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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP002603-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GLENN T. ZAMZOW,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming an Order Entered in Fond du Lac County, the Honorable Gary R. Sharpe, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

STATEMENT OF THE ISSUES

The circuit court relied exclusively on a police officer's videotaped assertion that the defendant's vehicle had crossed the center line to find that reasonable suspicion supported the subsequent traffic stop.

1. Whether the introduction of the police officer's videotaped statement at the Fourth Amendment suppression hearing violated the defendant's Sixth Amendment right "[i]n all criminal prosecutions … to be confronted with the witnesses against him…."

How the circuit court ruled: The circuit court held that the Sixth Amendment's Confrontation Clause did not apply at suppression hearings; and that if it did, the officer's statement was not "testimonial" and its consideration did not violate the Clause.

How the court of appeals ruled: The court of appeals held that the Confrontation Clause does not apply at suppression hearings, and did not reach whether the statement was testimonial.

2. Whether the introduction of the deceased police officer's assertion, without any opportunity for the defendant to cross-examine the officer, violated the defendant's state due process rights.

How the lower courts ruled: Both the circuit court and the court of appeals held that the circuit court's consideration of the officer's statement did not violate the defendant's due process rights.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this court.

STATEMENT OF THE CASE

The defendant, Glenn T. Zamzow, was tried and convicted in Fond Du Lac County Circuit Court of Operating While Intoxicated (3rd), Wis. Stat. § 346.63(1)(a),[1] and Operating with a Prohibited Alcohol Content, Wis. Stat. § 346.63(1)(b). (59). Zamzow's appeal is limited to the trial court's denials (36, 66) of his pretrial and postconviction motions to suppress evidence derived from his initial traffic stop, which Zamzow argued was not supported by reasonable suspicion. (11, 15, 25, 63).

The police officer who stopped Zamzow's vehicle, Officer Craig Birkholz of the Fond du Lac Police Department, died shortly after the stop. (77:3). At the suppression hearings,[2] the state relied on a dashcam video taken from Officer Birkholz's squad car to meet its burden of proving that Officer Birkholz had reasonable suspicion to stop Zamzow. (78:3-34; 80:12-15; App. 128-131). The video included (1) a visual recording of Zamzow's driving prior to the traffic stop (78:33-34); (2) Officer Birkholz's statement to

[1] All references are to the 2011-12 version of the Wisconsin Statutes, unless otherwise indicated.

[2] When the video was played at the initial suppression hearing (78), for whatever reason no audio played. (80:3-4; App. 119-20). The circuit court judge later replayed the video in chambers after the hearing, and realized that it included audio. (*Id.*) The court advised the parties, and scheduled a second evidentiary hearing so the audio portions could be made part of the record. (*Id.*).

Zamzow, upon initially approaching Zamzow's window, that "[t]he reason I stopped you is you were crossing the center line there coming at me and then again when I turned around and got behind you" (80:12; App. 128); and (3) Officer Birkholz's statements to a fellow officer about the reason for the stop. (80:14-15; App. 130-31). Zamzow's counsel objected to the introduction of Officer Birkholz's statements as violating Zamzow's confrontation rights. (80:5-8; App. 121-124).

The court ultimately held that it could not determine from the video whether Zamzow crossed the line. (80:19-24; App. 135-40). The video begins with Officer Birkholz ascending a four-lane bridge (*i.e.*, with two lanes running in both directions) at about 3 a.m. (58:Timestamp 3:03:03).[3] Despite the time, there are numerous vehicles traveling in both directions of traffic. Officer Birkholz is in the left hand lane. According to the telemetry data appearing on the video, Officer Birkholz's squad car is going approximately 30 m.p.h.

As Officer Birkholz crests the bridge, a vehicle appears in the oncoming lane, and its headlight temporarily flood the screen. (58:Timestamp 3:03:15). After that car passes, the road curves and starts to descend, and two

[3] The same DVD containing the video of the stop was entered as an exhibit at the suppression hearing (19) and later as an exhibit at the trial. (58). It is currently located in an envelope marked item 58 in the index. Further, the DVD actually contains two dashcam videos, one taken from Officer Birkholz's vehicle ("Squad 16") and the other from a backup officer ("Squad 4") who arrived at the scene a few minutes after the stop. The DVD also contains a proprietary media application called "VidPlayer." To view the video of Zamzow's stop, the following file on the DVD must be opened with the VidPlayer application:
11-2888/Squad16/media/2011.03.13_03.04.04_FPDDV_squad16.mt9

vehicles are visible in the oncoming lanes at the bottom of the bridge/hill. (58:Timestamp 3:03:23).

As the two oncoming cars approach Officer Birkholz toward the bottom of the hill, he shifts from the left to the right-hand lane. (58:Timestamp 3:03:35). After the two cars pass, Officer Birkholz then pulls a U-turn. (58:Timestamp 3:03:42).

Significantly, there is not a "center line" where Officer Birkholz turns around at the bottom of the hill, which is also about where Zamzow's vehicle first appears. Instead, there appears to be a middle lane that either direction of traffic may enter in order to make a left-hand turn. (58:Timestamp 3:03:40-42).

After completing the U-turn, Officer Birkholz accelerates to 59 m.p.h as he approaches Zamzow. (58:Timestamp 03:04:00). Officer Birkholz then activates his emergency lights, and initiates the traffic stop. (58:Timestamp 03:04:04).

The court held that it "could not determine from the video whether or not the defendant was crossing the center line as he was approaching the officer." (80:19; App. 135). According to the Court, when Officer Birkholz was behind Zamzow, it appeared that Zamzow's tires may have been on the line, but "the Court could not discern to the extent that there was an actual cross of the center line…." (80:19-20; App. 135-36). The court further noted that there was not anything else in the video that could support the traffic stop, such as evidence of weaving, speeding, or any other traffic violation. (80:23-24; App. 139-40).

The court concluded that the only possible evidence to support the stop would come from Officer Birkholz's videotaped statements. (80:23-24; App. 139-40). The court held that Officer Birkholz's statement to Zamzow was non-testimonial[4], and the Confrontation Clause thus did not prohibit him from considering it. (80:20-22; App. 136-38). On the other hand, Officer Birkholz's statements to his fellow officer were testimonial, and were thus barred by the Confrontation Clause. (*Id.*).[5]

The court ultimately held that Officer Birkholz's statement to Zamzow sufficiently supported reasonable suspicion to make the traffic stop.

> Based upon Officer Birkholz's belief that the – and testimony that the vehicle did, in fact, cross the center line twice in that short amount of time, I believe that there is sufficient basis for the officer to have made a stop for further inquiry. A cross of the center line is a violation of traffic law. … So I am relying upon the officer's testimony as to the cross of the center line that he observed more so than the specifics that I observed on the video.

(80:24-26; App. 140-42).

Zamzow later moved the court to reconsider its conclusion that Officer Birkholz's statement to Zamzow was

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[4] The transcript actually has the court calling the statement "not non-testimonial," but it is clear from the context of the court's remaining remarks that either the court misspoke or the court reporter mis-transcribed this passage, and that the court was holding that the statement was non-testimonial.

[5] The State has not appealed the trial court's determination that the Confrontation Clause prohibited the court's consideration of Officer Birkholz's statements to the other officer.

not testimonial. (25). At the subsequent hearing, the court held that the Confrontation Clause was not even applicable to the suppression hearing, citing ***State v. Frambs***, 157 Wis. 2d 700, 702 (Ct. App. 1990). (81:17-21; App. 145-49). The court also reiterated, in case the Clause was applicable, its holding that the statement was not testimonial. (*Id.*).

Zamzow took the case to trial, but was convicted on both counts. (52:1-2; 57:1-2). Postconviction counsel timely filed a motion for postconviction relief arguing that the court's consideration of Officer Birkholz's statement at the suppression hearing violated Zamzow's due process rights, in addition to his confrontation right. (63:1-5). The court denied the motion (66, 85:13-15; App. 154-156), and Zamzow timely appealed (67).

A divided Court of Appeals affirmed the convictions. ***State v. Zamzow***, 2016 WI App 7, 366 Wis. 2d 562, 874 N.W.2d 328, 334. (App. 101-16). The majority held that the confrontation clause does not apply at suppression hearings, and did not reach whether Officer Birkholz's statement was nontestimonial. ***Id.***, 2016 WI App 7, ¶¶ 11, 16, n. 5. It also rejected Zamzow's due process claim. ***Id.***, ¶¶ 12-16. The dissent pointed out that the Sixth Amendment applies to all "criminal prosecutions," not just trials, and that the upshot of the court's decision would be to turn suppression hearings into the kind of "paper reviews" found in civil law countries but foreign to our common law tradition. ***Id.***, 2016 WI App 7, ¶ 22 (Reilly, J., dissenting) (citing ***Crawford v. Washington***, 541 U.S. 36, 43 (2004)).

Zamzow timely filed a petition for review, which this court granted on March 7, 2016. The State Public Defender's Officer appointed undersigned counsel as successor post-conviction counsel shortly thereafter.

ARGUMENT

I. The Court's Reliance on Officer Birkholz's Videotaped Accusation to Decide the Suppression Issue Violated Zamzow's Sixth Amendment Confrontation Rights.

This case involves the intersection of two constitutional rights: Zamzow's Fourth Amendment right to be secure against unreasonable searches and seizures, and his Sixth Amendment right, "in all criminal prosecutions … to be confronted with the witnesses against him."

The Confrontation Clause reflects the considered judgment of the Founding generation that the best test for the reliability of a statement is through the "crucible of cross-examination." ***Crawford v. Washington***, 541 U.S. 36, 61-62 (2004). The Supreme Court has not squarely addressed whether or not the Confrontation Clause applies at a suppression hearing, though in one instance it tacitly assumed that it does. ***McCray v. State of Ill.***, 386 U.S. 300, 305 (1967) (rejecting Confrontation Clause argument based on type of testimony involved, not because Clause inapplicable at suppression hearings).

The Supreme Court has, however, held that other Sixth Amendment rights apply at pretrial proceedings such as suppression hearings. ***Waller v. Georgia***, 467 U.S. 39, 46-47 (1984) (Public Trial Clause applies to suppression hearings); ***Coleman v. Alabama***, 399 U.S. 1, 9-10 (1970) (Counsel Clause applies at preliminary hearing). Indeed, both ***Waller*** and ***Coleman*** refer to the need for exacting witness examinations to produce reliable evidence as justification for applying the respective Sixth Amendment right at the pre-trial

proceeding, holdings that imply that the Confrontation Clause applies as well. ***Waller*** 467 U.S. at 46-47; ***Coleman v. Alabama***, 399 U.S. at 9-10.

The Court has also recognized that Fourth Amendment "suppression hearings often are as important as the trial itself," since the entire case may turn on whether or not the government legally obtained the evidence against the accused. ***Waller***, 467 U.S. at 46-47. Further, suppression hearings often involve factual determinations of contentious issues, namely the propriety of the government's actions. *Id*. The defendant's ability to challenge the reliability of an accusation is integral to the adversarial nature of the common law system, and is a right guaranteed by the Confrontation Clause throughout a "criminal prosecution," including a suppression hearing. ***Crawford***, 541 U.S. at 61-62.

Officer Birkholz's claim that Zamzow crossed the center line was the kind of testimonial out-of-court statement prohibited by the Confrontation Clause. ***Crawford***, 541 U.S. at 68. It was an accusation, recorded due to the possibility it would be needed in court, ostensibly designed to solicit some kind of response from Zamzow that could likewise be used in court. Zamzow was unable to cross-examine Officer Birkholz about the accusation, such as by challenging (1) the officer's ability to see Zamzow's vehicle in the early morning conditions, (2) the fact that the video does not depict Zamzow crossing of the center line, and (3) that it does not appear that there was even a "center line" at the where Officer Birkholz first sees Zamzow's vehicle. Accordingly, the court's reliance on Officer Birkholz's statement violated Zamzow's confrontation rights.

A. The Confrontation Clause applies at suppression hearings.

1. The Confrontation Clause prohibits the introduction of testimonial statements without the opportunity to cross-examine the declarant.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him…" Taken literally, the Clause would arguably prohibit introduction of any hearsay evidence by a declarant unavailable to testify in person. ***See Maryland v. Craig***, 497 U.S. 836, 848 (1990).

The Supreme Court has not adopted a literal take of the Confrontation Clause, though it has struggled to define exactly what the Clause does prohibit. In ***Ohio v. Roberts***, 448 U.S. 56 (1980), the Court held that the Confrontation Clause bars the admission of an unavailable witness's statement against a criminal defendant unless the statement bears "adequate 'indicia of reliability.'" *Id*., at 66. To meet that test, the ***Roberts*** court held evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trust-worthiness." *Id*.

The Supreme Court repudiated ***Roberts*** just 24 years later, rejecting the proposition that the Confrontation Clause was merely a constitutional recognition of the problem with hearsay evidence. "[W]e do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability'." ***Crawford***, 541 U.S. at 61-62. Whether a statement is deemed "reliable" will depend upon which

factors the judge considers and how much weight the judge accords to each. ***Id***. at 63. Different judges will give "the same significance to opposite facts," and may even consider the very factors that make a statement testimonial to also make the statement "reliable" and thus admissible under ***Roberts***. For example, the trial court in ***Crawford*** had reasoned that the declarant's questioning by a "neutral" police officer increased the statement's reliability, a proposition that Justice Scalia, writing for the Court, found hard to swallow. "The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." ***Crawford***, 541 U.S. at 66.

The Court concluded that the Confrontation Clause does not provide a "substantive guarantee" of general reliability, but a procedural guarantee on *how* reliability is to be determined. The Clause:

> commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses ... is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

Crawford, 541 U.S. at 61-62.

The ***Crawford*** Court held that "[w]here testimonial evidence is at issue … the Sixth Amendment demands … unavailability and a prior opportunity for cross-examination."

The Court declined to give "a comprehensive definition of 'testimonial,'" but said "it applies at a minimum to … police interrogations." ***Crawford***, 541 U.S. at 68.

The Court later refined the "testimonial" definition somewhat, at least with respect to police interrogations. ***Davis v. Washington***, 547 U.S. 813, 822 (2006). Interrogations "are testimonial when the circumstances objectively indicate that there is no … ongoing emergency, and … the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." ***Id.***

2. The Supreme Court has applied the Confrontation Clause at a suppression hearing.

Crawford and its progeny address *what* the Confrontation Clause requires, but not *when* it is required. Certainly, the Court has repeatedly celebrated the Confrontation Clause as conferring an important trial right. ***See, e.g., California v. Green***, 399 U.S. 149, 166 (1970). But in those cases, the confrontation issue arose during trial, so the Court would naturally discuss the importance of the right in the context of the trial. And just because a right is important during trial it does not follow that it is unimportant during other phases of the "criminal prosecution" of the defendant. Indeed, the Court has assumed that the Confrontation Clause applies during a suppression hearing, holding that the Clause was not violated, not that the Clause was inapplicable. ***McCray v. State of Ill.,*** 386 U.S. 300, 305 (1967).

In ***McCray***, the state court had allowed police officers testifying at a suppression hearing to withhold the identity of an informant, pursuant to the "informer privilege" well-recognized by state and federal courts. 386 U.S. at 308-09.

The Supreme Court concluded that application of the privilege did not violate the Confrontation Clause.

First, the issue at the suppression hearing was not whether the informant's statements were true, but whether the officers who relied upon them in arresting the defendant had done so "reasonably," as the Fourth Amendment commands. ***McCray***, 386 U.S. at 312-13.[6] And, "[t]he arresting officers in this case testified, in open court, fully and in precise detail as to what the informer told them and as to why they had reason to believe his information was trustworthy. Each officer was under oath. Each was subjected to searching cross-examination." ***McCray***, 386 U.S. at 313.

Second, the Court refused to hold that the Confrontation Clause effectively eliminated testimonial privileges from the law of evidence. The Court declined to give the Clause a construction such that "no witness on cross-examination could ever constitutionally assert a testimonial privilege, including the privilege against compulsory self-incrimination guaranteed by the Constitution itself." *Id*. at 314.

If the Confrontation Clause did not apply at the suppression hearing, then there would be no reason for the ***McCray*** Court to make mention that the arresting officers were "subjected to searching cross-examination." 386 U.S. at 313. Nor would the court have noted that evidentiary privileges trump the Confrontation Clause. The Court would have instead just held that the Clause had not yet attached, and there was no right to cross-examine the arresting officers or the informant.

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[6] ***See also Crawford***, 541 U.S. at 59, n. 9 ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.")

The Supreme Court cases cited by the Court of Appeals below do not contradict ***McCray**'s* holding. ***See Zamzow***, 2016 WI App 7, ¶¶ 11-15. (App. 108-11). In one group of cases, the Court discusses whether the Confrontation Clause prohibited the introduction of certain out-of-court statements at the defendant's *trial*, not a pre-trial proceeding such as a suppression hearing. ***Roberts***, 448 U.S. at 66 (Confrontation Clause allows introduction of preliminary hearing testimony at trial if declarant truly unavailable for trial and statement "bears adequate indicia of reliability"); ***California v. Green***, 399 U.S. 149, 166 (1970) (Confrontation Clause allowed admission of prior testimony at subsequent trial if declarant available for cross-examination at trial); ***Barber v. Page***, 390 U.S. 719, 725-26 (1968) (Confrontation Clause barred introduction of preliminary hearing testimony at trial). The Court would naturally refer to the defendant's confrontation rights "at trial" in these cases, since the issue arose in the context of testimony introduced at the defendant's trial. At no point does the Court suggest that the Confrontation Clause confers a trial right *exclusively*.

If anything, the Court has been careful to explain that while the use of unexamined out-of-court statements at a criminal trial, such as the notorious trial of Sir Walter Raleigh, may be the "paradigmatic" violation of the Confrontation Clause, "the paradigmatic case identifies the core of the right to confrontation, not its limits." ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 315 (2009). The confrontation right was not created in response to the Raleigh trial. Instead, the use of *ex parte* examinations in the case "provoked such an outcry precisely because it flouted the deeply rooted common-law tradition of live testimony in court subject to adversarial testing." ***Id***. (quotation marks and citations omitted). So while a defendant's right to confront

witnesses at a suppression hearing may not be the "core" of Confrontation Clause, it is within its limits.

In another group of cases relied upon by the court of appeals below, the Supreme Court discussed the evidentiary rules applicable at suppression hearings, not whether the Confrontation Clause was applicable at the hearing. ***United States v. Matlock***, 415 U.S. 164, 167-77 (1974) (district court should not have excluded hearsay statements from suppression hearing when they bore sufficient "indicia of reliability" and declarant was available to testify at hearing); ***Brinegar v. United States***, 338 U.S. 160, 173 (1949) (evidence that official had previously arrested defendant for similar offenses admissible at suppression hearing but not at trial.) In neither case did the Court hold that the Confrontation Clause has no applicability at a suppression hearing. At most, these cases reflect the evidence rule based Confrontation Clause test formally adopted by the Court in ***Roberts*** but then rejected by ***Crawford***.

Finally, the Court of Appeals cites a plurality opinion holding that the Due Process Clause, but not the Confrontation Clause, required the state to disclose certain written statements in its file prior to trial. ***Pennsylvania v. Ritchie***, 480 U.S. 39, 61 (1987) (plurality opinion). A fifth justice agreed that the Due Process clause required the disclosures, but specifically refused to join the plurality on the confrontation issue because he did "not accept the plurality's conclusion … that the Confrontation Clause protects only a defendant's trial rights…." ***Id.*** at 61-62. (Blackmun, J., concurring in part and concurring in the judgment). The four remaining justices dissented on procedural grounds, holding that the writ of certiorari should have been dismissed because the order at issue was not final. ***Id.*** at 72-73. (Stevens, J., dissenting). Because the "narrowest

grounds" explaining the judgment was the Court's decision on the Due Process issue, the plurality's opinion on the Confrontation Clause is dicta. ***Marks v. United States***, 430 U.S. 188, 193 (1977). Even so, the plurality's opinion that the Confrontation Clause does not require pre-trial disclosures is inapposite to the issue at hand: whether the Confrontation Clause applies at a suppression hearing.

3. Sixth Amendment rights apply throughout criminal prosecutions

While the Supreme Court simply assumed that the defendant had a right confrontation rights at the suppression hearing in ***McCray***, the Court has more directly addressed the applicability of other Sixth Amendment rights to pretrial proceedings. Specifically, the Court has held that the Sixth Amendment right to counsel applies at all "critical stages" of the prosecution. ***Coleman***, 399 U.S. at 9-10, and that the right to a public trial applies to suppression hearings. ***Waller*** 467 U.S. at 46-47. The Court recognized that these rights attach pre-trial because the Sixth Amendment applies to "criminal prosecutions" not just trials, and the failure to recognize the rights pre-trial could prejudice the accused's rights and defenses.

The Supreme Court has most fully addressed when a Sixth Amendment right attaches in the context of the Counsel Clause. The Court concluded that a defendant had a Sixth Amendment right to the presence of counsel at a post-indictment lineup, because "the presence of his counsel [was] necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." ***United States v. Wade***, 388 U.S. 218, 227 (1967). The Court similarly observed that "It is

well-settled that a court proceeding in which a defendant enters a plea … is a 'critical stage' where an attorney's presence is crucial because 'defenses may be ... irretrievably lost, if not then and there asserted.'" ***Wright v. Van Patten***, 552 U.S. 120, 128 (2008) (quoting ***Hamilton v. Alabama***, 368 U.S. 52, 54 (1961)).

Most significant to the case at hand, the Court has tied the right of counsel to be present at a pretrial proceeding to the need of counsel to effectively cross-examine witnesses at the proceeding. In ***Coleman***, 399 U.S. 9-10, the court held that the defendant had the right to counsel at a preliminary hearing in part because "the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over." ***Id***.[7] This of course suggests that if the trial court could not then prohibit counsel from cross-examining any of the state's witnesses at the preliminary hearing without running afoul of the Confrontation Clause.

The Supreme Court has also held that the Sixth Amendment right to a "public trial" applies at suppression hearings. ***Waller***, 467 U.S. at 46-47. Among the salutary effects of a public trial is its tendency to keep witnesses honest when being questioned by counsel, since

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[7] The Supreme Court has not determined whether the Sixth Amendment right to counsel applies at suppression hearings. However, other courts have had little trouble finding that it does, because a hearing on a pretrial motion to suppress evidence is a "critical stage of the prosecution…wherein the rights of the accused are so significantly affected as to foreclose the possibility of any meaningful defense at trial." ***Olney v. United States***, 433 F.2d 161, 163 (9th Cir. 1970) (quotation marks and footnotes omitted). ***See also People v. Strothers***, 87 A.D.3d 431, 433 (N.Y. 2011); ***State v. Curry***, 147 P.3d 483, 485-86 (Utah 2006).

they are subject to public scrutiny. ***Id***. And while a suppression hearing is technically not part of the ultimate "trial," "suppression hearings often are as important as the trial itself." ***Id***. The outcome may determine whether the charges are dismissed, or pled to by the defendant.

The Court further reasoned that in addition to being as important as the trial, "a suppression hearing often resembles a bench trial: witnesses are sworn and testify … [and the] outcome frequently depends on a resolution of factual matters." Moreover, "[t]he need for an open proceeding may be particularly strong with respect to suppression hearings. A challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor. … [S]trong pressures are naturally at work on the prosecution's witnesses to justify the propriety of their conduct in obtaining the evidence." ***Waller***, 467 U.S. at 46-47 (bracketing, citations, and quotation marks omitted). ***Waller*** thus suggests that the Confrontation Clause applies at suppression hearings: the salutary effect of conducting an examination of the prosecution's witnesses in public would be negated if the prosecution could simply shield them from scrutiny by submitting police reports and other out-of-court statements.

Federal courts have also recognized that the Sixth Amendment's Compulsory Process Clause applies at suppression hearings. "There is no doubt that appellant had the right under the sixth amendment to subpoena [the witness] to testify on his behalf at the suppression hearing." ***United States v. Bowe***, 698 F.2d 560, 565 (2d Cir. 1983); ***see also United States v. Macklin***, 902 F.2d 1320 (8th Cir.1990).

4. The Confrontation Clause applied at Zamzow's suppression hearing.

The lesson to be learned from the Court's application of other Sixth Amendment rights to pretrial hearings is that Sixth Amendment rights apply not just at trial, but whenever the exercise of that right is critical to the accused's rights and defenses. The right to counsel exists to give a person whose liberty the government seeks to curtail the benefit of a professional advocate who can preserve and promote the accused's rights and defenses, and so the right to counsel exists at "critical stages" of the prosecution. ***Coleman***, 399 U.S. at 9-10. The accused has a right to public trial because public scrutiny promotes an honest fact-finding process; and since "suppression hearings often are as important as the trial itself" and involve a defendant's considerable Fourth Amendment rights, the Public Trial clause applies to suppression hearings. ***Waller***, 467 U.S. at 46-47.

The Confrontation Clause likewise applies at suppression hearings because the benefits of confrontation are just as applicable at suppression hearings as they are at trial. The Court has repeatedly stressed the importance of the Confrontation Clause at trial, not to denigrate its viability at pre-trial proceedings, but to emphasize the central importance of an accused's right to confront adverse witnesses in the common law tradition of adversarial factual hearings. Indeed, the Court has recognized that the Due Process clause includes confrontation rights in noncriminal settings, observing that a defendant's right to challenge a witness's version of events through cross-examination is fundamental to our conception of the common law process. ***Greene v. McElroy***, 360 U.S. 474, 496-97 (1959). In our adversarial system, each

party has an opportunity to present the evidence supporting their position, and an opportunity to challenge the evidence presented by the opposing party. ***Id***. And when the evidence is in the form of witness statements, experience has shown that cross-examination of a witness under oath, where the factfinder can observe the witness's physical responses when answering, is the best method for challenging its reliability. ***Id***.

The Court summarized the benefits of the Confrontation Clause thusly:

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Green, 399 U.S. at 158 (quotation marks and footnote omitted). There may be other means, besides cross-examination, for determining whether a statement is reliable. But when it comes to "criminal prosecutions," the Confrontation Clause has spoken. "[I]t commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." ***Crawford***. 541 U.S. at 61-62.

Further, "suppression hearings often are as important as the trial itself." ***Waller***, 467 U.S. at 46. Defendants have a Fourth Amendment right to be secure from unreasonable searches and seizures, and evidence gathered in violation of this right is inadmissible at trial. ***Wong Sun v. United States***,

371 U.S. 471, 484 (1963). Once a defendant makes a prima facie showing of a Fourth Amendment violation, he or she is entitled to an evidentiary hearing on whether the violation actually occurred, and evidence should be suppressed as a result. "[W]hen probable cause is challenged in a suppression hearing in a criminal case … the trial court weighs the evidence, determines credibility and chooses between conflicting versions of the evidence." ***State v. Pfaff***, 2004 WI App 31, ¶ 17, 269 Wis. 2d 786, 797. The court cannot make this determination reliably, however, if it only considers unchallenged, out-of-court statements.

Indeed, if there is no right to confront witnesses at a suppression hearing, then suppression hearings could turn into "paper reviews," where the court considers only the officer's police reports. ***Zamzow***, 2016 WI App 7, ¶ 22 (Reilly, J., dissenting). There would be no opportunity to question the officer's ability to perceive the events described, or whether the report accurately reflects the officer's perception of events. Indeed, there would be less pressure on the officers to accurately describe the circumstances of a search or seizure if they know that they will not be subject to cross-examination under oath.

As the leading Fourth Amendment scholar says, "It should not be assumed that the right of confrontation has no application at a Fourth Amendment suppression hearing, for such is not the case." LaFave, 6 Search & Seizure § 11.2(d) (5th ed.). Other courts considering the issue have found that the Sixth Amendment applies at suppression hearings. For example, the Second Circuit has held that removing the defendant from a suppression hearing violated his Sixth Amendment confrontation rights because he was unable to assist his counsel in cross-examining witnesses. ***United States v. Clark***, 475 F.2d 240, 247 (2d Cir. 1973);

Curry v. State, 228 S.W.3d 292, 298 (Tex. App. 2007); ***People v. Sammons***, 478 N.W.2d 901, 907 (1991).

Finally, the two Wisconsin cases that the Court of Appeals cites in the opinion below each warrant brief discussion. In ***State v. Frambs***, 157 Wis. 2d 700, 702 (Ct. App. 1990), the court held that the Confrontation Clause did not bar certain hearsay evidence at a pre-trial evidentiary hearing to determine whether the defendant's own wrongdoing had caused the declarants to be unavailable as witnesses. The court of appeals concluded that the Confrontation Clause "was inapplicable to the pretrial motion hearing in this case," *i.e*. a hearing on admissibility of hearsay testimony. ***Frambs***, 157 Wis. 2d at 703.

First, ***Frambs*** was decided before ***Crawford***, which not only revitalized the importance of the Confrontation Clause as distinct from the rule against hearsay, but also recognized the "forfeiture by wrongdoing" exception to the Clause. 541 U.S. at 62. The accused forfeit their Confrontation right when acting with the purpose of preventing a witness from testifying. ***Id.***; ***see also Giles v. California***, 554 U.S. 353, 377 (2008). Thus the hearsay testimony at issue in the ***Frambs*** case would be admissible at the suppression hearing under the forfeiture by wrongdoing exception to the Confrontation Clause.

Second, the ***Frambs*** case involved a pure evidentiary question, not a suppression hearing. As discussed above, the suppression hearing is about important constitutional rights, and are not run-of-the-mill evidentiary issues left to the court's discretion. Indeed, the holding was limited to "the pretrial motion hearing in this case," not necessarily all pretrial motions. ***Frambs***, 157 Wis. 2d at 703. Finally, ***Frambs*** relied on the same Supreme Court cases referring to

the Confrontation Clause as a trial right that was discussed above. Again, these cases stand for the proposition that the confrontation right is important at trial, not that it is only important at trial and nowhere else.

In the second case cited by the court of appeals below, ***State v. Jiles***, 2003 WI 66, 262 Wis. 2d 457, 477, 663 N.W.2d 798, 808, the trial court commandeered the hearing from the unprepared state prosecutor, and relied exclusively on the police reports attached to the defendant's suppression motion to conclude that the defendant's statements were voluntary. This court decided that the judge's actions denied the defendant the full evidentiary hearing required by statute. ***Id***., ¶ 49. The Confrontation Clause is only mentioned in passing, when the court quotes the observation in ***Frambs*** that the Supreme Court has not ruled that the Confrontation Clause applies to pre-trial hearings. ***Id***., ¶ 31. However, as discussed above, neither has the Court ruled that the Clause does not apply in suppression hearings.

B. Officer Birkholz's accusation was a Testimonial statement barred by the Confrontation Clause.

Zamzow challenged the constitutionality of the traffic stop, alleging that the state did not have reasonable suspicion to seize him because he had not crossed the center line. The video seems to bear him out, as the trial judge found that it does not show Zamzow crossing the center line. (80:19-24; App. 135-40). Nor did the video depict any bad driving that would otherwise support a traffic stop. (80:23-24; App. 139-40.) As the trial judge acknowledged, the only evidence supporting the stop was Officer Birkholz's assertion that Zamzow had crossed the center line. (80:23-24; App. 139-40). Officer Birkholz's statement was the type of testimonial hearsay that the Confrontation Clause prohibits.

The ***Crawford*** Court held that "[w]here testimonial evidence is at issue … the Sixth Amendment demands … unavailability and a prior opportunity for cross-examination." The Court declined to give "a comprehensive definition of 'testimonial,'" but said "it applies at a minimum to … police interrogations." ***Crawford***, 541 U.S. at 68. Further, interrogations "are testimonial when the circumstances objectively indicate that there is no … ongoing emergency, and … 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.

First, there was no ongoing emergency. Zamzow was simply being pulled over for an alleged traffic violation.

Second, Officer Birkholz's was not making casual conversation with Zamzow when telling Zamzow that he had pulled him over for crossing the center line. Officer Birkholz had just made a traffic stop of Zamzow, which Officer Birkholz surely knew could lead to forfeiture or criminal proceedings. He also surely knew that any inculpatory statements Zamzow made in response Officer Birkholz's accusation would be admissible at any subsequent proceeding. Officer Birkholz certainly knew that the audio and video of the encounter was being recorded.

True, the statement at issue was made by the government official, not the witness being question. But that certainly does not help the state. After all, the Confrontation Clause, like many other rights enjoyed by the accused, was born of the Founders' well-earned distrust of government officials. "The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." ***Crawford***, 541 U.S. at 66.

A "skilled examiner" would have plenty to work with if there had been an opportunity to cross-examine Officer Birkholz about the stop. ***Coleman***, 399 U.S. 9-10. To begin, Officer Birkholz's assertion that Zamzow had crossed the center line when approaching Officer Birkholz is contradicted by the video. The trial court could not see Zamzow's vehicle cross the center line when approaching Officer Birkholz. (80:19; App. 135). Indeed, Officer Birkholz's vehicle is on the crest of the bridge when Zamzow's vehicle first comes into view a significant distance away toward the bottom of the bridge, and Zamzow's vehicle does not appear to touch or cross the center line as it approaches Officer Birkholz. (58:Timestamp 3:03:23-42). Further, there does not appear to be a "center line" at the bottom of the bridge/hill where Zamzow's vehicle first appeared, but instead a turning lane. (58:Timestamp 3:03:40-42).

Thus, if Officer Birkholz were on the stand, his cross-examination may begin with counsel simply asking Officer Birkholz to explain where on the road he first observed Zamzow cross the center line. Was it at some point before Zamzow comes into view on the video? If so, how is it that Officer Birkholz was able to see it but the dashcam was not?

Or, did Officer Birkholz see Zamzow at the bottom of the hill? If so, what did Zamzow actually cross into? Was it actually a turning lane, as it appears on the video? If so, how far into the lane did Zamzow go into the turning lane? Why would Officer Birkholz say that Zamzow crossed the "center line" if he actually meant the turning lane? And did Officer Birkholz believe that crossing into the turning lane was a traffic violation?

Or, did Officer Birkholz see Zamzow cross the center line closer to Officer Birkholz's vehicle? If so, why does it not appear on the video?

We can only speculate as to what Officer Birkholz's answers would be. He might have even confessed, when confronted with the video and the solemnity of testifying under oath, that Zamzow did not actually cross any center line when approaching.

But if Officer Birkholz would not admit that on the stand, there are additional lines of inquiry into Officer Birkholz's ability to see Zamzow's vehicle. The stop occurred at about 3 a.m. in the morning. Officer Birkholz may have been tired from the end of a long day or his shift. He may have been experiencing some night blindness from the headlights of oncoming traffic, his own eyesight issues, and/or his fatigue. He may have been distracted by the other vehicles on the road, the computer in his squad car, or a call from dispatch.

Officer Birkholz may of course deny he had any vision problems or had been distracted, but the trial court, having the benefit of seeing and hearing Officer Birkholz's responses firsthand, may disbelieve him. ***Green***, 399 U.S. at 158.

Once Zamzow passes, Officer Birkholz U-turns, accelerates behind Zamzow, and turns on his squad lights. (58:Timestamp 3:03:40-3:04:04). It is then that the trial court says that Zamzow's tires touch the double yellow line, but do not appear to cross it. (80:19-20; App. 135-36). Trial counsel could thus cross Officer Birkholz on whether he had pulled over Zamzow for touching the double yellow line. If he had, then the litigation would move on to the question of whether simply touching the yellow line justifies the traffic stop, as well as whether Zamzow may have touched the yellow line

simply because a police car had suddenly accelerated behind him at a high rate of speed.

Zamzow's stop was conducted in the middle of the night, and Officer Birkholz's out-of-court assertion that Zamzow crossed the center line is not supported by the video of Zamzow's driving. Cross-examination of Officer Birkholz about when Zamzow actually crossed the center line, and about Officer Birkholz's ability to accurately perceive Zamzow's driving, would certainly have helped the court determine whether Zamzow had in fact crossed the center line, and whether his stop was justified.

The circuit court's consideration of Officer Birkholz's out-of-court statement at the suppression hearing thus violated Zamzow's rights under the Confrontation Clause. Because Officer Birkholz's statement was the only evidence supporting reasonable suspicion to make the traffic stop, the court should have granted the motion and ordered all evidence derivative of the stop suppressed. ***Wong Sun***, 371 U.S. at 484.

II. The Circuit Court's Reliance on Officer Birkholz's Videotaped Accusation to Decide the Suppression Issue Violated Zamzow's Due Process Rights.

The criminally accused enjoy not just the protections of the Sixth Amendment, but also the general protections of the Fourteenth Amendment's Due Process Clause. No State shall "deprive any person of life, liberty, or property, without due process of law…." U.S. CONST. AMEND XIV. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." ***California v. Trombetta***, 467 U.S. 479, 485 (1984). And "[i]n almost every setting where important decisions turn on questions of fact, due

process requires an opportunity to confront and cross-examine adverse witnesses." ***Goldberg v. Kelly***, 397 U.S. 254, 269 (1970) (due process required welfare recipients be given opportunity to cross-examine adverse witnesses at benefits termination hearing.) The introduction of Officer Birkholz's statement, which Zamzow could not cross-examine, at the Fourth Amendment suppression hearing thus violated Zamzow's due process rights.

As discussed above, the right to confront adverse witnesses is a fundamental characteristic of our common law legal system. The whole point of the adversarial system is to give the accused "an opportunity to show that [the accusation] is untrue." ***Greene***, 360 U.S. at 496-97. When the accusation is in the form of a statement, the best method for showing that the statement is untrue is through cross-examination of the declarant. *Id*.

> We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion.
>
> . . .
>
> For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

Id., (citations and quotation marks omitted).

Accordingly, "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." ***Chambers v. Mississippi***, 410 U.S. 284, 294 (1973). ***See also State v. Disch***, 119 Wis. 2d 461, 478 (1984).

The suppression hearing is, of course, a "setting where important decisions turn on questions of fact." ***Goldberg***, 397 U.S. at 269. Indeed, "suppression hearings often are as important as the trial itself." ***Waller***, 467 U.S. at 46-47. It is at the suppression hearing that the criminally accused can protect their Fourth Amendment right to be secure against unreasonable searches and seizures by preventing the government from using illegally obtained evidence at trial. ***Wong Sun***, 371 U.S. at 484. "[T]he police must obey the law while enforcing the law; … in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." ***Spano v. New York***, 360 U.S. 315, 320-21 (1959).

For these reasons, several courts have held that there is a due process right to confront witnesses at suppression hearings. ***United States v. Green***, 670 F.2d 1148, 1154 (D.C. Cir. 1981). ***State v. Harr***, 156 W. Va. 492, 497, 194 S.E.2d 652, 655 (1973). Other courts have recognized that the confrontation right is integral to the idea of a fair hearing, without necessarily invoking the "due process" clause specifically. For example, in ***United States v. Mejia***, 69 F.3d 309, 314 (9th Cir.1995), a district court judge fell ill in the midst of a suppression hearing, and a second judge resumed the hearing after reviewing transcripts of the first two witnesses. The Court of Appeals held that the second judge

should have instead granted the defendant's request for a continuance "so that the government's two main witnesses would testify in person and be cross-examined in front of the judge who would be required to assess their credibility."

Zamzow did not have an opportunity to cross-examine the only "witness" against him at the suppression hearing. He had no opportunity to challenge Officer Birkholz on whether he actually saw Zamzow cross the center line. The Court's consideration of Officer Birkholz's statement despite Zamzow's inability to cross-examine it violated Zamzow's due process rights.

CONCLUSION

For the reasons stated above, Mr. Zamzow respectfully requests that this court reverse the trial court order denying his motion to suppress evidence.

Dated this 6th day of April, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,481 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 this 6th day of April, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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