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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 No. CR1201792 CA A164057 SC S069454

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

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

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

Continued…

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BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

INTRODUCTION

People often approach law enforcement with information about represented criminal defendants. Some people, such as adults-in-custody (AICs), may even hope to benefit from providing that information. But whatever their motivation, people do not become state agents subject to Article I, section 11, merely by discussing information with the state. Rather, to turn someone into a state agent, the state must authorize that person to act on its behalf. In other words, the state must *do* something—instruct, assist, or compensate a person—to manifest an intent to confer authority on that person.

In this case, the state met with an AIC on multiple occasions to discuss his offer to provide information about defendant's incriminating statements. After each meeting, the state admonished the AIC that he was not being directed to speak with defendant. Although the state met with the AIC more than once, the state formed no agreement or implicit understanding with him. It offered no instructions or assistance that would facilitate the elicitation of information from defendant. And it identified no benefit that the AIC would receive for more or better information in the future. The AIC nevertheless continued to gather information in the hope of obtaining some benefit. Under

those circumstances, the state did not make the AIC its agent. The Court of Appeals erred by concluding otherwise.

BACKGROUND

A. After defendant's wife was found dead, detectives suspected that defendant might have been involved.

Defendant was a sergeant for the Gladstone Police Department and married to the owner of a Gladstone hair salon. *State v. Benton*, 317 Or App 384, 388, 505 P3d 975 (2022). In May 2011, defendant's wife was found dead in the salon from a gunshot wound, strangulation, and blunt force trauma. *Id.* Detectives began to suspect that defendant was involved in the homicide after interviewing him and learning that he had been estranged from his wife over abuse allegations. *Id.* at 388–90.

Detectives also received a tip that a woman named Susan Campbell may have helped with the killing. *Id.* at 390. Detectives found a gun near Campbell's home that matched the gun likely used in the homicide. *Id.* Further investigation revealed that Campbell had been in contact with defendant shortly before and after the homicide. *Id.* at 389, 391. In fact, defendant had spoken often with Campbell on a cellphone that he initially tried to hide from investigators. *Id.* at 389. When detectives grew worried that Campbell might dispose of evidence, they arrested her for aggravated murder. *Id.* at 391. Campbell eventually revealed that defendant had offered money to her and her son, Jaynes, to kill his wife. (Court Ex 21).

In 2012, the state and Campbell entered into a cooperation agreement. *Benton*, 317 Or App at 392. As part of the agreement, Campbell testified at grand jury and committed to testifying at trial. (eTCF 348). Based on Campbell's testimony, a grand jury indicted defendant for aggravated murder, attempted murder, solicitation, and conspiracy. *Benton*, 317 Or App at 392.

At the end of 2012, the police arrested defendant and lodged him at Multnomah County Jail pending trial. *Id.* There, between April and August 2015, he lived and worked with another AIC, Travis Layman. *Id.*

B. During pretrial detention, defendant made statements to a fellow AIC, Layman, about his involvement in the homicide.

Layman had served several years in prison, most of them in the State of Washington. (eTCF 3556; P Tr 7927–29).[1] Later, while serving time in Oregon, he sometimes learned information about inmates and offered that information to state officials for better treatment in his own cases. *Benton*, 317 Or App at 409; (eTCF 3556). He had mixed results: "Sometimes his offers and information have been received positively resulting in a benefit to him and sometimes they have not." *Benton*, 317 Or App at 409.

In April 2015, Layman and defendant were both living and working in Unit 8C as trusties for the jail. *Benton*, 317 Or App at 392; (eTCF 3556).

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[1] The record consists of two sets of transcripts, one for pretrial proceedings, the other for trial proceedings. The state uses "P Tr" to denote the transcript for pretrial proceedings.

Within a month and a half, they had become friendly and requested that they have cells next to each other. *Benton*, 317 Or App at 409. Over time, Layman and defendant discussed their lives, including why they were in jail. (eTCF 3556–57). During those discussions, Layman learned that defendant was involved in the homicide of a woman, and, at some point, jail deputies told Layman that defendant was in jail for killing his wife. *Benton*, 317 Or App at 392; (eTCF 3556–57). As defendant told Layman more about the charges, he let on that he had committed the homicide. *Benton*, 317 Or App at 409. Layman began taking notes on the conversations without defendant's knowledge. *Benton*, 317 Or App at 410; (eTCF 3557).

C. Between June 16 and July 30, Layman made three proffers to the state, none of which led immediately to a cooperation agreement.

Based on the information that he had gathered from defendant, Layman made three proffers to the Clackamas County District Attorney's Office—on June 16, July 2, and July 30, respectively. *Id.* at 410–416.

1. June 16: Layman offered what he initially knew about defendant.

After Layman reached out to them, Clackamas County detectives and district attorneys agreed to meet with him to hear what he had to say. *Id.* at 409. They arranged for Layman to be put on the judicial calendar in Multnomah County and transported there for the meeting. *Id.* at 410.

During the first proffer, reading from undated notes, Layman told the prosecutors and detectives what defendant had told him—namely, that defendant wished that he would have committed the murder in another county because Clackamas was "crooked"; that he wished that he had stopped the plan after his accomplices had "screwed up" an earlier murder attempt involving a drug overdose; that his current girlfriend knew that he had murdered his wife; that one of his accomplices, Jaynes, would likely turn on him; that his wife "had it coming"; and that Campbell's husband knew about the attempted overdose. *Id.* Layman explained that he decided to take notes on his conversations with defendant because he hoped that "it would help [him] in [his] case." *Id.* at 411. He also said that "he did not like that defendant did this to a woman." *Id.*

Detectives asked Layman what he knew about defendant and the overdose attempt, other people's involvement in the crimes, and the amount of money that defendant offered Campbell in exchange for murdering his wife. *Id.* at 410–11. Layman did not know the answers. *Id.* at 411. At the end of the proffer, an investigator advised Layman that "we're not directing you or telling you to have any conversations with [defendant]. * * * [T]he fact that you're talking to us [does not mean that] we would in any way direct you, or tell you to have any conversations with him." *Id.* The detective then told Layman, "[But] if there's anything that you remember that * * * you think that we do need to know to make an informed decision [about forming a cooperation agreement],

will you tell one of your attorneys, and they can contact the prosecutor." *Id.* at 412.

In the days after the June 16 proffer, Layman continued to talk to defendant and take notes on their conversations. *Id.* at 412. He kept track of dates because the exact dates seemed important to the state. *Id.* He also continued to cooperate with law enforcement in other cases in Multnomah and Clackamas Counties. *Id.*

2. July 2: Layman offered more information after sensing that the state did not want to enter a cooperation agreement.

Before the July 2 proffer, a deputy district attorney asked an investigator to secure a location at a courthouse for further discussions with Layman. *Id.* As he had before, the investigator arranged a transport for Layman for a "hearing on 'something'" to avoid suspicion. *Id.* Layman spoke with prosecutors and investigators about the information that he had already provided, but, at some point, it became clear that the parties would not enter a cooperation agreement. *Id.* When the deputy district attorney was about to end the meeting, Layman told the investigator that he had additional information. *Id.*

Layman then related to the prosecutors and investigators what defendant told him about his trial strategy, his relationship with his girlfriend, his move from his wife's home and how the timing of the move made the situation look

bad, the manner of wife's killing and the discovery of the body, and his response when he came to the scene, with the suggestion that defendant was faking his reaction and could have "[won] an Oscar." *Id.* at 413.

Layman also told the detectives that he obtained information by asking defendant "if there was anything new after defendant had had a meeting with an attorney or investigator" and then would ask specific questions as defendant started talking. *Id.* at 414. Layman further explained that, after the first proffer, he had "pulled back a little bit" in his conversations with defendant because, in his mind, "it's kind of done. He's not going to tell me anything." *Id.* at 413. But then defendant "hit [him] with that,[2] that was, like, kind of out of left field." *Id.* Layman explained that he did not "come out of the blue and just ask [defendant] something" about his case. (P Tr 8154). He also described how "it's not only just asking [defendant] questions"; in fact, sometimes "[defendant would] come back [from a meeting] and tell me" what happened without prompting. (P Tr 8171). He reiterated "it wasn't just always me just initiating conversation." (P Tr 8172).

[2] The record is somewhat unclear what Layman meant by "that." In context, it appears that Layman was referring to what he had just told investigators about how defendant "finished" the killing. (P Tr 8150–53). He explained how he "didn't even want to go back and write it down" because it could "just be all complete bullshit." (P Tr 8153).

The investigator asked if Layman had any more information about where defendant was when he got the call about the victim, how defendant harmed the victim, and what Jaynes did during the murder. *Benton*, 317 Or App at 413. Layman did not know the answers to any of those questions. *Id.* At the end of the meeting, the investigator admonished him that "[he had] to understand [they] are not directing [him] to have any communication * * * with [defendant] at all." *Id.* The state still had not entered into a cooperation agreement with Layman. *Id*.

After the second proffer, Layman spoke again with defendant and asked him questions about the crimes, learning more information. *Id.* at 415–16. Around the same time, Layman wrote a letter to Judge You and suggested that he had information that would help him secure a good deal in his Multnomah County case. *Id.* at 414. He also wrote a letter to Clackamas County Deputy District Attorney Wentworth expressing his frustration about their discussions of defendant's case. *Id.* The same day, he wrote a second letter to DDA Wentworth suggesting that he had new information about the murders and asking Wentworth to contact his attorneys. *Id.* at 414–15. Wentworth did not respond to either letter. *Id.* at 415.

On July 6, Layman's attorney moved for a continuance in his Clackamas County case without objection from the state. *Id.* at 414. The record does not

reflect any connection between the lack of objection and Layman's proffers to the state in defendant's case.

On July 18, Layman was moved away from defendant's cellblock without any involvement from prosecutors or detectives in defendant's case. *Id*. at 415. Except for a single friendly letter that defendant sent to Layman, to which Layman did not respond, Layman had no contact with defendant after July 18. (eTCF 3559).

3. July 30: Layman offered more information with more details.

On July 30, almost two weeks after Layman moved out of defendant's cellblock, Layman met again with Clackamas County detectives and district attorneys. *Benton*, 317 Or App at 415.

Layman provided more details about defendant's crimes from conversations with defendant between July 2 and July 18. *Id.* He told detectives what defendant said about Jaynes's role in the murder, including that Jaynes "finished it." *Id.* He identified defendant as a former police officer who had training as an EMT. *Id.* at 415–16. He noted that defendant had said that Campbell mistook the date when the attempted overdose occurred and that defendant had mentioned that Fentanyl was used. *Id.* at 416. He specified how much defendant had paid Campbell for the murder. *Id.* He described how defendant would not identify the murder weapon but did reveal that it had

incriminating DNA evidence on it. *Id.* He also confirmed that defendant's motive for the murder was to avoid losing money in a divorce. *Id.*

The state again admonished Layman that he was not being directed to talk to defendant. *Id.* Prosecutors and law enforcement in defendant's case met with Layman a couple more times over the next few months after the July 30 proffer to discuss what consideration, if any, Layman might receive for his information about defendant. *Id.* Only in January 2016, months after Layman had last communicated with defendant, did the parties enter a cooperation agreement. *Id.* Under it, Layman would testify against defendant and Clackamas County prosecutors would inform the sentencing court in Layman's Multnomah County case that he had been helpful to them in defendant's case. *Id.*

D. The trial court denied defendant's motion to exclude Layman's testimony, and the state presented that testimony at defendant's trial.

Before trial, defendant moved to exclude Layman's testimony about the statements defendant made to Layman on the ground that Layman was a state agent and that his discussions with defendant violated defendant's right to counsel. *Id.* at 408. The trial court issued a final letter opinion in which it made findings consistent with the evidence described above. It found that "[a]t no time during the proffers did law enforcement or the prosecutors share information regarding Defendant's case with Layman or ask Layman to

question Defendant about specific subjects." (eTCF 3559). It further found that, although "[t]he subject matter of the questions [detectives asked] of Layman may have suggested what they were investigating or what they deemed important," the state's interest in defendant was not "the impetus behind Layman's subsequent conversations of questioning Defendant." (eTCF 3559).

Based on those findings, the trial court denied defendant's motion to exclude Layman's testimony about defendant's statements. It reasoned that the state's "circumstantial encouragement" of Layman—by asking him follow-up questions and accepting his notes—was insufficient to make Layman a state agent. (eTCF 3560). It also noted that, although detectives did not instruct Layman to not ask questions, the state did not communicate anything to him that would prompt him to believe that he was authorized to "ask additional questions of Defendant on behalf of the State or as a predicate to a subsequent cooperation agreement." (eTCF 3560). It further observed that the state "never placed or allowed [Layman] to remain with Defendant" and that the state never "compensated [Layman] before or during his conversations with the Defendant." (eTCF 3560). It likewise found that Layman would not have understood the state's decision to meet with him as an agreement to provide him a benefit, especially because "Layman had previously provided information about other inmates before without benefiting therefrom." (eTCF 3560). At bottom, the trial court concluded, "[t]here is no evidence that law enforcement

or the prosecutors took some action beyond merely listening to Layman that was designed deliberately to elicit incriminating remarks of Defendant." (eTCF 3560).

Shortly before trial, Campbell reneged on her cooperation agreement, and the state did not call her to testify. *Benton*, 317 Or App at 392. Instead, the state offered Layman's testimony about his conversations with defendant. *Id.* at 393. Layman explained that defendant told him that he had hired Campbell and Jaynes to kill his wife, that he had wished that he had stopped it after a botched attempt involving Fentanyl, that he helped "finish[] her off" after Campbell called him and told him that the victim was not dead, and that he killed his wife to avoid her receiving any part of his retirement pension. *Id.* A unanimous jury found defendant guilty of two counts of aggravated murder and two counts of conspiracy.[3] *Id.*

E. The Court of Appeals reversed the trial court's ruling.

The Court of Appeals reversed the trial court's order, holding that Layman became a state agent after the July 2 proffer meeting.[4] *Id.* at 426–27.

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[3] The trial court merged the conspiracy convictions and one of the convictions for aggravated murder with the other conviction for aggravated murder. *Benton*, 317 Or App at 393. It dismissed one count of attempted murder on a post-trial motion. *Id.*

[4] On appeal, defendant raised 31 assignments of error, of which the Court of Appeals addressed 12. The Court of Appeals reversed the judgment

Footnote continued…

Relying on *State v. Sines*, 359 Or 41, 379 P3d 502 (2016), the court acknowledged that common-law agency principles may help a court determine when a person becomes a state agent. *Id.* at 425 (noting that an agency relationship may form depending on the state and the informant's "objective statements and conduct"). But it noted that common-law agency principles need not be "strict[ly] appli[ed]" in this context. *Id.* at 424.

Applying those common-law agency principles, the court "readily conclude[d]" that Layman was not acting as a state agent in questioning defendant either before or after the initial June 30 proffer. *Id.* at 425. But it concluded that Layman became a state agent after the July 2 proffer because, at that point, "[t]he level of state involvement in Layman's questioning of defendant shifted significantly * * *." *Id.* at 426. It emphasized that the state incentivized Layman to continue to ask questions of defendant by evincing a willingness to hear new information, refusing to offer him any benefits in the form of a reduced sentence during negotiations, and then failing to affirmatively discourage his questioning of defendant. *Id.* It thus held that "[b]y July 2, the totality of the state's involvement in Layman's activities of questioning

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based only on assignments of error nine and ten relating to whether Layman was a state agent after July 2, 2015.

defendant about the murder of the victim was sufficient to trigger the state constitutional exclusionary protections." *Id.* at 428.

QUESTION PRESENTED

When does a private actor become a state agent for purposes of Article I, section 11, of the Oregon Constitution?

PROPOSED RULE OF LAW

A private actor becomes a state agent for purposes of Article I, section 11, if a reasonable person would conclude that the state authorized the person to elicit incriminating information from defendant on the state's behalf. Relevant factors include (1) whether an express agreement or informal understanding developed between the state and the person, (2) whether the state offered instructions or assistance to the person to help elicit information, and (3) whether the state offered benefits to the person in exchange for specific information. But private actors do not become state agents only because they want or expect a benefit. Nor must the state affirmatively discourage private actors from asking questions of a defendant if it makes clear that they are not being authorized to do so.

SUMMARY OF ARGUMENT

A private actor does not become a state agent under Article I, section 11, unless a reasonable person would conclude that the state intended to authorize that person to act on its behalf. Under Oregon law, as under federal law, the

key question for state agency is what the state says or does to convey its intent. The pivotal factors for determining state agency are (1) the relationship between the state and the informant, (2) the offer of any directions or assistance to facilitate questioning by the state, and (3) the source of the informant's motivation to do what the state has communicated that it wants.

Here, based those factors, Layman was not a state agent after the July 2 proffer meeting. A reasonable observer would not conclude that the state and Layman had come to an informal understanding under which Layman would receive certain benefits if he gathered specific information. Nor did the state direct or instruct Layman to ask questions or imply that it wanted Layman to elicit certain information from defendant about his case. Finally, the state did not suggest, much less identify, any particular benefit for Layman in the offing. Rather, Layman acted on his own initiative. For those reasons, Layman was never the state's agent.

ARGUMENT

A. An informant does not act as a state agent unless a reasonable person would conclude that the state directed the informant to act on the state's behalf.

Article I, section 11, of the Oregon Constitution provides that, "[i]n all criminal prosecutions, the accused shall have the right * * * to be heard by

himself and counsel."[5] "After a defendant has been charged with a crime and the right to counsel has attached, Article I, section 11, of the Oregon Constitution prohibits the police from asking the defendant about that crime without first notifying his or her lawyer." *State v. Prieto-Rubio,* 359 Or 16, 18, 376 P3d 255 (2016). The prohibition on asking the defendant about a crime extends to the state's officials and their agents. *State v. Smith*, 310 Or 1, 13, 791 P2d 836 (1990). The narrow question here is under what circumstances a person becomes a state agent for purposes of questioning a defendant.

1. Under Oregon law, a person does not become a state agent unless a reasonable observer would conclude that the state authorized the person to act on its behalf.

Under this court's case law, a person becomes a state agent only if the state manifests its intent to confer authority on that person to do specific things on its behalf. In other words, a common-law agency test applies. The key inquiry, then, is whether the state's conduct would suggest to a reasonable observer that the state intended to create an agency relationship with the person.

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[5] In the Court of Appeals, defendant asserted that Article I, section 12, also applied to Layman's conversations with defendant. *See* Opening Brief, *State v. Benton* (A164057) at 121. But because defendant did not "make a separate argument under that section," the Court of Appeals addressed only Article I, section 11. *Benton*, 317 Or App at 421 n 3. The sole issue before this court, therefore, is whether Article I, section 11, required suppression of Layman's testimony about defendant's statements.

This court has already explained how to answer that question for purposes of Article I, section 9, in *Sines*, when it held that a private person did not become a state agent even though the state spoke with her about taking certain evidence, hoped that she would take it, and made it easier for her to do so. In *Sines*, a housekeeper was concerned that the defendant was sexually abusing a child. *Sines*, 359 Or at 44–45. She called DHS and asked whether the state could test the child's underwear if she took it from the defendant's house. *Id.* at 46, 59. The DHS employee told her that the state had a laboratory that could test the evidence and could "probably tell a lot" about her sexual-abuse concerns. *Id.* He also gave the housekeeper his direct telephone number. *Id.* Even though the DHS employee privately expected the housekeeper to turn over the underwear, the DHS employee made clear that he was not asking the housekeeper to take it. *Id.* But the DHS employee also made it easier for the housekeeper. *Id.* Unbeknown to the housekeeper, the DHS employee delayed a local sheriff's routine follow-up safety check by four days, presumably to give the housekeeper more time to take the underwear. *Id.* A few days later, the housekeeper turned over the underwear to the police. *Id.* The Court of Appeals reversed the trial court's denial of a motion to suppress the evidence, holding that the housekeeper had become a state agent through the support and encouragement of the DHS employee. *Id.* at 48–50.

This court reversed. It started by observing that common-law agency principles are pivotal to determining state agency. *Id.* at 55. The key inquiry is whether the "principal's manifestation to an agent" could be "reasonably understood by the agent" to express "the principal's assent that the agent take action on the principal's behalf." *Id.* (quoting *Restatement (Third) of Agency* § 3.01 (2006)). What mattered in *Sines*, then, was whether the state expressed its assent that the housekeeper "should or may act on behalf of the state." Under that test, this court concluded that the housekeeper was not a state agent.

In coming to that conclusion, this court rejected the defendant's arguments that the housekeeper became a state agent because the state supported her by delaying the safety check, answering her questions, and failing to discourage her. *Id.* at 60–62. This court reasoned that the delay of the safety check did not turn the housekeeper into a state agent because "[t]hat unilateral action by the state * * * was never communicated to the housekeeper, and could not have affected her or her decision to act." *Id.* at 60. Nor did the DHS employee's discussion of how the underwear could be tested: "The fact that the DHS employee truthfully answered the anonymous caller's unsolicited question about what they could determine from particular evidence and provided his direct phone number do not rise to the level of state instigation or direction to make the caller's subsequent search state action." *Id.* at 60–61.

Finally, the DHS employee's failure to warn the housekeeper that stealing the underwear constituted a theft did not make the housekeeper a state agent either. *Id.* at 61. This court reiterated that "[t]he ultimate issue is whether the housekeeper acted on behalf of the state" and that this court determines that issue "by considering whether the state's conduct would have conveyed to her that she was so authorized." *Id.* at 61–62. It then observed that "[f]ailing to warn or advise the housekeeper against engaging in a potentially criminal act is not such conduct" because "the fact that an officer did not discourage the private party from undertaking the search generally has been found insufficient" to attribute the search to the state. *Id.* at 62 (quoting Bergman and Duncan, *4 Wharton's Criminal Procedure* § 24:20 at 24–78).

Put simply, under *Sines*, a private actor does not become a state agent even if the state subjectively hopes that the person will do something, truthfully answers questions about the consequences of doing that thing, makes it easier to do it without communicating that help to the person, and fails to discourage the person from doing it. Rather, a person becomes a state agent only if the state directs or authorizes the person to act on the state's behalf.

The principles of *Sines* apply with equal force to the Article I, section 11, context, as this court's cases already show. For starters, informants do not become state agents merely because they repeatedly discuss crimes with a defendant or learn that the state is interested in information about a defendant.

In *Smith*, for instance, deputies told the defendant's cellmate, Jischke, "that if he heard something [about the defendant] and wanted to pass it along, he could, but he was not required to do so." *Smith*, 310 Or at 14. Although the deputies "instructed [Jischke] not to question defendant" and Jischke generally heeded that direction, Jischke did ask the defendant "clarifying questions" if "he did not understand what defendant was telling him." *Id.* This court concluded that Jischke was not a state agent. It first determined that a prison informant does not become a state agent unless the state confers its authority by "initiating, planning, controlling, or supporting [the informant's] activities." *Id.* at 13 (quoting *State v. Lowry*, 37 Or App 641, 651, 588 P2d 623 (1978)). It then reasoned that the state had not done any of those things with Jischke: the deputies "made no deals with Jischke, paid him no money, and offered him no encouragement." *Id.* at 14. That was so even though the deputies knew that Jischke may be talking to the defendant and had advised him that he could pass along information if he wanted.

Likewise, informants do not make themselves state agents merely because they have information and hope to receive a benefit for it. In *State v. McNeely*, 330 Or 457, 8 P3d 212 (2000), for example, an informant, Thompson, was placed in the same cell as the defendant and learned information about the defendant's involvement in an aggravated murder that the state used in the defendant's trial. *Id.* at 459–60. At trial, the defendant moved to suppress

Thompson's testimony, arguing that an informant can "automatically bec[o]me a 'state agent' for purposes of the state and federal constitution" if he or she "was attempting to gain a benefit from the state by providing information to the police." *Id.* at 460. Affirming the trial court's rejection of that argument, this court necessarily assumed that Thompson's subjective hopes or expectations of a benefit could not make him into a state agent and, therefore, that Thompson had not become a state agent because no one "from the state initiated, planned, controlled, or supported" his activities. *Id.* at 461.

Nor do people become state agents merely because they persist in seeking information after the state has conveyed that it is not asking them to do so. In *State v. Acremant,* 338 Or 302, 108 P3d 1139 (2005),[6] for example, the state instructed the defendant's father to ask the defendant about where a body was buried during a visit to the defendant in pretrial detention. *Id.* at 329. The father asked the defendant about the body during two separate encounters. *Id.* at 325–26. During the first encounter, the defendant refused to tell his father the body's location. *Id.* at 325. At that point, the detectives did not ask the father to continue questioning the defendant. *Id.* at 326. But the father

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[6] In *Acremant*, the defendant argued under Article I, section 12, that certain statements obtained by his father should not have been admitted in his criminal trial. *Acremant*, 338 Or at 328. But this court's analysis drew on *Smith*, an Article I, section 11, case and focused solely on whether the defendant's father was the state's agent. *Id.* at 328–29.

persisted. *Id.* During a second encounter about a week after the first, the father prompted another discussion about the body, and this time the defendant gave up the body's exact location. *Id.* This court determined that "as a matter of law" the father was not acting as a police agent during that second encounter. *Id.* at 328. It reasoned that the detectives "had not instructed [the father] to continue to try to obtain information after [the] defendant refused to disclose it." *Id.* For that reason, this court concluded, "the police lacked sufficient involvement in controlling or directing [the father's] actions [during the second encounter] to render him a state agent." *Id.*

In summary, as this court's cases show, the state makes a person a state agent if it manifests its intent to confer authority on that person to act on the state's behalf. 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." *Sines*, 359 Or at 56 n 7. Directions, instructions, informal agreements with the suggestion of concrete benefits—all those things would likely manifest the state's intent to authorize a person to act on its behalf. But the state does not manifest an intent to confer authority merely by speaking with people, asking questions about what they know, truthfully answering their inquiries, taking helpful action unbeknown to them, or failing to discourage them.

2. Other jurisdictions also recognize that an informant is not a state agent unless the state directed the informant to obtain information or offered a *quid pro quo* arrangement.

The same analysis applies under the Sixth Amendment and analogous state constitutional provisions protecting a person's right to counsel. Under the Sixth Amendment, after a defendant has been indicted, government agents may not deliberately elicit incriminating information in the absence of counsel. *Massiah v. United States*, 377 US 201, 206, 84 S Ct 1199, 12 L Ed 2d 246 (1964). The state "deliberately elicits" incriminating statements when it "knowingly circumvent[s] the accused's right to have counsel present in a confrontation between the accused and a state agent," including when the government "must have known" that "its agent was likely to obtain incriminating statements from the accused in the absence of counsel." *Maine v. Moulton*, 474 US 159, 176, 106 S Ct 477, 88 L Ed 2d 481 (1985); *id.* at n 12. But "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." *Id.* at 176. In other words, "a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police." *Kuhlmann v. Wilson*, 477 US 436, 459, 106 S Ct 2616, 91 L Ed 2d 364 (1986).

Applying those principles, many courts have found that an informant is a state agent only when the government has instructed the informant to obtain information about a particular defendant or a specific topic. *See, e.g.*, *United States v. LaBare*, 191 F3d 60, 65–66 (1st Cir 1999) (finding no state agency even though the government enlisted an informant to report whatever he learns about crimes from AICs in general); *Moore v. United States*, 178 F3d 994, 999 (8th Cir 1999) (finding no agency where the government did not direct informant to procure more information from the defendant after a proffer meeting); *United States v. Love*, 134 F3d 595, 604 (4th Cir 1998) (same); *United States v. Birbal*, 113 F3d 342, 346 (2d Cir 1997) (same); *United States v. Watson*, 894 F2d 1345, 1348 (DC Cir 1990) (same). Indeed, at least one court has suggested that "[a]lthough there are some differences in the approaches of the various jurisdictions, they are unified by at least one common principle: to qualify as a government agent, the informant must at least have some sort of agreement with, or act under instructions from, a government official." *Manns v. State*, 122 SW3d 171, 183–84 (Tex Crim App 2003).

Similarly, other courts have reasoned that, to transform informants into state agents, the state must agree to compensate the informants or create a reasonable belief that they will be compensated. *See Thompson v. Davis*, 941 F3d 813, 816–17 (5th Cir 2019) (requiring for state agency a showing that the informant "(1) was promised, reasonably led to believe [that he would receive],

or actually received a benefit in exchange for soliciting information from the defendant; *and* (2) acted pursuant to instructions from the State, or otherwise submitted to the State's control." (Emphasis in original.)); *United States v. Taylor*, 800 F2d 1012, 1016 (10th Cir 1986) (finding no state agency in the absence of an "express or implied *quid pro quo*" or instructions or directions by the government).

Some courts consider a combination of those factors. In California, for instance, the crucial questions for determining state agency are whether the state made promises to the informant about a possible deal, directed the informant to obtain more information, or suggested that obtaining more information would benefit the informant. *People v. Fairbank*, 16 Cal 4th 1223, 1248–49, 947 P2d 1321 (1997), *as modified on denial of reh'g* (Feb. 18, 1998) (finding no agency based on those factors). Likewise, in Wisconsin, courts consider whether the state has promised any consideration to an informant in exchange for information and the extent to which the state directed or controlled the informant's questioning. *State v. Arrington*, 402 Wis 2d 675, 707–11, 976 NW2d 453 (2022) (finding no agency where officers did not promise any consideration as to a particular defendant or try to control the informant's questioning, even though the state provided the informant a tape recorder to record conversations).

To be sure, even when courts purport to apply similar tests, it is not always obvious when a private actor becomes a state agent. It often depends on the specific facts of the case. *See, e.g.*, *United States v. Henry*, 447 US 264, 270, 100 S Ct 2183, 65 L Ed 2d 115 (1980) (finding agency where a government agent told a paid informant to pay attention to what the defendant said about a crime); *State v. Ashby*, 336 Conn 452, 475–84, 247 A3d 521 (2020) (finding agency where, even absent instructions or an express *quid pro quo*, detective expressed openness to additional information being gathered about certain topics and asked informant if he was willing to wear a wire); *In re Pers. Restraint of Benn*, 134 Wash 2d 868, 911–13, 952 P2d 116 (1998) (finding no agency even though paid informant had long history of offering information in exchange for benefits because long course of history with law enforcement did not make a person an agent).

Even within the same circuit, subtly different facts can prove dispositive. *Compare United States v. Malik*, 680 F2d 1162, 1165 (7th Cir 1982) (finding no agency where informant was not "under instructions as a paid informant of the Government"), *with United States v. York*, 933 F2d 1343, 1358 (7th Cir 1991) *overruled on other grounds by Wilson v. Williams*, 182 F3d 562 (7th Cir 1999) (finding agency where an FBI agent had an informal agreement to help the informant with his parole application in exchange for specific information that the agent was "interested in receiving"); *compare Brooks v. Kincheloe*, 848

F2d 940, 945 (9th Cir 1988) (finding no agency because informant took some action before meeting with detectives and detectives did not issue instructions or promise payment), *with Randolph v. California*, 380 F3d 1133, 1144 (9th Cir 2004) (finding agency because informant "hoped to receive leniency" and detectives consciously took advantage of that hope, even though informant was not instructed to ask questions). But regardless of those varying outcomes, most jurisdictions require that, at the very least, a government official take some action beyond merely meeting with an informant and discussing the informant's information. *See Manns*, 122 SW3d at 182–83 nn 58–59 (collecting cases).

3. To determine whether an informant is a state agent, courts consider the nature of any agreement, the state's instructions or assistance, and the informant's motives.

As this court's cases and other persuasive authorities have established, the most useful factors for determining when an informant has become a state agent are (1) the relationship between the state and the informant, (2) the presence or absence of instructions or assistance in eliciting information, and (3) the source of the informant's motive to offer information to the state.

Nature of Relationship. The closer that the relationship between the state and an informant comes to an express, specific agreement, the more likely that the informant has become a state agent. Two principles guide this part of the inquiry: (1) informants become state agents if they enter into a formal

agreement or an implied *quid pro quo* understanding that any reasonable observer could ascertain; but (2) informants do not become state agents only because they have cooperated with the state in the past.

The easy case is when the state and an informant have entered into a formal agreement with specific terms about a particular defendant—then, the informant is a state agent, as almost every jurisdiction has held. But an implied agreement, or an informal understanding, that an informant will receive certain benefits for certain information may also make the informant a state agent in the totality of the circumstances. *See, e.g.*, *York*, 933 F2d at 1357 (observing that "[a]greements of course, don't have to be explicit or formal, and are often inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct over a sustained period of time"); *In re Neely*, 6 Cal 4th 901, 915, 864 P2d 474 (1993) (same). What tips the balance is how obvious it would be to a reasonable observer that the state is offering an identifiable benefit—payment of money or a reduction in a sentence—for particular information. At the very least, if the state indirectly, but definitively, spells out what it wants and what an informant may get for it, an agency relationship likely forms. *See, e.g.*, *State v. Bruneau*, 131 NH 104, 109, 552 A2d 585 (1988) (Souter, J.) (noting that an agreement may be "confirmed by a mere wink or nod").

But informants do not become state agents only because they have cooperated in the past with the government. *See, e.g.*, *United States v. Johnson*, 338 F3d 918, 921 (8th Cir 2003) (finding no agency where informant had been "helpful to the government in the past" but had not received instructions to question the defendant); *Love*, 134 F3d at 604 (finding no agency where informant has previously cooperated with the government but the cooperation did not extend to investigation of the defendant); *United States v. Brink*, 39 F3d 419, 423 (3d Cir 1994) (same). Rather, even if the informant knows from past experience that information can be traded for benefits, the state still must take some act beyond merely listening to the informant and discussing his or her information to transform the informant into a state agent.

Instructions or Assistance. An informant will almost always be an agent if the state instructed the informant to elicit specific information from a particular defendant. Conversely, as many jurisdictions have held, without some kind of instruction or control by the state, no agency relationship will likely form. *See, e.g.*, *Manns*, 122 SW3d at 182–84 (collecting cases and noting that most courts agree that "to qualify as a government agent, the informant must at least have some sort of agreement with, or act under instructions from, a government official").

Likewise, if the state offers support or assistance—such as by paying the informant or by placing the informant in a cell near the defendant to facilitate

conversation—an informant will become an agent if a reasonable observer would conclude that the support communicated to the person that the state was authorizing the person to act on its behalf. *See, e.g.*, *Lowry*, 37 Or App at 655 (observing that a detective delayed transferring an informant so that he could continue to interrogate the defendant and paid the informant for a taped statement);[7] *Neely*, 6 Cal 4th at 918 (noting that deputies had devised a ploy and offered instructions to help the informant initiate a conversation about a particular topic); *Brink*, 39 F3d at 424 (finding it "significant" that, after the informant began providing information to the government, the government placed him in a cell with the defendant). But the state's offer of assistance will not always evince an intent to confer authority on a private person. As this court reasoned in *Sines* "unilateral action by the state" that is "never communicated" to a private person cannot "have affected her decision to act." *Sines*, 359 Or at 60.

Source and Nature of Informant's Motives. Also relevant are the source and nature of an informant's motives—in particular, whether the state does anything to spur informants to do something that they would not otherwise

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[7] In *Smith*, this court endorsed *Lowry*'s rule and aspects of its reasoning. *See Smith*, 310 at 13–14. But this court expressly noted that it found *Lowry* unhelpful in resolving the dispute over state agency in *Sines*. *Sines*, 359 Or at 61 n 10.

be inclined to do or whether, instead, the informants are acting on their own initiative in the hope of obtaining a benefit. The easy case is that of an "entrepreneur." If informants act on their own initiative, they cannot turn themselves into state agents merely because they hope for a benefit. Indeed, "[h]opes and motives * * * do not supply the element of agreement or request that agency requires." *Bruneau*, 131 NH at 111. Rather, when an informant is "acting as an entrepreneur" who may hope to "make a sale to the Government," the state does not thereby become responsible for the informant's actions, "any more than a person who has bought an article from a salesman in the past is responsible if the salesman then steals something similar in the hope of making a second sale." *Watson*, 894 F2d at 1348.

Most important is whether informants' motives derive from purely personal hopes or expectancies or from a reasonable expectation, created by the government, that they will receive specific benefits by providing particular information against particular defendants. After all, "[t]hat the informer has a self-interest in obtaining better treatment from the government does not thereby automatically make the informer an agent of the government." *People v. Cardona*, 41 NY2d 333, 335, 360 NE2d 1306 (1977). By contrast, "if the government affirmatively plays on that motivation or harkens the informer to his self-interest, it thereby runs the risk of being responsible and accountable for the informer's actions." *Id.*

In summary, to determine whether a person's acts are fairly attributable to the state, this court applies an approach informed by common-law agency principles. The essential inquiry is whether the state has manifested an intent to confer authority on the informant through some act or statement beyond merely meeting with the informant and discussing what the informant knows. In answering that inquiry, a court considers the relationship between the state and the informant, any instructions or assistance offered by the state, and the source of the informant's motive to inform.

B. Because detectives did not form an agreement with Layman, instruct him to ask specific questions of defendant, or offer a specific benefit to continue questioning defendant, Layman was not a state agent.

Under those principles, the Court of Appeals erred when it held that Layman became an agent after the July 2 proffer meeting.

To be clear, the Court of Appeals got it right that Layman was not a state agent before the June 16 proffer and between that proffer and the July 2 proffer. As it "readily concluded," neither prosecutors nor detectives were "aware of Layman" or knew that he had been talking to defendant. *Benton*, 317 Or App at 425. Moreover, even if Layman had cooperated in the past, such cooperation "did not make him a police agent *with respect to defendant*." *Id.* (emphasis added). And during the first proffer on June 16 "there was no discussion whether Layman would receive a benefit in return for [the] information [he had

learned about defendant], even though he indicated that he expected a benefit." *Id.*

But the Court of Appeals erred when it concluded that the state manifested an intent to confer authority on Layman to question defendant after the July 2 proffer meeting. First, indisputably, Layman and the state formed no express agreement at the July 2 proffer meeting. The only express agreement came six months later when the parties entered into a cooperation agreement. The record otherwise contained no evidence that state officials and Layman had a "meeting of the minds" about any specific arrangement involving the use of Layman to gather information from defendant in the future.

Nor would a reasonable observer infer any informal understanding from the state and Layman's course of conduct. During neither of the two meetings with Layman did the state propose a particular benefit for Layman's *continued* or *future* questioning. The state also did not offer any assistance, such as a recording device or a technique that might elicit more information from defendant. To be sure, investigators asked a few reasonable clarifying questions about how much Layman knew about a particular topic: for example, after Layman had told them that defendant received a call about his wife, an investigator asked Layman if defendant had told him where he was when he received that call. (*See* P Tr 8150). But no one asked Layman whether he was willing to find out where defendant was when he took the call. In fact, no one

urged Layman to ask any specific question of defendant. More importantly, no one took the additional step of suggesting to Layman that the state would offer him specific benefits if, but only if, he gathered better information from defendant in future conversations.

Admittedly, Layman and the state met more than once, and Layman may have learned from earlier encounters what the state generally wanted to know about defendant. But Layman and the state were not acting against the backdrop of a longstanding, symbiotic relationship. *See York*, 933 F3d at 1357 (noting that "symbiotic" relationships over a "sustained time" may give rise to an informal understanding that a reasonable observer would view as an agency relationship). In fact, Layman had no continuing relationship with and received no ongoing favors from the detectives or prosecutors in defendant's case. Rather, the "repeated interactions" between Layman and law enforcement in defendant's case arose from Layman's self-motivated persistence and "his own opportunistic strategy to somehow benefit from the relationship he cultivated with [defendant]." *Rolling v. State*, 695 So 2d 278, 292 (Fla 1997) (concluding that informant was not a state agent under the Sixth Amendment despite persistent attempts to strike a deal with the State); *see also Acremant*, 338 Or at 329 (finding no state agency even though the defendant's father was previously

authorized to gather information from the defendant, failed to gather that information, yet persisted in trying to seek it).[8]

Second, the state did not instruct Layman to ask questions of defendant or offer any practical support. To the contrary, at the end of both the June 16 proffer and the July 2 proffer, a detective admonished Layman that he was *not* being directed to ask or do anything. Although that kind of admonishment is not dispositive, it weighs in favor of concluding that Layman was not an agent where no other evidence suggested that the state sought to influence any decision Layman might make to further communicate with defendant. Moreover, the state did not move Layman to a cell where he could more easily converse with defendant or offer him any material assistance—for instance, a tape recorder or an interview technique—to support any future conversations with defendant.[9]

Third, from the start, Layman took motivation from his own desire to lessen his sentence, not from anything that the state offered. In that respect, he

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[8] To be sure, in *Acremant*, the defendant's father was not an AIC informant and had different incentives to help the state in his son's case. But the larger principle still holds that private persons who persist in seeking information for the state do not become state agents only because they persisted.

[9] More than a month before Layman approached Clackamas County prosecutors and detectives, Layman and defendant were placed in cells next to each other at their request. *Benton*, 317 Or App at 409. The Clackamas County District Attorney's Office played no role in that decision.

served as a textbook example of an entrepreneurial informant seeking benefits in exchange for whatever information he could gather. Nor did the state trade on Layman's sentencing exposure or otherwise try to direct his efforts toward defendant in exchange for a specific sentencing reduction. In fact, at the time, prosecutors still intended to call Susan Campbell to testify about the same matters that Layman had related. Satisfied with that evidence, the state had little reason to provide Layman a benefit or to make him think that it would provide one.

In short, although the state was willing to talk to Layman and hear his information about defendant, the state never evinced an intent to confer authority on him. It proposed or implied no agreements, it offered no directions or support, and it identified no specific benefit to motivate Layman to act. Layman offered the information on his own initiative, and the state did not actively support his efforts merely by discussing what he knew. For all those reasons, Layman was never the state's agent.

In drawing a contrary conclusion, the Court of Appeals reasoned that "[t]he level of state involvement shifted significantly" during the July 2 proffer meeting. *Benton*, 317 Or App at 426. For instance, the court observed that the state "secur[ed] [Layman's] presence for in-person negotiations," "receiv[ed] additional information" when Layman was trying to secure a benefit for himself, and asked "about additional topics after Layman successfully obtained

information on topics the state had previously asked about in the first proffer." *Id.* at 427.

But the court overemphasized those facts, which have little bearing on the formation of a state agency relationship. As an initial point, the state was not suggesting anything to Layman by meeting in person with him, much less implying that it wanted Layman to act on its behalf *in the future*. The same is true of the state's decision to hear the additional information that Layman was offering. By then, because of the June 16 proffer meeting, it was already clear to Layman that the state was willing to listen to his information. A reasonable person, therefore, would not think that the state was manifesting an intent to authorize Layman to question defendant merely by listening again to information about past conversations. For an entrepreneurial informant like Layman, the desire to obtain a benefit for himself might motivate him to do any number of self-serving things. But the question is whether a reasonable observer would conclude that the *state* authorized him to do those things by instructing him or compensating him. Here, a reasonable observer would not conclude that the state prompted Layman in those ways.

The Court of Appeals also lay too much emphasis on what detectives failed to do. It observed that, during the July 2 proffer, Layman had revealed to detectives that he had switched his tactics—namely, that he was dating his conversations with defendant, focusing on topics that the state appeared to care

about from the first proffer, and questioning defendant, not simply listening to him. *Benton*, 317 Or App at 428–29. But, by itself, revelation of those new tactics cannot have made Layman into the state's agent. The state did not direct him to do those things. The Court of Appeals nonetheless reasoned that the state telegraphed that he should do those things by failing to discourage him more vehemently. *Id.* at 426 (noting that "no one from the state told Layman to cease questioning defendant"). The problem with that analysis is twofold.

First, as this court has stressed, "the fact that an officer did not discourage [a] private party" from doing something does not mean that the private party has become the state's agent. *Sines*, 359 Or at 62 (quoting Bergman and Duncan, *4 Wharton's Criminal Procedure* § 24:20 at 24–78). The state must do something more to communicate that it is authorizing the person do something on the state's behalf. *See id.*

Second, an investigator *did* discourage Layman from believing that he was acting on the state's behalf. The investigator explicitly reminded Layman that the state was not directing him to speak to defendant: "So as I said last time *you have to understand* we are not directing you to have any communication with [defendant] at all." (P Tr 8153 (emphasis added)). In fact, the investigator emphasized that admonishment by confirming with Layman, "You understand that?" (P Tr 8153). Layman answered, "Yeah." (P Tr 8153). In doing so, the investigator was making clear to Layman that he was not the state's agent.

Finally, the Court of Appeals expressed concern that, if the state could avoid creating an agency relationship by perfunctorily admonishing informants that they were not being directed to ask questions of defendants, it would "undermine the protections of the exclusionary rule, because it would allow the state to provide all the hallmarks of positive encouragement and assistance in a jailhouse informant's activities, but avoid any consequences of that relationship." *Benton*, 317 Or App at 429. That concern, while legitimate, is beside the point here. The state can make a private person a state agent through an implied agreement and through the "hallmarks of positive encouragement," and when the state has done so, merely uttering a perfunctory admonishment would not be sufficient to avoid the consequences of that agreement. But in this case there never was any implicit agreement. To create an implicit agreement, the indicia of an implied agreement—instructions, an offer of benefits, some kind of assistance to help elicit information from the defendant—must still be identifiable from the state's interactions with the informant. The record here contained no such indicia. For that reason, the Court of Appeals' concern is misplaced.

Cases involving AIC informants pose thorny questions because they pit a defendant's right to counsel against the public interest in the state's ability to use critical evidence that the state may have had no part in uncovering. To answer those questions, courts look to the objective evidence of the state's

intent to confer authority on the informant—whether the state has a pre-existing plan or informal understanding with the informant, whether the state has directed or instructed an informant to do something specific with a particular defendant, and whether the state has somehow spurred an otherwise uninterested informant to act by offering the informant a specific benefit. In other words, the focus is on what the state actually does to convey its intention to confer authority. Under that clear, judicially manageable standard, the state did not make Layman its agent.

CONCLUSION

This court should reverse the judgment of the Court of Appeals.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 15, 2022, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and David L. Sherbo-Huggins, attorneys for respondent on review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 9,730 words. I further 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 as required by ORAP 5.05(3)(b).

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