **[34]** To function as "counsel" as that term is used in the Sixth Amendment, lawyers in capital cases must perform a reasonable mitigation investigation. *Wiggins v. Smith*, 539 U.S. 510, 521–22, 123 S.Ct. 2527 (2003). But the *Strickland*-*Wiggins* duty has limits. It "does not require counsel to investigate every conceivable line of ... evidence no matter how unlikely the effort would be to assist the defendant." *Id.* at 533, 123 S.Ct. 2527. Instead, "counsel has a duty to make reasonable [professional] investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 521, 123 S.Ct. 2527 (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). The ultimate question is not whether the decision to forgo presenting certain mitigating evidence was unreasonable, but whether the "investigation" supporting that decision "*was itself reasonable.*" *Id.* at 523, 123 S.Ct. 2527.

To illustrate, consider four *Wiggins* cases. In each of them, trial counsel failed to conduct more than a perfunctory mitigation investigation. In *Porter v. McCollum*, for example, trial counsel was deficient because "[h]e did not obtain *any*

of Porter's school, medical, or military service records," and therefore "did not even take the *first step* of interviewing witnesses or requesting records." 558 U.S. 30, 39–40, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam) (emphases added). In *Rompilla v. Beard*, defense counsel failed entirely to examine the defendant's "prior conviction file," which contained evidence depicting the defendant's "childhood and mental health very differently from anything defense counsel had seen or heard." 545 U.S. 374, 383, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). In *Wiggins*, trial counsel "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." 539 U.S. at 524, 123 S.Ct. 2527. And in *Terry Williams v. Taylor*, trial counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. 362, 395, 120 S.Ct. 1495 (2000).

[35] **[36]** Once counsel functions as counsel, we do not second-guess counsel's strategic decisions using 20/20 hindsight. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (emphasizing we must "eliminate the distorting effects of hindsight"). That is particularly true when it comes to mitigation decisions under *Wiggins*. The sort of mitigation evidence contemplated by *Wiggins*—such as a defendant's family history, victimization by violent abuse, substance abuse, mental illness, &c.—is inherently a "two-edged sword." *Pinholster*, 563 U.S. at 201, 131 S.Ct. 1388 (quotation omitted). True, such evidence can cause jurors to pity the defendant. But it's also true that such evidence can cause jurors to find the defendant "was simply beyond rehabilitation." *Ibid.*

[37] As deferential as the *Strickland*-*Wiggins* standard is under the Sixth Amendment, it's all the more so under AEDPA. The Supreme Court has said AEDPA makes ineffectiveness claims "all the more difficult" because the "standards created by *Strickland* and § 2254(d) are both 'highly deferential.' " *Richter*, 562 U.S. at 105, 131 S.Ct. 770 (quotation omitted). So "when the two apply in tandem, review is 'doubly' so." *Ibid.* (quotation ***294** omitted). We "may grant relief only if *every* fairminded jurist would agree that *every* reasonable lawyer would have made a different decision." *Dunn v. Reeves*, 594 U.S. 731, 739–40, 141 S.Ct. 2405, 210 L.Ed.2d 812 (2021) (per curiam) (citation modified).

B

In this case, the state habeas court conducted a nearly two-week evidentiary hearing. The state habeas court considered live witness testimony, post-trial exhibits, and the trial record. It made 88 pages of factual findings that are presumed correct. *See* 28 U.S.C. § 2254(e)(1); ROA.97981–98069. And on the basis of those factual findings, the state habeas court held that trial counsel "did not perform deficiently in their investigation of mitigating evidence" because they made "strategic decisions that were well within the range of reasonable professional judgment." ROA.98068.

Holberg had two highly experienced trial lawyers. Both had extensive experience before Amarillo juries. ROA.98020–23, 98034. The defense team also had the assistance of two highly experienced investigators *and* a mental-health expert. ROA.98000–02, 98041–46.

This five-person defense team interviewed numerous witnesses—including family members, "acquaintances," "dozens of Holberg's fellow prostitutes, drug addicts, and strippers," "former school counselors," Holberg's "former 'sugar daddy,' " and "multiple jail personnel." *Holberg v. Davis*, 2021 WL 3603347, at *135. Holberg's trial team traveled several times to "locate witnesses." ROA.98010–15. One of Holberg's attorneys traveled to multiple states "trying to locate individuals to build a mitigation case." ROA.98046. Her counsel even walked the streets and went to a " 'crack house' at '1:00 ... in the morning' to try and interview ... witnesses." ROA.98039.

The defense team reviewed Holberg's medical, school, employment, and criminal records; investigated Holberg's "family troubles," "sexual and drug history, Holberg's non-violent character, and Holberg's relationship with her ex-husband and daughter"; interviewed Holberg multiple times; interviewed Holberg's stepfather about "the family's troubles with drugs and alcohol," "Holberg's drug history, the physical trauma and abuse she suffered," and Holberg's ex-husband's abusiveness during their marriage. ROA.98008–10.

All told, the defense team made a strategic decision to portray Holberg as "a person with problems that could be fixed." ROA.98016. "The hope was that a juror would view Holberg's crime as an aberration for a girl who was basically and intrinsically good." ROA.98016. As the court found, "the defense team's strategy was to help at least one juror to see

Holberg as someone who could be the juror's sister, daughter, or friend." ROA.98016. And defense counsel worried that amplifying Holberg's troubled, violent, abusive, and drug-ridden past would make her appear "defective" to Amarillo jurors in the mid-1990s. ROA.98015–16.

C

[38] Holberg cannot show that the state courts transgressed AEDPA. We need not decide whether the five-person defense team's multi-State investigation and dozens of mitigation interviews comported with professional norms in the 1990s. That's because reasonable jurists would not unanimously find that Holberg proved *Strickland* prejudice.

[39] First, Holberg challenges the state court's statement that the "allegedly uninvestigated and unpresented evidence, ***295** even taken at face value, is not so remarkable that it would have offset the brutality and depravity of her crime." ROA.97915. She says that statement imposed a standard "more onerous ... than the outcome-determinative standards the Supreme Court [has] rejected." Holberg En Banc Br. at 68. But read with the "benefit of the doubt" § 2254(d) requires, *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam), the state court did no such thing. It did not announce a new legal standard. It explained why Holberg had not satisfied *Strickland*'s reasonable-probability standard: the aggravating evidence—most notably, the brutality of Towery's murder—overwhelmed the mitigating evidence. The Supreme Court has not forbidden that reasoning. It has endorsed it. [9] The state court did not act unreasonably by employing it here.

[40] Second, Holberg argues that the state court's observation that "the majority of the evidence that Holberg alleges was not presented ... *was* actually presented" effectively "subtracted" the mitigation evidence presented at trial from the unpresented mitigation evidence. ROA.97915; Holberg En Banc Br. at 68. That subtraction, she says, violated the Supreme Court's command that courts consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding." *Terry Williams*, 529 U.S. at 397, 120 S.Ct. 1495. But again, that misreads the state court. Its point was not that new mitigation evidence must be considered in isolation—much less "subtracted" from the trial mitigation. Its point was the familiar one the Supreme Court itself has made: "[m]ost of the mitigating evidence [Holberg] presented [in state habeas proceedings] was not new." *Thornell v. Jones*, 602 U.S. 154, 165, 144 S.Ct. 1302 (2024).

[41] Nor was the state court's conclusion so plainly wrong that some impermissible rationale must be hiding beneath the surface. The unpresented mitigation was serious. It included evidence that Holberg had been exposed to drugs and alcohol in utero, raped multiple times, sexually abused by her stepfather, and afflicted with significant cognitive impairments. *See* Holberg En Banc Br. at 53–55. But as the Supreme Court recently summarized its mitigation-prejudice cases, those cases generally involved sentencings where "defense counsel introduced little, if any, mitigating evidence at the original sentencing." *Thornell*, 602 U.S. at 171, 144 S.Ct. 1302. Holberg, "by contrast, started with much more mitigation," including her trial testimony about physical and sexual abuse beginning in early childhood, her long history of substance abuse, and the traumatic effects of her aunt's murder. *Ibid.*; *see* Texas En Banc Br. at 15–16 (collecting record citations). And the brutal nature of Towery's murder—which the plurality recounts in detail—was a "weighty aggravating circumstance[.]" ***296** *Thornell*, 602 U.S. at 171, 144 S.Ct. 1302. Given those distinctions, "fairminded jurists could disagree" on whether the unpresented mitigation created a reasonable probability of a different outcome. *Alvarado*, 541 U.S. at 664, 124 S.Ct. 2140.

It is telling that neither the dissents nor Holberg confronts the state habeas hearing or the relevant state habeas court decision. Holberg argues that the state habeas court erred in its May 14, 2012, decision. *See* Holberg En Banc Br. at 68–74 (quoting from that order). But she all but ignores the state court's *subsequent* decision. After the May 2012 order, the Texas Court of Criminal Appeals sent the case back for an evidentiary hearing. The state habeas court conducted it over the course of two weeks and then issued the operative 88-page supplemental order on December 30, 2013. *See* ROA.97981–98069. That December 2013 supplemental order is the relevant one—and Holberg all but ignores it. Worse, the dissenters ignore it altogether.

* * *

In an AEDPA case like this one, it is not enough to say that the state courts erred. Nor is it enough to find clear error in the state courts' decision that the 58 stab wounds (18 of them in the back), the knife in Towery's abdomen, the lamp shoved 5.5 inches down Towery's throat, Towery's iron-pulverized nose, Holberg's confession, and the wad of bloodsoaked bills found

on Holberg after her drug-fueled post-murder party make any *Brady* error immaterial. Rather, Holberg (and the dissenting opinions) must show that the state courts were *so* wrong and blundered *so* badly that they cannot be fairminded jurists. We hold Holberg cannot meet that standard.

AFFIRMED.

Leslie H. Southwick, Circuit Judge, concurring: [*]
The dissenting opinions are well taken. I believe they have accurately described the constitutional violation in this case, which is the prosecutor's failure to uphold the duty to disclose impeachment evidence that is material to guilt or punishment.

Even so, our authority to grant relief under Section 2254 after a state court decision rejecting the same claim is significantly restricted. *See, e.g., Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770 (2011). My reluctance to join those learned opinions has all to do with my conclusion that we must read the state court decision as finding that the undisclosed evidence was not material. I cannot say that all fairminded jurists would disagree with that finding. Accordingly, that means that the state court decision was not unreasonable to the extent required by precedent.

My failure to join the principal opinion is because it does not accept that there was a *Brady* violation here. I believe there was a serious one. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). I write separately to explain my more limited reasons to affirm.

I. Antiterrorism and Effective Death Penalty Act, or AEDPA

A federal court may not grant *habeas* relief to a state prisoner unless the applicant establishes that the relevant state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d)(1).

***297** The statutory phrases "contrary to" and "an unreasonable application of" clearly established federal law have "independent meaning." *Williams v. Taylor*, 529 U.S. 362, 405–06, 120 S.Ct. 1495 (2000). A decision is "contrary to" clearly established federal law "only if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if it resolves a case differently than the Supreme Court has on a set of materially indistinguishable facts." *Jimenez v. Guerrero*, 133 F.4th 483, 492 (5th Cir. 2025) (quoting *Langley v. Prince*, 926 F.3d 145, 155 (5th Cir. 2019) (*en banc*)). An "unreasonable application," though, occurs where the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams*, 529 U.S. at 407–08, 120 S.Ct. 1495.

More generally, "[a] state court's determination that a claim lacks merit precludes federal *habeas* relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101, 131 S.Ct. 770. The obligation to accept a state court's decision so long as fairminded jurists could disagree with it (implying that some fairminded jurists agree with it) does not apply to disagreements about the law. Each judge is to make that analysis and apply it regardless of the analysis of others. *See Andrew v. White*, 604 U.S. 86, 95, 145 S.Ct. 75, 220 L.Ed.2d 340 (2025).

"General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings" of the Supreme Court. *Andrew*, 604 U.S. at 94, 145 S.Ct. 75. Therefore, the Court's precedents should not be limited to their facts. *Id.* In *Andrew*, the Court was discussing *Tennessee v. Payne*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), which specifically held that the Eighth Amendment did not erect a *per se* bar to the "admission of victim impact evidence and prosecutorial argument on that subject." *Id.* at 93, 145 S.Ct. 75. Despite that clear holding, the broader, clearly established principle was that "the introduction of unduly prejudicial evidence could ... violate the Due Process Clause." *Id.* As another example, the "Eighth Amendment principle that a sentence may not be grossly disproportionate to the offense is 'clearly established under § 2254(d)(1),' even though it arises out of a 'thicket of Eighth Amendment jurisprudence' and lacks 'precise contours.' " *Id.* at 94–95, 145 S.Ct. 75 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 72, 123 S.Ct. 1166 (2003)).

On the opposite end of the spectrum, holdings "that speak only at a high level of generality" may not supply a ground for relief. *See Brown v. Davenport*, 596 U.S. 118, 136, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022). That limitation has been illustrated when a court construed general Supreme Court holdings that a "defendant must have adequate notice of the charges against him," as "clearly establish[ing] that a prosecutor's focus on one theory of liability at trial can render

earlier notice of another theory of liability inadequate." *Lopez v. Smith*, 574 U.S. 1, 5–7, 135 S.Ct. 1 (2014).

In sum, a clear principle, even in the absence of an on-point application of the principle, is what makes clearly established law.

II. Clearly Established Law in this Case

Brady, of course, is more than a "general legal principle." *See Andrew*, 604 U.S. at 94, 145 S.Ct. 75. It is an opinion in which the Supreme Court "squarely established" the operative rule and has consistently thereafter has applied it. *See* ***298** *White v. Woodall*, 572 U.S. 415, 427, 134 S.Ct. 1697 (2014) (citation omitted). *Brady*'s clear legal principle is that a prosecutor has a duty to disclose favorable evidence that is "material either to guilt or punishment." *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936 (1999) (quoting *Brady*, 373 U.S. at 87, 83 S.Ct. 1194). Impeachment evidence is favorable evidence, *see United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985), and any evidence is material "if 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, 115 S.Ct. 1555 (1995) (citation omitted).

In another opinion, the Court considered a concession by the State that certain evidence was favorable to the defendant and not disclosed, causing the case to turn on whether the evidence was material. *Smith v. Cain*, 565 U.S. 73, 75, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012). The Court explained a "reasonable probability" of a different outcome "does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.' " *Id.* at 75, 132 S.Ct. 627 (quoting *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555 (alterations in original). I will later discuss the particular relevance of materiality in my conclusions about this case.

These precedents do not require that the specific form the favorable, material evidence takes in a case have been identified as such in a Supreme Court precedent. To require disclosure, the evidence need not come in any particular shape or size, be written in ink but not pencil, have been captured on audio- or video-recording, or appear in any specific form. Instead, the Court has said clearly that if the prosecution has material exculpatory evidence, it must be disclosed.

It is true that " '[t]he difference between applying a rule and extending it is not always clear,' but '[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt' " to fairminded jurists. *White*, 572 U.S. at 427, 134 S.Ct. 1697 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666, 124 S.Ct. 2140 (2004)). Where it is "so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement on the question,' " we *still* characterize the state *habeas* court's failure to apply the rule in that way as an unreasonable application of clearly established law. *See id.* (quoting *Richter*, 562 U.S. at 103, 131 S.Ct. 770).

No extension is required in this case as *Brady* is clearly implicated. This court must "look for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision.' " *Yarborough*, 541 U.S. at 661, 124 S.Ct. 2140 (quoting *Andrade*, 538 U.S. at 71–72, 123 S.Ct. 1166). A reviewing court's evaluation of a *Brady* violation examines whether the evidence was (1) suppressed, (2) favorable, and (3) material. *See Youngblood v. West Virginia*, 547 U.S. 867, 869–70, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). While the materiality of specific evidence will differ from case to case, *Brady*'s focus remains unchanged. *See Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936 (1999). Whether this evidence was material and favorable is what we must examine, not whether a new factual scenario has presented itself for considering those requirements.

III. The Undisclosed Evidence

By the mid-1990s, Brittany Holberg had been engaged for several years in prostitution ***299** to support her drug addiction. A.B. Towery had been a client. The principal and dissenting opinions highlight different evidence about Towery's physical condition in 1996, when he was 80 years old, but there is no doubt that in November of that year, Holberg inflicted brutal injuries on him that caused his death.

The undisclosed evidence concerned why Vicki Kirkpatrick was in the cell with Holberg and how Kirkpatrick was benefitted after obtaining a supposed confession. That is different information than defense counsel's being generally aware that Kirkpatrick had worked as an informant for the Amarillo Police Department on several different occasions. That is all defense counsel knew.

Holberg's initial state *habeas* petition requested an evidentiary hearing, arguing: "Kirkpatrick indicated she was a confidential informant for the Task Force or SWAT team[, and] defense counsel was entitled to know that information as well as if any deals had been cut." Eleven years later, in July 2011, the state court held a hearing to determine whether affidavits or live testimony would be needed to resolve Holberg's claims for relief. *See* TEX. CODE CRIM. PROC. art. 11.071 § 9(a). The court ordered the parties to depose Kirkpatrick and allowed the State to present an affidavit from District Attorney James Farren. In May 2012, the state *habeas* court made several findings, citing the transcript of Kirkpatrick's plea colloquy — which included Kirkpatrick's testimony regarding her previous testimony at Holberg's trial — and District Attorney Farren's affidavit and testimony.

This evidence before the state *habeas* court detailed that a few months before the start of Holberg's trial, on May 13, 1997, Kirkpatrick had been arrested for felony burglary. The charge carried a maximum of 20 years' imprisonment. Kirkpatrick rejected a five-year plea offer from the State, later choosing to plead guilty and seek a sentence of probation. With her sentencing forthcoming, she was placed in the same cell as Holberg, but was then removed from that cell immediately after informing someone that she had obtained a full confession. Later, at Kirkpatrick's plea hearing, District Attorney Farren, who led the prosecution of Holberg, testified favorably for Kirkpatrick. Those details were not known to Holberg's counsel.

With those as the relevant facts, I next consider how the Texas state courts resolved Holberg's *Brady* claims.

IV. State Court Proceedings

Already mentioned is that a state prisoner applying for relief in federal court must establish that the relevant state court decision on those claims "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Insofar as the *Brady* claim is concerned, the relevant state court decision is an unpublished opinion issued by the 251st Texas District Court on May 14, 2012. The opinion denied numerous claims for relief. We must first decide whether that opinion rejected the *Brady* claim on the merits and explained its reason for doing so.

First possibility. If the state court opinion is "reasoned" and explains its decision on the merits, "a federal *habeas* court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson v. Sellers*, 584 U.S. 122, 125, 138 S.Ct. 1188, 200 L.Ed.2d 530 (2018). This approach necessarily includes "look[ing] through" an unexplained opinion from the state's court of last resort to the "last related state-court decision that does provide a relevant rationale." *Id.* That "look through" comes ***300** into play here because on September 17, 2014, the Texas Court of Criminal Appeals, after reviewing the 2012 district court decision and its supplemental opinion, simply held: "We adopt the trial judge's findings and conclusions on all of the claims raised. Based upon the trial court's findings and conclusions and our own review, we deny relief." *Ex parte Holberg*, Nos. WR-68,994-01,-02,-03, 2014 WL 5389907, at *1 (Tex. Crim. App. Sept. 17, 2014). No reasons there, just an adoption of the state district court's findings and conclusions. Before examining the state district court opinion on the possibility of a look through, I will set out the effect of not finding any reasoning.

Second possibility. If the state court "decision is unaccompanied by an explanation, the *habeas* petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98, 131 S.Ct. 770. This means a federal "*habeas* court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 102, 131 S.Ct. 770.

Further, the same principle applies where a "state-court opinion addresses some but not all of a defendant's claims." *Johnson v. Williams*, 568 U.S. 289, 298, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013). This "presumption of merits adjudication" is not easily overcome. *Jimenez v. Guerrero*, 133 F.4th 483, 489 (5th Cir. 2025). "[A] petitioner rebuts the presumption of merits adjudication only if he offers evidence of 'state-law procedural principles' that are contrary to the presumption, [ ] or evidence that 'leads *very clearly* to the conclusion that a federal claim was inadvertently overlooked in state court." *Id.* (first quoting *Richter*, 562 U.S. at 99, 131 S.Ct. 770; and then quoting *Johnson*, 568 U.S. at 303, 133 S.Ct. 1088).

Here, there is no basis to find the state district court overlooked the *Brady* claim. That claim is specifically identified as an issue, discussed in two numbered paragraphs,

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and rejected in a third. No procedural bar was mentioned in the discussion, and for all these reasons I conclude the denial was on the merits. It is difficult to decide, though, if the opinion was reasoned, *i.e.*, that it announced its legal or factual basis for denial. If there were reasons, we evaluate the rejection of the *Brady* claim based on those reasons. *Wilson*, 584 U.S. at 125, 138 S.Ct. 1188. If there is not a reasoned explanation, "the *habeas* petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98, 131 S.Ct. 770.

With respect for the state *habeas* court that needed to address 35 issues and wrote a 128-page opinion in doing so, the *Brady* explanation is disjointed, *i.e.*, the relation between the paragraphs is unclear. The first of three paragraphs that discuss the claim sets out the requirements for a *Brady* violation: "(1) the evidence at issue is 'favorable to the accused, either because it is exculpatory, or because it is impeaching'; (2) the State suppressed the evidence, 'either willfully or inadvertently'; and (3) 'prejudice ... ensued' because the evidence was material." The third and final paragraph stated: "Holberg has failed to show that the State violated its obligations under *Brady v. Maryland*." If there are reasons, they are not in any of those paragraphs.

That middle, second paragraph inexplicably identified three possible, non-exhaustive, and seemingly irrelevant shortcomings that might bar a *Brady* claim: (1) the prosecutor's files were opened to the defense ***301** for examination; (2) the allegedly suppressed information was actually possessed by the defense; and (3) the allegedly suppressed evidence was not admissible. As far as I can tell from the briefing before that court and from the hearing that was held — the briefs and a transcript being in the record here — no one suggested the prosecutor had an open file policy or that Holberg was allowed such access. Even if that policy had existed, it would not by itself bar a *Brady* claim, as the relevant favorable information would not likely have been in the file. As to the second reason, the State argued in the state court and a few of my colleagues now take the position that Holberg's counsel knew that Kirkpatrick at times had worked as an informant. As I will discuss, though, there has never been a finding that the defense knew Kirkpatrick was working with the prosecution or law enforcement in this case. As to the third supposed bar to a *Brady* claim, I did not find any argument before the state district court (or now) that the alleged undisclosed *Brady* material would be inadmissible.

If the second paragraph did constitute the reasons, it would be an unreasonable application of any known Supreme Court precedent. Instead of adopting that understanding, my interpretation is that because those specific grounds for denying a *Brady* claim were not relevant to the case as presented in the state court, we cannot consider them to be poor reasons for the result and therefore not worthy of deference. Instead, they were simply general statements of law. I conclude the state court decision never stated reasons to reject the *Brady* claim. Consequently, we must affirm unless there is "no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98, 131 S.Ct. 770.

V. Applying Brady

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). One factual finding that I accept as correct is that Kirkpatrick testified truthfully at Holberg's trial. Of course, a federal court's AEDPA obligation to accept the state-court findings is irrelevant to whether jurors would have accepted the testimony as truthful if the testimony had been impeached.

Kirkpatrick's testimony included that she was not acting as an informant in Holberg's case. "Informant" is a label whose definition could be disputed. Kirkpatrick could be found to have been truthful in denying that her role in Holberg's case was that of an "informant," or at least truthfully did not think she was. Indeed, many of my colleagues in this case insist she was not. The undisclosed evidence, though, was that after Kirkpatrick's work with Corporal Stallings was insufficient to make her burglary charge go away, she obtained Holberg's murder confession and used that confession in pursuit of receiving probation in her own case.

As discussed already, the duties imposed on prosecutors by *Brady* are not limited to a closed set of facts but will arise from the ever-changing situations in which material, exculpatory evidence known to the prosecutor can be discovered or created. As applied to this case, Kirkpatrick's role need not be forced into a narrow category like "informant" for *Brady* to apply. At the very least, Kirkpatrick knew about the benefits of working with the police and assisted the prosecution in Holberg's case.[1] ***302** The defense was entitled to the information on how the supposed confession was obtained and how Kirkpatrick immediately benefitted and could benefit further as she would not be sentenced

until after she testified. That information would have allowed counsel to impeach Kirkpatrick's credibility.

Further, it is not sufficient that defense counsel knew Kirkpatrick was a sometimes-informant, that such knowledge could have led counsel to question Kirkpatrick before trial or cross-examine at trial, and that those missed opportunities are the problem, not the failure to disclose. That is not how *Brady* works. The obligation of the prosecution is not satisfied simply because defense attorneys knew a little and might with a better investigation have learned more. Where the relevant information is favorable and material and the prosecution has it, the obligation is to disclose. To repeat, the scope of that duty extends to the learning of "*any* favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555 (emphasis added).

Under *Brady*, it is the favorability of the evidence that counts, and the circumstances make clear that Kirkpatrick had much to gain from testifying the right way against Holberg. Regardless as to why she was placed in Holberg's cell, once the confession was allegedly obtained, Kirkpatrick was removed from the cell and told the police. Rather quickly, Kirkpatrick's "success" must have been brought to the attention of prosecutors — they did use the confession, after all. Despite the prosecutors' knowledge, the State, decades later, is still arguing there was nothing to disclose.

In conclusion, there is ample, clearly established Supreme Court authority that prosecutors had to disclose this information to the defense.

VI. Materiality

I find the facts that Kirkpatrick was placed in Holberg's cell and obtained a confession, along with her sentencing being delayed until her testimony, to be significant items of impeachment evidence that could have placed her testimony in a much less favorable light had jurors been informed of them.

Relief does not inevitably follow, though, as not all *Brady* errors are prejudicial. Because the state *habeas* decision was unreasoned but on the merits, the state *habeas* applicant's "burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98, 131 S.Ct. 770. The potentially reasonable basis I will consider is that the undisclosed evidence was not "material." To repeat, "material" requires a determination "that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.' " *Smith*, 565 U.S. at 75, 132 S.Ct. 627 (quoting *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555). Or, in another strongly-worded standard, there must be " 'far more' than 'clear error' " but be "so lacking in justification" so as to "preclude[ ] even the 'possibility for fairminded' dispute." *Martin*, 607 U.S. at 220–21, 146 S.Ct. 589 (citations omitted).

If other evidence that was before the jury was sufficiently strong, it would be proper to hold that the *Brady* violation was not material. In addition, regardless of my own view, I must conclude that every fairminded jurist would find that this undisclosed evidence undermined confidence in the conviction or in the capital sentence. ***303** *See Strickler*, 527 U.S. at 290, 119 S.Ct. 1936.

Materiality needs to be considered separately as to the jurors' finding of guilt and their determination about the sentence of death.

The materiality of the violation as to guilt can be assessed, first, in terms of her counsel's trial strategy that Holberg killed Towery in self-defense. The state *habeas* court found that the self-defense theory was overwhelmingly weak and at times was contradicted by Holberg's own testimony. Second, to find Holberg guilty of capital murder, jurors had to find that she committed the murder while in the commission of or attempt to commit a burglary or a robbery. Kirkpatrick alone gave direct evidence, based on the supposed confession, that Holberg was trying to take cash from Towery. She testified that a struggle ensued and that the murder occurred during that struggle.

In my assessment, the evidence was quite weak that Holberg was acting in self-defense. The *Brady* violation was not material as to the murder conviction. As to capital murder, even though I see merit in CHIEF JUDGE ELROD'S dissent on this point, I conclude there are reasonable jurists who could reject the materiality of Kirkpatrick's testimony about robbery because there was other evidence that money was taken, the events of the murder and the theft were sufficiently contemporaneous, and, consequently, the evidence about Kirkpatrick did not "put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936 (quoting *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555).

Relief as to the conviction of capital murder cannot be given.

As for punishment, Kirkpatrick also was alone in providing a particular piece of evidence relevant to another requirement for a death sentence, namely, a finding by jurors of future dangerousness. Kirkpatrick testified that Holberg said how she enjoyed seeing the flow of blood. District Attorney Farren downplayed that part of the testimony in the State's closing argument. Relevant here, he dismissed the accuracy of Kirkpatrick's testimony, perhaps finding it to undermine her credibility on more important matters. Farren even stated to the jury that Kirkpatrick's testimony regarding the blood was likely "jailhouse talk." The state *habeas* court found that the effect of Kirkpatrick's testimony at the punishment phase of the trial was minimal because "the purpose [2] of presenting [this bloody-fountain testimony was to] ... show that Holberg revealed details about the crime that Kirkpatrick could not have known without Holberg having told her about them."

Before concluding every fairminded jurist would agree that Holberg would not have been sentenced to death had jurors known of the undisclosed evidence about Kirkpatrick, what has to be considered is the other evidence in the State's case during the punishment phase. The State highlighted the depravity of the murder, connected Holberg to a separate murder, and attacked the defense's mitigation case. This evidence had nothing to do with Kirkpatrick. In fact, during the punishment phase, the States's only mention of Kirkpatrick came in its closing argument and did not concern Kirpatrick's testimony. Moreover, as mentioned, the sheer brutality of the murder is at least some evidence that a person is inclined to commit extreme violence. The prosecutor's informing jurors not to credit the most graphic parts ***304** of Kirkpatrick's testimony also makes me discount its weight.

I cannot conclude that every reasonable jurist would find that Kirkpatrick's testimony about Holberg's delight in her crime was material.

VII. Conclusion

Reasonable, even excellent, arguments supporting that a state court should have granted *habeas* relief are not enough. *Richter*, 562 U.S. at 102, 131 S.Ct. 770. "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* In the Supreme Court's controlling view, Congress "stop[ped] short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," but permitted it only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[at] Court's precedents." *Id.* at 102–03, 131 S.Ct. 770. In sum, Congress has declared that when a federal court is reviewing the denial of *habeas* relief by a state court, the Great Writ is a restricted writ. Nonetheless, it must not be treated as a caged writ.

As mentioned, the required disagreement by all "fairminded jurists" does not apply to each judge's obligation to apply that judge's understanding of what the relevant Supreme Court authority means. *See Andrew*, 604 U.S. at 95–96, 145 S.Ct. 75. Having determined what the precedents require, I disagree with the principal opinion's apparent limiting of *Brady.* On *de novo* review, it would not be unreasonable to say that the State violated Holberg's due process rights. Nonetheless, I am bound by the duty to uphold the state *habeas* court's unexplained ruling that could have been based on a finding that the disputed evidence was not material, a duty that applies unless no fairminded jurist could decide such a finding was reasonable. Seeking to be fair about what some fairminded jurists could find, I believe the duty applies.

I agree with the decision to AFFIRM.

Haynes, Circuit Judge, concurring in part and dissenting in part:

As other opinions discuss the complexities of this case in detail, I do not write at length. I concur with the primary concurring opinion's judgment to the extent it denies Holberg habeas relief as to the issue of guilt, as it is apparent to me that there is a great deal of evidence that Holberg committed the murder of Towery.

However, I respectfully dissent from the primary concurring opinion to the extent it denies Holberg habeas relief as to her death sentence. I agree with Judge Higginbotham's dissenting opinion that much of the evidence presented that supports the death penalty was provided by only one witness (Vicki Kirkpatrick), [1] that witness had criminal charges pending, and she served as a paid informant for the police. Had Kirkpatrick not testified or been discredited, it is highly likely that the jury would not have sentenced Holberg to death. I agree with Judge Higginbotham that AEDPA's demands are satisfied in this case. Accordingly, I would send this back to the district court to allow the state court to either set their own sentence other than the death penalty or have a sentencing jury trial.

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Accordingly, I concur in part and dissent in part from the primary concurring opinion.

Patrick E. Higginbotham, Circuit Judge, dissenting, joined by Stewart, Graves, Higginson, Douglas, and Ramirez, Circuit Judges:

***305** This case turns on suppressed *Brady* evidence at a capital sentencing. As our court fails to engage with the suppressed evidence, stepping past its materiality, and endorses a death sentence resting on unimpeached, compensated witness testimony, I dissent.

I.

A.

On November 13, 1996, a young Brittany Holberg had been high on crack cocaine for days—one episode in a lifelong battle with addiction. She wrecked her car and fled to A.B. Towery in order to calm down and "talk to him." Holberg testified that she had an ongoing relationship with Towery in which "sexual favors [were] exchanged for money." Towery was coming home with groceries when Holberg arrived. When he saw Holberg at the gate of his apartment complex, Towery invited her in and began unpacking his groceries. Once inside, Holberg smoked more crack while Towery was in the other room. But Towery discovered what she was doing. Holberg testified that he became enraged—as had happened before. [1] He threw money at her and screamed, "You stupid bitch, whore. What do you want? You want money? Is that what you want to do so you can smoke the rest of the day away?" Holberg testified that the next thing she knew, Towery "hit [her] in the back of the head," shoved her to the floor, and fought hard enough to rip the hair from her scalp.

The struggle turned deadly. Holberg ultimately stabbed Towery 58 times. She changed clothes, fled the scene with the money Towery threw at her, and hitched rides with strangers to Memphis, Tennessee. She was arrested three months later and brought back to Texas after waiving extradition.

B.

Shortly after her arrival, the state made sure that Holberg shared a jail cell with Vicki Kirkpatrick, an Amarillo burglar, prostitute, and compensated informant. Kirkpatrick later served as a key trial witness, capping off the state's case-in-chief with chilling details that cast Holberg as a depraved killer.

Kirkpatrick told the jury that Holberg not only confessed to "committ[ing] the murder"—she bragged about it. The relevant parts of Kirkpatrick's testimony, elicited on direct examination by District Attorney James Farren, unfolded as follows:

> **KIRKPATRICK**: She committed the murder, that she stabbed him several times, she stuck a lamp thing down his throat because she got tired of hearing him make the noises.
>
> [...]
>
> **KIRKPATRICK**: [S]he said that what happened was the man had some money on him, she wanted it, they started struggling. He wouldn't give it to her and then they just started fighting.
>
> [...]
>
> **KIRKPATRICK**: There was a fork involved. She said that she had picked it up and started to stab him. And she said that as she started stabbing him the blood was just amazing, just — I don't know how you say it, just —
>
> ***306** **FARREN**: Did she ever tell you anything about the blood looking pretty?
>
> **KIRKPATRICK**: It was pretty, like a fountain of — you know, just a fountain.
>
> **FARREN**: After she saw the blood and it looked like a fountain and it was pretty, did she indicate what impact that had on her? How she felt about that?
>
> **KIRKPATRICK**: She just said she couldn't stop, that she just kept doing it over and over. The more she did it, the prettier it was to her.
>
> **FARREN**: Did she ever mention any words like "fun" and "amazing?"
>
> **KIRKPATRICK**: It was fun and amazing. That was her exact words.
>
> **FARREN**: Now, a few moments ago, you mentioned some noises. Did she say what kind of noises?

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KIRKPATRICK: Gurgling noises. Just, you [k]now, I guess like pain noises.

FARREN: What did she do about these gurgling noises?

KIRKPATRICK: Stuck the lamp thing down his throat. Jammed it down his throat.

FARREN: And, did she tell you if that had any effect on the noises?

KIRKPATRICK: No. She did not say whether it stopped or not. She just said she got tired of hearing it so she rammed it down his throat.

[...]

FARREN: Did you ask her how she felt about it now that this was all over? Would she ever do something like that again?

KIRKPATRICK: She said that if things —if she was — she just said that if she had to do it all over again, yes, she would.

FARREN: Did she say why?

KIRKPATRICK: For drugs.

FARREN: Do you remember her saying anything like she'd do anything to get drugs or drug money?

KIRKPATRICK: Yeah. Yes, I do.

FARREN: Did she indicate to you — what was her demeanor while you were talking about this?

KIRKPATRICK: What do you mean by that?

FARREN: Was she crying, laughing?

KIRKPATRICK: No. No remorse.

After hearing Kirkpatrick's damning, scandalous testimony, the jury convicted Holberg of capital murder and recommended a death sentence. But this appeal turns on what the jury did not hear: the state promised Kirkpatrick favorable treatment for her testimony in this case and paid her for information in dozens of other cases. [2]

II.

As it turns out, throughout 1997, Kirkpatrick built quite a résumé as a compensated informant for Amarillo police. And their working relationship was close; Corporal Eddie Stallings talked to her "almost every day." Stallings would provide Kirkpatrick "money to make drug buys." If she turned up a "good warrant" for police to investigate (which she did "possibly 40" times), he would pay her money and facilitate the dismissal of her criminal charges.

Meanwhile, as this informant relationship came into bloom, Holberg's case cast a national spotlight on Amarillo. District Attorney James Farren filed the murder complaint against Holberg in November 1996. In February 1997, the nationwide program "America's Most Wanted" featured ***307** Holberg as its lead story. Tips sent to the show enabled Holberg's arrest in Memphis.

No doubt seeking victory in a highly publicized murder case, prosecutors asked numerous inmates to testify against Holberg. One of Holberg's cellmates, Lynette Voss Tucker, later testified that she "never heard [Holberg] boast about the death of A.B. Towery[,]" but that the prosecution told her that "it would be in [her] best interest" to "say [she] knew [Holberg] longer than [she] did, and that [Holberg] bragged about the killing." These attempts failed. But it just so happened that Kirkpatrick, the state's proven forty-time paid informant, was arrested for burglary soon after Holberg's capture. The Amarillo DA's office saw opportunity and seized it.

Charged with burglary and numerous other crimes, Kirkpatrick was placed in Holberg's jail cell. A "short time" later, Kirkpatrick signed an affidavit recounting Holberg's alleged gruesome comments about Towery's murder. (Although Kirkpatrick said Holberg made these comments while "everybody was up talking," multiple other cellmates testified that they never heard them. [3])

Police thanked Kirkpatrick by releasing her from jail that very day. Armed with her damning claims, the state dropped sixteen of Kirkpatrick's outstanding criminal charges, no doubt sensing the impact her gripping testimony would have on an Amarillo jury. But the state kept her on a short leash until Holberg's trial. It left Kirkpatrick's sentence upon the burglary charge pending to assure she would perform again. And Kirkpatrick understood what prosecutors wanted from

her. After later being arrested another time, she wrote a letter to the judge in her burglary case seeking release and advising: "I made a statement that I'd testify on the brutal murder that Brittany Holberg did and I am still willing."

Kirkpatrick's pending burglary charge carried up to 20 years in prison plus a maximum $10,000 fine.[4] At first, Farren's office gave Kirkpatrick an initial five-year plea offer that Farren said "had absolutely nothing to do with – with her testifying in the Holberg case." But then, the state floated the possibility of an even sweeter deal for three years.

Kirkpatrick testified against Holberg incentivized by this better deal, plus her ongoing paid informant relationship with the same police department. That is a textbook conflict of interest—but one that Holberg's jury never learned about. Although Farren later reneged the three-year offer after the jury verdict in Holberg's case and before Kirkpatrick's sentencing, conceding the state thought "it might create an appearance of impropriety if we ***308** changed our offer," the damage in Holberg's case was already done.

Holberg's death sentence rests on unimpeached testimony, bought from Kirkpatrick by the state and paid for with promises of leniency. *Brady* cannot support that outcome.

III.

A.

Brady v. Maryland bars "the suppression by the prosecution of evidence favorable to an accused" whenever that evidence "is material either to guilt or to punishment."[5] Concealing Kirkpatrick's conflicts of interest violated *Brady*, and details of these conflicts would have been material at the sentencing phase of Holberg's trial.

Brady is not simply a rule of evidence. It is an allocation of responsibility crafted to thwart overzealous capital prosecutors and ground death sentences in constitutional due process. It remains part of a structural foundation that sustains the death penalty today. Our court's treatment of Holberg's case strikes at these underlying tendons supporting capital punishment and poses a great threat to its loss—not to mention *Brady* obligations in everyday prosecutions when government witnesses are simultaneously being paid by the same prosecution team.

This concern is no hypothetical. In 1972, the Supreme Court took down the death penalty nationwide in *Furman v. Georgia.* Several Justices cited the danger of death sentences imposed arbitrarily and inflicted irreversibly.[6] Their worries remain well-founded; a recent study demonstrates that although death sentences comprise only 0.005 percent of felony convictions in the U.S., capital cases account for 11 percent of all successful *Brady* claims.[7]

That is no surprise. Capital prosecutions "are emotional and high stakes[, and] they may create tunnel vision and lead otherwise neutral prosecutors and police to engage in aggressive tactics in an effort to convict the defendant."[8] So when the High Court later reinstated capital punishment in *Gregg v. Georgia*, it emphasized that bolstered safeguards to contain passion and impulse were essential to the return of the ultimate punishment our justice system can provide.[9]

These safeguards all reaffirm the jury as the ultimate decisionmaker. In the return of capital cases, new precautions included bifurcated trials to guide the jury's discretion at guilt and sentencing, as well as individualized sentencing schemes that help the jury weigh certain aggravating and mitigating factors.[10] But again as these ***309** measures were not enough on their own, the High Court also invoked *Brady*, reminding that its core protections remain the foundation of any workable death penalty regime. In the very same case that brought back capital punishment (*Gregg*), the Court explained:

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then *accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die* by a jury of people who may never before have made a sentencing decision.[11]

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The Supreme Court has repeated this principle time and time again since *Gregg*: without properly informed juries, our constitution cannot countenance capital punishment. It is instructive that *Jurek v. Texas*, in tandem with *Gregg*, cautioned that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." [12] In *Banks v. Dretke*, the Court reminded that informants have dangerous power in death cases, reviving a capital *Brady* claim because "[t]he jury ... did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants." [13] And as recently as *Glossip v. Oklahoma* in 2025, the Court held that when the state lies by omission in a capital case, it casts a pall over any resulting execution. [14] Letting Holberg's death sentence stand cuts this sinew of the modern death penalty and forgives prosecutors for reaching their hands into the jury room, a walk away from the principle that allowed its return.

B.

Information about Kirkpatrick's conflict of interest in Holberg's case, plus her other compensated informant work for the same law enforcement team, is classic *Brady* evidence. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." [15] A *Brady* violation is material if it creates "a 'reasonable probability' of a different result" at trial or at sentencing [16]—or, in other words, when the suppression of evidence " 'undermines confidence in the outcome of the trial' " [17] such that at least one juror might have voted for a life sentence.

We must keep in mind well-established principles from the Supreme Court: when a witness proves the defendant's "eligibility for the death sentence," then impeachment evidence for that witness is material. [18] That is common sense; when a witness ***310** account is "the only evidence that the jury had before it" on the "predicates for capital murder," discrediting that account clearly creates a reasonable probability of a different result in a capital case. [19]

Under AEDPA, we ask whether fairminded jurists could disagree that Kirkpatrick's conflict of interest meets that standard. [20] "The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case." [21] Otherwise, "[t]he 'all reasonable jurists' standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one." [22]

To establish materiality, Holberg need not prove she would have received a different sentence if Kirkpatrick's conflict were disclosed. The question is whether the jury's vote for death was "a verdict worthy of confidence" despite the suppressed evidence. [23] Said another way, materiality is not a sufficiency-of-the-evidence test. Even if "the record contained ample, independent evidence ... sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty" apart from Kirkpatrick, [24] "none of the *Brady* cases has ever suggested that sufficiency of the evidence (or insufficiency) is the touchstone." [25]

C.

Holberg establishes suppression, favorability, and materiality.

First, on suppression, the state never disclosed its work with Kirkpatrick. Texas denies it worked with Kirkpatrick at all in this case, so by default, it makes no disclosure argument. And until now, Texas never contested that it suppressed Kirkpatrick's other contemporaneous informant work. That is little surprise, as there is no evidence from the time of Holberg's trial to support disclosure.

In an affidavit ten years after Holberg's conviction, her trial counsel suggested that she discovered Kirkpatrick "provided [the State] truthful information to solve other ***311** crimes" at some unstated point in time. [26] JUDGE OLDHAM'S opinion treats this line as a trump card. But one cannot have it both ways: Corporal Stallings, Kirkpatrick's handler as an informant, testified less than one month after Holberg's trial that nobody knew Kirkpatrick was an informant. Stallings' contemporaneous promise, that nobody else knew Kirkpatrick was an informant, directly contradicts counsel's

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self-serving affidavit a decade later that she somehow knew Kirkpatrick was an informant.

Other evidence also suggests, overwhelmingly, that counsel did not know Kirkpatrick's informant status before trial. Counsel never cross-examined Kirkpatrick about her relationship with the state, in Holberg's case or any other case, even though "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility" that counsel could have used to Holberg's advantage.[27] And even if we credit counsel's "strategic" silence about Kirkpatrick's *other* informant work, we cannot forget another omission that speaks volumes: counsel also never asked about Kirkpatrick's conflict of interest *in Holberg's own case*. Any lawyer would seize that impeachment opportunity if they knew about it, given the chance to destroy Kirkpatrick's credibility *against Holberg* despite her truthful tips to police on other occasions. But *Brady* has a second protection that also shields the accused from counsel error: it requires disclosing information revealing bias, regardless of whether counsel asked for it. There is no record showing that this *Brady* evidence was turned over before trial. As such, there can be no serious debate that the state violated its obligation by hiding its extensive, working relationship with Kirkpatrick.

Second, Texas concedes that discrediting Kirkpatrick would have been favorable to Holberg.[28]

And third, whether or not Holberg's *conviction* may rest on her unchallenged confession, fiercely impeaching Kirkpatrick certainly would have been "material" to Holberg's *sentencing*.[29] "The constitutional error ... in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination."[30] If Holberg's trial counsel had known Kirkpatrick collaborated with law enforcement *in this case*, collaborated with the same law enforcement team every day for months on other cases, and received compensation for her testimony dozens of times from that same law enforcement ***312** team, they could have obliterated Kirkpatrick's credibility and exposed her incentive to secure a death sentence for Holberg. As Holberg's habeas counsel puts it, the state covered up that Kirkpatrick was an "interested witness who touted her informant work to seek leniency for herself," which "would have called into serious question the good faith of the State's case" for death.

To appreciate the difference this information would have made, we need look no further than the jury's charge in the sentencing phase, where it considered the following two questions:[31]

> 1. Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, BRITTANY MARLOWE HOLBERG a/k/a/ BRITTANY MARLOWE JOHNSON, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> 2. Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Kirkpatrick's testimony was in lockstep with the jury's considerations for death. *Only Kirkpatrick* established two key aggravating "circumstances of the offense:" robbery and the absence of self-defense.[32] Indeed, if the state couldn't prove Holberg had the premeditated intent required for robbery, then this would not be a *capital* murder case at all.[33] Yet there is absolutely zero other evidence besides Kirkpatrick's conflicted testimony that Holberg intended to rob Towery *before the killing*. Even Judge Oldham, who argues robbery did not rest on Kirkpatrick, can cite none. And we know this issue mattered to the jury because they said so themselves during trial: the jury sent out a note during deliberations to ask "can you commit robbery after you murder someone or is it theft." Kirkpatrick gave the only evidence for that issue. So it simply beggars belief to claim impeaching her could have had no effect on the outcome of the trial.

Beyond that, *only Kirkpatrick* testified that Holberg delighted in the crime and would do anything to get drugs, providing the sole direct evidence of Holberg's "personal moral culpability." And Kirkpatrick was also vital to the jury's finding that Holberg posed a "continuing threat to society." Prosecutors asked the state's future dangerousness expert to assume Towery "was making some kind of a gagging sound and that [Holberg] shoved the lamp down ***313** his throat to stop the noise," and that she enjoyed the flow of blood. *Only Kirkpatrick* said that. The expert specifically cited Kirkpatrick's uncorroborated claims when he deemed

Holberg a future danger in prison, concluding "there is a significant probability that [she] would commit criminal acts of violence in the future" and remarking that "the gratuitous lamp down the throat, that just speaks intensity, anger, violence." This prediction has remained unrealized, of course, in Holberg's 28 years as a model prisoner freed from the power of cocaine. Although JUDGE OLDHAM claims Holberg "conced[ed]" future dangerousness, that is an overreading of her en banc brief—and it does not matter in any event, because even if "the record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty,"[34] the question is whether Holberg received a jury "verdict worthy of confidence."[35] She did not.

The jury voted for death because it found future dangerousness without sufficiently mitigating circumstances. It could not have reached this result without Kirkpatrick's conflicted, unimpeached testimony providing the only evidence for several factors in the jury charge—including intent to rob, a *sine qua non* predicate for capital murder. That seriously compromised the jury verdict, and *Brady*'s materiality standard demands no more.

Unlike the Supreme Court's recent decision denying habeas relief in *Klein v. Martin*, Kirkpatrick's tale was central to this case, singular in its brutality, and unsubstantiated.[36] (In *Klein*, by contrast, AEDPA foreclosed relief because the suppressed evidence was cumulative—not the case here.[37]) The "possibility of a reward" for her testimony in this case "gave [Kirkpatrick] a direct, personal stake" in Holberg's death sentence.[38] "The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely[.]"[39]

***314** *Brady* required the state to disclose evidence of this understanding. "The fact that other evidence could have supported [a] capital conviction fails to address the question of the gravity of the ... testimony at issue and how the State's failure to reveal the existence of a sentencing deal underlying that ... testimony affected the jury's conclusions."[40] That the state reneged its better three-year offer, or that Kirkpatrick later rejected the original five-year offer, are red herrings that change nothing. *When Kirkpatrick took the stand*, there remained a better "sentencing deal underlying that ... testimony."[41]

Brady also required disclosing Kirkpatrick's extensive and contemporaneous informant work for the same police department in "possibly 40" other cases. This constant collaboration was "information that might have been helpful in conducting the cross-examination,"[42] as it shows Kirkpatrick's compensated teamwork with the state. The jury was entitled to know that there was always "the possibility of a reward" when Kirkpatrick testified because that dynamic bore on her credibility.[43] Evidence that Kirkpatrick was offered "substantial benefits to fabricate [her] story would have had a profound impact on [her] already suspect credibility."[44]

IV.

A.

These facts demonstrate that at the sentencing phase, Holberg did not "receive[ ] a fair trial, understood as a trial resulting in a verdict worthy of confidence."[45] With respect for my colleagues who disagree, Holberg clears AEDPA's relitigation bar, and the state habeas court was objectively unreasonable to conclude otherwise.

As already mentioned, the Supreme Court has repeated that when testimony "critical at the penalty phase" is "uncorroborated by any other witness," information to impeach that witness is material and must be disclosed.[46] That is this case. The state never disclosed its work with Kirkpatrick. Kirkpatrick's testimony was vital to Holberg's death sentence; it was the only predicate for the robbery underpinning Holberg's capital murder charge, and it bore on numerous other aggravating factors at sentencing. And the testimony about what Holberg said was not only uncorroborated (making Kirkpatrick a linchpin at the penalty phase), but multiple witnesses from the same jail cell confirmed her testimony was outright false, affirming that they never heard Holberg tell Kirkpatrick anything like what she claimed.[47] So the state habeas court was objectively unreasonable to find no *Brady* violation. ***315** Those who would affirm here only compound that error.

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JUDGE OLDHAM'S opinion loses sight of the core issue. With a citation to AEDPA, it dismisses the effect of Kirkpatrick's conflict. But that statute did not—and could not—nullify *Brady.* Blind fealty to AEDPA in this case costs the integrity of a capital jury verdict. Giving the state courts due deference, that is not the balance the dark history of capital punishment in this country demands. JUDGE OLDHAM also inexplicably minimizes evidence that Kirkpatrick was offered favorable treatment if she testified against Holberg, and (incorrectly) claims informant work in *other* cases falls outside *Brady*'s ambit.[48] Consider what the primary concurring opinion steps past. Holberg's case drew national attention to Amarillo. After other inmates refused to sell their credibility to the state, Amarillo law enforcement put Kirkpatrick—their forty-time paid informant—into Holberg's cell. Kirkpatrick reported Holberg's horrific details of Towery's murder, which numerous other cellmates never heard. The state compensated Kirkpatrick as it had done many times before, adding this time her release from jail and dropping the pending criminal charges against her. Then, as further assurance, it left one charge pending until Kirkpatrick testified at Holberg's trial. Kirkpatrick knew her freedom hinged on how she performed. And to no surprise, Kirkpatrick obligingly gave the jury details which fit the sentencing questions like a glove. Her story went unchallenged on cross-examination.

I do not list these details again to be repetitive. I do so to point out that one can only call Kirkpatrick's conflict immaterial by sidestepping the facts of the conflict. In stepping past the undisputed fact that Kirkpatrick was offered rewards for testifying against Holberg, my colleagues lose sight of the singular role Kirkpatrick's account had as the jury deliberated death. Kirkpatrick had every motive to help secure the death sentence prosecutors wanted. Yet this court sends Holberg to the death chamber without ever putting that information before a jury, with the frankly astonishing claim that our panel committed "fundamental error" by "start[ing] and end[ing our] analysis with *Brady.*" Where else to anchor *but Brady*, the foundational constitutional safeguard of our death penalty system today?

Kirkpatrick was compensated for a lie: that Holberg told her that she enjoyed the flow of blood and exulted in the carnage. She, in turn, gave this lie to the jury—that Holberg was a killer, not a very sick young woman with a crippling addiction. The jury only had a body, and, beyond cavil, was convinced by the lies paid for by the prosecution (protecting Kirkpatrick from prison for her own criminal work). Stepping past this core reality in the smoke of determined pens forgets that the 1963 decision of *Brady* was not a simple evidentiary rule, but a foundational principle thought to be essential to the return of capital punishment and continually brought forward by the Supreme Court. To now take whatever life Holberg may have, after 28 years as a model prisoner have demonstrated ***316** that she was a sick lass and not a killer, is a reality hanging over this case—ignoring the role of *Brady* lying in the center of the Supreme Court's work to return a death penalty free of the flaws that brought it down. That indisputable reality is why this death sentence must not stand. Its violation infects a trial.

B.

In my view, the *Brady* claim alone requires reversal. But the ineffective-assistance claim also darkens this sentence.

One of Holberg's lawyers self-described as a family practitioner and had never tried a capital case, while her other lawyer had only limited capital experience. Several omissions raise doubt about counsel's effectiveness. They barely cross-examined Kirkpatrick and never questioned her credibility. They incompetently challenged Holberg's intent to rob.[49] And they did not present significant mitigating evidence about Holberg's troubled background, despite the fact that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."[50]

Moreover, were it true that "Holberg's defense counsel knew about Kirkpatrick's [informant] activities and chose not to impeach her with it,"[51] it would only strengthen Holberg's ineffective-assistance claim. How could Holberg's counsel sit silently while Kirkpatrick—who *they supposedly knew was conflicted*—told the jury Holberg had a "fun and amazing" time slaying Towery, confessed to everything with "no remorse," and sought to steal Towery's money? That is a surrender. If Holberg's lawyers truly knew Kirkpatrick was a hired gun—which again there is no contemporaneous evidence to support—yet never revealed that fact to the jury, then these "counsel" were no counsel at all.

A constitutional violation afflicts this case whether the state suppressed Kirkpatrick's informant status, in violation of *Brady*, or Holberg's counsel somehow had that information yet never used it, constituting ineffective assistance. We need

go no further: the *Brady* claim controls this appeal. Regardless of whether Holberg's counsel asked for it, the government was obligated to disclose information in its possession that was favorable to her, and it did not do so. I simply pause to point out that this alternative claim is far from baseless, as my colleagues suggest. The primary concurring opinion's flight from *Brady* works as a confession of ineffective assistance.

V.

Two potent reminders from the record remain. First, the state's own tactics are ***317** revealing. That prosecutors put Kirkpatrick on the stand and concealed her conflict of interest is a powerful testament to her value in Holberg's case. If the prosecution did not believe Kirkpatrick would make a difference, it would not have called her as a witness. Instead, the state, with its extensive, cultivated, working relationship with Kirkpatrick, dropped sixteen criminal charges after her shocking written testimony against Holberg, dangled one last charge over her head alongside a favorable plea offer to spur "act two" at Holberg's trial, *and then hid all of that*, both from Holberg's counsel and the jury.

These Amarillo prosecutors plainly knew their jurors would find Kirkpatrick's account material—that Holberg took delight in the "pretty fountain of blood." And they were concerned that knowledge of their relationship with Kirkpatrick would impugn its value. No wonder they worked hard to secure Kirkpatrick's testimony, and to keep from the jury that Kirkpatrick was trying to avoid prison. And those efforts paid off with a death sentence in a nationally watched case.

Second, Holberg has maintained a clean prison record over nearly three decades on death row. The reality proven by all these years is that she was not the stone-cold killer Kirkpatrick said she was. [52] Holberg, a lass, acted while sick in the iron grip of cocaine. Now, free of the drug, she has proved that Kirkpatrick's bought testimony, and its illusory specter of "future danger," was truly baseless.

VI.

At the least, we must vacate Holberg's death sentence. Following *Brady*'s demands, we would then remand to the district court with instructions to grant the Great Writ, conditioning its issuance "upon the passage of a reasonable but certain period of time during which the state court of conviction may cure the constitutional error by vacating [Holberg's] death sentence and imposing a sentence less than death, or by conducting a new punishment hearing." [53]

This result would fully respect the role of the state courts. Holberg's state court conviction would remain intact. And since federal courts are "without power" over steps that follow a grant of the writ of habeas corpus, [54] with a salute to AEDPA, ***318** the state would retain full control over resentencing—including, as the district court noted, the discretion to "afford [Holberg] the grace and dignity that have been absent from her life to date."

I dissent and urge the High Court to halt this weakening of *Brady*, the powerful long-time sinew deemed a prerequisite to our capital punishment system. A sentence of death must be by the hand of a jury, not the pen of jurists.

Jennifer Walker Elrod, Chief Judge, joined by Richman and Ramirez, Circuit Judges, dissenting:

This case could be about whether a repeat paid informant whose testimony underscored the prosecution's picture of Brittany Marlowe Holberg as a cold-blooded, drug-addled killer should be believed. It could be about that witness testifying, in response to the prosecution's leading questions, that in a jailhouse encounter, Holberg said that the blood "was pretty, like a fountain," that "the more she did it, the prettier it was to her," that "[i]t was fun and amazing," and that Holberg "stuck [a] lamp ... down [Towery's] throat" because "she got tired of hearing" the "gurgling noises" that he was making. It could be about how that testimony colored the jury's view of the case and was one of the last impressions that the State left on the jurors.

But this is a federal habeas case, and Congress has, through the Antiterrorism and Effective Death Penalty Act (AEDPA) dictated a more limited role for our court. As a federal court sitting in habeas, we defer to the state habeas court for fact-finding, except when the petitioner rebuts the presumption of that court's correctness by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Accordingly, we must defer to the state court here, which requires us to consider only the narrow impeachment evidence against the witness, Vicki Kirkpatrick: that she had a history of being rewarded by the police for information. Further, we do not grant relief if "a fairminded jurist could find th[e] theory" that the suppressed evidence

tends to support "farfetched." *Klein v. Martin*, 607 U.S. 213, 224, 146 S.Ct. 589 (2026). Yet even under these highly constrained principles, I cannot reach the same conclusion as the concurring opinions.

To find Holberg guilty of capital murder, the jury needed to find not only that she intentionally caused A.B. Towery, Sr.'s death, but that she did so "in the course of committing or attempting to commit burglary of a habitation owned by [Towery], or in the course of committing or attempting to commit robbery of [Towery]." Because Kirkpatrick's testimony provided the only direct evidence of intent to rob or burglarize and taints any finding of these aggravating elements, there was no reasonable basis for the state habeas court to deny Holberg relief on her *Brady* claim. As Holberg clears AEDPA's bar, I proceed to a *de novo* review of her *Brady* claim. Because that review of Holberg's *Brady* claim likewise indicates that she is entitled to relief, I would grant Holberg's petition. I therefore respectfully dissent.

I

The other opinions in this case have thoroughly discussed the requirements of AEDPA in federal habeas cases. With this in mind, I only briefly summarize our deferential standard of review.

The state habeas court's decision must stand unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." ***319** 28 U.S.C. § 2254(d). A federal habeas petition overcomes this deferential standard if, but only if, "no fairminded jurist would agree" with the state habeas court's application of Supreme Court precedent. *Andrew v. White*, 604 U.S. 86, 92, 145 S.Ct. 75, 220 L.Ed.2d 340 (2025) (citing *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770 (2011)).

If we determine that "a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied" and we will then review the claim *de novo*, "without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842 (2007). We can only grant relief if, pursuant to this merits inquiry, we determine that the Constitution was violated and that this violation was not harmless error. *See Brown v. Davenport*, 596 U.S. 118, 122, 142 S.Ct. 1510 (2022).

II

This appeal primarily turns on the question of whether the state habeas court unreasonably applied clearly established federal law. Because the state habeas court's *Brady* opinion was functionally unreasoned, [1] we consider whether Holberg has shown that "there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98, 131 S.Ct. 770.

Holberg alleges that the state habeas court misapplied the Supreme Court's clearly established precedent in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). [2] Under *Brady*, Holberg must show "that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material." *LaCaze v. Warden La. Corr. Inst. for Women*, 645 F.3d 728, 735 (5th Cir. 2011) (citing *Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994)); *accord Brady*, 373 U.S. at 87, 83 S.Ct. 1194 ("We now hold that the [1] suppression by the prosecution of evidence [2] favorable to an accused upon request violates due process where the evidence is [3] material either to guilt or to punishment."); *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936 (1999) (similar).

In my view, there was no reasonable basis for the state habeas court to deny relief to Holberg on her *Brady* claim, because she has established all three elements of the claim.

A

First, Holberg has shown that the prosecution actually suppressed evidence.

Around the time that Kirkpatrick testified against Holberg, Kirkpatrick cooperated with the police regularly and frequently. [3] A member of the Amarillo Police ***320** Department gave her money "to make drug buys" and paid her for information that led to arrests. He also helped her receive favorable treatment related to minor crimes and traffic infractions that she had committed.

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The State does not contest that the prosecutor had a duty to be aware of this information. And for good reason. Under *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," and to disclose this evidence. *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555 (1995).

Because the police had the information and the prosecutor failed to disclose it, it was suppressed—the principle in *Kyles* applies regardless of whether the prosecutor knew about the evidence. *Wearry v. Cain*, 577 U.S. 385, 394 n.8, 136 S.Ct. 1002, 194 L.Ed.2d 78 (2016) (quoting *Youngblood v. West Virginia*, 547 U.S. 867, 869–870, 126 S.Ct. 2188 (2006)) (applying *Brady* when the "statement was probably ... never seen by anyone involved with the actual trial until ... it was [all] over, i[f] at all" (alterations in original)). To the extent that the primary concurring opinion suggests that the prosecutor's duty to learn of and disclose favorable evidence can be forgone if it would require too much work to learn of the information known by members of the same police department, such a rule is novel. And, even if that rule controlled, the evidence here is not so attenuated as to trigger that proposed exception to the rules of *Brady* and *Kyles*. The relevant information was concentrated in just two Amarillo Police Department officers, who had simple ties to one another and the key witness. Kirkpatrick worked with a member of the Amarillo Police Department for at least "a two[-]to[-]three month period," during which they were in contact "almost every day." That same police officer, Corporal Stallings, arrested her on the burglary charge that led her to share a cell with Holberg. "[J]ust" after Kirkpatrick was "released from the Randall County Jail" on bond, which Corporal Stallings helped arrange, she gave her statement about Holberg to another member of the same police department. She then helped Corporal Stallings recover stolen property.

This was not some long-ago cooperation with some far-flung unit. It was coincident with and connected to Kirkpatrick's written statement in Holberg's case, given to the same police department immediately after her release. And the close ties between Kirkpatrick's case and Holberg's extend beyond the police department: the prosecutors in Holberg's case also represented the State in Kirkpatrick's burglary case. Any fair-minded jurist would say that the prosecutor had a "duty to learn" of this *Brady* material and disclose it. *Kyles*, 514 U.S. at 437–438, 115 S.Ct. 1555.

Holberg also overcomes AEDPA's bar on the issue of fact as to whether her counsel knew of Kirkpatrick's work as a paid informant. *See* 28 U.S.C. § 2254(d)(2). No fair-minded jurist, on these facts, could reasonably determine that Holberg's counsel had the relevant information at the time of trial. [4] *See id.* The State points to ***321** an affidavit from Holberg's trial counsel stating that the defense chose to limit its attacks on Kirkpatrick's credibility because Kirkpatrick had "provided [law enforcement officers] truthful information to solve other crimes." [5] Even if we were to take this statement at face value and assume that it accurately depicts the events at the time of trial, [6] it is not enough to say that the prosecutor did not suppress information about Kirkpatrick. Knowing that Kirkpatrick was an informant is not the same as knowing that she was *paid* for her information. *Cf. post*, at 324-25 (Higginson, J., dissenting) (regarding the credibility problems with compensated witnesses); *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 788–92 (5th Cir. 2018) (holding that the "verdict cannot stand" when the plaintiff misled the jury by creating the impression that an expert did not have a "pecuniary incentive" to testify). And nothing in the record indicates that Holberg's trial counsel knew about the financial nature of Kirkpatrick's relationship with the police.

Because the prosecutor had a duty to learn and disclose this information about Kirkpatrick and because the defense counsel did not know this information about Kirkpatrick, no fair-minded jurist could conclude that the prosecution did not suppress *Brady* evidence.

B

Second, this suppressed *Brady* evidence was favorable to Holberg.

Because the prosecution's duty under *Brady* "encompasses impeachment evidence as well as exculpatory evidence," *Strickler*, 527 U.S. at 280, 119 S.Ct. 1936 (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985)), a "[witness]'s paid informant status[ ] qualifies as evidence advantageous to" the defendant, *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256 (2004). "AEDPA does not 'require [us] to wait for some nearly identical factual pattern before a legal rule must be applied.' Nor does AEDPA prohibit [us] from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case

in which the principle was announced.' " *Panetti*, 551 U.S. at 953, 127 S.Ct. 2842 (internal ***322** citations omitted). So although the facts of *Banks* are distinguishable, the fundamental premise is not. Cooperation with the police casts a shadow on a witness's testimony. Compensated cooperation casts a longer one. *See Banks*, 540 U.S. at 691, 124 S.Ct. 1256 (emphasizing that a witness's status as a paid informant was favorable to the habeas petitioner). It therefore falls within the broader category of favorable impeachment evidence that the prosecution must disclose. *See Kyles*, 514 U.S. at 433, 115 S.Ct. 1555.

The ongoing relationship between Kirkpatrick and the Amarillo police, in which Corporal Stallings rewarded Kirkpatrick for information, leads to the logical conclusion that she expected similar benefits in this case—whether in the form of a deal, favorable testimony related to her pending burglary charge, or leniency from a judge. While the jury may still ultimately have credited her testimony, the jury, having reached this logical conclusion, would likely take it with a grain of salt. This type of implicit ulterior motive is classic impeachment material and puts Kirkpatrick's testimony in a different light. It would be unreasonable for a judge to conclude that the information is not favorable to Holberg. [7]

Here, the information about Kirkpatrick's paid informant status was both suppressed and favorable—and no reasonable jurist could have found otherwise.

C

Third, this suppressed *Brady* evidence was material to the aggravating factors that allowed the jury to convict Holberg of capital murder. [8]

"Undisclosed evidence is material if it could reasonably have 'put the whole case in such a different light as to undermine confidence in the verdict.' " *Klein*, 607 U.S. at 221, 146 S.Ct. 589 (quoting *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936). Even if suppressed, favorable information can be immaterial "if 'considerable' other evidence 'link[s]' the defendant to the crime and the record provides 'strong support' that the defendant would have been convicted anyway," this test is stricter than a simple sufficiency-of-the-evidence test. *Id.* at 222, 146 S.Ct. 589 (alteration in original) (quoting *Strickler*, 527 U.S. at 292–94, 119 S.Ct. 1936). Thus, the relevant question is not whether Holberg *could* have been convicted without this evidence. It is whether a reasonable jurist could be confident that she *would* have been. *See Klein*, 607 U.S. at 221–22, 146 S.Ct. 589.

***323** To convict Holberg of capital murder, the jury in this case must have found that in addition to committing murder, she did so "in the course of committing or attempting to commit burglary of a habitation owned by [Towery], or in the course of committing or attempting to commit robbery of [Towery]." The jury instructions included no other bases for capital murder—the jury must have found that the State proved these aggravating elements to convict Holberg of capital murder rather than murder. As the Texas Court of Criminal Appeals put it, the jury was required to find beyond a reasonable doubt that Holberg "intentionally caused the death of an individual while in the course of appropriating his property without his effective consent and with the intent of depriving him of that property." *Holberg v. State*, 38 S.W.3d 137, 139 (Tex. Crim. App. 2000).

Kirkpatrick offered the primary evidence that Holberg intended to rob Towery. She testified that Holberg "went back to get more money and he wouldn't give it to her," which led to the struggle in which Holberg killed Towery. Kirkpatrick's testimony put the intent into Holberg's mouth. *Cf. Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) ("A confession is like no other evidence."). If you take Kirkpatrick at her word, Holberg went there for the money. That would provide the aggravating factor needed to convict Holberg of capital murder.

But Kirkpatrick's testimony was the only direct evidence that did so. The State cites various other portions of the trial record, asserting that the "evidence of robbery was overwhelming." [9] It is not. The evidence, as the State presents it, can be distilled to: (1) Holberg had money after the crime that she did not have before; and (2) there was some evidence that Towery's money was taken from his person. And the State omits the evidence that contradicts this version of events, as Judge Higginson explains in his opinion. *See post*, at 334 (Higginson, J., dissenting).

The State's evidence does not necessarily demonstrate that Holberg committed the murder "in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of" robbery. The same evidence could also be consistent with a decision to take the money *after* the murder or (perhaps less convincingly) consistent with Holberg's own story that Towery threw the money at her. *Holberg*, 38 S.W.3d at 141 (quoting *Riles v. State*,

595 S.W.2d 858, 862 (Tex. Crim. App. 1980)). At trial, counsel did not advance an alternative motive besides self-defense, but that does not change the calculus here. Putting forth another motive would have been counterproductive to the self-defense theory, but defense counsel may have chosen a different tack if they knew what we know now. We cannot be certain what they would have done but there can be no fair-minded disagreement that discrediting Kirkpatrick would have pressure-tested the robbery element in a way that undermines confidence in the verdict. Far from "overwhelming," the circumstantial evidence here is not "considerable" enough to outweigh Kirkpatrick's role in proving this element. *Klein*, 607 U.S. at 221, 146 S.Ct. 589.

Holberg "need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict," but rather only that "the favorable evidence could reasonably be taken to put the whole case in such a different light as ***324** to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434–35, 115 S.Ct. 1555. Because the suppressed evidence tends to impeach the witness who provided "the only direct evidence presented by the State to show a critical element" of the crime, it could reasonably undermine the verdict—and it is therefore material to the aggravating element. *LaCaze*, 645 F.3d at 738; *see Kyles*, 514 U.S. at 441–45, 115 S.Ct. 1555 (holding that the "effective impeachment of one eyewitness can call for a new trial" in a case where " 'the essence of the State's case' was the testimony of eyewitnesses"); *cf. Strickler*, 527 U.S. at 294–295, 119 S.Ct. 1936 (holding that evidence impeaching a witness was not material when there was "direct evidence" unrelated to that witness of the predicate offense). "No fairminded jurist" could conclude otherwise. *Andrew*, 604 U.S. at 92, 145 S.Ct. 75.

III

Because there was no reasonable basis for the state *habeas* court to deny relief to Holberg on her *Brady* claim, we should rightly proceed to consider Holberg's claim on the merits, without deferring to the state habeas court's decision. *See, e.g., Panetti*, 551 U.S. at 954, 127 S.Ct. 2842. And on the merits—as set out above—the constitutional violation is clear. Holberg has shown suppression, favorability, and materiality—all three elements required for a *Brady* violation. *See Brady*, 373 U.S. at 87, 83 S.Ct. 1194; *Strickler*, 527 U.S. at 281–82, 119 S.Ct. 1936; *LaCaze*, 645 F.3d at 735. Further, given *Brady*'s materiality standard, we need not conduct the additional step of harmless-error review. *See Kyles*, 514 U.S. at 435, 115 S.Ct. 1555 (holding that, "once a reviewing court applying *Bagley* has found constitutional error[,] there is no need for further harmless-error review" because a *Bagley* claim has a materiality component).

Holberg has therefore cleared every one of federal habeas law's difficult hurdles, and we should grant her petition for relief.

* * *

Had the jury convicted Holberg of murder, her *Brady* claim would fail. However, for the *capital* murder charge at issue in this case, the jury must have found, consistent with the instructions they were given, that State proved beyond a reasonable doubt the aggravating elements of robbery or burglary. Kirkpatrick's status as a paid informant was suppressed, favorable, and material to those aggravating elements of robbery and burglary that allowed the jury to convict Holberg of capital murder. It may be that a jury still would have convicted Holberg of the same charge without Kirkpatrick's testimony. But even under § 2254(d)'s deferential standard, I am not confident that that is the case.

Holberg is entitled to habeas relief, so I respectfully dissent.

Stephen A. Higginson, Circuit Judge, dissenting, joined by Higginbotham, Stewart, Richman, Graves, Douglas, and Ramirez, Circuit Judges, dissenting:

[42] Although ten members of our court—a clear majority—agree that the prosecution committed error under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), the eighteen of us still come to a macabre impasse, splitting evenly in six separate opinions that require a scorecard to know whether Texas has authority to lethally inject Brittany Holberg. That is so even though the state kept secret that it was compensating its "key" accusing witness.

I doubt any prosecutor will comprehend the disintegrated *Brady* rule members of our court in the primary concurring opinion approve of today. Certainly no defense ***325** counsel will. Our court's due process contraction—Holberg's execution, after gross *Brady* misconduct—will be as staining as it is unworkable. The government may fail to disclose its extensive work with, and potential leverage over, a witness who told the jury a defendant celebrated her grisly capital murder in an alleged jailhouse confession? The defense

has no opportunity to cross-examine, test the informant for bias, or suggest to the jury that the confession may be compromised? Compensation of an informant who recites a capital confession is not even material?

Members of our court conclude that answering "yes" to each of these questions presents a reasonable application of the *Brady* rule, despite over a half-century of contrary Supreme Court law. Since at least the 1950s, the Supreme Court has strictly cautioned about the credibility of witnesses compensated by the prosecution, whether through direct financial payments, reduced sentences, or dropped charges. *See On Lee v. United States*, 343 U.S. 747, 757–58, 72 S.Ct. 967 (1952); *Hoffa v. United States*, 385 U.S. 293, 311, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). Rather than prohibit this government testimony, the Supreme Court has fixed in place three interlocking due process imperatives: first, *Brady* disclosure requirements; second, defense cross-examination using that disclosed evidence; and third, court instructions warning the jury to assess compensated witness testimony with vigilance and great care. Only then does the Supreme Court trust that jurors can assess the compromised position of these witnesses and weigh their credibility.

Needless to say, these checks only work if the government discloses information about witness compensation in the first place. A defendant cannot cross-examine about information it lacks. A trial court cannot warn the jury either. This case demonstrates the consequences that result when the government fails to uphold its duty to the system—here, above all, Brittany Holberg's life.

I agree with Judge Higginbotham that Vicki Kirkpatrick's hidden status as a compensated informant means there can be no confidence in the jury's crippled deliberative process during the penalty phase of this case. I write separately because that same *Brady* violation undermines confidence in Holberg's guilty verdict, too. The prosecution's suppressed *Brady* material provided the only confession evidence negating Holberg's assertion of self-defense and the only direct evidence that Holberg intended to rob Towery for money and drugs—the underlying felony permitting a capital charge. Any determination that this case presents no *Brady* violation was an unreasonable application of Supreme Court precedent, such that the Antiterrorism and Effective Death Penalty Act (AEDPA) does not bar relief here.

I.

I do not retread every twist of this tragic case, but a few factual and procedural points bear repeating.

A.

A jury found Brittany Holberg guilty of capital murder and sentenced her to death for killing A.B. Towery, an 80-year-old man in "pretty good shape" who had paid her for sex for years. This capital prosecution turned on the later-recanted testimony of Vicki Kirkpatrick, "a key prosecution witness," who testified that Holberg confessed in elated and gratuitous terms to the killing. *See Holberg v. State*, 38 S.W.3d 137, 139 (Tex. Crim. App. 2000). [1] Kirkpatrick ***326** provided the sole confession evidence contradicting Holberg's own trial testimony that she killed Towery in self-defense, and also the prosecution's only direct evidence establishing that Holberg killed Towery in the course of robbing him for money or drugs, making her eligible for a capital sentence under Texas law. *See* TEX. PENAL CODE § 19.03(a)(2) (1996).

At the same time, Kirkpatrick served as a compensated, confidential informant for the City of Amarillo's Police Department in dozens of cases—the very same department that arrested Holberg and that served Randall County, which prosecuted her. While Kirkpatrick worked as a compensated informant for the Amarillo Police, they arrested her and placed her in the same cell as Holberg. And, on the very day that Kirkpatrick gave her statement to Amarillo Police Sergeant Ronald Hudson detailing Holberg's alleged confession—one resulting in a conversation no one else in the crowded jail cell heard and that Holberg denied—the prosecution dismissed sixteen of Kirkpatrick's criminal charges and released Kirkpatrick on bond. [2]

Yet the prosecution did not reveal its extensive use of Kirkpatrick as a compensated, confidential informant. The jury therefore had no reason to doubt Kirkpatrick's credibility. And the trial court was kept ignorant, too. It gave no cautionary jury instructions warning of Kirkpatrick's informant status. The defense, the judge, and the jury were all in the dark as to Kirkpatrick's paid relationship with the police and any ulterior motives she may have harbored in testifying that Holberg confessed—gruesomely—to capital murder.

Contrary to the concurring opinions, I see the materiality of the prosecution's secret throughout this trial. It crippled Holberg's defense over and over again.

At opening, Randall County District Attorney James Farren explained to the jury that they would learn that Holberg had confessed to her cellmate, Kirkpatrick. Kirkpatrick would then tell them what Holberg had allegedly told her: If Holberg "had to do it all over again, she would" because "she'd do anything to get her drug money." Farren described the killing in graphic language, nodding to the testimony that Kirkpatrick would provide. "You will learn that she beat A.B. Towery with a hammer," Farren stated. She told her cell mate that the ensuing spews of blood, he reported, just "amazed her." The end of ***327** his opening statement referenced Kirkpatrick's testimony, too: "[F]inally, finally, the lamp, the lamp to stop the gagging noises." "You will not hear the gagging noises during this trial," Farren noted, "But I suspect that you, like those of us who worked on this case, will hear the gagging noises not in this courtroom but in your thoughts, your sleep and in your dreams maybe for the rest of your lives."

When the prosecution put Kirkpatrick on the stand, it elicited from her just the information it had promised to the jury in its opening. Kirkpatrick testified that Holberg described killing Towery as "fun and amazing," that his blood looked "pretty, like a fountain," and that she "got tired of hearing" gurgling noises coming from Towery's throat, so she "rammed" a lamp down it. Kirkpatrick also told the jury that Holberg robbed Towery for drug money and that Holberg would "do it all over again." In response to Farren's questioning, Kirkpatrick agreed that she had only just met him for the first time at trial. She never noted her longstanding working relationship with the Amarillo Police Department, instead testifying that she wanted "to give the police truthful, accurate information."

Because the prosecution elicited nothing about Kirkpatrick's working relationship with law enforcement, its potential leverage, or her motive to lie, neither could the defense. The most the defense could do in its minimal cross-examination was probe at Kirkpatrick's pending criminal charge and her own history as a drug user and prostitute. To starkly see the impact of the government's nondisclosure, one need only survey this nonexistent cross-examination immediately after Kirkpatrick told the jury that Holberg had confessed to a capital crime and convicted herself in their jail cell.

But the withheld evidence's further impact is the possibility that Holberg would not have taken the stand had her own words not been used against her. Because she had to rebut Kirkpatrick's testimony, the prosecution was able to conduct a severe and extended cross-examination of Holberg, which it later capitalized on.

Predictably, the government-induced defense paralysis worsened. At closing, the defense grasped at straws trying to discredit Kirkpatrick. It noted Kirkpatrick's inability on cross-examination to recall a statement she had allegedly made to defense counsel during a pretrial interview and the incongruity of Holberg's alleged confession with certain facts the prosecution and defense had elicited from other witnesses. The defense's last-ditch effort was to imply—without support available from the information the government suppressed—that Kirkpatrick could have had something to gain in "saying something that would help" the prosecution: "You can get money, you can get charges reduced or dropped." The materiality of the withheld evidence could not be more glaring.

The prosecution's closing and rebuttal closing set up a stark contrast between Holberg's testimony (untrustworthy) with Kirkpatrick's rendition of Holberg's confession (trustworthy). The running leitmotif was that Holberg herself lied—about her drug use, her family life, and Towery's death. The Holberg that appeared before the jury was "just an illusion." By contrast, Texas told the jury to believe in Kirkpatrick's Holberg, especially her jailhouse confession. Texas told the jury Kirkpatrick repeated details "there is no way she could have known unless she learned them from [Holberg]." As Farren insisted on rebuttal, "I'm not trying to sell you on the fact that [Holberg] is like a vampire and thought the blood was pretty, but I am telling you ***328** she really did talk to Ms. Kirkpatrick and she really did tell her these things."

When the state court instructed the jury at the close of the trial's guilt phase that they were the "exclusive judges" of the "credibility of the witnesses" and of "the weight to be given to their testimony," they were not instructed to scrutinize Kirkpatrick because of her status as a compensated informant who had extracted Holberg's alleged jailhouse confession.

B.

After the Texas Court of Criminal Appeals denied Holberg's direct appeal, she petitioned for state habeas relief. Her petition included an allegation that the prosecution violated her due process rights, including by eliciting false testimony

from Kirkpatrick in violation of *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and failing to disclose her confidential paid informant status in violation of *Brady.*

Holberg also asserted ineffective assistance of counsel claims in her state habeas petition, including based on trial counsel's failure to cross-examine and impeach Kirkpatrick at trial. In response—and thirteen years after trial—a member of Holberg's trial team, Candace Norris, submitted an affidavit. Defending herself against Holberg's claim that Norris did not cross examine Kirkpatrick, she spoke conditionally: "If" she "did not ask about any deals [Kirkpatrick] may have had with the State it would have been because in interviewing or visiting with her prior to the trial, whether directly or through investigators [Kirkpatrick] stated that she had no deal with the state." Because Norris had no information about any of Kirkpatrick's cooperation with the prosecution, "asking what type of deal she was getting for her testimony" would have been futile, "cause[ing] Kirkpatrick's testimony to be bolstered when she answered she was doing it because it was the truth." She emphasized that "Vicki Kirkpatrick's statements are absolutely damning to Holberg."

As to Holberg's claim that defense counsel should have used another witness who "could have provided information to attack Kirkpatrick's credibility" to impeach Kirkpatrick, Norris was again speculative. She submitted that the "State in all likelihood would" have rebutted any witness testimony by "call[ing] in law enforcement to testify that Kirkpatrick has a reputation in the community for truth and veracity because she has provided them truthful information to solve other crimes." Fully absent from Norris's affidavit was *any* admission that she knew Kirkpatrick was a compensated informant, and certainly not before trial.

The state habeas court made no specific findings regarding Holberg's allegations that Kirkpatrick had a long history as a paid informant for the Amarillo Police Department. Addressing the *Napue* claim, the state habeas court: restated the case's procedural history; found that the state and Kirkpatrick had no plea agreement in her burglary case; recounted what Kirkpatrick and Farren testified to during that proceeding, as well as Kirkpatrick's recantation and Farren's response; and credited Farren's testimony not Holberg's allegations. Addressing Holberg's *Brady* claim, the state habeas court simply noted that it had "previously entered factual findings relevant" to Holberg's "alleg[ation] that the State knowingly procured the false testimony of Vickie Kirkpatrick through threats." It "reiterate[d] that Holberg's allegations regarding Kirkpatrick have no merit," but again made no mention of—much less a finding about—Holberg's allegation that the prosecution was required to turn over information about Kirkpatrick's ***329** extensive, compensated informant work.

Correspondingly, in its conclusions of law addressing Holberg's *Brady* claim, the state habeas court provided little, if any, analysis. It outlined the three-factor *Brady* test, incorporated a paragraph about "open file" policies, and concluded summarily that Holberg has "failed to show that the State violated" its *Brady* obligations.

II.

Because Holberg seeks federal habeas relief, we assess her claim under AEDPA. But despite the concurring opinions' protestations, AEDPA presents no bar to relief here, where the state habeas court ignored *Brady*'s requirement that prosecutors turn over material evidence. Here, the prosecution did not. The ultimate result was a capital murder verdict in which there can be no confidence. Any conclusion to the contrary rested on a fundamental misunderstanding or misapplication of *Brady.*

A.

To determine whether the state court unreasonably applied clearly established Supreme Court law, we must first confirm what the law requires. A *Brady* claim only succeeds if the evidence was favorable to the defense, suppressed, and that suppression was material to the defendant's case. *Strickler v. Greene*, 527 U.S. 263, 280–82, 119 S.Ct. 1936 (1999). Texas has conceded that the information about Kirkpatrick's compensated, confidential informant status was favorable. Unlike to the panel, Texas now intimates doubt about suppression to us, as an en banc court, nearly twenty years after Holberg's trial. Because some members of the primary concurring opinion appear to pick up on this suggestion, seeking to shift the window that has long framed this case, I address this point first. However, the parties' long-standing divergence centers on whether Kirkpatrick's testimony was material to the capital-murder conviction and, if so, whether it was unreasonable for the state habeas court to impliedly conclude otherwise. This primary issue comprises the bulk of my analysis.

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1.

As just noted, this *Brady* assessment begins with a detour—the issue of suppression. In decades of state and federal habeas litigation, the *Brady* focus has been on materiality. Judge Kacsmaryk assumed Kirkpatrick's paid informant status had been suppressed. In its initial appeal to this court, Texas did not argue that the evidence had been disclosed. Both the panel majority and dissent assumed suppression. And, even after our full court voted to rehear this case en banc, only a single judge asked a single question during oral argument intimating doubt about suppression.[3] No state or federal judge has contended before today that decades of habeas *Brady* litigation has rested on a false premise because the prosecution actually honored its disclosure obligation. This last-minute hypothesis that disclosure occurred fails for numerous reasons.

To start, Kirpatrick's police handler, Amarillo Police Corporal Eddie Stallings, swore in court that Kirkpatrick's compensated, confidential informant's status had *not* been disclosed. That should end the matter for us. It did for Judge Kacsmaryk, who assumed based on this testimony that her compensated status had not been disclosed. It did for the panel, even the dissenting opinion. Needless to say, we do not ***330** do capital case fact-finding as an en banc court.

Although unnecessary, all aspects of Holberg's capital trial align with Stallings's sworn testimony that the prosecution suppressed its extensive work with Kirkpatrick.

First, Texas has never identified any contemporaneous pretrial discovery notice of Kirkpatrick's status. *See Powell v. Quarterman*, 536 F.3d 325, 335 (5th Cir. 2008) (describing *Brady*'s requirement that material be disclosed "in time for its effective use at trial"). When prosecutors honor their *Brady* obligation, the turnover record of witness compensation arrangements is pretrial and unmistakable. Yet, despite decades of record review, no court has ever identified a shred of pretrial discovery notice revealing Kirkpatrick's paid informant status.

Second, Texas cannot point to trial testimony revealing disclosure. When prosecutors disclose witness payments, that bias evidence is the first thing they elicit on direct examination to take the sting out of the inducements and to show candor to the court and jury. Yet District Attorney James Farren did the opposite, asking Kirpatrick to confirm that the two of them had only just met. In subsequent direct examination, and then also on redirect, Farren never elicited police payments.

Even more stark, cross-examination of Kirkpatrick confirms the defense lacked notice of her compensated status and bias. Defense counsel did not ask a single question about any money she had been given by her police handlers. Oppositely, at closing, the defense vainly speculated about the same, implying to the jury that Kirkpatrick *might* want to get something out of testifying. If there had been *Brady* disclosure, it would be inconceivable—certain *Strickland* error—for defense counsel to neglect devastating impeachment of the prosecution's "key" accusing witness who delivered a jailhouse confession by Holberg.

The thin reed at which Texas and members of our court grasp cannot support their argument's weight. The affidavit they point to—responding to ineffective assistance of counsel claims and submitted thirteen years after trial—offers no confirmation that defense trial counsel received any contemporaneous discovery notice of Kirkpatrick's compensated, working relationship with the Amarillo Police. The suggestion that it provides mystery proof that the government actually disclosed is imaginative; it makes sense only with a selectively quoted reading of her affidavit excising its tentative language. It also ignores entirely the fact that the affidavit was a post hoc submission in response to an attack on Norris's effectiveness as counsel.

To summarize, this late-breaking leap has no contemporaneous trial record support. It is contradicted by prosecution team testimony, from Kirkpatrick's own police handler. No party at trial used it. The federal district judge, who denied federal habeas, did not see it. Neither did the majority or the dissent at the panel stage. Only one member of this court even hinted inquiry about it at en banc argument. Regardless, the post-trial, post-habeas Norris affidavit now grasped at, when accurately examined, fails to support the argument that the prosecution disclosed Kirkpatrick's compensated status.

Any intimation of disclosure by Texas is a last-minute invention.

2.

Brady deems evidence material when its disclosure leads to a " 'reasonable probability' of a different result," such that "the government's evidentiary suppression 'undermines confidence in the outcome of the ***331** trial.' " *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375 (1985)). At both the guilt and sentencing stages, Kirkpatrick's testimony was critical to Texas's case, providing the supporting evidence for the robbery, undercutting Holberg's account of self-defense, and painting her as an unremorseful addict who posed a continued threat to society.

The Supreme Court has recognized that accusing witnesses compensated by the government for their testimony have acute incentive to lie. *See Hoffa*, 385 U.S. at 311, 87 S.Ct. 408. Despite this leverage and bias, the Supreme Court has concluded these government agents may still testify because the jury can weigh their credibility. So, when the prosecution discloses the status of a compensated informant, the witness will face severe cross-examination. Even then, the jury must receive a clear instruction to exercise caution and great care when weighing such testimony. *See id.* ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury."); *see also On Lee*, 343 U.S. at 757, 72 S.Ct. 967 ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."); *Banks v. Dretke*, 540 U.S. 668, 702, 124 S.Ct. 1256 (2004) ("Jurors suspect [informants'] motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable." (quoting Stephen Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1385 (1996))); *cf. United States v. Cervantes-Pacheco*, 826 F.2d 310, 315–16 (5th Cir. 1987) (en banc) (stressing that guardrails protect criminal defendants in contexts like these).

Only a fully informed jury can assess credibility.

These everyday imperatives have obvious, heightened importance in the context of confessions, to which juries attach enormous import. *See Floyd v. Vannoy*, 894 F.3d 143, 157 (5th Cir. 2018) (per curiam) ("Confessions are generally considered strong evidence of guilt, and a sound confession alone may significantly influence a juror's decision."); *McCarthy v. State*, 65 S.W.3d 47, 56 (Tex. Crim. App. 2001) ("A confession is likely to leave an indelible impact on the jury."). As the Supreme Court has stated, "A confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246 (1991); *cf. Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (state court cannot exclude evidence bearing on the credibility of a confession); *id.* at 689, 106 S.Ct. 2142 ("[T]he one question every rational juror needs answered [is]: If the defendant is innocent, why did [she] previously admit [her] guilt?").

Vigilance elevates in cases such as this one, where the verdict risks a life. The unique severity and irrevocability of the death penalty demand the highest procedural stringency, both at sentencing and also in the guilt-innocence phase. In this regard, it is worth remembering Justice Stewart's words: "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal ***332** justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Furman v. Georgia*, 408 U.S. 238, 306, 92 S.Ct. 2726 (1972) (STEWART, J., concurring).

With this context—caution regarding the reliability of compensated witnesses, especially those testifying to confession evidence, especially in a capital case—we may analyze the materiality of the State's suppression of Kirkpatrick's status as a compensated police informant. The counterfactual question we are tasked with addressing is whether there is a reasonable probability that at least one juror would not have found Holberg guilty knowing that the prosecution had compensated the relator of her alleged confession. *See Kyles*, 514 U.S. at 434–35, 115 S.Ct. 1555. The answer speaks for itself.

As described above, the prosecution capitalized on Kirkpatrick's testimony throughout the guilt phase, both for the grisly, inflaming picture it helped them paint and its value as the sole confession rebutting Holberg's theory of self-defense and establishing the aggravating robbery permitting a capital murder charge. It is difficult to imagine evidence more material in a capital case than evidence revealing that the ghastly confession to capital murder that the jury heard—but Holberg denied—may be a story made up by a longtime, paid informant. [4]

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Kirkpatrick's recitation of Holberg's alleged confession could not be challenged at trial. If Kirkpatrick's compensated informant status had been disclosed to the defense, Holberg's counsel would have introduced devastating bias evidence: Kirkpatrick had worked extensively for law enforcement; she was given thousands of dollars as payments; she was in daily communication with the Amarillo Police during the months leading up to Holberg's alleged confession; and Kirkpatrick received legal benefits on the same day she narrated Holberg's alleged confession, including dismissal of numerous charges and a release on bond. Indeed, the entire trial may have reconfigured had Holberg not been obliged to take the stand to rebut the damning confession put in her mouth.

Texas tries to suggest that Kirkpatrick's status as a compensated informant was immaterial because other evidence corroborated Holberg's guilt such that no reasonable juror would have come out differently even if the defense had been able to say that the government had purchased its confession evidence. Texas first contends that the evidence Holberg "was not acting in self-defense was essentially insurmountable." It then asserts that, as to the robbery aggravator, the "evidence was overwhelming." The primary concurring opinion goes further, dramatizing the details of the homicide, and conveniently avoiding virtually any analysis of Kirkpatrick's testimony and what impeachment of it would have meant to the jury. *Cf. Wearry v. Cain*, 577 U.S. 385, 394, 136 S.Ct. 1002 (2016) (per curiam) ("[T]he state postconviction court improperly evaluated [ ] materiality ... emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not.").

This approach is flawed. As the Supreme Court has made clear, *Brady* is not "a sufficiency of evidence test." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. Instead, we ask whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." ***333** *Id.* at 435, 115 S.Ct. 1555. When the government has compensated a witness who testifies that the defendant confessed to capital murder and fails to disclose that information to the defense, the court, and the jury, confidence is decimated. The concurring opinions' guilt-based analysis sidesteps the Supreme Court's constitutional focus on the withheld favorable evidence and how it could have been used by the defense. This approach abdicates *Brady*. *See United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392 (1976) ("[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."); *Wearry*, 577 U.S. at 394, 136 S.Ct. 1002 (reversing the Louisiana courts' denial of post-conviction relief under *Brady* where undisclosed evidence would have "further diminished" a witness's credibility); *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375.

This case hinged on whether Holberg killed Towery during the course of a robbery or acted to defend herself. Kirkpatrick supplied the only direct confession evidence that Holberg did not kill Towery in self-defense. At trial, the defense put on evidence that Holberg began to use force only after Towery had struck her in the head and pursued her while she retreated from him; that she grabbed several objects (including a skillet, an iron, a hammer, forks, and multiple knives) to defend herself from Towery; that Towery had a knife she believed he would use against her; and that she continued to stab him because she feared for her life throughout the confrontation. That Holberg was acting in self-defense against a man who had paid her for sex for years would make this sequence —while tragic—more understandable. A person fearing an imminent onslaught might continuously stab at her attacker with any object in her reach until he stopped. But not a person who, as Kirkpatrick testified, delights in "pretty" blood spewing like a "fountain" from another's body. Not a person who describes the gore as "just amazing." Not a person who admits to sociopathic pleasure-killing. This confession evidence was molten.

Beyond the confession testimony's graphic self-incrimination, Kirkpatrick also supplied the only direct evidence that Holberg intended to rob Towery for money and drugs—the underlying felony that permitted the charged offense of capital murder. Holberg alleged that she was strung out, had crashed her car, and headed to the home of the man paying her for sex. The prosecution argued that Holberg went through Towery's pockets, found his wallet, and stole hundreds of dollars. Yet investigators found cash "strewn about the apartment." The prosecution could not explain why Holberg would have left conspicuous money behind. Other evidence conflicted with robbery, too. For example, Holberg's blood and fingerprints were not on Towery's wallet, although they were elsewhere in the apartment. The prosecution's theory that Holberg killed Towery for prescription pills was even less substantiated. Kirkpatrick served to eliminate doubt. She recounted that Holberg had told her that "what happened was the man had some money on him, she wanted it, [and] they started struggling." Kirkpatrick testified that Holberg would "do it all over again" for drugs. With Kirkpatrick's

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testimony of Holberg's alleged confession, the jury could not deny the robbery aggravator.

Kirkpatrick's testimony was crucial and distinctive, not duplicative of other evidence before the jury. On the one hand, the jury heard from Holberg, who swore that she fought in self-defense against Towery's assault. Yet her testimony impossibly conflicted with her own confession related by Kirkpatrick. Facing this dueling evidence, the prosecution's suppression ***334** disabled the defense from severe and extended cross-examination of Kirkpatrick, just as it precluded the trial judge from giving the jury any "customary, truth-promoting precautions that generally accompany the testimony of informants." *Banks*, 540 U.S. at 701, 124 S.Ct. 1256.

I cannot imagine concluding that any—much less every—juror would have convicted Brittany Holberg of capital murder based on a severely discredited paid informant's story and indirect, circumstantial evidence. The prosecution's failure to disclose information about Kirkpatrick's longstanding compensated relationship with law enforcement erodes confidence in Holberg's conviction.

B.

Let me finish by returning to AEDPA. I start with discussion of one Texas argument not adopted by the primary concurring opinion; continue with one Texas argument both concurring opinions embrace; and conclude with one argument offered by the primary concurring opinion but not asserted by Texas.

1.

First, to the extent that Texas suggests that the state habeas court reached its *Brady* conclusion by deeming the doctrine inapplicable to information regarding a witness's contemporaneous compensated working relationship with law enforcement so long as no deal was struck in the case before it, that conclusion would be based on an unreasonable application of Supreme Court precedent, and we would owe it no deference. *See Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law .... [a] federal court must then resolve the claim without the deference AEDPA otherwise requires.").

The *Brady* rule Texas asks us to adopt is a malformed *Brady* analysis providing that prosecutors who hide payments to their "key" accusing witnesses do not cause a loss of confidence in the guilty verdicts they unsurprisingly obtain. Texas's proposed rule would blueprint a new variant on the discarded silver platter doctrine, *see Elkins v. United States*, 364 U.S. 206, 208, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), allowing prosecutors to profit from paid-for witnesses in a police stable and evade core, due process disclosure obligations. In *Bagley*, the Supreme Court prohibited this maneuvering: "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model" because the prosecutor is not tasked simply with winning a case but also ensuring justice. *See* 473 U.S. at 675 n.6, 105 S.Ct. 3375; *cf. Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) ("[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones.").

The Supreme Court has never splintered the government's *Brady* obligation into a shell game, permitting it to hide valuable evidence in other cases being worked on by the same police at the same time. Since the doctrine's invention, the Supreme Court has instead emphasized the doctrine's capaciousness. In 1963, the Supreme Court announced in *Brady* 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." 373 U.S. at 87, 83 S.Ct. 1194. In *Agurs*, it reconfirmed that "if the omitted evidence creates a reasonable doubt that did not otherwise ***335** exist, constitutional error has been committed." 427 U.S. at 112, 96 S.Ct. 2392. In *Bagley*, the Supreme Court extended the *Brady* rule to impeachment evidence, holding that the government commits constitutional error where it "fail[s] to assist the defense by disclosing information that might have been helpful in conducting the cross-examination" such that it "deprives the defendant of a fair trial." 473 U.S. at 678, 105 S.Ct. 3375. The Supreme Court clarified and enhanced the scope of a prosecutor's obligation in *Kyles*, holding that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." 514 U.S. at 437, 115 S.Ct. 1555. In *Strickler*, the Supreme Court reiterated *Brady*'s comprehensive mandate: the prosecution's suppression of favorable evidence "violates due process where the evidence is material either to guilt or punishment." 527 U.S. at 280, 119 S.Ct. 1936. It did the same in *Banks*. *See* 540

U.S. at 691, 124 S.Ct. 1256. And, in *Wearry*, the Supreme Court concluded that the prosecution's failure to disclose impeachment evidence—which, in turn, led the jury to credit a witness's account rather than the defendant's alibi—violated the defendant's due process rights. *See* 577 U.S. at 392–94, 136 S.Ct. 1002.

Whether Kirkpatrick received compensation for her work in this case or in a multitude of simultaneous others, with the same law enforcement, team makes no difference. *See, e.g., Robinson v. Mills*, 592 F.3d 730, 738 (6th Cir. 2010) (granting habeas relief and rejecting Tennessee's argument that a witness's informant work only in "unrelated cases" and the prosecutor's lack of "knowledge of her informant activities" did not matter for *Brady*). Owing the "benefit of the doubt" to the state habeas court, it would be improper for us to assume it operated with Texas's perception that *Brady* operates under a this-or-that-case dichotomy. *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357 (2002) (per curiam). Undoubtedly, for this reason, no opinion today takes up Texas's gambit.

2.

Second, to the extent the state habeas court understood that *Brady* applies to information about contemporaneous paid informant work, but found such a rule inapplicable, that conclusion was plainly unreasonable.

AEDPA is demanding, but it does not constrain lower courts to narrowly limit cases to their facts. To the contrary, "[g]eneral legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of [the Supreme] Court." *Andrew v. White*, 604 U.S. 86, 94, 145 S.Ct. 75, 220 L.Ed.2d 340 (2025) (per curiam). "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.' " *Panetti*, 551 U.S. at 953, 127 S.Ct. 2842 (citation omitted). Rather, "certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Andrew*, 604 U.S. at 94, 145 S.Ct. 75 (quoting *White v. Woodall*, 572 U.S. 415, 427, 134 S.Ct. 1697 (2014)); *see also Taylor v. Riojas*, 592 U.S. 7, 9, 141 S.Ct. 52, 208 L.Ed.2d 164 (2020) (per curiam) (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)). Although AEDPA offers "leeway" to state habeas courts examining *Brady*, *Reeder v. Vannoy*, 978 F.3d 272, 279 (5th Cir. 2020) (quoting *Cobb v. Thaler*, 682 F.3d 364, 379 (5th Cir. 2012)), it does not grant our court permission to "abdicat[e]," and " 'does not by definition preclude relief,' " ***336** *Pitchford v. Cain*, 608 U.S. 391, 146 S. Ct. 1345, 1353, 225 L.Ed.2d 11 (U.S. 2026) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005)).

To repeat, Kirkpatrick had an indivisible relationship with the very same law enforcement tasked with charging and prosecuting Holberg. Evidence of this working relationship would have been indispensable to impeach the state's "key" witness—who provided the sole, valuable confessional evidence contradicting Holberg's claim of self-defense and the only direct evidence permitting the aggravating felony permitting a capital charge. Because the prosecution never disclosed Kirkpatrick's extensive, compensated relationship with the Amarillo Police, the defense lacked devastating information necessary to test Kirkpatrick's credibility on cross-examination immediately after she told the jury that Holberg had effectively convicted herself. The defense, the trial court, and, most importantly the jury, remained ignorant of Kirkpatrick's incentive to lie. As our en banc court put it almost forty years ago, "the credibility of the compensated witness" is "for a properly instructed jury to determine." *Cervantes-Pacheco*, 826 F.2d at 316. Considering Kirkpatrick's role as a "key" prosecution witness supplying prosecution's only testimonial account of the violent encounter and only direct evidence of the alleged robbery in graphic language that would haunt jurors "for the rest of [their] lives," it is inconceivable that a fairminded jurist could find nonmateriality. [5]

Where a state court disregards clearly established federal standards—here, *Brady*, the bedrock for the rule of law and criminal justice in the United States—AEDPA's bar is cleared.

3.

Third, to the extent the primary concurring opinion now seeks to narrate an extended set of facts it claims are entitled to deference and determinative, I offer two responses.

To begin, it is telling that, before our en banc court, Texas's *only* factual-deference arguments relate to its assertion that Norris's post hoc declaration proved there was no suppression.

Regardless, granting habeas relief requires no disregard of the state habeas court's factual determinations. The state habeas

court never addressed, much less made factual findings about, Holberg's assertion that the prosecution failed to turn over evidence of Kirkpatrick's longstanding compensated working relationship with law enforcement, evidence of which Holberg's counsel adduced from Kirkpatrick's separate criminal trial. Nor did it make any pertinent finding about Stalling's testimony confirming Kirkpatrick's paid police informant status. Rather, the state habeas court examined only Holberg's allegations that the prosecution "knowingly procured ***337** [ ] false testimony" from Kirkpatrick. There was thus no finding related to Kirkpatrick's concurrent compensated relationship with law enforcement for Holberg to rebut. *See* 28 U.S.C. § 2254(e)(1).

* * *

Today, members of this court interpret *Brady* to allow prosecutors to proffer crucial accusing witnesses, with whom they have contemporaneous paid informant relationships, without permitting defendants, courts, and juries to test these witnesses' incentives to lie. As my colleague wrote in a prior capital case, "Sound criminal procedure must adhere to sacred first principles." *Lucio v. Lumpkin*, 987 F.3d 451, 498 (5th Cir. 2021) (en banc) (Elrod, J., dissenting).[6] If *Brady* does not require disclosure in this case, which cuts at the heart of someone's "eligibility for the death sentence," *Strickler*, 527 U.S. at 295, 119 S.Ct. 1936, it is hard to imagine when it would. In determining that *Brady* was not violated, the state habeas court acted unreasonably. Vindicating *Brady* here would do nothing more than require Texas to retry Holberg, playing by the rules the Supreme Court has required for over half a century.

I dissent.

All Citations

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Footnotes

* Elrod, Chief Judge, and Higginbotham, Richman, Southwick, Graves, Willett, Ho, Duncan, Engelhardt, and Wilson, Circuit Judges.

1 After Holberg's trial, both issues were recodified without material change in the Texas Code of Criminal Procedure, article 37.071, § 2(b)(1) (future dangerousness) and § 2(e)(1) (mitigating circumstances).

2 Holberg halfheartedly attempts to defend the panel majority by contending that AEDPA does not apply because the state courts did not explain *why* her *Brady* claim failed. *E.g.*, Holberg En Banc Br. at 33. But all 18 members of this en banc court agree on one thing—if only one thing—and that's that AEDPA *does* apply. AEDPA does not require either the state trial court or the TCCA to write a reasoned opinion rejecting Holberg's *Brady* claim. *See* ROA.97964 ("Holberg ... failed to show that the State violated its obligations under *Brady v. Maryland*."); *Ex parte Holberg*, No. WR-68,994-01, 2014 WL 5389907, at *1 (Tex. Crim. App. Sept. 17, 2014) (per curiam) ("Based upon the trial court's findings and conclusions and our own review, we deny relief."). Where, as here, "a state court's decision is unaccompanied by an explanation," AEDPA requires the habeas petitioner to show that "there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (citing 28 U.S.C. § 2254(d)).

3 "A state-court decision is 'contrary to' clearly established federal law only if it 'arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if' it resolves 'a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.' " *Langley v. Prince*, 926 F.3d 145, 155 (5th Cir. 2019) (en banc) (quoting *Terry Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). In her en banc brief, Holberg repeatedly says the state court's decision was "contrary to" *and/or* "an unreasonable application" of clearly established Supreme Court precedent. Holberg En Banc Br. at 2, 24, 26, 31, 46, 68. But she never applies the *Terry Williams* standard. Nor does she ever point to a Supreme Court decision involving materially indistinguishable facts. *Cf. id.* at 30 (contending only that the state court's

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decision was contrary to *circuit* precedent in the Sixth and Ninth Circuits). *But see, e.g.,* *White v. Woodall*, 572 U.S. 415, 420 n.2, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014) ("[A] lower court may not consul[t] its own precedents, rather than those of this Court, in assessing a habeas claim governed by § 2254." (quotation omitted)); *Renico v. Lett*, 559 U.S. 766, 779, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) (same); *Parker v. Matthews*, 567 U.S. 37, 48, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (per curiam) (same); *Marshall v. Rodgers*, 569 U.S. 58, 64, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013) (per curiam) (same); *Lopez v. Smith*, 574 U.S. 1, 6, 135 S.Ct. 1, 190 L.Ed.2d 1 (2014) (per curiam) (same). Nor do today's dissenters apply AEDPA's "contrary to" exception to the relitigation bar.

4 Another provision in AEDPA suggests a potentially more onerous standard of review for state-court factual determinations: "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.SC. § 2254(e)(1). The Court has never clarified the relationship between §§ 2254(d)(2) and (e)(1). *Brumfield*, 576 U.S. at 322, 135 S.Ct. 2269. Here, we need not resolve this question because even under the arguably more lenient standard of § 2254(d)(2), the state court's factual determinations were far from unreasonable. *See* *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010) (opting to apply § 2254(d)(2)); *Titlow*, 571 U.S. at 18–19, 134 S.Ct. 10 (similar); *Brumfield*, 576 U.S. at 322, 135 S.Ct. 2269 (similar).

5 *See, e.g.,* *Waddington v. Sarausad*, 555 U.S. 179, 194, 129 S.Ct. 823, 172 L.Ed.2d 532 (2009) (reversing the Ninth Circuit because it "failed to review the state courts' resolution of this question through the deferential lens of AEDPA"); *Richter*, 562 U.S. at 101, 131 S.Ct. 770 (reversing the Ninth Circuit because "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA"); *White v. Wheeler*, 577 U.S. 73, 79, 136 S.Ct. 456, 193 L.Ed.2d 384 (2015) (per curiam) (reversing the Sixth Circuit because it "did not properly apply the deference it was required to accord the state-court ruling"); *Sexton v. Beaudreaux*, 585 U.S. 961, 968, 138 S.Ct. 2555, 201 L.Ed.2d 986 (2018) (per curiam) (reversing the Ninth Circuit because its "essentially *de novo* analysis disregarded [AEDPA's] deferential standard"); *Shinn v. Kayer*, 592 U.S. 111, 119, 141 S.Ct. 517, 208 L.Ed.2d 353 (2020) (per curiam) (reversing the Ninth Circuit because it "essentially evaluated the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable" (quotation omitted)); *Mays v. Hines*, 592 U.S. 385, 392, 141 S.Ct. 1145, 209 L.Ed.2d 265 (2021) (per curiam) (reversing the Sixth Circuit for "essentially evaluat[ing] the merits *de novo*" (quotation omitted)). There are many more examples.

6 JUDGE HIGGINSON'S dissent cites the state court's description on direct appeal of Kirkpatrick as a "key prosecution witness" as if it were a holding that her testimony was material to Holberg's guilt. *Post*, at 325-26 & n.1. But the dissent removes all context from the statement. The court was recounting the evidence supporting the jury's future dangerousness finding. Among that evidence was the fact that "while awaiting trial ... , [Holberg] repeatedly solicited a cell-mate to kill Vickie Marie Kirkpatrick, a key prosecution witness." *See* *Holberg v. State*, 38 S.W.3d 137, 139 (Tex. Crim. App. 2000). So the only import of that statement was that Holberg was dangerous because she tried to get a prosecution witness killed. In no way did the court's use of the word "key" signify that Kirkpatrick's testimony was material to Holberg's guilt, punishment, or future dangerousness—let alone the "sole" evidence of anything. *Contra post*, at 271-72 (HIGGINSON, J., dissenting).

7 Kirkpatrick's testimony was indeed graphic—as was *the entirety* of the trial, given the gruesomeness of the murder. *See, e.g., post*, at 318 (Elrod, C.J., dissenting); *post*, at 315 (HIGGINBOTHAM, J., dissenting); *post*, at 333 (HIGGINSON, J., dissenting). State prosecutors therefore had ample fodder for arguments to the jury. It's noteworthy, however, that prosecutors chose *not* to emphasize Kirkpatrick's testimony and instead downplayed it three times as "jailhouse talk" and "jailhouse puffery." ROA.9338–39. Prosecutors obviously had plenty of *other* evidence to emphasize at trial. There is a stark contradiction between the dissenting

opinions, which seize on Kirkpatrick's testimony and emphasize it, and the actual trial record, which did the opposite.

8 The sentencing-phase dissent cites two pieces of evidence to prove that a mysterious three-year "deal" took place: (1) Kirkpatrick's 2011 deposition for Holberg's habeas application, ROA.21302, and (2) Kirkpatrick's written judgment of conviction, ROA.30273. *Post*, at 307 (HIGGINBOTHAM, J., dissenting). As to the first, the state habeas court found Kirkpatrick's deposition testimony "not credible." ROA.97943.

As to the second, nothing about the written judgment proves a "sweeter" deal was offered. *Post*, at 307 (HIGGINBOTHAM, J., dissenting). The written judgment does have a line stating there was a "Term of Plea Agreement" for "three (3) years in the TDCJ-ID and a $1,000.00 fine." ROA.30273. But the only plea agreement identified at Kirkpatrick's plea hearing was the five-year deal, which Kirkpatrick refused. ROA.21507; ROA.97941. The judgment also has several typographical errors, including a statement that Kirkpatrick was sentenced to "five (5) years in the TDCJ-ID." ROA.30274. No one disputes that Kirkpatrick was sentenced only to three years in jail. ROA.21573 ("Vicki Marie Kirkpatrick, you're sentenced to serve three years ... and pay a fine of $1,000.00 plus cost."). Those inconsistencies undermine any inference that the typo-ridden judgment is smoking-gun evidence of a secret deal.

9 *See* *Thornell v. Jones*, 602 U.S. 154, 165, 144 S.Ct. 1302, 218 L.Ed.2d 626 (2024) ("[W]here the aggravating factors greatly outweigh the mitigating evidence, there may be no 'reasonable probability' of a different result."). Because *Thornell* postdates the relevant state-court adjudication, it is not clearly established law for § 2254(d) purposes. *See* *Greene v. Fisher*, 565 U.S. 34, 38, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011). But *Thornell* remains relevant for a narrower point: a state court's reading of Supreme Court precedent can hardly be unreasonable under § 2254(d) when the Supreme Court later adopts that same reading. *Cf.* *Berghuis v. Thompkins*, 560 U.S. 370, 389, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) ("The state court's decision ... was thus correct under *de novo* review and therefore necessarily reasonable under the more deferential AEDPA standard of review." (quotation omitted)).

* Judge Richman concurs in Parts I, II, III, IV and V, but does not join the final two Parts nor the court's judgment.

1 Corporal Stallings testified that he had gotten a "trespass warrant" and "traffic tickets" against Kirkpatrick dismissed after advising the DA's office of her work for the police. After her arrest for burglary, Stallings personally arranged for Kirkpatrick to be released on pretrial bond so that Kirkpatrick could aid the recovery of stolen property.

2 Regardless of the purpose, the issue on materiality is the effect of the evidence. As indicated, I believe some fairminded jurists could conclude it did not affect sentencing.

1 Although she only testified during the guilt phase of the trial, the same jury decided the sentencing, so that matters in the sentencing arena.

1 Holberg testified that throughout her relationship with Towery, there were times when "he got angry" and frightened her, like when he "had a hard time performing" or thought she was on drugs while with him.

2 Both monetary and non-monetary compensation trigger *Brady* disclosure obligations. See *United States v. Bagley*, 473 U.S. 667, 676-78, 105 S.Ct. 3375 (1985) (noting promises of favorable treatment were *Brady* material).

3 One cellmate later testified that she "never heard Brittany [Holberg] talk to any of the other women about her crime" and that she "remember[ed] feeling very suspicious of Vicki [Kirkpatrick] and thinking that the police were just sending Vicki in to get information out of Brittany." Another cellmate later testified that she "never heard Brittany talk to anyone about her crime," and that she "remember[ed] feeling suspicious of Vicki" and

"thinking that the police were using her to get information to use against Brittany" because "the police kept calling Vicki out of the cell to talk to them." And yet a third cellmate later testified that she "was in the Randall County Jail with Brittany Holberg while she was waiting to go to trial for capital murder," that she "spoke with Brittany a lot," and that she "never heard [Holberg] boast about the death of A.B. Towery;" instead, this cellmate said, Holberg "cried a lot and was very remorseful."

4 TEX. PENAL CODE ANN. § 30.02 (West 1994) (burglary of a habitation was a second-degree felony); *id.* at § 12.33 (penalties for second-degree felonies).

5 373 U.S. 83, 87, 83 S.Ct. 1194 (1963); *see also* *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375.

6 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *see, e.g., id.* at 305, 92 S.Ct. 2726 (BRENNAN, J., concurring) ("Death is an unusually severe and degrading punishment[, and] there is a strong probability that it is inflicted arbitrarily[.]"); *id.* at 309-10, 92 S.Ct. 2726 (STEWART, J., concurring) ("[O]f all the people convicted of rapes and murders ... many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.").

7 Brandon L. Garrett, Adam M. Gershowitz & Jennifer Teitcher, *The Brady Database*, 114 J. CRIM. L. & CRIMINOLOGY 185, 224 (2024).

8 *Id.* at 223.

9 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

10 Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 366 (1995).

11 *Gregg*, 428 U.S. at 190, 96 S.Ct. 2909 (emphasis added).

12 *Jurek v. Texas*, 428 U.S. 262, 271, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

13 540 U.S. 668, 701, 124 S.Ct. 1256 (2004).

14 604 U.S. 226, 246-52, 145 S.Ct. 612, 221 L.Ed.2d 90 (2025).

15 *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999).

16 *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555 (1995) (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375).

17 *Id.* (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375).

18 *Strickler*, 527 U.S. at 291, 294-95, 119 S.Ct. 1936 (citing *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555). At base, this is the same clearly-established *Brady* materiality standard, which *Strickler* simply applied in context of a bifurcated capital trial.

Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256 (2004) also applied *Strickler*'s logic to address conflicted witness testimony at capital sentencing. Although decided after Holberg's conviction became final, *see* *Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), *Banks* broke no new ground and illustrates how the principles of *Brady* and *Strickler* would apply to Holberg's case. *See* *Banks*, 540 U.S. at 700-02, 124 S.Ct. 1256 (finding *Brady* violation when witness's conflict of interest was not disclosed, and explaining that "[t]he witness whose impeachment was at issue in *Strickler* gave testimony that was in the main cumulative, and hardly significant to one of the two predicates for capital murder: armed robbery ...

Most tellingly, the witness' testimony in *Strickler* did not relate to the petitioner's eligibility for the death sentence." (internal quotation marks and citations removed)).

19 *Strickler*, 527 U.S. at 293-94, 119 S.Ct. 1936.

20 *See Harrington v. Richter*, 562 U.S. 86, 102-03, 131 S.Ct. 770 (2011) (describing AEDPA standard).

21 *Williams v. Taylor*, 529 U.S. 362, 409-10, 120 S.Ct. 1495 (2000) (O'CONNOR, J., writing for the Court on this issue).

22 *Id.*

23 *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555.

24 *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936.

25 *Kyles*, 514 U.S. at 435 n.8, 115 S.Ct. 1555.

26 Counsel's exact statement, purporting to justify why she never impeached Kirkpatrick, read in relevant part: "If in fact Kirkpatrick is being manipulated, it is highly probable that if an opinion was given by Voss-Tucker based on what she purports to be Kirkpatrick's reputation in the community the community would turn out to be prostitutes, druggies and other criminals. The state in all likelihood would then call in law enforcement officers to testify that Kirkpatrick has a reputation in the community for truth and veracity because she has provided them truthful information to solve other crimes."

27 *On Lee v. United States*, 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed. 1270 (1952).

28 Discussing Kirkpatrick's conflict at panel oral argument, Texas's counsel conceded that "in fairness ... I think it would be favorable" to Holberg if disclosed.

29 *See Brady*, 373 U.S. at 87, 83 S.Ct. 1194.

30 *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375; *see also id.* at 683, 105 S.Ct. 3375 (reversing finding of immateriality where "[d]efense counsel asked the prosecutor to disclose *any inducements* that had been made to witnesses, and the prosecutor failed to disclose that the possibility of a reward had been held out" (emphasis added)).

31 Kirkpatrick testified only at the guilt-innocence phase. But the same jury sat for both phases of the trial, and the state explicitly re-introduced all the guilt-innocence evidence (including Kirkpatrick's testimony) when the sentencing phase of trial began.

32 *See Banks*, 540 U.S. at 701, 124 S.Ct. 1256 ("Most tellingly, the witness' testimony in *Strickler* 'did not relate to [the petitioner's] eligibility for the death sentence' ... In contrast, Farr's testimony was the centerpiece of Banks's prosecution's penalty-phase case." (citations omitted)).

33 The guilt phase jury charge read: "Now, if you find from the evidence beyond a reasonable doubt that [Holberg] ... *in the course of committing or attempting to commit burglary* of a habitation owned by A.B. Towery, Sr., or *in the course of committing or attempting to commit* robbery of A.B. Towery, Sr., intentionally commit murder ... then you will find the Defendant guilty of Capital Murder ... but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of Capital Murder ... and proceed to consider whether or not the Defendant is guilty of the lesser included offense of Murder" (emphases added).

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34 *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936.

35 *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555.

36 *Klein v. Martin*, 607 U.S. 213, 146 S.Ct. 589 (2026) (per curiam).

37 *Id.* In *Klein*, the defendant Martin was convicted of accessory to attempted murder and sentenced to life in prison. Evidence revealed a homemade silencer had been used during the crime; Martin's girlfriend implicated him by testifying that she saw him browse his laptop for information about silencers.

At trial, the state suppressed key impeachment evidence: a forensic report of the laptop revealing (1) it had not been used for years and (2) keyword searches for "silencer," among other relevant terms, yielded no hits in the laptop data. The Supreme Court ultimately denied *habeas* relief, but for reasons not present here.

Most importantly, the suppressed evidence in *Klein* was cumulative. *See id.* at 223-25, 146 S.Ct. 589 (noting (1) DNA evidence tied Martin to the silencer recovered by the victim, (2) witness testimony placed him at the home where evidence of the silencer's construction was found, (3) he had a clear motive to kill the victim, (4) he owned a handgun matching the murder weapon, (5) he lacked an alibi, and (6) a witness testified Martin asked a friend to dispose of a paper bag after the crime took place, which the jury could presume contained the handgun).

By contrast, in Holberg's case, Kirkpatrick gave *the only direct evidence* on several issues essential to the death sentence—including intent to rob, self-defense, and moral culpability.

38 *Bagley*, 473 U.S. at 683, 105 S.Ct. 3375.

39 *Id.*; *see also Tassin v. Cain*, 517 F.3d 770, 775-80 (5th Cir. 2008) (citing *Bagley* and granting habeas on *Brady* claim, under AEDPA, given similar facts).

40 *Tassin*, 517 F.3d at 780.

41 *Id.*

42 *Bagley*, 473 U.S. at 668, 105 S.Ct. 3375.

43 *Id.*; *see also On Lee*, 343 U.S. at 757, 72 S.Ct. 967 ("The use of informers ... may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.").

44 *United States v. Sipe*, 388 F.3d 471, 490 (5th Cir. 2004).

45 *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555.

46 *Banks*, 540 U.S. at 700-01, 124 S.Ct. 1256 (summarizing *Strickler*); *see also id.* at 703, 124 S.Ct. 1256 ("Accordingly, as to the suppression of Farr's informant status and its bearing on 'the reliability of the jury's verdict regarding punishment,' all three elements of a *Brady* claim are satisfied." (citations omitted)).

47 *See ante* n. 3.

48 "[T]he Supreme Court has never limited a *Brady* violation to cases where the facts demonstrate that the state and the witness have reached a bona fide, enforceable deal." *LaCaze v. Warden*, 645 F.3d 728, 735 (5th Cir. 2011). Instead, "the crux of a Fourteenth Amendment violation is deception" in whatever form it may take, and "[a] promise is unnecessary." *Tassin*, 517 F.3d at 778; *see also Bagley*, 473 U.S. at 668, 105 S.Ct. 3375

("The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing *information that might have been helpful* in conducting the cross-examination." (emphasis added)).

49 *See Banks*, 540 U.S. at 700-01, 124 S.Ct. 1256 ("The witness whose impeachment was at issue in *Strickler* gave testimony that was in the main cumulative, *and hardly significant to one of the 'two predicates for capital murder: [armed] robbery[.]'* " (emphasis added)). Counsel claimed Holberg "did not enter that apartment with the intent necessary to prove the underlying felony" of robbery, but they stopped there and never explained why. They contested *whether* Holberg robbed anything, but not *when* she formed any intent to do so—even though that timing was key, since there was no capital crime if Holberg did not intend to rob Towery before the killing.

50 *See Williams*, 529 U.S. at 398, 120 S.Ct. 1495 (STEVENS, J., writing for the Court on this issue) ("[T]he graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability. The circumstances recited in his several confessions are consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation.").

51 *Ante*, at 274.

52 Notably, when Holberg's state habeas counsel deposed Kirkpatrick, *she recanted her testimony against Holberg.* Kirkpatrick testified that Farren told her to get information from Holberg in jail. She explained that after she could not get Holberg to say anything, Farren coached her about what to write in her affidavit, which he also later altered to reflect certain facts. Kirkpatrick said Farren threatened to keep her in jail if she did not cooperate but offered her a deal on her pending charges if she gave the testimony he wanted.

53 *Moore v. Johnson*, 194 F.3d 586, 622 (5th Cir. 1999).

54 *See, e.g., id.* (upon federal habeas court's grant of writ, the state may either resentence defendant or, within a reasonable time, commute her term to life); *Granviel v. Estelle*, 655 F.2d 673, 684 (5th Cir. 1981) (affirming conviction and remanding "to the district court with directions that the State of Texas determine within a reasonable time whether (1) to conduct a new sentencing proceeding in the manner provided by state statute, or (2) to vacate petitioner's sentence and impose a sentence less than death in accordance with state law"); *Loyd v. Whitley*, 977 F.2d 149, 160-61 (5th Cir. 1992) (remanding "for entry of an appropriate judgment issuing the Great Writ and directing the State of Louisiana, at its own option, to sentence Loyd to life imprisonment or to retry the sentencing phase of his trial within a reasonable period"); *King v. Puckett*, 1 F.3d 280, 287 (5th Cir. 1993) (same); *Marion v. Beto*, 434 F.2d 29, 32-33 (5th Cir. 1970) (same); *Jones v. Thigpen*, 788 F.2d 1101, 1102-03 (5th Cir. 1986) (same).

1 As Judge Southwick's opinion explains, while the state habeas court did write on the *Brady* issue, its sparse statements of the law do not explain its holdings. *Ante*, at 300-01 (Southwick, J., concurring).

2 Holberg also alleges an ineffective-assistance-of-counsel claim, which she contends entitles her to relief under *Strickland* and its progeny. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *see also, e.g., Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003). I agree with the primary concurring opinion that this claim fails to clear AEDPA's bar, but as I would grant relief on Holberg's *Brady* claim, I need not and do not address this claim in depth.

3 Allegations have been made that Kirkpatrick was rewarded for her work in this case specifically. The state habeas court found that the district attorney was credible in his testimony that the plea offer was made based on the facts of Kirkpatrick's own case and did not change after her testimony—in other words, that there was

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no deal in this case. Absent clear and convincing evidence to the contrary, we are bound by this determination, *see* 28 U.S.C. § 2254(e)(1), and I do not further discuss allegations about a deal in this case.

4 The State does *not* point to an open-file policy, under which all of the prosecutor's evidence is accessible to the defense, and there is no evidence that there was one in Amarillo in 1998. *See ante*, at 300-01 (Southwick, J., concurring) (noting that while the state habeas court discusses open-file policies as a "possible [but] seemingly irrelevant shortcoming[ ]" in a *Brady* opinion, no one in this court suggested that such a policy existed in this case); *cf.* Cynthia E. Hujar Orr & Robert G. Rodery, *The Michael Morton Act: Minimizing Prosecutorial Misconduct*, 46 St. Mary's L.J. 407, 414 (2015) (discussing a 2013 change to Texas state law that codified an open-file policy that expanded defendants' discovery rights). But to the extent there was an open-file policy, it would not cure the defects here. While an open-file policy can be a tool for meeting *Brady* obligations, it does not satisfy the requirements of *Brady* by simply existing. Rather, the relevant information must be in the open file. *See Strickler v. Greene*, 527 U.S. 263, 289, 119 S.Ct. 1936 (1999) (holding that the petitioner established cause when "the prosecution withheld exculpatory evidence" and the "petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence"). That criterion is not met in cases like this one, where the prosecutor had a duty to learn of the exculpatory or impeaching evidence but did not seek it out.

5 The State does *not* point to any finding of the state habeas court as to the credibility of this statement or counsel's knowledge at the time of trial.

6 There are good reasons not to do this. Counsel wrote the affidavit over a decade after the trial, and it may have been colored by the passage of time or the desire to avoid a finding of ineffectiveness. *See* Tex. Code Crim. Proc. Ann. art. 26.052(d)(2)(C) (barring appointment of counsel that has been found to have rendered ineffective assistance of counsel in the past); The affidavit is also somewhat ambiguous as to whether this representation reflects what counsel knew at trial or a later assumption about what would have happened. *Ante*, at 310-11 (Higginbotham, J., dissenting) (describing evidence that suggests that this statement does not reflect the time of trial).

7 Our unpublished opinion in *Dennes v. Davis* is not to the contrary. 797 Fed. App'x 835 (5th Cir. 2020). *Dennes* addressed whether independent cooperation with the police that concluded prior to the case at hand was *material*, not whether it was *favorable*. *Id.* at 842–43. It also addressed materiality with respect to the petitioner's argument about the witness's status as "an ongoing informant." *Id.* at 843. That latter argument was procedurally barred, and the panel held in its prejudice analysis that the witness's ongoing-informant status was *immaterial* based on a fact-specific inquiry, not that it was unfavorable. *Id.* at 843–46 (discussing the procedural bar to addressing the claim and analyzing materiality in the context of prejudice, considering the cumulative nature of the impeachment evidence and the corroborated testimony).

8 I agree with the opinions affirming the district court that a reasonable jurist could find that the weight of the evidence against Holberg's self-defense theory made Kirkpatrick's testimony immaterial to that issue. *See ante*, at 281-82 (Oldham, J., concurring); *ante*, at 303-04 (Southwick, J., concurring). Had Holberg been convicted of murder alone, her *Brady* claim would fail. However, as a capital murder charge and the associated capital punishment cannot stand without an aggravating factor (here, burglary or robbery), I dissent.

9 The State does not offer a similar defense of the burglary evidence. *Cf. Holberg*, 38 S.W.3d at 139 (discussing sufficiency of the evidence only as to robbery on direct appeal).

1 This quotation comes from the Texas Court of Criminal Appeals's decision on direct appeal in this case, so I am perplexed that the primary concurring opinion states "Kirkpatrick was far from the State's key witness" and later returns to this counterfactual assertion that she was not "key"—and hence immaterial—by insisting

that her "testimony played a small role in the prosecution's case." In so doing, the primary concurring opinion seeks to contradict the Texas Court of Criminal Appeals. As the primary concurring opinion itself recognizes, Supreme Court law ties *Brady* to key-witness status. The undeniable truth is that prosecutors in this case thought her testimony was crucial and presented her as a "key prosecution witness." *Holberg*, 38 S.W.3d at 139.

2 The primary concurring opinion's assertion that both Sergeant Hudson and Kirkpatrick's police handler, Amarillo Police Corporal Eddie Stallings, were uninvolved in Holberg's case and in obtaining the evidence the prosecution levied against her strains credulity. Sergeant Hudson apprehended Holberg in Tennessee and placed her in the Randall County jail; he received Kirkpatrick's affidavit containing Holberg's alleged confession; and he testified against Holberg at Holberg's trial. Corporal Stallings headed the Department's SWAT Team and was deeply involved in its work with Kirkpatrick and, by default, her testimony against Holberg. Indeed, in asking for probation in her own criminal case, Kirkpatrick noted that she would testify against Holberg and assured the judge that "SWAT d[id] have [her] statement of what [she] knew" about Holberg's case.

3 Notably, the primary concurring opinion disclaims suppression as a basis for its *Brady* conclusion, perhaps because it does not have consensus agreement on this point.

4 Indeed, the primary concurring opinion itself shows the impact of Kirkpatrick's convicting testimony, repeatedly recounting Kirkpatrick's untested, graphic testimony that she put in Holberg's mouth.

5 Indeed, Kirkpatrick's extensive, concurrent work with law enforcement in Amarillo stands diametrically opposite to the facts of *Dennes v. Davis*, the unpublished opinion to which Texas cites but, notably, the primary concurring opinion does not. *See* 797 F. App'x 835 (5th Cir. 2020). In *Dennes*, the dealings between the government and the informant had been limited, ending months before "Dennes's trial began," such that the evidence "provided no incentive for [the informant] to taint his testimony in favor of the state." *Id.* at 842. The government leverage in *Dennes* was not pecuniary; the informant did not testify as to guilt at trial, only at punishment; and the informant did not relate a confession. *See id.* at 842–45. Still, our court went to pains to confirm that the informant relationship was "wholly independent" and over, that it was unrelated to the later prosecution team and police, and that, regardless, the conflict was "glaringly obvious" to the jury. *See id.* *Dennes* confirms that the *Brady* violation is unmistakable in this case.

6 Despite our full court's ruling affirming Ms. Lucio's capital sentence, two days before her execution, the Texas Court of Criminal Appeals issued a stay. *Ex parte Lucio*, No. WR-72,702-05, 2022 WL 1211313, at *1 (Tex. Crim. App. Apr. 25, 2022) (per curiam). Soberingly, the state trial judge then found that the original prosecution team had illegally suppressed critical evidence in violation of *Brady*, and that Lucio was actually innocent of the charged murder. *See Ex parte Lucio*, No. 7-CR-885 (Tex. 138th Dist. Ct. Oct. 16, 2024) (Findings of Fact and Conclusions of Law on Applicant's First Subsequent Application for a Writ of Habeas Corpus).

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