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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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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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

The state's argument for why the Confrontation Clause does not apply at suppression hearings can be boiled down to three reasons: (1) The Supreme Court has already held that it does not; (2) the Confrontation Clause was adopted in response to the practice of using *ex parte* affidavits at trial; and (3) the reliability of the government's witnesses are not at issue at suppression hearings. However: (1) while the Supreme Court has noted the importance of the confrontation right at trial, it has assiduously avoided using language limiting that right to trial; (2) the rejection of the use of *ex parte* affidavits at trial is "the core of the right to confrontation, not its limits," ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 315 (2009); and (3) the reliability of government officials is very much an issue at suppression hearings.

But before diving into each of the state's arguments, Zamzow notes what is conspicuously absent from the state's response. First, the state totally ignores that the Supreme Court has already held that suppression hearings are tantamount to trials, in both form and importance, and for that reason recognized that the Sixth Amendment's Public Trial Clause applies at suppression hearings. ***Waller v. Georgia***, 467 U.S. 39, 46-47 (1984). The state offers no explanation for why the Public Trial Clause but not the Confrontation Clause applies at suppression hearings, even though both Clauses

serve the same purpose: to increase the reliability of witness testimony. Zamzow Br. 16-17.

Second, the state fails to reckon with the stark implications of a lack of any confrontation rights at suppression hearings: they would not be "hearings" at all, as the state could always shield its officials from scrutiny by submitting their written reports to the court regardless of the official's availability. Zamzow Br. 10, 13, 18-20. This would be entirely antithetical to the adversarial legal system that is the common law tradition and that is guaranteed by our constitution. ***Melendez-Diaz***, 557 U.S. at 315; ***Crawford v. Washington***, 541 U.S. 36, 61-62 (2004).

A. The Supreme Court has not limited the Confrontation Clause to trials.

As Zamzow anticipated, the state relies on a series of Supreme Court cases discussing the importance of the Confrontation Clause at trial to suggest that the Court has already held that the right only applies at trial. *Compare* Zamzow Br. 13. *with* State Br. 8-11. However, the Court has never actually declared the Confrontation Clause only applies at trial. Instead, the Court has carefully used language to avoid such a cramped reading of its holdings. In ***Mattox v. United States***, 156 U.S. 237, 242-43 (1895), the Court observed that the "*primary* object" – not the "exclusive" object – of the Confrontation Clause was to prevent convictions based on depositions and *ex parte* affidavits. Similarly, in ***California v. Green***, 399 U.S. 149, 157 (1970), the Court said the right to confront witnesses at trial was the "core" of the Sixth Amendment right, not the "extent" of that right. The closest the state gets is in footnote 10 of the plurality opinion in ***Pennsylvania v. Ritchie***, 480 U.S. 39, 54 n. 10 (1987) (plurality), where Justice Powell simply observes

that the Court had not yet recognized a Confrontation Clause violation prior to trial. The state fails to recognize that the case was actually decided on due process grounds, 480 U.S. at 55-61, that a fifth justice expressly refused to join the plurality because it suggested that the confrontation clause did not apply pre-trial, ***id***. at 61-62 (Blackmun, J., concurring in part and concurring in the judgment), and that the remaining judges would have dismissed the case on procedural grounds. ***Id***. at 72-73 (Stevens, J., dissenting). Zamzow Br. 14-15.

The state fails to acknowledge that the Court is referring to the defendant's trial in each instance simply because the issue arose in the context of the defendant's trial. ***See, e.g., Crawford***, 541 U.S. at 65-67. Zamzow Br. 13. Indeed, in many of the cases, the Court refers specifically to the importance of the confrontation right at *jury* trials, even though the Clause clearly applies at both jury and bench trials. ***See, e.g., Barber v. Page***, 390 U.S. 719, 725 (1968) (holding that the confrontation right encompasses "the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."); ***Delaware v. Fensterer***, 474 U.S. 15, 19 (1985); ***Davis v. Alaska***, 415 U.S. 308, 317 (1974). Of course, in each instance the Court is referring to the "jury" not because the Confrontation Clause only applies at jury trials and not bench trials, but because in those cases the confrontation issue arose in the context of a jury trial.

The state's attempt to explain away ***McCray v. Illinois***, 386 U.S. 300, 305 (1967) by comparing it to ***Smith v. Illinois***, 390 U.S. 129 (1968), actually supports Zamzow. In each case, whether there was a Confrontation Clause violation turned on whether the defendant was able to fully cross-examine the witness about the issue to be decided by the tribunal. In ***McCray***, the issue at the suppression hearing was

whether police officers had reasonably relied upon an informant to arrest the defendant, not whether the informant's accusations were actually true. Thus, there was no confrontation violation where the officers were subject to cross-examination at the hearing, but the informant was not. In ***Smith***, an informant testified pseudonymously about the factual issue to be decided at trial: whether the defendant had sold drugs to the witness. 390 U.S. at 129-131. However, allowing the witness to testify without revealing his true identity violated the defendant's confrontation right, because it prevented the defendant from exploring the witness's credibility. ***Id***. at 131-32. Zamzow, unlike McCray, was unable to cross-examine the arresting officer at the suppression hearing.

The state's attempt to equate Fourth Amendment suppression hearings with statutory preliminary examinations is off the mark. The Wisconsin cases declining to recognize a constitutional (as opposed to statutory) confrontation right at preliminary hearings relied upon ***Gerstein v. Pugh***, 420 U.S. 103 (1975). ***See State v. O'Brien***, 2014 WI 54, ¶¶ 25-26, 354 Wis. 2d 753, 850 N.W.2d 8; ***Mitchell v. State***, 84 Wis. 2d 325, 336, 267 N.W.2d 349, 354 (1978). In ***Gerstein***, the Court determined that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest[,]….and this determination must be made by a judicial officer either before or promptly after arrest." 420 U.S. at 114, 125. Whether the determination is made prior to arrest with an arrest warrant, or after an arrest in what some states term a "preliminary hearing," the determination may be made "by a magistrate in a nonadversary proceeding on hearsay and written testimony[.]" ***Id***. at 120. The Court observed that some states may include statutory rights in such post-arrest "preliminary hearings" above and beyond what the Fourth Amendment

requires. ***Id***. at 123-124. The Wisconsin Supreme Court subsequently determined that the preliminary hearing under Wis. Stat. § 970.03 was the kind of informal preliminary hearing contemplated in ***Gerstein***, and so could be determined on the basis of hearsay evidence without violating the constitution. ***O'Brien***, 2014 WI 54, ¶ 29.

Suppression hearings, however, are not statutory in nature. They are constitutional, stemming from Fourth Amendment rights. Further, the Supreme Court has recognized that suppression hearings closely resemble trials, both in form and importance. ***Waller***, 467 U.S. at 46-47. Indeed, that is why the Court extended the Sixth Amendment right to a "public trial" to suppression hearings, even though the text of the right is limited to "trial[s]." Again, the state makes no attempt to explain why the Public Trial Clause, but not the Confrontation Clause, applies at suppression hearings. Zamzow Br. 16-17.

The state also reads too much into footnote 1 of ***Melendez-Diaz***. 557 U.S. at 311, n. 1. The Court is simply clarifying that while the Confrontation Clause requires that chain of custody – if at issue – must be established by live witnesses, the government does not have to call as a witness "everyone who laid hands on the evidence." ***Id***. This is entirely consistent with Zamzow's position, that reasonable suspicion and probable cause must be proved by live witnesses. Zamzow does not contend that the state has to call every officer tangentially related to a stop or seizure. And again, because ***Melendez-Diaz*** arose in the context of a trial it is only natural that the Court would refer to the importance of the right at trial.

Zamzow reiterates his analysis of ***State v. Frambs***, 157 Wis. 2d 700, 702 (Ct. App. 1990) and ***State v. Jiles***,

2003 WI 66, 262 Wis. 2d 457, 477, 663 N.W.2d 798, 808, found in his initial brief. Zamzow Br. 21-22. Finally, the federal and state cases relied upon by the state suffer from the same logical fallacy advanced by the state in this case, that the Supreme Court's emphasis of the importance of confrontation at trial means that the confrontation right *only* applies at trial. State Br. 17-18, 25-26.

B. The Confrontation Clause is not limited to the "Paradigmatic Case."

The state also suggests that the Confrontation Clause was meant only to ban the practice of trial by *ex parte* affidavits, as infamously used in Sir Walter Raleigh's trial. State Br. 19-20, citing ***Crawford***, 541 U.S. at 42-44, 50-51. However, the Court referred to this as the "principal evil at which the Confrontation Clause was directed," not the only "evil." ***Id.*** at 50; ***Melendez-Diaz***, 557 U.S. at 315 ("the paradigmatic [Raleigh] case identifies the core of the right to confrontation, not its limits.") The Raleigh case "provoked such an outcry precisely because it flouted the deeply rooted common-law tradition of live testimony in court subject to adversarial testing." ***Melendez-Diaz***, 557 U.S. at 315 (quotation marks and citations omitted).

Moreover, the Court has recognized that the Sixth Amendment – which refers to "criminal prosecutions," after all – confers rights at criminal proceedings that were unknown at the time of the founding. Again, the Court has recognized that the Public Trial Clause applies at suppression hearings. ***Waller***, 467 U.S. at 46-47. The unanimous court did not feel constrained to apply the Public Trial Clause to trials alone, even though closed suppression hearings certainly were not the "principal evil at which the [Public Trial] Clause was directed." ***Crawford***, 541 U.S. at 50.

C. The reliability of law enforcement officer's is an issue in suppression hearings

The state does not explain why the benefits of confrontation would not accrue at a suppression hearing. Zamzow Br. 19-20. Confrontation exposes the witness to perjury for false testimony, allows learned counsel to ask important questions through cross-examination, and gives the factfinder an opportunity to see and hear the witness's responses firsthand. ***Green***, 399 U.S. at 158.

The state argues at one point that the "Court's analysis in [***Davis***] focuses on the jury's need to make an informed judgment about credibility, a concern not present at pre-trial [suppression] hearings…." State Br. 10. It is not clear if the state is arguing that the Confrontation Clause does not apply at suppression hearings because the factfinder is a judge rather than a jury, or if the state is arguing that the "credibility" of the state's witnesses is never an issue at suppression hearings. If the state is arguing that the presence of the jury is necessary for the confrontation clause to apply, that is an unprecedented position that would deny the defendant of confrontation rights in every bench trial.

An argument that credibility is never an issue at a suppression hearing would be no less shocking. If 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, imagine their reaction if ex parte testimony could be credited because it was *given* by a government official. Our entire system of government is predicated on the observation that "[i]f men were angels, no government would be necessary." THE FEDERALIST NO. 51 (James Madison). Indeed, the credibility of the officer may be the only issue at

the suppression hearing, such as at "***Franks***" suppression hearings, where the defendant may show that the affiant (usually a law enforcement official) intentionally or recklessly included false statements in a search warrant application. ***Franks v. Delaware***, 438 U.S. 154, 156-157 (1978).

II. Officer Birkholz's Accusation was a Testimonial Statement Barred by the Confrontation Clause.

The state argues that even if the Confrontation Clause had applied at the suppression hearing, it was not violated because the officer's accusation that Zamzow crossed the centerline was not "testimonial." State Br. 28-30. The state points to the fact that the statement occurred on a "well-lit" highway, not an interrogation room.

This might matter if the statement had been an accusation made *to* an officer by a disinterested witness during a traffic stop. But this was an accusation *by* an officer. The state does not dispute that the officer certainly knew that he was being recorded, or that the contents of the recording – such as Zamzow's response – might become evidence at any trial that might result from the stop. Zamzow Br. 23. Indeed, if this court holds that an officer's recorded statements during a roadside traffic stops are nontestimonial as a matter of law, then that would give the government a convenient way of avoiding the Confrontation Clause at suppression hearings and trials: simply make the accusation while making the stop.

Zamzow's discussion of the various questions that could have been asked of Officer Birkholz during cross-examination illustrates why the Confrontation Clause mattered in this case: the only evidence that there was a basis for the stop was the officer's accusation, and there were reasons to doubt it. Zamzow Br. 24-26. The state

conspicuously fails to dispute that the video does not show a traffic violation, or that cross-examination may have caused the court to conclude that the state failed to meet its burden of proof at the hearing.

The state also suggests that the question of whether Zamzow actually crossed the centerline is irrelevant, because all that matters is whether Officer Birkholz reasonably believed that he had. State Br. 32. However, it is impossible to determine what Officer Birkholz actually believed, and whether it was reasonable, without subjecting him to cross-examination. As laid out in Zamzow's initial brief, there are numerous questions that could have been asked of Birkholz regarding what Officer Birkholz actually saw, and whether it constituted a traffic violation. Zamzow Br. 24-26.

Even if the state is correct, that Officer Birkholz's accusation was nontestimonial, that is not the end of the Confrontation Clause analysis. This court recognized that the Confrontation Clause test articulated in ***Ohio v. Roberts***, 448 U.S. 56, 66 (1980) – 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 – survived ***Crawford*** with respect to nontestimonial statements. ***State v. Manuel***, 2005 WI 75, ¶60, 281 Wis. 2d 554, 586, 697 N.W.2d 811, 826 ("we join the jurisdictions that have used ***Roberts*** to assess nontestimonial statements"). The state has not endeavored to explain how Officer Birkholz's accusation meets the ***Roberts*** test.

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

The state's Due Process argument suffers from the same basic defect as its Confrontation Clause argument: it fails to acknowledge that the Supreme Court has already recognized the special role of suppression hearings in modern criminal procedure as tantamount to trials in both form and function. ***Waller***, 467 U.S. at 46-47. For example, suppression hearings are subject to the Public Trial Clause. ***Id***. A suppression hearing is not an initial determination of probable cause for detention, which ***Gerstein*** held may be made without a hearing via ex parte affidavits. 420 U.S. at 114, 125. Even if ***Waller*** and ***Gerstein*** were inconsistent, Waller would control as it is the more recent case.

Further, while ***McCray*** did hold that the defendant's due process rights were not violated at the suppression hearing, it did so after noting that:

> The 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. Indeed, the Court's actual Due Process holding was that "[n]othing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every such hearing to assume the arresting officers are committing perjury." ***Id***. ***United States v. Matlock***, 415 U.S. 164 (1974) was not a Due Process case, and simply notes ***McCray***'s holding in passing. *See also* Zamzow Br. 14.

While the Supreme Court may not have recognized a due process right to cross-examine witnesses at a sentencing hearing, it has recognized a due process right to be sentenced on accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶¶10-11, 291 Wis. 2d 179, 185 (citing ***United States v. Tucker***, 404 U.S. 443, 447 (1972)). Further, sentencing occurs after trial or a guilty plea, and with all the attendant due process rights presumably followed.

Finally, the state refers to a recent Supreme Court case holding that admission of a three-year's statements to a teacher did not violate the Confrontation Clause. ***Ohio v. Clark***, 576 U.S. ____, 135 S. Ct. 2173, 2183 (2015). The Court mentions in passing that admission of such testimony was not "fundamentally unfair," but at no point suggests that the defendant had raised, or that the Court was deciding, a Due Process claim. ***Id***.

CONCLUSION

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

Dated this 10th day of May, 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 2,986 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 10th day of May, 2016.

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