

No. 21-70010

**IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT**

BRITTANY MARLOWE HOLBERG,

Petitioner-Appellant,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
THE HONORABLE MATTHEW J. KACSMARYK, DISTRICT JUDGE
CASE No. 2:15-CV-00285-Z-BP

**BRIEF OF GENDER JUSTICE ORGANIZATIONS
AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER-APPELLANT**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities identified in Brittany Marlowe Holberg’s Certificate, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Pursuant to Federal Rule of Appellate Procedure 29, five gender justice organizations respectfully submit this amicus curiae brief in support of Petitioner-Appellant Brittany Marlowe Holberg. All parties consented to this filing.¹

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are nonprofit organizations with expertise in the field of gender-based violence. All have deep familiarity with the effects of child abuse, sexual assault, and systems of prostitution on the women who experience those life-altering events. As organizations committed to protecting survivors of gender-based violence, amici seek to ensure that courts and juries understand the physical, mental, emotional, and social trauma that gender-based violence leaves in its wake.

The **Battered Women’s Justice Project (BWJP)** serves as a national resource center on the civil and criminal legal responses to gender-based violence and promotes systemic change to create an effective and just response to victims, perpetrators, and the children exposed to gender-based violence.

The **Villanova Law Institute to Address Commercial Sexual Exploitation (CSE Institute)** educates and provides technical assistance to legislators, policy decision makers, and stakeholders to improve legal responses to

¹ No party or party’s counsel authored this brief in whole or in part or contributed money that was intended to fund the preparation or submission of this brief, and no person or entity—other than the amici and their counsel—authored the brief or made a monetary contribution to its preparation or submission.

commercial sexual exploitation and sex trafficking across the country. The CSE Institute also offers direct legal services to survivors of sex trafficking who seek to vacate convictions resulting from victimization, including prostitution. The CSE Institute's approach is multi-disciplinary, victim-centered, and trauma-informed.

RESPOND Against Violence (RESPOND) is a multidisciplinary think-tank that seeks to generate sustainable change in the collective response to violence and trauma by forming alliances, enhancing policies, and creating lasting change.

The **Texas Council on Family Violence (TCFV)** is a Texas coalition dedicated to creating safer communities and freedom from family violence. With statewide reach and direct local impact, TCFV shapes public policy, equips service providers with essential tools, and initiates strategic prevention efforts. Since 1978, TCFV has been a nationally recognized leader in efforts to end family violence.

The **Texas Association Against Sexual Assault (TAASA)** is a Texas coalition of survivors, advocates, rape crisis centers, and allied professionals committed to eliminating sexual violence in Texas. TAASA member agencies comprise a statewide network of more than 80 crisis centers serving both rural and metropolitan areas. TAASA also participates in the Governor's Sexual Assault Survivors' Task Force by contributing its expertise in conversations about significant public policy issues related to sexual violence in Texas.

INTRODUCTION AND SUMMARY OF ARGUMENT

The first 23 years of Brittany Holberg's life were marked by unrelenting neglect, sexual abuse, and violence: A family friend sexually assaulted Ms. Holberg when she was four years old. Her stepfather's friend sexually abused her for several years beginning at age twelve. A stranger assaulted her in an alley when she was fifteen. Her ex-husband was so violent she ended up needing eighteen stitches in her forehead. She was gang-raped at the age of twenty-two. The jury that sentenced Ms. Holberg heard next to nothing about the trauma Ms. Holberg endured and the impact of those experiences on her. Had her counsel developed and presented this mitigating evidence, there is a reasonable probability her jury would not have condemned Ms. Holberg to die.

Ms. Holberg's sexual and gender-based trauma rendered her especially vulnerable to lasting mental health consequences such as PTSD, depression, emotional numbness, and addiction. Ms. Holberg's repeated sexual victimization increased the likelihood that she would engage in risky sexual behaviors—including prostitution—as a coping mechanism in adulthood. These effects of gender-based violence have been established by scientific and academic research *for decades*, and yet Ms. Holberg's trial counsel inexplicably forwent investigation into Ms. Holberg's history. Had the jury been presented with the full extent of Ms. Holberg's sexual abuse and its impact on her psychological and cognitive

functioning, it would have had the context it needed to evaluate whether mitigating circumstances supported a sentence of life imprisonment. It would have had the tools to see through the prosecution’s argument that Ms. Holberg became a drug-addicted prostitute by “choice.” Ms. Holberg needed to earn the sympathies of only a single juror to avoid a sentence of death. Amici respectfully submit that with the benefit of this evidence at least one juror would likely have decided to spare Ms. Holberg’s life.

FACTUAL AND LEGAL BACKGROUND

Texas law requires juries to make two findings to condemn a defendant to death: (1) there is a probability that the defendant will be a continuing threat to society and (2) there are no mitigating circumstances—for example, the defendant’s character, background and moral culpability—that warrant life imprisonment instead. Tex. Code. Crim. Proc. art. 37.071, § 2(b). A jury must make both findings unanimously. *Id.* §§ 2(d)(2), (f)(2).

Ms. Holberg’s trial counsel did not even try to present a meaningful mitigation case. *See* ROA.9533 (“The defense abandoned the mitigation issue, stating during its opening statement that “we will not proceed to question number two.” (quotations omitted)). Yet, as this Court recognized, “the evidence Holberg’s counsel declined to place before the jury” is similar to that which has been “deemed critical for the jury to hear in other death penalty cases.” *Id.* Ms.

Holberg’s childhood and early adult years were characterized by “repeated sexual victimization”—“[a]lmost every man in Holberg’s life prior to her arrest treated her as a sexual object”—exposure to “rampant abuse of prescription medication and illicit drugs,” and her family’s general disregard and “casual indifference” to her wellbeing. ROA.110964-66.

While all these facts (and more) bear on Ms. Holberg’s moral culpability, amici draw on their expertise on the consequences of sexual and gender-based violence to explain why trial counsel’s failure to investigate and present Ms. Holberg’s sexual victimization was particularly devastating. The jury was deprived of the tools it needed to understand the trauma and resulting impairments that affected Ms. Holberg’s behavior. The prosecution was left free to cast Ms. Holberg’s life experiences—drug addiction, prostitution, violence—as choices she made, rather than the predictable responses to the repeated sexual abuse and violence she experienced. The science on this is—and has long been—clear: sexual trauma has a pronounced adverse impact on its victims. Ms. Holberg’s jury needed to know that.

ARGUMENT

I. Had the jury learned the full extent of Ms. Holberg’s sexual and gender-based trauma, at least one juror may have found Ms. Holberg’s life worth sparing.

From an early age, Ms. Holberg experienced repeated sexual abuse and

gender-based violence.² When she was four years old, a family friend and babysitter raped her digitally. ROA.40927; ROA.85373. From ages twelve to fifteen, her stepfather's friend (with whom her mother was having an affair) repeatedly sexually abused her. ROA.85697, 85764-65, 85724; ROA.85387-88. When she was fifteen, two men assaulted her in an alley outside a grocery store. ROA.8906-08. When she was seventeen, another stranger assaulted her while she was jogging. ROA.8894-97; ROA.77795-98; ROA.85392. After she was married at seventeen, her ex-husband molested and sodomized her. ROA.47589; ROA.104182-83. Throughout her teenage years, the constant assaults on her body led her to repeatedly seek medical attention for issues with her reproductive system, including urinary tract infections, chronic pelvic pain, infertility, pelvic adhesive disease, chlamydia, neisseria gonorrhoea, pelvic inflammatory disease, herpes, and ovarian cysts. ROA.85392. And when she was twenty-two, she was beaten and raped by a gang of men who left her "covered with bruises." ROA.85412-13. Following that incident, she told doctors: "every time I close my

² Medical records and police records that were available at the time of Ms. Holberg's trial corroborate the traumatic events discussed here. The availability of these records is confirmed and summarized in the 78-page affidavit of Scharlette Holdman, who conducted an investigation into mitigation evidence at the direction of Ms. Holberg's counsel during federal habeas proceedings. *See* ROA.85348. Holdman reviewed extensive medical, educational, social history, law enforcement records' and family affidavits that were available at the time of trial as part of this investigation. *Id.*

eyes I relive that rape. The only time I can be free of it is when I close my eyes and sleep.” ROA.77727; ROA.77700-02; ROA.77711-12; ROA.8544. Nurses reported that she had an “obsession” with the rape.³

These experiences would have provided critical, missing context for Ms. Holberg’s violent altercation with A.B. Towery. Had the jury learned the full extent of Ms. Holberg’s repeated victimization and the proven link between childhood sexual abuse and mental health illnesses (including addiction), prostitution, and revictimization, there is a reasonable probability at least one juror would not have condemned Ms. Holberg to die.

A. Gender-based violence often leads to poor mental health consequences for survivors.

Copious research available at the time of trial demonstrates that survivors of trauma due to sexual abuse and gender-based violence often experience lasting and debilitating mental health effects. Survivors of gender-based trauma, for instance, commonly experience depression and anxiety disorders, such as post-traumatic stress disorder (PTSD). Karla Fischer, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. Ill. L. Rev. 691, 720

³ Records that would have been available to counsel at the time of trial indicate that Ms. Holberg had numerous encounters over many years with physicians, medical staff, and law enforcement officers who described her as “psychotic, hallucinating, paranoid, and delusional”—the state she was in at the time of her encounter with Mr. Towery. See ROA.85417.

(1989); Michael J. Grills, *Expert Testimony on Rape Trauma Syndrome in Colorado: Broadening Admissibility to Address the Question of Consent in Sexual Assault Prosecutions*, 61 U. Colo. L. Rev. 833, 855 (1990). The symptoms associated with trauma vary, but many survivors experience dissociation, shame, distrust, difficulties with memory, and emotional numbing. See Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 Hofstra L. Rev. 923, 962, 945 n.89 (2008) (citing Judith Lewis Herman, *Trauma and Recovery* 118-22 (1992)) (noting “complex array of symptoms associated with exposure to severe and chronic interpersonal violence”); Herman, *supra*, at 34 (“Traumatic events produce profound and lasting changes in physiological arousal, emotion, cognition, and memory.”). Survivors, for example, may “experience fear, nightmares about the assault, depression, avoidance responses to people and situations that take the form of phobias, changes in lifestyle, anxiety, and sexual and interpersonal dysfunctions.” Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome and Its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395, 427-28 (1985). Trauma due to sexual violence and gender-based violence can thus alter the way people process, connect to others, and experience the world, all of which can explain a survivor’s participation in an act of violence. See Herman, *supra*, at 53 (“In the aftermath of traumatic events,

survivors doubt both others and themselves. Things are no longer what they seem.”).

The situation is even more dire for those who are abused as children. Research shows that childhood sexual abuse has “a substantial impact on the character development, personality integration and emotional well-being” of children, Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *Child Abuse and Neglect* 177, 178 (1983), which makes it difficult for survivors abused as children to later regulate reactions to stressful events and navigate relationships with others, see Kimberly A. Crnich, *Redressing the Undressing: A Primer on the Representation of Adult Survivors of Childhood Sexual Abuse*, 14 *Women’s Rts. L. Rep.* 65, 67 (1992) (“the adult survivor may be shackled with a multitude of behavior patterns and physical problems as a result of the unresolved trauma of sexual victimization”); Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 *Am. J. Prev. Med.* 245, 252-53 (1998) (“The linking mechanisms appear to center on behaviors such as . . . sexual behaviors that may be consciously or unconsciously used because they have immediate pharmacological or psychological benefit as coping devices in the face of the stress of abuse, domestic violence, or other forms of family and household dysfunction.”). Survivors of childhood sexual trauma are

thus significantly more likely to experience anxiety, feelings of isolation and lower self-esteem compared to nonsurvivors, and those who survive childhood rape are often saddled with lifelong depression. See Donald C. Bross, *Terminating the Parent-Child Legal Relationship As A Response to Child Sexual Abuse*, 26 Loy U. Chi. L.J. 287, 292 (1995); John E.B. Myers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection*, 28 J. Fam. L. 1, 6 (1990); Herman, *supra*, at 94 (“Protracted depression is the most common finding in virtually all clinical studies of chronically traumatized people.”); Felitti, *supra*, at 253 (“High levels of exposure to adverse childhood experiences would expectedly produce anxiety, anger, and depression in children.”). Survivors are also likely to experience feelings of low self-esteem, feelings of isolation, “guilt, self-blame, pain and rage” far into adulthood. Summit, *supra*, at 178; see Angela Browne and David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 Psychological Bulletin 66, 72 (1986) (summarizing “long-term effects of sexual abuse mentioned in the clinical literature”).

Childhood trauma may also disrupt normal brain development, which can “impair[] . . . intellectual and social development.” Richard Fossey, *Law, Trauma, and Sexual Abuse in the Schools: Why Can’t Children Protect Themselves?*, 91 Ed. Law Rep. 443, 451 (1994). Studies thus link childhood trauma—including sexual

violence—to “psychological changes in the central nervous system”—the system that regulates fear response, impulse control, reasoning, and academic learning. *Id.* (citing B.A. van der Kolk, *The Separation Cry and the Trauma Response: Developmental Issues in the Psychobiology of Attachment and Separation*, in *Psychological Trauma* 31 (1987)). Other studies find that survivors of childhood trauma grow up to have “significantly lower IQ scores” than nonsurvivors. Cynthia M. Perez and Cathy Spatz Widom, *Childhood Victimization and Long-Term Intellectual and Academic Outcomes*, 18 *Child Abuse & Neglect* 617, 623 (1994). But however the effects of childhood trauma later manifest, many experts have long agreed: significant childhood stress severely impacts adult behavior. *See* John Briere and Marsha Runtz, *Symptomatology Associated With Childhood Sexual Victimization In A Nonclinical Adult Sample*, 12 *Child Abuse and Neglect* 51, 51 (1988); Bruce D. Perry and Ronnie Pollard, *Homeostasis, Stress, Trauma, and Adaptation*, 7 *Stress in Children* 33, 33-34 (1998) (“traumatic experiences during infancy and childhood” impact “all future emotional, behavioral, cognitive, social, and physiologic functioning”).

Trauma is cumulative: repeated exposure to traumatic events exacerbates survivors’ symptoms and leads to heightened “risk for the onset” of more severe symptoms. R. Jay Turner and Donald A. Lloyd, *Lifetime Traumas and Mental Health: The Significance of Cumulative Adversity*, 36 *J. Health And Social*

Behavior 360, 368, 371 (1995) (noting “especially compelling relationships” between “cumulative trauma experience” and “psychological distress”); *see* Crnich, *supra*, at 67 (“the more severe, prolonged, forceful or repeated the abuse, the more persistent and lasting the effects to the adult survivor”). It is therefore no surprise that survivors who experience repeated and sustained abuses feel their effects in spades. *See* Yutaka Ito et al., *Increased Prevalence of Electrophysiological Abnormalities in Children with Psychological, Physical, and Sexual Abuse*, 5 J. Neuropsychiatry & Clinical Neurosciences 401 (1993); Herman, *supra*, at 86 (“People subject to prolonged, repeated trauma develop an insidious, progressive form of post-traumatic stress disorder that invades and erodes the personality.”).⁴

⁴ The scientific research since trial only confirms these findings: prolonged sexual abuse and cumulative trauma lead to lasting and often debilitating consequences for survivors. *See, e.g.*, Cate Fisher et al., *The Impacts of Child Sexual Abuse: A Rapid Evidence Assessment, Independent Inquiry into Child Sexual Abuse* 55 (2017) (concluding that childhood sexual abuse survivors commonly experience depression and anxiety disorders, such as post-traumatic stress disorder (PTSD) and that survivors “may adopt certain behaviours in an effort to manage, suppress, or gain temporary relief from the trauma and distress of the abuse”); Emily M. Zarse et al., *The Adverse Childhood Experiences Questionnaire: Two Decades of Research on Childhood Trauma as a Primary Cause of Adult Mental Illness, Addiction, and Medical Diseases*, 6 Cogent Medicine 1, 3 (2019) (finding that that significant childhood stress “severely impacts adult behavior.”); Leslie Dawn Culpepper, *The Link: Trauma and Substance Abuse*, 5 J. Psych. & Clinical Psychiatry 1, 2 (2016) (finding that when survivors turn to “self-medication for the experiential impact of trauma,” that can lead to “prostitution or exchanging sex for drugs,” making them increasingly “vulnerable to further traumatic experiences like rape or other violence”); Nicole

B. Gender-based violence often leads survivors to substance dependence and abuse.

The jury also never learned how Ms. Holberg’s sexual abuse and gender-based violence increased the likelihood that she would become addicted to drugs—and how her addiction may have led to other coping behaviors.

As explained above, trauma due to sexual abuse and gender-based violence often leads to severe mental health consequences: survivors often experience depression, feelings of isolation, anxiety, anger, numbness, and—in the cases of women experiencing PTSD—flashbacks and nightmares. *See supra* p. 9.

Substance use can quiet these symptoms. Women survivors thus often use substances as self-medication for the mental health consequences of abuse. *See* Cathy Spatz Widom, *The Role Of Placement Experiences In Mediating The Criminal Consequences Of Early Childhood Victimization*, 61 *Am. J. of Orthopsychiatry, Mental Health, and Social Justice* 195 (1991). Indeed, survivors who experienced childhood trauma are more likely to abuse drugs as adults.

Thomas H. Maugh II, *Studies Link Childhood Abuse to Adult Social Dysfunction: Research: Neglect is Tied to Lower IQs and Misuse of Drugs, Alcohol. Results Also Dispel Notions Related to Temperament and Prostitution*, *The Los Angeles*

P. Yuan et al., *The Psychological Consequences of Sexual Trauma* 11 (March 2006) (noting that survivors of sexual trauma may turn to “high-risk sexual behaviors” as “extreme coping mechanisms”).

Times (Feb. 17, 1991), <https://www.latimes.com/archives/la-xpm-1991-02-17-mn-2176-story.html> (summarizing Widom, *supra*, at 195 (in sample group of survivors, “[a]bout 45% of the abused and neglected group mistreated alcohol, and 25% were drug users . . . compared to 35% and 23%, respectively, for the controls”).

It thus comes as no surprise that survivors who cope by self-medicating with drugs and alcohol are also more likely to develop addictions. *See* Bradford J. Roegge, *Lemmerman v. Fealk: A ‘Reasonableness’ Solution Allows Michigan’s Incest Victims Greater Access to the Courts*, 71 U. Det. Mercy L. Rev. 943, 947 (1994) (explaining how self-medication provides link between trauma and addiction). In 1996, the National Center on Addiction and Substance Abuse at Columbia University published stark numbers: nearly 70% of the women seeking substance abuse treatment in a program the prior year had histories of sexual abuse. *The National Center on Addiction and Substance Abuse at Columbia University, Substance Abuse and the American Woman* 32 (1996) (citing Michael Windle et al., *Physical and Sexual Abuse and Associated Mental Disorders Among Alcoholic Inpatients*, 152 Am. J. of Psychiatry 1322 (1995)). High dependency rates, of course, extend to other drugs, like cocaine, opiates, and marijuana, too.

Crucially, studies also show that when survivors turn to self-medication to soothe the impact of trauma, that can lead to prostitution or exchanging sex for

drugs, making survivors increasingly “vulnerable to subsequent abuse.” Maria L. Imperial & Jeanne B. Mullgrav, *The Convergence Between Illusion and Reality: Lifting the Veil of Secrecy Around Childhood Sexual Abuse*, 8 St. John’s J. Legal Comment. 135, 143 (1992); see, e.g., *Andrus v. Texas*, 140 S. Ct. 1875, 1877 (2020) (“To fund a spiraling drug addiction, Andrus’ mother also turned to prostitution.”). Case in point: a 1981 San Francisco study found that 70% of prostitutes in the study were raped by clients an average of thirty-one times. Dorchen Leidholdt, *Prostitution: A Violation of Women’s Human Rights*, 1 Cardozo Women’s L.J. 133, 138 (1993) (citing Mimi Silbert & Ayala Pines, *Occupational Hazards of Street Prostitutes*, 8 Crim. Just. Behav. 395, 397 (1981)). And an Oregon-based study—published a decade later—concluded that 78% of the prostitutes in the study had been raped; of those, 48% had been raped by pimps an average of sixteen times, and 79% had been raped by johns an average of thirty-three times per year. *Id.* (citing *The Council for Prostitution Alternatives 1991 Annual Report 2*). When survivors of gender-based trauma turn to drugs and alcohol to self-medicate—and to prostitution to fund those coping strategies—they thus increase the risk that they will endure additional sexual abuse and trauma. That compounds the mental health consequences of any previous trauma and creates a cycle of coping behaviors. *See supra* p. 16.

C. Gender-based violence often leads survivors to engage in high-risk sexual behaviors and increases the likelihood of repeated victimization.

The jury likewise never learned that a history of sexual trauma and gender-based violence often leads survivors to engage in high-risk sexual behaviors (separate and apart from those driven by substance dependence) that make them vulnerable to further victimization.

Research shows that survivors are “more likely to engage in sex work, to change sexual partners frequently, and to engage in sexual activities with casual acquaintances than people who were never sexually abused.” S. Zierler et al., *Adult Survivors of Childhood Sexual Abuse and Subsequent Risk of HIV Infection*, 81 Am. J. of Pub. Health 572, 575 (1991); *see also* Van Der Kolk, *supra*, at 144 (describing how adults abused as children were often “on edge,” had “enormous trouble” negotiating intimate relationships,” and “often engaged in self-destructive behaviors”). Survivors, for instance, are significantly more likely to turn to prostitution as adults. Rebecca L. Thomas, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 Wake Forest L. Rev. 1245, 1252 (1991) (“Studies have shown that adults sexually victimized as children have a tendency toward prostitution or promiscuity, sexual dysfunction, and the inability to form intimate relationships.”). There are multiple reasons why. One is that survivors of sexual trauma may turn to high-risk sexual behaviors to

cope with poor mental health. *Id.*⁵ In the same way that feelings of despair, numbness, flashbacks and nightmares may cause survivors to self-medicate with drugs and alcohol, *see supra* pp. 9, 16, those same feelings may also lead survivors to numb their pain through risky sexual behaviors.

Survivors' engaging in high-risk sexual behaviors may also be attributed to modeling behaviors experienced earlier in life. Survivors may, for example, think of sexually abusive behaviors or other high-risk sexual behaviors as "normal" sexual behavior because of their experiences with their perpetrators. Fossey, *supra*, at 452 ("trauma victims have a tendency to reexpose themselves to situations that are reminiscent of the original trauma"). Minors suffering childhood sexual abuse can also be socialized by perpetrators to believe they are helpless, which makes them less likely to resist others' sexual advances and thus more likely to engage in high-risk sexual behaviors as adults. *Id.* at 453 ("Trauma victims who exhibit learned helplessness lack a belief they can control their environment.").

Engaging in high-risk sexual behaviors also means survivors are "more apt to being victimized by others;" this is especially true for survivors of childhood

⁵ Trauma researcher Bessel Van Der Kolk describes a sexual abuse victim who ran away from a group home, met up with others to do drugs, then left with a group of boys in a car who gang-raped her. Van Der Kolk, *supra*, at 165-66. This case study, Van Der Kolk argues, demonstrates how difficult it is for a survivor to "think through how she might protect herself." *Id.* at 166.

sexual abuse. Thomas, *supra*, at 1252 (“they are more likely to be predisposed to further victimization”); *see* Crnich, *supra*, at 67 (“studies have shown that sexually assaulted children are at greater risk for adult sexual assault than are children who have not been victims of sexual assault” (citing Judith M. Siegel et al., *The Prevalence of Childhood Sexual Assault: The Los Angeles Epidemiologic Catchment Area Project*, 126 Am. J. Epidemiology 1141, 1141-53 (1987))).

Indeed, a 1986 study reported that “68% of incest victims later experienced a rape or attempted rape by a nonrelative compared with 38% of women raped who were not incestuously abused as children.” Imperial, *supra*, at 142 (citing Diana E. H. Russell, *The Secret Trauma: Incest In The Lives Of Girls And Women* 158 (1986)).

Numbers aside, “[t]he extreme vulnerability of these women to further sexual exploitation is difficult to overstate.” Margaret A. Baldwin, *Pornography and the Traffic in Women: Brief on Behalf of Trudee Able-Peterson, et al., Amici Curiae in Support of Defendant and Intervenor-Defendants, Village Books v. City of Bellingham*, 1 Yale J.L. & Feminism 111, 125 (1989).

* * *

The jury that sentenced Ms. Holberg to die never learned about the established link between childhood sexual trauma, prostitution, and revictimization, and thus did not have the tools to understand how the sexual abuse Ms. Holberg suffered beginning when she was a child predictably affected her

mental health as an adult. That evidence—the evidence the jury did not hear—was mitigating, and its absence from this trial was prejudicial.

The prosecution told jurors that Ms. Holberg “chose the drugs,” “chose the prostitution,” and “chose to live a life of deception, manipulation and violence.” ROA.9948. Had jurors learned that for Ms. Holberg drugs and prostitution were trauma-induced coping mechanisms, they would have had the tools to reject the prosecution’s narratives of choice and deceit, and reason to feel empathy for Ms. Holberg. Had trial counsel fully investigated the history of Ms. Holberg’s sexual victimization and provided it to Dr. Patel, the jurors would have heard him testify about how “[t]hese extremely formative experiences left Brittany vulnerable to mood and trauma-based disorders and deprived her of effective coping strategies or healthy relationships with which to buffer or assist her in managing the innate vulnerabilities she was born with.” ROA.85757.

There is easily a “reasonable probability” that at least one juror “would have assessed a substantially less harsh sentence.” *Miller v. Dretke*, 420 F.3d 356, 366 (5th Cir. 2005); *see Wiggins v. Smith*, 539 U.S. 510, 534–35 (2003) (finding prejudice from counsel's failure to present “powerful” mitigating evidence including “sexual molestation, and repeated rape”); *see also Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (finding failure to present evidence of brain damage, fetal alcohol syndrome, and mental retardation prejudicial); *Walbey v.*

Quarterman, 309 F. App'x 795 (5th Cir. 2009) (finding failure to present childhood upbringing and mental health condition prejudicial). The failure of the courts to properly apply that clearly established standard in the circumstances of this case was error.

II. Ms. Holberg's history of gender-based violence was highly relevant to the jury's assessment of her moral culpability.

The evidence the jury did not hear would also have equipped them to reject the gendered tropes the prosecution used to explain Ms. Holberg's actions. In the prosecution's telling, Ms. Holberg was a boy-crazy party girl with a predilection for drugs and prostitution by operation of moral failing; her work as a prostitute was inherently "deceitful," and that propensity for deceit meant she was lying to the jury when she testified about her encounter with Mr. Towery. In reality, as the jury should have heard, Ms. Holberg was trapped in a cycle of mental illness, substance abuse, re-victimization, and violence as a result of the unrelenting sexual abuse and violence she had experienced since childhood. The jury lacked the counter-narrative that would have negated the dehumanizing gender stereotypes and social biases the prosecution exploited to convince the jury Ms. Holberg was simply an irredeemably bad person. Amici explain below the well-understood social biases that a properly developed mitigation case would have defused. The failure to investigate and present that mitigation case was clearly prejudicial.

A. The prosecution demonized Ms. Holberg by relying on the stereotype that women who enter the sex trade do so solely as a matter of choice.

Throughout the guilt and sentencing phases, the prosecution discredited the trauma Ms. Holberg endured by portraying her life experiences as a series of bad choices. The prosecution told the jury that Ms. Holberg had an “[a]ll-American upbringing, nothing particularly unusual.” ROA.8069. That, despite her “all-American” childhood, Ms. Holberg chose drugs, ROA.8076 (Holberg “likes prescription drugs almost as much as or more than she does street drugs”); ROA.8069 (“When her drug of choice wasn’t available, she would turn to prescription drugs.”); ROA.8081 (Holberg “would buy cocaine and party”); chose prostitution, ROA.110927 n.65 (Holberg “became boy crazy”); chose to endure abuse, ROA.9151 (“You would allow yourself . . . to be raped and beaten by pimps?”), ROA.9106 (“Nobody heard—to your knowledge—heard any female pleas for help.”); and chose murder, ROA.9110 (“Why didn’t you get up and walk out?”). In the end, the prosecution told the jury, Ms. Holberg was a violent prostitute with a drug addiction because she was a “party girl” who freely elected a life of debauchery. ROA.8081:12-23, 8602:5-6, 15-16, 9272:23-9273:5, 9506:24-9507:3. Trial counsel only reinforced that narrative by arguing that Ms. Holberg became “boy crazy” in her teenage years. ROA.1107, ROA.9539:22-24.

That narrative played on the societal misconception that women who engage

in prostitution always do so because they want to.⁶ Research demonstrates that people have traditionally perceived prostitutes as morally destitute individuals, driven by their “sexual impulses.” David A.J. Richards, *Commercial Sex and the Right of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. Pa. L. Rev. 1195, 1255 (1979); see Tracy M. Clements, *Prostitution and the American Health Care System: Denying Access to A Group of Women in Need*, 11 Berkeley Women’s L.J. 49, 54 (1996). Indeed, “[a]t least since the early 19th century, female sex work has become politically and socially discussed as an issue of social disorder, unwieldy female sexuality, and unrestricted sexual autonomy.” Dax J. Kellie et al., *Prejudice Towards Sex Workers Depends on the Sexual Activity and Autonomy of their Work, Hobbies and Daily Activities*, 7 Collabra: Psychology 1, 1 (2021). In large part, that is because of the longstanding belief that women should not and do not enjoy sex like men do (a trope the prosecution played on extensively in cross examining Ms. Holberg). See Richards, *supra*, at 1255 (“female unchastity” seen as “disgusting failure” to “performed one’s mandated social role as wife and mother”); Sarah Gill, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA Women’s L.J. 27, 34 (1996). So, the theory goes, women would not choose prostitution unless

⁶ Amici acknowledge that women may pursue “sex work” volitionally. Ms. Holberg, however, was forced into prostitution *as a child*, as a result of her sexual abuse.

they were abnormally promiscuous—which is a choice. *See Gill, supra*, at 34 (noting “traditional attitude” that women who “engage in casual sex are promiscuous”).

Unsurprisingly, this misconception is laden with negative bias—especially about morality. Research shows, for instance, that people have long associated women who have sex outside of marriage and women who have sex for money with dishonesty, dirtiness, and lack of virtue. *See Sakthi Murphy, Rejecting Unreasonable Sexual Expectations: Limits on Using A Rape Victim’s Sexual History to Show the Defendant’s Mistaken Belief in Consent*, 79 Cal. L. Rev. 541, 548, 550-51 (1991). Prostitution, unsurprisingly, has traditionally been considered downright “immoral”—indeed, in 1996 one researcher observed that the “general view” was that prostitution “undermines the ultimate roots of the moral personality.” Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 Cornell J.L. & Pub. Pol’y 99, 103 (1996). Accordingly, “[a] woman’s sexual lifestyle has always been one of the prime criteria for deciding whether her ‘no’ indeed means ‘yes.’” *See Murphy, supra*, at 548.

For purposes of this appeal, it does not matter whether these stereotypes are right or wrong. What matters is that the jury was asked to draw on these stereotypes to conclude that Ms. Holberg, because she engaged in prostitution, was

morally bankrupt. The jury lacked the means to reject that narrative and conclude that in Ms. Holberg’s case, her behavior was profoundly affected by her experience of sexual violence and trauma. That *absence of evidence* mattered.

B. The prosecution undermined Ms. Holberg’s morality by relying on the stereotype that women who enter the sex trade are deceitful.

The prosecution’s depiction of Ms. Holberg as a *lying* prostitute likewise drew on other deep-seated gender tropes. The prosecution repeatedly told the jury that because Ms. Holberg had to fake enjoyment and sexual pleasure for her clients, she was “trained and experienced in deception.” ROA.9076; *see, e.g.*, ROA.9062 (“the hooker at least has to appear to be enjoying it, there’s an element of deceit”); ROA.9061 (“there’s an element of deceit or deception involved in this business, isn’t there?”); ROA.9497 (“she concedes that both dancing for these folks who come to see it and the prostitution involves a lot of deception, a lot of creating illusions for these people”); ROA.9079 (calling Ms. Holberg “an accomplished deceiver”); ROA.9077 (“Would you agree that your history suggests someone who is a trained, experienced and successful liar?”).

Accordingly, the prosecution concluded, Ms. Holberg was an unsympathetic liar whose testimony could not be credited. *See* ROA.9330 (prostitutes are “liars and you can’t believe them”); ROA.9335 (“Trust the prostitute and the crack addict. She’s the one that will tell you the truth.”); ROA.9337 (“You have only the word of the lying prostitute drug addict [Brittany Holberg]”); ROA.9340 (“Brittany

Holberg is a liar. Her life is a lie.”); ROA.9152 (“you want this jury to believe that despite the fact you have lied . . . , you simply wouldn’t lie to them here today?”).

That narrative appealed to social bias reflecting skepticism of women in general and the credibility of survivors of sexual violence in particular. See Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1092 (1986); Karen Jones, *The Politics of Credibility*, in *A Mind of One’s Own: Feminist Essays on Reason and Objectivity* 154, 155 (Louise Antony & Charlotte Witt eds., 2002) (“It is commonplace that the credibility we ascribe to reports should be a function of the trustworthiness of the testifier, or testifiers, and the plausibility of what they say in the light of what else we believe.”); Evelina Giobbe & Sue Gibel, *Impressions of A Public Policy Initiative*, 16 Hamline J. Pub. L. & Pol’y 1, 51 (1994) (describing how prostitutes often face credibility problems when discussing abuse or trauma they experienced); accord Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. Pa. L. Rev. 1, 9 (2017) (describing three “[r]ecurring tropes of disbelief,” including (1) the survivor “is malicious or vindictive and therefore lying”; (2) the survivor regrets “consenting to sexual activity with the accused and [is] therefore lying”; or (3) the survivor was intoxicated or high when the sexual assault occurred, making her “incapable of assessing whether she consented” and is “therefore lying when she claims

otherwise”).”⁷

When the prosecution repeatedly depicted Ms. Holberg as a liar, it impugned her credibility by drawing on centuries of skepticism toward survivors of gender-based violence and asked the jury to likewise “draw[] upon a store of existing beliefs about rape complainants.” *Id.* at 8. That necessarily affected not just the jury’s assessment of Ms. Holberg’s testimony, but also the jury’s sentencing decision. The death penalty is, at its core, a moral assessment. *See* Louis D. Bilonis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 *J. Crim. L. & Criminology* 283 (1991); *see Johnson v. Texas*, 509 U.S. 350, 371 (1993) (Texas special issues “compel the jury to make a moral judgment about the severity of the crime and the defendant’s culpability” (quotations omitted)). By urging the jury to see Ms. Holberg as “deceitful,” the prosecution was urging a moral judgment. Once again, the evidence the jury did not hear would have mattered, in this instance because it would have reinforced that Ms. Holberg was truthful—truthful about her experiences of abuse, and truthful about her account of Mr. Towery’s death—which in turn would have invited a different judgment about her character. The jury could have developed empathy for Ms. Holberg, instead of

⁷ In the seventeenth century, jury instructions “warn[ed] the jury to use special suspicion in evaluating the testimony of a rape complainant.” Tuerkheimer, *supra*, at 22-23. Today’s model penal code exhibits similar skepticism for women testifying about their sexual abuse. *See id.* at 26 (discussing, for example, the instruction that jurors “evaluate the testimony of a victim ... with special care”).

condemnation.

When the prosecution appealed to stereotypical attitudes about women and prostitution to attack Ms. Holberg’s credibility and morality, it urged the jury to believe a story about a drug-addicted, sex-crazed prostitute—not to see a person whose life was worth saving. It was here that a full presentation of the mitigating facts was desperately needed, but Ms. Holberg’s trial counsel all but abandoned the effort from the outset. In the trial of a question centered around Ms. Holberg’s moral culpability, the jury heard only that Ms. Holberg had no morals. Had the jury heard the mitigating context for Ms. Holberg’s conduct, there is at least a reasonable probability one juror would have voted differently.

* * *

One final observation: Gendered stereotypes also entered into the courts’ prior analyses of Ms. Holberg’s case. The state court, for instance, reasoned that witnesses who “worked as prostitutes and exotic dancers” had “backgrounds that called their credibility into question” and thus could reasonably be disregarded by counsel. ROA.1089. The district court reasoned that the repeated rape of 12-year old Brittany by adult Andy Grimes amounted to a “sexual relationship” that would have been aggravating evidence in the jury’s eyes. ROA.110927-28 n.65. For the reasons explained in Ms. Holberg’s brief, those analyses were objectively unreasonable. *See* Brief for Appellant at 42-44. But the intrusion of these tropes

into the judicial process only illustrates how deep they run, and how important it was for trial counsel to equip the jury with counternarratives to reject them.

CONCLUSION

For the above reasons, this Court should reverse the district court's denial of Ms. Holberg's petition for habeas corpus relief.

Dated: July 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2023, I electronically filed the foregoing Brief of five gender justice organizations as Amici Curiae in Support of Petitioner with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. I certify that all interested parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Dated: July 14, 2023

/s/ Meaghan VerGow

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 29(a)(5) and FED. R. APP. P. 32(a)(7)(B) because it contains 5,783 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and 5TH CIR. R. 32.2.

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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Dated: July 14, 2023

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