STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP2603-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GLENN T. ZAMZOW,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, THE HONORABLE GARY R. SHARPE, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

CASES CITED

Page

Page

Page

Page

STATUTES CITED

RULES CITED

CONSTITUTIONAL PROVISIONS

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ISSUES PRESENTED

1. The United States Supreme Court has historically viewed the right to confront the witnesses against the accused in a criminal proceeding as a trial right inapplicable to pretrial hearings. Did the court of appeals err in holding the right to confront witnesses as interpreted in

Crawford v. Washington, 541 U.S. 36 (2004), does not apply to a suppression hearing?

The circuit court found that the right to confront witnesses as interpreted in *Crawford*, did not apply to a suppression hearing. The court of appeals agreed.

2. *State v. Jiles,* 2003 WI 66, ¶ 31, 262 Wis. 2d 457, 663 N.W.2d 798, held that a *Miranda-Goodchild*[1] hearing in which the State chose not to present live testimony from law enforcement officers to prove a statement voluntary did not violate due process. Does the Due Process Clause require the right to confront and cross-examine witnesses at a suppression hearing to determine probable cause for a search or seizure?

The court of appeals held that based on case law and a totality of the evidence at the suppression hearing, the circuit court did not violate due process by relying on a police officer's video statement.

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

[1] *Miranda v. Arizona,* 384 U.S. 436 (1966); *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

vehicle (78:3-4). He argued that police lacked reasonable suspicion for a traffic stop, therefore, the Fourth Amendment required suppression of 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).[2] Wilson described the video cameras in Fond du Lac police squad cars (78:7-8). He identified a DVD he burned from two 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).

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

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). Zamzow objected to the admission of the DVD at the suppression hearing on the grounds, among others, that the Birkholz statements violated his Sixth Amendment right to confront witnesses (78:29-30; 80).[3]

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, and Birkholz's other actions depicted on the video, the circuit court found Zamzow's vehicle did cross the center line; 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.*

[3] 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).

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).[4] 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).

After briefing in the Court of Appeals, that court ordered the case heard by a three judge panel. A divided court of appeals affirmed the circuit court. *State v. Zamzow*, 2016 WI App 7, 366 Wis. 2d 562, 874 N.W.2d 328, (Reilly, P.J., dissenting).

Addressing Zamzow's contention that the right to confront witnesses applied to his suppression hearing, the majority observed that *United States v. Matlock*, 415 U.S. 164 (1974), and *McCray v. Illinois*, 386 U.S. 300 (1967), established the right to confront witnesses as a trial right. *Zamzow*, 366 Wis. 2d 562, ¶ 10. The majority then relied on *Frambs*, rejecting Zamzow's argument that *Crawford*

[4] 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).

abrogated *Frambs*. The majority noted: "*Crawford* did not address pretrial hearings, in any way." *Zamzow*, 366 Wis. 2d 562, ¶ 11. The dissenting judge relied on the language of the Sixth Amendment, "[i]n all criminal *prosecutions,* the accused shall enjoy the right ... to be confronted with the witnesses against him," and language in *Crawford* itself to disagree with the majority. *Zamzow*, 366 Wis. 2d 562, ¶¶ 21-23 (emphasis Judge Reilly's). Judge Reilly concluded that in view of *Crawford*, the right to confront witnesses should apply to suppression hearings. *Id.*

Addressing Zamzow's contention that relying on officer Birkholz's hearsay video statement violated due process, the majority again relied on *Matlock* and *McCray* and additionally noted the Supreme Court's discussion in *United States v. Raddatz*, 447 U.S. 667 (1980), concluding that "less process is due at suppression hearings than at a criminal trial." *Zamzow*, 366 Wis. 2d 562, ¶ 13. The majority also rejected Zamzow's contention that officer Birkholz's hearsay video statement was too unreliable to comport with due process. The majority noted that the issue at the suppression hearing was whether a reasonable officer, knowing what officer Birkholz knew at the time of the stop, would have had reasonable suspicion or probable cause to believe that Zamzow had violated or was violating the law. The majority also rejected Zamzow's contention that the circuit court relied "solely" on the video statement. *Zamzow*, 366 Wis. 2d 562, ¶ 14-16. "In light of the Supreme Court cases identified

…, Zamzow's failure to produce any case law supporting his due process argument, and the record in this case, Zamzow has failed to convince us the circuit court" violated due process by relying on officer Birkholz's video statement. *Id.* ¶ 16. Judge Reilly did not address Zamzow's due process claim.

STANDARD OF REVIEW

Review of the circuit court's decision to deny Zamzow's motion to suppress presents a question of constitutional fact that this Court reviews under a two-part standard. It upholds the circuit court's findings of historical or evidentiary fact unless clearly erroneous. It independently reviews the circuit court's application of constitutional principles to those evidentiary facts. *State v. Henderson*, 2001 WI 97, ¶ 16, 245 Wis. 2d 345, 629 N.W.2d 613.

ARGUMENT

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

In this Court, like the dissent of Judge Reilly, Zamzow focuses on the word "prosecutions" in the Sixth Amendment to argue that the right to confront witnesses applies to his suppression hearing. He points to several Sixth Amendment rights that the Supreme Court has applied to pre-trial proceedings, principally the right to counsel and the right to a public trial. Zamzow's brief 7-17.

The Sixth Amendment, in its entirety, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend VI.

Zamzow's argument paints with too broad a brush. No one would seriously argue that the right to an impartial jury applies to suppression hearings or preliminary hearings in general. Applying the impartial jury requirement to a suppression hearing involving the voluntariness of a confession would violate *Jackson v. Denno*, 378 U.S. 368 (1964). Nor would the right to be informed of the nature and cause of the accusation be of much use if it applied only at trial. Each of the rights enumerated in the Sixth Amendment must be analyzed on its own. And the United States Supreme Court has historically viewed the right to confront witnesses as a trial right.

A. Historically, the right to confront witnesses applied only at trial.

More than 120 years ago, the United States Supreme Court observed:

> 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). The right to confront, then encompasses the right to cross-examine the witness to discover the truth and to have the jury observe the witness's demeanor on the stand in order to judge the credibility of the testimony. *See also Barber v. Page*, 390 U.S. 719, 725 (1968) (The right to confront witnesses encompasses "the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."). These concerns are either diminished or not present at pre-trial evidentiary hearings.

In *California v. Green*, 399 U.S. 149 (1970), the Court rejected a claim that a California evidence code provision violated the Confrontation Clause by permitting at trial, prior inconsistent statements for the truth of the matter asserted. 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 the right to 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), the Court again emphasized cross-examination at trial. 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 right to confrontation 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." *Pennsylvania v. Ritchie*, 480 U.S. 39, 54 n.10 (1987). The *Ritchie* Court stated, "The opinions of this Court show that the right to confrontation is a *trial* right...." *Id.* at 52 (plurality opinion) (emphasis the Court's).

The Supreme Court has also distinguished between a determination of probable cause for arrest or for search warrants and proof of an accused's guilt at a trial.[5] In *Brinegar v. United States*, 338 U.S. 160, 173 (1949), the Court stated:

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[5] As the State will develop in more detail when addressing Zamzow's due process claim, this distinction is especially important in due process analysis.

> [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).

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 "Jordon's" 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, citation and 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[6] 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 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.

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[6] 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 v. Illinois,* 386 U.S. 300, 302 (1967).

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). *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.").

Zamzow claims that the *McCray* Court rejected McCray's confrontation claim but did not hold that confrontation did not apply to a suppression hearing. But 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. By comparing *Smith* to *McCray*, one cannot escape the fact that the right to confrontation does not apply to pre-trial proceedings.[7]

[7] The State further notes that the *Smith* Court, by resting its holding that a trial witness's name must be disclosed on the Sixth Amendment, forecloses application of an informant privilege at trial. *Smith v. Illinois,* 390 U.S. 129 (1968).

Zamzow does not address *Cooper*. That case turned on the reasonableness of a search of an impounded car a week subsequent to its seizure. *Cooper*, 386 U.S. at 59-62. But in footnote 2, the Court wrote: "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 the suppression hearing]. This contention we consider absolutely devoid of merit." It is hard to see how *Cooper's* footnote does not lend substantial support to the conclusion that the right to confrontation does not apply to suppression hearings.

Moreover Zamzow does not cite a single case in which the United States Supreme Court has found a violation of the right to confront witnesses at a pre-trial hearing. And there can be no doubt that the distinction plays a part in the Court's confrontation jurisprudence. *See, e.g., Kentucky v. Stincer*, 482 U.S. 730, 738 n.9 (1987). Even under the broader view expressed by Justice Blackmun in *Stincer* footnote 9, this case does not involve the withholding of information making cross-examination at trial less effective. The question of reasonable suspicion for the traffic stop was not relevant to Zamzow's guilt at trial.[8]

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[8] This Court 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, 364 Wis. 2d 234, 868 N.W.2d 143 (footnote omitted).

Wisconsin cases are consistent with the United States Supreme Court's pre-*Crawford* cases. In *State v. Frambs*, 157 Wis. 2d 700, 460 N.W.2d 811 (Ct. App. 1990), the court of appeals held that hearsay statements could be used at a pre-trial motion hearing to prove a 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, this 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.* It concluded: "'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), this 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). The court of appeals 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, the court of appeals held: "Of course, there is no constitutional right to confront witnesses at a preliminary examination." *Id*. at 422-23.

The court of appeals 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, the court of appeals noted Oliver "did not have a constitutional right of 'confrontation' at his preliminary examination." *Id*. at 146.

Several of the United States Courts of Appeals have also either stated that the right to confrontation does not apply at pre-trial hearings or rejected a claim of a violation of that right by citing to one of the above cited Supreme

Court cases. *See United States v. De Los Santos*, 819 F.2d 94, 97 (5th Cir. 1987) ("As the Court recently noted in *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S. Ct. 989, 999, 94 L.Ed.2d 40 (1987), '[t]he opinions of this court show that the right of confrontation is a trial right"); *United States v. Andrus*, 775 F.2d 825, 836 (7th Cir. 1985) (holding the Sixth Amendment does not provide a right to confrontation at a hearing to determine whether statements are admissible under federal rules); *United States v. Boyce*, 797 F.2d 691, 693 (8th Cir. 1986) ("[T]he right of confrontation does not apply to the same extent at pretrial suppression hearings as it does at trial."); *United States v. Smith*, 79 F.3d 1208, 1210 (D.C. Cir. 1996) (no right to confront non-testifying government witnesses at a pretrial detention hearing).

The above survey of confrontation cases both in the United States Supreme Court, other federal courts and in Wisconsin courts demonstrates that before *Crawford*, the prevailing view was that 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 the historic view that the Confrontation Clause does not apply to suppression hearings.

In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), 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. *See also State v. O'Brien*, 2014 WI 54, ¶ 29, 354 Wis. 2d 753, 850 N.W.2d 8 (citing *Crawford*, 541 U.S. at 68).

As this Court noted in *O'Brien,* 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, the pre-trial proceeding at issue in *O'Brien* or the suppression hearing at issue here.

A close reading of *Crawford* reveals that the Supreme Court focused heavily on the trial where a jury decides the guilt or innocence of the accused. The Court began, after quoting the language of the Sixth Amendment, with this observation:

> The Constitution's text does not alone resolve this case. One could plausibly read "witnesses against" a defendant to mean those who actually testify *at trial*, … those whose statements are offered *at trial*, … or something in-between…. We must therefore turn to the historical background of the Clause to understand its meaning.

Crawford, 541 U.S. at 42-43 (emphasis added). In describing the historical background to which the Court referred, the majority opinion began with the English common law.

> The founding generation's immediate source of the concept [of confrontation], however, was the common law. *English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials.*
>
> ….

> Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.*, the witnesses against him, brought before him face to face."
>
> Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century…. These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. … [These results] came to be used as evidence in some cases, … resulting in an adoption of continental procedure.
>
> The most notorious instances of civil-law examination occurred in the great *political trials* of the 16th and 17th centuries. *One such was the 1603 trial of Sir Walter Raleigh for treason.*

Id. at 43-44 (emphasis added).

After summarizing Walter Raleigh's trial, reviewing the experience of the Stamp Act in the colonies and setting out the history of the adoption of the Sixth Amendment, the Court observed two inferences about the Sixth Amendment's meaning:

> First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.
>
> ….
>
> Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements *introduced at trial* depends upon "the law of Evidence for the time being."

Id. at 50-51 (emphasis added) (quoted source omitted).

And second: "the Framers would not have allowed admission of testimonial statements of a witness *who did not appear at trial* unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54 (emphasis added).

The State notes the abuses causing the Framers' concern and that the *Crawford* majority recounted, were all trial abuses. Thus *Crawford* strongly infers that the Sixth Amendment's focus is on the criminal trial. *Crawford* spends no time addressing or even mentioning pre-trial procedures except as those procedures produced testimonial statements which were later sought to be introduced at trial.

One can conclude from this focus that a pre-trial proceeding would not have concerned the Framers because the issue of probable cause to arrest or reasonable suspicion to search or seize — issues which do not bear on guilt or innocence — once decided are unlikely to reappear in criminal trials. The Framers had no concern over the creation of certifications by justices of the peace upon examination of suspects and witnesses except where those certifications substituted for testimony at trial.

The *O'Brien* Court dealt with the use of hearsay evidence at preliminary hearings. *O'Brien,* 354 Wis. 2d 753, ¶ 1. There, the petitioners asserted that by permitting the use of hearsay evidence at preliminary examinations, Wis.

Stat. § 970.038 violated their rights under the Confrontation Clause. Their argument assumed the right to confrontation applied to preliminary examinations. *O'Brien,* 354 Wis. 2d 753*,* ¶ 28. The Court adhered to the Wisconsin cases of *Padilla*, and *Oliver* referred to above. *O'Brien,* 354 Wis. 2d 753*,* ¶ 30. *See also State ex rel. Funmaker v. Klamm*, 106 Wis. 2d 624, 634, 317 N.W.2d 458 (1982) (citing *Mitchell*, 84 Wis. 2d at 336). The *O'Brien* Court concluded that "the Confrontation Clause does not apply to preliminary examinations." *O'Brien*, 354 Wis. 2d 753, ¶ 30.

This 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). Zamzow cites *Melendez-Diaz* for the proposition that the paradigmatic case identifies the core of the right to confrontation. Zamzow's brief 13. The *Melendez-Diaz* Court did hold 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," violated the Confrontation Clause under *Crawford*. *Id.* at 307. But Zamzow misses the *Melendez-Diaz* Court's statement most relevant to this case. In addressing a contention in the dissenting opinion, the majority opinion 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 (emphasis added). The thrust of this footnote is that it is the use of out-of-court statements at trial which renders the declarant of those statements, witnesses against the accused. The Supreme Court said as much in *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705, 2716 (2011), "when the State elected to introduce [the declarant's affidavit at trial, the declarant] became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way." These cases make clear that only out-of-court statements introduced at trial make the declarant a witness within the meaning of the Sixth Amendment.

One could correctly substitute in the *Melendez-Diaz* Court's footnote, "probable cause" or "reasonable suspicion" for "chain of custody." It is the State's obligation to establish reasonable suspicion for the stop, but reasonable suspicion for the stop does not establish the guilt or innocence of the defendant. Probable cause or reasonable suspicion for a search or a seizure 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 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.").

The court of appeals correctly concluded that Zamzow's right to confront the witnesses against him encompassed only the trial to determine his guilt or innocence. This Court should affirm the court of appeals on the same basis.

II. 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 non-testifying 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 points to the "primary purpose of the interrogation" test that a statement is testimonial when "'the primary purpose is to establish or prove past events potentially relevant to later criminal

prosecution.'" Zamzow's brief 23 (quoting *Davis v. Washington*, 547 U.S. 813 (2006)). 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).

Davis did announce "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) (emphasis added). "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.

If this Court applies the primary purpose test to officer Birkholz's statement to Zamzow, depicted 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. It is officer Birkholz's statement to Zamzow informing him of the reason he had stopped his vehicle. It is a straightforward statement of fact. 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), not in an interrogation room.

On this record, at the time he made the statement, officer Birkholz did not know whether or not Zamzow was guilty of anything more than a minor civil 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 testimony. 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 to bolster the test results.

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 officer 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 spends considerable argument addressing the possible cross-examination his attorney might have conducted had officer Birkholz testified at the suppression hearing. That argument is irrelevant in determining whether officer Birkholz's statement is testimonial. The question of whether the statement is testimonial turns on the circumstances under which the statement is made rather than its content. *See Clark*, 135 S. Ct. at 2180 (quoting *Bryant*, 562 U.S. at 358) (stating the inquiry is "in light of all the circumstances, viewed objectively, [was] the 'primary purpose' of the conversation … to 'creat[e] an out-of-court *substitute for trial testimony*.'") (emphasis added).

But more importantly, Zamzow's argument misdirects the inquiry away from whether the purpose of the conversation was to create an out-of-court substitute for trial testimony to addressing whether the video shows Zamzow crossed the center line. Even so, his argument is flawed because the question is whether officer Birkholz had a reasonable suspicion that Zamzow crossed the center line,

not whether Zamzow actually did cross the center line. *See State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143 (holding "reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops.") (footnote omitted).

"The focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of circumstances." *State v. Hogan*, 2015 WI 76, ¶ 36, 364 Wis. 2d 167, 868 N.W.2d 124 (citations and internal quotation marks omitted). There is reasonable suspicion justifying a stop if the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a traffic offense. *State v. Brown*, 2014 WI 69, ¶ 20, 355 Wis. 2d 668, 850 N.W.2d 66 (citations and internal quotation marks omitted).

The appropriate question is not whether Zamzow actually crossed the center line but whether officer Birkholz believed Zamzow crossed the center line, and whether officer Birkholz's belief was a reasonable one. 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" (80:26). The fact that the court could observe that the video showed Zamzow's tires upon or even very close to the center of the roadway sufficiently demonstrates officer Birkholz's

belief that Zamzow had crossed the line to be reasonable. The beginning of Chief Justice Roberts' opinion in *Heien v. North Carolina*, ___ U.S ___, 135 S. Ct. 530, 534 (2014), illustrates the point:

> The Fourth Amendment prohibits "unreasonable searches and seizures." Under this standard, a search or seizure may be permissible even though the justification for the action includes a reasonable factual mistake. An officer might, for example, stop a motorist for traveling alone in a high-occupancy vehicle lane, only to discover upon approaching the car that two children are slumped over asleep in the back seat. The driver has not violated the law, but neither has the officer violated the Fourth Amendment.

Even if officer Birkholz did not correctly perceive Zamzow's driving or could not tell where the center line was because of its absence, these things do not render officer Birkholz's belief that he had seen Zamzow cross the center line unreasonable. The circuit court's factual finding, even if not conclusively establishing Zamzow did cross the center line, give officer Birkholz a "reasonable suspicion" that Zamzow had committed a traffic offense.

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

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

In the alternative, Zamzow argues that this Court should hold that due process should require confrontation and cross-examination at suppression hearings. He contends

that because a suppression hearing turns on historical facts, due process requires confrontation and cross-examination.

"(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). "Accordingly, resolution of the issue whether the … procedures provided … are constitutionally sufficient requires analysis of the governmental and private interests that are affected." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citing *Arnett v. Kennedy*, 416 U.S. 134, 167-68 (1974)) (Powell, J., concurring in part). "[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." *United States v. Raddatz*, 447 U.S. 667, 679 (1980).

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, $4,995. *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;[9] 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 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, Rules 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

[9] 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 United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974).

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 with 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.

As the *Brinegar* Court observed, the use of ex parte affidavits and written testimony finds long historical support in determining probable cause under the Fourth Amendment. *Brinegar*, 338 U.S. at 174 n.12. And the *Gerstein* Court explicitly rejected the need for cross-examination for the probable cause determination required by the Fourth Amendment. Given the historical use of affidavits and testimony not subject to cross-examination in issuing search and arrest warrants in the first place, and *Gerstein's* rejection of cross-examination in a hearing to determine probable cause for detention, it is difficult to see how determining that issue of probable cause for a traffic stop at a suppression hearing offends "fundamental fairness."

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. He relies on *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), to claim "[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." Zamzow's brief 26-27. But Zamzow's implication that *Goldberg v. Kelly* always requires confrontation and cross-examination whenever important decisions turn on questions of fact is wrong. Confrontation and cross-examination is not required at sentencing.

> To aid a judge in exercising this discretion intelligently the New York procedural policy encourages him to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities. The sentencing judge may consider such information even though obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine.

Williams v. New York, 337 U.S. 241, 245 (1949); s*ee also Williams v. Oklahoma*, 358 U.S. 576, 584 (1959). Confrontation and cross-examination are not constitutionally required for loss of "good time." *See Wolff v.*

McDonnell, 418 U.S. 539, 568 (1974) ("[T]he Constitution should not be read to impose [the procedure of confrontation] at the present time and that adequate bases for decision in prison disciplinary cases can be arrived at without cross-examination."). And at a revocation hearing, a parolee or probationer has only a limited right to confrontation and cross-examination. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (finding "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)[.]"). *See also United States v. Cardenas,* 784 F.2d 937, 938 (9th Cir. 1986) (rejecting contention that due process requires a defendant at a detention hearing to be afforded the right to confront and cross-examine witnesses; government may proceed by proffer).

It is also noteworthy that in *Ohio v. Clark*, 576 U.S. ___, 135 S. Ct. 2173, 2179 (2015), 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." *Id.* at 2183. If fundamental fairness permits out-of-court statements for which no cross-examination may be had in a trial deciding guilt, then fundamental fairness cannot 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 that due process requires confrontation and cross-examination at suppression hearings.

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 Madison, Wisconsin, this 26th day of April, 2016.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 8,979 words.

Dated this 26th day of April, 2016.

_____
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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 this 26th day of April, 2016.

_____
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