IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, vs. LYNN EDWARD BENTON, Defendant-Appellant, Respondent on Review.	Clackamas County Circuit Court No. CR1201792 CA A164057 SC S069454

BRIEF OF *AMICI CURIAE* CRIMINAL JUSTICE REFORM CLINIC AND FORENSIC JUSTICE PROJECT IN SUPPORT OF RESPONDENT BENTON

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Clackamas County
Honorable Kathie F. Steele, Judge

Opinion Filed: February 9, 2022
Author of Opinion: Ortega, P. J.
Before: Ortega, P. J., and Shorr, J., and Powers, J.

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I. INTERESTS OF *AMICI CURIAE*

The Criminal Justice Reform Clinic ("CJRC") at Lewis & Clark Law School is a legal clinic dedicated to students receiving hands-on legal experience while engaging in a critical examination of and participation in important issues in Oregon's criminal justice system. Under the supervision of Lewis & Clark Law School faculty, CJRC students work on a variety of cases and issues, including for clients that are currently or were formerly incarcerated. In addition to direct client casework, CJRC also works in collaboration with attorneys and organizations in Oregon on various research reports, data driven projects, and legal briefs, all designed to understand and improve Oregon's criminal justice system.

Forensic Justice Project ("FJP") is a nonprofit organization dedicated to preventing and correcting wrongful convictions related to forensic evidence. FJP seeks to develop the intersection between law and science, and, to that end, intervenes in cases involving forensic and other scientific issues.

Amici do not have a private interest in this case. *Amici* share a compelling interest in mitigating the risks of wrongful convictions

obtained based on incentivized testimony from jailhouse informants. *Amici* urge the Court to affirm the Court of Appeals' decision in this case, which recognizes the dangers inherent in the use of unregulated informant testimony.

II. SUMMARY OF ARGUMENT

The right to counsel in criminal proceedings it at the heart of the protections afforded to the accused by our criminal justice system. The State proposes a rule of law that would permit the government to make an end run around the constitutional protections afforded by Article I, section 11 and the Sixth Amendment by positively encouraging jailhouse informants to obtain incriminating information from represented criminal defendants, so long as the government does not explicitly authorize the informant to do so on the State's behalf. Absent the presence of counsel, the informant is free to fabricate the details of that encounter in any way that serves the informant's interests. And because police and prosecutors are already predisposed to the defendant's guilt, the government is ill-suited to distinguish fact from fiction.

Although widely used throughout the criminal legal system, testimony from jailhouse informants is inherently unreliable because snitches are offered substantial benefits, including sentencing reductions, the dismissal of criminal charges, and preferential treatment, in exchange for their cooperation. The mere prospect of these benefits incentivizes informants to provide false testimony, as demonstrated by hundreds of wrongful convictions obtained as a result of fabricated testimony from jailhouse snitches.

In that context, it is critical that the exclusionary rule apply to protect the constitutional rights of criminal defendants where an informant purports to elicit incriminating information from an accused at the behest of the government, whether by express instruction or through tacit encouragement.

Because the Court of Appeals' decision is legally correct and necessary to protect the accused from the inherently unreliable testimony of jailhouse informants, this Court should affirm.

III. ARGUMENT

As one author put it, "the idea behind 'snitching' is simple: a suspect provides incriminating information about someone else in

exchange for a deal, maybe the chance to avoid arrest and walk away, or the promise of a lesser charge or sentence."[1] The reality of snitching, however, "is complicated: anyone can become an informant, and the government has unfettered discretion over the benefits that it can offer, including money, leniency for past crimes, and the freedom to commit new ones."[2]

The "snitch system" in Oregon and elsewhere "represents an enormous unregulated market in which the government is authorized to pressure and reward anyone it chooses, in almost any way it pleases, in exchange for almost anything it wants."[3]

It is under that framework that the State, here, demands more: the right to freely question a represented defendant outside the presence of counsel and through the use of a snitch who has every incentive to lie. As discussed below, the State's proposed rule would

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[1] Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice*, 2nd ed. (2022) at 4, limited preview available at https://books.google.com/books?hl=en&lr=&id=nyCIEAAAQBAJ&oi=fnd&pg=PP13&dq=jailhouse+informants+natapoff&ots=UNVLb9N68a&sig=RWJ967urSL3301Z0QIrqg3G9HLs#v=onepage&q=jailhouse%20informants%20natapoff&f=false.

[2] *Id.* at 3–4.

[3] *Id.* at 4.

become a breeding ground for misconduct and increased reliance on dubious snitch testimony that will inevitably lead to more wrongful convictions in this state.

A. The foundational right to counsel cannot be circumvented by using jailhouse informants to question defendants.

The criminal justice system in the United States is adversarial in nature. By definition, it requires a contest between opposing sides. The United States Constitution and Oregon Constitution provide important rights to govern that contest, including, for example, the rights to confront witnesses, compulsory process, a speedy and public trial, and a jury. The right to counsel is a central component of the entire system because it is the right by which all others are protected: it is the "glue that holds [the system] together."[4] That is, the right to counsel serves to balance the system by ensuring that the government and the accused come into the adversarial process on equal terms.[5]

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[4] James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine*, 22 UC DAVIS L REV 1, 40 (1988); *see also* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 1 (1955).

[5] *See* Kathleen M. Maicher, Note, *Inanimate Listening Devices: A*

The constitutional guarantees provide the right to counsel at all critical stages of the prosecution, including interrogation.[6] The government is not permitted to circumvent the right to counsel by designating a civilian informant to engage in questioning on its behalf.[7] The reason for that prohibition is simple: when government officials encourage an informant to collect information from criminal defendants, they are commissioning the informant to gather information from individuals whom the government itself is forbidden from questioning outside the presence of counsel.

Oregon courts have long made clear that the exclusionary rule applies "if the police were directly or indirectly involved to a sufficient extent in initiating, planning, controlling or supporting [the informant's] activities."[8]

Violation of Sixth Amendment Right to Counsel, 14 LOY U CHI L J 359, 389–90 (1983).

[6] *See, e.g.*, *White v. Maryland*, 373 US 59, 60 (1963); *State v. Newton*, 291 Or 788, 802, 636 P2d 393 (1981).

[7] *Kuhlmann v. Wilson*, 477 US 436 (1986); *Maine v. Moulton*, 474 US 159 (1985); *United States v. Henry*, 447 US 264 (1980); *United States v. Massiah*, 377 US 201 (1964); *State v. Smith*, 310 Or 1, 13, 791 P2d 836 (1990); *State v. Lowry*, 37 Or App 641, 651–52, 588 P2d 623 (1978).

[8] *Smith*, 310 Or at 13 (alteration in original) (quoting *Lowry*, 37 Or

The State, here, seeks to expand its authority to use informants to elicit incriminating information from the accused, arguing that the exclusionary rule should apply only where there is "objective evidence of the state's intent to confer authority on the informant."[9]

In a "snitch system" that is already unregulated, the State's proposed rule would completely unmoor snitch testimony from any type of judicial oversight—oversight that is critically important because the information coming from snitches is inherently unreliable, while at the same time unduly persuasive to the factfinder and a leading cause of wrongful convictions across the country.[10]

App at 651).

[9] Opening Brief at 39–40.

[10] *See* Natapoff, *supra* note 1, at 12–13 ("One especially rich development since the first edition [of Natapoff's book] has been new psychological research into how juries evaluate informant witnesses. Our adversarial system relies heavily on juries to decide whether witnesses are lying, and it turns out that, when it comes to compensated criminal witnesses, ordinary people are not very good at it. Jurors routinely believe lying informants and convict innocent people based on informant testimony.").

B. The testimony of jailhouse snitches is notoriously unreliable and a leading cause of wrongful convictions across the country.

In 2004, the Center on Wrongful Convictions published a ground-breaking report on the "snitch system," finding that incentivized informant testimony is one of the leading causes of wrongful convictions in capital cases.[11] The same problem exists in non-capital cases. To date, 217 of the 3,268 known exonerations across the country featured false or unreliable informant testimony.[12]

The rationale for jailhouse informants to provide false information is not complicated. In exchange for their cooperation, snitches are provided with benefits that range from a reduction in

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[11] Brandon L. Garrett, *Judging Innocence*, 108 COLUM L REV 55, 93 n143 (2008) (citation omitted); *see also* Paul C. Giannelli, *Brady and Jailhouse Snitches*, 57 CASE W RES L REV 593, 595 (2007); Rob Warden, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CENTER ON WRONGFUL CONVICTIONS, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, 3 (2005), https://www.aclu.org/other/snitch-system-how-snitch-testimony-sent-randy-steidl-and-other-innocent-americans-death-row.

[12] NATIONAL REGISTRY OF EXONERATIONS, *Exoneration Detail List*, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=JI.

charges to monetary payments to relief from deportation.[13] Snitches may negotiate privileges in jail, access to commissary, support at parole hearings, and even favors for friends and family.[14]

Courts have repeatedly acknowledged the unreliability of informant testimony,[15] and researchers caution that offers of reduced

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[13] See INNOCENCE PROJECT, *Informing Injustice: The Disturbing Use of Jailhouse Informants*, https://innocenceproject.org/informing-injustice/ (hereinafter "*Informing Justice*"); Brandon L. Garrett, *Characteristics of Informant Testimony*, https://convictingtheinnocent.projects.law.duke.edu/wp-content/uploads/sites/7/2016/10/garrett_informants_appendix.pdf; *See also* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM CRIM L REV 737, 748 (2016).

[14] *See Informing Justice*, *supra* note 13; Garrett, *supra* note 13; *see also* REPORT OF THE 1989-90 LOS ANGELES GRAND JURY, INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 12–15 (June 16, 1990) (hereinafter "GRAND JURY REPORT") ("The benefits can range all the way from added servings of food up to the ultimate reward, release from custody. According to an officer at the central jail, inmates who provide information about problems within the jail might be rewarded with an extra phone all, visits, food or access to a movie or television.") (describing the range of benefits provided).

[15] *See, e.g.*, *Carriger v. Stewart*, 132 F3d 463, 479 (9th Cir 1997) (finding that informants "who are rewarded by the government for their testimony are inherently untrustworthy"); *United States v. Bernal-Obeso*, 989 F2d 331, 333 (9th Cir 1993) (finding that informants granted immunity are "[b]y definition * * * cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under

sentences and other benefits "may provide not only a powerful incentive to cooperate, but also a powerful incentive to lie."[16]

As some commentators put it, "'when the criminal justice system offers witnesses incentives to lie, they will.'"[17] Former Assistant and Associate Attorney General, and current Senior Ninth Circuit Judge Stephen S. Trott has written extensively about the dangers of "using rewarded criminals as witnesses."[18] Indeed, 45.9% of the first 111 death row exonerations since 1970 involved false

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suspicion of crime, and from lying under oath in the courtroom"); *United States v. Cervantes-Pacheco*, 826 F2d 310, 315 (5th Cir 1987) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence …."); *United States v. Singleton*, 144 F3d 1343, 1353–54 (10th Cir 1998), *vacated, on reh'g en banc*, 165 F3d 1297 (10th Cir 1999); *United States v. Levenite*, 277 F3d 454, 462 (4th Cir 2002); *Horton v. Mayle*, 408 F3d 570, 581 (9th Cir 2005); *Silva v. Brown*, 416 F3d 980, 991 (9th Cir 2005).

[16] R. Michael Cassidy, *Soft Words of Hope: Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW U L REV 1129, 1140 (2004). *See also* Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L J 1381, 1383 (1996) ("[Informants'] willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, [and] soliciting others to corroborate their lies with more lies[.]").

[17] Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 BC THIRD WORLD L J 75, 92 (2008) (quoting Warden, *supra* note 11, at 2).

[18] Trott, *supra* note 16, at 1381.

testimony from incentivized witnesses.[19] Judge Trott warns that the government, by its actions, "can either contribute to or eliminate the problem."[20] The exonerations across the country have shed light on the snitch market that continues to produce wrongful convictions.

In 1987, Christopher Abernathy was wrongfully convicted of first-degree murder, aggravated criminal sexual assault, and armed robbery after an acquaintance, Allen Dennis, told police that Abernathy admitted to kidnapping, raping, and stabbing a 15-year-old girl.[21] More than 15 years later, Dennis recanted his testimony and revealed that police promised him lenient treatment on some unrelated minor charges and also gave him $300 to buy clothes for court.[22] In 2014, DNA testing excluded Abernathy as the perpetrator, and Abernathy was finally released in 2015—twenty eight years after Dennis falsely implicated him in exchange for police

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[19] Warden, *supra* note 11, at 3.

[20] Trott, *supra* note 16, at 1381.

[21] NATIONAL REGISTRY OF EXONERATIONS, Christopher Abernathy, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4640.

[22] *Id.*

favors.[23]

Just last month—in September 2022—the Ninth Circuit affirmed the district court's finding of "actual innocence" in a notorious wrongful conviction case in Oregon involving Frank Gable and the murder of Oregon Department of Corrections Director Michael Francke.[24] Gable spent more than 28 years in prison for a crime that he did not commit after multiple witnesses implicated him at trial.[25] The Ninth Circuit discussed in detail six witnesses who recanted their statements since trial, and the court recognized that "[n]early every recanting witness negotiated benefits in their own criminal cases in exchange for their statements against Gable[.]"[26]

Despite the repeated instances of wrongful conviction based on incentivized informant testimony, police and prosecutors continue to rely on snitches in all types of cases. And courts continue to accept the unregulated practice of buying and selling testimony that turns the question of guilt and innocence on its head. In *Snitching:*

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[23] *Id.*

[24] *Gable v. Williams*, 49 F4th 1315, 1318–19 (9th Cir 2022).

[25] *Id.* at 1321.

[26] *Id.* at 1323–25.

Criminal Informants and the Erosion of American Justice, author and leading researcher on unreliable informant testimony Alexandra Natapoff explains that the snitch system "inherently involves the toleration of crime."[27] The system allows known criminal actors to walk away in exchange for information, without any assurance that the information is, in fact, true. Natapoff reported on a car wash attendant from Los Angeles who explained the rule "three will set you free"—an adage that "referred to the widespread understanding that if you were charged with a felony but gave the government information about three other people, they would let you go."[28]

With horse-trading that happens largely behind closed doors, the criminal justice system is ill-equipped to ensure the reliability of testimony offered by jailhouse informants. Police and prosecutors are often pre-disposed towards a defendant's guilt and may not be appropriately critical of snitch testimony.[29] Evidence that may

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[27] Natapoff, *supra* note 1, at 33.

[28] *Id.* at 48.

[29] *Cf.* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L REV 829, 848 (2002) ("A prosecutor has a powerful incentive to accept a cooperator's account uncritically.").

undermine the informant is easily discarded, whereas inconsequential details become confirmatory.[30]

In many cases, the informant's testimony is vague and includes few details about the alleged crime—statements that are "easy to make but extremely difficult * * * to disprove."[31] In cases where snitches are able to provide more details about the crime, the government may improperly assume that the snitch's recitation is credible. But, in truth, snitches have a variety of ways to "obtain the necessary information about another prisoner's pending charges in order to convincingly fabricate a confession," including from law enforcement, the media, or even from the defendant, *e.g.*, where the defendant has denied rather than confessed to a crime.[32]

It is not difficult to gather details of a crime in order to

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[30] *See* Hon. Fred Kaufman, THE COMMISSION ON PROCEEDING INVOLVING GUY PAUL MORIN, *Executive Summary* at 10 (Ont Ministry of the Att'y Gen 1998), *available at* https://wayback.archive-it.org/16312/20210402201842/http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_esumm.html (last visited Oct. 27, 2022) (hereinafter, "MORIN COMMISSION").

[31] *Id.* at *Recommendations*, No. 41, ¶ 2, at 13, *available at* http://netk.net.au/Canada/Morin22.asp (last visited Oct. 27, 2022).

[32] Christopher Sherrin, *Jailhouse Informants, Part I: Problems With Their Use*, 40 CRIM L Q 106, 113–14 (1998).

manufacture a purported "confession." Career criminals (and career informants) are in a prime position to figure out the game and use it to their advantage. Leslie Vernon White, an infamous informant and self-confessed career criminal, gave false information in three murder cases in a thirty-six day period and even demonstrated for police that he could use a phone to obtain enough false information within 20 minutes to testify against someone.[33] White ultimately provided prosecutors with testimony in as many as 40 cases and, in 1990, appeared on *60 Minutes* to give a firsthand account of how he was able to find details of a crime to make his perjured testimony sound believable:

> First, White would determine the last name of a person recently charged with a murder in Los Angeles County (available in the public record). Using the prison chaplain's phone, White then called the Document Control Center of the Los Angeles County Sheriff's Office to obtain a case number and arrest date. White would then call the District Attorney's Record's Bureau and pose as a Deputy District Attorney to get the names of prosecutors assigned to the case and names of key witnesses. White would then identify himself as a Los Angeles police officer to the County

[33] Armbrust, *supra* note 17, at 92–93 (citing Jim Dwyer, *et al.*, ACTUAL INNOCENCE 127 (2000)).

> Coroner's Office, where he learned how the victim was killed. Finally, White would call families of the victim and accused to learn characteristics personal to each. Armed with this information, White would fabricate a seemingly credible "confession" on the part of the accused.[34]

Other informants have given similar accounts.[35] The "incriminating" information may even come from police and prosecutors themselves.[36] For example, in 1995, Ramon Ward was wrongfully convicted of murder and sentenced to life without parole after two jailhouse snitches testified that Ward admitted to committing the murders.[37] Both of the informants denied receiving

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[34] THE JUSTICE PROJECT, *Jailhouse Snitch Testimony: A Policy Review*, at 13 (2007), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf (last visited Oct. 27, 2022) (hereinafter, "*Jailhouse Snitch Testimony*").

[35] *See*, *e.g.*, Armbrust, *supra* note 17, at 91–92 (discussing Dennis Ackaret, an informant who testified in many cases in Florida and Indiana, and who admitted in one case that he had learned details from investigators who showed him pictures of the murder victim and took him to the crime scene).

[36] *Id.*

[37] NATIONAL REGISTRY OF EXONERATIONS, *Ramon Ward*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5694.

any benefits in exchange for their testimony.[38] Eight years after Ward was convicted, information came out that the informants were given special privileges, including conjugal visits from girlfriends, marijuana and alcohol, and reduced charges for cooperating in investigations.[39] According to one police officer, one of the informants had testified as a prosecution witness in as many as 20 murder trials.[40] Another witness testified that police fed him details so that he could then testify that defendants had admitted their crimes during jailhouse conversations.[41]

In the words of a former prosecutor discussing the risks of working with snitches, "[n]o witness, except of course for the defendant himself, has a greater interest in the outcome of a criminal case."[42] Still, a confession from the accused—no matter how it is obtained or whether it was actually obtained at all—"radically

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Steven M. Cohen, *What Is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L REV 817, 827 (2002).

changes the complexion of a case, particularly one lacking other evidence that directly implicates the defendant in the crime."[43]

Although the accused, in theory, are entitled to probe the credibility of jailhouse informants through cross examination, that purported safeguard offers little comfort because defense counsel face significant obstacles in impeaching unreliable snitch testimony. Due to the frequent movement of prisoners, investigating the circumstances surrounding jailhouse confessions is difficult, and nearly impossible with the passage of time.[44] As a result, defense counsel is often limited to focusing on the informant's motivation to lie. In many cases, however, it is difficult or impossible to establish what benefits a snitch has received (or will receive) in exchange for his or her testimony.[45] Arrangements between prosecutors and snitches may not be reduced to writing or may include less formal benefits, such as improved conditions of confinement, *e.g.*,

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[43] Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L REV 1375, 1375 (2014).

[44] GRAND JURY REPORT, *supra* note 14 at 44.

[45] *Id.* at 39.

preferential treatment or the relaxation of jail rules.[46]

The unregulated use of snitch testimony continues in secret.

C. Courts and legislatures across the country are reforming the snitch system in light of the inherent dangers of buying and selling testimony.

Because the use of snitch testimony is a "'recipe for disaster,"'[47] researchers recommend guardrails to ensure reliability, including written pre-trial disclosures, reliability hearings, corroboration requirements, and cautionary jury instructions.[48] Courts and legislatures in several states have adopted the recommendations.[49] For example, the Court of Criminal Appeals in Oklahoma interpreted the *Brady* "materiality" requirement to include any information that might lead a factfinder to deem snitch testimony unreliable.[50] As another example, courts in Illinois are required to hold pretrial

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[46] *Id.* at 12–15, 23, 39.

[47] Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L REV 759, 762 (2002) (quoting MORIN COMMISSION, *supra* note 30, *Executive Summary*, at 14).

[48] *Jailhouse Snitch Testimony*, *supra* note 34, at 2–5.

[49] *Id.* at 6–7, 14–15.

[50] *Id.* at 7, 15 (citing *Dodd v. State*, 993 P2d 778 (Okla Crim App 2000)).

reliability hearings in capital cases during which the court considers information provided by prosecutors, the informant's criminal history, any benefit conferred or to be conferred to the informant in exchange for his testimony, other cases in which the informant has testified, and any other information relevant to the informant's credibility.[51] And courts in several states, including California, Montana, and Connecticut, issue a special cautionary instruction to warn juries of the dangers inherent in snitch testimony.[52]

Oregon appellate courts have yet to address ways in which to prevent the use of unreliable snitch testimony.

D. Police and prosecutors can convey their intent to make the informant part of the "team," regardless of the words that they choose.

The State proposes a rule that would require a definitive statement by police and prosecutors to deputize the informant.[53] The proposed rule ignores the ways in which police and prosecutors can convey the same intent without an explicit statement.

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[51] *Id.* at 14.

[52] *Id.* at 6–7, 14–15.

[53] Opening Brief at 39–40.

This Court has already recognized the ways in which law enforcement can subtly impact witness testimony through suggestion in questioning and non-verbal cues.[54] This case presents a not-so-subtle arrangement under which police specifically asked Layman, the informant, for the information they wanted to hear.[55] Indeed, it was only after Layman purportedly secured that information that prosecutors entered into a written "cooperation agreement" with Layman.[56]

While other states are reforming the snitch system to prevent gross miscarriages of justice, the State's proposed rule here would do the opposite—it would create a free-for-all in Oregon. Making

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[54] *State v. Lawson*, 352 Or 724, 786–87, 291 P3d 673 (2012) (explaining that, in the eyewitness identification context, "[s]tudies show that the use of suggestive wording and leading questions tend to result in answers that more closely fit the expectation embedded in the question. * * * Witness memory, moreover, can become contaminated by external information or assumptions embedded in questions or otherwise communicated to the witness."); GRAND JURY REPORT, *supra* note 14, at 39 (describing the "unwritten understanding between prosecutors and informants as to the benefits to be derived from their testimony" as a "'secret society' where even though nothing is said, the prosecutors and the informants know that some benefit will flow to the informant for his testimony").

[55] *State v. Benton*, 317 Or App 384, 410–16, 505 P3d 975 (2022).

[56] *Id.* at 416.

informants free-agents would further incentivize the use of unreliable snitch testimony in Oregon because the State could do what it did here—feed the snitch information through questions that, on their surface, suggest neutrality, but, upon further examination, reveal the details that the prosecution needs to hear. So long as police and prosecutors repeat the magical incantation that would prevent the informant from becoming a state actor, the State could avoid any check on reliability by questioning the defendant outside the presence of counsel.

Amici ask this Court to decline the State's invitation to further incentivize the use of unreliable snitch testimony that will inevitably lead to more wrongful convictions in Oregon.

IV. CONCLUSION

Amici respectfully request that the Court affirm the Court of Appeals' decision.

DATED this 27th day of October, 2022.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in ORAP 9.05(3)(a); and (2) the word count of this brief—as described in ORAP 5.05(2)(a)—is 4,163 words.

I certify that the size and type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 27th day of October, 2022.

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CERTIFICATE OF SERVICE AND FILING

I certify that on October 27, 2022, I served the foregoing BRIEF OF AMICI CURIAE CRIMINAL JUSTICE REFORM CLINIC AND FORENSIC JUSTICE PROJECT by electronically filing with the:

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I further certify that on October 27, 2022, I caused the foregoing to be served upon the following persons through means of electronic service pursuant to ORAP 16.45 and by mailing a true copy thereof in a sealed, first-class postage-paid envelope to the address shown below:

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