STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2603-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GLENN T. ZAMZOW,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, THE HONORABLE GARY R. SHARPE, PRESIDING

BRIEF OF THE ATTORNEY GENERAL OF WISCONSIN

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Page

Constitution & Statutes

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Attorney General does not request oral argument.

The Attorney General believes the Court should publish the opinion in this case. The case raises a question of first impression in Wisconsin: whether the Confrontation

Clause as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004), applies to evidentiary hearings resolving whether to suppress evidence under the Fourth Amendment. This Court ordered a three-judge panel on its own motion because the case raised an issue of state-wide concern. Order of May 5, 2015.

STATEMENT OF THE CASE

The State charged Glenn T. Zamzow with operating a motor vehicle while intoxicated, third offense, and operating a motor vehicle with a prohibited blood alcohol concentration (1). Zamzow moved to suppress all evidence of his intoxication and blood alcohol concentration (11; 15). He restricted his motion to the legality of the initial stop of his vehicle (78:3-4). He argued that police lacked reasonable suspicion for a traffic stop, therefore, the Fourth Amendment required suppression the evidence obtained after the stop (77:5).

Officer Birkholz, the officer who stopped Zamzow's vehicle, died before the suppression hearing (78:4). At the suppression hearing, the State called officer Dan Wilson, whose duties at the time of the hearing included analyzing and dealing with digital and computer evidence (78:6).[1] Wilson described the video cameras in Fond du Lac police squad cars (78:7-8). He identified a DVD he burned from two

[1] By the time of trial, Wilson had been promoted to detective (84:78).

squad cars, squad 16 and squad 4 (78:12, hearing Exhibit 1). Squad 16 belonged to officer Birkholz and squad 4 belonged to officers Weed and Beck (78:14).

The State also called officer Beck who testified he and Weed responded to the traffic stop Birkholz had initiated (78:18-19). When Beck arrived on the scene, he observed officer Birkholz talking to Zamzow (78:19). He testified he watched the DVD Wilson burned before the hearing. The videos from both squad 16 and squad 4 accurately depicted what occurred at the scene after he arrived (78:24-26). He recognized the vehicles involved in the stop, (78:28), and he identified Zamzow (78:22). The circuit court admitted the DVD for the hearing (78:33).

The DVD contained Birkholz's initial statement to Zamzow that he stopped Zamzow because he observed him cross the center line twice, once as Zamzow approached Birkholz and once after Birkholz turned around and got behind Zamzow (80:12). The video also contained Birkholz's statement to Weed that he observed Zamzow cross the center line twice (80:14).[2] Zamzow objected to the admission of the DVD at the suppression hearing on the grounds,

[2] Initially, the circuit court sustained hearsay objections to Birkholz's DVD statements (78:19-20). After the hearing the court, relying on Wis. Stat. §§ 901.04(1) and 911.01(4)(a), and *State v. Jiles*, 2003 WI 66, ¶¶ 29-30, 262 Wis. 2d 457, 663 N.W.2d 798, concluded that hearsay was admissible at a suppression hearing (21; 79:2-3).

among others, that Birkholz statements violated his Sixth Amendment right to confront witnesses (78:29-30; 80).

The court ultimately found that Johnson Street, the street where the stop occurred, was a well marked and well lit, four-lane urban street with two lanes in each direction (80:25). The court could not determine from the video alone whether Zamzow crossed the center line (80:19). But, based on Birkholz's statements that he observed Zamzow's vehicle cross the center line, the court found Zamzow's vehicle did cross the center line and the stop was, therefore, justified (80:24).

The circuit court rejected Zamzow's Confrontation Clause claim on the basis that the right of confrontation did not apply to pre-trial motions; the court relied on *State v. Frambs*, 157 Wis. 2d 700, 460 N.W.2d 811 (Ct. App. 1990) (81:19). In the alternative, the court also concluded that the statement Birkholz made to Zamzow was non-testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004) (80:23). The court found the statement to officer Weed was testimonial (80:20-21). The court, therefore, considered only Birkholz's statement to Zamzow. (80:23). The court denied the motion to suppress (24).

A jury found Zamzow guilty of both charges, (52; 57).[3] The circuit court entered a judgment of conviction (59). Zamzow moved for post-conviction relief, (63), which the circuit court denied (66). Zamzow appealed (67).

On May 5, 2015, after briefing, this Court ordered the case heard by a three judge panel and invited the Attorney General of Wisconsin to file a brief. The Attorney General accepted the invitation and now submits this brief defending the judgment of conviction.

STANDARD OF REVIEW

Zamzow expresses some question of who has the burden of proof at a suppression hearing and the level of proof for that burden when he notes that *State v. Jiles*, 2003 WI 66, ¶ 26, 262 Wis. 2d 457, 663 N.W.2d 798, addresses a motion to suppress a statement as involuntary. Zamzow's brief at 10 & n.2. This Court has held the State has the burden of establishing reasonable suspicion for a protective sweep type search. "The burden is on the state to demonstrate that there existed articulable facts that would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing danger to those on the arrest scene." *State v. Kruse*, 175 Wis. 2d 89, 97,

[3] At trial, the circuit court again admitted the DVD but the audio portion was muted so the jury did not hear Birkholz's statements about his observation that Zamzow twice crossed the center line (84:91-92).

499 N.W.2d 185 (Ct. App. 1993) (internal quotation marks omitted) (quoting *Maryland v. Buie,* 494 U.S. 325, 334 (1990)). The "controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." *United States v. Matlock,* 415 U.S. 164, 177 n.14 (1974); *see also State v. Raflik*, 2001 WI 129, ¶ 53, 248 Wis. 2d 593, 636 N.W.2d 690.

Zamzow also suggests that this Court's review of the circuit court's finding of the historical fact—Zamzow crossed the center line—should be de novo. Zamzow's brief at 11, 22. Normally, in reviewing a trial court's decision on a suppression motion, this Court upholds a trial court's findings of historical fact unless they are clearly erroneous. *State v. Houghton*, 2015 WI 79, ¶ 18, ___ Wis. 2d ___, ___ N.W.2d ___. Whether the facts as found by the trial court meet constitutional standards is a question of law, which this Court reviews de novo. *Id*.

In the Attorney General's view, the appropriate standard of review based on both Birkholz's video statement and the video evidence itself is the clearly erroneous standard as set out in Wis. Stat. § 805.17(2) and *State v. Walli,* 2011 WI App 86, ¶ 17, 334 Wis. 2d 402, 799 N.W.2d 898, which held that "when evidence in the record consists of disputed testimony and a video recording, we will apply the clearly erroneous standard of review when we are reviewing the trial court's findings of fact based on that recording."

Zamzow claims that the sole evidence he crossed the center line is Birkholz's video statement. That conclusion appears to be a correct reading of the circuit court's factual findings (80:24-25). Zamzow also claims Berol's squad video demonstrates he did not cross the center line. The circuit court stated that based on the video Zamzow came "very close to and/or upon the center line, and I simply, from the video, could not ascertain whether a cross actually occurred. But that's more the nature of the video…" (80:26). The circuit court found the video ambiguous on whether Zamzow crossed the center line.

This case, then, resolves without the necessity of addressing a different standard of review. If the circuit court correctly admitted Birkholz's video statement, its factual finding must be affirmed and so too the conviction, as Birkholz's statement provides record support for the court's finding. If the circuit court erred in admitting Birkholz's video statement, its factual finding has no record support; its factual finding must be reversed and so too the conviction.

ARGUMENT

Zamzow raises a single issue in this appeal: whether at his suppression hearing, the circuit court's admission of the squad video containing officer Birkholz's statements to both Zamzow and officer Weed violated his right to confront the witnesses against him and his right to due process. He argues the circuit court erred in admitting the video over his

hearsay, Confrontation Clause and other objections. Without the video he claims the State did not establish reasonable suspicion for the stop of his vehicle.[4]

More specifically, Zamzow does not appear to dispute that under *State v. Frambs*, 157 Wis. 2d 700, 460 N.W.2d 811 (Ct. App. 1990), and *State v. Jiles*, 2003 WI 66, ¶ 29, 262 Wis. 2d 457, 663 N.W.2d 798, Wisconsin permits hearsay at suppression hearings as an evidentiary matter. But he reads *Crawford v. Washington*, 541 U.S. 36 (2004), to require a live witness or a prior opportunity for cross-examination for a testimonial hearsay statement to be admitted at suppression hearings as a constitutional matter, even if a state's hearsay rules permit hearsay for suppression motions. He takes the position that *Crawford* undermined *Frambs* and *Jiles* from a confrontation point of view, therefore, this Court should not follow them. In the alternative, he argues that officer Birkholz's statements are so unreliable that to permit the circuit court to rely on them to determine reasonable suspicion violates due process. He is wrong on both counts.

[4] Zamzow's brief refers to "probable cause" as the necessary requirement for a reasonable traffic stop. The Wisconsin Supreme Court has just held that "reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops." *State v. Houghton*, 2015 WI 79, ¶ 30.

I. THE SIXTH AMENDMENT RIGHT TO CONFRONT DOES NOT APPLY TO SUPPRESSION HEARINGS.

To resolve the Confrontation Clause issue, the Attorney General believes it is first necessary to understand that the United States Supreme Court's and the Wisconsin Supreme Court's pre-*Crawford* jurisprudence did not apply the right to confront witnesses to pre-trial hearings such as motions to suppress evidence and preliminary hearings, where the primary issue is not the guilt or innocence of the accused. Then this Court can determine whether *Crawford* requires any change.

A. The jurisprudential landscape of the Confrontation Clause prior to *Crawford*.

The Sixth Amendment of the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." The right to confront witnesses encompasses "the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Barber v. Page*, 390 U.S. 719, 725 (1968).

The United States Supreme Court's jurisprudence before *Crawford* limited the scope of the Confrontation Clause to the trial to determine guilt or innocence of the accused. In *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987), the Court stated, "The opinions of this Court show that the

right to confrontation is a *trial* right…." (plurality opinion) (emphasis the Court's). The Court made the point 120 years ago.

> The primary object of the [Sixth Amendment] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895). Both aspects of confrontation, cross-examination and the occasion for the jury to weigh demeanor in determining credibility re-enforce each other to the end of having the jury, as the sole judge of credibility, determine the truth of the matter. This becomes clear when examining the Supreme Court's pre-*Crawford* confrontation cases.

In *California v. Green*, 399 U.S. 149 (1970), the Court rejected a claim that a California evidence code provision permitting at trial, prior inconsistent statements for the truth of the matter asserted, violated the Confrontation Clause. Relying on *Mattox*, the *Green* Court opined, "it is th[e] literal right to 'confront' the witness *at the time of trial* that forms the core of the values furthered by the Confrontation Clause." *Id.* at 157 (emphasis added). So long as the declarant testified at trial, no violation of confrontation occurred. And in addition to the historical

support for permitting prior inconsistent statements where the witness testifies at trial, the *Green* Court believed that full and effective cross-examination at the time of trial provided the jury ample opportunity to judge the witness's credibility. *Id.* at 159-61.

In *Delaware v. Fensterer*, 474 U.S. 15 (1985), an expert witness testified on direct examination that he had "no specific knowledge as to the particular way that [he] determined [his conclusion]." *Id.* at 16-17. On cross-examination he confirmed he could not recall the method he employed. *Id.* at 17. Nevertheless, the *Fensterer* Court found no violation of the Sixth Amendment since Fensterer had fully demonstrated the expert's opinion to be unreliable. And "[q]uite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory." *Id.* at 19.

The Court has found confrontation violations in restrictions placed on cross-examination where the restriction affected the jury's ability to fairly judge whether the witness is worthy of belief. The Court's analysis in those cases focuses on the jury's need to make an informed judgment about credibility, a concern not present at pre-trial hearings to determine probable cause or reasonable suspicion. In *Davis v. Alaska*, 415 U.S. 308 (1974), Richard Green, a juvenile adjudged delinquent for a burglary and on probation, was a crucial witness for the State. The trial court

prohibited Davis's counsel from bringing out that Green was on probation for burglary because Alaska made juvenile delinquency adjudications confidential. *Id.* at 309-11. The Supreme Court found the trial court's restriction on Green's cross-examination violated the Confrontation Clause because it prevented Davis from arguing a bias theory to the jury.

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this [bias theory]. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the [State's] proof . . . .'

Id. at 317.

"[T]he Court normally has refused to find a Sixth Amendment violation when the asserted interference with cross-examination did not occur at trial." *Ritchie,* 480 U.S. at 54 n.10. The Court has distinguished between a determination of probable cause for arrest or search warrants and proof of an accused's guilt at a trial. In *Brinegar v. United States*, 338 U.S. 160, 173 (1949), the Court stated:

> [Brinegar's argument] approaches requiring … proof sufficient to establish guilt in order to substantiate the existence of probable cause. There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.

The *Brinegar* Court noted that applications for warrants occur ex parte where the rules of evidence do not apply "mainly because the system of Evidence rules was devised for the special control of trials by jury." *Id.* at 174 n.12 (citation omitted) (internal quotation marks omitted). *See also United States v. Raddatz*, 447 U.S. 667, 679 (1980) ("[T]he interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial.").

One can best perceive the distinction between suppression hearings and trials by comparing *Smith v. Illinois*, 390 U.S. 129 (1968), with *McCray v. Illinois*, 386 U.S. 300 (1967), cases decided shortly after the Court applied the Sixth Amendment to the states. *See Pointer v. Texas*, 380 U.S. 400 (1965). In *Smith,* a witness who identified himself on the witness stand as "James Jordon" testified Smith sold him narcotics. Although police officers corroborated some of his testimony, only he and Smith testified to the sale itself. Smith's version was entirely different. "The only real question at the trial, therefore, was the relative credibility of [Smith] and this prosecution witness." *Smith*, 390 U.S. at 130. On cross-examination, the witness admitted that "James Jordon" was not his real name. But when defense counsel asked him for his real

name and where he lived, the trial court sustained the prosecutor's objections. *Id.* at 130-31.

The *Smith* Court held that although the trial court had not completely denied Smith cross-examination of the prosecution's main witness, when "the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives." *Id.* at 131 (footnote omitted) (citation omitted) (internal quotation marks omitted). Restricting Smith's cross-examination violated the Confrontation Clause. *Id.* at 132.

In *McCray* the Court encountered witness identity in a suppression hearing. Officer Jackson, the arresting officer, testified he had a conversation with an informant[5] who told Jackson that McCray was selling narcotics, that McCray had narcotics on his person and that McCray could be found at a particular location. Jackson and another officer went to the location, found McCray, searched him and discovered narcotics. *McCray*, 386 U.S. at 302. When McCray asked for the informant's name on cross-examination at the

[5] Jackson testified he had been acquainted with the informant for approximately a year, that during this period the informant had supplied him with information about narcotics activities, that the information had proved to be accurate and had resulted in numerous arrests and convictions. *McCray,* 386 U.S. at 302.

suppression hearing, the prosecutor objected and the trial court sustained the objection. *Id.* at 303.

The *McCray* Court noted the distinction between suppression hearings and trials determining guilt in balancing society's need for an informer privilege. *Id.* at 307. The Court held McCray's confrontation "contention … absolutely devoid of merit." *Id.* at 314. *Accord Cooper v. California,* 386 U.S. 58, 62 n.2 (1967) ("Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State did not produce the informant to testify against him [at a suppression hearing]. This contention we consider absolutely devoid of merit."). *See also United States v. Matlock,* 415 U.S. 164, 175 (1974) (citing *McCray* and stating, "In the course of the opinion, we specifically rejected the claim that defendant's right to confrontation under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment had in any way been violated.").

The contrast between *Smith* on the one hand and *McCray* on the other, could not be more striking. At a criminal trial, a government witness using a false name who bought narcotics from a defendant must disclose his or her name and address to avoid violating the Confrontation Clause. But at a suppression hearing, the State may withhold the name of a confidential informant who bought

narcotics from a defendant without violating the Confrontation Clause.

Wisconsin cases are consistent with the United States Supreme Court pre-*Crawford* cases. In *State v. Frambs*, 157 Wis. 2d 700, 460 N.W.2d 811 (Ct. App. 1990), this Court held that hearsay statements could be used at a pre-trial motion hearing to prove witness unavailability at trial. *Id.* at 703-05. The *Frambs* Court concluded "Frambs had no confrontation clause rights as to hearsay declarants at this motion hearing …." *Id.* at 705.

In *State v. Jiles*, 2003 WI 66, ¶ 29, 262 Wis. 2d 457, 663 N.W.2d 798, the Wisconsin Supreme Court stated in the context of a motion to suppress Jiles's statements, that he could not "prevail on an argument that the court *must* apply the rules of evidence at a suppression hearing" relying on Wis. Stat. §§ 901.04(1) and 911.01(4)(a). The *Jiles* Court further observed "[t]hese rules enjoy support from the Supreme Court's analysis in *United States v. Matlock*, 415 U.S. 164, 172-73 …."). *Id.*, ¶ 30. The *Jiles* Court also quoted with approval from *Frambs*. "'We see no evidence that the Supreme Court intended the protection of the confrontation clause to be available to a defendant in those pretrial situations enumerated in sec. 901.04(1), Stats.'" *Id.* (quoting *Frambs*, 157 Wis. 2d at 704).

Wisconsin cases have also rejected confrontation claims to preliminary hearings where, like suppression hearings, the issue of guilt or innocence is not at issue and no jury is present. In *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), the Wisconsin Supreme Court held "there is no constitutional right to confront adverse witnesses at a preliminary examination." *Id.* at 336 (citing *Barber*, 390 U.S. at 725).

This Court relied on *Mitchell* to reach the same result in *State v. Padilla*, 110 Wis. 2d 414, 329 N.W.2d 263 (Ct. App. 1982). Padilla was charged with sexual assault of a child. The only witness at the preliminary hearing was the child's mother, who testified about what the child had told her about the assaults. *Id.* at 426-27. Citing *Mitchell*'s clear holding, this Court held: "Of course, there is no constitutional right to confront witnesses at a preliminary examination." *Id.* at 422-23.

This Court again addressed the right to confrontation at a preliminary hearing in *State v. Oliver*, 161 Wis. 2d 140, 467 N.W.2d 211 (Ct. App. 1991), a case in which Oliver was charged with physical abuse of a four-year-old child. At the preliminary hearing, the child was unable to communicate with the trial court so the court found the child incompetent to testify. *Id.* at 142. The court then allowed the child's father to testify that the child told him Oliver hit him. *Id.* In the course of holding the child's statement admissible, this

Court noted Oliver "did not have a constitutional right of 'confrontation' at his preliminary examination." *Id*. at 146.

It is clear from the above survey of confrontation cases both in the United States Supreme Court and in Wisconsin courts, that before *Crawford*, the Confrontation Clause did not apply to hearings such as suppression hearings or preliminary hearings where no jury was present and guilt was not the issue.

B. *Crawford* did not change prior law that the Confrontation Clause does not apply to suppression hearings.

Zamzow argues that *Crawford* undermines the conclusion of *Frambs* and *Jiles* that the Confrontation Clause did not apply to hearings such as suppression hearings or preliminary hearings. *Crawford* does no such thing.

In *Crawford*, the Supreme Court determined that the Confrontation Clause prohibits the use of testimonial hearsay at a criminal trial unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. *State v. O'Brien*, 2014 WI 54, ¶ 29. 354 Wis. 2d 753, 850 N.W.2d 8 (citing *Crawford*, 541 U.S. at 68).

The *O'Brien* Court dealt with the use of hearsay evidence at preliminary hearings. *O'Brien,* 354 Wis. 2d 753,

¶ 1. As the Wisconsin Supreme Court noted, the *Crawford* Court declared this new approach when prosecutors offered out-of-court statements at a criminal trial. *Crawford*, 541 U.S. at 40; *O'Brien,* 354 Wis. 2d 753, ¶ 29. Therefore, the *Crawford* Court had no occasion to address pre-trial hearings such as the preliminary hearing at issue in *O'Brien* or the suppression hearing at issue here. The Court, adhered to the Wisconsin cases of *Mitchell*, *Padilla*, and *Oliver* referred to above. *O'Brien,* 354 Wis. 2d 753*,* ¶ 30.

The Wisconsin Supreme Court's rejection of a confrontation claim in a pre-trial setting finds further support in the post-*Crawford* case of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The United States Supreme Court held that admission at a criminal trial of "affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine," *id.* at 307, violated the Confrontation Clause under *Crawford*. In addressing a contention in the dissenting opinion, the Court observed;

> Contrary to the dissent's suggestion, … we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While … "[i]t is the obligation of the prosecution to establish the chain of custody" … this does not mean that everyone who laid hands on the evidence must be called. …It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live.

Id. at 311 n.1. One could correctly substitute in the Court's footnote, "probable cause" for "chain of custody." It is the State's obligation to establish probable cause for the stop, but the probable cause or reasonable suspicion for the stop does not establish the guilt or innocence of the defendant. Probable cause (or reasonable suspicion) for a search that results in damning evidence may not be proved at the trial at all and if it is, it most likely provides the jury context for the seized evidence. It is the evidence seized that demonstrates the defendant's guilt.

Take this case. At trial, the State could (and in this case did) convince a jury of Zamzow's guilt on both OWI and BAC without Birkholz's statements. The blood alcohol level the chemical test revealed alone went a long way to proving his guilt. While it certainly enhanced the State's case to show the video of officer Weed's administration of and Zamzow's performance on the field sobriety tests, the evidence was not necessary to sufficiently prove Zamzow guilty. All of the evidence on the muted video merely increased the likelihood that the jury believed Zamzow to be impaired at the time he drove and corroborated the accuracy of the test result for a blood alcohol content higher than allowable.

The majority of states that have addressed confrontation at suppression hearings post-*Crawford* have

concluded *Crawford* did not a change the Supreme Court's pre-*Crawford* jurisprudence limiting confrontation to the trial of guilt.

In *State v. Rivera*, 2008-NMSC-056, 192 P.3d 1213, the New Mexico Supreme Court reversed the New Mexico Court of Appeals' precedent holding confrontation applied to hearings to suppress evidence. *Id.*, ¶ 1. The court first pointed to many of the United States Supreme Court cases the State has cited above to demonstrate the pre-*Crawford* view that limited the Confrontation Clause to trial. *Id.,* ¶¶ 12-19. It then stated, "Nothing in the Supreme Court's recent pronouncements suggests that the Court has changed its interpretation of the Confrontation Clause. Instead, recent cases continue to focus on the protections afforded a defendant at trial." *Id.*, ¶ 18. The opinion cites *Giles v. California*, 554 U.S. 353, 358 (2008), as authority including the *Giles* Court quote, "'[t]he [Sixth] Amendment contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present *at trial* for cross-examination ….'" Rivera, 192 P.3d 1213, ¶ 18 (alteration and emphasis the New Mexico Supreme Court's).

In *People v. Felder,* 129 P.3d 1072 (Colo. App. 2006), the Colorado Court of Appeals rejected Felder's claim that "under the Supreme Court's recent decision in *Crawford* … [Felder's] right of confrontation was violated by the

admission, at the pretrial suppression hearing, of hearsay statements made by [an] unidentified confidential informant." *Id.* at 1073. The court stated, "*Crawford* addressed a defendant's rights of confrontation at *trial*. Nothing in *Crawford* suggests that the Supreme Court intended to alter its prior rulings allowing hearsay at pretrial proceedings, such as a hearing on a suppression motion challenging the sufficiency of a search warrant." *Id.* (emphasis in original).

See also Vanmeter v. State, 165 S.W.3d 68, 74 (Tex. App 2005) ("We have carefully read *Crawford* for any signal the Supreme Court intended its holding to apply at pretrial suppression hearings and have found nothing to signal such an intention."); *State v. Woinarowicz*, 2006 ND 179, ¶ 11, 720 N.W.2d 635 ("In *Crawford,* the United States Supreme Court did not indicate it intended to change the law and apply the Confrontation Clause to pretrial hearings."); *People v. Brink*, 818 N.Y.S.2d 374, 374 (N.Y. App. Div. 2006) ("We reject the contention of defendant that *Crawford* … applies to his pretrial suppression hearing …."); *State v. Watkins*, 190 P.3d 266, 270 (Kan. Ct. App. 2007) ("[T]he majority of courts addressing this issue following *Crawford* have concluded that the confrontation rights are not implicated at pretrial evidentiary hearings."); *State v. Williams*, 960 A.2d 805, 820 (N.J. Super. Ct. App. Div. 2008) ("*Crawford* is inapplicable to the instant case since

Randolph's statement was not used at the trial but during a suppression hearing."); *State v. Harris*, 2008-2117, p. 1 (La. 12/19/08); 998 So. 2d 55, 56 ("The right to confrontation contained in the United States and the Louisiana Constitutions is not implicated in this pre-trial matter."); *State v. Weathersby*, 2009-2407, p. 3 (La. 3/12/10); 29 So. 3d 499, 501 ("[A] defendant's constitutionally guaranteed right to confront witnesses and to have compulsory process for obtaining them is only secured at trial and not during a pre-trial hearing."); *State v. Fortun-Cebada*, 241 P.3d 800, 807 (Wash. Ct. App. 2010) ("[N]othing in *Crawford* suggests that the Supreme Court intended to change its prior decisions allowing the admission of hearsay at pretrial proceedings, such as a suppression hearing.").

Other states also agree with the *O'Brien* Court's conclusion that *Crawford* does not require confrontation at a preliminary hearing. *See State v. Rhinehart*, 2006 UT App 517, ¶ 14, 153 P.3d 830 ("The Confrontation Clause pertains to a criminal defendant's right to confront and cross-examine the witnesses against the defendant at trial …. Consequently, we are not persuaded by Defendant's argument that *Crawford* requires application of the Confrontation Clause at preliminary hearings."); *Sheriff v. Witzenburg*, 145 P.3d 1002, 1005 (Nev. 2006) ("[W]e conclude that there is no Sixth Amendment confrontation right at a preliminary examination. Thus, *Crawford* is inapplicable at

a preliminary examination ...."); *Greshan v. Edwards*, 644 S.E.2d 122, 124 (Ga. 2007) ("There being no indication in *Crawford* of a change from the Court's previous statements that the right of confrontation is a trial right, we join the several States which have addressed this issue in their conclusion that the holding in *Crawford* is not applicable to preliminary hearings."), *overruled on other grounds by Brown v. Crawford*, 715 S.E.2d 132 (Ga. 2011); *State v. Timmerman*, 2009 UT 58, ¶ 13, 218 P.3d 590 ("[W]e hold that the federal Confrontation Clause does not apply to preliminary hearings."); *Peterson v. California*, 604 F.3d 1166, 1169-70 (9th Cir. 2010) ("*Crawford* does not affect the reasoning of … the Supreme Court cases holding that the Confrontation Clause is primarily a trial right."); *State v. Lopez*, 2013-NMSC-047, ¶ 9, 314 P.3d 236, 239 ("The United States Supreme Court consistently has interpreted confrontation as a right that attaches at the criminal trial, and not before.").

Zamzow argues that Birkholz's statements were too unreliable to support the circuit court's determination that he crossed the center line. If, by this argument, he means to suggest that reliability plays some part in the post-*Crawford* confrontation world, he is mistaken. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), relied in part on "indicia of reliability." *See also Crawford*, 541 U.S. at 60 ("[*Roberts*] admits statements that *do* consist of *ex parte* testimony upon

a mere finding of reliability."). And *Crawford* squarely rejected this approach. *Crawford*, 541 U.S. at 60-68.

C. Even if this Court were to apply *Crawford*, officer Birkholz's statements are non-testimonial.

The State believes this Court can and should resolve this case by holding *Crawford* does not apply to suppression hearings and reject Zamzow's Confrontation Clause claim on that basis. But the circuit court alternatively found that officer Birkholz's statement to Zamzow was non-testimonial (80:23). It held the admission of that statement would not violate the Confrontation Clause even if *Crawford* applied to the suppression hearing at issue here (80:23).

As noted above, under *Crawford*, admission of a nontestifying witness's testimonial statements violates the Confrontation Clause unless the witness is unavailable and defendant had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 54. Zamzow claims that a statement is testimonial when "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Zamzow's brief at 13 (quoting *State v. Manuel*, 2005 WI 75, ¶ 42, 281 Wis. 2d 554, 697 N.W.2d 811). The Wisconsin Supreme Court decided *Manuel* a little more than one year after *Crawford*. *Compare Crawford*, 541 U.S. at 36 (decided March 8, 2004), *with Manuel*, 281 Wis. 2d 554

(decided June 10, 2005). The Supreme Court's "more recent cases have labored to flesh out what it means for a statement to be 'testimonial.'" *Ohio v. Clark*, 576 U.S. ___, 135 S. Ct. 2173, 2179 (2015).

Since *Manuel*, *Davis v. Washington*, 547 U.S. 813 (2006), announced "what has come to be known as the 'primary purpose' test." *Clark*, 135 S. Ct. at 2179. Statements are testimonial "when the circumstances objectively indicate that ... the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. The inquiry of whether a statement is testimonial must consider all of the relevant circumstances. *Michigan v. Bryant*, 562 U.S. 344, 369 (2011). "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Clark*, 135 S. Ct. at 2180 (quoting *Bryant*, 562 U.S. at 358). "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Bryant*, 562 U.S. at 359.

Applying the primary purpose test to officer Birkholz's statement to Zamzow on the squad video, this Court should conclude that in light of all the circumstances, viewed objectively, the 'primary purpose' of Birkholz's statement was not to create an out-of-court substitute for trial

testimony. The statement is not the result of interrogation or even informal questioning. The purpose of officer Birkholz's statement to Zamzow was to inform him of the reason he had stopped his vehicle. Moreover, the conversation took place at the side of the road on Johnson Street, a well marked and well lit, four-lane urban street (80:25).

On this record, at the time he made the statement Birkholz did not know whether or not Zamzow was guilty of anything more than a minor traffic offense—crossing the center line. He probably did suspect that Zamzow was impaired but he did not know if his suspicion would prove true. And certainly he did not intend to create an out-of-court substitute for trial. He most probably thought that if Zamzow was intoxicated, the proof would lie in the test result revealing his blood alcohol level. If he thought about the squad video at all, he probably thought that the depiction of Zamzow's performance on the field sobriety tests might be used at trial.

Zamzow may have thought that the traffic stop would result in his prosecution for OWI or prohibited BAC, but the fact that the stop would reveal Zamzow to be impaired does not make Birkholz's statement testimonial. *See Clark*, 135 S. Ct. at 2183 ("It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution."). The statement at issue here is "nothing like the notorious use of *ex parte* examination in

Sir Walter Raleigh's trial for treason, which [the Supreme Court] ha[s] frequently identified as 'the principal evil at which the Confrontation Clause was directed.'" *Clark*, 135 S. Ct. at 2182 (quoting *Crawford*, 541 U.S. at 50, and citing *Bryant*, 562 U.S. at 358).

Zamzow criticizes the circuit court for differentiating between Birkholz's statement to him and Birkholz's statement to Weeds because the only "difference is who the audience was." Zamzow's brief at 13. But under "all of the relevant circumstances," *Bryant*, 562 U.S. at 369, the audience does matter. *See Clark*, 135 S. Ct. at 2181-182 (analyzing whether statements from a child victim were testimonial by examining the teachers' (the audience) perspective).

The statement the circuit court considered here is non-testimonial.

II. ZAMZOW CANNOT PREVAIL ON HIS CLAIM THAT USE OF HEARSAY AT A SUPPRESSION HEARING VIOLATES DUE PROCESS.

Perhaps recognizing that Confrontation Clause jurisprudence will not carry the day for him, Zamzow argues that this Court should hold that a circuit court cannot rely on hearsay from an unavailable declarant to support factual findings at a suppression hearings as a matter of due process. He contends that unchallenged hearsay is so unreliable that due process prevents a judge from relying on

it to determine a constitutional fact. By his own admission, Zamzow's argument is novel. Zamzow's brief at 17. The argument also finds no support in the Supreme Court's cases nor in the cases of the Wisconsin Supreme Court.

United States v. Matlock, 415 U.S. 164 (1974), presented the Supreme Court in a prosecution for bank robbery, with a question of whether a third party's voluntary consent to search Matlock's living quarters was "legally sufficient" to permit admission of the incriminating evidence seized, $4995. *Id.* at 166. Matlock lived in a house with Gayle Graff and others. Officers asked Graff if they could search the house. Graff consented. *Id.* Graff told the officers that she and Matlock shared a bedroom. Officers found the money in the bedroom. *Id.* at 167.

The district court suppressed the money. It found that although Graff's hearsay statement was admissible to prove the officers' reasonable belief that she had authority to consent, it could not be admitted for its truth;[6] therefore, the government had not proved Graff's common authority over the bedroom sufficient to consent to the search. *Id.* at 167-68. The Supreme Court reversed. Relying in part on Graff's out-of-court statement, the *Matlock* Court found, "the Government sustained its burden of proving by the

[6] When it decided *Matlock*, the Supreme Court had not yet decided *Illinois v. Rodriguez*, 497 U.S. 177 (1990), which endorsed the doctrine of apparent authority. *See Matlock*, 415 U.S. at 177 n.14.

preponderance of the evidence that Mrs. Graff's voluntary consent to search the east bedroom was legally sufficient." *Id.* at 177.

In reaching its conclusion the *Matlock* Court relied on *Brinegar's* distinction between proving guilt at trial and proving probable cause. *Brinegar*, 338 U.S. at 173; *Matlock*, 415 U.S. at 173. It noted the "rules of evidence governing criminal jury trials are not generally thought to govern hearings before a judge to determine evidentiary questions…." *Matlock*, 415 U.S. at 173. The Court referred to the then proposed, since adopted, Federal Rules of Evidence, Rule 104(a) and 1101(d)(1), and to evidence commentators Wigmore and McCormack. *Id.* at 173-74. The Court found significance in the fact that "[s]earch warrants are repeatedly issued on ex parte affidavits containing out-of-court statements of identified and unidentified persons." *Id.* at 174 (citing *United States v. Ventresca*, 380 U.S. 102, 108 (1965)). Finally, the Court relied on *McCray*, in which "we specifically rejected the claim that defendant's right to confrontation under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment had in any way been violated." *Matlock*, 415 U.S. at 175.

Gerstein v. Pugh, 420 U.S. 103 (1975), presented the Supreme Court two issues: "whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so,

whether [an] adversary hearing … is required by the Constitution." *Id.* at 111. The Court held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.* at 114.

However, the Court held that the full panoply of adversary safeguards, including cross-examination, were "not essential for the probable cause determination required by the Fourth Amendment." *Id.* at 119-20. The Court concluded that probable cause can be "determined reliably without an adversary hearing. The standard … traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof." *Id.* at 120-21 (again relying on *Brinegar*, 338 U.S. at 174-75).

The Court further stated:

> This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.

Gerstein, 420 U.S. at 121-22.

The *Jiles* Court held "[Jiles] also loses on a contention that a *Miranda-Goodchild* hearing without the State presenting live testimony from law enforcement officers will

never constitute a full and fair hearing and will always amount to a denial of due process." *Jiles*, 262 Wis. 2d 457, ¶ 31 (citing *Matlock*, 415 U.S. at 174-75, and *McCray*, 386 U.S. at 313). Unlike the Confrontation Clause analysis, Zamzow cannot claim that *Crawford* undermines *Jiles* from a due process perspective. *Crawford* rests on the Confrontation Clause of the Sixth Amendment not the Due Process Clause of the Fourteenth Amendment.

Zamzow relies heavily on the concept of fundamental fairness in advancing his due process claim. It is therefore noteworthy that in *Clark*, the Supreme Court stated, "Clark is also wrong to suggest that admitting L.P.'s statements [at trial] would be fundamentally unfair given that Ohio law does not allow incompetent children to testify." *Clark*, 135 S. Ct. at 2183. If fundamental fairness permits out-of-court statements for which no cross-examination may be had in a trial deciding guilt, it is difficult to see how fundamental fairness can carry the day in the determination of the lesser decision of probable cause. *See Gerstein*, 420 U.S. at 121 (describing "probable cause" as a "lesser consequence[]").

This Court should decline Zamzow's invitation to find hearsay statements inadmissible at suppression hearings as a matter of due process.

CONCLUSION

For the reasons given above, this Court should affirm the circuit court's judgment of conviction and the order denying post-conviction relief.

Dated at this 28th day of July, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,033 words.

Dated at this 28th day of July, 2015.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at this 28th day of July, 2015.

_____
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