IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

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

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

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STATEMENT OF THE CASE

Defendant submits revised questions presented and proposed rules of law and includes a comprehensive statement of facts pertinent to resolving the issues on review.

Questions Presented and Proposed Rules of Law

First Question Presented

Does the state violate the right-to-counsel provision of Article I, section 11, if it engages in conduct that is *reasonably likely* to prompt an otherwise nonstate actor to question a represented criminal defendant in the absence of the defendant's attorney?

Proposed Rule of Law

Yes. The state violates Article I, section 11, if it engages in conduct that is *reasonably likely* to prompt an otherwise nonstate actor to question a represented criminal defendant in the absence of the defendant's attorney.

Second Question Presented

Does the state violate the compelled-self-incrimination clause of Article I, section 12, if it *actually* induces an otherwise nonstate actor to question an incarcerated defendant in the absence of *Miranda* warnings?

Proposed Rule of Law

Yes. The state violates Article I, section 12, if it *actually* induces an otherwise nonstate actor to question an incarcerated defendant in the absence of *Miranda* warnings.

Third Question Presented

Does the state violate the right-to-counsel provision of Sixth Amendment, if it *knew* or *should have known* that a potential informant was likely to attempt to elicit incriminating statements from the defendant or if it created a situation *likely to induce* the defendant to make incriminating statements in the absence of counsel?

Third Rule of Law

Yes. The state violates the Sixth Amendment if it *knew* or *should have known* that a potential informant was likely to attempt to elicit incriminating statements from the defendant or if the state created a situation *likely to induce* the defendant to make incriminating statements in the absence of counsel.

Summary of Argument

Defendant is serving a true-life sentence for the aggravated murder of his wife, based almost entirely on the testimony of a jailhouse informant, who claimed that defendant had confessed to him while the two were housed

together in the Multnomah County Jail. The issues on review involve the constitutional protections that forbid the state from questioning a represented, incarcerated defendant in the absence of the defendant's lawyer and without *Miranda* warnings. Specifically, the issues involve the extent of the role, if any, that the state is permitted to play in the acquisition of a defendant's uncounseled and unwarned statements *via* the questioning of the defendant by an inmate.

Defendant submits that the state violates the right-to-counsel clause of Article I, section 11, if it engages in conduct that is *reasonably likely* to induce an otherwise nonstate actor to question a *represented* defendant and relay the defendant's statements to the state. Whereas, defendant submits, the state violates the compelled-self-incrimination clause of Article I, section 12, if it *actually* induces an otherwise nonstate actor to do the same with respect to an *incarcerated* defendant.

Under the state's proposed rule, however, the state can interfere predictably with a defendant's right to counsel, so long as "a reasonable person would [not] conclude that the state *directed* the informant to act on the state's behalf." Pet BOM 15 (emphasis added).

Defendant's rules derive from a first-principles analysis of the constitutional protections at issue. This court's jurisprudence establishes that the right to counsel protects the constitutionally ordained balance of power between the state and the individual in criminal prosecutions. It adapts as

developments in the state's investigatory and prosecutorial practices threaten to skew that balance in the state's favor. And its scope is delineated by rules designed to inhibit the state from operating strategically to contravene the defendant's rights.

The right against self-incrimination represents an additional but equally important piece of the fair-trial architecture. Beyond that, it contains a deeply rooted concern that compelled confessions are unreliable, *i.e.*, constitutionally unfit to be used to support a conviction because they introduce an unacceptably high risk of error.

Consistent with those principles, this court has held that suppression is required under Article I, section 11, if the state was "directly or indirectly involved to a sufficient extent in initiating, planning, controlling, or supporting [a jailhouse informant's] activities." Defendant's rule simply elaborates that the state is involved to a "sufficient extent" if it engages in conduct that is reasonably likely to induce an otherwise nonstate actor to question a represented defendant and relay the defendant's answers to the state.

This court applies a slightly different analysis under Article I, section 12, focusing on whether the state's conduct was a primary motivating factor in an individual's decision to question an incarcerated defendant. Accordingly, the state violates Article I, section 12, if it *actually* induces or motivates an inmate to question another inmate without providing *Miranda* warnings. Moreover,

this court should hold that *Miranda* warnings are required under Article I, section 12, even if the defendant is unaware that he his being interrogated by a state actor.

Defendant's proposed rules are consistent with *State v. Sines*, 359 Or 41, 379 P3d 502 (2016). There, this court held that common-law agency principles can be a useful tool for determining whether the state should be held responsible, under Article I, section 9, when it did not discourage a Good Samaritan from taking evidence from a person's house and bringing it to the police. This court held that the state must do something—through its words or actions—to objectively communicate to the Good Samaritan the state's blessing or encouragement of the contemplated private conduct. Because the state had done nothing to affirmatively encourage the Good Samaritan's actions, her actions did not implicate Article I, section 9.

The state contends that *Sines* compels the conclusion that there can be no state action under Article I, section 9, unless the relationship between the state and the individual satisfies the common-law test for agency. It then asks this court to graft that test into Article I, section 11.

The state's reading of *Sines* is overbroad even in the Article I, section 9, context. But even assuming it is correct in that context, it is incompatible with Article I, sections 11 and 12. Indeed, it defeats the three primary purposes that those provisions were designed to serve. First, the state's rule produces, rather

than reduces, unfairness at trial by enabling an end run around the defendant's right to counsel and to remain silent. And it alters the fundamental ground rule that the state must secure a guilty verdict *without* the defendant's uncounseled assistance—to permit the state to induce an inmate to induce the defendant to make statements for the state's use at trial. Second, the state's rule fails to counter the modern state practice of deliberately, albeit carefully, eliciting incriminating statements from represented, incarcerated defendants by incentivizing inmates to do the work while disclaiming any intention of making them agents of the state subject to the state's control and direction. Third, the state's rule decreases, rather than increases, the reliability of the evidence produced at trial and thus the soundness of the convictions thereby obtained.

Defendant's proposed rules, on the other hand, serve the original principles of Article I, sections 11 and 12, and are consistent with this court's case law construing them in the jailhouse-informant context.

Lastly, the state violates a defendant's Sixth Amendment right to counsel if it "knew" or "should have known" that a potential informant was likely to attempt to elicit incriminating statements from the defendant or if the state created a situation "likely to induce" the defendant to make incriminating statements in the absence of counsel.

Here, the state violated defendant's state and federal constitutional rights—even under the state's proposed standard. The state's management of

and participation in the "snitch system"[1] and prior dealings with the jailhouse informant in this case gave the informant a reasonable expectation that the state would grant him sentencing reductions for eliciting uncounseled statements from other inmates. The state's course and manner of dealings with the jailhouse informant with respect to his information about defendant specifically, including entering into a contractual relationship with him that expressly forbade him from disclosing his cooperation with the state to defendant, and the active status of the negotiations between him and the state over the extent of the benefit the state would provide him: (1) actually induced the him to elicit information from defendant; (2) was reasonably likely to have had that effect; (3) reasonably communicated to the jailhouse informant that the state welcomed—and in that sense *authorized*—his assistance in gathering evidence from defendant; and (4) should have caused the state to know that the informant was likely to attempt to elicit incriminating statements from defendant. Thus, the state violated defendant's rights under all four proposed standards.

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[1] Coined by the Center on Wrongful Convictions at Northwestern University School of Law, the "snitch system," refers to the government's practice of incentivizing individuals to testify against others in exchange for leniency in their own cases. Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, 3 (2005).

Summary of Facts

Early Investigation[2]

On the evening of May 28, 2011, defendant was on duty as a sergeant with the Gladstone Police Department (GPD), when he, accompanied by two other individuals, found DHB (defendant's wife) dead inside the beauty salon that she owned. DHB had been shot in the back with a .25 caliber bullet and had injuries to her chest and neck. Tr 125, 128, 620, 1638. Defendant yelled his wife's name, bent down, and checked her pulse before collapsing into tears. Tr 125, 128, 181-82.

In the days that followed, defendant voluntarily participated in two recorded interviews and consented to over a dozen searches, including but not limited to searches of DHB's residence, vehicles, and salon; defendant's sister's residence (where defendant was living at the time); and defendant's personal and patrol vehicles, his personal and work cell phones, his personal and work computers, his work areas at GPD, his storage units, his safe deposit boxes, and the uniform he had been wearing on the day of the murder. Defense Pretrial Exhibit 230.

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[2] Although the early investigation is not strictly relevant to the merits of the legal issue on review, defendant offers it to help place the issue in its proper context within the broader framework of defendant's trial.

During defendant's first police interview, defendant explained that he had moved out of the couple's home about two months earlier due to discord in the marriage and that he had not seen or spoken to DHB for about two weeks before her death. Tr 845-46. When asked if they had been involved in any physical altercations, defendant said that he lost his temper once and pinned her in a corner with his forearm to make her listen to him. Tr 856. He also said that DHB's mother had claimed that DHB had told her that defendant "had gotten physical with her." Tr 856.

During the second interview, defendant was asked to surrender his cell phones. Tr 913. Defendant turned over his work cell phone. Tr 915. Later in the interview, a second cell phone rang. Tr 917. Defendant said that he had forgotten about that phone and that his parents had recently given it to him. Tr 918. Defendant gave that cell phone to the detectives as well. Tr 918.

Over the next 18 months, police conducted more than two-dozen additional searches targeting defendant, including wiretaps, pen registers, computer searches, and DNA tests, as well as a second search of defendant's sister's house and a search of Julie Nelson's house (where defendant had moved in the summer of 2012). Defense Pretrial Exhibit 230.

During those searches, police found no physical evidence that defendant participated in, paid for, or was in any way involved in DHB's murder. *Id.*

Within a week of DHB's death, however, police had arrested defendant's friend, Campbell, for the murder, after Campbell made suspicious statements to her longtime friend, Pfortmiller. Tr 700-04. The police obtained a search warrant and found a .25 caliber gun and magazine in paint cans in Campbell's neighbor's garage. Tr 1033.

Campbell and defendant had been "super close" friends for more than a decade. Tr 687-88. Defendant visited Campbell "all the time" both on and off duty, sometimes for hours at a time. Tr 687, 2724. Defendant was "definitely [Campbell's] best friend." Tr 693. In 1999, defendant may have helped Campbell's son, Jaynes, get out of trouble by not forwarding a police report to the district attorney's office alleging sexual misconduct. Tr 2869-2966. Campbell "adored" and "idolized" defendant, so much so that defendant's former partner wondered if they were in a romantic relationship. Tr 1400.[3]

According to neighbors, defendant had been going to Campbell's house multiple times a week for five years prior to the relevant events. Tr 2726, 2733. In May 2011, defendant was still visiting multiple times per week. Tr 2725. Between March 2 and May 2, 2011, 87 of the 281 calls that defendant made or received on the phone that his parents had given him were between defendant

[3] Although the transcriptionist wrote, "idealized," the audio recording of the trial testimony demonstrates that the witness said, "idolized."

and Campbell. Tr 2598, 2600. Defendant also received a call from Campbell a few hours before DHB's body was discovered, and defendant and his sister visited Campbell a few times in the days that followed. Tr 2598, 2600, 2820, 517.

According to Pfortmiller, Campbell was "crazy" and a long-term "drug addict." Tr 692. She started with opiates, but over time "meth * * * took her over." Tr 692. Around the time of the victim's death, Campbell was using Fentanyl. Tr 692.

During the months preceding the victim's death, Campbell had made statements to both Pfortmiller and defendant's sister about wanting or attempting to harm DHB, but neither Pfortmiller nor defendant's sister took Campbell seriously. Defendant's sister thought that Campbell's statements "were just these ramblings of an individual who never really said anything that she meant." Tr 1827. She always made "grandiose statements" like that. Tr 1799. Pfortmiller said that she disregarded Campbell's statements, because "she lies a lot, like, pathological." PTr 1256.

In the days following DHB's death, defendant's sister told him about what Campbell had said and that she had not taken Campbell seriously because "she's a crazy lady," and defendant responded that he did not believe her either. Tr 2807-11.

Through the state's dealings with Campbell, it too learned that she had longstanding mental health and drug addiction issues that made it difficult for her to maintain a coherent train of thought or consistently recall and relate past events. Defense Pretrial Exhibit 227, 242-43, 257-58. And she repeatedly described *herself* as a "compulsive liar." *Id.* at 232, 247, 266.

Despite those credibility issues, after more than a year of negotiations, the state entered into a cooperation agreement with Campbell that allowed her to avoid a potential death sentence (and serve only 15 years) by agreeing to testify that defendant had offered to pay her and her son, Jaynes, to kill the victim. Defense Pretrial Exhibit 308 (Campbell Cooperation Agreement 10/24/2012).

Campbell testified before a grand jury to that effect, which indicted defendant for two counts of aggravated murder, two counts of conspiracy, three counts of solicitation, and one count of attempted murder.

Over the next three years, the state's cooperation agreement with Campbell fell apart, and shortly before the trial was scheduled to begin, the state declared that Campbell would not be a witness for the prosecution, because she had not been truthful before the grand jury and been insufficiently cooperative with the state. *See* Demurrer to Indictment; or Alternatively, a Motion to Limit the State's Evidence to the Facts Found by the Grand Jury on Which the Charges Are Based, TCF 3715-17 (summarizing history).

In response, defendant subpoenaed Campbell to be a witness for the defense. Tr 5 (September 13, 2016). Campbell asserted her privilege against self-incrimination. *Id.* at 7. Consequently, Campbell did not testify at trial. Indeed, no one purporting to have personal knowledge of any of the events or circumstances precipitating DHB's death did.[4]

State's Reliance on Jailhouse Informant Layman

The state's case came to rest nearly entirely on a career criminal and serial jailhouse informant, Layman, who in exchange for lenient treatment on two felony cases, claimed that defendant had confessed while the two were incarcerated together at the Multnomah County Jail. Tr 1859-2369; PTr 7915, 7927-29, 7934-60, 8692-93.

Layman's Criminal History and Background

Layman's criminal career began at age 15. Court Exhibit 4 (OYA Records; Initial Evaluation June 26, 1991). He was "in and out" of juvenile facilities as a teen, including stints at MacLaren Youth Correctional Facility and Youth Adventures (an inpatient drug and alcohol treatment facility). PTr 7926.

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[4] The following non-law-enforcement witnesses testified at grand jury who claimed personal knowledge of the events surrounding the charged crimes: Susan Campbell, Mickey Campbell, Andrew Church, Mary Gage, Nicholas Smith, Anthony Stephens, and Kurt Redd. None of those witnesses testified at trial. Indictment, App Br ER 4.

He received his first adult conviction at 19. PTr 7927. At 22, he was sentenced to prison for the first time for a residential burglary. PTr 7928. At 24, he was sentenced to 14 months in prison for forgery. PTr 7929. At 27, he was convicted of first-degree robbery and possession of a firearm and sentenced to 13 years in prison. PTr 7929. Layman served all those sentences in Washington State. PTr 7929.

A Washington State corrections officer described Layman as "manipulative" and said that Layman would "prey upon," "befriend," and "exploit" weaker inmates. Tr 8687, 8695. He referred to Layman as a "first-class doper dirtbag," who "is more than an inmate, he's a convict." Tr 8692-93. He has "learned how to operate within the prison culture" and can be "charming," but is a "predator for his own personal gain." Tr 8693-95.

Layman was released from prison in May 2013. PTr 7929. Two months later, he was arrested for theft and disorderly conduct in Ashland, Oregon. PTr 7930. Two months after that, in September 2013, he planned and executed a burglary-turned-armed-robbery-and-kidnapping in Multnomah County aimed at stealing Parent Teacher Association (PTA) funds from a private residence. PTr 7930, 5583. In the course of the robbery, Layman stuck a gun in the victim's face, tied the victim up, and demanded money. PTr 7930, 5583. Layman was not arrested for that offense for about a year. PTr 8815.

In the meantime, in January 2014, Layman was arrested in Clackamas County for delivery of substantial quantities of heroin and methamphetamine. PTr 7932. Layman was not immediately charged for those offenses either.

In April 2014, Layman was arrested for identity theft and trespassing in Multnomah County and held in custody at the Multnomah County Jail. Tr 3393. From jail, Layman called his girlfriend and told her, "I don't got another 15-year sentence in me," and "I'm going to do everything I can to fucking get out of here as soon as I can, Baby, and I'm not going back to prison." Tr 3393-94. He also told her that he had taken a psychological evaluation at the recommendation of his attorney, but that his attorney could not use the evaluation, because if the state ever got ahold of it, "*the next time I catch a felony they will never let me out of prison, ever.*" PTr 5439 (emphasis added).

Layman effectuated his desire to avoid prison by cooperating with the state to testify against another inmate whom he met in the Multnomah County Jail in exchange for a probationary sentence on the identity theft case. PTr 7837, 7843.

But only two weeks after Layman's release on probation, he was arrested and indicted on the Clackamas County drug case noted above. He immediately offered to testify against his co-defendant, and told the prosecutor, "I will work with you in any way." PTr 7941-42. Six weeks after that, in October 2015, Layman was charged with the PTA robbery and transferred to the Multnomah

County Jail. PTr 8815. Over the next couple of months, Layman wrote letters to multiple Multnomah County prosecutors offering to inform on an identity-theft ring, his codefendant in the PTA robbery,[5] and numerous other inmates in the Multnomah County Jail involved in a potential "hit" within the jail. PTr 7943, 7945-46, 8622, 8629; Defense Pretrial Exhibit 666-67.

Layman's undertakings as an informant created an ethical conflict for the attorney appointed to represent him on the PTA robbery and additionally resulted in Layman being transferred to the same housing unit within the Multnomah County Jail as defendant for "protective custody" while Layman and the state continued to negotiate. PTr 7778, Tr 6288, 8961.

When Layman arrived in defendant's housing unit, defendant was the "trustee," which meant that he was allowed out of his cell for long periods at a time, primarily to clean and serve meals. PTr 7991; Tr 2399. Shortly thereafter, defendant was transported to Clackamas County Jail for a couple days for a court hearing, and Layman temporarily took over defendant's duties. While defendant was away, a deputy revealed to Layman that defendant was in

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[5] Layman signed a proffer agreement with the Multnomah County District Attorney's Office to testify against his codefendant, but the state was not interested in his information, because Layman was "at the top of the food chain" in terms of culpability. PTr 8450.

jail for killing his wife. PTr 8073; Tr 1871. Another deputy allowed Layman to go into defendant's cell while defendant was away. Tr 8072.

When defendant returned, Layman "advocated" for them to be able to work together as trustees. PTr 7992. Defendant and Layman spent much of their days together cleaning and talking. Deputies allowed Layman into defendant's cell several more times to mop, and although defendant kept all of his discovery in his cell, Layman claimed that he never read through it and did not see or read any news detailing the state's factual allegations. PTr 8022.

About six weeks after Layman arrived at the unit, he informed his Clackamas County attorney, Bernstein, that he had obtained incriminating information on defendant. PTr 8168-69.

The State's Direct Involvement with Layman

Then-Senior Deputy District Attorney (DDA) John Wentworth of the Clackamas County District Attorney's Office (CCDA) told his senior investigator, Schmautz, that Layman wanted to provide information about defendant. PTr 8497. Investigator Schmautz called the jail, spoke with the captain, and asked that Layman be put on the court docket for "something" so that he would be transported to the Multnomah County Courthouse "and it would not appear as if he's meeting with law enforcement." PTr 8498. Investigator Schmautz described it as a "pretext" "so that if -- if a defense

attorney were to look at OJIN, [they] wouldn't know that he was being transported to do a proffer as an informant." PTr 8498.

The June 16, 2015 Meeting

On June 16, 2015, the state transported Layman to the Multnomah County Courthouse where Layman, Bernstein, and Kvernland (Layman's Clackamas and Multnomah County attorneys) met with Senior DDA Wentworth, DDA Burkhart, Investigator Schmautz, and Detective Sudaisar.

The state prepared and proposed a formal "proffer agreement," which provided in pertinent part:

- "Travis Layman, has indicated he has information that may assist the investigation of criminal activities by [defendant]. *To that end*, the Clackamas County District Attorney's Office (CCDA) and Travis Layman *hereby enter* in the following Proffer Agreement in *connection with the investigation into the murder of [DHB]*."
- "The purpose of Travis Layman making a proffer is to provide the CCDA and Major Crimes Team with an opportunity to *assess the value*, extent and truthfulness of *his information* about the murder of [DHB]."
- Travis Layman *agrees* to cooperate with *any efforts and requests by the CCDA and Major Crimes Team* to verify that information provided by him is truthful and complete.
- "While Travis Layman *hopes to receive some benefit by cooperating with the CCDA*, he expressly understands that the CCDA is making no promise of any consideration *at this time*."
- "The *CCDA agrees* that statements, testimony, or information provided by Travis Layman during this proffer

may not be used against him in other criminal cases he may have pending in Clackamas County."

- "The government may make derivative use of * * * any statements or information provided by Travis Layman's proffer under this agreement. This provision is *necessary to eliminate the necessity of a hearing wherein the government would otherwise have to prove* that the evidence it sought to introduce at trial against Travis Layman or in a related legal proceeding is derived from 'a legitimate source wholly independent' of statements or information from the proffer."

- "Travis Layman *agrees not to reveal this cooperation* or any information about his or any related investigation or prosecution to anyone *without the prior consent of the CCDA*."

Defense Pretrial Exhibit 670 (emphasis added); ER 1-3.

Layman, his attorneys, and Senior DDA Wentworth, as the representative of the state, all signed the contractual agreement that day. *Id.*

Before Layman said anything at the meeting, the state sought and obtained Layman's permission to audio and video record the meeting. PTr 7989. After reading Layman *Miranda* rights, Investigator Schmautz began to interrogate Layman. PTr 7991. Investigator Schmautz asked if Layman was familiar with defendant, and Layman said that he was. PTr 7991. Investigator Schmautz asked Layman how he had come in contact with defendant, and Layman said that he had met defendant in unit "8C" at the Multnomah County Jail, they worked together as trustees, and they were out of their cells together 8 to 12 hours a day. PTr 7991-92. Investigator Schmautz asked how long they had been working together, and Layman said about four months (although it

had only been about a month). PTr 7993. Investigator Schmautz told Layman to tell them what he wanted them to know. PTr 7993.

Layman was surprised at how many people had come to the meeting, which caused him to ask if he could just read his notes. PTr 7994. Layman said that if, while he was reading, he said, "today," it did not mean the present day, but referred to the day on which he wrote the note. Investigator Schmautz asked if he could "give [them] some indication as to when that may have been?" PTr 7994-95. Layman knew "as soon as they asked me about dates" that dates were important. PTr 8162.

Layman read his notes, which alleged that defendant had told him the following: "[H]e wishe[d] he would have had his wife killed in Multnomah County, because Clackamas County is crooked, and he would only be looking at a little bit of time." PTr 7996. "[H]e should have stopped it after the idiots screwed up the overdose * * * because it got messy." PTr 7997-98. "The only reason the crazy bitch's son isn't telling on [defendant] is because they haven't offered him a good enough deal." PTr 7999. Crazy bitch "is the one that did it." PTr 8025. DHB "had it coming." PTr 8015.

After defendant finished reading, Layman was asked a series of questions. Investigator Schmautz asked why DHB "had it coming," what defendant meant by "messy," and how the son was involved. PTr 8015, 8023, 8025. Investigator Schmautz, Detective Sudaisar, and Senior DDA Wentworth

asked several times if defendant had told him what his job was at the time of the killing. PTr 8026-28, 8044. Detective Sudaisar asked questions about the circumstances surrounding the attempted overdose, what defendant had said that made Layman think that defendant was responsible for the murder, and whether he knew anything about the relationship between defendant and the "crazy bitch's" family. PTr 8029-30.

Layman was unable to answer those question or provide any additional significant information. PTr 8015-44. He speculated that defendant might have used drugs to manipulate Campbell but admitted that he did not know. Tr 8030-31.

Investigator Schmautz asked Layman to turnover his notes, which Layman did. PTr 8124. Detective Sudaisar asked, "Are you still having daily contact with [defendant]?" Layman said, "Yeah, every day." PTr 8016.

Investigator Schmautz said that they were not directing him to have further conversations with defendant:

> "INVESTIGATOR SCHMAUTZ: So, Travis, just so you're clear, we do not want -- we're not directing you or telling you to have any conversations with him. He's represented by attorneys, and we don't want you to think --
>
> "LAYMAN: Right.
>
> "INVESTIGATOR SCHMAUTZ: -- the fact that you're talking to us that we would in any way direct you, or tell you to have any conversations with him."

PTr 8047.

At the end of the meeting, Investigator Schmautz said: "So if there's anything that you remember that you need -- that you think that we do need to know to make an informed decision, will you tell one of your attorneys, and they can contact the prosecutor." PTr 8058.

After the meeting, Senior DDA Wentworth asked Investigator Schmautz to "secure a location in the Multnomah County courthouse where the attorneys could meet with Layman" for the purpose of negotiating "case consideration" in exchange for Layman's testimony. PTr 8525, 8517. Senior DDA Wentworth told Investigator Schmautz that he was not expecting to interview Layman, "unless he had information not provided in the original proffer." PTr 8526. Investigator Schmautz followed the same procedure that he had previously used to conceal Layman's cooperation with the state. PTr 8525-26.

The July 2, 2015 Meeting

On July 2, 2015, Senior DDA Wentworth, DDA Burkhart, and Investigator Schmautz met with Layman and his attorneys to negotiate for Layman's testimony. PTr 8517. Senior DDA Wentworth offered Layman concurrent time on the Clackamas County drug case with whatever sentence he might receive on the PTA robbery. PTr 8518-19. Layman adamantly rejected that offer. Tr 8519. It was "clear" that the parties were not going to reach an agreement, so the state "prepared to terminate the communication. And

[Layman] said, 'I have some more information I want to give you.'" PTr 8517-18.

Investigator Schmautz asked if Layman was "willing to share * * * what that additional information is." PTr 8129. Layman agreed; but before he began to read his notes, he told Investigator Schmautz that he had recorded the dates on which he had elicited the information and asked if he wanted the dates. Investigator Schmautz replied affirmatively. Tr 8129-30.

Layman provided the state with the answers to many of the questions that he had been asked during the first proffer, including details about defendant's role in the murder (*e.g.*, that "crazy bitch" called defendant after she shot DHB, and DHB was still alive when he got to the shop, so "he had to finish it" and "she was shot then beat to death"); defendant's motive (*e.g.*, that defendant and DHB had been "fighting for months" and "he couldn't stand the bickering"); and defendant's relationship with Campbell (*e.g.*, that "he met crazy bitch 15 years ago while doing social work and had been helping her ever since"). PTr 8134, 8141-42. Layman admitted that defendant always ended his statements about the murder by claiming that he was only conveying the state's allegations and that most of what he told Layman was already out in the media. PTr 8142.

When Layman finished, Investigator Schmautz again asked for his notes, and Layman gave them to him. PTr 8124. And as he had during the first session, he asked Layman for more information, including twice asking if

defendant had told him where he was when he got the call from Campbell, if defendant had told him how he actually physically harmed the victim, if defendant had told him what Campbell's son was doing while the victim was being "finished," and if defendant had talked any more about the son. PTr 8150-52. Layman was not able to answer those questions. PTr-8150-52.

Investigator Schmautz asked if they were still housed next to each other. Layman said, "Right next to each other." PTr 8153.

Investigator Schmautz asked if Layman understood that they were not "directing" him to have further conversation with defendant. Layman said, "Yeah." PTr 8153.

Investigator Schmautz asked who had initiated the conversations, and Layman explained that it all "stemmed" from Layman and that he would not ask about the details of defendant's case "out of the blue," that he would usually wait until after defendant had come back from a meeting with one of his attorneys or an investigator and ask if anything was new, and that Layman would ask further questions while defendant was talking. PTr 8153-55.

Layman's Letters

The night of the second proffer, Layman wrote a letter to then-Multnomah County Judge You (the settlement judge on the PTA robbery case), stating that he had developed incriminating information on defendant and was

trying to negotiate a "fair deal" with the Clackamas County District Attorney's Office. PTr 8187. Layman explained that going into the July 2 meeting, "I was under the impression I was going to get a significant time cut from 80 to 90 months," PTr 8188, but that Wentworth had only offered to run the Clackamas County sentence concurrently with his Multnomah County sentence, which he felt was a "slap in the face." Layman wrote, "I believe my testimony is worth a lot more than [Senior DDA Wentworth] wants to admit. He wouldn't even talk to me if it wasn't." PTr 8193-94.

Layman also wrote a letter to Senior DDA Wentworth, stating that he had been expecting to get 60 months off his Multnomah County sentence for testifying against defendant, and that "you wouldn't even be talking to me if you had a sure win." PTr 8250. Layman continued, his testimony would give Senior DDA Wentworth a "slam dunk win" and it would be "a hell of a blow" to defendant's attorneys. PTr 8250-51.

On July 8, and 16, Layman wrote additional letters to Senior DDA Wentworth, stating that he had developed additional incriminating information. PTr 8257, 8259. On July 18, Layman was moved to a different housing unit without consultation with the CCDA. PTr 8522.

The July 30, 2015 Meeting

On July 30, Layman and Kvernland met with Senior DDA Wentworth, DDA Burkhart, Detective Sudaisar, Investigator Schmautz, and a deputy district attorney from Multnomah County to give a third proffer. PTr 8263.

Layman read from his notes, which contained further information responsive to the state's prior inquiries, as well as significant detail about the murder and defendant's trial strategy. As before, Layman made note of the dates on which he had questioned defendant. On July 3, he learned about Jaynes's role in the actual murder and what Jaynes had been doing when the victim was "finished," PTr 8267, as well as defendant's job at the time of the murder. PTr 8268. On July 5, he learned about an "overdose attempt." PTr 8182. On July 10, he learned where defendant was when he received the call from Campbell and further information regarding defendant's responsibility for DHB's death. PTr 8284-86. On July 11, and July 13, he learned about the murder weapon. PTr 8291, 8298. On July 12, he learned about defendant's motive. PTr 8294. On July 14, he learned about the plan that defendant developed after Campbell called him. PTr 8299.

When Layman finished reading his notes, he said, "Get that shit away from me, man. I don't want to have to do this no more," and pushed his notes across the table. PTr 8318.

Layman and the State Finalize Cooperation Agreement

After the third proffer, negotiations continued between Layman and the CCDA, which included settlement conferences with Judge You and the Multnomah County deputy district attorney. The Multnomah County prosecutor testified that although Wentworth did not ask Multnomah County to agree to any particular sentence, it was "clear" that Wentworth valued Layman's testimony and wanted Multnomah County to settle the case. PTr 8471.

A detective from the Portland Police Department told Detective Edwards that Layman "was practiced at this," that he had "attempted to manipulate the court systems in the past," and that they should be "very careful" about relying on him "in a court setting." Tr 8762; Defense Pretrial Exhibits 644-46.

Nonetheless, on January 21, 2016, the state and Layman entered a cooperation agreement under which Layman would testify against defendant in exchange for sentencing concessions in both cases. Defense Pretrial Exhibit 630, ER 4-11.

At trial, Layman testified consistently with the information he provided in his proffers. Tr 1859-2388. The jury convicted defendant of aggravated murder and other related offenses. Tr 4394-95. The Court of Appeals reversed defendant's convictions on the ground that the state's involvement with Layman was sufficient to make him a state actor by the conclusion of the

second proffer, under Article I, section 11, such that his questioning of defendant without defendant's lawyer present violated defendant's right to counsel. *State v. Benton*, 317 Or App 384, 408-429, 505 P3d 975 (2022).

The state sought and this court granted review of the following question:

> "If a person housed in the same correctional facility as a defendant questions that defendant to gather information that the person hopes to use to secure some personal benefit, when does the person become a state agent under Article I, sections 11 and 12, of the Oregon Constitution?"

Argument

Defendant was convicted of aggravated murder and sentenced to life in prison without the possibility of parole based almost exclusively on the testimony of a jailhouse informant, who, in exchange for a lighter sentence, testified that defendant had admitted culpability in his wife's murder. At trial and before the Court of Appeals, defendant asserted that the state had encouraged and supported the informant's efforts to elicit incriminating statements from defendant and thus had violated defendant's rights under Article I, sections 11 and 12, of the Oregon Constitution, and the Sixth Amendment to the United States Constitution. The Court of Appeals held that the state violated Article I, section 11, and that the Sixth Amendment did not require suppression of anything beyond what it had suppressed under Article I, section 11.

Defendant presents all three bases for reversal here, beginning with his state constitutional claims. *See Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981) (addressing state constitutional claims before federal ones); *State v. Castrejon*, 317 Or 202, 211-12, 856 P2d 616 (1993) (explaining scope of review under ORAP 9.20(2)). When interpreting a provision of the Oregon Constitution, this court examines its text and context, the historical circumstances prompting its adoption, and prior supreme court case law construing it. *Priest v. Pearce*, 314 Or 411, 415–16, 840 P2d 65 (1992). "The purpose of that analysis is not to freeze the meaning of the state constitution in the mid-nineteenth century." *State v. Davis*, 350 Or 440, 446, 256 P3d 1075 (2011). "Rather it is to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances." *Id.*

I. The state violates Article I, section 11, if it engages in conduct that is *reasonably likely* to induce an otherwise nonstate actor to question a represented defendant; the state violates Article I, section 12, if it *actually* induces an otherwise nonstate actor to do the same with respect to an incarcerated defendant.

Under the Oregon Constitution, the state is prohibited from using a defendant's statements at trial if the state engaged in conduct that was reasonably likely to prompt an otherwise nonstate actor to question the defendant after the defendant's right to counsel had attached. Suppression of a

defendant's statements is also required if the state engaged in conduct that actually prompted a person to take such action while the defendant was in custody.

As will be shown below, the state's proposed rule, which asks whether the state entered into a legally cognizable, principle-agent relationship with the nonstate actor is but one (rather obvious) way for the state to violate the constitutional rights of the defendant. But this court's Article I, sections 11 and 12, cases—as well the United States Supreme Court's Sixth Amendment jurisprudence—make clear that common-law agency is not the touchstone of the analysis. The test is whether the state created conditions—through its statements and conduct—that were reasonably likely to lead an otherwise nonstate actor to elicit the unwarned and uncounseled statements of an incarcerated defendant for the state's use at trial.

A. Defendant's proposed rule is consistent with the historical principles that animate Article I, sections 11 and 12 and this court's caselaw analyzing state action in the jailhouse-confession context

1. The historical circumstances and animating principles of the right-to-counsel and right-to-remain-silent provisions of the Oregon Constitution, support defendant's rule.

i. Article I, section 11

The right-to-counsel provision of the Oregon constitution prohibits the state from engaging in conduct that is reasonably likely to cause a private individual to elicit incriminating information from a represented defendant and

relay it to the state. Article I, section 11, provides, "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel." Under that provision, "Once an attorney is appointed or retained, there can be no interrogation of a defendant concerning the events surrounding the crime charged unless the attorney representing the defendant on that charge is notified and afforded a reasonable opportunity to attend." *State v. Sparklin*, 296 Or 85, 93, 672 P2d 1182 (1983). Stated slightly differently, "[O]nce a person is charged with a crime he or she is entitled to the benefit of an attorney's presence, advice and expertise in *any situation* where the state may glean involuntary and incriminating evidence or statements for use in the prosecution of its case against [the] defendant." *Id.* (emphasis added).

This court has extensively analyzed the historical circumstances and animating principles of Article I, section 11, and from that caselaw, three principles stand out as paramount: (1) fundamental fairness at trial is the ultimate value the right to counsel protects; (2) the amount of protection it provides evolves over time to counteract the state's adoption of investigatory procedures and prosecutorial techniques that threaten to upset the constitutionally struck balance of power between the state and an individual in criminal prosecutions; and (3) the scope of the protection must be delineated by rules that inhibit strategic manipulation by the state.

In *State v. Davis*, this court examined the historical roots and analytical principles that have shaped the development of the right to counsel at both the state and federal levels in determining the point at which the right "attaches." 350 Or 440, 464-70, 256 P3d 1075 (2011). This court explained that the Article I, section 11, right to counsel, like its federal corollary in the Sixth Amendment to the federal constitution, was originally understood to apply only to the trial itself. *Id.* at 469. However, advancements in the nature of criminal investigations and prosecutions (including the creation of professionalized police forces and public prosecutors) led the United States Supreme Court to extend the right to pretrial matters. *Id.* at 469-70 (citing *Powell v. Alabama*, 287 US 45, 69, 53 S Ct 55, 77 L Ed 158 (1932) ("[A criminal defendant] requires the guiding hand of counsel at *every step* in the proceedings against him.") and *Brewer v. Williams*, 430 US 387, 398, 97 S Ct 1232, 51 L Ed 2d 424 (1977) ("[Assistance of counsel before trial] is indispensable to the fair administration of our adversary system.")).

The *Davis* court noted a similar evolution in this court's interpretation of Article I, section 11. Starting in *State v. Newton*, 291 Or 788, 790, 636 P2d 393 (1981), this court concluded that a defendant is entitled to counsel in any pretrial contact with the state if "the state's case may be enhanced or the defense impaired due to the absence of counsel[.]" *See also Sparklin*, 296 Or at 94 ("The development of the right to an attorney at pretrial confrontations

between the state and the individual reflects a concern for the *preservation of the fairness of trial and counsel's effectiveness in defending against the charge*.") (Emphasis added). The focus of Article I, section 11, is on "the trial; that is, it is the protection of rights to which a defendant is entitled in the trial itself which the guarantee is intended to preserve." *Id.* at 94.

Indeed, this court has held "under the right to counsel clause in Article I, section 11, an arrested driver has the right upon request to a reasonable opportunity to obtain legal advice before deciding whether to submit to a breath test." *State v. Spencer*, 305 Or 59, 74-75, 750 P2d 147 (1988). That is because by that point the individual "is confronted with the full legal power of regardless of whether a formal charge has been filed." *Id.* at 74.

Moreover, in *State v. Prieto-Rubio*, 359 Or 16, 376 P3d 255 (2016), and *State v. Savinskiy*, 364 Or 802, 441 P3d 557 (2019), this court determined the *scope* of the protection that Article I, section 11, confers. Central to the court's holdings in both cases was avoiding the adoption of constitutional rules that are easily exploitable or manipulable by the state.

In *Prieto-Rubio*, for example, this court discussed at length the majority and dissenting opinions in *Texas v. Cobb*, 532 US 162, 121 S Ct 1335, 149 L Ed 2d 321 (2001). The majority in *Cobb* held that that the Sixth Amendment right to counsel is categorically offense-specific. *Prieto-Rubio*, 359 Or at 30.

However, Justice Breyer, writing for the four-justice dissent, disagreed,

arguing that the majority's narrow approach would "encourage strategic manipulation of charging by prosecutors as a way to circumvent a defendant's constitutional right to counsel." *Id.* at 31 (citing *Cobb*, 532 US at 182–83 (Breyer, J., dissenting)). "'The majority's rule,' he noted, 'permits law enforcement officials to question those charged with a crime without first approaching counsel, through the simple device of asking questions about any other related crime not actually charged in the indictment.'" *Id.* (citing *Cobb*, 532 US at 182-83 (Breyer, J., dissenting)). According to the dissent, the majority's rule "undermines, the Sixth Amendment's 'right to counsel,' a right so necessary to the realization in practice of that most 'noble ideal,' a fair trial." *Cobb*, 532 US at 186 (Breyer, J., dissenting) (citing *Gideon v. Wainwright*, 372 US 335, 344, 83 S Ct 792, 9 L Ed 2d 799 (1963)).

Persuaded by Justice Breyer's arguments, the *Prieto-Rubio* court rejected the state's request to adopt a rule akin to the majority's rule in *Cobb*, because it "risks the sort of strategic charging behavior that the Court of Appeals fairly identified in its opinion in this case, echoing the [scholarly] criticism of the United States Supreme Court's decision in *Cobb*." *Prieto-Rubio*, 359 Or at 35.

To discern the correct Oregon constitutional test, this court revisited the "concerns that underlie the state constitutional right to counsel," stating that its "purpose * * * is to ensure that a defendant charged with a crime has the benefit of an attorney's presence, advice, and expertise 'in any situation where the

state *may* glean" evidence from the defendant for use at trial. *Prieto-Rubio*, 359 Or at 36 (quoting *Sparklin*, 296 Or at 93) (emphasis in *Prieto-Rubio*).

Accordingly, "to the extent that questioning about uncharged offenses may *foreseeably lead* to such incriminating information about the charged offense, it is foreclosed by the state constitutional right to counsel. Otherwise, the state constitutional guarantee of the right to counsel would be *circumvented*." *Id.* (emphasis added).

In *Savinskiy*—this court's most recent decision on the issue—the court reiterated all of the above-described principles and adhered to idea that "[t]he scope of the Article I, section 11, right to counsel should be understood in the context of key principles that emerge from our discussion in *Prieto-Rubio*," 364 Or at 813, in which this court made clear that the concerns raised by the dissent in *Cobb* were well taken and integral to its interpretation of Oregon's state constitutional right to counsel. *Id.* at 814-16.

This court once again rejected the state's proposed rule because it "risks the sort of strategic charging behavior" that the *Cobb* decision permits. *Id.* at 815. Rather, "protecting a defendant's Article I, section 11, right to the assistance of counsel at trial," it held, "means recognizing that evidence obtained through pretrial investigative stages can undermine 'the fairness of trial and counsel's effectiveness in defending the charge' if the evidence was

obtained when counsel was not given the opportunity to be present." *Id.* at 820 (citing *Prieto-Rubio*, 359 Or at 27).

Thus, this court's Article I, section 11, cases establish the three overriding principles that should guide this court in determining the standard for state action in this context. The rule must be tuned to preserve fundamental fairness in the trial process. The rule must adapt to offset the state's adoption of investigatory procedures and prosecutorial techniques that threaten to upset the constitutional balance of power in criminal prosecutions. And the scope of the protection must be delineated by rules that inhibit their strategic manipulation by the state.

ii. Article I, section 12

The right-to-remain-silent provision of the Oregon constitution prohibits the state from engaging in conduct that actually causes a private individual to elicit unwarned statements from an incarcerated defendant.

Article I, section 12, affords a person in state custody or in compelling circumstances the right to remain silent. *Davis*, 350 Or at 458; *State v. Vondehn*, 348 Or 462, 474, 236 P3d 691 (2010). Because "custodial interrogation is inherently compelling," Article I, section 12, requires the provision of *Miranda* warnings to ensure that any waiver of the right to silence is knowing and voluntary. *Vondehn*, 348 Or at 474; *cf. United States v. Henry*, 447 US 264, 274, 100 S Ct 2183, 65 L Ed 2d 115 (1980) ("[T]he mere fact of

custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents."). Accordingly, "If the police conduct a custodial interrogation without first obtaining a knowing and voluntary waiver of the suspect's rights, then they violate the suspect's Article I, section 12, rights." *Vondehn*, 348 Or at 474

Tracing the historical roots of the *Miranda* rule is instructive here because that reveals that it, too, shares similar core concerns with the right to counsel in addition to another that is particularly relevant here—the reliability of the evidence.

The Supreme Court in *Miranda v. Arizona*, 384 US 436, 440, 86 S Ct 1602, 16 L Ed 2d 694 (1966), explained that the Fifth Amendment right against self-incrimination was "founded on a complex of values" all of which "point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Id.* at 460. Consequently, "To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' * * * to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Id.*

In light of those principles, the Court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. "In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.*

The Court has subsequently characterized the rule as a "constitutionally based" "prophylactic rule" that creates an irrebuttable presumption of compulsion when an in-custody suspect is interrogated without first being warned of his rights. *State v. Delong*, 357 Or 365, 382-83, 350 P3d 433 (2015) (outlining the development of Supreme Court's post-*Miranda* decisions).

In addition to deterrence, the Court has justified application the exclusionary rule in this context for the "protection of the courts from reliance on untrustworthy evidence." *Michigan v. Tucker*, 417 US 433, 448, 94 S Ct 2357, 41 L Ed 2d 182 (1974) (noting that scenarios ranging from old-fashioned torture, to separation from friends and family, to the simple desire to put an end to an exhausting interrogation all create a risk of producing false confessions); *Id.* n 23 (noting that the Court has long regarded such evidence with "mistrust" and recognizing that "'a system of criminal law enforcement which comes to

depend on the "confession" will, in the long run, be less reliable and more subject to abuses' than a system relying on independent investigation") (citing *Escobedo v. Illinois.*, 378 US 478, 488-89, 84 S Ct 1758, 12 L Ed 2d 977 (1964)).

Although the Supreme Court has over the years used those bases to constrict the application of the exclusionary rule where exclusion would be inconsistent with its mere prophylactic status or its concern over the unreliability of the resulting evidence, those holdings do nothing to alter the foundational principles that underlie the privilege against self-incrimination itself. *Tucker*, 417 US at 447-48 (declining to apply exclusionary rule where state's failure to advise was in "good faith" and circumstances did not suggest unreliability); *United States v. Patane*, 542 US 630, 643, 124 S Ct 2620, 159 L Ed 2d 667 (2004) (declining to extend exclusionary rule to physical evidence derived from a defendant's unwarned statements, because failure to warn is only a breach of the prophylactic rule, not the Fifth Amendment itself).

Oregon has taken a slightly different approach since adopting the *Miranda* rule—determining that police questioning in the absence of *Miranda* warnings *directly* violates Article I, section 12, because it denies the suspect his right to remain silent absent a knowing a voluntary waiver of that right. *Vondehn*, 348 Or at 474-75; *Delong*, 357 Or at 372 (same). That distinction was critical to this court's divergence from *Patane* in requiring suppression of

physical evidence derived from failures to warn under Article I, section 12. *Vondehn*, 348 Or at 474-75. Oregon's right is thus more protective of the individual freedoms it protects than the Fifth Amendment.

That distinction is also critical because in *Illinois v. Perkins*, 496 US 292, 302–03, 110 S Ct 2394, 110 L Ed 2d 243 (1990), the Court held that *Miranda* warning are not required under the Fifth Amendment when an incarcerated defendant does not know he is communicating with a government agent.

Justice Marshall, however, viewed custody as the cornerstone of the analysis, and dissented:

> "The psychological pressures inherent in confinement increase the suspect's anxiety, making him likely to seek relief by talking with others. The inmate is thus more susceptible to efforts by undercover agents to elicit information from him. Similarly, where the suspect is incarcerated, the constant threat of physical danger peculiar to the prison environment may make him demonstrate his toughness to other inmates by recounting or inventing past violent acts. Because the suspect's ability to select people with whom he can confide is completely within their control, the police have a unique opportunity to exploit the suspect's vulnerability."

Perkins, 496 US at 307–08 (Marshall, J., dissenting) (internal quotation marks and citations omitted); *see also Id.* at 302-03 (Brennan, J., concurring) ("The State is in a unique position to exploit this vulnerability because it has virtually complete control over the suspect's environment. Thus, the State can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses.").

On remand in *Perkins*, the Illinois appellate court maintained its holding that the defendant's Fifth Amendment right was violated, but on a similar theory to the one that underlies the *Miranda* requirement under Article I, section 12: because the defendant's unwarned undercover interrogation took place after the defendant had invoked and thus occurred in the absence of a knowing and voluntary waiver. *People v. Perkins*, 248 Ill App 3d 762, 769, 618 NE2d 1275 (1993).

This court has yet to definitively hold that Article I, section 12, would require *Miranda* warnings in these circumstances. *See State v. Acremant*, 338 Or 302, 327-28, 108 P3d 1139 (2005) (noting but not deciding the issue). For the reasons articulated in the dissenting and concurring opinions in *Perkins*, this court should hold under Article I, section 12, that *Miranda* warnings are required whenever a state actor questions an incarcerated defendant. *Cf. Boehm v. State*, 113 Nev 910, 914, 944 P2d 269, 271 (1997) (so requiring under state constitution); *Holyfield v. State*, 101 Nev 793, 803, 711 P2d 834 (1985) (citing pre-*Perkins* cases from numerous states that had held that *Miranda* applied to custodial questioning conducted by undercover agents). Moreover, this court has held that the Article I, section 12, right to remain silent does not attach until the defendant is placed in custody or compelling circumstances. *Davis*, 350 Or at 459. At that point any statements elicited from a defendant by undercover police agents cannot be the product of a knowing and voluntary waiver of that

right, if the defendant has not been informed that he has that right in the first place. Thus, this court should hold, under Article I, section 12, that once a defendant is placed in custody, the state cannot use undercover agents to question him without providing *Miranda* warnings.

Finally, under both the state and federal constitutions, once an in-custody defendant invokes, all interrogation must cease. *State v. Scott*, 343 Or 195, 203, 166 P3d 528 (2007) (defining "interrogation" as "conduct that the police should know [is] *reasonably likely to elicit* an incriminating response") (emphasis added).

As will be shown in the next section, the analytical underpinnings discussed above are already reflected in the state-action standards that this court has previously applied under Article I, sections 11 and 12.

2. This court's state-action caselaw under Article I, sections 11 and 12, supports defendant's rule.

In *State v. Smith*, this court announced the state-action standard that applies under Article I, section 11, in the circumstances presented here: where a "jailhouse informant" reports the statements of a represented defendant to the state. 310 Or 1, 13, 791 P2d 836, 844 (1990).

This court expressly adopted the rule and reasoning of *State v. Lowry*, 37 Or App 641, 652, 588 P2d 623 (1978), *rev den*, 285 Or 195 (1979). In particular, the court quoted the following rule: "'[I]f the police were directly or

indirectly involved to a sufficient extent in initiating, planning, controlling or supporting [the informant's] activities, the exclusionary protection would apply.'" *Smith*, 310 Or at 13 (quoting *Lowry*, 37 Or App at 651).

This court then described the factual circumstances presented in *Lowry* and concluded that the facts presented in *Smith* were more akin to the circumstances that the *Lowry* court had found insufficient to constitute state action than those that the *Lowry* court had found to be sufficient. Thus, a detailed review of *Lowry* is critical to understanding this court's holding in *Smith*.

In *Lowry*, the jailhouse informant, Reed, had provided information to the authorities in numerous prior cases in exchange for various forms of consideration. 37 Or App at 643-44. While cooperating as an informant in a different case, Reed met the defendant and "related on his own initiative" to a detective that the defendant had admitted involvement in a robbery. *Id.* at 646. The detective was unaware of the defendant's existence prior to that point and "cautioned Reed that he could not act as [his] agent and that he should not be asking questions of any inmate." *Id.* at 654.

Despite the detective's admonitions, Reed continued to question the defendant about the robbery. *Id.* A week later, Reed provided the detective with more information about the defendant's role in the robbery. The detective relayed the information to the detective who was investigating the robbery. *Id.*

at 647. The second detective asked to have Reed held for an additional 24 hours to provide him time to get a recorded statement from Reed. *Id.* at 655.

Both detectives met with Reed the next day. *Id.* Reed was asked if knew the defendant. Reed's reaction to that question was, "'Now, this guy is a detective sergeant. If he's that concerned about this guy, maybe I ought to make it my business to find out something about him.'" *Id.*

Before Reed went back to the cell, he told the detectives that he needed money. One of the detectives put $20 in his account without telling him. *Id.* Reed returned to his cell and "began one of his well-practiced approaches which he termed a 'sales pitch.'" *Id.* at 648. Later on, Reed and the detectives negotiated a price of $50 for his taped statement.

The Court of Appeals concluded that Reed did not become an agent of the police with respect to the statements he elicited from the defendant until the conclusion of his first meeting with both detectives. The court reasoned that the fact that Reed was acting as an informant *vis-a-vis* another inmate does not, alone, convert him into "a police agent with respect to everyone from whom he might obtain information." *Id.* at 653.

It further reasoned that Reed's prior experience receiving compensation in exchange for information may have given him a "reasonable expectation" that the state would reward him for the information he obtained from the defendant, but that "those past episodes did not constitute sufficient

involvement in Reed's *self-initiated* interrogation of defendant to bring into play the exclusionary protection." *Id.* (emphasis added).

But the court concluded that, by the end of Reed's first meeting with both detectives, the state's involvement was sufficient to trigger exclusion. The court noted five critical facts: (1) The first detective had arranged for Reed's transfer to be delayed to make it possible for the second detective to obtain a recorded statement; (2) When Harris "showed up with a tape recorder and expressed interest in the defendant," that gave Reed "positive encouragement" to obtain additional incriminating statements; (3) Reed knew from prior experience that the more detailed the statement, the better the potential reward; (4) The detectives knew that Reed was skilled in eliciting information from other inmates and would expect remuneration; and (5) "[T]hey allowed Reed to go back to the cell and did nothing to discourage him from interrogating defendant further." *Id.* at 655. Taken together, "Their actions *encouraged* him to get information from defendant." *Id.* at 656 (emphasis added).

Significantly, the court reasoned that Reed became a state agent before the state added $20 to his account (of which Reed was unaware) and before they negotiated the $50 sale price for his information (which occurred after Reed questioned the defendant).

In *Smith*, a jailhouse informant, Jischke, initiated contact with a detective claiming to have information concerning a murder. 310 Or at 12. There was no

indication that Jischke had ever held himself out to the state as an informant in the past. Two detectives came to meet Jischke, and he "*gave* them information about defendant." *Id.* (emphasis added). The detectives told Jischke "not to ask questions and that he was not working for the police." *Id.* The detectives also "told Jischke that if he heard something and wanted to pass it along, he could, but he was not required to do so." *Id.* at 14.

"*Without prompting*, [Jischke] sent letters to the deputies outlining defendant's *unsolicited statements*. Jischke said that the motivation for his information gathering was his revulsion at the manner in which the victim was killed." *Id.* (emphasis added). The detectives made no deals with Jischke, and Jischke did not ask for anything in return. *Id.* at 12-13. However, one of the detectives did appear at Jischke's subsequent sentencing and informed the court that Jischke had assisted in a murder investigation. *Id.* at 13.

The defendant in *Smith* argued that the deputies "actively encouraged Jischke to question defendant" by testifying at Jischke's sentencing about his helpfulness in a murder investigation. *Id.* at 14. But this court rejected that argument because "Jischke was unaware that this would occur, and he gathered all information prior to his sentencing." *Id.* at 15. Consequently, this court held that the detectives were not "'directly or indirectly involved to a sufficient extent in initiating, planning, controlling or supporting' Jischke's activities to render him their agent." *Id.*

This court engaged in a direct fact-matching analysis with *Lowry*, centered around the line that the Court of Appeals drew, thus implying that the outcome in *Smith* would have been different if the circumstances in *Smith* had more closely approximated those that the Court of Appeals found to amount to state action in *Lowry*.

It is also clear from the method of analysis applied in both *Smith* and *Lowry* that this court's use of the term "agent" in *Smith*, was not intended to equate to an actual, common-law agent. Neither court reviewed the evidence for manifestations that the state had *intended* to authorize or direct the informants to act on its behalf and under its control. Instead, the courts used the term "agent" or "police agent" in both cases as shorthand to convey the requirement that the state's actions must have played a meaningful role in influencing or encouraging the informant's information gathering activities.

In *Smith*, for example, the informant was directly "instructed not to question the defendant." *Id.* at 14. The state offered him "no encouragement" nor was any *quid pro quo* contemplated by either side. *Id.* Rather, the informant unilaterally provided the defendant's *volunteered* statements to the police for his own personal reasons. *Id.* And the detective's subsequent appearance at the informant's sentencing had little relevance, because there was no evidence that the state had done anything to cause the informant to reasonably expect that to happen prior to the informant's acquisition of the

statements. *Id.* Thus, that subsequent act could not have reasonably influenced or motivated the informant's prior decision to turn state's evidence. *Id.*

Lowry applied the same rule, holding that Reed's "self-initiated" pursuits, which the state expressly rebuked, were not attributable to the state. 37 Or App at 653. However, the court held that once the state became aware of Reed's activities, the state's acts and omissions "encouraged" Reed—a known snitch who traded incriminating information to the state for compensation—to continue eliciting information from the defendant by, for example, expressing affirmative interest in the defendant and through the attendance of a high-ranking detective at the meeting with recording equipment. *Id.* at 655-56.

The *Smith* court affirmed *Lowry's* conclusion that those actions "encouraged Reed to talk to Lowry" by repeatedly characterizing them thusly. *Smith*, 310 Or at 14 ("police actively encouraged [Reed] to elicit information from Lowry); *Id.* (evidence gathered prior to the "specific police encouragement" was admissible).

In summary, the *Smith-Lowry* standard asks whether the state was directly or indirectly involved to a sufficient extent in "encouraging" or "supporting" the informant's activities. Defendant's proffered rule simply adds contours to that standard by drawing the sufficient-extent line at actions that are reasonably likely to spur the informant to question or to continue to question the defendant.

Turning to Article I, section 12, in *Acremant*, this court concluded that the defendant's right to silence was not violated, because the defendant's father was not acting as a "police agent" when he questioned the defendant while the defendant was in jail on suspicion of murder. 338 Or at 328. There, police had asked the defendant's father to ask the defendant about the location of the victim's body. *Id.* at 325. The father complied, but the defendant refused to provide the information. *Id.*

The father was not instructed to continue to seek any information from the defendant, but several days later, the father talked to the defendant again, and the defendant revealed the location of the body. *Id.* at 326.

This court relied on *Smith*, finding particularly significant the fact that the informant there "testified that his principle (*sic*) motivation for his information gathering 'was his revulsion at the manner in which the victim was killed.'" *Id.* at 329 (quoting *Smith*, 310 Or at 14).

Similarly, this court noted that the trial court found that the defendant's father's "primary motivation for questioning defendant a second time about the location of George's body was [his] own personal desire to provide assistance

to the police in the face of his son's crimes." *Id.* at 329. Thus, police lacked sufficient involvement in controlling and directing the father's action to render him a state agent under Article I, section 12. *Id.*

Consequently, in light of this court's heavy focus the "primary motivation" of the would-be state actor or agent in *Acremant*, the rule under Article I, section 12, appears to require that the state's actions subjectively motivated an otherwise private citizen to question an incarcerated defendant. That standard places the focus on the actual impact of the state's actions and whether they motivated or in some way caused a private party to pursue evidence on behalf of the state, regardless of whether the state should have known that their actions would have that effect.

Smith, *Lowry*, and *Acremant*, all support defendant's proposed rules.

3. *State v. Sines* is consistent with defendant's rule.

Sines does not contradict defendant's proposed rule; rather, it provides a sufficient—but not necessary—method for assessing the state's role in the chain of events that led to its possession of the evidence at issue.[6]

In *Sines*, the defendant's housekeeper, acting as a Good Samaritan, anonymously called a DHS child-abuse tip line "on the verge of tears" to report her suspicion that the defendant was raping his nine-year-old daughter. 359 Or at 45. She asked what DHS could determine from a pair of underwear, and the DHS employee said that they had a lab that could "probably tell a lot." *Id.* The housekeeper explained that several pairs of the child's underwear were stiff from apparent sexual discharge and stated that she was considering taking a

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[6] It should also be noted that *Sines* involves a different constitutional provision (Article I, section 9) that protects different interests—unrelated to the balance-of-power and unreliability concerns at the core of Article I, sections 11 and 12, which are foundational ground rules for the conduct of fundamentally fair criminal trials themselves. Article I, section 9, is not a trial right principally. It is an ever-present, direct check on arbitrary state interference with the property and privacy of citizens. Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or L Rev 819, 836-840, 845 (2008) (outlining the historical and analytical development of Article I, section 9). The injury produced by its violation is itself the constitutional harm to be prevented, and the provision is "*given effect* by denying the state the use of evidence secured in violation of those rules against the persons whose rights were violated, or, in effect, by restoring the parties to their position as if the state's officers had remained within the limits of their authority." *State v. Davis*, 295 Or 227, 666 P2d 802 (1983) (emphasis added). Said another way, the suppression remedy is in service of the individual's right to be secure from unlawful governmental intrusions. The evidence is not excluded because it is unreliable or inconsistent with structural framework for a fair trial.

pair. *Id.* "The DHS employee reiterated several times that he could not tell her to take that kind of action, and that it was her decision." *Id.*

The DHS employee gave the housekeeper his direct telephone number, expecting that she probably would take the underwear. *Id.* The DHS employee then, unbeknownst to the housekeeper, called a deputy sheriff to report the situation, and they decided to assign the case a five-day response time to see whether the housekeeper would take any action. *Id.* at 46.

That same day, the housekeeper told another of the defendant's employees, who similarly suspected abuse, "I'm thinking we need to get something of evidence," and "I'm thinking underwear." *Id.* The other employee agreed, retrieved a pair the next day, and delivered them to the housekeeper. *Id.* That evening, the housekeeper called her contact at DHS, told him what they had done, and brought the underwear to DHS the next day. *Id.*

The Court of Appeals held that the housekeeper's seizure of the underwear amounted to state action. *State v. Sines*, 263 Or App 343, 353, 328 P3d 747 (2014), *rev'd*, 359 Or 41 (2016). Describing the situation as "a close case," this court disagreed. 359 Or at 62. This court began its analysis by contrasting the state's proposed rule for state action under Article I section 9—which was based on common-law agency principles—with the defendant's proposed rule, which was derived from various lower federal courts. *Id.* at 51-52.

The court wrote that "common-law agency principles can provide *substantial assistance* in determining when a private citizen's search or seizure should be considered state action for purposes of Article I, section 9." *Id.* at 55 (emphasis added). It also characterized those principles as "helpful" because they focus on the "objective statements and conduct of the parties to assess whether the conduct of a private individual should be attributed to the government." *Id.*

That was so in light of the defendant's arguments that the DHS employee's failure to discourage the housekeeper from taking the underwear despite secretly believing she was likely to do so and his behind-the-scenes arrangement to delay the safety check made the state responsible for the housekeeper's actions.

This court rejected the defendant's arguments, explaining that the "unilateral action" of the state that was "never communicated" to the housekeeper "could not have affected her or her decision to act." *Id.* at 60. Further, this court noted that the state had provided the housekeeper with "little, if any, such affirmative encouragement, initiation, or instigation[.]" *Id.*

In light of the competing arguments at play, this court stated that "[t]he ultimate issue is whether the housekeeper acted on behalf of the state, which we determine by considering whether the state's conduct would have conveyed *to her* that she was so authorized." *Id.* at 61-62 (emphasis added).

This court's discussion of common-law agency principles in *Sines* cannot be divorced from the context of that case. It makes perfect sense in the Good-Samaritan search context—where the state exerts no other force or influence over a citizen's decision to aid in the investigation of a suspect. It preserves the ability for selfless, private citizens to do good—to act on their own initiative to assist law enforcement in preventing harm and solving crimes. And the state has no obligation under Article I, section 9, to discourage that. *Cf Coolidge v. New Hampshire*, 403 US 443, 488, 91 S Ct 2022, 29 L Ed 2d 564 (1971) ("[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.").

Accordingly, under *Sines*, where there is no other connection between the state's conduct and the citizen's retrieval of evidence, the issue may be whether the government authorized or directed the free, private citizen to act on its behalf. However, that does not mean that the state can subtly *encourage or support* a citizen's investigative activities, so long as it stops short of directly authorizing or controlling them. The deeper question in every such case is whether the state created circumstances that were "reasonably likely" to cause a private citizen to take some action that the state could not itself take. In some situations, that may be established by demonstrating that the state manifested its intent to make the citizen an agent of the state. In other circumstances, the

causal nexus between the state's conduct and the citizen's actions can be established by offering support or encouragement to, or by exercising other forms of influence over, the citizen. Consequently, *Sines* does not disturb the general rule that suppression is required if the state's conduct was reasonably likely to lead a citizen to acquire evidence for the state that the state could not obtain directly.

4. Defendant's proposed rules preserve the original purposes of the right to counsel and to remain silent.

Defendant's proposed standards fulfill the constitutional promises contained in Article I, sections 11 and 12, and echo the language of other standards that this court has deemed sufficient to protect the underlying constitutional interests at stake.

First, drawing the line at state conduct that is reasonably likely to influence or that actually influences a private citizen to question a defendant and report the defendant's statements to the state protects against two varieties of state produced unfairness: "rule breaking" and "rule changing." That is, permitting the state to intentionally but subtly encourage individuals to engage in conduct that the state is not permitted to engage in directly and that deprives the defendant of a fair trial violates basic notions of fair play in the classic "rule-breaking" sense. Additionally, and perhaps more fundamentally, incentivizing individuals to retrieve a defendant's uncounseled admissions for

the state disturbs the delicate balance of power that the right to counsel regulates. The practice, thus, presents a different type of unfairness: it amounts to a "rules change" from those that the founders selected—to rules that are more advantageous to the state—rules that permit the state to rely on a class of evidence that the appointment of counsel is expressly intended to prevent.

Second, defendant's rule directly responds to modern prosecutors' increasing reliance upon jailhouse-informant testimony despite the empirical evidence of the dangers it poses to the accuracy and justness of guilty verdicts.[7]

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[7] A 2004 study by the Center on Wrongful Convictions at Northwestern University School of Law found jailhouse-informant testimony to be the "leading cause of wrongful convictions in U.S. capital cases [45.9%]—followed by erroneous eyewitness identification testimony in 25.2% of cases, false confessions in 14.4% and false or misleading scientific evidence in 9.9%" Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, 3 (2005).

Currently, The National Registry of Exonerations shows that jailhouse informant testimony is responsible for 15% of all murder exonerations, and 23% of a death-penalty exonerations. The National Registry of Exonerations, *Snitch Watch* (accessed October 26, 2022) https://www.law.umich.edu/special/exoneration/Pages/Features.Snitch.Watch.aspx

The government's reliance on informant testimony is steadily increasing. Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convicitons*, 37 Golden Gate U L Rev 106, 110-12 (2006) (documenting police and prosecutors' increasing reliance on informant testimony); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U Cin L Rev 645, 655 (2004) (same).

The due-process-infused, reliability-of-evidence concerns that are at the constitutional root of the right to remain silent are at their apex in this context; thus, this court's rule should also serve the prophylactic function of preventing the admission of a defendant's unwarned and uncounseled statements by precluding the state from seeking to garner such evidence.

Jailhouse-informant testimony is arguably even less reliable than a defendant's unwarned statements, because it involves two layers of inherent unreliability. First, incarceration, alone, places significant pressures on the defendant to make false, exaggerated, or misleading claims about his charges for all of the reasons Justices Marshall noted. Second, jailhouse-informant testimony hinges on the honesty of intensely self-interested criminals that empirical analysis has shown has led to an alarming number of wrongful convictions. Thus, the constitutional rule should be geared toward minimizing the state's participation in the production of this type of evidence because it both increases the state's relative position over the accused beyond that which the constitution deems fair; and its unreliability introduces the grave risk of not just producing more convictions than the founders intended, but more wrongful ones. Thus, requiring counsel's presence whenever his or her client is questioned by another inmate whom the state has so encouraged reduces the likelihood that the state will come into possession of this type of evidence in the

first place—evidence that undermines both the fairness of the process of the trial and the justness of the outcome.

Third, prohibiting the state from engaging in conduct reasonably likely to induce an informant to question a represented defendant operates as a better bulwark against state efforts to get as close to the line as possible or to "push the envelope" in pursuit of evidence that the constitution expects it to do without. Put simply, defendant's standard disincentivizes state efforts to manipulate or circumvent the defendant's right to a fair trial, by penalizing rather than rewarding such efforts.

Finally, holding the state to the reasonably foreseeable or likely results of its conduct is this court's oft chosen approach to safeguard these rights. *See*, *e.g.*, *Prieto-Rubio*, 359 Or at 36 (questioning about uncharged offenses that may "foreseeably lead" a defendant to make incriminating statements about the charged offense is prohibited); *Scott*, 343 Or at 203 (after a suspect invokes, the police may not engage in "conduct that the police should know [is] reasonably likely to elicit an incriminating response"). Thus, defendant's standards are familiar, easily applied by law enforcement, and regularly enforced by courts.

B. The state's proposed rule is (1) derived from an overbroad reading of *Sines*; (2) inconsistent with the historical principles that animate Article I, sections 11 and 12; and (3) unhelpful in the jailhouse-informant context.

The state argues that "a person becomes a state agent *only if* the state directs or authorizes the person to act on the state's behalf." Pet BOM 19 (emphasis added). According to the state, "The state's conduct, moreover, 'must be such that a reasonable observer—such as the agent or a later factfinder—would understand the conduct to be *intended* by the principal *to assent* to the creation of an agency relationship.'" *Id* at 22 (quoting *Sines*, 359 Or at 56 n 7) (emphasis added).

The state's broad reading of *Sines* seems doubtful given that it trains the objective inquiry on the intent of the principal with respect to forming an agency relationship and not on the reasonably likely or foreseeable effect of the state's actions on the prospective agent's decision to obtain evidence for the state. That inadequacy is particularly apparent in the jailhouse-informant context, because in these cases the state often expressly intends *not* to make an informant its agent—and the state's conduct often objectively reflects that intention. For example, in many of the cases cited above, the government told the informants that they were not agents of the police and were not authorized or directed to question anyone on the state's behalf. The whole "game" has shifted to providing potential informants with subtle and not-so-subtle rewards

and punishments to incentivize the delivery of a defendant's statements to the state *without* making the informant a common-law agent.

This court should clarify that *Sines* discussion about the usefulness of common-law agency should be limited to the facts, arguments, and constitutional provisions before the court at that time. It does not establish the exclusive standard for state-action under Article I, section 9, much less a universal standard that applies to every other constitutional provision, particularly the provisions at issue here for which it is especially ill-suited.

But even if this court were to agree with state's interpretation of *Sines* under Article I, section 9, the state's proposed test is plainly insufficient to protect the interests that sections 11 and 12 guarantee—indeed it undermines them.

The state's rule carves a simple, straightforward path for the state to follow to obtain a defendant's statements in contravention of his constitutional rights—evidence that denigrates the fundamental fair-trial principle that once charged, the state may contend with the defendant only through counsel. Under the state's proposal, so long as the state's efforts to encourage the informant are not so obvious that a reasonable third-party observer would think that the state intended to assent to the creation of an agency relationship, the state can *intentionally* seek to generate uncounseled admissions for its use at trial. That

rule is anathema to *all* of the principles that underlie the right to counsel and the right to remain silent.

Beyond that, the state's standard falsely equates the complex set of dynamics that lead jailhouse informants to produce evidence with those that inspire Good Samaritans to do so.

The state and the jailhouse informant have an entirely different relationship and stand in entirely different relative positions of influence over each other than do the state and private citizens like the ones at issue in *Sines* and *Acremant.* The state's standard apparently gives no weight to the fact that the state has created a marketplace for incriminating information that it cannot directly obtain, by agreeing to first appraise and then buy it from inmates—often making payment in the form of days, months, and even years of freedom. But, unlike a traditional market transaction—where the buyer and seller are presumed to stand at arm's length—in this market the state has a degree of leverage inconceivable between private parties; the state has the exclusive power to take liberty and the power to restore it. Thus, whether the inmate is being held in jail pretrial or in prison posttrial, the state has deprived or is seeking to deprive the inmate of his liberty. At the same time, the state holds out to the inmate the possibility of regaining some of that liberty or reducing that exposure if the inmate can provide it with incriminating information on other higher-value inmates.

The state's interpretation of the *Sines* test is arguably reasonable when applied to a free, private citizen over whom the state lacks the type of leverage it exerts over the jailhouse informant. But the standard applied in *Sines* does not appear to account for the dynamics at issue here where the state's leveraged position alone exerts constant pressure on the inmate to turn state's evidence. Indeed, it appears that the state has adopted protocols and practices—an entire apparatus, complete with fake OECI docket entries, transportation to clandestine, secure meetings, and form contracts of adhesion—to exploit that asymmetrical power dynamic to serve its own prosecutorial ends.

For that reason alone, the agency test that this court found "helpful" in *Sines* under Article I, section 9, is not helpful here. That test focuses on what the state must do to make a private citizen—whose liberty the state does not already control—an agent of the state. That dynamic is also why defendant's standard, which can be met through much more subtle state encouragement, is the proper standard to apply to the jailhouse informant, to whom the state is constantly advertising a powerful, state-created incentive to pursue information on its behalf. But again, even if the state's interpretation of *Sines* is correct *and it applies here*, for all of the reasons just discussed—and in keeping with the rules-of-the-game metaphor utilized above—the jailhouse informant surely starts off on third base while the private citizen begins in the batter's box, in terms of what more the state needs to do to bring them home.

II. Whether this court adopts defendant's or the state's proposed rule, the state violated defendant's Oregon constitutional rights under both proposed standards.

A. If this court adopts defendant's proposed tests, all of defendant's statement to Layman should have been suppressed.

The state created circumstances likely to induce Layman to elicit incriminating statements from defendant by maintaining and operating the "snitch system," by locating a known informant facing serious jeopardy in proximity of defendant, and by advising the informant of defendant's charges. Those actions of the state were also Layman's proximate motivation for pursuing evidence from defendant.

The pressures generated by the state's management of and participation in the snitch system are sufficient to make the actions of inmates operating within that incentive scheme attributable to the state, because they are reasonably likely to induce inmates to elicit information from other inmates.

This court should hold that the Oregon Constitution demands that the state either discontinue the practice of compensating inmates for eliciting statements from represented inmates or ensure that those who do abide by the constitutional safeguards necessary for a fair trial such as providing *Miranda* warnings and notifying counsel if any questioning of the defendant is going to take place. That rule would not prevent the state from rewarding inmates for information that was volunteered by the defendant or overheard. It simply

requires jailhouse informants to follow the same constitutional rules as the state. Alternatively, the state could withdraw from information-trade and rely exclusively on the altruism or other personal motivations of inmates to supply it with information. Under that approach, the constitution would not regulate the inmate informants' private action, so warnings and counsel would not be required.

Oregon has actively chosen to avail itself of a particular method for eliciting evidence from represented defendants. It openly holds out the promise of freedom or other benefits to inmates who collaborate with the state. Layman was a career criminal and sophisticated operator within the snitch system and had recently and successfully transacted under its terms. Thus, when the state placed Layman (who at that time was actively attempting to inform on other inmates to reduce his current jeopardy) in the proximity of defendant and informed Layman of defendant's charges, the state's actions were reasonably likely to lead Layman to seek incriminating information from defendant and deliver it to the state in exchange for the possibility of a reduced sentence. And that is precisely what happened.

B. Under both proposed standards, the state's involvement was sufficient to require exclusion by the conclusion of Layman's first meeting with the state on June 16, 2015.

By the end of the first proffer, under both defendant's and the state's proposed tests, the state's words and actions were reasonably likely to result in

Layman's continued questioning of defendant. And it would have been reasonable for anyone in Layman's position to believe, based on the "objective manifestations" of the state, that the state wanted or *authorized* him to do so.

This case contains all of the factors that the *Lowry* court found sufficient to constitute state action and then some, and it has practically no similarities with *Smith*, *Acremant*, and *Sines*. Like the informant in *Lowry*, Layman was working as an informant in another case at the time he met defendant, and as in *Lowry*, Layman was housed in the same unit as defendant as a result of his activities as an informant. Like the informant in *Lowry*, the state was aware that Layman was a seasoned informant who would demand a benefit in exchange for his information. And similarly, still, the state sent high-ranking officials with recording devices to the meeting who expressly asked about defendant—signaling its high level of interest in acquiring information about defendant—and thereby providing Layman with "positive encouragement" to continue to pursue such information.

Moreover, as in *Lowry*, where the state had asked the jail to delay Reed's transport for 24 hours, here, too, the state affirmatively intervened to procure defendant's statements from Layman by coordinating with the jail to facilitate the clandestine transmission of Layman's information to the state, which also gave Layman additional time to gather more evidence for the state by not blowing his cover.

Here, however, the state went far beyond the state's actions *Lowry*: the state and Layman signed a literal contract that entailed ongoing commitments from both sides with respect to the information disclosed in the proffer. That is, on June 16, 2015, the parties entered into a continuing contractual relationship characterized by the exchange of mutual consideration in which Layman agreed to provide information in order to "assist the investigation of criminal activities by [defendant] * * * in connection with the investigation into the murder of [DHB]."

The continuing nature of their arrangement is reflected by Layman's "agree[ment] to cooperate" with all future efforts and requests by the state to verify his information. Layman also "*agree[d] not to reveal"* his cooperation with the state or any information about "*his* or any related *investigation* or prosecution" to anyone (including defendant) "without the prior consent of the CCDA."

The purpose of the proffer was to provide the state "with an opportunity to assess the value" of his information, while recognizing that Layman "hope[d] to receive some benefit by cooperating with the CCDA."

In exchange for Layman's assistance, the state "agree[d]" that nothing he told them could "be used against him in other criminal cases he may have pending in Clackamas County." The contract did not obligate the state to

provide Layman with any additional benefits "at this time," thereby implying it might in the future.

The dynamics of the meeting are also significant. Rather than simply receiving or listening to Layman's information, the state began the meeting by interrogating Layman about his connection to and familiarity with defendant and directed Layman to provide the evidence in a particular way—to give the approximate "dates" on which the defendant made certain statements, which increased the usefulness of the information to the state beyond what Layman had volunteered on his own.

When Layman finished reading his notes, the state asked Layman for additional information about particular aspects of the case, but Layman lacked the answers to any of their substantive questions at that time.

Toward the end of the meeting, the state prescribed the channel that it wanted Layman to use to communicate with the state if Layman had additional information about defendant to share. And it simultaneously told Layman that it was not "directing" him to engage defendant in further conversation, but implied that it was receptive to additional information and that such information might increase the benefits that the state would extend in exchange. The state then transported Layman to his cell knowing that he would be spending 8 to 10 hours a day with defendant. And Layman promptly began eliciting from

defendant the answers to the questions that the state had asked him at the meeting.

This case is entirely dissimilar to *Sines* and *Smith*, where the state was essentially a passive recipient of the evidence. The state did not ask for more than what the witnesses offered, as it repeatedly did here. This case is also unlike *Sines* and *Acremant*, since those cases involved the efforts of Good Samaritans whose interactions with the state had little to no bearing on their altruistic reasons for providing the police with evidence of serious crimes. Whereas here, both Layman and the state through their established course of conduct had regularly held themselves out to each other as potential trading partners in the state-created market for incriminating evidence. That is, the state knew that Layman's assistance was contingent on receiving a direct, personal benefit in return.

Thus, the state created circumstances that made it reasonably likely if not certain that Layman would continue to question defendant. And by entering into a formal contractual collaboration with Layman, knowing he expected a benefit in return and that the value of the benefit depended on his worth to the state in successfully prosecuting defendant, any reasonable person in Layman's position would believe that his continued efforts to incriminate defendant would be welcomed and rewarded—and in that sense "authorized" by the state.

Consequently, all the statements that Layman elicited after the first proffer should have been suppressed.

C. Under both proposed standards, the state's involvement was sufficient to require exclusion by the conclusion of Layman's second meeting with the state on July 2, 2015.

Two weeks after the state signed its proffer agreement with Layman, the state manufactured another pretext for Layman's transport the Multnomah County Courthouse to facilitate his continued surreptitious cooperation with the state. And the state again sent several high-ranking members of the prosecution team.

The original purpose of the meeting was for the state to make an official offer for Layman's information, a potentially significant development in the process of closing the transaction. That is, the state moved from simply agreeing to appraise Layman's information for its potential value to making a concrete offer to purchase his cooperation at trial.

However, through its offer, the state communicated to Layman that the information he had provided up to that point would not earn him much, as it failed to include any concessions on his PTA robbery case.

When it became clear that Layman would not accept the state's offer, the state "prepared to terminate the communication," which prompted Layman to provide additional information to the state. The state's opening offer thus put

Layman on notice that he might need to obtain even more information to achieve the level of benefit he sought from the state.

Conveniently, the state brought audio recording equipment to the meeting because Senior DDA Wentworth recognized the possibility that Layman might arrive with additional information that he had not provided in the first proffer.

Layman revealed that he had started documenting the dates on which defendant made certain statements—in compliance with the state's request during the first proffer—and he provided the state with the answers to many of the questions that it had asked about during the first proffer. For example, the state had asked for details about defendant's role in the murder, and Layman reported that the "crazy bitch" called defendant after she shot DHB, and DHB was still alive when he got to the shop, so "he had to finish it" and "she was shot then beat to death." The state had asked why the victim "had it coming," and Layman reported that defendant and DHB had been "fighting for months" and "he couldn't stand the bickering." The state had asked about defendant's relationship with Campbell, and Layman reported that "he met crazy bitch 15 years ago while doing social work and had been helping her ever since." Thus, Layman made it clear to the state that he was pursuing the information that the state was interested in.

As it had during the first proffer, the state asked additional questions—further revealing its areas of interest to Layman, knowing that the same

technique had led Layman to acquire the answers to its prior questions. But Layman did not have the answers to any of their questions.

Layman explained that all of defendant's statements "stemmed from" Layman's strategic interrogation technique, which he disclosed to the state. The state then confirmed that Layman was still housed next to defendant, failed to admonish him *not* to question defendant, and went away to consider what more it could do for Layman in light of the information he had acquired from defendant since the first proffer.

When those facts and circumstances are added to everything the state had done up to that point, the state's communications to Layman were crystal clear: it still desired more information—particular information, including what defendant was doing when Campbell shot the victim, whether defendant played a role in physically harming the victim, what Jaynes's role was in causing the victim's death. And if Layman got more information for the state, the state would consider upping the consideration it was willing to pay in exchange, as it had just demonstrated. Under those circumstances, no reasonable person would be surprised to learn that Layman sought out that information from defendant and brought it to the state.

Moreover, Layman revealed the effect that the state's conduct had on him. As soon as the state, asked him for "dates," he knew that recording the dates of his conversations with defendant was important to the state. He

regarded the state's opening bid for his information to be a "slap in the face" because he believed, based on prior dealings with the state, that his information was worth at least 60 months off his sentence. Layman regarded his information as valuable because, it would give the state a "slam dunk win" and be "a hell of a blow" to defendant's attorneys. He believed that Senior DDA Wentworth would not have even met with him if the state had a strong case. Thus, the state's interactions with Layman caused him to believe, and reasonably so, that the state needed his help, and would pay up if he improved the state's prospects for securing defendant's conviction. [8]

And even under the state's rule, the state's course of dealings with Layman gave him a reasonable expectation of recompense for his efforts, which could be characterized as an implied agency or employment relationship that not only *authorized*, but *incentivized*, Layman to elicit defendant's unwarned and uncounseled statements for the state's use at trial. Consequently, all of the

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[8] Layman's statements and actions at the end of the third proffer also establish that he had felt compelled by the state to elicit incriminating information from the defendant following the second meeting. When Layman finished reading his notes, he exclaimed, "Get that shit away from me, man. I don't want to have to do this no more," and angrily pushed his notes across the table. Thus, his subjective understanding of his situation mirrored reality—the state was exerting its leverage over him to force him to continue to question defendant on pain of a lengthier prison sentence.

statements that Layman purportedly collected from defendant after the second meeting should have been suppressed, under all of the proposed rules.

III. The state violated defendant's right to counsel under the Sixth Amendment.

After a criminal defendant's Sixth Amendment right to counsel has attached, government agents are forbidden from deliberately eliciting incriminating statements from the defendant outside the presence of counsel. *Massiah v. United States*, 377 US 201, 84 S Ct 1199, 12 L Ed 2d 246 (1964). That protection is implicated when the prosecution seeks to introduce statements made by a represented defendant to a "jailhouse informant" if the statements at issue were (1) "deliberately elicited" by the informant and (2) the informant's conduct is "attributable to the government." *Henry*, 447 US at 270.

In *Henry*, an FBI agent told Nichols, a longstanding paid informant who was incarcerated in the same jail as the defendant, not to question the defendant but to pay attention if the defendant engaged him in conversation or talked in front of him. *Id.* at 268. Nichols ignored those instructions and engaged the defendant in conversations, and the defendant made incriminating statements to him. Nichols provided the information to the FBI agent and was compensated for it. *Id.* at 266.

The Court held that Nichols was a government agent and had, through his conversations with the defendant, deliberately elicited the statements in

violation of the defendant's Sixth Amendment rights, despite the fact that he was directly admonished not to question the defendant. *Id.* at 271. The Court highlighted the fact that the FBI agent was aware that Nichols had access to the defendant and would be able to engage him in conversations without arousing his suspicions, and that based on prior dealings, Nichols knew he would only be paid if he produced useful information. *Id.*

Specifically, the Court held that Nichols' conduct was "attributable to the Government" under the circumstances "[e]ven if the [FBI] agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, *he must have known* that such propinquity likely would lead to that result." *Id.* at 271. The Court concluded: "By intentionally creating a situation *likely to induce* [the defendant] to make incriminating statements without the assistance of counsel, the Government violated [the defendant's] Sixth Amendment right to counsel." *Id.* at 274 (Emphasis added).

The Ninth Circuit subsequently distilled and applied *Henry* in *Randolph v. California*, 380 F3d 1133, 1144 (9th Cir 2004), a case very similar to the one at bar. In that case, Moore, the defendant's cellmate, wrote a letter to prosecutors offering to testify against the defendant in exchange for leniency. *Id.* at 1139. Moore met with the prosecutor and the detective involved in the defendant's case several times to discuss his possible testimony, as well as a

plea deal relating to the crime for which Moore was being held. *Id.* Moore was told not to expect a deal in exchange for his testimony and was returned to the cell he shared with the defendant. *Id.* at 1144.

The court held that any information that Moore elicited from the defendant after he was returned to their shared cell was elicited on behalf of the government. The court recognized that "*Henry* makes clear that it is not the government's intent or overt acts that are important; rather, it is the "likely * * * result" of the government's acts. *Id.* (quoting *Henry*, 447 US at 271). The court concluded that a "jailhouse informant can be considered a government agent [even] if there is no express agreement between the informant and the government that the informant will be compensated for his services." *Id.* Moreover, it was "clear that Moore hoped to receive leniency and that, acting on that hope, he cooperated with the State." *Id.* The prosecutor and detective who met with him "either knew or *should have known* that Moore hoped that he would be given leniency if he provided useful testimony against [the defendant]." *Id.* at 1147.

Under the Sixth Amendment, then, if the state knew or "should have known" that the informant was likely to attempt to elicit incriminating statements from the defendant or if the state created a situation "likely to induce" the defendant to make incriminating statements, those statements must be suppressed.

That standard, like defendant's proposed standard under Article I, section 11, looks at whether the state "should have known," *i.e.*, whether it was *reasonably* likely or foreseeable that the state's interactions with the informant would lead the informant to attempt to elicit uncounseled statements from the defendant.

The state violated defendant's Sixth Amendment right to counsel in this case. Layman was actively working as an informant at the time he met defendant. The state knew he would expect compensation for his information, and the state did compensate him for that information. The state also knew Layman was having daily contact with defendant, would be able to engage defendant in conversations without arousing defendant's suspicion, and was employing specific strategies to elicit information from defendant.

Thus, even if the state "did not intend that [Layman] would take affirmative steps to secure incriminating information * * *, [it] *must have known* that such propinquity likely would lead to that result." *Henry*, 447 US at 271. Moreover, because the state "either knew or *should have known* that [Layman] hoped that he would be given leniency if he provided useful testimony against [defendant] * * * and the state made a conscious decision to obtain [Layman's] cooperation. That cooperation rendered [Layman] an agent of the State." *Randolph*, 380 F3d at 1144.

For those reasons, the trial court should have suppressed *all* of defendant's statements to Layman.

IV. The state's use of jailhouse informants like Layman is pernicious to the credibility and reliability of criminal prosecutions.

This case exemplifies the broader problem with the state's reliance on purported admissions by a defendant to a jailhouse informant—it creates an extreme risk of producing wrongful convictions.

Defendant was convicted by a death-qualified jury and sentenced to life in prison without the possibility of parole. At his trial, the state presented no physical evidence nor any percipient witness testimony that defendant killed his wife or paid or offered to pay anyone to do so.

The state had sought the indictment against defendant because Campbell, a mentally unstable, long-term drug addict, who could not maintain coherent thought, and who was known to be a "pathological," "compulsive liar"—facing the death penalty—*claimed* that defendant had offered to pay her and her son to kill DHB.

Maybe Campbell shot DHB for payment, or maybe she did it out of love, loyalty, or devotion to her best friend whom she "idolized," and whom she knew was unhappy in his marriage. That should have been up to a jury to decide. But the state did not call Campbell as a witness. Instead, the state chose to rely (remarkably) on an even *less* reliable witness—a hardened,

lifelong, violent criminal—who had recently expressed his willingness to do "anything" to avoid prison, and who had taken a psychological evaluation that he believed exposed him to a virtual life sentence on his next felony.

The state was warned by other law enforcement agencies that Layman was a "predator" who would "prey upon" and "exploit" other inmates for his "own personal gain" and that he had "manipulated court systems" in the past.

Yet, while Layman in the process of trying to inform on another inmate, a corrections deputy informed Layman of defendant's charges and allowed Layman into defendant's cell, where defendant kept his discovery. Layman even admitted that defendant had told Layman that defendant was only telling him about the state's *allegations* and that most of it was already out in the media.

However, the state chose to engage Layman in a cooperation agreement under which it granted Layman leniency on the charges he was facing in exchange for Layman's testimony about defendant's statement and Layman's *claim* that defendant was not merely relaying the state's allegations, but admitting to their underlying truth.

While it is, of course, not this court's place to revisit a jury's verdict, in this or any other case, it would not be inappropriate to recognize that the state's reliance on Layman, and jailhouse informants like him, pose an extreme risk to the integrity of the process and soundness of the convictions it produces. Those

risks are well documented both in law and logic as well as empirically, and they highlight the need for state constitutional rules that keep the state from *contributing* to the harms they pose to the individual accused and to our system of justice.

V. Nothing in the Court of Appeals opinion should be interpreted to foreclose defendant from relitigating the issue of access to Layman's psychological evaluation.

After the Court of Appeals reversed defendant's convictions under Article I, section 11, it decided a separate assignment of error related to the trial court's refusal to conduct *in camera* review of Layman's psychological evaluation for potential impeachment evidence. *Benton*, 317 Or App at 430-33.

The Court of Appeals held that defendant had failed to make the threshold showing necessary to obligate the trial court to conduct *in camera* review of the records. *Id.* at 437-39.

Defendant is concerned that that aspect of Court of Appeals decision could produce confusion on remand. If defendant's convictions are reversed, and if the state chooses to retry him, and if the state chooses to rely on Layman as a witness, then defendant should have a full opportunity relitigate the issue and make a new record in support of *in camera* review. Consequently, this court should clarify that the last section of the Court of Appeals opinion is not law-of-the-case and does not foreclose relitigation of that issue.

CONCLUSION

Defendant asks this court to reverse defendant's judgment of conviction and remand to the trial court for further proceedings.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By David Sherbo-Huggins at 4:43 pm, Oct 27, 2022

DAVID SHERBO-HUGGINS OSB #105016
SENIOR DEPUTY PUBLIC DEFENDER
David.Sherbo-Huggins@opds.state.or.us

Attorneys for Defendant-Appellant
Lynn Edward Benton

EXCERPT OF RECORD INDEX

John S. Foote, District Attorney for Clackamas County
Clackamas County Courthouse, 807 Main Street Room 7, Oregon City, Oregon 97045
503 655-8431, FAX 503 650-8943, www.co.clackamas.or.us/da/

June 16, 2015

Gayle Kvernland
Attorney at Law

Jack Bernstein
Attorney at Law

Re: *Investigation into the murder of Debbie Benton*

Dear Counsel:

Your client, Travis Layman, has indicated he has information that may assist the investigation of criminal activities by Lynn Edward Benton. To that end, the Clackamas County District Attorney's Office (CCDA) and Travis Layman hereby enter in the following Proffer Agreement in connection with the investigation into the murder of Debbie Benton. This letter constitutes the exclusive recital of the terms of this agreement.

1. **Purpose:** The purpose of Travis Layman making a proffer is to provide the CCDA and Major Crimes Team with an opportunity to assess the value, extent and truthfulness of his information about the murder of Debbie Benton.

2. **Information**: Travis Layman agrees to provide truthful and complete information, with no material misstatements or omissions of fact, relating directly or indirectly to the murder of Debbie Benton. Travis Layman will neither attempt to protect any person or entity who has been involved in criminal activity, nor falsely implicate any person or entity in criminal activity.

3. **Recording**: Travis Layman agrees that any interview may be electronically recorded or otherwise documented.

4. **Verification**: Travis Layman agrees to cooperate with any efforts and requests by the CCDA and Major Crimes Team to verify that information provided by him is truthful and complete.

5. **No Promises**: While Travis Layman hopes to receive some benefit by cooperating with the CCDA, he expressly understands that the CCDA is making no promise of any consideration at this time. This agreement does not obligate the CCDA to negotiate any terms or make any offer to Travis Layman.

6. **No Direct Use**: The CCDA agrees that statements, testimony, or information provided by Travis Layman during this proffer may not be used against him in other criminal cases he may have

pending in Clackamas County. This agreement does not offer contractual immunity in any other unrelated matters, nor does it offer contractual immunity against Travis Layman in a prosecution for perjury, false swearing or other related criminal charges should he testify materially contrary to the substance of the cooperation.

7. **Derivative Use**: The government may make derivative use of, and may pursue investigative leads suggested by, any statements or information provided by Travis Layman's proffer under this agreement. This provision is necessary to eliminate the necessity of a hearing wherein the government would otherwise have to prove that the evidence it sought to introduce at trial against Travis Layman or in a related legal proceeding is derived from "a legitimate source wholly independent" of statements or information from the proffer. Additionally, Travis Layman understands that information derived from information provided by this proffer, but not specifically mentioned in it, may be used against him in any future proceedings.

8. **Impeachment**: If Travis Layman should testify materially contrary to the substance of the proffer, or otherwise present in a legal proceeding a position materially different or inconsistent with the proffer made under this agreement, that proffer may be used against him as impeachment or rebuttal evidence, or as the basis of a prosecution for perjury.

9. **No Disclosure of Cooperation**: Travis Layman agrees not to reveal this cooperation or any information about his or any related investigation or prosecution to anyone without the prior consent of the CCDA.

10. **Breach of Cooperation**: It is expressly understood and agreed by the parties that the determination for whether these cooperation terms have been breached rests exclusively with the CCDA, so long as that determination is made in good faith and not arbitrarily. Should the CCDA determine that Travis Layman, after the date of this agreement: (a) has committed any further crime or has violated any condition of release or supervision imposed by the Court (whether or not charged); (b) has given false, incomplete, or misleading information; or (c) has otherwise breached any condition of this agreement, the CCDA will have the right, in its sole discretion, to void this agreement, in whole or in part. Furthermore, Travis Layman agrees that substantial compliance of this agreement is not acceptable and will be considered a breach of the cooperation agreement.

11. **Sentencing Information**: Travis Layman understands that the government may provide the contents of his proffer to any judge or jury who may sentence him upon conviction for his pending charges or for other charges for which he may be prosecuted and convicted as a result of further investigation.

12. **Brady Discovery**: Travis Layman understands that Brady v. Maryland and its progeny require that the CCDA provide any indicted defendant all information known to the government which tends to mitigate or negate such defendant's guilt. Should Travis Layman's proffer contain Brady material, the government will be required to disclose this information to the appropriate defendant(s).

/// /// ///

/// /// ///

13. **Memorialization of Agreement**: No promises, agreements or conditions other than those set forth in this agreement will be effective unless memorialized in writing and signed by all of the parties listed below or confirmed on the record before the Court.

I have carefully reviewed every part of this agreement with my attorney. I understand and voluntarily agree to its terms.

6/16/15
Date

Travis Layman

I represent the defendant as legal counsel. I have carefully reviewed every part of this agreement with defendant. To my knowledge, defendant's decision to make this agreement is an informed and voluntarily one.

6/16/15
Date

Gayle Kvernland
Attorney for Defendant

6/16/15
Date

Jack Bernstein
Attorney for Defendant

I represent the CCDA as a Deputy District Attorney. I agree to the terms and conditions as outlined in the agreement.

06-16-15
Date

John D. Wentworth
Sr. Deputy District Attorney

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR CLACKAMAS COUNTY

THE STATE OF OREGON, Plaintiff, v. TRAVIS ALLEN LAYMAN, Defendant.	Clackamas County Case #CR1401458 Multnomah County Case#14CR24600 **COOPERATION AGREEMENT**

The parties to these matters include the defendant, Travis Allen Layman, personally and through his attorneys, Jack Bernstein and Gayle Kvernland, the State of Oregon, through Deputy District Attorneys Greg Horner, John D. Wentworth and Lewis Burkhart, and Jeff Auxier, John Foote, District Attorney for Clackamas County and Rod Underhill, District Attorney for Multnomah County(hereinafter referred to collectively as "the State") formally enter into the following negotiated cooperation and resolution of the above-referenced case, (hereinafter referred to as the "agreement").

The purpose of the agreement is to ensure that all juries and courts have the full and complete truth from Mr. Layman concerning his personal knowledge and that of participants and/or witnesses that he has spoken to concerning the conspiracy, solicitation and murder of Debbie Higbee-Benton on May 28, 2011 charged in Clackamas County Circuit Court case CR1201792, CR1201793, CR1400775 and CR1100967, and other criminal matters.

The parties agree to the following:

A. That Travis Layman enters into a cooperation agreement concerning Clackamas County case number CR141458 and Multnomah County case number 14CR24600.

B. That Travis Layman is facing charges in Multnomah County for Robbery in the First Degree with a Firearm, Robbery in the Second Degree with a

Defendant Initials TL

Defense Counsel Gayle Kvernland Initials GK

Defense Counsel Jack Bernstein Initials JB

Deputy District Attorney Jeff Auxier Initials JA

Chief Deputy District Attorney Greg Horner Initials GH

Senior Deputy District Attorney John D. Wentworth Initials JW

Deputy District Attorney Lewis Burkhart Initials LSB

Firearm, Kidnapping in the First Degree with a Firearm, Burglary in the First Degree with a Firearm, Attempted Aggravated Theft in the First Degree and Unauthorized Use of a Vehicle with a Firearm. He is also facing charges in Clackamas County for Unlawful Delivery of Heroin, Conspiracy to Commit the Unlawful Delivery of Heroin, Unlawful Delivery of Methamphetamine and Conspiracy to Commit the Unlawful Delivery of Methamphetamine.

C. That pursuant to this agreement, on December 16, 2015, Mr. Layman entered pleas of guilty to Kidnapping in the Second Degree with a Firearm, Robbery in the Second Degree with a Firearm, Burglary in the First Degree with a Firearm, Attempted Aggravated Theft in the First Degree and Unauthorized Use of a Motor Vehicle with a Firearm in Multnomah County Circuit Court case number 14CR24600. The charge of Robbery in the First Degree with a Firearm was dismissed. A presentence investigation will be conducted and sentencing will be held over until resolution of *State v. Lynn Edward Benton*, Clackamas County Circuit case number CR1201792. That if Travis Layman complies with the terms of this agreement, in Multnomah County Circuit Court case number 14CR24600, Mr. Layman will be sentenced to the Oregon Department of Corrections for a minimum of 70 months followed by 3 years of post-prison supervision. At sentencing, the Multnomah County District Attorney's Office may recommend a term of incarceration up to the maximum allowable by law, but Mr. Layman cannot request less. The Clackamas County District Attorney's Office agrees to appear personally at Mr. Layman's sentencing hearing and provide the sentencing judge with information regarding Mr. Layman's testimony and cooperation with the State. The Multnomah County District Attorney's Office is in no way bound by the information provided by the Clackamas County District Attorney's Office, and may therefore make any sentencing recommendation it deems appropriate under the totality of circumstances.

D. That Mr. Layman will enter a plea of guilty to Unlawful Delivery of Methamphetamine (Substantial quantity) in Clackamas County Circuit Court case number CR1401458. Sentencing will be held over until resolution of *State v. Lynn Edward Benton*, Clackamas County Circuit Case number CR1201792. That if Travis Layman complies with the terms of this agreement, pursuant to his '8C' gridblock on this charge, Mr. Layman will be sentenced to the Oregon Department of Corrections for a term of 34 months

Defendant Initials

Defense Counsel Gayle Kvernland Initials GK

Defense Counsel Jack Bernstein Initials

Deputy District Attorney Jeff Auxier Initials JA

Chief Deputy District Attorney Greg Horner Initials

Senior Deputy District Attorney John D. Wentworth Initials

Deputy District Attorney Lewis Burkhart Initials LSB

followed by 3 years of post-prison supervision to be served concurrently with his sentence in Multnomah County Circuit Court case number 14CR24600. He will also receive a 180 day Oregon driver's license suspension as required by statute.

E. That Travis Layman agrees to waive all of his State and Federal Constitutional rights, including but not limited to: double jeopardy, statute of limitations, speedy trial, Fourth and Fifth Amendment rights, post-conviction relief, any *Blakely* claims, second look rights, state and federal habeas corpus rights, and all state and federal appellate rights and collateral review rights as they relate to all of the charges in the indictment.

F. That Travis Layman agrees that his waiver will prohibit any claim of violation of any State or Federal Constitutional Rights should he later raise any challenge to set aside the proceedings, plea, conviction or sentence.

G. That the State, will determine whether Mr. Layman has fully complied with the terms of this agreement. It is expressly understood and agreed by the parties that the determination for whether these cooperation terms have been breached rests exclusively with the mentioned deputy district attorneys or their designees, so long as that determination is made in good faith and not arbitrarily. Should the Clackamas County District Attorney's Office or the Multnomah County District Attorney's Office determine that the defendant, after the date of the agreement, breached any condition of this agreement, the Clackamas County District Attorney's Office or the Multnomah County District Attorney's Office will have the right, in its sole discretion, to void this agreement in whole or in part. Furthermore, Mr. Layman agrees that substantial compliance of this agreement is not acceptable and will be considered a breach of the cooperation agreement.

1. As part of this agreement, Mr. Layman agrees to testify truthfully at grand jury, trial and/or hearings, or any and all matters involving any suspects or this case. He also agrees to allow the State to utilize any and all of the information he has provided to the State to date in addition to any subsequent interviews thereafter.

Defendant Initials TL

Defense Counsel Gayle Kvernland Initials GK

Defense Counsel Jack Bernstein Initials JB

Deputy District Attorney Jeff Auxier Initials JA

Chief Deputy District Attorney Greg Horner Initials GH

Senior Deputy District Attorney John D. Wentworth Initials JW

Deputy District Attorney Lewis Burkhart Initials LSB

2. If the trial court finds that Mr. Layman was dishonest, lied, or committed perjury or false swearing at any proceeding related to this agreement then that shall constitute non-compliance with his agreement and Mr. Layman will lose all benefits of this agreement.

3. The parties understand that there is nothing to prevent the State from charging and prosecuting Mr. Layman for perjury, false swearing or any other charges against him if he is not truthful under oath in any hearing or trial.

4. The parties agree and understand that Mr. Layman is not receiving any type of immunity and/or agreement not to prosecute any other charges, whether State or Federal, in this case or any other matter. Nor, is Mr. Layman receiving consideration of any kind in any case in this jurisdiction or any other except as expressly stated in this agreement.

H. Mr. Layman understands and agrees, that should he violate this cooperation agreement or fail to fulfill its conditions for any reason, and his case then goes to sentencing, trial or other hearing(s), then all statements made to the State by him at any time will be admissible against him at all stages regarding these charges now pending or which may be filed in the future. In other words, Mr. Layman agrees that all statements he has made, or makes, prior to, subsequent to, or as part of the cooperation process, will be admissible against him in any subsequent proceeding. He has carefully considered this aspect of the bargain and accepts.

I. The parties further agree that should the Clackamas County District Attorney's Office or Multnomah County District Attorney's Office determine that Mr. Layman breached his agreement: (1) the defendant may not withdraw his guilty plea in case numbers CR1401458 and 14CR24600; (2) the Clackamas County District Attorney's Office and Multnomah County District Attorney's Office are free to prosecute him for any and all of the charges as listed in the Indictments, in the matter of *State v. Travis Layman*, Clackamas County Circuit Court case CR1401458 and Multnomah County Circuit Court case 14CR24600, (3) that the Clackamas County District Attorney's Office and Multnomah County District Attorney's Office are free to make any sentencing recommendation and is not bound by this agreement,

Defendant Initials _____

Defense Counsel Gayle Kvernland Initials GK

Defense Counsel Jack Bernstein Initials _____

Deputy District Attorney Jeff Auxier Initials JA

Chief Deputy District Attorney Greg Horner Initials _____

Senior Deputy District Attorney John D. Wentworth Initials _____

Deputy District Attorney Lewis Burkhart Initials LSB

and (4) Mr. Layman may be prosecuted for any crime committed by him, whether or not such crime was the subject of the agreement.

J. No promises, agreements or conditions other than those set forth in this agreement will be effective unless memorialized in writing and signed by all of the parties listed below or confirmed on the record before the Court.

K. Mr. Layman stipulates that the cooperation agreement shall remain in effect throughout the course of the criminal investigation and prosecution of all cases in which defendant cooperates with the state. In order to enforce this agreement, the Mr. Layman waives any future challenges to his right to a speedy trial, the statute of limitations and his rights against double jeopardy.

The defendant, Travis Layman, agrees to the following:

A. To cooperate and make himself available to the State and/or law enforcement agencies, whenever requested to do so and to truthfully answer any question put to him in all matters relating to the conspiracy, solicitation and murder of Debbie Higbee-Benton on May 28, 2011. That includes the right to debrief Mr. Layman further concerning any of the listed matters, and the right to require him to testify at grand jury, trial, and/or hearing(s), or any and all matters involving this case.

B. To accurately and truthfully tell all he knows about these matters described above involving the suspects and/or witnesses concerning the investigation of to the conspiracy, solicitation and murder of Debbie Higbee-Benton on May 28, 2011. Mr. Layman agrees to provide truthful and complete information, with no material misstatements or omissions of fact, relating directly or indirectly to any criminal activity. Mr. Layman will neither attempt to protect any person or entity who has been involved in criminal activity, nor falsely implicate any person or entity in criminal activity. Mr. Layman agrees to cooperate with any efforts and requests by the State and/or law enforcement agencies to verify that information provided is truthful and complete. He agrees that any interview may be electronically recorded or otherwise documented.

Defendant Initials TL

Defense Counsel Gayle Kvernland Initials GK

Defense Counsel Jack Bernstein Initials JB

Deputy District Attorney Jeff Auxier Initials JA

Chief Deputy District Attorney Greg Horner Initials ~~GH~~

Senior Deputy District Attorney John D. Wentworth Initials JW

Deputy District Attorney Lewis Burkhart Initials LSB

C. To testify truthfully and fully during questioning by the State, the defense, the court and the jury at all proceedings pertaining to all the matters described in this agreement.

D. Mr. Layman also agrees to allow the State to utilize any and all of the information he provided to the State as of this date, and any subsequent interviews thereafter.

E. Mr. Layman agrees not to reveal this cooperation or any information about this agreement or any related investigation or prosecution to anyone, without the prior consent of the Clackamas County District Attorney's Office.

F. The Clackamas County District Attorney's Office may make any derivative use of, and may pursue investigative leads suggested by, any statements or information provided by Mr. Layman under this agreement. This provision eliminates the requirement of a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441, 460 (1972), wherein the State would otherwise have to prove that the evidence sought to introduce against Mr. Layman was derived from a "legitimate source wholly independent" of statements or information from the client.

G. That Travis Layman will not engage in new criminal activity or attempt to negatively influence any ongoing criminal investigation in case numbers CR1201792, CR1201793, CR1400775 and CR1100967.

H. The failure to comply with any condition(s) of this agreement will result in a finding by the State of non-compliance with the terms and conditions of this agreement, and, accordingly, a request by the state to the trial judge for the co-defendants and suspects, or Mr. Layman's sentencing judge, to so find and to thereby derive Mr. Layman of any and all benefits of this agreement.

I. Mr. Layman understands that there are no other promises, either express or implied other than those contained in the agreement. This entire agreement is written and contained in this document signed below by the parties. Any amendment must be written and signed by the parties below.

Defendant Initials _____

Defense Counsel Gayle Kvernland Initials _____

Defense Counsel Jack Bernstein Initials _____

Deputy District Attorney Jeff Auxier Initials JA

Chief Deputy District Attorney Greg Horner Initials _____

Senior Deputy District Attorney John D. Wentworth Initials _____

Deputy District Attorney Lewis Burkhart Initials LSB

Defendant Travis Layman — Dated 01/21/16

(by my signature above, I agree that I have read each page I initialed and understand this agreement. I know that I can ask for more time to review this document with my lawyer.)

Gayle Kvernland, Attorney for Defendant — Dated 1/21/16

Jack Bernstein, Attorney for Defendant — Dated 1/21/16

Jeff Auxier, Deputy District Attorney, Multnomah County — Dated 1/26/16

Greg Horner, Chief Deputy District Attorney, Clackamas County — Dated 1/21/16

John D. Wentworth, Deputy District Attorney, Clackamas County — Dated 01/21/2016

Lewis Burkhart, Deputy District Attorney, Clackamas County — Dated 1/21/16

Submitted by

Defendant Initials TL

Defense Counsel Gayle Kvernland Initials GK

Defense Counsel Jack Bernstein Initials JB

Deputy District Attorney Jeff Auxier Initials JA

Chief Deputy District Attorney Greg Horner Initials GH

Senior Deputy District Attorney John D. Wentworth Initials JW

Deputy District Attorney Lewis Burkhart Initials LSB

John D. Wentworth, OSB #944620
Senior Deputy District Attorney
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Oregon City, Oregon 97045
(503) 655-8353

Page 8 of 8, **Cooperation Agreement**, *State v. Travis Layman*, Clackamas County Circuit Court case CR1401458 and Multnomah County Circuit Court case CR1401458.

Defendant Initials _____

Defense Counsel Gayle Kvernland Initials _____

Defense Counsel Jack Bernstein Initials _____

Deputy District Attorney Jeff Auxier Initials JA

Chief Deputy District Attorney Greg Horner Initials _____

Senior Deputy District Attorney John D. Wentworth Initials _____

Deputy District Attorney Lewis Burkhart Initials LSB

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 18,530 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 27, 2022.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Christopher A. Perdue #136166, Assistant Attorney General, attorney for Plaintiff-Petitioner on Review.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By David Sherbo-Huggins at 4:43 pm, Oct 27, 2022

DAVID SHERBO-HUGGINS OSB #105016
SENIOR DEPUTY PUBLIC DEFENDER
David.Sherbo-Huggins@opds.state.or.us

Attorneys for Respondent on Review
Lynn Edward Benton