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

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

Appeal from the Judgment of the Circuit Court
for Clackamas County
Honorable KATHIE F. STEELE, Judge

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

INTRODUCTION

The narrow question in this case is whether an adult-in-custody (AIC), Travis Layman, became the state's agent at any point before he questioned defendant. The state's opening brief explained that a person becomes the state's agent if the state manifests an intent to permit the person to act on its behalf. Defendant agrees with that much. But he also proposes a broader set of circumstances in which a person ma y become the state's agent—namely, when the state engages in conduct that is "reasonably likely" to prompt a person to do something that the state wants.

This court should reject defendant's proposed test. No legal source supports it. Indeed, if defendant is right, then much of this court's case law on state agency is wrong, and the state will rarely, if ever, be able to rely on information from private parties gathered after the state discusses a suspect, defendant, or investigation with them. The state's rule, moreover, suffers from none of the problems that defendant identifies. It does not permit or encourage the state to manipulate the rules or authorize AICs to act as agents through covert, careful signaling. If a reasonable observer would conclude that the state was creating an implied understanding, through winks and nods or otherwise,

then an agency relationship has formed. But that is not the case here. Layman was never the state's agent. This court should reverse the Court of Appeals.

ARGUMENT

A. Defendant's "reasonable likelihood" test is inconsistent with this court's case law and would attribute a wide range of private conduct to the state.

This court has never suggested that the state makes people into its agents if it does something that merely bears a risk of spurring them to action. The state unavoidably runs that risk when it meets with a person and discusses information of potential interest to law enforcement, as this court's cases show. Rather, the test for agency turns on the state's intent, which courts assess by considering the state's objective manifestation of that intent.

Take *State v. Sines*, 359 Or 41, 379 P3d 502 (2016). In *Sines*, this court concluded that a DHS employee did not make a housekeeper a state agent merely by telling the housekeeper that if she turned over stained underwear the state's laboratory could test it to help determine if the defendant was abusing a child. 359 Or at 62. For obvious reasons, the DHS employee and other state officials subjectively hoped that the housekeeper would take the underwear. *Id.* at 45–46, 60. The DHS employee gave the housekeeper his direct line in case she had any questions. *Id.* In fact, he predicted "based on their conversation" that "[the housekeeper] probably would take the underwear." *Id.* at 45. But this court did not inquire into the mere risk that the DHS employee's statements

would prompt the housekeeper to take the underwear. That risk was obvious, and it increases almost any time that a state employee offers honest answers to genuine questions about a serious crime. Rather, the inquiry was whether the state's conduct would make clear to a reasonable observer that the housekeeper was acting for the state. *Id.* at 58–60. Because it did not, the housekeeper was not the state's agent.

Similarly, in *State v. Smith*, 310 Or 1, 791 P2d 836 (1990), this court concluded that jail deputies did not make an AIC informant, Jischke, into a state agent merely by telling him that he could relay information about the defendant if he wanted. 310 Or at 14–15. Indeed, the deputies knew that Jischke was talking to the defendant at that point. By telling Jischke that he could offer information on the defendant, the deputies created an obvious risk that Jischke would continue to talk to him. But this court did not reason that state agency may depend on the mere risk that the state's conduct would cause Jischke to question the defendant. The question in *Smith* was whether the deputies had communicated their intent—by initiating, planning, controlling, or supporting—to authorize Jischke to gather information about the defendant on their behalf and report back to them. *Id.* at 13. Because they had not, Jischke was never the state's agent.

Defendant's application of his proposed "reasonable likelihood" standard confirms its startling breadth. Under his test, *all* of defendant's statements to

Layman must be suppressed. As he argues, the state's general willingness to listen to information from any AIC—creating a "marketplace" for "snitch" testimony—made it reasonably likely that Layman would question defendant on the state's behalf. (Def BOM 63 (arguing that 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* * *")). But if Oregon's policies regarding the use of informants have led to a "snitch system," as defendant and *amici* maintain, the solution is not for this court to gerrymander the state-agency test to end it. The better approach to that policy problem would be for the Oregon Legislature to enact statutes to address any potential for unfairness and to ensure the reliability of evidence. (*See, e.g.*, CJRC and FJP Amicus Brief 19–20 (explaining that some states have created special jury instructions and other procedures to ensure reliability and fairness of testimony from AIC informants)).

Defendant offers no support for his sweeping proposed standard other than the "animating principles" and "historical circumstances" of Article I, section 11. (Def BOM 30–50). But defendant's reliance on the purpose and scope of the right to counsel is beside the point. To state the obvious: All constitutional rights are important. And criminal procedural constitutional rights are, of course, vital to the fairness, accuracy, and integrity of criminal trials. But the question here is whether those constitutional rights are

implicated at all when a represented defendant voluntarily confides in another AIC who has a motive to share that information with police. As this court and every other court recognize, the constitution does not constrain the actions of private citizens, nor does it require that the state disregard critical evidence if a person has come by it through a method that the state may not use. *See, e.g.*, *State v. Lien*, 364 Or 750, 767, 441 P3d 185 (2019) (describing it as "axiomatic" that constitutional prohibitions do not apply the actions of private parties).

Finally, defendant does not even try to explain how litigants and trial courts will apply the "reasonable likelihood" standard. To be sure, he identifies the sufficient-involvement standard of *Smith* and *State v. Lowry*, 37 Or App 641, 588 P2d 623 (1978)—asking whether the state initiated, planned, controlled, or supported the informant's activities—as a baseline. (Def BOM 42–48). But the question those cases ask is, "When does the state's involvement become pervasive enough to attribute a private party's actions to the state?" Defendant does not offer an answer to *that* question.

Instead, defendant urges this court to "add[] 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." (Def BOM 48). In other words, he suggests replacing "sufficiently involved" with "acts that a reasonably likely to spur" an informant's activities. But that move just

raises a new question—namely, "when are acts reasonably likely to spur an informant to do something that the state wants the informant to do?" And trying to answer that new question poses all the same problems of the knowledge-and-acquiescence test rejected by *Sines*. Determining whether a "reasonable likelihood" exists would likely depend on the state actor's knowledge of the informant's tendencies and motivations to take certain risks. *See Sines*, 359 Or at 58–59 (observing that it is difficult to apply a test that depends on what the state "knew" or "acquiesced" in). Put simply, defendant's proposed rule is unsupported and unworkable.

B. The state's proposed rule for state agency will not permit strategic manipulation.

The state's rule will provide clearer, more easily applied guidance to trial courts, litigants, and law enforcement. It builds on decades of case law and picks out three discrete aspects of the AIC context to determine when people become state agents: (1) whether there was an express or implied understanding between a person and the state; (2) whether the state has offered instructions or assistance to the person; and (3) whether the state has offered benefits to the person in exchange for specific information. (State BOM 14, 27). The state also offers application-specific principles for weighing those factors, including the principle that "wink-and-nod" arrangements are implied agreements that may give rise to an agency relationship. (State BOM 28). By focusing on those

particular ways in which the state may manifest that it intends to make an AIC informant its agent, courts will more readily and predictably resolve close cases.

Defendant nonetheless faults the state's rule for deriving from an "overbroad reading of *Sines*," permitting too much strategic manipulation, and providing too little help in the unique dynamics of the AIC-informant context. (Def BOM 59–62).

First, the state's rule is consistent with *Sines*. It focuses on whether a reasonable observer would understand the state's statements or acts to manifest a general agreement, a specific *quid pro quo* deal, or an implied understanding under which a person will act on the state's behalf. *Sines*, 359 Or at 55 (describing state agency test as requiring focus on objective manifestations of the state's intent). If the state's rule departs from *Sines* at all, it does so in the direction of preventing the very situations that defendant claims that the *Sines* analysis would miss. Under the state's rule, if the state "incentivize[d]" a person with "not-so-subtle rewards and punishments," a reasonable observer would likely conclude that the state and the person had an informal understanding that certain information would be rewarded with certain benefits. (Def BOM at 59–60). The state's rule covers that scenario.

Second, and relatedly, the state's rule does not permit strategic end-runs around a defendant's constitutional rights. In fact, under the state's rule, a wink-and-nod arrangement could create state agency. (State BOM 28

(acknowledging that agreements may be "confirmed by a mere wink or nod") (quoting *State v. Bruneau,* 131 NH 104, 109, 552 A2d 585 (1988) (Souter, J.)). The only question is whether a reasonable observer would conclude from the winks and nods that the state intended to confer authority to act on its behalf.

Third, the state's rule is sensitive to the dynamics of AIC informants. In fact, the state's rule builds on decades of cases primarily involving AIC informants. (*See* State BOM 23–32). Defendant does not even mention those cases, much less explain why they are not persuasive. In those cases, courts strike a balance between treating AIC informants as independent citizens with the capacity to help law enforcement and understanding that AIC informants can be as entrepreneurial and self-interested as anyone else with something to gain. But no case abolishes the use of information from AIC informants altogether or suggests that AIC informants are almost always state agents if the state is willing to make deals with them. Rather, those cases pick out recurring aspects of the AIC-informant context—entrepreneurial AICs, ongoing relationships, etc.—and articulate workable principles and presumptions to guide the state-agency inquiry. Based on those cases, the state's rule strikes a similar balance that will provide clear, easily applied guidance to law enforcement, litigants, and trial courts.

C. Under either rule, Layman was never the state's agent.

Defendant is mistaken that, under either rule, Layman was already the state's agent when he first met with Clackamas County District Attorney's Office attorneys and investigators. (Def BOM 64–69). His argument misgauges the significance of *Lowry* and misses the lessons of *Sines*.

For starters, *Smith*'s endorsement of the test in *Lowry* is not necessarily an endorsement of all its reasoning. As this court noted in *Sines*, because the informant in *Lowry* was a longstanding "stool pigeon" of jail deputies, *Lowry* had limited value in informing what test should apply to determine state agency in other scenarios. *Sines*, 359 Or at 61 n 10 (noting that *Lowry* was not helpful in articulating and applying state-agency test).

Moreover, even if it were more persuasive authority, *Lowry* differs from this case in several respects. In *Lowry*, the informant, Reed, brought information to the same jail deputy to whom he had previously brought information. *Lowry*, 37 Or App at 644. Indeed, Reed and the deputy had a "very close relationship." *Id.* Here, by contrast, none of the Clackamas County district attorneys or investigators knew of Layman before they met. Similarly, when Reed asked for support in providing information to the deputy, the deputy helped to provide it. *Id.* at 644–46 (noting that deputy referred to cooperating detective Reed's request to be transferred to Clackamas County jail to ask questions of a represented defendant and later transferred Reed to a smaller

cell). The deputy even put $20 in Reed's account after Reed suggested that he needed money. *Id.* at 647. Under those circumstances, an undeniable understanding had formed between Reed and the deputies. That same understanding never formed between Layman and the state.

At any rate, the reasoning of *Sines* clarifies the scope of *Lowry*. In *Sines*, the DHS employee knew that the housekeeper wanted to be helpful, as the deputies in *Lowry* knew that Reed wanted to be helpful. In *Sines*, the housekeeper was obviously susceptible to private motivations—a genuine concern about a child's safety—just as Reed in *Lowry* was susceptible to private hopes of personal benefits. And, in *Sines*, the DHS employee signaled his interest in the housekeeper's help by offering his direct line and answering all her questions truthfully. *Sines*, 359 Or at 44–46. Yet *Sines* made clear that even when a state actor knows that a private party is motivated to help, the state does not make that person an agent merely by discussing that information with the person and remaining open to future conversations.

Because defendant recognizes the force of *Sines*, he asks this court to make it inapplicable to AIC informants. (Def BOM 61–62 (arguing that *Sines* "does not appear to account for the dynamics at issue" in the AIC informant context). He suggests that *Sines* is a one-off, narrow application of state agency that applies only when a Good Samaritan offers information to the police out of the kindness of her heart. (Def BOM 60–61). But this court never suggested

that *Sines* was limited to its facts. To the contrary, it engaged in a far-reaching exploration of common law agency principles and analogous case law—including *Smith*—when it concluded that common law agency principles provide "clearer and more easily applied" guidance. *Sines*, 359 Or at 59. Moreover, defendant's proposed reading of *Sines*—namely, that "Good Samaritans" should be treated differently—creates more problems than it solves. It would require that courts determine how much, if any, self-interest is too much to make someone a "Good Samaritan." And it would force courts to figure out how to treat someone with mixed motives, as Layman arguably had. *See State v. Benton*, 317 Or App 384, 411, 505 P3d 975 (2022) (noting that Layman had testified that he gathered information about defendant because he thought it would help his case and because he "did not like that defendant did this to a woman"). *Sines* avoided those problems by relying on agency principles that trial courts are especially well equipped to identify and apply. *See Sines*, 359 Or at 59 n 9 (declining to apply the knowledge-and-acquiescence test in part because of problem of analyzing mixed motivations).

Finally, defendant is wrong that Layman was the state's agent under either rule after July 2 for all the reasons explained in the State's Brief on the Merits. (*See* State BOM 33–36). In arguing otherwise, defendant relies on a reading of the record directly at odds with the trial court's express and implicit findings. For instance, he suggests that the state's disappointing offer to

Layman "put Layman on notice that he might need to obtain even more information to achieve the level of benefit he sought from the state." (Def BOM 69–70). He likewise asserts that, because "Senior DDA Wentworth recognized the possibility that Layman might arrive with additional information that he had not provided in the first proffer," he brought recording equipment to the second proffer, suggesting that the state was signaling to Layman that it wanted more and better information. (Def BOM 70). But the trial court found that the state communicated nothing of the kind to Layman. (*See* eTCF 3559 (trial court finding that the state's communications with Layman was not the "impetus behind Layman's subsequent conversations of questioning Defendant")). Because the facts essential to defendant's position run counter to the trial court's findings, defendant's argument fails. Layman was never the state's agent.

D. Defendant's other arguments are not properly before this court and otherwise unavailing.

Defendant's arguments under Article I, section 12, and the Sixth Amendment are not properly before this court. They also fail on their merits.

1. Article I, section 12, presents no basis for affirmance.

The Court of Appeals declined to reach the issue of whether Article I, section 12, required reversal because defendant failed to make a separate argument under that section. *Benton*, 317 Or App at 421 n 3 (so concluding). Defendant made none of the arguments in the Court of Appeals that he now

makes under Article I, section 12, before this court. Nor is this case the proper vehicle for this court to hold broadly, as defendant requests, that state agents must give *Miranda* warnings to anyone questioned in a jail or prison. (Def BOM 41–42). For those reasons, this court should decline defendant's belated invitation to consider the issue.

Regardless, defendant offers no principled basis for offering a different state-agency rule under Article I, section 12. He argues only that, because the father in *State v. Acremant*, 338 Or 302, 108 P3d 1139 (2005), interrogated the defendant primarily out of his own personal desire to help police, *Acremant* "*appears* to require that the state's actions subjectively motivated an otherwise private citizen to question an incarcerated defendant." (Def BOM 50 (emphasis added)). In his view, "[t]hat standard places the focus on the actual impact of the state's actions * * * regardless of whether the state should have known that their actions would have that effect." (Def BOM 50). But *Acremant* does not support an "actual impact" state-agency test. In fact, *Acremant* relied on this court's state-agency rule under Article I, section 11, with no suggestion that it intended to adopt a qualitatively different standard under Article I, section 12. *See Acremant*, 338 Or at 328–29 (citing *Smith*). Moreover, if "actual impact" were the standard, then *Acremant* failed to follow its own rule. *Id.* at 329 (explaining that state had asked father to find out information, and, based on that request, father persisted in trying to find out that information, even after the

state had told him that it was pursuing another investigative tactic). But that is not the rule from *Acremant*. Nor should it be the standard for state agency under any constitutional provision.

2. The Sixth Amendment presents no basis for affirmance.

The Court of Appeals rejected defendant's argument that the Sixth Amendment required suppression of Layman's testimony about defendant's statements. *Benton*, 317 Or App at 430. Defendant did not cross-petition this court on the issue. Nor is that issue merely subsidiary. For that reason, this court should decline to consider his arguments. *Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc.*, 355 Or 44, 70 n 16, 322 P3d 531 (2014) (declining to consider issue on which respondent did not cross-petition); *Reynolds v. Schrock*, 341 Or 338, 343 n 5, 142 P3d 1062 (2006) (declining to address issue on which party did not cross-petition where parties did not discuss issue in briefing); *see also* ORAP 9.20(2) (observing that "the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or *the response* claims were erroneously decided by that court" and that "[t]he court may consider other issues that were before the Court of Appeals") (emphasis added); *State v. Castrejon*, 317 Or 202, 212, 856 P2d 616 (1993) (observing that ORAP 9.20(2) does not permit review of "*any* issue that was raised in or by the Court of Appeals" but only "subsidiary appellate issues

(properly raised and preserved) that may require resolution once the principal issue on review is resolved" (emphasis added)).

Regardless, the Court of Appeals correctly rejected defendant's arguments under the Sixth Amendment. As the State's Brief on the Merits explains, the settled consensus under federal law is that a person does not become an agent if the state discusses information with the person and expresses some interest in it. Rather, a person becomes an agent only if the state and the person have some kind of pre-existing agreement under which the informant will gather information for the state. (*See* State's BOM 24–25 (collecting and discussing federal cases)). Defendant misplaces his reliance on *Randolph v. California,* 380 F3d 1133, 1144 (9th Cir 2004), which is an outlier even within the Ninth Circuit itself. *See Sanders v. Cullen*, 873 F3d 778, 813 (9th Cir 2017) (concluding that informant was not government agent where evidence did not show that informant recorded conversations or "had agreed to report back to the government"); *Brooks v. Kincheloe,* 848 F2d 940, 945 (9th Cir 1988) (finding no agency because detectives did not issue instructions or promise payment). This court should reject his Sixth Amendment arguments.[1]

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[1] Defendant also asks this court to clarify that the Court of Appeals' conclusion about his right to an *in camera* inspection of records relating to Layman is not the law of the case. (Def BOM 79). But this court should decline to address that concern. Defendant did not petition for reconsideration of the Court of Appeals opinion to clarify the scope of remand or petition this

Footnote continued…

CONCLUSION

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

Respectfully submitted,

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court to consider the issue. If this case is remanded, defendant is free to argue that the issue is not law of the case and can appeal any contrary ruling.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 10, 2022, I directed the original Reply 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, upon Aliza B. Kaplan, attorney for amicus curiae Criminal Justice Reform Clinic at Lewis & Clark, upon Janis C. Puracal, attorney for amicus curiae Forensic Justice Project, and upon Jessica A. Schuh, attorney for amici curiae Criminal Justice Reform Clinic at Lewis & Clark and Forensic Justice Project, 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 3,740 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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