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 Case No. 15CR05982 CA A159531 SC S064084

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review the decision of the Court of Appeals
on an 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

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PETITIONER'S BRIEF ON THE MERITS

INTRODUCTION

This criminal appeal arises from defendant's conviction for misdemeanor driving while suspended (DWS), ORS 811.182. The issue is whether the Implied Consent Combined Report (Combined Report) that the state presented as evidence at trial is "testimonial" under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

At trial, evidence established that defendant drove her car without a valid driver's license. In support of an affirmative defense, defendant testified that the she never received notice that her license had been suspended. In response, the state offered and the court admitted the Combined Report, which was created during a previous driving-under-the-influence-of-intoxicants (DUII) investigation. The report stated that defendant's driver's license was being suspended because she refused to submit to a blood test to measure blood alcohol content (BAC). It included an officer's statement that he gave defendant a copy of the form.

The officer who signed the report did not testify, and defendant objected to the Combined Report under the Sixth Amendment's Confrontation Clause. The trial court overruled the objection, ruling that the report was not testimonial evidence. Defendant appealed and assigned error to the trial court's ruling. The Court of Appeals summarily affirmed defendant's conviction. *Order*

Granting Summary Affirmance, ER 4. This court granted defendant's petition for review.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

The federal Confrontation Clause prohibits the admission of "testimonial" hearsay if the defendant has no opportunity to cross-examine the declarant. Here, to support an affirmative defense to DWS, defendant testified that she did not receive notice that her driver's license was suspended. The trial court admitted an Implied Consent Combined Report as evidence of notice. The report includes various factual assertions made by an officer pertaining to a DUII investigation, including that defendant was "given a copy of this form" and that her driver's license would be suspended. Were the officer's declarations in the report testimonial?

Proposed Rule of Law

Yes. As a general rule, testimonial hearsay is a solemn declaration or affirmation made for the purpose of establishing or proving some fact. The Combined Report is a solemn declaration or affirmation. The reporting officer affirmed by his signature that the facts contained in the report occurred. And the report was made to prove or establish facts. Those facts included observations that were relevant to prove defendant was guilty of DUII and

DWS, and to justify the administrative suspension of defendant's driver's license. Thus, the Combined Report fits the definition of testimonial hearsay.

SUMMARY OF ARGUMENT

The Confrontation Clause applies to "testimonial" statements, which are solemn affirmations or declarations made primarily to establish or prove facts that may be relevant at trial. Examples of statements that make up the "core class" of testimonial evidence are things such as affidavits and statements an objective witness would reasonably expect to be available as evidence at trial.

First, the Combined Report fits within the core class of testimonial evidence. Like an affidavit—the quintessential example of testimonial evidence—it is a formal declaration of historical fact. And it functions in the same way as other investigative police reports. As such, an objective officer would expect the report to be available at trial.

Second, the primary purpose of the Combined Report is to establish facts. The implied-consent statutory scheme exists to provide evidence of intoxication for use as evidence in DUII prosecutions. The Combined Report is a creature of that statutory scheme and furthers its primary goal. Moreover, under the DWS statutory scheme, a statute explicitly provides that the notice provision of the Combined Report can be used as evidence in criminal trial during the prosecution's case-in-chief. Finally, the Combined Report is used as prima facie evidence that a driver's license is subject to suspension by the DMV. A

document made to function as prima facie evidence in any type of adjudication exists for the purpose of establishing facts. Given the evidence that the Combined Report exists to act as a formal declaration of fact, it is testimonial.

SUMMARY OF FACTS

State's Evidence

On February 12, 2015, Portland Police Officer Derek Moore pulled defendant over because her license-plate light was burnt out. Tr 48-49. When Moore asked defendant for her driver's license, registration, and proof of insurance, defendant could not produce her license. Tr 50. She was nervous, fumbled with her documents, and stammered excuses for not having the license. Tr 50. Defendant was able to provide an identification card, which Moore used to check her DMV records. Tr 50-51. Moore learned that defendant's driver's license had been suspended in October 2012 and that the suspension was scheduled to last until October 2015. Tr 51.

At trial, the state offered the Combined Report,[1] which was signed by a law-enforcement officer sometime between September 8, 2012, and October 2,

[1] The Combined Report is part of Exhibit #1. P Tr 12. That exhibit contains three pages. The first page is a DMV record regarding the status of defendant's driver license. ER 1. The second and third pages are the Combined Report. ER 2-3. Defendant did not object to the first page. P Tr 12-13. But defendant did object to the Combined Report. P Tr 13.

2012.[2] Tr 46-47; *Exhibit #1*, ER 2-3. The report contains, among other things, the following statements:

- "You were arrested for driving under the influence of intoxicants (DUII) and you were asked to submit to a test under the Motorist Implied Consent Law."
- "At the time the request was made, there were reasonable grounds to believe that you were driving under the influence of intoxicants."
- "Before being asked to submit to a test, you were informed of the required rights and consequences information by the reporting officer * * *."
- "You were given a copy of this form * * * as written notice."
- "If requested, you were given a reasonable opportunity to contact counsel or others."
- "Your driving privileges will be suspended * * * on the 30th day after the date of arrest * * * and for the period of time and for the reason indicated below."

The form then contains two boxes corresponding to two possible scenarios: (1) that the arrested driver failed a BAC breath test, or (2) that the driver refused to submit to a breath, blood, or urine test. ER 2. In that second box, the reporting officer indicated that the defendant "refused to submit to a **blood test** when receiving medical care in a health care facility immediately after a motor vehicle accident." *Id*. (boldface in original). Consequently, the

[2] The report does not indicate exactly when the reporting officer signed it. However, it lists the date of arrest as September 8, 2012, and it bears a stamp indicating that the form was "processed" on October 2, 2012.

form states that defendant's license would be suspended for a three-year period. *Id.*

At the bottom of the form, it says, "I affirm by my signature that the foregoing events occurred." *Id.* That statement is followed by an officer's signature. *Id.* The back of the form lists the driver's rights and the consequences that exist under the implied-consent statutory scheme, it instructs the driver how to request an administrative hearing to contest the license suspension, and it states that "[i]f no hearing is requested, the allegations contained in this document will be accepted at fact." ER 3.

Defense Evidence

Defendant testified at trial that she had no notice that her driver's license was suspended. Tr 59. She explained that she woke up in the hospital on September 8, 2012, with very serious injuries and no memory of how she got there. Tr 54. She soon learned that she had been admitted to the hospital with an extremely high BAC, two broken arms, six broken ribs, and other injuries. Tr 54-55.

She testified that she could not recall an officer coming to the hospital to talk with her at all. Tr 55-56. She did not recall an officer asking her to submit to a blood test or refusing to do so. Tr 59. And she had no memory of an officer reading her the Combined Report or giving her a copy of it. Tr 56. When the hospital discharged defendant, she did find a citation for DUII and

Reckless Driving, but she never found a copy of the Combined Report. Tr 56-57. Weeks later, an officer came to defendant's door to discuss the DUII incident, but he never mentioned the fact that defendant's license had been suspended. Tr 57.

Defendant also testified that she went to a DMV office on January 21, 2015, to update her name following her recent marriage. Tr 58, 67. But DMV staff did not tell her that her license was suspended; they told her only that it had expired. Tr 58, 67, 69. She tried to renew her license, but DMV staff told her that she needed to provide her birth certificate. Tr 68-69. Because she did not have that with her, she obtained an identification card with her married name instead. Tr 67.

Procedural Facts

Prior to trial, defendant objected to the admissibility of the Combined Report before trial "on the grounds of hearsay and confrontation." P Tr 12-13. Defendant argued that she "h[ad] the right to confront [the officer who signed the report] over whether [the events described in the report] actually happened, and * * * that's the confrontation argument under *Crawford*." P Tr 14. In response, the state argued that the report was not testimonial evidence and thus did not implicate the Confrontation Clause. P Tr 14. Relying on *State v. Velykoretskykh*, 268 Or App 706, 343 P3d 272 (2015), the trial court held that the Combined Report was nontestimonial evidence. P Tr 17-18. In

Velykoretskykh, the Court of Appeals specifically held that a Combined Report is not testimonial, 268 Or App at 712-13, but defendant argued that *Velykoretskykh* was wrongly decided, P Tr 18.

Defendant appealed from her conviction, again arguing that the Combined Report was testimonial evidence and that *Velykoretskykh* was wrongly decided. The state moved for summary affirmance, arguing that *Velykoretskykh* controlled the outcome of the case. The Court of Appeals granted the state's motion and affirmed, ruling that defendant's "opening brief does not present a substantial question of law because the court considered and rejected the same arguments in [*Velykoretskykh*.]" *Order Granting Summary Affirmance*, ER 4.

ARGUMENT

The federal Confrontation Clause[3] ensures that a criminal defendant has the opportunity to confront her accusers face to face at trial. *Crawford v. Washington*, 541 US 36, 61, 124 S Ct 1354, 158 L Ed 2d 177 (2004). It prohibits the admission of testimonial hearsay unless (1) the declarant appears at trial, or (2) the declarant is unavailable and the defendant had a prior

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[3] The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." It is made applicable to the states by the Fourteenth Amendment. *Michigan v. Bryant*, 562 US 344, 352, 131 S Ct 1143, 179 L Ed 2d 93 (2011).

opportunity to cross-examine him or her. *Davis v. Washington*, 547 US 813, 821, 126 S Ct 2266, 165 L Ed 2d 224 (2006).

In this case, the trial court admitted a Combined Report as evidence against defendant. The report's author did not appear in court, the state did not establish that he was unavailable, and defendant had no prior opportunity to cross-examine him. So the issue before this court is simply whether or not the report was testimonial in nature. As explained below, the Combined Report is testimonial because it falls within the core class of testimonial documents identified in *Crawford* and because it is a solemn declaration made for the purpose of establishing facts. Accordingly, the trial court erroneously admitted the report, and reversal is required.

I. Evidence is "testimonial" if it falls within the "core class" of testimonial evidence identified by the United States Supreme Court or is a solemn declaration made for the purpose of establishing or proving a fact that may be relevant at trial.

In *Crawford*, the United States Supreme Court clarified the scope of the protections provided by the Confrontation Clause. In doing so, the Court attempted to ascertain the Framers' intent. *Crawford*, 541 US at 43. It assumed that the English common-law tradition would have informed the Framers' understanding of the Clause. *Id*. That tradition was "one of live testimony in court subject to adversarial testing." *Id.* But at times that tradition morphed into something more reminiscent of the continental civil-law system. *Id.* In

some criminal cases, "[j]ustices of the peace and other officials examined suspects and witnesses before trial." *Id*. The results of those examinations were "read in court in lieu of live testimony." *Id.*

The Supreme Court concluded that the Confrontation Clause was a reaction to that English practice. "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id*. at 50. For that reason, the Clause requires that a defendant be allowed to confront adverse "witnesses"—that is, those who "bear testimony" against her. *Id.* at 51 (quoting Noah Webster, 2 *An American Dictionary of the English Language* (unpaginated) (1828)). From that premise, the Court declared that the Confrontation Clause prohibits the introduction of "testimonial" evidence without the opportunity for the defendant to cross-examine the declarant. *Id.* at 61 ("[The Confrontation Clause] commands * * * that [the] reliability [of evidence] be assessed in a particular manner: by testing in the crucible of cross-examination.").

In the time since *Crawford*, the Supreme Court has declined to provide a comprehensive definition for testimonial evidence. *See Ohio v. Clark*, ___ US ___, 135 S Ct 2173, 2179, 192 L Ed 2d 306 (2015) (noting that *Crawford* did not offer an "exhaustive definition of 'testimonial'" and that the Court's more recent cases "have labored to flesh out" its meaning). But *Crawford* did

establish guideposts that resolve this case. First, it defined the word "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 US at 51 (quoting Webster, 2 *American Dictionary* (unpaginated)); *accord State v. Copeland*, 353 Or 816, 842, 306 P3d 610 (2013) (applying that definition to describe testimonial evidence). Second, it set out three formulations to describe the "core class" of testimonial evidence:

> 1. "*[E]x 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[;]"
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> 2. "[E]xtrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[;]" and
>
> 3. "[S]tatements 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[.]"

Crawford, 541 US at 51-52 (internal quotation marks, ellipses, and citations omitted). Statements that fit within those formulations constitute the quintessential examples of testimonial hearsay.

Evidence that does not fall within the core class of testimonial evidence can still be classified as testimonial. In that situation, the Supreme Court typically asks whether, "in light of all the circumstances, viewed objectively, the 'primary purpose' of the [statement at issue] was to 'creat[e] an out-of-court

substitute for trial testimony.'" *Clark*, 135 S Ct at 2180 (citation omitted); *accord United States v. Liera-Morales*, 759 F3d 1105, 1109 (9th Cir 2014) ("The Supreme Court in *Crawford* set forth examples of the 'core class' of testimonial statements, and post-*Crawford* cases have since 'clarified . . . the limits of the testimonial statement category' by focusing largely on the 'primary purpose' of the interrogation or investigation.") (citation omitted; ellipses in original). If a statement's primary purpose is to "establish or prove past events potentially relevant to later criminal prosecution," the statement is likely testimonial. *Davis*, 547 US at 822 (footnote omitted). If a statement has some other primary purpose, then the statement is not testimonial. *Clark*, 135 S Ct at 2180.

For example, in *Davis*, the Court looked at two different types of evidence: (1) a 9-1-1 call made to report an assault, and (2) responses to police questioning at the scene of an assault made after the aggressor had been contained. 547 US at 817-21. The Court held that the latter was testimonial and the former was not. *Id.* at 828-30. It reasoned that the primary purpose of the 9-1-1 call was to get help during an ongoing emergency, not to provide a substitute for in-court testimony. *Id.* at 828. After all, "[n]o 'witness' goes into court to proclaim an emergency and seek help." *Id*. By contrast, the primary purpose of the police questioning was to investigate a possible crime, and the

responses to those questions were an "an obvious substitute for live testimony." *Id.* at 830.

In making the distinction in *Davis*, the Court relied on two critical factors. First, the 9-1-1 call described ongoing events as they happened, while the responses to police questioning recounted past events. *Id.* at 827, 830. Second, the Court evaluated the formality of the statements, noting that "formality is indeed essential to testimonial utterance." *Id.* at 830 n 5; *accord Clark*, 135 S Ct at 2180 (explaining that a formal statement is more likely to be testimonial in nature, "while less formal[ity] * * * is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused"). It concluded that statements made in response to an officer's questions were sufficiently formal to support the conclusion that the statements were testimonial. *Davis*, 547 US at 830 n 5. In comparison, the 9-1-1 call lacked a similar level of formality. *Id.* at 827.

To summarize, testimonial evidence is that evidence that falls within the core class of evidence described in *Crawford.* Other solemn declarations or affirmations that have the primary purpose of establishing or proving facts can also be classified as testimonial evidence. Determining whether a statement's primary purpose is testimonial requires a court to examine the totality of the circumstances, focusing on factors such as the formality of the statements and

whether the statements recounted past facts that could be relevant to a later criminal trial.

II. The Combined Report falls within the core class of testimonial evidence described in *Crawford* because it is the functional equivalent of in-court testimony and because an objective officer would reasonably believe that it would be available for use at trial.

Perhaps the simplest way to resolve this case is to recognize that the Combined Report fits within the core class of testimonial evidence listed in *Crawford*. That core class includes written documents (such as affidavits) that are the "functional equivalent" of in-court testimony and includes documents that contain statements that would lead an "objective witness reasonably to believe that the statement[s] would be available for use at a later trial." *Crawford*, 541 US at 51-52 (internal quotation marks and citations omitted). The Combined Report fits neatly within both of those categories.

The Combined Report is the "functional equivalent" of in-court testimony. Indeed, it closely mirrors the documents at issue in *Melendez-Diaz v. Massachusetts*, 557 US 305, 129 S Ct 2527, 174 L Ed 2d 314 (2009), and *Bullcoming v. New Mexico*, 564 US 647, 131 S Ct 2705, 180 L Ed 2d 610 (2011)—both of which were found to fall within the core class of testimonial documents.

In *Melendez-Diaz*, police sent a suspicious substance discovered in the defendant's possession to a state laboratory for testing. 557 US at 308. In their certificates of analysis, forensic analysts identified the substance as cocaine and reported its weight. *Id.* They then swore to the accuracy of the certificates before a notary public, as required by law. *Id.* The certificates were then admitted at trial as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed." *Id.* at 309 (quoting Mass Gen Laws, ch 111, § 13) (ellipses in *Melendez-Diaz*). The Supreme Court held that the certificates were "quite plainly affidavits"[4] and that there was "little doubt that the documents * * * f[e]ll within the 'core class of testimonial statements'" described in *Crawford*. *Id.* at 310.

The Court came to a similar conclusion in *Bullcoming*. There, the evidence at issue was a report from a forensic laboratory, which revealed that the defendant had driven with a .21 BAC. *Bullcoming*, 564 US at 655. The report was similar in character to the certificates at issue in *Melendez-Diaz*, except that the factual statements were not given under oath. *Id*. at 664. Nonetheless, the Court concluded that the reports fell within the core class of testimonial statements, "rejecting as untenable any construction of the

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[4] The Court defined "affidavits" as "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." *Melendez-Diaz*, 557 US at 310 (quoting *Black's Law Dictionary* 62 (8th ed 2004)) (brackets in *Melendez-Diaz*).

Confrontation Clause that would render inadmissible only sworn *ex parte* affidavits, while leaving admission of formal, but unsworn statements 'perfectly OK.'" *Id.* at 664 (quoting *Crawford*, 541 US at 52-53 n 3).

Like the evidence in *Melendez-Diaz* and *Bullcoming*, the Combined Report in this case fits within the core class of testimonial documents. First, like the documents at issue in those cases, a law-enforcement agent created the Combined Report during a criminal investigation. Second, as explained more fully below, it recorded past facts that potentially would be relevant at a later criminal trial for the prosecution of a particular defendant. And, third, the Combined Report was a formalized statement of fact, the truth of which was affirmed by the reporting officer's signature. In fact, the report itself noted that events recorded therein were intended to "be accepted as fact" by a state administrative agency. *See* ORS 813.410(1) (providing for the suspension of a person's driving privileges based upon the allegations in a Combined Report or similar document unless a hearing is requested). Like the report in *Bullcoming*, the Combined Report was not made under oath, but the lack of an oath does not detract appreciably from the formality with which the officer issued the statements. But for the lack of that oath, the Combined Report operates in the same manner as an affidavit—a document mentioned twice in *Crawford*'s listed core class of testimonial material.

In addition, the fact that the Combined Report functions much like a standard police report[5] suggests that an objective officer writing the report would reasonably believe that it would be available for use in later litigation. A police report's essential function is to recount past events that will be relevant at a later criminal trial. Those reports are routinely used during the course of criminal litigation. As explained more fully below, the Combined Report functions in the same way as other police reports: it recounts facts that will be relevant to criminal prosecutions for DUII and DWS. As such, an objective officer would reasonably expect the Combined Report to be available for use in those prosecutions. Thus, because police reports fall within the core class of testimonial evidence, the Combined Report—which is hardly distinguishable from a standard police report—does too. *See Bullcoming*, 564 US at 660 ("Suppose a police report recorded an objective fact[,] * * * [c]ould an officer [who did not write the report] present the information in court * * *? [T]he answer is emphatically 'No.'"); *State v. Lahai*, 128 Conn App 448, 469, 18 A3d 630, *rev den*, 301 Conn 934, 23 A3d 727 (2011) ("A police report is a quintessential example of * * * formalized testimonial material.").

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[5] At the top of the Combined Report form, three subtitles for the document are listed: (1) "Notice of Suspension," (2) "Temporary Driver Permit," and (3) "*Police Report* to DMV." *Exhibit #1*, ER 2 (emphasis added).

In short, the Combined Report falls within the core class of testimonial material because it is the functional equivalent of in-court testimony and because an objective officer would reasonably believe that the report would be available for use at a later trial.

III. The primary purpose of the Combined Report is to prove facts that may be relevant to a criminal prosecution.

Even if not within the core class of testimonial material, statements are testimonial if their primary purpose is to establish or prove facts that could be relevant in a later trial. Statements made for some other purpose, generally are not testimonial. For example, "[b]usiness and public records are generally admissible absent confrontation" because they are "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez-Diaz*, 557 US at 324. Similarly, in *Copeland*, this court held that a written proof of service was not testimonial because its primary purpose was administrative and not prosecutorial. 353 Or at 818.

But the Combined Report is distinguishable from both the public and business records discussed by the United States Supreme Court and the proof of service mentioned in *Copeland*. While the Combined Report may have multiple purposes, its *primary* purpose is to formally record facts that may be

relevant to later prosecutions—most prominently prosecutions for DUII and DWS.

A. The Combined Report furthers the goal of the implied-consent statutory scheme to develop evidence for DUII prosecutions, suggesting that the primary purpose of the Combined Report is testimonial.

The Combined Report is a preprinted form disseminated by the Oregon DMV pursuant to implied-consent statutory scheme found in ORS 813.095 *et seq*. Understanding that scheme is integral to understanding the role the Combined Report plays. *See State ex rel Juv. Dept. v. S.P.*, 346 Or 592, 615-19, 215 P3d 847 (2009) (examining the statutory scheme for the Child Abuse Multidisciplinary Intervention Program to determine the primary purpose of a child-sex-abuse interview performed by CARES).

ORS 813.100(1) summarizes the implied-consent statutory scheme:

> "(1) Any person who operates a motor vehicle upon premises open to the public or the highways of this state shall be deemed to have given consent, subject to the implied consent law, to a chemical test of the person's breath, or of the person's blood if the person is receiving medical care in a healthcare facility immediately after a motor vehicle accident, for the purpose of determining the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance. A test shall be administered upon the request of a police officer having reasonable grounds to believe the person arrested to have been driving while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance. Before the test is administered the person requesting the test shall be informed of consequences and rights as described under ORS 813.130."

That paragraph encapsulates the primary purpose of the implied-consent statutes: to "determin[e] the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants." *Accord State v. Cruz*, 121 Or App 241, 244, 855 P2d 191 (1993) ("The purpose of the implied consent law is to permit the state to gather and introduce evidence to prove a violation of ORS 813.010.").

The Combined Report itself is described by ORS 813.100(3)(d), which requires an officer to notify the DMV of the actions taken under the implied-consent statute in "a report as described in ORS 813.120." ORS 813.120(1) explains the required contents of the Combined Report:

> "(1) A report required by ORS 813.100 shall disclose substantially all of the following information:
>
> "(a) Whether the person, at the time the person was requested to submit to a test, was under arrest for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance.
>
> "(b) Whether the police officer had reasonable grounds to believe, at the time the request was made, that the person arrested had been driving under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance.
>
> "(c) Whether the person refused to submit to a test or if the person submitted to a breath or blood test whether the level of alcohol in the person's blood, as shown by the test, was sufficient to constitute being under the influence of intoxicating liquor under ORS 813.300.
>
> "(d) Whether the person was driving a commercial motor vehicle and refused to submit to a test or if the person submitted to

> a breath or blood test whether the level of alcohol in the person's blood, as shown by the test, was 0.04 percent or more by weight.
>
> "(e) Whether the person was informed of consequences and rights as described under ORS 813.130.
>
> "(f) Whether the person was given written notice of intent to suspend required by ORS 813.100 (3)(b).
>
> "(g) If the arrested person took a test, a statement that the person conducting the test was appropriately qualified.
>
> "(h) If the arrested person took a test, a statement that any methods, procedures and equipment used in the test comply with any requirements under ORS 813.160."

Most of those requirements demand that an officer make a record of facts that support a DUII prosecution. Thus, a completed Combined Report constitutes an officer's factual statement that the driver was arrested on suspicion of DUII. It proves the driver was "informed of consequences and rights as described under ORS 813.130," which satisfies the factual prerequisite for administering a breath, blood, or urine test to determine whether a driver is under the influence of alcohol. ORS 813.100(1) ("Before the test is administered the person requested to take the test shall be informed of consequences and rights as described under ORS 813.130."). And, if the driver refuses to submit to a BAC test, it establishes that refusal, which itself is admissible to prove guilt in a later DUII trial. ORS 813.310 ("If a person refuses to submit to a chemical test under ORS 813.100 * * *, evidence of the person's refusal is admissible in any civil or criminal action, suit or proceeding

arising out of acts alleged to have been committed while the person was driving a motor vehicle * * * while under the influence of intoxicants.").

In short, the goal of the implied-consent statutes is to collect evidence for use in a DUII prosecution, and the primary purpose of the Combined Report is to further that goal.

B. 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 in trial.

The DWS statutory scheme provides further evidence that the Combined Report is testimonial. A defendant commits misdemeanor DWS if she drives while her license is suspended, provided that the suspension resulted from a prior refusal to submit to a BAC test pursuant to the implied-consent statutes. ORS 811.182.[6] As an affirmative defense to that crime, a defendant may

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[6] ORS 811.182 provides in relevant part as follows:

> "(1) A person commits the offense of criminal driving while suspended or revoked if the person violates ORS 811.175 [see below] and the suspension or revocation is one described in this section * * *.
>
> "* * * * *
>
> "(4) The offense described in this section, criminal driving while suspended or revoked, is a Class A misdemeanor if the suspension or revocation is any of the following:
>
> "* * * * *
>
> "(c) A suspension under ORS 813.410 resulting from refusal to take a test prescribed in ORS 813.100[.]"

present evidence that she received no notice of the suspension. ORS 811.180(1)(b). But 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." *Id.*

In other words, 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. That means that the Combined Report's primary purpose is to establish facts relevant to a criminal prosecution.

The state will undoubtedly draw comparisons between the Combined Report's role in a DWS prosecution and the role of the proof of service found to be nontestimonial in *Copeland*. But the Combined Report is distinguishable.

In *Copeland*, the trial court had issued a Family Abuse Prevention Act (FAPA) restraining order prohibiting the defendant from contacted his then-

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In turn, ORS 811.175 (referenced in subsection (1)) provides in part as follows:

> "(1) A person commits the offense of violation driving while suspended or revoked if the person does any of the following:
>
> "(a) Drives a motor vehicle upon a highway during a period when the person's driving privileges or right to apply for driving privileges have been suspended or revoked in this state by a court or by the Department of Transportation."

wife. 353 Or at 818. The defendant later violated that order and was charged with punitive contempt. *Id.* As an element of the contempt allegation, the state had to prove that defendant had notice of the restraining order. *Id.* at 819. To prove that element, the state offered a proof of service signed by a deputy sheriff and attesting to the fact that the deputy personally served defendant with the restraining order. *Id.* at 818-19. The defendant objected, arguing that the proof of service was testimonial evidence offered in violation of the Confrontation Clause. *Id.* at 819. The state argued that the proof of service was not testimonial. *Id.*

On review, this court held that the proof of service was not testimonial. *Id.* at 846. The court reasoned that the proof of service was "not prepared in response to a request made by law enforcement during the course of an investigation." *Id.* at 843. And it observed that the alleged violation of the restraining order "did not occur until well after service was completed." *Id.* Furthermore, the deputy was statutorily obligated to prepare the proof of service. *Id.* Those factors led this court to concluded that the proof of service's "primary purpose * * * was administrative, not prosecutorial." *Id.* at 846. It existed to "serve the administrative functions of the court system, ensuring that [the] defendant * * * received the notice to which he is statutorily and constitutionally entitled, establishing a time and manner of notice for purposes of determining when the order expires or is subject to renewal, and assuring the

petitioner that the subject of the order knew of its existence." *Id*. While it was foreseeable that the proof of service could be relevant to a later criminal prosecution, the court concluded that that was not its "more immediate and predominant purpose." *Id.* Finally, the court noted that the goal of the overarching FAPA statutory scheme is to prevent abuse, not to punish a person for violating FAPA restraining orders. *Id*.

Admittedly, there are some parallels between the role of the Combined Report in a DWS case and that of the proof of service in a contempt proceeding. Both notify the recipient of a government action and are mandated by statute. Both have the potential of being used as evidence to prove notice should a person violate a restraining order or drive without a license. In both cases, it is speculative at the time of the statements whether a contempt or DWS proceeding will ever arise.

However, a Combined Report is distinguishable from a proof of service in several key ways. First, as explained above, ORS 811.180(2)(e) specifically provides for the use of a Combined Report as state's evidence in a DWS trial. So while it is possible that a DWS trial may never come, the report is made specifically to be used as evidence if one does occur. The existence of that statute suggests that the Combined Report was made primarily to prove a fact relevant to a criminal trial, as opposed to simply recording an administrative act.

Second, as explained in the preceding section, the Combined Report does much more than attest to the fact that defendant was given notice of a license suspension. It provides evidence for use in a DUII case pursuant to the implied-consent statutory scheme. The notice portion of the Combined Report is only one line out of the whole form, while the great majority of the form is taken up by factual assertions that are directly relevant to criminal charges. By contrast a proof of service exists solely to document the delivery of a document to the recipient, furthering a single administrative purpose.

Finally, an officer prepared the Combined Report during an ongoing criminal investigation. The eventual use of the proof of service as evidence was speculative in *Copeland*, whereas the Combined Report was reasonably certain to be relevant to an upcoming DUII prosecution.

C. The fact that the Combined Report was sent to the DMV does not mean that its primary purpose is nontestimonial.

The Combined Report is testimonial despite the facts that it is made on a DMV form, it is sent to the DMV, and it establishes facts justifying an administrative sanction. The contents of the Combined Report reveal its primary purpose as a recounting of past events that are potentially relevant to a later criminal prosecution. And to the extent that the purpose of the report is to further an administrative adjudication rather than a criminal prosecution, the report remains testimonial in nature.

As *Crawford* discussed, the Confrontation Clause was a reaction to the use of out-of-court statements as evidence in criminal trials. Thus, *Crawford* explained that the Confrontation Clause was directed at "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact." 541 US at 51 (citation and quotation marks omitted). The Court did not limit the definition of testimony to those statement made specifically for criminal prosecution.

And, given the historical origin of the Clause, it makes no sense that an affidavit (or similar formal statement of past fact) prepared for a civil or administrative proceeding is somehow nontestimonial, while the same document prepared for a criminal proceeding is. Regardless of the nature of the upcoming proceeding, formal statements of fact in advance of litigation are the functional equivalents of in-court testimony. *See United States v. W.R. Grace*, 455 F Supp 2d 1199, 1202 (D Mont 2006) (holding that there is no "exception to the confrontation rule where [prior] testimony was not given during the course of the criminal process"); *State v. Carpenter*, 275 Conn 785, 832, 882 A2d 604 (2005), *cert den*, 547 US 1025 (2006) (holding that investigative reports made for use in probate litigation were testimonial); *Simmons v. State*, 95 Ark App 114, 120, 234 SW3d 321 (2006) (holding that "a deposition taken in anticipation of a future civil trial constitutes a 'testimonial statement as required by *Crawford*"). Thus, 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.

To summarize, the Combined Report fits within the core class of testimonial documents. It is the functional equivalent of in-court testimony, and a reasonable officer would expect it to be available for use in a later prosecution. Furthermore, the primary purpose of the report is to establish past facts. The facts in the report could serve as evidence in DUII trial, a DWS trial, and an administrative adjudication. At bottom, the Combined Report is a "solemn declaration or affirmation" and its primary purpose is to establish or prove the facts attested to by the reporting officer; therefore, it is testimonial.

IV. The admission of the Combined Report was not harmless beyond a reasonable doubt.

When a trial court's erroneous ruling violates a defendant's federal constitutional right, this court applies the federal harmless error standard. *State v. Bray*, 342 Or 711, 725, 160 P3d 983 (2007). Under that standard, a violation of the Sixth Amendment requires reversal unless the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 US 673, 681, 106 S Ct 1431, 89 L Ed 2d 674 (1986).

Here, the error was obviously harmful. Under ORS 811.180(2)(e), the Combined Report made the lack-of-notice affirmative defense unavailable to

defendant as a matter of law. But even if the affirmative defense was available, the Combined Report was direct evidence that defendant had received notice of her license suspension. In fact, it was the only such evidence. Accordingly, the error was not harmless beyond a reasonable doubt, and this court should reverse.

CONCLUSION

The admission of the Combined Report violated defendant's Sixth Amendment right to confrontation. Defendant requests that this court reverse the decisions of the Court of Appeals and the trial court and remand for a new trial.

Respectfully submitted,

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Signed
By John Evans at 1:48 pm, Oct 25, 2016

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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)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,872 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 Brief on the Merits of Petitioner on Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 25, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Brief on the Merits of Petitioner on Review will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, and Joanna Jenkins #972930, Assistant Attorney General, attorneys for Respondent on Review.

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