IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. MATTHEW SCOFIELD SAGDAL, Defendant-Appellant, Petitioner on Review.	Multnomah County Circuit Court No. 100545212 CA A146601 SC S061846

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Multnomah County
Honorable KARIN JOHANNA IMMERGUT, Judge

Opinion Filed: October 9, 2013
Before: DeMuniz, Senior Judge
Concurring Judges: Ortega, Presiding Judge, Nakamoto, Judge

Continued…

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STATEMENT OF THE CASE

Defendant was convicted of reckless driving (a misdemeanor) by a six-member jury. Defendant maintains that he had a constitutional right to a jury of at least 10 members, because the case was tried in circuit court. As explained below, however, the Oregon Constitution creates no such right; it requires only that juries have at least six members. Because state statutes require trials in misdemeanor-only cases to be before six-person juries, the trial court correctly rejected defendant's request for a jury of at least 10 members.

Defendant also argues that the trial court erred in denying his motion to suppress Intoxilyzer accuracy certificate evidence on Sixth Amendment Confrontation Clause grounds. But because the Intoxilyzer accuracy certificate evidence was not "testimonial" evidence, it was properly admitted over defendant's Confrontation Clause objection.

Questions Presented

1. ORS 136.210(2) require six-person juries for misdemeanor-only cases tried in circuit court—does that statute violate the Oregon Constitution?

2. Pursuant to statute and administrative rule, Intoxilyzer machines are regularly tested for accuracy, and certificates of each machine's accuracy are maintained as public records by the Department of State Police Forensic

Services Division. Are the Intoxilyzer accuracy certificates "testimonial" statements for purposes of the Confrontation Clause of the Sixth Amendment to the United States Constitution?

Proposed Rules of Law

1. The Oregon Constitution allows six-person juries in criminal cases in circuit court. Article VII (Amended), section 9, of the Oregon Constitution specifically allows six-person juries in criminal cases in circuit court, and Article I, section 11, of the Oregon Constitution does not give defendants the right to a 10 (or more) person jury in such cases.

2. Intoxilyzer certificates are not testimonial, because they are created for the primary purpose of administering an agency's affairs (administering the implied consent breath testing program), and because the individual who conducts the routine testing and accuracy certification does not do so for the primary purpose of generating evidence to be used in a criminal trial. Because Intoxilyzer certificates are not testimonial, they can be admitted without giving a defendant the opportunity to cross-examine the creator of the certificate.

Factual and Procedural Background

The Court of Appeals accurately summarized the historical facts in its opinion, as follows:

> One evening, defendant was found in the driver seat of his car, which was running but stopped in the left turn lane of a public road. He appeared to be asleep or unconscious. When police

> officers arrived, they smelled alcohol on defendant's breath and noticed that his eyes were watery, his eyelids were droopy, and his speech was slurred. After defendant performed poorly on field sobriety tests, he was arrested and transported to the police station. There, defendant agreed to take an Intoxilyzer alcohol breath test, which revealed that his blood alcohol content was 0.30.

State v. Sagdal, 258 Or App 890, 891, 311 P3d 941 (2013), *rev allowed*, 354 Or 814 (2014).

Defendant was charged with one count of driving under the influence of intoxicants (DUII), ORS 813.010, and one count of reckless driving, ORS 811.140. Defendant pleaded no contest and entered diversion on the DUII charge, and he proceeded to trial on only the reckless driving charge. Before trial, defendant requested "a minimum of a ten-person jury, under Article I, section 11[,] of the Oregon Constitution, which is required in Circuit Court." (Tr 11). Because defendant faced only a misdemeanor charge, the court rejected his request for at least a 10-person jury, and it empaneled a six-person jury. (Tr 12).

Defendant also objected to the admission of the certificates of accuracy for the Intoxilyzer breath testing machine on the ground that "it's testimonial evidence that violates the right to confront witnesses." (Tr 17). The court overruled that objection and allowed the certificates to be admitted at trial. (Tr 25, 189-90; State's Exhibits 4, 5).

At the trial, defendant was found guilty. The jury was polled, and it revealed that all six jurors voted to find defendant guilty. (Tr 193-94). The trial court entered a judgment of conviction based on the jury verdict, and defendant appealed to the Court of Appeals.

In the Court of Appeals, defendant renewed both his challenge to the denial of his request for a jury of at least 10 people and to the admission of the Intoxilyzer certificate evidence. The Court of Appeals rejected both assignments of error via written opinion,[1] and this court granted defendant's petition for review. *State v. Sagdal*, 354 Or 814, ___ P3d ___ (Feb. 13, 2014). On review, defendant renews his arguments concerning the size of the jury and the admissibility of the Intoxilyzer certificate evidence.

Summary of Argument

1. The trial court correctly denied defendant's request for a 10 (or more) person jury in his misdemeanor trial for reckless driving.

ORS 136.210(2) requires circuit courts to empanel a six-person jury when—as in this case—the only charges at trial are for misdemeanor offenses. That statute does not violate the Oregon Constitution. Article VII (Amended),

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[1] The Court of Appeals devoted most of its opinion to the jury-size issue. It summarily rejected defendant's Confrontation Clause argument based on its prior decisions in *State v. Norman*, 203 Or App 1, 125 P3d 15 (2005), *rev den*, 340 Or 308 (2006), and *State v. Bergin*, 231 Or App 36, 217 P3d 1087 (2009), *rev den*, 348 Or 280 (2010). *Sagdal*, 258 Or App at 891 n 1.

section 9, of the Oregon Constitution specifically authorizes the legislature to enact laws providing for juries of fewer than 12 members, and it sets a minimum jury size at six members. That provision, enacted in 1972, applies in all courts and for all types of cases.

Although Article I, section 11, of the Oregon Constitution refers to verdicts returned by 10 jurors, it does not establish a minimum jury size. The intent of the voters who enacted the "10 members" provision of Article I, section 11, in 1934, was not to establish a minimum jury-size requirement. Rather, read in the context of the entire provision, and placed in its proper historical context, that clause merely permits nonunanimous jury verdicts in some criminal cases tried in circuit court. It does not vest a criminal defendant with a right to a jury of a specific size. Moreover, even if Article I, section 11, conflicts with the specific jury-size provision of Article VII (Amended), section 9, the later provision is more specific and newer, and it thus would govern.

2. The trial court also correctly denied defendant's motion to exclude the Intoxilyzer accuracy certificates on Confrontation Clause grounds. Neither the statements of the technician that the equipment was tested and certified to be accurate, nor the statements that the certificates had been retrieved from OSP's computer system and were true copies, are "testimonial" within the meaning of the Sixth Amendment. Therefore, defendant had no right to cross-examine the maker of those statements.

ARGUMENT

A. The Oregon Constitution does not give criminal defendants a right to a jury of at least 10 members in cases tried in the circuit court; in fact, the constitution explicitly allows six-person juries.

ORS 136.210(2) provides that, "[i]n criminal cases in the circuit courts in which the only charges to be tried are misdemeanors, the trial jury shall consist of six persons." The first issue in this case is whether that statute is permissible under the Oregon Constitution. Two provisions of the constitution are implicated: an amendment to Article I, section 11, adopted by the voters following a legislative referral in 1934, and Article VII (Amended), section 9, adopted by the voters following a legislative referral in 1972.

Article VII (Amended), section 9, specifically permits the legislature to adopt laws allowing "juries consisting of less than 12 but not less than six jurors." On its face, it permitted the legislature to enact ORS 136.210(2), which requires six-person juries in misdemeanor cases. Despite the provision's inclusive text, however, defendant argues that it applies only to civil cases or to criminal cases tried outside of circuit court, because—in his view—Article I, section 11, requires juries of at least 10 members for criminal cases in circuit court. (Pet Br 35-38). Defendant is mistaken.

Article I, section 11, provides, in part, "that in the circuit court ten members of the jury may render a verdict of guilty or not guilty[.]" Although the provision makes no specific reference to a minimum jury size, by

implication it suggests—as defendant argues—that for criminal cases tried in circuit court there must be a jury of at least 10 members and that, therefore, ORS 136.210(2) is unconstitutional. Such a read of that provision, however, would not accurately reflect the intent of the voters who enacted it. As explained below, their intent was simply to permit nonunanimous jury verdicts in criminal cases tried in circuit court; it was not to enshrine a minimum jury size into the state constitution.

Considered together, Article I, section 11, and Article VII (Amended), section 9, are not incongruous. The former merely allows for nonunanimous verdicts in criminal cases in circuit court, and the later establishes a constitutional minimum jury size of six members. To the extent that the two provisions are in tension, Article VII (Amended), section 9—as the later enacted and more specific—should control. Because a six-person jury was constitutionally authorized and statutorily required in defendant's case, the trial court correctly denied defendant's request for a 10 (or more)-person jury.

1. Article I, section 11, does not require a minimum number of jurors for circuit court trials.

Defendant's argument begins from the premise that the voters who amended Article I, section 11, of the Oregon Constitution in 1934 intended to create a right to a jury of at least 10 people in any criminal case tried in the

circuit court. But his argument fails from the outset. Article I, section 11, was never intended to enshrine a minimum jury size into the constitution.

As with any constitutional interpretation question, this court's ultimate goal is to ascertain the intent of those who enacted the provision—in this case, the voters in 1934 who amended Article I, section 11, to include the contested provision. *See Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 57, 11 P3d 228 (2000) (When interpreting a constitutional provision created through an initiative petition, this court's task is to discern "[t]he people's understanding and intended meaning" of the provision.). "The purpose of that analysis is not to freeze the meaning of the state constitution" in the time period when the relevant provision was adopted. *State v. Davis*, 350 Or 440, 446, 256 P3d 1075 (2011). Rather, the "goal is to determine the meaning of the constitutional wording, informed by general principles" that those who adopted the provision would have understood were being advanced by the provision. *State v. Mills*, 354 Or 350, 354, 312 P3d 515 (2013).

When interpreting a constitutional provision enacted by legislative referral, this court "consider[s] the same sources * * * that [it] consider[s] in interpreting a statute." *State v. Pipkin*, 354 Or 513, 526, 316 P3d 255 (2013). It looks to the provision's "text, context, and legislative history, 'should [the legislative history] appear useful to [the] analysis.'" *Id.* (quoting *State v. Algeo*, 354 Or 236, 246, 311 P3d 865 (2013); brackets in *Pipkin*). "[T]he text and

context" of the provision "are the most important clue" to understanding that meaning. *Stranahan*, 331 Or at 57. Beyond merely examining the text and context, "the history of the * * * measure," including "relevant materials in the voters' pamphlet" are also relevant . *Flavorland Foods v. Washington County Assessor*, 334 Or 562, 575, 54 P3d 582 (2002). Here, that analysis demonstrates that voters in 1934 did not intend the amendment to Article I, section 11, to enshrine a minimum jury-size requirement into the constitution.

a. The text of Article I, section 11, does not vest criminal defendants with the right to a minimum number of jurors; in context, it merely allows nonunanimous jury verdicts in some criminal cases.

Article I, section 11, of the Oregon Constitution, provides, in part:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury * * *; *provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise*[.][2]

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[2] Article I, section 11, provides, in full:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty

Footnote continued…

(Emphasis added). The italicized portion of that provision was added by the voters in 1934 following a legislative referral. *See* Or Laws 1933, SJR 4 (2d Spec Sess) (Senate Joint Resolution referring amendment to the voters). As the Court of Appeals noted, that text "assumes that (1) there is a jury, and (2) the jury is comprised of at least 10 members." *Sagdal*, 258 Or App at 894. It does not, however, explicitly so require. By its terms, it does not place any numerical limitation on the size of juries in circuit court. Defendant's argument essentially asks this court to insert text into Article I, section 11, that the voters did not adopt—a task this court should not undertake. *See Mills*, 354 Or at 356 ("It is simply not the province of the court to rewrite the text of the constitution to supply a provision that was not included. * * * Consequently, courts are obliged to respect not only what constitutional provisions state, but also what they do not.").

The real purpose behind the 1934 amendment—a purpose evident in its text—was to authorize nonunanimous jury verdicts in criminal cases, not to affirmatively require juries be of some minimum size. This purpose is evident

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(…continued)

> or not guilty, save and except a verdict guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.

from reviewing the disputed text in the context of the entire 1934 amendment. The amendment also added the following clause to Article I, section 11: "save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise[.]" As the Court of Appeals explained, "[i]f the 'saved' part of the 10-member jury verdict provision is that a verdict of guilty of murder in the first degree must still be unanimous, then it follows that the intended effect of the 1934 amendment was to allow a nonunanimous jury verdict in criminal cases other than murder in the first degree, not to create a right to a jury of a particular size." *Sagdal*, 258 Or App at 894-95.

b. When the "10 members" provision was added to Article I, section 11, in 1934, circuit court juries—by statute and tradition—consisted of 12 members.

Because this court is attempting to discern the intent of the people who enacted the "10 member" provision, it must look beyond the text and understand the historical context of the provision's enactment. "[This court does] not interpret text in isolation; [it] also consider[s] the historical context against which that text was enacted." *Pipkin*, 354 Or at 526. *See also State v. Reinke*, 354 Or 98, 107, 309 P3d 1059, *adh'd to as modified on recons*, 354 Or 570 (2013) ("Context includes 'the preexisting common law and the statutory framework within which the law was enacted.'"; quoting *Klamath Irrigation District v. United States*, 348 Or 15, 23, 227 P3d 1145 (2010)); *State v.*

Vasquez, 336 Or 598, 608-10, 88 P3d 271 (2004) (construing Article I, section 10, in the context of the criminal procedures that were in force at the time it was drafted). Here, that means this court's goal is to determine whether the voters in 1934 meant to enshrine a minimum jury size into Article I, section 11. As discussed below, voters in 1934 assumed that trial juries in circuit court consisted of 12 members. By adding the "10 member" provision to the constitution in 1934, the electorate was merely authorizing nonunanimous verdicts in criminal cases; it was not enshrining a minimum jury size into the constitution.

When the "10 members" clause was enacted in 1934, the composition of a "trial jury" in circuit court was statutorily prescribed to be 12 people. *See* Oregon Code, title XIII, ch IX, § 912 (1930) ("In criminal cases the trial jury shall consist of twelve (12) persons, unless the parties consent to a less number[.]"); Oregon Code, title XXX, ch I, § 104 (1930) ("A trial jury is a body of persons, twelve in number in the circuit court, and six in number in the county court and courts of justice of the peace[.]"). This also was true for civil cases. *See* Oregon Code, title II, ch II, § 201 (1930) ("The jury shall consist of twelve persons, unless the parties consent to a less number."). In fact, a 12-person jury requirement had been enshrined in Oregon statutes since before statehood up through the 1930 Oregon Code. *See, e.g.*, Oregon Territorial Laws, An Act Regulating Criminal Proceedings, ch V, § 61 (1843), *republished*

in Bush, Laws of a General and Local Nature, p 129 (1853) ("Such trial shall be had before the jury returned to serve in civil cases. If the defendant, or district attorney, shall require it, the whole number of twenty-four jurors, either of the regular panel or talesmen, shall be present in the jury box, *twelve of whom shall then be drawn* as in civil cases." (Emphasis added)); General Laws of Oregon, Civ Code, ch II, § 178, p 142 (Deady & Lane 1843-1872) ("The jury shall consist of twelve persons, unless the parties consent to a less number."); *Id.*, ch XII, § 915, p 290 ("A trial jury is a body of men, twelve in number in the circuit court, and six in number in the county court, and courts of justice of the peace[.]"); *Id.*, Crim Code, ch XV, § 152, p 359 ("In criminal actions, the trial jury is formed in the manner prescribed in Title II of Chapter II of the code of civil procedure[.]").[3]

In addition to the statutes in existence in 1934—all of which required a 12-person jury trial in circuit courts—the United States Supreme Court's case law at that time held that the Sixth Amendment to the United States Constitution required the jury to be "constituted, as it was at common law, of twelve persons, neither more nor less." *Thompson v. State of Utah*, 170 US 343, 349, 18 S Ct 620 (1898). As discussed below, *Thompson* was later

[3] These same statutes appear, in virtually identical form, in the various code compilations through 1920. The codes, as they existed in 1934, are set forth above.

overruled by *Williams v. Florida*, 399 US 78, 90 S Ct 1893, 26 L Ed 2d 446 (1970). But, in 1934, both state statutes and the United States Constitution required 12-person juries in felony trials.[4]

In enacting the changes to Article I, section 11, the voters, therefore, would have assumed a 12-person jury in circuit court. But, simply because that *assumption* existed in 1934 does not mean that it is frozen in the constitution, or that the 1934 amendment to Article I, section 11, was intended to transform that assumption into a state constitutional imperative. *See Davis*, 350 Or at 446 (holding that the purpose of constitutional interpretation "is not to freeze the meaning of the state constitution"). By amending the constitution to allow verdicts in criminal cases in circuit court to be rendered by "ten or more members" of the jury, the voters would not have been intending to enshrine a minimum jury size into the constitution. Had the voters intended such a result, they certainly would have employed a less subtle technique for achieving it. Instead—based upon their pre-existing assumptions and understandings about how circuit court juries were then constituted—the voters would have

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[4] In 1898—and even in 1934—the jury trial guarantee of the Sixth Amendment did not specifically apply to the states; therefore, Oregon was not in violation of the Sixth Amendment by allowing criminal trials (primarily misdemeanors) in district court and justice court to be held before six-person juries.

understood that they were merely allowing nonunanimous jury verdicts in circuit court.

c. The legislative history of the 1934 amendments to Article I, section 11, provides no evidence that the voters intended to enshrine a minimum jury size into the constitution.

Beyond the text and context of the 1934 amendments to Article I, section 11, the legislative history of that referral offers no clue that it was intended—as defendant suggests—to require a minimum number of jurors in circuit court. The ballot title caption for the proposed amendment made no reference to jury size at all, and instead read: "**CRIMINAL TRIAL WITHOUT JURY AND NON-UNANIMOUS VERDICT CONSTITUTIONAL AMENDMENT**." Official Republican Voters' Pamphlet, Special Election, May 18 1934, 6. The 25-word "purpose" statement of the same measure referred to verdicts returned by 10 jurors, but did not suggest that the amendment *required* juries to be a particular minimum size: "Authorizing accused, with judge's consent, to waive jury trial, except in capital cases; verdict, except guilty of first degree murder, by ten circuit court jurors."[5] *Id.*

[5] The reference in the caption and the purpose statement to a defendant's right to waive jury appears to be a holdover from a ballot title from the 1932 general election, where voters amended Article I, section 11, to specifically allow for defendants to waive jury trials in other than capital cases. Nothing about the 1934 referral made changes to Article I, section 11, concerning jury waivers. *See State v. Osbourne*, 153 Or 484, 486, 57 P2d 1083

Footnote continued…

Similarly, the arguments supporting and opposing the amendment identified the crucial issue as whether verdicts should be unanimous, not whether the constitution should mandate some minimum jury size. The argument in favor of the referral made clear that the goal behind the measure was to improve efficiency of the criminal justice system:

> The proposed constitutional amendment is to prevent one or two jurors from controlling the verdict or causing a disagreement.
> * * *
>
> Disagreements not only place the taxpayers to the expense of retrial which may again result in another disagreement, but congest the trial docket of the courts.
>
> The amendments provides that a jury of ten may return a verdict save and except in first degree murder. A notable incident of one juror controlling the verdict is found in the case of State v. Silverman recently tried in Columbia county. In this case 11 jurors were for a verdict of murder in the second [degree]. One juror was for acquittal. To prevent disagreement 11 jurors compromised with the one juror by returning a verdict of manslaughter. This they were compelled to do to prevent large costs of retrial.
>
> Disagreements occasioned by one or two jurors refusing to agree with 10 or 11 other jurors is a frequent occurrence.
>
> One unreasonable juror of the 12, or one not understanding the instructions of the court can prevent a verdict either of guilt or innocence.

(…continued)
(1936) ("The reference in the foregoing title to 'trial without jury' and waiver by an accused person of trial by jury were pertinent only to an amendment adopted by the people on November 8, 1932; and had no proper place in the title of the amendment under consideration.").

> We believe that the people of Oregon will clearly see the reasonableness of the proposed change and vote favorably for this measure, which certainly is a step in the right direction.

Official Republican Voters' Pamphlet, Special Election, May 18, 1934, 7 (ARGUMENT (Affirmative)).

The sole statement opposing the measure suggest that it would be unfair to grant those accused of first-degree murder a benefit (a right to a unanimous jury verdict) not offered to those accused of lesser crimes.[6] *Id.* at 8. Beyond that, though, the statement in opposition provides no other reasons for opposing the referral. Most important for the purposes of the issue before this court, the statement in opposition provides no evidence that the amendment was intended to establish a minimum size jury.

The state is not aware of any other "legislative" history associated with the measure. The history that is available, though, offers no suggestion that the

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[6] It also argued against the amendment on the ground, apparently, that allowing convictions by 10-person juries would merely mask the problem of poorly qualified district attorneys prosecuting cases: After lamenting that "a quarter of a century ago * * * the district attorney was considered one of the best, if not the best lawyer in the community; whereas * * * now he is possibly considered one of the poorest if not the worst," and that "without adequate compensation for * * * deputies" the district attorney could not secure "able and competent lawyers as deputies," the author of the statement in opposition concluded, "I am against the amendment not because I feel it is an ill-advised move. It is a weak and ill-advised attempt to correct an evil that will be abortive because it will not get the results sought for. It is an attempt to repair the engine in your automobile by patching up a hole in the exhaust pipe." *Id.* at 8.

voters intended to constitutionally mandate a minimum jury size for cases in circuit court. Rather, the intent of the voters in 1934 was to make jury trials in criminal cases more efficient and reduce the chance of a mistrial. To that end, the voters enacted the amendments to Article I, section 11, for the purpose of allowing nonunanimous jury verdicts in most criminal cases in the circuit court, and not to prescribe a minimum jury size.

2. Article VII (Amended), section 9, authorizes six-person juries.

a. The text of Article VII (Amended), section 9, specifically authorizes the legislature to enact statutes establishing six-person juries.

Defendant's argument is premised on Article I, section 11, providing him with a right to a 10 (or more) person jury. As explained above, that constitutional provision was never intended to provide a right to a jury of any particular size. For that reason alone, the trial court correctly denied defendant's request for a 12-person jury. However, if there remained any doubt about whether six-person juries are permitted in Oregon, that doubt was removed in 1972 by the enactment Article VII (Amended), section 9, of the Oregon Constitution. That provision was enacted by the voters following a referral from the legislature. It provides: "Provision may be made by law for juries consisting of less than 12 but not less than six jurors."

Defendant argues that this provision—to be harmonized with Article I, section 11—must be limited to juries in non-criminal cases or to juries outside

of the circuit court. (Pet Br 27-35). As explained above, though, Article I, section 11, did not establish a minimum jury size. Moreover, by its terms, Article VII (Amended), section 9, is not limited to specific courts or to specific types of cases. Defendant's argument, that Article VII (Amended), section 9, should be read to apply to only civil cases or criminal cases tried outside of the circuit court, is really an effort to add words to the constitution that are not there. The lack of qualification or limitation in the constitutional text, however, strongly implies that there is none. *See McIntire v. Forbes*, 322 Or 426, 429-30, 909 P2d 846 (1996) (text that is "inclusive, not exclusive, with no limits stated," indicates that there are no limits). Article VII (Amended), section 9, thus permitted the legislature to authorize, via ORS 136.210(2), six-member juries for misdemeanor cases.

b. The history of Article VII (Amended), section 9, confirms that it applies to criminal cases tried in circuit court.

The history of Article VII (Amended), section 9, further supports the conclusion that the provision allows the legislature to authorize juries of less than 12, but no fewer than six jurors for circuit court criminal cases.

i. The history of the legislative referral demonstrates the intent for the amendment to apply to criminal cases in circuit court.

The legislative history of the measure does not directly address whether the amendment would apply to both criminal and civil trials. But what that

history makes clear is a legislative intent to permit laws authorizing juries of fewer than 12, but no less than six, jurors in the circuit court, without qualification. When what became Article VII (Amended), section 9, originally was introduced in the legislature, it was limited to "courts inferior to circuit court"—meaning that it necessarily would not have applied to felonies, which could only be tried in circuit court. *See* Or Laws 1971, SJR 17 (House Amendments, deleting that phrase). However, the House deleted that limitation; therefore, the referred measure, as amended, allowed for six-person juries in any court. Minutes, House Committee on Judiciary (SJR 17), May 26, 1971, at 5.

At the House floor debate on SJR 17, Representative Skelton advised the House members that "a recent decision of the United States Supreme Court involving a Florida law involving a six man jury held that juries of less than twelve were, if authorized by the constitution or the laws of the state involved, would be constitutional as far as the federal constitution is concerned." House Floor Debate on SJR 17, May 31, 1971, tape 23, side 1. The United States Supreme Court decision referenced by Representative Skelton was *Williams v. Florida*, 399 US 78, 86, 90 S Ct 1893, 26 L Ed 2d 446 (1970)—a criminal case.

Representative Skelton also told legislators that the state was then "operating with six man juries in two different courts, in both the justices of the peace courts and the district courts." House Floor Debate on SJR 17, May 31,

1971, tape 23, side 1. The measure was needed because there was "some question as to the constitutionality of" that practice. *Id.*[7] But the measure "goes farther than just the district court and the justice of the peace courts[.]" *Id.* Amendments made in the House Judiciary Committee "would mean that we, the legislature, may make a law if we desire to provide for six man courts [*sic*] at the circuit court which is the general trial court level." *Id.*

Thus, the legislative history of what became Article VII (Amended), section 9, indicates that the legislature knew—when it referred the provision to the voters—that juries of fewer than 12 were constitutionally permissible in state court criminal cases. In other words, the provision that the legislature drafted was intended to permit it, without qualification or limitation, to authorize six-member juries in circuit court. If the legislature (or the electorate) had intended to limit that authority to civil cases only—or to criminal cases outside of the circuit court—certainly it would have said so.

ii. Voters' pamphlet material confirms that the amendment applies to juries in all courts for both civil and criminal cases.

In the voters' pamphlet, the explanation of the amendment provided by the "Committee Designated Pursuant to ORS 254.210" states that "[t]he

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[7] Oregon law has provided for six-person juries in justices of the peace courts and county courts since the Deady Code. General Laws of Oregon, Civ Code, ch XII, § 915, p 290 (Deady & Lane 1843-1872).

proposed amendment to the Oregon Constitution authorizes enabling legislation providing for juries composed of fewer than 12 jurors but not fewer than 6 jurors *in the trial of civil and criminal cases*." Official Voters' Pamphlet, General Election, November 7, 1972, 21 (emphasis added). *See Ecumenical Ministries v. Oregon State Lottery*, 318 Or 551, 560 n 8, 871 P2d 106 (1994) (in considering history of constitutional provision adopted by vote of people, court considers materials in voters' pamphlet, contemporaneous news reports, and editorial comments on measure). The pamphlet thus contained a statement informing voters that the proposed amendment applied, in part, to criminal cases.

Additionally, the argument in favor of the measure, supplied by the "Legislative Committee Pursuant to ORS 255.421(3)," explained:

> The United States Supreme Court has recently said, "The fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system." Oregonians should not forego badly needed court reform in deference to this "historical accident." The Supreme Court ruled in another case, JOHNSON v. LOUISIANA, that juries of less than 12 are completely permissible under the United States Constitution.

Official Voters' Pamphlet, General Election, November 7, 1972, 22. The reference to the first United States Supreme Court case is to *Williams v. Florida*, and the second is to *Johnson v. Louisiana*, 406 US 356, 92 S Ct 1620, 32 L Ed 2d 152 (1972). Both are criminal cases. Thus, the electorate would

have been aware that the United States Supreme Court had approved six-person juries *in criminal cases*, and it would have been aware that this amendment was designed to expressly permit six-person juries in criminal cases in Oregon.

As defendant notes (Pet Br 30-31), the voters' pamphlet materials regarding what is now Article VII (Amended), section 9, were erroneous in one respect. In addition to the discussion of *Williams* and *Johnson*, noted above, the argument in favor of the proposed amendment states that the measure "would amend the Oregon Constitution in Amended Article VII to permit the Legislature to provide by law for six-member juries *in civil cases*. The measure would not change the jury trial guarantee in Article I of the Oregon Constitution." Official Voters' Pamphlet, General Election, November 7, 1972, 22 (emphasis added).

The implication that the amendment would apply to only civil cases, however, is apparently attributable to an oversight on the part of the argument's drafters and should be discounted for several reasons. First, such a limitation is at odds with the unlimited text of Article VII (Amended), section 9. Second, the remainder of the argument discusses *Williams* and *Johnson*—two United States Supreme Court cases involving *criminal prosecutions*. Finally, a contemporaneous editorial in the Salem Capital Journal categorically stated that the argument in favor incorrectly implied that the measure applied to civil cases only. The editorial affirmed that the measure "no longer [was] limited to civil

cases, but would apply to criminal cases also." *Capital Journal*, November 1, 1972, section 1, at 4. The editorial writers knew this because they had read "the legislative committee notes and [had] talked with two staff lawyers who participated in drafting and redrafting." *Id.* "Apparently," the editorial writers opined, the argument in favor of the measure "was written prior to the final amendments" to the measure. "No matter how it happened," the argument in favor and its statement about civil cases was "misleading." *Id*.

The historical context and legislative history of the enactment of Article VII (Amended), section 9, confirms that it applies—without limitation—to jury trials in all state courts for both civil and criminal cases. That provision specifically permitted the legislature to enact ORS 136.210(2)—requiring six-person juries in misdemeanor cases—and the trial court did not err in empaneling such a jury in this case.

3. Even if Article I, section 11, conflicts with Article VII (Amended), section 9, Article VII (Amended) controls because it is more specific and was later enacted.

As explained above, there is no conflict between Article I, section 11, and Article VII (Amended), section 9. The 1934 amendments to Article I, section 11, merely permits verdicts in most criminal cases tried in circuit courts to be rendered by a nonunanimous vote of the jury. In other words, nothing in Article I, section 11, requires a minimum jury size for criminal cases tried in circuit court.

Article VII (Amended), section 9, on the other hand, explicitly addresses the issue of permissible jury size. It specifically permits the legislature to authorize juries of less than 12 members, while requiring that juries include at least six members. There is no limitation in that provision about which courts or what type of cases it applies to.

Because no conflict exists between those two constitutional provisions, and because six-person juries are specifically permitted by Article VII (Amended), section 9, this court's inquiry should end. However, even if this court perceives a conflict between the two provisions, it should conclude that the more specific and later-enacted Article VII (Amended), section 9, controls, and it should conclude that the six-person jury in this case was permissible.

First, Article VII (Amended), section 9, is more specific than Article I, section 11, with respect to the jury-size question before this court. To be sure, Article I, section 11, deals with criminal cases specifically, but it does not expressly address the number of jurors who must comprise the jury in a criminal case in circuit court. *See State ex rel Smith v. Sawyer*, 263 Or 136, 138 & n 1, 501 P2d 792 (1972) (noting that Article I, section 11, "obviously contemplates a jury of twelve persons," but not deciding "whether Article I, section 11, in any way inhibits the legislature from authorizing the use of juries of less than twelve members"). In contrast, Article VII (Amended), section 9, specifically states that "[p]rovision may be made by law for juries consisting of

less than 12 but not less than six jurors." Because Article VII (Amended), section 9, deals specifically with the number of jurors in a jury, it is the more specific provision. It therefore controls. *See State v. Dahl*, 336 Or 481, 489, 87 P3d 650 (2004) (applying maxim of construction to conflicting statutes).

Second, if two provisions of law conflict with each other, the latter-enacted one controls. *See Harris v. Craig*, 299 Or 12, 15 n 1, 697 P2d 189 (1985) (if two laws are "totally irreconcilable, the later will prevail[.]"). Article VII (Amended), section 9, was enacted by vote of the people in 1972, while the pertinent portion of Article I, section 11, was enacted, also by vote of the people, in 1934. Article VII (Amended), section 9, is the later-enacted provision, and for that reason as well, it controls.

4. The trial court correctly proceeded with a six-person jury in defendant's case.

With that understanding of the relevant constitutional and statutory framework in mind, this court should readily hold that the trial court correctly denied defendant's request for a jury of at least 10 members to adjudicate this misdemeanor prosecution. The only source defendant identifies for his purported right to a 10 (or more) person jury is Article I, section 11. But, that provision was never intended to elevate a common-law "historical accident" into a constitutional requirement. *See Williams*, 399 US at 88-89 ("In short, while sometime in the 14th century the size of the jury at common law came to

be fixed generally at 12, that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place." (footnotes omitted)). Instead, the intent of the 1934 amendments to Article I, section 11, was merely to permit nonunanimous verdicts in most criminal cases.

Any doubt about the constitutional authority for a six-person jury in this case, however, was removed by the enactment of Article VII (Amended), section 9, of the Oregon Constitution. That provision explicitly allows the legislature to enact statutes authorizing six-person juries for misdemeanor prosecutions. Pursuant to that authority, the legislature enacted ORS 136.210(2), which requires six-person juries in cases involving only misdemeanor charges, such as this. The trial court's compliance with that statute in this case did not violate the Oregon Constitution.

B. Admission of the Intoxilyzer accuracy certificates did not violate defendant's Sixth Amendment confrontation rights.

At defendant's trial, the trial court admitted—over defendant's objection—two documents certifying the accuracy of the Intoxilyzer 8000 breath testing machine that was used to establish defendant's blood-alcohol content. (Ex 4-5; Tr 190). The second issue in this case is whether defendant had a Sixth Amendment right to confront the creator of those certificates. Defendant argues that the information contained in the certificates constitutes

"testimonial" evidence, and that the Sixth Amendment Confrontation Clause thus entitled him an opportunity to cross-examine the witness who created them. (Pet Br 44). This court should reject defendant's claim. Neither the statements of the technician that the equipment was tested and certified to be accurate, nor the statements that the certificates had been retrieved from the state police computer system and were true copies, are "testimonial." Because the accuracy certificates are not "testimonial" evidence, defendant had no constitutional right to confront their creator; therefore, the trial court properly admitted the evidence.

1. The Sixth Amendment is implicated by only "testimonial" statements, made with the "primary purpose" of creating a substitute for in-court testimony.

The Sixth Amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." The Confrontation Clause bars the admission of "testimonial" statements unless the defendant had a prior opportunity for cross-examination and the declarant is unavailable. *Crawford v. Washington*, 541 US 36, 68, 124 S Ct 1354, 158 L Ed 2d 177 (2004). Only "testimonial statements" cause a declarant to be a "witness" within the meaning of that provision. *Davis v. Washington*, 547 US 813, 821, 126 S Ct 2266, 165 L Ed 2d 224 (2006).

To determine whether a statement is testimonial, the court must decide whether the witness had "a primary purpose of creating an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 562 US ___, 131 S Ct 1143, 1155, 179 L Ed 2d 93 (2011). If the "primary purpose" of the statement was "not to create a record for trial," then the statement is non-testimonial and its admissibility "is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.* (footnote omitted). *Accord Williams v. Illinois*, 567 US ___, 132 S Ct 2221, 2243, 183 L Ed 2d 89 (2012); *Davis*, 547 US at 822.

The United States Supreme Court has applied the primary purpose test to evidence similar to the accuracy certificates at issue here in three recent cases: *Melendez-Diaz v. Massachusetts*, 557 US 305, 129 S Ct 2527, 174 L Ed 2d 314 (2009), *Bullcoming v. New Mexico*, ___ US ___, 131 S Ct 2705, 180 L Ed 2d 610 (2011), and most recently in *Williams v. Illinois*. In those cases, the Court held that, where a laboratory report is created for the purpose of a particular criminal prosecution, its "primary purpose" was to substitute for in-court testimony. Consequently, the laboratory reports at issue in *Melendez-Diaz* (identifying an unknown substance as a controlled substance in a prosecution for distributing and trafficking in cocaine) and *Bullcoming* (identifying a defendant's blood-alcohol content in DUII prosecution)—which were prepared at the request of law enforcement and specifically for use in the prosecutions in those cases—were testimonial evidence that the defendants had the right to

confront. In *Williams*, on the other hand, a plurality of the Court concluded that a DNA profile report was not testimonial, because the report "was not prepared for the primary purpose of accusing a targeted individual." 132 S Ct at 2243. As discussed below, the primary purpose for preparing the Intoxilyzer accuracy certificates at issue in this case was not to create evidence for trial; rather, they were prepared by the Oregon State Police (OSP) to comply with their statutory obligation to administer Oregon's implied consent program.

That conclusion is consistent with this court's existing law. This court also recently has applied the primary purpose test to hold that a certificate of service of a restraining order was not testimonial evidence implicating the Confrontation Clause. *State v. Copeland*, 353 Or 816, 846-48, 306 P3d 610 (2013). This court noted that "the primary purpose for which the certificate of service in this case was created was to serve the administrative functions of the court system," *id.* at 846, and, although "[i]t was foreseeable that the certificate might be used in a later criminal prosecution * * * the more immediate and predominant purpose of service was to ensure that [the] defendant could—and would—comply with" the restraining order. *Id.* Finally, this court explained that, "[b]ecause the [United States Supreme] Court has not held, nor otherwise indicated, that a document primarily created for an administrative purpose could be rendered testimonial merely by the possibility that it might be used in a later criminal prosecution, we likewise refrain from doing so here." *Id.* at 848. In

other words, where the primary purpose in creating a document is for an administrative purpose, that document is not testimonial even if it was foreseeable that the document might be used in a later criminal prosecution. As explained below, the certificates at issue here were created for such an administrative purpose; therefore, they are not testimonial.

2. The Intoxilyer certificates were not testimonial under the Sixth Amendment because they were created in the regular course of business—namely, the regular course of equipment maintenance—for the primary purpose of administering the agency's affairs.

Because the Intoxilyzer accuracy certificates at issue in this case were made primarily for an administrative purpose, they are not "testimonial" for Confrontation Clause purposes. This is true even though, at the time the certificates were made, there was a possibility that they would be used in a later criminal proceeding.

a. The Oregon State Police are responsible for administering the implied consent program; part of that responsibility involves routinely testing for accuracy and certifying Intoxilyzer machines.

ORS 813.160 establishes the administrative requirements for the breath-testing component of the state's implied consent program.[8] Because the

[8] Oregon's implied consent statutes establish a regulatory system to ensure safety of Oregon's roadways and to provide a mechanism to immediately protect the public by removing intoxicated drivers from the road. *See, e.g.*, ORS 813.100(3) (requiring officer to immediately take custody of driver license of person who refuses to take, or fails, a breath test). Sanctions

Footnote continued…

administrative purpose of an out-of-court statement is critical to determining that the statement is not testimonial, the state explains the statutory duties and administrative requirements that led to the creation of the accuracy certificates in this case.

ORS 813.160(1) does two things. First, it identifies the types of chemical analyses that are "valid under ORS 813.300." Those include an analysis of a person's blood for alcohol content if it is performed in a laboratory meeting one of the listed qualifications, ORS 813.160(1)(a), as well as an analysis of a person's breath if it is "performed by an individual possessing a valid permit to perform chemical analyses issued by the Department of State Police and is performed according to the methods approved by the Department of State Police," ORS 813.160(1)(b).

Second, in conjunction with assigning OSP the responsibility for approving methods for breath testing, ORS 813.160(1)(b) imposes a number of express duties on OSP.[9] Those duties range from "approving methods of

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(…continued)
for failing to comply with the implied consent system are non-criminal. *See, e.g.*, ORS 813.095 (refusal to take breath or urine test when required by statute is a traffic violation).

[9] ORS 813.160(1)(b) provides:

(1) A chemical analysis is valid under ORS 813.300 if:

* * * * *

Footnote continued…

(…continued)

(b) It is an analysis of a person's breath and is performed by an individual possessing a valid permit to perform chemical analyses issued by the Department of State Police and is performed according to methods approved by the Department of State Police. For purposes of this paragraph, the Department of State Police shall do all of the following:

(A) Approve methods of performing chemical analyses of a person's breath.

(B) Prepare manuals and conduct courses throughout the state for the training of police officers in chemical analyses of a person's breath, which courses shall include, but are not limited to, approved methods of chemical analyses, use of approved equipment and interpretation of test results together with a written examination on these subjects.

(C) Test and certify the accuracy of equipment to be used by police officers for chemical analyses of a person's breath before regular use of the equipment and periodically thereafter at intervals of not more than 90 days. Tests and certification required by this subparagraph must be conducted by trained technicians. Certification under this subparagraph does not require a signed document.

(D) Ascertain the qualifications and competence of individuals to conduct chemical analyses in accordance with one or more methods approved by the department.

(E) Issue permits to individuals according to their qualifications. Permits may be issued to police officers only upon satisfactory completion of the prescribed training course and written examination. A permit must state the methods and equipment that the police officer is qualified to use. Permits are subject to termination or revocation at the discretion of the Department of State Police.

OAR 257-030-0170, which implements ORS 813.160(1)(b)(C), provides:

Footnote continued…

performing chemical analysis of a person's breath," to preparing manuals and conducting training, to "[t]est[ing] and certify[ing] the accuracy of equipment[.]" *See, e.g.*, ORS 813.160(1)(b)(A)-(E). Those duties all have in common the primary purpose of providing for a well-administered breath testing program, thereby ensuring the reliability of the testing.

Specifically, ORS 813.160(1)(b)(C) imposes on OSP a duty to routinely test the equipment for accuracy in accordance with minimum standards regarding the frequency with which the tests will be done, the qualifications of the technician running the tests, and documenting the results of the tests. The statute mandates that OSP:

> [t]est and certify the accuracy of equipment to be used by police officers for chemical analyses of a person's breath before regular use of the equipment and periodically thereafter at intervals of not more than 90 days. Tests and certification required by this subparagraph must be conducted by trained technicians. Certification under this subparagraph does not require a signed document.

(…continued)

> Pursuant to ORS 813.160(1)(b)(C), a trained technician of the Oregon State Police shall conduct an accuracy test of approved breath testing equipment and certify the accuracy of the equipment if accuracy test performance is within a range of 0.010 high to 0.020 low of the expected value. The testing can be performed by either an on site test, or by remote testing via telephone, modem, or Internet connection utilizing a computer. The computerized testing will utilize a security system to ensure the integrity of the scientific testing of the breath test equipment.

ORS 813.160(1)(b)(C).[10]

b. The certificate of accuracy is not testimonial.

When a technician tests and certifies the accuracy of an Intoxilyzer 8000, he or she is performing and documenting routine inspection/ maintenance of the equipment pursuant to OSP's statutory duty. As explained above, the certificate is created for the purpose of administering the agency's affairs, namely, administering the implied consent breath testing program. The person who tests the machine's accuracy has no particular prosecutorial purpose in mind, and does not know when, or even if, the certificate will ever be used. Consequently, the certificate of accuracy is not "testimonial" evidence; therefore, it can be admitted without allowing defendant an opportunity to cross-examine the person who created it.

Defendant proposes that a certificate of accuracy is testimonial because it "assists police investigations," and because it "contains statements that the technician would expect to be used at a later criminal prosecution." (Pet Br 3). That argument, however ignores the primary purpose for which these certificates were made (OSP's statutory duty to administer the implied consent program), and it ignores this court's admonishment in *Copeland* that a document created primarily for an administrative purpose will not be rendered

[10] Those maintenance records are publically accessible on OSP's website without any login or password.

testimonial "merely by the possibility that it might be used in a later criminal proceeding." 353 Or at 848.

Defendant also argues that the statements on the certificates by the person who retrieved those documents from OSP's computer system, declaring the documents to be true copies of OSP's records, are themselves testimonial because "they are prepared for use as evidence at trial and serve a necessary evidentiary purpose." (Pet Br 45). The United States Supreme Court, however, rejected that very argument in *Melendez-Diaz*. There, the dissent expressed concern that "the long-accepted practice of authenticating copies of documents by means of a certificate from the document's custodian stating that the copy is accurate," 557 US at 336-37 (Kennedy, J., dissenting), would be implicated by the Court's holding. The majority, in response, confirmed that "[a] clerk could by affidavit authenticate or provide a copy of an otherwise admissible record" without such authentication running afoul of the Confrontation Clause. 557 US at 322-23. Certificates authenticating official records, such as the one in this case, thus are not testimonial and do not implicate the Confrontation Clause of the Sixth Amendment. *See also, e.g.*, *United States v. Dowdell*, 221 US 325, 327-31, 31 S Ct 590, 55 L Ed 753 (1911) (recognizing and apparently applying historical exception to confrontation rule for documentary evidence used to prove collateral facts and concluding that various certifications made by a

judge, a clerk, and a court reporter did not implicate the defendant's confrontation right).

3. The trial court correctly denied defendant's motion to exclude the Intoxilyzer accuracy certificates.

The trial court correctly denied defendant's motion to exclude the accuracy certificates. Under the Sixth Amendment, a defendant's right to confront evidence against him is implicated only by testimonial evidence. Evidence is testimonial only if the evidence was made for the primary purpose of furthering prosecution of criminal charges. The Intoxilyzer accuracy certificates at issue here, however, were prepared to comply with OSP's statutory obligations to administer the implied consent program—not for the primary purpose of prosecuting this (or any other) defendant. Consequently, defendant had no Sixth Amendment right to cross-examine the certificate's creator.

CONCLUSION

The trial court and the Court of Appeals correctly rejected defendant's request for a 10 (or more) member jury, and they correctly rejected his efforts to exclude the Intoxilyzer accuracy certificates. This court should affirm the Court of Appeals' decision, and it should affirm the judgment of conviction.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 5, 2014, I directed the original Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jedediah Peterson, attorney for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 9,191 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(2)(b).

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