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 Case No. 100545212 CA A146601 S061846

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Multnomah County
Honorable Karin J. Immergut, Judge

Opinion Filed: October 9, 2013
Author of Opinion: De Muniz, Senior Judge
Concurring Judges: Ortega, Presiding Judge, and Nakamoto, Judge

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STATEMENT OF THE CASE

This criminal case involves two questions of constitutional interpretation.

Petitioner (defendant in the circuit court and hereafter) was tried in circuit court for the misdemeanor offense of reckless driving, ORS 811.140. Defendant argued that the Oregon Constitution required a jury of at least ten persons, but the trial court disagreed with defendant's argument and only empanelled six jurors, as provided for by ORS 136.210. Defendant also argued that a certification of accuracy for breath testing equipment was testimonial for purposes of the Confrontation Clause of the Sixth Amendment to the United States Constitution. The trial court disagreed and received two such certifications as exhibits. The jury found defendant guilty.

Defendant appealed and argued that the trial court erred by (1) empanelling a jury of, and receiving a verdict from, fewer than ten persons, in violation of Article I, section 11, of the Oregon Constitution, and (2) admitting certificates of accuracy for alcohol breath testing equipment in violation of the Confrontation Clause. The Court of Appeals rejected defendant's arguments and affirmed his conviction. *State v. Sagdal*, 258 Or App 890, 311 P3d 941 (2013). Defendant petitioned for review, and this court allowed review. *State v. Sagdal*, 354 Or 814, __ P3d __ (2014).

This appeal raises two questions. First, whether the Oregon Constitution allows for a jury of fewer than ten persons to reach a valid verdict in a criminal case in circuit court. Second, whether the Confrontation Clause of the Sixth Amendment requires the testimony of an operator who certified that breath testing equipment was accurate.

Questions Presented and Proposed Rules of Law

First Question Presented:

Does the Oregon Constitution allow for a jury of fewer than ten members to render a valid verdict in a criminal case in circuit court?

Proposed Rule of Law:

Article I, section 11, of the Oregon Constitution provides that "in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise[.]" Under that provision, a jury verdict in circuit court requires at least ten members of the jury. Therefore, any criminal case, whether it involves a felony or a misdemeanor, decided by a jury of six persons necessarily renders an invalid verdict.

Second Question Presented:

Is a certificate of accuracy for alcohol breath testing equipment testimonial for purposes of the Sixth Amendment?

Proposed Rule of Law:

A statement is testimonial for purposes of the Confrontation Clause if it serves an evidentiary purpose and is made in aid of a police investigation. A certificate of accuracy for alcohol breath testing equipment serves an evidentiary purpose, assists police investigations, and contains statements that the technician would expect to be used at a later criminal prosecution. Thus, a breath testing equipment certification is testimonial.

Summary of Argument

1. Article I, section 11, of the Oregon Constitution provides, in part, that "in the circuit court ten members of the jury may render a verdict of guilty or not guilty[.]" At the time the voters adopted the pertinent portion of the provision in 1934, the provision applied to all cases in circuit court, whether felonies or misdemeanors. Circuit courts had 12-person juries. Thus, at the time of its adoption, the amendment to Article I, section 11, required at least ten jurors to agree on a valid verdict in any criminal case in circuit court. Consequently, a trial to a jury of fewer than ten persons necessarily fails to satisfy the constitutional requirement to reach a valid verdict.

In 1972, Oregon voters adopted another amendment to the constitution, which provides that "[p]rovision may be made by law for juries consisting of less than 12 but not less than six jurors." Or Const, Art VII (Amended), § 9. The adoption of that amendment had no effect on the Article I, section 11,

requirement of at least ten jurors agreeing on a verdict in circuit court, for several reasons. The 1972 constitutional amendment only gives the legislature the authority to provide for different-sized juries. The voters did not purport to give the legislature the authority to pass any law regarding a jury that would be inconsistent with other constitutional requirements. Because the amendment left untouched the requirement of ten jurors agreeing on a verdict, Article VII (Amended), section 9, has no effect on the meaning of Article I, section 11.

The plain terms of Article I, section 11, require that in any criminal case in circuit court, at least ten jurors must agree on a verdict. Though the Oregon Constitution later gave the legislature the authority to provide for juries of as few as six persons, that does not affect the meaning of Article I, section 11. Consequently, all criminal cases tried in circuit court must be tried to a jury of at least ten persons, and a guilty verdict rendered by six persons is invalid.

2. The United States Supreme Court has held that the Confrontation Clause of the Sixth Amendment applies to statements that are "testimonial." In a series of cases explaining what the term means, the court has identified several key traits of a testimonial statement, chiefly that it serves an evidentiary purpose at trial and is made in circumstances in which someone would expect the statement to be used at a subsequent trial.

A laboratory report that indicates what a substance is or what someone's blood alcohol content (BAC) is would be testimonial under this test. Similarly,

an affidavit that attests to the proper functioning of the machine that measured the BAC is also testimonial. Under Oregon law, the affidavit serves an evidentiary purpose because without it, the actual report of a defendant's BAC is not admissible at trial. Also, because of the predicted use of the affidavit, the person who certifies that the machine works properly would expect that any statements made in the affidavit would be used at a subsequent trial. Because such affidavits are testimonial, a defendant's right to confront witnesses is violated if the affidavit is admitted without either the in-court testimony of the affiant or a prior opportunity for cross-examination.

Statement of Historical and Procedural Facts

The Court of Appeals accurately described the historical facts 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."

Sagdal, 258 Or App at 891.

Defendant was charged by information with driving while under the influence of intoxicants (DUII) (Count 1), ORS 813.010, and reckless driving (Count 2), ORS 811.140. Defendant pleaded no contest and entered diversion for DUII, and proceeded to a jury trial only on the charge of reckless driving.

Prior to trial, defendant requested a jury consisting of at least ten persons, as required by Article I, section 11, of the Oregon Constitution. The trial court denied defendant's request, saying, "We're going to stick with a six-person jury." Tr 12. Defendant renewed his argument before the verdict was read in court, Tr 191, after the verdict was read and a poll revealed all six jurors voted guilty, Tr 193-94, and before the court imposed sentence, Tr 196-97.

Prior to trial, defendant objected to the admission of breath test equipment certifications on the basis that they were testimonial evidence that required the confrontation of a witness in open court. Tr 17, 24. The state argued that the certifications were not testimonial. Tr 17-18. The trial court overruled defendant's objection. Tr 25. Defendant objected again on the same grounds when the court received the certifications, State's Exhibits 4 and 5. Tr 189-90.

Defendant appealed and assigned error to the admission of certificates of accuracy for alcohol breath testing equipment, on the basis that the admission of the evidence violated defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. The Court of Appeals "reject[ed] that argument without further discussion." *Sagdal*, 258 Or App at 891.

On appeal, defendant also argued that "his rights under Article I, section 11, of the Oregon Constitution were violated when the court empaneled a jury

of fewer than 10 persons and accepted a verdict from that jury." *Id.* at 891. The court framed the issue as requiring the interpretation of two constitutional provisions, Article I, section 11, and Article VII (Amended), section 9, of the Oregon Constitution. *Id.* at 891-92.

The court reviewed the "text, context, and historical circumstances surrounding the enactment of the 1934 amendment to Article I, section 11," and concluded that "the voters' intent in adopting the 10-person jury verdict provision in Article 1, section 11, was to provide for nonunanimous jury verdicts when the jury has 12 members. The amendment was not intended to mandate a minimum number of persons required to comprise a jury." *Id.* at 898.

With respect to Article VII (Amended), section 9, the court concluded that "the plain text of the provision unambiguously grants to the legislature the authority to allow for juries as small as six persons, without any explicit limitation of its scope to specific cases or courts." *Id*. at 899. The court then reviewed the historical circumstances surrounding the enactment of the provision and found that those circumstances confirmed that "the measure adopted by the voters was intended to apply to all the courts of Oregon." *Id.* at 901.

With that understanding, the court attempted to "harmonize" the provisions:

> "As previously discussed, when the 1934 amendment to Article I, section 11, was adopted, felonies were heard only in circuit court, and the circuit courts were the only courts using 12-person juries. Considered in that light, we reject defendant's argument that the intent of the people in adopting the 1934 amendment to Article I, section 11, was to provide for 12-person juries in misdemeanor cases in circuit court. Instead, we conclude that the intent of the amendment was to provide for nonunanimous jury verdicts in felony cases in circuit court, in which 12-person juries were used. Furthermore, we conclude that the authority granted to the legislature under Article VII (Amended), section 9, was not intended to be limited to courts other than circuit court. Accordingly, the legislature was authorized under Article VII (Amended), section 9, to provide for juries of fewer than 12 persons for misdemeanor cases in circuit court, as it did in ORS 136.210(2). In this case, the court properly empaneled a six-member jury for defendant's misdemeanor case, and the verdict returned by that jury is valid."

Id. at 901.

Argument

This case presents two different issues. The first issue involves the interpretation of two constitutional provisions that were approved by the voters as a referendum. The second issue involves the application of the Confrontation Clause of the Sixth Amendment to a certificate of accuracy for breath testing equipment.

I. A trial to a jury of six persons in circuit court violates the Oregon Constitution.

The question in this case is whether a criminal case tried in circuit court requires a jury of at least ten persons. Resolution of this issue requires the

interpretation of two provisions of the Oregon Constitution that were referred by the legislature and approved by the voters: Article I, section 11, and Article VII (Amended), section 9.

A. Analytical framework

To interpret the meaning of a referred constitutional amendment, this court uses the analytical framework set forth in *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 851 P2d 595 (1993), and *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 871 P2d 106 (1994). *See Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 57, 11 P3d 228 (2000) (so holding).

First, this court considers the text and context of the constitutional provision at issue. *Stranahan*, 331 Or at 56. "The best evidence of the voters' intent is the text of the provision itself." *Roseburg School Dist.*, 316 Or at 378. The context of a referred constitutional provision includes related ballot measures submitted to voters at the same election, Supreme Court case law, and the statutory framework and constitutional provisions in place when voters adopted the provision. *Martin v. City of Tigard*, 335 Or 444, 451, 72 P3d 619 (2003); *Stranahan*, 331 Or at 62 n 15; *Ecumenical Ministries*, 318 Or at 559.

Second, if the voters' intent is not clear from the text and context, this court considers the history of the provision. *Stranahan*, 331 Or at 56. When considering the history of a referred constitutional provision that was approved by the voters, this court examines "other sources of information that were

available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure," such as the ballot title, arguments included in the voters' pamphlet, and contemporaneous news reports and editorials. *Ecumenical Ministries*, 318 Or at 559 n 8.

Finally, if the meaning is still unclear after considering the text, context, and history of the provision, this court can resort to canons of construction. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 & n 4, 859 P2d 1143 (1993) (holding that "the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty" and noting that the *PGE* framework "applies * * * to the interpretation of laws and constitutional amendments adopted by initiative or referendum").

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

> "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; * * * 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 or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise*; * * * ."

(Emphasis added.) The italicized portion of Article I, section 11, was a constitutional amendment referred to the voters by the legislature in 1933 and

adopted by the voters in 1934. *See* Or Laws 1933, SJR 4 (2d Spec Sess) (Senate Joint Resolution referring the amendment to the voters); *State ex rel. Smith v. Sawyer*, 263 Or 136, 138, 501 P2d 792 (1972) (noting that the amendment was adopted in 1934).

Article VII (Amended), section 9, provides: "Provision may be made by law for juries consisting of less than 12 but not less than six jurors." The provision was referred by the legislature in 1971 and approved by the voters in 1972. Or Laws 1971, SJR 17 (Senate Joint Resolution referring the amendment to the voters); *see Carey v. Lincoln Loan Co.*, 342 Or 530, 539, 157 P3d 775 (2007) (so noting).[1]

To resolve the issue in this case, this court must answer two questions. First, at the time of its enactment in 1934, did the amendment to Article I, section 11, allow for a jury of fewer than ten persons in circuit court? Second, if not, did that change with the enactment of Article VII (Amended), section 9, in 1972? Because Article I, section 11, requires that ten jurors must agree on a verdict in a criminal trial in circuit court, and because Article VII (Amended),

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[1] In 1979, the legislature allowed for juries in certain criminal cases in circuit court to have "the same number of jurors" and "determine its verdict as provided by law for trial juries in criminal cases in the district courts." Or Laws 1979, ch 488, § 2 (amending ORS 136.210(2)). The current statute, most recently amended in 1995, provides: "In criminal cases in the circuit courts in which the only charges to be tried are misdemeanors, the trial jury shall consist of six persons." ORS 136.210(2); *see* Or Laws 1995, ch 658, § 76 (amending the statute).

section 9, does not change that requirement, all criminal cases tried in circuit court must be tried to a jury of at least ten persons. Consequently, a guilty verdict rendered by six persons is invalid.

B. Article I, section 11, requires a jury of at least ten persons in a criminal case in circuit court.

The plain text of Article I, section 11, provides that a valid verdict in a criminal trial in circuit court requires at least ten jurors. The context and history of the provision are consistent with that conclusion. Thus, at the time of its adoption in 1934, the amended provision in Article I, section 11, required at least ten persons on a jury in circuit court.

1. The text of Article I, section 11, indicates a requirement of at least ten jurors to render a valid verdict.

As a preliminary matter, the provision at issue in this case begins with the phrase, "provided, however[.]" Or Const, Art I, § 11. *See Black's Law Dictionary* 1454 (3d ed 1933) (defining "provided" and noting that "[o]rdinarily it signifies or expresses a condition," but that "it may import a covenant, or a limitation or qualification, or a restraint, modification, or exception to something which precedes"). The entire provision is phrased in terms of an exception that qualifies or modifies the previously delineated right, namely, that "[i]n all criminal prosecutions," an accused has various rights, such as "the right to public trial by an impartial jury," the right "to be heard by himself and counsel," the right "to demand the nature and cause of the accusation against

him," and the right "to meet witnesses face to face, and to have compulsory process for obtaining witnesses in his favor." Or Const, Art I, § 11. An "accused" has those rights in "all" criminal cases. The voters established one limitation on those rights by enacting the text that follows "provided, however."

The subsequent plain text – which applies in "all criminal prosecutions" – states two rules. The first clause provides that in "circuit court," "ten members of the jury may render a verdict." Or Const, Art I, § 11. Notably, the provision refers to what the jury may "render," as opposed to what the legislature can choose to do. *See Black's Law Dictionary* 1529 (defining "render verdict" as "[t]o agree on and to report the verdict in due form," and "[t]o return the written verdict into court and hand it to the trial judge"). That is, the requirement of what the jury may render applies to every case and is not subject to legislative approval or modification.

The second clause states an exception to that rule. *See Black's Law Dictionary* 1583 (defining "save" as "[t]o except, reserve, or exempt"). In cases of "first degree murder,"[2] the jury's verdict must be unanimous.

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[2] At the time, first-degree murder was a crime. *See* Or Code, title XIV, ch II, § 14-201 (1930). However, "[t]here is no longer a crime of 'first degree murder' in this state." *State v. Wagner*, 305 Or 115, 123 n 7, 752 P2d 1136 (1988). *See State v. Rogers*, 352 Or 510, 521, 288 P3d 544 (2012) (noting that first-degree murder in Article I, section 11, is "the historical analog of aggravated murder").

Another significant word in the amendment is "may." The first rule described above provides that a jury of ten persons "may" render a valid verdict. "May" can be defined as "[a]n auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency." *Black's Law Dictionary* 1171. When read in context, the word "may" signifies the possibility that a jury of ten persons can render a verdict. However, for that to be merely a possibility, there must be scenarios in which the jury returns a verdict that is agreed on by a number of people different than ten. When the rule is read in light of the amendment as whole – that is, that it requires unanimity for one conviction, and less-than-unanimity for all other convictions – the possibility referred to most likely is that a verdict by a jury of ten is possible, as well as a verdict by 11 or 12 jurors. In other words, the term "may" establishes that ten or more jurors must agree on a verdict.

When the clauses are read together, the plain text of the 1934 amendment provides for a complete set of rules that apply to criminal trials in circuit court. That is, it provides a rule (ten jurors "may" render a verdict in circuit court), and it identifies only one exception to that rule (unanimous jury for first-degree murder). The provision does not identify another exception, *i.e.*, that the rule itself only applies when the jury has 12 members.

Under the Court of Appeals reasoning, however, a second exception would be supported by the plain text – that the 1934 amendment enacted by the voters does not apply when the jury consists of six people. *See Sagdal*, 258 Or App at 901 (holding that "the intent of the amendment was to provide for nonunanimous jury verdicts in felony cases in circuit court, *in which 12-person juries were used*" (emphasis added)). That conclusion is not supported by the plain text, because there is no wording that suggests the provision only applies in some cases, such as those with 12-person juries. To the contrary, the terms are unambiguous: the rule applies in "all" criminal prosecutions in "circuit court."

To be sure, the amendment provides that a jury of ten "may" render a verdict. However, as argued above, that merely means that ten or more jurors are required to agree on a verdict. The term does not mean that ten jurors "may" render a verdict, while a jury of any other size, such as six jurors, "may" also render a verdict. To import such an exception into the amendment would be stretching the meaning of the term "may" beyond what it can bear.

The reasoning that would support such an interpretation is tautological – that the constitutional provision applies, except in cases in which it does not. Under that interpretation, Article I, section 11, actually provides that in circuit court, ten jurors may render a verdict, or fewer than ten jurors may render a verdict. However, to add that wording to the constitution would be

accomplishing what the voters did not intend. Instead, "[t]he best evidence of the voters' intent is the text and context of the provision itself[.]" *State v. Harrell/Wilson*, 353 Or 247, 255, 297 P3d 461 (2013). If the voters had intended for the 10-juror concurrence requirement to apply only sometimes, then that caveat would have been included in the amendment.

Article I, section 11, is unambiguous: ten jurors must agree on a guilty verdict in any criminal prosecution other than first-degree murder in circuit court. Thus, a verdict returned by a jury of less than ten persons in circuit court is not a valid verdict. Because the present case was tried in circuit court, the plain text of Article I, section 11, requires at least ten jurors to return a valid verdict.

2. The context of Article I, section 11, indicates that the voters envisioned a 12-person jury.

The context of Article I, section 11 – specifically, the extant constitutional and statutory framework in 1934 and this court's case law – demonstrates that the requirement of at least ten jurors applies in any case, whether a felony or a misdemeanor. First, in 1934, trials in circuit court had 12-person juries. Second, both felonies and misdemeanors were tried in circuit court. Those two conclusions support defendant's argument that at the time of its enactment in 1934, the voters did not intend to restrict the provision to felony cases tried before a 12-person jury.

a. The statutory and constitutional framework of 1934 supports the understanding that misdemeanors were tried in circuit court to juries of 12 members.

In 1934, circuit court had 12-person juries. Or Code, title XXX, ch I, § 30-104 (1930) (providing that "[a] trial jury is a body of persons, twelve in number in circuit court, and six in number in the county court and courts of justice of the peace"); *see State v. Osbourne*, 153 Or 484, 489, 57 P2d 1083 (1936) (noting that "the circuit court is the only court employing a jury of twelve"). Further, Oregon law provided that "[t]he verdict of a trial jury shall be unanimous[.]" Or Code, title XXX, ch I, § 30-106.

Both felonies and misdemeanors could be tried in circuit court. In 1934, the Oregon Constitution provided that "[n]o person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury[.]" Or Const, Art VII, § 18. The constitution also provided "that if any person appear before any judge of the circuit court and waive indictment, such person may be charged in such court with any such crime or misdemeanor on information filed by the district attorney." *Id.* Thus, a person could be tried for a misdemeanor in circuit court, provided a grand jury returned an indictment.

The statutory scheme regarding the conduct of criminal trials allowed for any crime to be indicted by a grand jury, whether felony or misdemeanor.

"The grand jury has power, and it is their duty, to inquire into *all crimes* committed or triable in the county, and present them to the court, either by presentment or indictment, as provided in this chapter." Or Code, title XIII, ch V, § 13-501 (1930) (emphasis added). Similarly, "[n]o person can be tried for the commission of *a crime* but upon the indictment of a grand jury, unless otherwise expressly provided by law." *Id.* § 13-105 (emphasis added). A "crime" was either a felony *or* a misdemeanor. *Id.* ch I, § 13-102. Thus, *any* crime could be tried in circuit court, provided a grand jury had returned an indictment and exclusive jurisdiction did not rest in another court.

The statutory scheme also allowed for circuit courts to have jurisdiction of misdemeanor cases. The jurisdiction of circuit courts was "limited and defined by the organic law of the state, article VII of the constitution." Or Code, title XXVIII, ch VI, § 28-601 (1930). At the time, Article VII, section 9, of the Oregon Constitution provided, "All judicial power, authority, and jurisdiction not vested by this constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the circuit courts[.]" District courts had "concurrent jurisdiction with the circuit courts of all misdemeanors committed or triable in their respective counties," provided the punishment did not exceed one year in the county jail or a fine of $3,000, or both. Or Code, title XXVIII, ch XI, § 28-1106. The legislature did not grant exclusive jurisdiction of misdemeanors to courts other than circuit courts, but rather

specifically provided that misdemeanors could be tried in either district court or circuit court. *Id*.

The context of the amendment to Article I, section 11, demonstrates that when voters approved the constitutional amendment in 1934, they would have understood that in some cases in circuit court, the only charge at issue could be a misdemeanor. The requirement of at least ten jurors in circuit courts was not limited solely to felony cases; it included any case that happened to be tried in circuit court. Thus, the amendment would have affected every case tried in circuit court, including misdemeanors, contrary to the Court of Appeals conclusion that it only applied to felonies.

b. Defendant's proposed interpretation of Article I, section 11, is consistent with this court's case law.

This court's case law confirms that misdemeanor cases could be tried in circuit court in 1934. In *State v. Chandler*, 113 Or 652, 653, 234 P 266 (1925), a grand jury indicted the defendant for a misdemeanor and he was to be tried in circuit court. The defendant demurred to the indictment and argued that the circuit court did not have jurisdiction of the offense in the indictment. The trial

court agreed, apparently on the basis that a justices' court[3] had exclusive jurisdiction of the case, and the state appealed. *Id.* at 653-54.

This court held that the circuit court had jurisdiction of the misdemeanor case. The court noted that no statute gave exclusive jurisdiction of the case to a separate court, such as a justices' court. *Id.* at 655. The court also noted that in any event, the jurisdiction of justices' courts was limited to cases involving a fine of not more than $100, while the offense at issue involved a potential fine of $250. *Id.* at 655-56. The court held that, "[i]n the absence of some statute depriving the Circuit Court of jurisdiction that court has jurisdiction of every offense committed and triable within the county." *Id.* at 656. Accordingly, the court concluded that the circuit court had jurisdiction of the misdemeanor case and reversed the decision of the trial court. *Id. Chandler* demonstrates that voters in 1934 approved a requirement of 12-person juries in circuit court in a system in which the requirement would apply to both felonies and misdemeanors.

This court's case law subsequent to the 1934 amendment is also consistent with defendant's proposed interpretation of Article I, section 11. In *State ex rel. Smith v. Sawyer*, the petitioner, a district attorney, pursued a

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[3] This court has noted that "statutes variously have referred to 'justices' courts,' 'justice's court,' and 'justice court.'" *State v. Webb*, 324 Or 380, 384 n 6, 927 P2d 79 (1996). Because this court used the phrase "justices' court" in *Chandler*, defendant will use the phrase in this brief.

mandamus action against the respondent, a circuit court judge, asking that this court order the judge to empanel a 12-person jury in a criminal case in which the defendant was charged with a felony. The petitioner alleged that the "respondent, with the consent of the defendant, but over the objection of the prosecutor, ordered the defendant * * * to be tried before a jury of six persons who were to be instructed that their verdict must be unanimous." 263 Or at 137.

This court ruled against the respondent, explaining that Article I, section 11, required a 12-person jury:

> "Respondent's argument ignores that portion of Art I, § 11, which provides that in all but first-degree murder cases a verdict in the circuit court may be rendered by ten members of the jury. This provision obviously contemplates a jury of twelve persons and makes no provision for a less than unanimous verdict if a jury of less than twelve members is used. It would seem to follow that if Art I, § 11, will permit the use of a jury of less than twelve members, its verdict must be unanimous."

Id. at 138. However, this court noted, "We need not consider whether Art I, § 11, in any way inhibits the legislature from authorizing the use of juries of less than twelve members." *Id.* at 138 n 1. Thus, while *Sawyer* noted that the provision "obviously contemplates a jury of twelve persons," *id.* at 138, the case did not address the issue in this case.

In *State v. Osbourne*, the defendant argued, *inter alia*, that the constitutional amendment at issue here, as applied to someone charged with

second-degree murder, deprives such defendants with equal protection of the laws and due process of law. This court rejected the argument, explaining:

> "It is also suggested that, in the event the legislature should give the district courts general jurisdiction and provide for a jury of twelve therein or should create a court of criminal administration, with jurisdiction over cases generally, as distinct from circuit courts, neither the district court nor the newly-created court would be affected by the amendment under discussion, because reference in the amendment is made only to circuit courts. When we remember that the circuit court is the only court employing a jury of twelve, it is very apparent that this reference to circuit courts is only definitive of the court or courts employing a jury of twelve as distinguished from a jury of six or any number less than twelve. So understood, it constitutes a constitutional restriction depriving the legislature of the power or authority to give to any court now existing or hereafter to be created, wherein a jury of twelve is required, the right to demand unanimous verdicts in any criminal case except those involving a conviction of murder in the first degree."

153 Or at 489-90. Again, this court's opinion is consistent with an understanding that Article I, section 11, requires at least ten members of the jury in circuit court, but the opinion does not purport to decide the issue in this case.

This court also construed the provision in *State v. Pipkin*, 354 Or 513, 316 P3d 255 (2013), and *State v. Phillips*, 354 Or 598, 317 P3d 236 (2013). In both cases, the general issue was the application of the juror concurrence requirement to the particular crime at issue. In *Pipkin*, the defendant was charged with burglary, committed by entering or remaining in the victim's home unlawfully, and the issue was whether the jury had to agree on a theory to

find the defendant guilty. 354 Or at 515. In *Phillips*, the defendant was charged with third-degree assault, and the issue was whether the jury had to agree on whether the defendant acted as the principal or as an accomplice. 354 Or at 600. This court analyzed the text, context, and historical circumstances of the amendment to Article I, section 11. *Pipkin*, 354 Or at 526-29; *Phillips*, 354 Or at 611-12. While both cases affirmed that 10 jurors were required to concur on a verdict, the analysis does not address the specific issue in this case.

Because the text and context of Article I, section 11, establish that at least ten jurors are required for any criminal case tried in circuit court, this court need not go further to determine the voters' intent. *Roseburg School Dist.*, 316 Or at 378 ("[I]f the intent is clear based on the text and context of the constitutional provision, the court does not look further.").

3. The history of the amendment to Article I, section 11, indicates that the voters did not intend for the meaning of the provision to deviate from the plain text.

Both the text of the referral to the voters and the title of the amendment are consistent with defendant's reading: the amendment requires at least 10 jurors in circuit court criminal cases, and it does not contemplate situations in which the requirement would not apply.

The referral to the voters in the voters' pamphlet stated:

> "CRIMINAL TRIAL WITHOUT JURY AND NON-UNANIMOUS VERDICT CONSTITUTIONAL AMENDMENT—Purpose: To provide by constitutional

> amendment that in criminal trials 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 10 members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise."

Official Republican Voters' Pamphlet, Special Election, May 18, 1934, 6.[4]

The title of the proposed amendment stated:

> "CRIMINAL TRIAL WITHOUT JURY AND NON-UNANIMOUS VERDICT CONSTITUTIONAL AMENDMENT—Purpose: Authorizing accused, with judge's consent, to waive jury trial, except in capital cases; verdict, except guilty of first degree murder, by 10 circuit court jurors."

Id.

The arguments for and against the amendment both contemplated the obvious – that the provision would result in 12-person juries, albeit with valid verdicts reached by a different quantum of jurors. For instance, the argument in favor of the amendment discussed how allowing a jury of 10 as opposed to all 12 to return a valid verdict could avoid "the expense of retrial" and "congest[ing] the trial docket of the courts":

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[4] In *Osbourne*, this court explained that the reference to a criminal trial "without jury" had been added to Article I, section 11, in 1932, and therefore had no effect on the non-unanimous jury provision considered by the voters in 1934: "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." 153 Or at 486.

> "The proposed constitutional amendment is to prevent one or two jurors from controlling the verdict or causing a disagreement. * * *
>
> "* * * * *
>
> "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."

Id. at 7.

Similarly, the argument against the amendment assumed it applied to 12-person juries:

> "[N]o lawyer need care whether it would be a 12 man jury, the court itself, a majority jury or a 10 man jury who decides the case, because the lawyer will take the cloth as he finds it and cut the suit accordingly and he will win or lose his case just the same; but to the citizens of our great country who have paid dearly to establish this 12 man jury, it is all important.
>
> "* * * * *
>
> "The particular amendment in question to section 11, Article 1 of the constitution of Oregon, is objectionable for other reasons than the above. One objection that seems overwhelming to me is the fact that anyone charged with murder in the first degree which means premeditated with malice aforethought, killing of a human being, is allowed the special privilege of no conviction unless 12 jurors unanimously agree; whereas, the small fry, the embezzler, the second degree murderer, the forger, the rapist *and all lesser crimes*, must take his chance on 10/12 jury."

Id. at 8 (emphasis added). The argument supports defendant's interpretation because it assumes, without dispute, that all crimes except first-degree murder would be tried before 12-person juries.

The history demonstrates that the voters' intent did not deviate from the plain meaning. That is, voters envisioned a jury of 12 in circuit court cases. Prior to the 1934 amendment to Article I, section 11, verdicts in criminal cases in circuit court had to be unanimous, 12-0. After the amendment, verdicts could be 10-2 in all criminal cases other than first-degree murder. The text, context, and history do not support the idea that the constitutional amendment was intended to allow for a 10-juror verdict in some cases, but a 6-juror verdict in others, depending on what the legislature decided to provide.

The text and context of Article I, section 11, as well as the history of the provision, provide an answer to the question defendant posed at the beginning of the argument: at the time of its enactment in 1934, did the amendment to Article I, section 11, allow for a jury of fewer than ten persons in circuit court to return a valid verdict? The answer is no.

Accordingly, this court should consider the second relevant question, namely, did that change in 1972 with the enactment of Article VII (Amended), section 9?

C. Article VII (Amended), section 9, did not change the requirement that ten jurors must return a guilty verdict in circuit court.

As previously noted, Article VII (Amended), section 9, of the Oregon Constitution provides, "Provision may be made by law for juries consisting of less than 12 but not less than six jurors." The text and context of the provision do not change the meaning of Article I, section 11, because nothing in Article VII (Amended), section 9, purports to provide for the number of jurors to reach a valid verdict. Instead, Article VII (Amended), section 9, was intended to give the legislature the flexibility to allow for juries of as few as six persons in some cases. The history of the provision is ambiguous and insufficient to change the meaning of the plain text. In short, the meaning of Article I, section 11, did not change with the enactment of Article VII (Amended), section 9.

1. The text and context of Article VII (Amended), section 9, indicate that it had no effect on the number of jurors that must agree on a verdict in a criminal case in circuit court.

The words "[p]rovision" and "by law" denote that the section describes a power that is given to the legislature over "juries." Or Const, Art VII (Amended), § 9. *See Black's Law Dictionary* 1388 (4th ed 1968) (in defining the phrase "provided by law," noting that "[t]his phrase when used in a constitution or statute generally means prescribed or provided by some statute"). The legislature's exercise of that power is discretionary, as it "may" do so. *See Black's Law Dictionary* 1131 (defining "may" as "[a]n auxiliary verb qualifying the meaning of another verb by expressing ability, competency,

liberty, permission, possibility, probability or contingency"). The legislature is not required to exercise the power in relation to every kind of case in every kind of court. Further, the power is solely to allow for a jury "consisting" of a certain number of jurors. *See Black's Law Dictionary* 381 (defining "consisting" as "[b]eing composed or made up of"). The text of Article VII (Amended), section 9, does not provide that the legislature can determine other aspects of juries, such as the qualifications to serve as a juror or, as relevant here, how many jurors must agree on a valid verdict.

Notably, the text of Article VII (Amended), section 9, does not purport to describe the number of jurors that must agree on a verdict. The implication is that other provisions of law allow for that. For example, at the time of the enactment of Article VII (Amended), section 9, a different section in the same article, section 5, provided in part, "In civil cases three-fourths of the jury may render a verdict."[5] Article VII (Amended), section 9, would have no effect on that provision. Instead, they would work together. That is, Article VII (Amended), section 9, applies to the size of the jury, and Article VII (Amended), section 5, provides for the requisite number of jurors to agree to reach a valid verdict. Article VII (Amended), section 9, and Article I, section

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[5] "In 1974, the voters repealed amended section 5 and replaced it with the current version." *Carey*, 342 Or at 538. The current version similarly provides, "In civil cases three-fourths of the jury may render a verdict." Or Const, Art VII (Amended), § 5(7).

11, should interact the same way. Article VII (Amended), section 9, allows the legislature to change the size of the jury, but that power must be exercised consistently with Article I, section 11.

The context of Article VII (Amended), section 9, suggests the voters did not intend to impliedly amend Article I, section 11. The best contextual evidence of the voters' intent with respect to Article VII (Amended), section 9, is the constitutional provisions in place when voters adopted the provision. At the time the voters approved the amendment, Article I, section 11, explicitly required at least ten jurors to agree on a verdict in a criminal case in circuit court. If the voters had intended to modify that requirement, such as to allow for juries of six to decide criminal cases in circuit court, the voters would have amended Article I, section 11.

2. The history of Article VII (Amended), section 9, does not clearly indicate whether the provision would allow for a jury verdict of fewer than ten persons in circuit court.

As previously noted, the relevant history of a referred constitutional provision includes information that was "available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure," such as the ballot title, arguments included in the voters' pamphlet, and contemporaneous news reports and editorials. *Ecumenical Ministries*, 318 Or at 559 n 8. The history of the provision, as illustrated by statements in the voters' pamphlet and an editorial in favor of the amendment, demonstrates that

the voters did not clearly evince the intent to change the meaning of Article I, section 11.

a. The information available to voters did not clearly indicate what the effect of the provision would be.

Here, the information that would have been generally available to the public is ambiguous as to the meaning of the amendment. The voters' pamphlet from 1972 included an explanation of the amendment, Ballot Measure 5, and an argument in favor of the amendment. However, the statements differed as to what effect, if any, the measure would have on criminal trials in circuit court.

The explanation of the proposed amendment, prepared by a citizen committee,[6] stated, "The 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, Nov 7, 1972, 21 (emphasis added) (attached as App-1). Circuit courts were not the only courts that heard criminal cases, so the statement did not clearly indicate that the Article I, section 11, requirement would be implicated.

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[6] The citizen committee was designated pursuant to *former* ORS 254.210 (1971), *renumbered as* ORS 251.205, which provided in part that prior to "any general election at which any legislative or constitutional measure is to be submitted to the people of the state by initiative or referendum, a committee of three citizens shall be selected, for each measure, to prepare the statement referred to in ORS 254.220 for that particular measure."

On the other hand, the argument in favor of the amendment, written by a legislative committee,[7] suggested the amendment would only apply to civil cases:

> "Ballot measure # 5 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 does not change the jury trial guarantees in Article I of the Oregon Constitution*."

Voters' Pamphlet at 22 (emphasis added) (attached as App-2). *See also id.* ("In short, a yes vote for measure # 5 will allow speedier justice at less cost to the taxpayer and all others involved in civil jury trials.").

The argument also suggested the amendment would be consistent with United States Supreme Court case law:

> "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 the 'historical accident'. The Supreme Court ruled in another case, JOHNSON V. LOUISIANA, that juries of less than 12 are completely permissive under the United States Constitution."

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[7] The legislative committee was designated pursuant to *former* ORS 255.421(3) (1971), *repealed by* Or Laws 1973, ch 712, § 5, which provided in part that prior to an election "at which a measure ordered referred by the Legislative Assembly is to be voted upon, the joint committee provided for in this subsection shall file with the Secretary of State a typewritten argument advocating the measure."

Id. at 5. The first quote is from *Williams v. Florida*, 399 US 78, 102, 90 S Ct 1893, 26 L Ed 2d 446 (1970), which held that the Sixth Amendment, as applied to the states through the Fourteenth Amendment, was not violated by a trial to a jury of six. The argument also referred to *Johnson v. Louisiana*, 406 US 356, 363, 92 S Ct 1620, 32 L Ed 2d 152 (1972), which had held that a guilty verdict by nine out of 12 jurors did not deprive the criminal defendant of due process of law or equal protection. Though both of those cases arose in the criminal context, the argument in the voters' pamphlet did not cite them for their application to criminal cases. Indeed, the argument did not even refer to them as criminal cases. Rather, the argument cited them for the broader proposition that voters should not feel bound by the 12-person jury system.

Voters relying on the pamphlet were told on the one hand that the amendment affected civil and criminal trials, and on the other hand that only civil trials would be affected. That ambiguity was also reflected in a contemporaneous newspaper editorial that endorsed the measure:

> "Ballot Measure 5 is one that looks so simple – *and is a mind-boggler*. Happily, nothing devastating is likely to happen as a result of its passage or defeat.
>
> "* * * * *
>
> "The proposal started out in the last legislature as a referendum to implement an already-passed district court reform bill – which is a good bill.

> "But after going in and out of committees and getting rewritten and rewritten again, it ended up as a jury-size bill. No longer is it limited to district courts but includes the higher-level circuit courts as well. And no longer is it limited to civil cases, but would apply to criminal cases also. We know this is so because we've read the legislative committee notes and talked with two staff lawyers who participated in drafting and redrafting.
>
> "Yet the official Voter's Pamphlet contains copy signed by the bill's sponsors which indicates otherwise. Apparently this was written prior to the final amendments. *No matter how it happened, it's misleading.*
>
> "Anyhow, the proposed amendment covers all courts and all kinds of cases, but the legislature itself in the next session could re-limit the matter.
>
> "We recommend its passage *despite its confusing and misleading aspects*, for it's costly and unnecessary to have big juries for all cases, and the supercautious legislature certainly will retain them for major criminal matters."

Vote yes on Measure No. 5, Capitol Journal, November 1, 1972, § 1, at 4 (emphasis added).

Editorials should carry weight only to the extent they reflect the understanding of the voters. *See Lipscomb v. State Bd. of Higher Ed.*, 305 Or 472, 482-83, 753 P2d 939 (1988) (citing newspaper editorials as persuasive evidence of a certain interpretation because they are "based on this understanding"). Here, however, the editorial merely reflects that voters may not have been sure what they were voting for. Aside from highlighting the ambiguity in the provision, the editorial argues that its interpretation is correct based on reading committee notes and talking to two unnamed lawyers who

helped write the admittedly misleading provision. Thus, the editorial does not elucidate what voters thought they were voting for, but rather illustrates that they may not have known what would happen with the passage of Ballot Measure 5.

The voters may have understood that the measure would have application to criminal trials held in district court. In 1972, district courts had "the same criminal and quasi-criminal jurisdiction as justices' courts," and had "concurrent jurisdiction with the circuit courts of all misdemeanors * * * where the punishment prescribed does not exceed one year's imprisonment in the county jail or a fine of $3,000, or both such fine and imprisonment." ORS 46.040 (1971).[8] Thus, the constitutional amendment, regardless of its effect on circuit courts, allowed for civil cases and criminal trials in district courts to have six-person juries.

b. This court should not consider any history that was not readily available to the voters.

In *Shilo Inn v. Multnomah County*, this court explained why it would not consider certain legislative history materials in construing a referred constitutional provision:

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[8] District court jurisdiction was later transferred to circuit court. Or Laws 1995, ch 658, § 1 ("All jurisdiction, authority, powers, functions and duties of the district courts and the judges of the district courts are transferred to the circuit courts and the judges of the circuit courts."); *id.* § 150 (providing that the transfer of jurisdiction would "become operative January 15, 1998").

> "Contrary to *amici*'s suggestion, however, the history that we consider does not include early drafts of the legislative bill that later was referred to the people, nor does it include statements made by legislators in hearings on that matter. Those materials may be indicative of the *legislature's* intent in crafting Measure 50 but, as we stated most recently in *Stranahan*, 331 Or at 57, 'it is the *people's* understanding and intended meaning of the provision in question – as to which the text and context are the most important clue – that is critical to our analysis.' (Emphasis added.) It follows that only those materials that were presented to the public at large help to elucidate the public's understanding of the measure and assist in our interpretation of the disputed provision. *Id.* at 64-65."

333 Or 101, 129-30, 36 P3d 954 (2001) (emphasis in original).

There are materials that document discussions that occurred prior to the legislature referring the provision to the voters. *See Sagdal,* 258 Or App at 900-01 (describing the history); Resp Br at 11-12 (same). However, as this court noted in *Shilo Inn*, the materials were not presented to the public at large and therefore do not elucidate the voters' intent in adopting the provision. Therefore, this court should not consider the materials in deciding the issue in this case. In any event, that legislative history would not be sufficient to overcome the plain words of the amendment, which do not change the requirement that at least ten jurors must agree on a verdict.

D. To the extent the answer is still unclear, maxims of construction can harmonize Article I, section 11, and Article VII (Amended), section 9.

If this court concludes that the application of Article VII (Amended), section 9, is unclear after considering the text, context, and history of the

constitutional provision, this court can resort to canons of construction to resolve the issue. In *PGE*, this court noted that the interpretive methodology applied to statutes also applies to "the interpretation of laws and constitutional amendments adopted by initiative or referendum." 317 Or at 612 n 4. Under that methodology, "[i]f the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *State v. Gaines*, 346 Or 160, 172, 206 P3d 1042 (2009).

This court did not reach that level of analysis in *Roseburg School Dist.*, *Ecumenical Ministries*, or *Stranahan*. However, consulting maxims of interpretation would be consistent with the overarching purpose of the inquiry, *i.e.*, to discern the intent of the voters, insofar as such maxims might reflect a common understanding of how different constitutional provisions will interact with each other. *See Stranahan*, 331 Or at 57 (with respect to a constitutional provision adopted by legislative referral, noting that "it is the people's understanding and intended meaning of the provision in question – as to which the text and context are the most important clue – that are critical to our analysis").

One applicable maxim of construction is that "a particular intent controls a general intent that is inconsistent with the particular intent." ORS 174.020(2). This court has described the analysis as follows:

> "[W]hen one statute deals with a subject in general terms and another deals with the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, while giving effect to a consistent legislative policy. However, if the two statutes cannot be harmonized, 'the specific statute is considered an exception to the general statute.'"

State v. Guzek, 322 Or 245, 268, 906 P2d 272 (1995) (citations omitted). Thus, if the provisions deal with the same subject, the first step is to determine whether the provisions can be read together and harmonized. If they cannot, then the court determines which provision is more specific. *See State v. Haugen*, 349 Or 174, 203, 243 P3d 31 (2010) (holding that because "[t]he statutes are in conflict," the court must "let the specific legislative intent control the general").

In this case, the provisions can be read together and harmonized. Article VII (Amended), section 9, allows the legislature to provide for juries of as few as six persons, but does not mandate that the legislature do so. Given the specific requirement of at least ten jurors in criminal cases (other than first-degree murder) in circuit court, the legislature could decide to provide for six-person juries in criminal cases in justices' or district courts, but not circuit courts. In other words, the provisions can be harmonized because Article VII (Amended), section 9, is a grant of authority for the legislature to do something, and Article I, section 11, among other things, merely defines one limit to the

exercise of that authority. Because the provisions can be read together and harmonized, this court does not need to decide which is more specific.

However, if this court concludes that the provisions are irreconcilable, then this court must decide which is specific and which is general. While that determination is not always easy to make, a provision is general when it applies to a number of different types of proceedings and specific when it only applies to one type of proceeding. *See Haugen*, 349 Or at 203-04 (describing the more particular statute at issue as a "seldom-used exception" and noting that it only applies to one crime).

Article I, section 11, applies in only one class of proceedings – criminal trials in circuit court. Article VII (Amended), section 9, on the other hand, applies generally and apparently without limitation to juries. Therefore, under the reasoning of *Haugen*, Article VII (Amended), section 9, is the more general provision and does not control. Instead, the more particular expression of the voters' intent should control, and that is embodied in the requirement of Article I, section 11, that at least ten jurors serve on a jury in any criminal case in circuit court.

II. A certificate of accuracy for breath testing equipment is testimonial under the Sixth Amendment.

A. A statement is testimonial for purposes of the Sixth Amendment if it serves an evidentiary purpose at a criminal trial.

The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, *Pointer v. Texas*, 380 US 400, 403, 85 S Ct 1065, 13 L Ed 2d 923 (1965), provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

In *Crawford v. Washington*, 541 US 36, 53-54, 124 S Ct 1354, 158 L Ed 2d 177 (2004), the United States Supreme Court held that under the Confrontation Clause, out-of-court testimonial statements of a witness are generally inadmissible, unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. In holding that the Confrontation Clause guarantees a defendant's right to confront those "who 'bear testimony'" against him, *id.* at 51, the court described some of the various forms the "core class of 'testimonial' statements" could take:

> "Various formulations of this core class of 'testimonial' statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as 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; extrajudicial statements * * * contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Id. at 51-52 (citations and quotation marks omitted, ellipsis in original).

The Supreme Court has subsequently applied the *Crawford* formulation to laboratory reports in *Melendez–Diaz v. Massachusetts*, 557 US 305, 129 S Ct 2527, 174 L Ed 2d 314 (2009), and *Bullcoming v. New Mexico*, __ US __, 131 S Ct 2705, 180 L Ed 2d 610 (2011).[9]

In *Melendez-Diaz*, the court held that a laboratory report that identified a substance as cocaine was testimonial for purposes of the Sixth Amendment. The court reasoned that because the report served an evidentiary purpose and was the functional equivalent of in-court testimony, it was testimonial:

> "There is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements' thus described. Our description of that category mentions affidavits twice. The documents at issue here, while denominated by Massachusetts law 'certificates,' are quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.' *Black's Law Dictionary* 62 (8th ed. 2004). They are incontrovertibly a '"solemn declaration or affirmation made for the purpose of establishing or proving some fact."' The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'
>
> "Here, moreover, not only were the affidavits '"made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,"' but

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[9] The Supreme Court also applied the Confrontation Clause to a report in *Williams v. Illinois*, __ US __, 132 S Ct 2221, 183 L Ed 2d 89 (2012). However, the case was decided by a plurality and is not binding. *See State v. Farber*, 295 Or 199, 208 n 11, 666 P2d 821 (1983) ("[A] four-person plurality is not binding precedent.").

> under Massachusetts law the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves."

557 US at 310-11 (some citations omitted, emphasis in original). Thus, the court held that "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." *Id.* at 311.

In *Bullcoming*, the defendant was arrested for driving under the influence. Pursuant to a warrant, the police obtained a sample of the defendant's blood and sent it to the New Mexico Department of Health, Scientific Laboratory Division (SLD). A forensic analyst then certified his findings in a form titled "Report of Blood Alcohol Analysis." The forensic analyst recorded the defendant's BAC and affirmed that the sample was received intact, statements in the report were accurate, and he had followed certain procedures in testing the blood. In another portion of the report, an SLD examiner certified that the analyst was qualified to conduct the test and that the "established procedure[s]" had been followed in handling and analyzing the sample. 131 S Ct at 2710-11.

The Supreme Court in *Bullcoming* described testimonial statements as those that serve an "evidentiary purpose" and are "made in aid of a police

investigation." *Id.* at 2717. Applying that understanding to the report at issue, the court concluded that the report was testimonial:

> "In all material respects, the laboratory report in this case resembles those in *Melendez-Diaz*. Here, as in *Melendez-Diaz*, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations. Like the analysts in *Melendez-Diaz*, analyst Caylor tested the evidence and prepared a certificate concerning the result of his analysis. Like the *Melendez-Diaz* certificates, Caylor's certificate is 'formalized' in a signed document, headed a 'report.' Noteworthy as well, the SLD report form contains a legend referring to municipal and magistrate courts' rules that provide for the admission of certified blood-alcohol analyses."

Id. at 2717 (citations omitted). Accordingly, the court held that the report was testimonial, as it was a document prepared by an analyst, made for "'the purpose of establishing or proving some fact' in a criminal proceeding." *Id.* at 2716 (quoting *Melendez-Diaz*, 129 S Ct at 2540.

B. The breath test certifications in this case were testimonial for purposes of the Sixth Amendment, requiring the testimony of the analyst that certified that the Intoxilyzer worked properly.

Under the analytical framework established by *Crawford*, *Melendez-Diaz*, and *Bullcoming*, the two breath test certifications in this case were testimonial under the Sixth Amendment.

The primary purpose of the certificates in this case was to allow the state to offer evidence of defendant's BAC on the night of the incident. The crime of reckless driving requires proof that the defendant "recklessly drives a vehicle * * * in a manner that endangers the safety of persons or property." ORS

811.140(1). Whether a driver was intoxicated can be relevant to whether the driver was reckless. *E.g., State v. Griffin*, 55 Or App 849, 852, 640 P2d 629 (1982) ("'Recklessness' includes driving while under the influence of intoxicants."). Here, there was no testimony as to defendant's actual driving. Instead, the state relied primarily on defendant's level of intoxication to argue that he drove recklessly regardless of the manner of his driving. *See* Tr 158, 160, 161, 177 (state's closing argument).

Thus, in this case, the report of defendant's BAC was essential to the state's case. However, by statute, the BAC report is not admissible unless the breath test machine has been certified to be accurate. *See* ORS 813.160(1) (describing when a breath test is "valid" in order to prove someone's BAC at a civil or criminal trial or proceeding, and providing that the state police "shall * * * [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"). The reports at issue in this case, though they did not offer direct evidence of defendants' BAC on the night of the incident, were essential to the state proving that fact.

The "certificate[s] of accuracy" in this case also contain several testimonial statements that could add weight to a state's argument that the Intoxilyzer works properly and produced an accurate result. For instance, each certificate contains this statement:

> "On the date indicated below, the following Intoxilyzer 8000 breath alcohol testing equipment was tested and certified to be accurate, in accordance with ORS 813.160 and OAR 257-030-0170, by the undersigned trained technician of the Oregon State Police Forensic Services Division."

App Br at ER 2-3. In other words, each certification states that (1) the Intoxilyzer was tested and certified to be accurate on a specific date, (2) the testing was in accordance with Oregon statutes and administrative rules, (3) a named technician performed the testing, and (4) the named technician is "trained." Each of those statements serves an evidentiary purpose and is testimonial.

Further, each certificate contains the following statement:

> "Pursuant to ORS 40.460(25), I hereby certify that I retrieved this document directly from the computer system maintained and operated by the Oregon Department of State Police and that this document accurately reflects and is a true copy of the information contained in that computer system.
>
> "In testimony thereof, I have affixed my signature."

App Br at ER 2-3. Each certification includes a signature below that statement. The signature in each certification is different, and neither signature appears to be the named technician's, whose signature is in a different location on both certifications. Those statements, too, are testimonial because they serve an evidentiary purpose and are made in the aid of a police investigation. To be sure, the certifications are not direct evidence of defendant's BAC on the night

in question. However, they are prepared for use as evidence at trial and serve a necessary evidentiary purpose.

C. The error in this case harmed defendant.

An error is harmless if there was little likelihood that it affected the jury's verdict. *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). In this case, admission of the Intoxilyzer certifications was not harmless. Without the certifications, the report of defendant's BAC would not have been admissible. The state mentioned defendant's BAC several times during closing argument. *See* Tr 158, 160, 161, 177. For example, the prosecutor argued, "Is it safe to have someone on the road with a blood alcohol level of point three? No." Tr 160. Because the state emphasized defendant's BAC and relied on it to show that defendant was reckless when he drove, the admission of the BAC and the necessary breath test certifications likely affected the jury's verdict. Therefore, this court should reverse defendant's conviction.

CONCLUSION

If this court agrees with either defendant's first or second question presented, this court should reverse the decision of the Court of Appeals and remand to the trial court for a new trial.

Respectfully submitted,

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

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(d) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 11,591 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on April 9, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Jamie Contreras #022780, attorney for Plaintiff-Respondent.

Respectfully submitted,

s/ Jed Peterson

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