IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DOROTHY ELIZABETH RAFEH, aka Dorothy Elizabeth Barnett, Defendant-Appellant, Petitioner on Review.	Multnomah County Circuit Court No. 15CR05982 CA A159531 SC S064084

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 JOHN A. WITTMAYER, Judge

Order Granting Summary Affirmance Filed: April 13, 2016
Signed by: Ericka L. Hadlock, Chief Judge
Before: Hadlock, Chief Judge, and Garrett, Judge

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
JOHN P. EVANS #133532
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
john.p.evans@opds.state.or.us

Attorneys for Defendant-Appellant
Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
JOANNA L. JENKINS #972930
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
joanna.jenkins@doj.state.or.us

Attorneys for Plaintiff-Respondent
Respondent on Review

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

INTRODUCTION

Under ORS 813.410, drivers who refuse an implied consent chemical test are subject to having their driver licenses suspended automatically. To carry out this administrative suspension, the governing statutes impose a duty on the officer who requested the test to fill out an Oregon Department of Transportation, Driver and Motor Vehicle Services Division (DMV) form—the Implied Consent Combined Report—and give a copy of it to the driver. Among other things, the form notifies the drivers that their licenses will be suspended unless they request an administrative hearing, and it contains a certification of service to establish that the notice has been given to the driver and that the administrative suspension process has been triggered.

In this case, defendant's license had been suspended in 2012 pursuant to ORS 813.410. In 2015, defendant drove a vehicle while the suspension was still in effect and, as result, she was prosecuted for driving with a suspended license. She raised the affirmative defense that she had not received notice of the suspension. To the rebut that defense, the state offered the portion of the Implied Consent Combined Report indicating that she had been given a copy of the notice.

At issue on review is whether the statement that defendant had been given a copy of the form was testimonial for purposes of the federal Confrontation Clause—in other words, whether the state must call the officer who gave defendant the notice rather than relying on the form itself.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Question presented: Was the statement on the Implied Consent Combined Report that a copy of the form had been given to defendant testimonial under the Sixth Amendment's Confrontation Clause?

Proposed rule of law: No. Evidence is testimonial under the Sixth Amendment's Confrontation Clause only if the primary purpose of the statement was to create a substitute for live testimony at a criminal trial. The statement at issue here was not testimonial because the primary purpose for which it was created was administrative. It was created to administer the affairs of the agency by notifying the driver of the suspension and of her administrative hearing rights, documenting that she had received that information, and memorializing the suspension.

STATEMENT OF FACTS

On October 8, 2012, DMV suspended defendant's driving privileges for a period of three years pursuant to ORS 813.410, for refusing an implied consent blood test. (Ex 1). On February 12, 2015, Portland Police Officer Derek Moore stopped defendant for an equipment violation and learned that her driver

license was suspended. (Tr 49-51). Accordingly, defendant was charged with misdemeanor driving while suspended under ORS 811.175 and ORS 811.182(4)(c). (ER 1).[1]

At trial, defendant raised the affirmative defense set out in ORS 811.180(1)(b), that she "had not received notice of the * * * suspension." (Tr 44). To rebut that affirmative defense, the state offered a certified copy of defendant's driving record containing the relevant portion of the Implied Consent Combined Report that set out notice of DMV's intent to suspend defendant's driving privileges for three years, beginning on the 30th day after defendant's 2012 arrest. (Ex 1). That form contained a signed statement by Marion County Deputy Sheriff Ronald Cereghino, the officer who issued the document, affirming that the events set forth in the notice of suspension had occurred—including, as relevant here, that defendant had been given a copy of the form. (Ex 1).

Defendant objected to the admission of the Implied Consent Combined Report form, contending that unless Deputy Cereghino was called as witness and subjected to cross-examination, admitting the document violated her rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. (Tr 14). The trial court overruled the objection, relying on the

[1] ORS 811.175, ORS 811.180, and ORS 811.182 are set out in full in the appendix to this brief, along with other frequently cited statutes.

Court of Appeals' decision in *State v. Velykoretskykh*, 268 Or App 706, 343 P3d 272 (2015). (Tr 17-18). *Velykoretskykh*, in turn, relied heavily on this court's decision in *State v. Copeland*, 353 Or 816, 306 P3d 610 (2013), to conclude that the Implied Consent Combined Report is not testimonial when offered by the state in a driving-while-suspended trial to rebut the affirmative defense under ORS 811.180(1)(b). 268 Or App at 710-13. Defendant appealed, arguing that *Velykoretskykh* was wrongly decided. (App Br 2). The Court of Appeals summarily affirmed, citing *Velykoretskykh*. (Pet Rev, ER 1).

SUMMARY OF ARGUMENT

The "primary purpose" test determines whether a statement is "testimonial" under the federal Confrontation Clause. A statement is testimonial only if its primary purpose is to create an out-of-court substitute for trial testimony at the criminal prosecution. The statutory requirements and the format of the Implied Consent Combined Report demonstrate that the primary purpose of the form is to serve the administrative functions related to administering the license suspension, including notifying the driver of the suspension and of her administrative hearing rights, documenting for DMV that the driver has received that information so that the suspension may go into effect, and memorializing the suspension if it is not challenged. The document is analogous to the certificate of service considered by this court in *State v. Copeland*, 353 Or at 843-46. Under this court's reasoning in *Copeland*, as well

as the United States Supreme Court cases relied on by *Copeland* or decided subsequently, the evidence at issue here was not testimonial, because its primary purpose was administrative.

Defendant's proposed rule, as well as the arguments in support of her claim, fail to adequately account for the primary-purpose test. Moreover, her arguments misunderstand the nature and purpose of the Implied Consent Combined Report, and they incorrectly construe a number of contextual statutes. The evidence at issue here was not created to serve as an out-of-court replacement for trial testimony in a criminal prosecution. Therefore, it was not testimonial and it did not fall within the ambit of the federal Confrontation Clause.

ARGUMENT

Under the governing primary-purpose test, the Implied Consent Combined Report was not testimonial. Defendant's arguments to the contrary fail to account for the controlling primary-purpose test, and they are premised on a misunderstanding of the evidence at issue, as well as an incorrect reading of contextual statutes.

A. The federal Confrontation Clause applies only to evidence whose primary purpose is testimonial.

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." The federal

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). At issue here is whether the Implied Consent Combined Report evidence admitted in this case was "testimonial" evidence.

The "primary purpose test" determines whether a statement is "testimonial" under the federal confrontation clause. *Ohio v. Clark*, __ US __, 135 S Ct 2173, 2179-80, 192 L Ed 2d 306 (2015). "[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." *Id*. at 2180. The Court has described testimonial statements as statements that have a primary purpose "to establish or prove past events potentially relevant to later criminal prosecution," and to "creat[e] an out-of-court substitute for trial testimony." *Id*. (quoting *Davis*, 547 US at 822 and *Michigan v. Bryant*, 562 US 344, 358, 131 S Ct 1143, 179 L Ed 2d 93 (2011)). *See also Crawford*, 541 US at 51 (discussing various formulations that have been used to describe testimonial statements including: "pretrial statements that declarants would reasonably expect to be used prosecutorially," or statements made under circumstances that "would lead an objective witness reasonably to believe that

the statement would be available for use at a later trial."). The relevant time for determining a statement's primary purpose is when the statement was made. *See*, *e.g.*, *Copeland*, 353 Or at 843-46 (discussing relevant Supreme Court caselaw). Ultimately, the primary purpose inquiry "must consider 'all of the relevant circumstances.'" *Clark*, 135 S Ct at 2180 (quoting *Bryant*, 562 US at 369).

The primary-purpose test has evolved from the Court's efforts to apply *Crawford* in subsequent cases. At issue in *Crawford* was whether certain statements made by a witness during a police interrogation were subject to the constraints of the Confrontation Clause. In analyzing that issue, the Court discussed what it referred to as the "core class of 'testimonial' statements," including: "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford*, 541 US at 51. The Court declined to "spell out a comprehensive definition of 'testimonial,'" but held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations*." *Id*. at 68 (emphasis added).

But it now is clear that even statements that might otherwise appear to fall into one of those categories are testimonial only if their primary purpose was to create an out-of-court substitute for trial testimony. *Davis*, 547 US 813

(statements made in response to police interrogation are not "testimonial" if their primary purpose was to enable police to meet an ongoing emergency); *Bryant* 562 US 344 (same). It does not matter that a statement "had the natural tendency to result in [the defendant's] prosecution" or that "a jury would view the statement as the equivalent of in-court testimony," if that was not the primary purpose of the statement. *Clark*, 135 S Ct at 2183.

B. The Implied Consent Combined Report was not testimonial.

1. The primary purpose of the Implied Consent Combined Report is to serve the administrative licensing functions of the Oregon Department of Transportation, Driver and Motor Vehicles Division.

The Implied Consent Combined Report admitted at defendant's trial was a public record of an administrative agency, the Oregon Department of Transportation, Driver and Motor Vehicles Division. Statutes governing administrative driver's license suspensions dictate the creation and contents of the Implied Consent Combined Report. Those statutory requirements demonstrate that the primary purpose of the report is to serve administrative licensing functions.

The governing statutes show that the Implied Consent Combined Report is created to serve an administrative purpose. The Oregon Department of Transportation is charged with all tasks relating to issuing and suspending driver licenses: "The Department of Transportation shall perform all of the duties, functions and powers with respect to * * * [t]he administration of the

laws relating to driving privileges granted under licenses and permits and under the vehicle code." ORS 802.010(1)(c). Oregon's implied consent statute, ORS 813.100, requires police officers to fulfill certain distinct duties as agents for the department. Although the events triggering those duties arise in the course of a criminal investigation of driving under the influence of intoxicants, ORS 813.100(3)(a)-(d) require a police officer to take a number of administrative actions on "behalf of the department" according to a timeline established by department rule, including: immediately taking custody of any driver's license or permit issued to the driver by the state; providing written notice of intent to suspend on "forms prepared and provided by" the department; issuing the driver a temporary driving permit if the person is qualified for one; and preparing and delivering a report of the actions taken under this section to the department, along with any seized license and a copy of the notice of intent to suspend. The fact that the Implied Consent Combined Report is created to fulfill the functions of an administrative agency—license suspension and temporary licensing—shows that its primary purpose is administrative.

The statutory requirements for the contents of the Implied Consent Combined Report further demonstrate that its function is to serve the administrative licensing purpose. ORS 813.410(6) sets out the requirements for a valid driver license suspension under ORS 813.100. ORS 813.120(1) sets out

the required contents of the report mandated by ORS 813.100(3)(d). Not coincidentally, the requirements for a valid suspension listed in ORS 813.410(6) are identical to the requirements for the contents of the report to the department that are listed in ORS 813.120(1). Similarly, ORS 813.100(3)(b) specifies that the notice of intent to suspend "shall inform the person of consequences and rights as described under ORS 813.130." ORS 813.130, in turn, "establishes the requirements for information about rights and consequences for purposes of ORS 813.100 and 813.410." Again, the statutes require that the report contain information that must be provided to the driver in order to validly suspend the person's license. Thus, its purpose is to facilitate license suspensions.

Finally, the fact that the administrative agency prepares and distributes the Implied Consent Combined Report form further supports the conclusion that its primary purpose is administrative. The department is required by statute and administrative rule to prepare and distribute the form or forms used for the notice of intent to suspend referenced in ORS 813.100(3)(b), and the report referenced in ORS 813.100(3)(d) and ORS 813.120. *See*, *e.g.*, ORS 813.100(3)(b) (officer must provide the driver "with a written notice of intent to suspend, on forms prepared and provided by the Department of Transportation); ORS 813.120(2) ("A report required by ORS 813.100 may be made in one or more forms specified by the Department of Transportation.").

See also OAR 735-070-0054(1) ("A police report required by ORS 813.100 must be submitted to the Driver and Motor Vehicle Services Division of the Department of Transportation (DMV) on forms approved and distributed by the department.").

To carry out that statutory duty, the department has developed Form 735-0075—the Implied Consent Combined Report—which is the means for recording the information required by ORS 813.100 and ORS 813.120. *See* OAR 735-090-0040 (identifying the forms that must be sent by the officer to the department according to the specified timelines). The Implied Consent Combined Report, a complete copy of which is included as an Appendix to this brief, consists of five double-sided pages. With one exception, the first four pages are identical—the top page is the original and the next three pages are carbon copies. The front side of those pages contains the fill-in-the-blank check-box form that serves as the notice of intent to suspend for the driver, as well as the report to the department. The reverse sides of pages one through four contain an identical statement of the statutory implied consent rights and consequences, as required by ORS 813.100(3)(b) and ORS 813.130. They also contain information for the driver on how to request a hearing. The forth page is the copy that is given to driver, and differs in one respect from the first three pages: it is about an inch-and-a-half longer than the first three pages, to allow a space for the officer to issue a temporary driver permit if applicable. Finally,

the front and back of the fifth page of the Implied Consent Combined Report contains a "Notice of Rights and Procedures in Driver and Motor Vehicle Services Implied Consent Hearings." The fifth page is provided to the driver along with page four, the notice of intent to suspend.

The format of the Implied Consent Combined Report is narrowly tailored to serve the department's administrative functions. The form memorializes the legal basis for the proposed license suspension while, at the same time, it notifies the driver of the basis for the agency's proposed action. As the form states, it also functions as the agency's order: "This document represents an Order of DMV pursuant to ORS 813.410. If no hearing is requested, the allegations in this document will be accepted as fact." (App 2, 4, 6, 8). The report thus fulfils the requirements of the agency's governing implied consent statutes, and simultaneously, it also conforms to the requirements of Administrative Procedures Act, including ORS 183.413 (notice of hearing rights and procedures), ORS 183.415 (notice of right to hearing for persons affected by actions taken by state agencies), and ORS 183.415(3)(e) (the notice must contain a "statement indicating whether and under what circumstances an order by default may be entered"). *See also* OAR 137-003-0670(1)(a) (final order by default when party fails to request a hearing); OAR 137-003-0672 (default in cases where order may become final in absence of request for hearing).

At the same time, the fill-in-the-blank check-box format of the Implied Consent Combined Report affords the issuing officer no discretion as to its content. All of the entries on the form are dictated by the statutory duties. That includes the statement at issue in this case. As mandated by ORS 813.120(1)(f), the form includes a place for the issuing officer to indicate "[w]hether the person was given written notice of intent to suspend required by ORS 813.100 (3)(b)."

In sum, the primary purpose of the administrative form is to fulfill the administrative functions of the agency. It fulfills statutory notice requirements including notice to the affected driver of the agency's intended licensing suspension action and, should the driver request a hearing, the notice frames the issues at the hearing, as it sets out the requirements for a valid suspension. In case of default, it serves as the agency's order.

2. *Copeland* confirms that under the primary-purpose test, the Implied Consent Combined Report was not testimonial.

As demonstrated above, the primary purpose of the Implied Consent Combined Report is to facilitate administrative license suspensions. Because the primary purpose for which it was created is administrative, it is not testimonial. That conclusion comports with this court's application of the primary-purpose test in *Copeland*. The evidence at issue in this case is

analogous to the certificate of service that this court held in *Copeland* was not testimonial.

In *Copeland*, the state charged the defendant with contempt for violating a restraining order. 353 Or at 818-19. At trial, the state offered the certificate of service, signed by the deputy who served the restraining order, as evidence that the defendant had notice of the order. *Id*. The defendant objected to the admission of the certificate of service without the ability to cross-examine the deputy, contending, as relevant here, that it violated his federal confrontation rights. *Id*.

In addressing that claim, this court first distinguished the certificate of service from the types of documentary evidence that the United States Supreme Court has held to be testimonial, starting with the forensic analysis certificates that were at issue in *Melendez-Diaz v. Massachusetts*, 557 US 305, 324, 129 S Ct 2527, 174 L Ed 2d 314 (2009). *Copeland*, 353 Or at 842-44. The defendant in *Melendez-Diaz* was charged with trafficking in cocaine, and the certificates of analysis showed the results of the forensic analysis performed on the substances seized by police. *Melendez-Diaz*, 557 US at 308. Whereas public records generally do not raise confrontation concerns because they are created for the administration of an entity's affairs and not for the purpose of establishing some fact at trial, the forensic certificates in *Melendez-Diaz* were made for the sole purpose of proving a fact at trial. *Copeland*, 353 Or at 842-

43. Further, they were sworn affidavits and, thus, "formalized materials" that contained "'the precise testimony the analysists would be expected to provide if called at trial'"; "they were prepared in response to an investigative law enforcement request"; and under the governing statutes, "the 'sole purpose' of creating the certificates was to provide *prima facie* evidence in a criminal proceeding." *Id*. (quoting *Melendez-Diaz*, 557 US at 311).

In contrast, this court explained, the certificate of service at issue in *Copeland* "was not prepared in response to a request made by law enforcement during the course of an investigation," and in fact, "the violation of the restraining order did not occur until well after service was completed." *Id*. at 843. Additionally, the governing statutes that required production of the certificate of service demonstrated that the certificate was made primarily for the purpose of administrating an entity's affairs. *Id*.

After distinguishing the certificate of service from the forensic certificate in *Melendez-Diaz*, this court noted that later decisions of the Court, including *Bullcoming v. New Mexico*, 564 US 647, 131 S Ct 2705, 180 L Ed 2d 610 (2011) and *Williams v. Illinois*, __ US __, 132 S Ct 2221, 183 L Ed 2d 89 (2012), "reinforced" the distinctions between testimonial documents and nontestimonial documents based on their primary purpose. *Copeland*, 353 Or at 843-46; *see also id*. at 844 ("To determine if a statement is testimonial, we must decide whether it has 'a primary purpose of creating an out-of-court substitute

for trial testimony.' * * * When the 'primary purpose' of a statement is 'not to create a record for trial,' 'the admissibility of the statement is the concern of the state and federal rules of evidence, not the Confrontation Clause.'") (quoting *Bullcoming*, 131 S Ct at 2720 (Sotomayor, J., concurring) (quoting *Michigan v. Bryant*, 562 US at 358-59) (internal citations omitted)). *Clark*, decided after *Copeland*, solidifies that distinction. In *Clark*, the Court discussed the development of the primary-purpose test, and expressly confirmed that a statement "cannot fall within the Confrontation Clause unless its primary purpose was testimonial." 135 S Ct. at 2180.

In concluding that the certificate of service was not testimonial, the court in *Copeland* reiterated that the primary purpose of the document was to serve the administrative functions of the court system. 353 Or at 846. Although it was foreseeable that the certificate might later be used in a prosecution to prove that the defendant had notice of the restraining order, that did not alter that primary, or "immediate and predominate" purpose. *Id*. The court analogized the certificate of service to warrants of deportation that federal courts have held are nontestimonial:

> In each case, a document is created and kept in a public agency's ordinary course, with an attestation by a public official that he or she did something (served the defendant) or saw the defendant do something (leave the country), and is offered to prove an element of a crime in a subsequent prosecution. The warrants of deportation * * * have consistently been held to be nontestimonial because their "primary purpose is to maintain records concerning

> the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions."

Id. at 847 (quoting *United States v. Torres–Villalobos*, 487 F3d 607, 613 (8th Cir 2007)).

This court rejected the defendant's argument that the certificate of service was testimonial because it fell within the core class of testimonial statements identified in *Crawford* that are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Copeland*, 353 Or at 847 (quoting *Crawford*, 541 US at 52). "Because the 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 in this case." *Id*. at 848. For the same reasons the certificate of service in *Copeland* was not testimonial, the Implied Consent Combined Report evidence was not testimonial.

The Implied Consent Combined Report is distinguishable from the forensic certificates in *Melendez-Diaz* for the same reasons that the certificate of service at issue in *Copeland* was distinguishable. Although the report was prepared during a criminal investigation, the official preparing the report was acting on behalf of an administrative agency—not law enforcement. *See Bryant*, 562 US at 368 (explaining that police officers perform multiple roles—

in the context of that case, first responders and criminal investigators—and that "[t]heir dual responsibilities may mean that they act with different motives simultaneously or in quick succession"). And the crime of driving with a suspended license was not committed until years after Deputy Cereghino issued the Implied Consent Combined Report, in a different county, under the jurisdiction of a different police agency. Additionally, as set out above, the governing statutes demonstrate that the primary purpose of the Implied Consent Combined Report was administering the affairs of the department—specifically, of DMV.

This court's description of the purpose of the certificate of service in *Copeland* highlights how similarly the two documents function:

> [U]nder ORS 107.718(8)(b), the county sheriff or another peace officer—in this case a deputy sheriff—has a legal duty to personally serve a restraining order and to make proof of that service. The routine fulfillment of those duties ensures that respondents in restraining order proceedings receive the notice to which they are statutorily and constitutionally entitled, establishes a time and manner of notice for purposes of determining when the order expires or is subject to renewal, and assures the petitioner that the respondent knows of its existence.

Id. Similarly, Deputy Cereghino had a legal duty to personally serve the Implied Consent Combined Report and to document that service in the report. His routine fulfilment of those duties ensured that defendant received the notice of suspension, established the time and manner of notice for purposes of determining the timing of the suspension, and assured the agency that its

obligation to provide notice had been met, so that defendant knew of its existence and could abide by it or request a hearing to challenge it should she wish to do so. In sum, under this court's decision in *Copeland*, the Implied Consent Combined Report was not testimonial.

C. Defendant's arguments fail to account for the primary-purpose test, and they are premised on a misunderstanding of the evidence and an incorrect reading of contextual statutes.

Defendant proposes that: "As a general rule, testimonial hearsay is a solemn declaration or affirmation made for the purpose of establishing or proving some fact." (Pet Br 2). It is true that the Court in *Crawford* quoted an 1828 dictionary for the proposition that: "'Testimony,' * * * is typically '[a] solemn declaration or affirmation made for purposes of establishing or proving some fact.'" *Crawford*, 541 US at 51. But that definition by no means ends the analysis. As explained above, the Court's subsequent decisions make clear that a statement is testimonial only if its primary purpose is to create an out-of-court substitute for trial testimony at the criminal prosecution. Although defendant argues that "evidence is 'testimonial' if it falls within the 'core class' of testimonial evidence" identified in *Crawford*, even evidence previously deemed to fall within such a "core class"—*e.g.*, a statement made during a police interrogation—is not testimonial if the primary purpose of the statement was not to create an out-of-court substitute for trial testimony. Defendant's proposed rule, as well as her arguments in support of her claim, fail to account

for the primary-purpose test. Moreover, her arguments misunderstand the nature and purpose of the Implied Consent Combined Report, and they incorrectly construe a number of contextual statutes.

1. Defendant's arguments misunderstand the nature and purpose of the Implied Consent Combined Report.

Defendant asserts that the Implied Consent Combined Report is "the 'functional equivalent'" of in-court testimony, and that it "closely mirrors" the laboratory reports at issue in *Melendez-Diaz* and *Bullcoming*, which documented the forensic analysis of evidence for purposes of use by the prosecution at trial. (Pet Br 14). But that argument entirely disregards the primary purpose of the Implied Consent Combined Report, which is not to create a record for trial, but rather to administer the agency's affairs.

As discussed above, the official who prepared the Implied Consent Combined Report was acting on behalf of an administrative agency—not law enforcement—and the document's intended purpose was to administer the affairs of the agency. It was not intended to serve as an out-of-court substitute for trial testimony. Indeed, the crime for which the report became relevant was not committed until years after the document was created. Defendant emphasizes that the report was "a formalized statement of fact," and points to the statement on the form that the document "represents an order of DMV," and that, [i]f no hearing is requested, the allegations contained in this document will

be accepted as fact." (Pet Br 16). But that is beside the point if its primary purpose was administrative. The DMV's administrative notice of license suspension functions in its capacity as an administrative record by serving as the agency's order; it is not analogous to a forensic scientist's report on the testing of trial evidence, prepared on behalf of the prosecution, for purposes of the criminal trial.

Defendant also asserts that the Implied Consent Combined Report is "hardly distinguishable from a standard police report." (Pet Br 17). She argues that "it recounts facts that will be relevant to a criminal prosecution for DUII and DWS." (Pet Br 17). But the Implied Consent Combined Report, an administrative check-the-box form, is nothing like a standard police report. A standard police report documents a police investigation of a crime. It contains a detailed narrative statement of the actions and observations of the officer, any statements of witnesses, victims, and the suspect, descriptions of evidence, and the like. And as the court observed in the case relied on by defendant, "[i]t is prepared "with an eye toward prosecution.'" *State v. Lahai*, 128 Conn App 448, 469, 18 A3d 630 (2011) (quoting *United States v. Palmer*, 463 F Supp 2d 551, 553 (ED Va.2006)). A standard police report might contain "the precise testimony the [officer] would be expected to provide if called at [the DUII] trial." *Melendez-Diaz*, 557 US at 310. But every word contained in the preprinted Implied Consent Combined Report is regulated by statute and

administrative rule, and it relates directly to the administrative license suspension under ORS 813.410. A standard police report is entirely different from the administrative record at issue here.

2. Defendant's arguments incorrectly construe a number of contextual statutes.

Defendant's proposed rule of law relies on an incorrect reading of the applicable statutes. First, defendant argues that the governing statutes demonstrate that "the primary purpose of the Combined Report is to prove facts that may be relevant to a criminal prosecution." (Pet Br 18). She asserts that the purpose of ORS 813.100 is to gather evidence of a crime, citing the Court of Appeals' decision in *State v. Cruz*, 121 Or App 244, 855 P2d 191 (1993). (Pet Br 19-30). There is subsequent Court of Appeals authority contrary to that position. *See, e.g.*, *State v. Vazquez-Escobar*, 211 Or App 115, 120-22, 153 P3d 168 (2007) (explaining that the comprehensive program of license suspension, including ORS 813.100, is remedial in nature—it is a method of removing the danger imposed by intoxicated drivers). But even if the implied consent statutes serve more than one purpose, the primary purpose of the Implied Consent Combined Report is administering a license suspension, which is unquestionably a civil, remedial purpose. *Burbage v. Dept. of Motor Vehicles*, 252 Or 486, 491, 450 P2d 775 (1969) (driver license suspension proceeding nonpunitive); *State v. Robinson*, 235 Or 524, 532, 385 P2d 754

(1963) (driver license revocation proceeding is not punishment nor intended to be punishment).

Defendant also argues that ORS 813.120 requires that "an officer make a record of facts that support a DUII prosecution." (Pet Br 21). On the contrary, however, ORS 813.120 has nothing to do with a criminal prosecution for driving under the influence, as opposed to an administrative license suspension. It requires that the Implied Consent Combined Report contain the information needed to support and provide notice of the basis for a license suspension. As noted, ORS 813.120(1) exactly tracks the requirements of ORS 813.410(6).

Defendant next argues that: "A specific statutory reference to the use of the Combined Report as evidence in a DWS trial also strongly suggests that its primary purpose is to be used as evidence at trial." (Pet Br 22). That argument fails because the statute in question, ORS 811.180, contains no specific reference to the use of the Implied Consent Combined Report as evidence, and furthermore, the statutory text at issue is a procedural provision relating to the solely to the order of evidence.

Specifically, defendant asserts that:

> ORS 811.180(2)(e) provides that the lack-of-notice defense is "not available" if the "defendant was provided with notice of intent to suspend under ORS 813.100"—that is, the notice contained in the Combined Report. The statute further states that the notice of intent to suspend "may be offered in the prosecution's case in chief."

(Merit's Br 23).

ORS 811.180(2) provides in part:

> (2) The affirmative defenses described in subsection (1)(b) of this section are not available to a defendant under the circumstances described in this subsection. Any of the evidence specified in this subsection may be offered in the prosecution's case in chief. This subsection applies if any of the following circumstances exist:
>
> * * * * *
>
> (e) The defendant was provided with notice of intent to suspend under ORS 813.100.

Thus, ORS 811.180(2)(e) merely provides that the affirmative defense is not available if the circumstance exists that "defendant was provided with notice of intent to suspend under ORS 813.100." There is no specific reference to the use of the report as evidence. The statute does not specify how the relevant circumstance—that defendant was provided with notice of intent to suspend under ORS 813.100—must, should, or may be proved.

The wording of the statutory phrase —"Any of the evidence specified in this subsection may be offered in the prosecution's case in chief"—indicates that the legislature intended to clarify that the state may offer evidence refuting the affirmative defense in its case-in-chief. The phrase is directed at the order of evidence. If a defendant raises the affirmative defense in her opening statement, the state need not wait for rebuttal to address it. The phrase does not identify any specific evidence.

The legislative history of the statute supports that construction. The predecessor statute to ORS 811.180, which created the affirmative defense, was enacted in 1975 as Article 9, § 92 of Senate Bill 1, part of the 1975 Vehicle Code. As initially proposed, the statute contained no provision relating to the order in which evidence might be received. The Oregon District Attorneys Association requested an amendment allowing the state to admit evidence relating to the affirmative defense in its case-in-chief. Committee minutes show that the provision was not intended to address any specific *means* of proof but was intended to clarify *when* the evidence could be offered:

> Article 9, Section 92
>
> The Oregon District Attorney's Association requested that Section 92 be amended as follows: "After subparagraph (c) of subsection (3), add the following new subsection (4): (4) Any of the evidence specified in subsection (3) of this *section may be offered in the prosecution's case in chief*. Subsequent subsections of this section are renumbered accordingly." *See* Exhibit B.
>
> SENATOR COOK said that it seemed reasonable for such evidence to be admissible and asked how this evidence will be established.
>
> MR. GILLETTE said he was not sure what evidence would be satisfactory. His concern was that it would not be admissible until rebuttal.
>
> SENATOR W. BROWN moved that the amendment be adopted.
>
> [setting out votes, recording that "The motion passed"]

Minutes, Senate Committee on Judiciary, February 20, 1975, Page 9 (emphasis added). The final version of the 1975 statute made no mention of the Implied Consent Combined Report. *Former* ORS 487.560 (1975). Although the statute has been amended and renumbered, that statutory text has remained essentially unchanged.

In sum, ORS 811.180 does not contain a "specific statutory reference to the use of the Combined Report as evidence in a DWS trial." Defendant's argument—that the Implied Consent Combined Report's "primary purpose is to establish facts relevant to a criminal prosecution," because "there is a statutory provision that expressly defines the manner in which the Combined Report will function as evidence in a DWS trial and may be included in the state's case" (Pet Br 23)— fails because it is based on an inaccurate premise. And in any event, even if a statute expressly provided for admission of the Implied Consent Combined Report at trial, that would not be the primary purpose of the report and, thus, it would not be testimonial.

3. Defendant's argument that the Implied Consent Combined Report was intended to serve as evidence in an administrative adjudication is both contrary to the primary purpose test and also misunderstands the purpose of the document.

Finally, defendant argues that "if this court finds that the primary purpose of the Combined Report is to establish or prove some fact relevant to an administrative adjudication—as opposed to a criminal prosecution—that is

sufficient to find that it is testimonial." (App Br 28). That premise appears contrary to United States Supreme Court case law suggesting that testimonial evidence is an out-of-court substitute for trial testimony "relevant to a later criminal prosecution," *Clark*, 135 US at 2180 (quoting *Davis*, 547 US at 822), or "that declarants would reasonably expect to be used prosecutorially." *Crawford*, 541 US at 51. And, in fact, it is directly contrary to this court's holding in *Copeland* that a document created primarily for an administrative purpose is not testimonial. Notably, the cases defendant cites were decided without the benefit of the United States Supreme Court's more recent discussions of the primary-purpose test.[2]

But in any event, defendant has failed to establish that the purpose of the Implied Consent Combined Report is to serve as a substitute for live testimony, or even that it was intended for use as *evidence*, at the adjudicative proceeding. The Implied Consent Combined Report is a public record that has legal significance in the context of the administrative agency action—it provides and

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[2] The out-of-jurisdiction cases defendant cites in support of her position (Pet Br 27) are not helpful to her. *State v. Carpenter*, 275 Conn 785, 882 A2d 604 (2005), held that the reports made for use in probate litigation were not testimonial—only the witness statements contained within the reports implicated confrontation concerns. And *United States v. W. R. Grace*, 455 F Supp 2d 1199 (D Mont 2006) and *Simmons v. State*, 95 Ark App 14, 234 SW3d 321 (2006), involved depositions.

memorializes notice of the license suspension. As such, it frames the issues for an administrative hearing if the driver elects to contest it. It may serve as the agency's order. But its purpose is not to serve as evidence at the administrative hearing. In fact, the form itself indicates otherwise. Information set out in the "Notice of Rights and Procedures in Driver and Motor Vehicle Services Implied Consent Hearings" differentiates the ICCR and other legal documents from "evidence":

> 8. Order of Evidence: The hearing will be conducted in this sequence:
>
> a. Pre-hearing review of the notice of hearing, request for hearing, the implied consent form received by DMV from the law enforcement agency, the Notice of Rights and Procedures, and, for blood test failures, DMV's notice of suspension.
>
> b. Evidence in support of the suspension.
>
> c. Your statement and evidence disputing DMV actions.
>
> d. Rebuttal testimony.

(App 10).

Thus, although the administrative law judge reviews the Implied Consent Combined Report along with other documents in the record, it is distinct from "[e]vidence [presented] in support of the suspension." The report is not the "functional equivalent of in-court testimony," nor was that its intended purpose.

In sum, defendant's arguments fail to account for the controlling primary-purpose test and are otherwise without factual support. The trial court and the Court of Appeals correctly concluded that the Implied Consent Combined Report evidence was not testimonial within the meaning of the federal Confrontation Clause.

CONCLUSION

For the reasons explained above, this court should affirm the judgment of the Court of Appeals and the trial court.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Joanna L. Jenkins
JOANNA L. JENKINS #972930
Senior Assistant Attorney General
joanna.jenkins@doj.state.or.us

Attorneys for Plaintiff-Respondent
Respondent on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 29, 2016, I directed the original Brief on the Merits of Respondent on Review, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and John P. Evans, attorneys 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 6,664 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).

/s/ Joanna L. Jenkins

JOANNA L. JENKINS #972930
Senior Assistant Attorney General
joanna.jenkins@doj.state.or.us

Attorney for Plaintiff-Respondent
State of Oregon

JLJ:eh3/7877825