No.

In the Supreme Court of the United States

JEFFREY L. MOESER,
PETITIONER,

v.

STATE OF WISCONSIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fourth Amendment demands that "no Warrants shall issue[] but upon probable cause, *supported by Oath or affirmation*." U.S. Const. Amend. IV (emphasis added). Born out of the founding generation's hatred of general warrants, this requirement is an essential protection of individual liberty. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 558 (1999). Yet this Court has never addressed what this provision requires. Lacking guidance, the federal courts of appeals and state high courts have split four ways over what counts as an "Oath or affirmation" and apply this central constitutional protection against government overreach in conflicting ways.

The question presented is whether a sheriff (1) who indisputably did not make an oral or written oath or affirmation to anyone and (2) who falsely signed a pre-printed affidavit stating that he had been "first duly sworn on oath," (3) which was in turn notarized by a fellow law enforcement officer who also falsely asserted in the jurat that the affidavit had been "sworn to," "supported [the warrant application] by Oath or affirmation" because, as the Wisconsin Supreme Court held, "the [original] officer was impressed with th[e] obligation" to tell the truth. App., *infra*, 4a-5a (quoting *State* v. *Tye*, 636 N.W.2d 473, 478 (2001)) (internal quotation marks omitted).

RELATED PROCEEDINGS

1. *State* v. *Moeser*, No. 2017CF000515 (Portage Cnty. Cir. Ct. Nov. 15, 2019) (order denying motion to suppress).
2. *State* v. *Moeser*, No. 2017CF000515 (Portage Cnty. Cir. Ct. July 10, 2019) (judgment of conviction).
3. *State* v. *Moeser*, No. 2019AP2184-CR (Wis. Ct. App. June 24, 2021) (opinion affirming circuit court's denial of motion to suppress).
4. *State* v. *Moeser*, No. 2019AP2184-CR (Wis. Nov. 23, 2022) (opinion affirming court of appeals' affirmance of circuit court's denial of motion to suppress).

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The opinion of the Supreme Court of Wisconsin (App., *infra*, 1a-54a) is reported at 982 N.W.2d 45. The opinion of the Wisconsin Court of Appeals (App., *infra*, 55a-94a) is unpublished but is available at 2021 WL 2589158. The Circuit Court of Portage County's order denying defendant's motion to suppress (App., *infra*, 102a-103a) and its oral statement of reasons for it (App., *infra*, 111a-115a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on November 23, 2022. On February 9, 2023, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including April 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT

A. Factual Background

In October 2017, Sergeant Steven Brown, a deputy of the Portage County, Wisconsin, Sheriff's Office, stopped petitioner Jeffrey Moeser for speeding. App., *infra*, 6a; Resp. Wis. Br. 6. After stopping him, Sergeant Brown performed a record check, which showed that Moeser had previously been convicted of driving while intoxicated. App., *infra*, 6a. Sergeant Brown then tested him, *ibid.*, and the preliminary breathalyzer test registered a blood alcohol content greater than .02 percent, the limit to which petitioner was subject under Wisconsin law. *Ibid.*; see Wis. Stat. § 340.01(46m)(c) (2016). Sergeant Brown then arrested Moeser for suspected driving over his .02 percent limit and drove him to a local hospital for a blood draw. App., *infra*, 6a.

At the hospital, petitioner declined to consent to a blood draw. App., *infra*, 6a. Sergeant Brown therefore drew up an application for a search warrant and a supporting affidavit. *Ibid.* He prepared both "in the presence of Lieutenant Jacob Wills, a notary public," *ibid.*, who worked alongside Sergeant Brown as a sheriff for Portage County. Pet. Wis. Br. 2.

Sergeant Brown's affidavit consisted of pre-printed text interspersed with blank spaces in which he handwrote information. See App., *infra*, 6a-7a, 57a-58a. At the top of the affidavit's first page, Sergeant Brown wrote his own name on a blank line that preceded the pre-printed language, "being first duly sworn on oath, deposes and says." *Id.* at 6a, 57a. The

affidavit's second paragraph stated, in pre-printed text, "I have personal knowledge that the contents of this affidavit are true." *Id.* at 6a. And Sergeant Brown "personally penned in the probable cause section" of the affidavit that followed. *Id.* at 7a. Finally, Sergeant Brown signed the affidavit's last page. *Id.* at 110a. Sergeant Brown's signature is located "immediately above the jurat" that prefaces the blank line reserved for the issuing official's signature. *Id.* at 7a. The jurat reads, "Subscribed and sworn to before me." *Ibid.*

After Sergeant Brown completed the affidavit, Lieutenant "Wills dated and signed the jurat, [which appeared immediately below Sergeant Brown's signature,] and * * * affixed his notary seal." App., *infra*, 58a. Lieutenant Wills then "presented the completed warrant to the on-call court commissioner, who authorized the warrant." *Ibid.* "Moeser's blood was drawn pursuant to the warrant and revealed a BAC" in excess of .02 per cent. *Id.* at 7a.

Notwithstanding the language in Sergeant Brown's affidavit asserting that he had been "first duly sworn," App., *infra*, 6a, to which Sergeant Brown subscribed his name, "[i]t is undisputed that Sergeant Brown made no oral oath or affirmation, either before or after signing the affidavit. It is also undisputed that he made no such oath or affirmation before the judicial officer." *Id.* at 7a. Additionally, Lieutenant "Wills subsequently completed a supplemental report describing his recollections," in which he stated: "I notarized Sgt. Brown's signature certifying his true and accurate *identity*. . . . *Following the established*

procedure for obtaining an OWI search warrant, I did not administer an oath, nor did Sgt. Brown swear to me the facts contained in the Affidavit." *Id.* at 58a-59a (omission in original; emphasis added). Not requiring an oath "was the 'established policy' of the Portage County Sheriff[']s Office." *Id.* at 59a.

B. Judicial Proceedings

Respondent filed a criminal complaint charging petitioner with committing two felony offenses of operating a vehicle while intoxicated. App., *infra*, 7a; see Wis. Stat. §§ 346.63(1)(a) and (b) (2016). Before trial, "Moeser filed a motion to suppress the blood test results, arguing that the warrant did not satisfy constitutional requirements because * * * Brown was not placed under oath regarding the statements made in his affidavit." App., *infra*, 58a.

The Portage County, Wisconsin, Circuit Court "heard [petitioner's] motion on stipulated facts[,] orally denied [his] motion to suppress," and "subsequently memorialized that ruling by written order." App., *infra*, 8a; see *id.* at 102a-103a (order denying motion to suppress). The court reasoned that "the nature of the affidavit and warrant documents indicated that the officer realized he was swearing to the truth of what he said," thus satisfying the oath requirement.[1] App., *infra*, 114a.

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[1] For clarity and consistency, the petition refers to the constitutional injunction that "no Warrants shall issue, but upon probable cause, *supported by Oath or affirmation*," U.S. Const. Amend. IV (emphasis added), simply as the "oath requirement" and to oaths and affirmations simply as "oaths."

A divided Wisconsin Court of Appeals affirmed. App., *infra*, 56a. It too focused on Sergeant Brown's subjective intent and some accompanying formalities. See *id.* at 68a-70a. Applying a standard developed to determine when claims brought against state employees were adequately "sworn to," see *id.* at 68a (discussing *Kellner* v. *Christian*, 539 N.W.2d 685 (Wis. 1995), and Wis. Stat. § 893.82(5) (2019-20)), the court "explained that '[t]he essentials of an oath are: (1) a solemn declaration; (2) manifestation of intent to be bound by the statement; (3) signature of the declarer; and (4) acknowledgement by an authorized person that the oath was taken.'" *Id.* at 68a-69a (quoting *Kellner*, 539 N.W.2d at 688) (brackets in original). To the court, Sergeant Brown's "writing his name on the blank space for 'name of Affiant' preceding the statement 'being first duly sworn on oath, deposes and says'" qualified as "ma[king] a 'solemn declaration.'" *Id.* at 69a. Sergeant Brown "manifested an 'intent to be bound by the statement,'" moreover, in three ways: by writing his name in that blank space; by "stating in his affidavit: 'I have personal knowledge that the contents of this affidavit are true'"; "and by signing the affidavit in the presence of a notary public" above the "notary jurat indicating that the affidavit's contents were '[s]ubscribed and sworn to.'" *Ibid.* (brackets in original). Lastly, Sergeant Brown signed the affidavit and Lieutenant Wills acknowledged it. *Id.* at 69a-70a. Thus, the majority held "that the four *Kellner* factors support the conclusion that the affidavit and warrant satisfied the oath or affirmation requirement." *Id.* at 70a.

Judge Kloppenburg dissented. She began by noting that

> It is undisputed that: (1) contrary to the face of the search warrant affidavit, the officer seeking the warrant did not "make an oath or affirmation as to the truthfulness of the contents of the" affidavit before the officer who notarized the affidavit * * * and (2) the officer seeking the warrant did not make such an oath or affirmation before the court commissioner who issued the warrant. It is also undisputed that the officers followed a department policy that dispenses with the oath or affirmation requirement for a valid search warrant.

App., *infra*, 79a (citation omitted). She then looked to a different part of *Kellner* for the test: "In order to constitute a valid oath, there must be in some form an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath." *Id.* at 86a (quoting *Kellner*, 539 N.W.2d at 688-689). The *Kellner* court, she argued, drew a clear distinction between an oath or affirmation itself and a statement asserting that an oath or affirmation previously occurred. See *id.* at 87a (noting "*Kellner* reflects [the] distinction between evidence in an affidavit that an oath was administered and the administration of the oath itself"). The latter, however, is not a substitute for the former: "[m]erely citing in a piece of paper that one has accepted upon one's self an oath is insufficient to constitute a swearing." *Id.* at 86a (quoting *People* v. *Coles*, 535 N.Y.S.2d 897, 903 (N.Y. Sup. Ct. 1988)). "A jurat containing the words 'being duly sworn,'" she noted,

"is evidence of the fact that an oath was in fact properly administered. However, such jurat is neither part of the oath nor conclusive evidence of its due administration and may be attacked and shown to be false." *Ibid.* (quoting *Coles*, 535 N.Y.S.2d at 903).

Judge Kloppenburg pointed out not only that the majority mistook evidence that an oath had been taken with the act of taking an oath itself, but also that the statements in Sergeant Brown's affidavit upon which the majority relied—that Sergeant Brown was "first duly sworn on oath" and that the affidavit was "[s]ubscribed and sworn to before" Lieutenant Wills—"ha[d] been *proven* to be inaccurate." App., *infra*, 80a n.1 (emphasis added). Here "[i]t is undisputed that Sergeant Brown made no oral oath or affirmation, either before or after signing the affidavit," *id.*at 7a, while the official who purportedly administered the oath confirmed in writing that he "did not administer an oath" and that Sergeant Brown did not "swear to [him] the facts contained in the Affidavit," *id.* at 59a. Judge Kloppenburg thus disagreed with the majority that Sergeant Brown could be "reminde[d] of the importance and solemnity of the search warrant application process * * * here, where the statements that the contents had been sworn to were not accurate and where no such swearing had been made or administered." *Id.* at 91a n.4.

A divided Wisconsin Supreme Court affirmed. App., *infra*, 32a-33a. The majority rejected the appellate court's reliance upon the *Kellner* test, *id.* at 16a-17a, and adopted instead a purpose-based test. The majority emphasized no fewer than nine times

that "[t]he *purpose* of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth." *Id.* at 5a (quoting *State* v. *Tye*, 636 N.W.2d 473, 540-541 (Wis. 2001)) (brackets in original; emphasis added). Surveying case law, it determined "that no particular 'magic words' or specific procedures are constitutionally required in order for an individual to be deemed to be under oath." *Id.* at 23a. What matters is whether "the facts or circumstances indicate that the oath or affirmation was administered" in a manner that achieves its purpose. *Id.* at 24a. The court held they did: "The facts in this case * * * support that Sergeant Brown was sufficiently impressed with his duty to tell the truth." *Id.* at 29a.

In particular, the court held, "[t]he language in Sergeant Brown's affidavit, his signature, and Lieutenant Wills' notarization satisfy this requirement." App., *infra*, 30a. The court first noted that "Sergeant Brown wrote his name below the title, 'AFFIDAVIT,' and next to the words, 'being first duly sworn on oath, deposes and says,' both of which impressed [sic] that he was signing a sworn statement." *Ibid.* "Just two paragraphs down," the court continued, "the affidavit contained a statement expressly affirming that 'the contents of this affidavit are true.' Sergeant Brown completed the affidavit by verifying its contents with his signature just above the jurat, which again reminded him that the document was 'sworn.'" *Ibid.* "Finally, in Sergeant Brown's presence," the court concluded, "Lieutenant Wills further impressed [sic] the seriousness of the occasion

by notarizing the affidavit. The words in the affidavit impressed Sergeant Brown with the duty to tell the truth." *Id.* at 30a-31a (footnotes omitted).

Justice Hagedorn, joined by Justice Karofsky, concurred. App., *infra*, 34a-35a. He believed that the oath "requirement is satisfied when an affiant: (1) knowingly and intentionally makes a statement; (2) affirms, swears, or declares that the information in the statement is true; and (3) does so under circumstances that impress upon the affiant the obligation to tell the truth." *Id.* at 34a. "Sergeant Brown['s] statement [that] * * * he had personal knowledge that the contents of th[e] affidavit [we]re true," he argued, satisfied the first and second requirements. *Ibid.* (internal quotation marks omitted). "And by signing the statement before a notary with knowledge it would be presented to a magistrate * * * Sergeant Brown acted under circumstances that impressed upon him the solemn obligation to tell the truth." *Ibid.* "This was enough," Justice Hagedorn thought, "to pass constitutional muster— but not by much." *Ibid.* He noted, moreover, that "the dissent offers strong counterarguments that call the sufficiency of the oath into question. In particular, the affidavit could be read to suggest a separate oath had already taken place, when the record is clear that it did not." *Id.* at 35a. In the end, however, he "disagree[d] with [the dissent's] ultimate conclusion." *Ibid.*

Justice Bradley, joined by Justice Dallet, dissented. App., *infra*, 36a, 54a. She began by asking how under the majority's own test Sergeant Brown could have been "'impressed with the duty to tell the truth'" when

"the first sentence of [his] affidavit [was] false." *Id.* at 36a (internal citation omitted). "[I]n this case," she noted, "it is undisputed that the first sentence of Sergeant Brown's affidavit was not true. It says Sergeant Brown was 'first duly sworn on oath.' He wasn't." *Ibid.*

Scrutinizing the Framers' debates surrounding adoption of the oath requirement in the Fourth Amendment, the original public meaning of "Oath or affirmation," and early judicial interpretations of the oath requirement, she instead concluded that, "from the early days of the republic," App., *infra*, 48a, an oath was understood as "an 'act' done before a judicial officer," *id.* at 46a. Indeed, she argued, the Wisconsin Supreme Court itself had previously defined an oath as "an unequivocal and *present act* by which the affiant consciously takes upon himself the obligation of an oath." *Id.* at 51a (quoting *Kellner*, 539 N.W.2d at 689 (first emphasis added)). Although Justice Bradley "agree[d] with the majority that an oath is a matter of substance, not form," she emphasized that "this does not mean that law enforcement can dispense with the act of an oath altogether and still call it an oath." *Id.* at 53a. To her, "Sergeant Brown's 'oath' was deficient as a matter of substance because there was no actual oath taken by [him.]" *Id.* at 53a-54a. "Indeed," she argued,

> there was no "oath" "taken" "before" anyone. There was no attestation, much less an attestation before a magistrate. Because Sergeant Brown did not commit any act before any other person that would indicate he was under oath at any point in the

> process of drafting, signing, or notarizing the affidavit, I conclude that he was not under oath for purposes of the Fourth Amendment.

Id. at 54a.

REASONS FOR GRANTING THE PETITION

I. Lacking Direction From This Court, The Federal Courts Of Appeals And State High Courts Have Split Four Ways Over What The Fourth Amendment's Oath Requirement Means

This Court has never discussed what the oath requirement means. *State* v. *Gutierrez-Perez*, 337 P.3d 205, 208 (Utah 2014) ("[T]he United States Supreme Court has also not yet addressed th[is] issue."); see also Andrew H. Bean, Comment, *Swearing by New Technology: Strengthening the Fourth Amendment by Utilizing Modern Warrant Technology While Satisfying the Oath or Affirmation Clause*, 2014 BYU L. Rev. 927, 938 (2014) ("The Supreme Court has never elaborated on what an *Oath* means."). Absent any guidance by this Court, courts of appeals and state high courts have struggled to give content to the Constitution's text and have repeatedly expressed uncertainty about the meaning of the oath clause. See, *e.g.*, *Gutierrez-Perez*, 337 P.3d at 209 ("[T]he text of the Fourth Amendment does not give any clues as to what is meant by the 'Oath or affirmation' requirement."). As a result, lower courts have fractured. Although all jurisdictions agree that traditionally administered religious oaths suffice, there is little consensus beyond that.

Many courts hold that an oath requires the creation of an obligation entailing religious, legal, or moral sanctions for making a false statement. *United States* v. *Bueno-Vargas*, 383 F.3d 1104, 1110 (9th Cir. 2004) (explaining that the individual must be "impressed with the solemnity and importance of his or her words and of the promise to be truthful, in moral, religious, or legal terms"); *Gutierrez-Perez*, 337 P.3d at 210 (same); *United States* v. *Turner*, 558 F.2d 46, 50 (2d Cir. 1977) (identifying the "theory" behind the clause as the idea that "those who have been impressed with the moral, religious or legal significance of formally undertaking to tell the truth are more likely to do so than those who have not made such an undertaking.").

The history of oaths demonstrates the importance of sanctions to encourage performance of what the oath demands. See, *e.g.*, Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America,* 70 Ohio St. L.J. 1, 4 (2009) (describing the "natural and universal custom" of oaths that "juxtapose[e] the individual's dishonest motive against his sense of moral culpability and fear of divine punishment"); Bean, 2014 BYU L. Rev. at 950 ("A careful analysis of the history of oaths * * * reveals that the oath or affirmation requirement is satisfied when the person providing testimony * * * understands that she could be charged with perjury if his or her statement is false.").

But even among jurisdictions that agree that some sanctioning mechanism is necessary, courts disagree

about which mechanisms beyond the traditionally religious are sufficient. Some courts hold that only legal mechanisms, specifically perjury, suffice. See, *e.g.*, *People* v. *Fournier*, 793 P.2d 1176, 1180 n.5 (Colo. 1990) ("[T]he test * * * is whether * * * perjury could be charged if the affiant knowingly falsified any material allegations in the affidavit."). Others hold that no legal sanction is required and that one subject to a conscience-imposed moral sanction is equally under oath. See, *e.g.*, *City of Cedar Rapids* v. *Atsinger*, 617 N.W.2d 272, 275-276 (Iowa 2000) (criticizing the perjury approach as "circular" and holding that the proper test is whether the affiant's "conscience was bound") (citation omitted).

Other courts reject altogether the idea that an oath necessarily requires some sanctioning mechanism that instills a fear of punishment in the person making a statement. Some of these courts look only to whether warrant applicants have been made to understand that it is important that they tell the truth. See, *e.g.*, *State* v. *Nunez*, 67 P.3d 831, 836 (Idaho 2003) (holding that warrant was constitutionally sufficient where officer had been reminded "that the judicial system expects and relies on truthful testimony"). But a final group of jurisdictions go further still, holding that subjective intentions or beliefs are enough to satisfy the Constitution, even without any semblance of an oath at all. See, *e.g.*, *United States* v. *Brooks*, 285 F.3d 1102, 1105 (8th Cir. 2002) ("[A] person who manifests an intention to be under oath is in fact under oath."); *Atwood* v. *State*, 111 So. 865, 866 (Miss. 1927) (holding that "[a]lthough not a word was said * * * in reference

to an oath," an oath existed "by construction" because both parties "knew an oath was necessary").

* * *

These legal standards are irreconcilable. If this Court does not intervene, this central protection of the Fourth Amendment will continue to vary from jurisdiction to jurisdiction and fail to guarantee truth-telling in some.

A. Three State Supreme Courts Hold That Making Oneself Liable To Legal Punishment For Making False Statements Constitutes An Oath

The high courts of Colorado, Georgia, and New York hold that whenever witnesses make a statement under penalty of perjury they take an oath. See *Britt* v. *Davis*, 60 S.E. 180, 180 (Ga. 1908) ("Whether an oath * * * is sufficient may be tested by the question whether a conviction for perjury or false swearing could be predicated upon it."); *Fournier*, 793 P.2d at 1180 n.5 (testing whether "the oath * * * requirement has been satisfied" by looking to whether "perjury could be charged"); *People* v. *Sullivan*, 437 N.E.2d 1130, 1133 (N.Y. 1982) (finding the oath requirement met based on the "criminal consequences of knowingly providing" a false statement).

These courts disagree among themselves over whether declarants must understand they are potentially subject to perjury charges. New York, for example, asks whether the statement-giver actually knew there were legal penalties for making a false statement. See *Sullivan*, 437 N.E.2d at 1133 ("[A]

method of verification by which the maker of the statement is first alerted to the criminal consequences of knowingly providing false information * * * and then voluntarily acknowledges his acceptance of those consequences should suffice for purposes of the constitutional mandate."). Colorado, on the other hand, looks merely to whether a perjury prosecution would be available, not to whether the declarant knew this. See *Fournier*, 793 P.2d at 1180 n.5 (requiring only that the "procedures followed were such that perjury could be charged").

B. Four Federal Circuits And Five State High Courts Hold That Making Oneself Liable To Punishment In Conscience By Creating A Moral Obligation To Tell The Truth Constitutes An Oath

The Second, Fourth, Fifth, and Ninth Circuits and the supreme courts of Iowa, Mississippi, South Dakota, Texas, and Utah hold that making oneself subject to punishment in conscience by creating a moral obligation to tell the truth amounts to an oath. See *Turner*, 558 F.2d at 50 (describing an oath or affirmation as "[e]nsuring that the witness or affiant will be impressed with the solemnity and importance of his words" by "impress[ing]" her with the "moral, religious, or legal" significance of her testimony); *Bueno-Vargas*, 383 F.3d at 1110 ("[W]hether a statement is made under oath or affirmation turns on whether the declarant * * * is impressed with the solemnity and importance * * * of the promise to be truthful, in moral, religious, or legal terms."); *United States* v. *Looper*, 419 F.2d 1405, 1407 (4th Cir. 1969)

("All that the common law requires is a form or statement which impresses upon the mind and conscience of a witness the necessity for telling the truth."); *United States* v. *Richardson*, 943 F.2d 547, 549 (5th Cir. 1991) (explaining an oath or affirmation "must be administered in a solemn manner calculated to awaken the conscience") (citation omitted); *State* v. *Carter*, 618 N.W.2d 374, 377 (Iowa 2000) ("[W]e look to see if the oath or affirmation was accomplished in such a way that the person's conscience was bound.") (internal citation omitted); *Atwood* v. *State*, 111 So. 865, 866 (Miss. 1927) ("The form of the oath is immaterial so long as it appeals to the conscience of the party making it, and binds him to speak the truth."); *Brummer* v. *Stokebrand*, 601 N.W.2d 619, 623 (S.D. 1999) ("The function of an oath is to bind the conscience of the speaker."); *Wheeler* v. *State*, 616 S.W.3d 858, 864 (Tex. Crim. App. 2021) ("An oath is any form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully.") (citation omitted); *Gutierrez-Perez*, 337 P.3d at 210 (defining an oath in part by the "moral" nature of the witness's promise).

Many, if not all, courts that have accepted this definition of an oath also accept the perjury approach. See *Bueno-Vargas*, 383 F.3d at 1110 (explaining that the "promise" of an oath can be defined in "moral, religious, or *legal* terms") (emphasis added); see also *Looper*, 419 F.2d at 1407 ("[A]ll the district judge need do is to make inquiry as to what form of oath * * * would give rise to a duty to speak the truth.").

C. Four State Supreme Courts Go Further, Holding That Individuals Are Under Oath When They Understand That It Is Important To Tell The Truth

The high courts of Connecticut, Idaho, New Hampshire, and Wisconsin hold that declarants are under oath whenever they are impressed with the importance of telling the truth. See *State* v. *Grant*, 404 A.2d 873, 877 (Conn. 1978) ("An oath * * * signifies the undertaking of an obligation to 'speak the truth.'"); *Nunez*, 67 P.3d at 836 ("The basic purpose behind an oath is to affirm the import and necessity of telling the truth."); *State* v. *Sands*, 467 A.2d 202, 223 (N.H. 1983) ("We find that the oath * * * sufficiently impressed upon the deputy sheriff his obligation to tell the truth."); App., *infra*, 5a ("[T]he constitutional guarantee is satisfied because * * * th[e] affidavit * * * impress[ed] [his] mind with [his] duty to [tell the truth].") (fourth, fifth, and sixth alterations in original).

Unlike the perjury and conscience-focused inquiries, this approach does not require that an oath entail a religious, legal, or moral sanction. See pp. 14-16, *supra*. Rather, these courts rely on the declarant's sense of responsibility to do what is required or the court expects. Thus, the Idaho Supreme Court held that an officer who took an oath at one hearing, but not in a subsequent one, still gave testimony in the second hearing "supported by * * * oath" because he had been adequately "remind[ed] * * * that the judicial system expects and relies on truthful testimony." *Nunez*, 67 P.3d at 836.

The Supreme Court of Connecticut held likewise that oath-like formalities that fail to communicate a similar responsibility to tell the truth do not represent an oath. *Grant*, 404 A.2d at 877. In *Grant*, the State of Connecticut argued that a state's attorney's "acknowledgment" on an application for a wiretap satisfied the requirement that the application be submitted under oath. *Id.* at 874. The court disagreed, holding that an "acknowledgment" constitutes "a formal statement of [a] person executing an instrument that he or she executed the instrument as a free deed and act," but does not "signif[y] the undertaking of an obligation to speak the truth." *Id.* at 877 (internal quotation marks omitted). For that reason, the court held, the attorney's acknowledgment did not satisfy the oath requirement. *Ibid.*

The Wisconsin Supreme Court followed this approach in the decision below. No oath of any kind was administered to the officer whose factual testimony supported the warrant. App., *infra*, 7a. But the court still held that the oath requirement was satisfied because the officer's affidavit "impressed [him] with the duty to tell the truth." *Id.* at 5a, 31a. The court reached this conclusion because the pre-printed affidavit form stated that the officer had been "first duly sworn," even if he had not been, and because the form stated that "the contents of this affidavit are true." *Id.* at 30a.

D. One Federal Circuit and Eleven State High Courts Hold That Individuals Who Are Not Actually Under Oath Satisfy The Oath Requirement If They Intend To Be Or Mistakenly Believe They Are Under Oath

The Eighth Circuit and the high courts of Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Nebraska, Oklahoma, South Carolina, and Washington hold that individuals' intentions and beliefs—even if wrong—can "constructively" place them under oath. But even these jurisdictions conflict. Eight states require the requisite intention or belief in both the oath-taker and the official who should have administered the oath. See *Cox* v. *State*, 261 S.W. 303, 305 (Ark. 1924) ("[I]f [he] signed the affidavit for the purpose of swearing to it, knowing that the clerk regarded his act of signing the affidavit as a method of making affirmation, * * * [he] was sworn."); *State* v. *Kemp,* 20 P.2d 499, 500 (Kan. 1933) ("[B]oth parties intended that out of [the] visit to the notary there should come what would have the effect of * * * an oath; and the court holds that * * * the legal effect of what occurred was the same as if [he] was sworn."); *Carrier* v. *Commonwealth*, 142 S.W.3d 670, 674 (Ky. 2004) ("To make a valid oath or affirmation, there must be some overt act which shows that there was an intention to take an oath or affirmation on the one hand and the intention to administer it on the other.") (citation omitted); *State* v. *Snyder*, 304 So. 2d 334, 336 (La. 1974) ("It is sufficient that both the person swearing and the officer administering the oath understand that what is done

is proper for the administration of the oath."); *Atwood*,[2] 111 So. at 866 ("Although not a word was said by either in reference to an oath, they both knew an oath was necessary, and both intended that the necessary thing should be done."); *State* v. *Privitt*, 39 S.W.2d 755, 757-758 (Mo. 1931) ("[I]t is only required that something be done in the presence of the officer which is understood by both the officer and the affiant to constitute the act of swearing"); *Farrow* v. *State*, 112 P.2d 186, 190 (Okla. Crim. App. 1941) ("[I]t was understood by both parties that said acts of the deputy fulfilled the requirements as to taking an oath, and said instrument was just as valid as though an invocation to the deity had been made."); *State* v. *Douglas*, 428 P.2d 535, 539 (Wash. 1967) ("[T]hey both knew an oath was necessary and both intended that the necessary thing should be done.") (citation omitted).

The three other jurisdictions look only to the intentions or beliefs of the warrant applicants, who, they hold, can unilaterally place themselves under oath through their state of mind. See *Brooks*, 285 F.3d at 1105 ("[A] person who manifests an intention to be under oath is in fact under oath."); *State* v. *Howard*, 167 N.W.2d 80, 87 (Neb. 1969) (holding that signing statement that one knows "must be sworn to" makes it

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[2] Although the court in *Atwood* also notes the importance of the declarant's conscience being bound, see p. 16, *supra*; *Atwood*, 111 So. at 866 ("The form of the oath is immaterial so long as it appeals to the conscience of the party making it."), the court's analysis of this point allows for it to be satisfied "by construction." See *ibid.*

"a statement under oath") (citation omitted); *State* v. *Holladay*, 112 S.E. 827, 827 (S.C. 1922) ("Q. But you didn't actually swear him? A. He knew he was swearing to it. * * * That was sufficient.").

At their most generous, these jurisdictions apply a nearly irrebuttable presumption that officers applying for search warrants are under oath, without requiring any specific act to establish that status. In *State* v. *Douglas*, for example, an officer had signed an affidavit that falsely stated "Eugene G. Steinauer (KCSO) being first duly sworn on oath deposes and says." 428 P.2d at 538. The Washington Supreme Court conceded that he "fail[ed] to comply literally with * * * the constitution" without any "adequate excuse." *Id.* at 539. Yet it held that the officer's simply reading and signing the affidavit and handing it to the magistrate "was the equivalent of an oath" because both the officer and the magistrate "knew an oath was necessary and * * * intended that the necessary thing should be done." *Id.* at 539-540 (quoting *Atwood*, 111 So. at 866). The Mississippi Supreme Court likewise held that where an officer applied for a warrant and "not a word was said by either" him or the magistrate "in reference to an oath," he was still under oath "by construction" because "[b]oth of them knew that an oath was necessary." *Atwood*, 111 So. at 866. Under this approach, believing that one should be under oath even when one knows one is not satisfies the oath requirement.

* * *

The deep conflict among jurisdictions calls for this Court's intervention. See, *e.g.*, *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995) ("Because uniformity among federal courts is important on questions of this order, we granted certiorari to end the division of authority."). Lower courts understand that the Fourth Amendment's requirement that warrants be "supported by Oath or affirmation" is "no technical or trivial component of the Warrant Clause." *United States* v. *Chapman*, 954 F.2d 1352, 1370 (7th Cir. 1992). But without any guidance from this Court, they apply very different rules and similar cases come out differently depending solely upon where the warrant issues.

II. The Decision Below Is Wrong

The Wisconsin Supreme Court erred in holding that the oath requirement is satisfied whenever an individual is impressed with "an appropriate sense of obligation to tell the truth." App., *infra*, 5a, 30a. Like some other courts, it misunderstood both the requirement's purpose and history. To satisfy the oath requirement, an individual must create or perhaps at the very least affirm an obligation to tell the truth that is backed by moral, religious, or legal sanctions. Therefore, the appropriate inquiry is not whether individuals believe that they should tell the truth. Rather, it is whether they created or affirmed an obligation whose violation was subject to religious, legal, or moral punishment. See, *e.g.*, *United States* v. *Turner*, 558 F.2d 46, 50 (2d Cir. 1977); *United States* v. *Bueno-Vargas*, 383 F.3d 1104, 1110 (9th Cir. 2004);

State v. *Gutierrez-Perez*, 337 P.3d 205, 210 (Utah 2014).

A. Proper Oaths Create Sanctionable Obligations To Tell The Truth

A proper oath does more than merely put the oath-taker on notice of an extant obligation to tell the truth. It creates a new obligation with "moral, legal, or religious significance." *Turner*, 558 F.2d at 50; see also Thomas Raeburn White, *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses*, 51 Am. L. Reg. 373, 415 (1903) ("In its essential features therefore the oath * * * is thought to impose upon the swearer an added obligation to tell the truth."); *Id*. at 417 n.75 (collecting cases that share this understanding).[3]

The generative power of an oath is clear from the language used in and about oaths. First, it is routine to refer to the "obligation of the oath"—such language expresses the intuition that an oath carries an obligation separate and distinct from any pre-existing obligations. See, *e.g.*, *District of Columbia* v. *Arms*, 107 U.S. 519, 521 (1883). So too, where the language of the oath is formalized, it is often framed in terms of 'taking' or 'undertaking' some new obligation. See, *e.g.*, 5 U.S.C. § 3331 ("I take this obligation freely, without any mental reservation or purpose of evasion.")

[3] Philosophy of language recognizes this distinction. An oath is a performative utterance. It *does* rather than *describes* something. See J.L. Austin, *How to Do Things with Words* 1-11 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975).

(prescribing the oath of office for all federal officers); cf. Fed. R. Evid. 603 advisory committee's notes on proposed rules ("Affirmation is simply a solemn *undertaking* to tell the truth.") (emphasis added).

The oath's religious origins further point to its role in creating a new, sanctionable obligation. Ancient cultures accepted that oaths called upon a god who "would witness the truth of the speaker's statement and, if the speaker spoke falsely, would smite him" and further, that the oaths were meant to "heighten[] a natural duty to tell the truth by invoking supernatural retribution." Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 Ohio St. L.J. 1, 9 (2009). The ancients relied on oaths even when "the gods summoned as witnesses by the oath would have punished without such a ceremony for the sin of lying." White, 51 Am. L. Reg. at 382. And English common law reflected this understanding. It required oaths from Christians even though their religion provided divine punishment for lying when they were not under oath. See Milhizer, 70 Ohio St. L.J. at 22-23.[4] The oath thus must do more than merely inform

[4] The Ten Commandments themselves understand lying and lying under oath to be two different sins with the latter violating two commandments. Compare, *e.g.*, *Catechism of the Catholic Church* ¶ 2147 (2d ed.) ("Promises made to others in God's name engage the divine honor, fidelity, truthfulness, and authority. They must be respected in justice. To be unfaithful to them is to misuse God's name and in some way to make God out to be a liar [in violation of the second commandment.]") with *id.* ¶ 2464 ("The eighth commandment forbids misrepresenting the truth in our relations with others.").

the oath-taker of an extant obligation—it must create an obligation and impose sanctions for its violation.

This test retains the essence of the traditional religious oath by requiring the oath-taker to, for example, "promise to," *Gutierrez-Perez*, 337 P.3d at 210, or "formally undertak[e] to tell the truth," *Turner*, 558 F.2d at 50. But the broader standards accepted by some courts fail on this score because at best, they seek only to remind the nominal oath-taker of the need for truthfulness, see, *e.g.*, *State* v. *Nunez*, 67 P.3d 831, 836 (Idaho 2003) ("[T]he requirement of an oath * * * remind[s] law enforcement officials that the judicial system expects and relies on truthful testimony."), and at worst, they require nothing more than a one-sided belief that the oath-taker is under or should be under oath, see, *e.g.*, *United* States v. *Brooks*, 285 F.3d 1102, 1105-1106 (8th Cir. 2002) (finding officer under oath merely because the documents he signed repeatedly mentioned the need for an oath). These broader standards can lead courts to find an oath sufficient even where, as here, the officer lies about being sworn in the very document that should put him on notice about the need for truthfulness. See App., *infra*, 36a (Bradley, J., dissenting) (noting that "it is undisputed that the first sentence of Sergeant Brown's affidavit was not true").

B. The Original Understanding Of The Oath Or Affirmation Clause Required The Creation Of A Religious, Legal, Or Moral Obligation Backed By Sanctions

The Founders understood that an oath or affirmation must create—not merely acknowledge—an independent obligation to tell the truth. Importantly, they also understood that the obligation must be backed by sanctions for violations. Neither oath nor affirmation is defined anywhere in the Constitution. As this Court has held, when the text of the Constitution does not resolve the case, "we must * * * turn to the historical background * * * to understand its meaning." *Crawford* v. *Washington*, 541 U.S. 36, 42-44 (2004). In both England and the early Republic, an oath had to create an obligation to tell the truth with sanctions for violations—either from God, the law, or conscience.

Prior to the Founding, England, see 1 W. & M. c. 1, § 4; 1 W. & M. c. 18, § 10, and the colonies, see, *e.g.*, Act of Apr. 1699, ch. 2, 1699 Va. Acts 170, both recognized oaths resting on religious sanctions. By the mid-eighteenth century, however, they began recognizing as oath-equivalents forms of affirmations that did not invoke God. See*, e.g*, Act of Dec. 13, 1756, *reprinted in* 18 *The Colonial Records of the State of Georgia* 157 (Allen Candler ed., 1910); Act of June 20, 1728, ch. 4, §§ 1-5, 1874 Mass. Acts 495-496; Act of Nov. 1703, ch. 64, 1717 N.J. Laws 45-46. These oath-substitutes still required the creation of an obligation to tell the truth, but the sanctions were legal, not religious. See, *e.g.*, N.H. Const. of 1784, Pt. II; Mass.

Const. of 1780, Ch. VI, Art. I; An Act Relative to the People Commonly Called Quaker, 1796 Conn. Pub. Acts 348. The Massachusetts Constitution, for example, stated that Quakers can take an affirmation that omits the words "I do swear," and "so help me God" (among others) and instead state "[t]his I do under pains and penalties of perjury." Mass. Const. of 1780, Ch. VI, Art. I. So, too, did the New Hampshire Constitution. N.H. Const. of 1784, Pt. II.

C. Requiring Oaths To Create Obligations And Impose Sanctions Makes An Easily Administrable Test

The proper test for an oath—whether an act creates an obligation for whose violation sanctions can follow—respects an oath's essential elements and draws clear lines without reducing oaths to mere formalities. Under this test, a court asks only whether an act created an obligation to tell the truth and if there are sanctions for violating that obligation. See, *e.g.*, *Gutierrez-Perez*, 337 P.3d at 1024-1025 (finding oath where officer declared information in warrant application was true and subjected himself to non-felony perjury). The broader standards endorsed by some courts, by contrast, entail difficult inquiries into whether officers have been sufficiently "impressed" with the importance of telling the truth—or more difficult still, whether officers *believe* they are under oath. Such subjective inquires have "special costs" because the difficulty in proving subjective intent poses evidentiary issues that can be "peculiarly disruptive of effective government." *Harlow* v.

Fitzgerald, 457 U.S. 800, 816-817 (1982). In the Fourth Amendment context, these evidentiary issues "reduce [the court] to speculating about the hypothetical reaction of a hypothetical constable." *Whren* v. *United States*, 517 U.S. 806, 815 (1996). Subjective inquiries also impose burdens on law enforcement officers because they require them "to act on necessary spurs of the moment with all the knowledge and acuity of constitutional lawyers." Wayne R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 1.4(d) (4th ed. 2004) (quoting *State* v. *Romeo*, 203 A.2d 23 (N.J. 1964)). Both concerns have led this Court to conclude that "[e]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004) (quoting *Horton* v. *California*, 496 U.S. 128, 138 (1990)).

Nor would the proposed test "elevate form over substance." App., *infra*, 18a. It requires no particular act to create the obligation. Indeed, courts endorsing this test have held that a wide variety of actions and statements can show the creation and acceptance of a new obligation. See *Gutierrez-Perez*, 337 P.3d at 206 (finding eWarrant application valid where the application included a screen stating "By submitting this affidavit, I declare under criminal penalty * * * that the foregoing is true and correct"); *Turner*, 558 F.2d at 50 (allowing an oath to be performed telephonically); *Bueno-Vargas*, 383 F.3d at 1111 (finding that a written and faxed statement in which the officer accepted perjury liability qualified as an

affirmation); *United* States v. *Looper*, 419 F.2d 1405, 1407 (4th Cir. 1969) (holding that an oath merely required "any form which stated or symbolized that defendant would tell the truth").

III. This Case Is An Ideal Vehicle For Resolving A Recurring Constitutional Question of Undeniable Importance

The oath requirement is "no technical or trivial component of the Warrant Clause." *United States* v. *Chapman*, 954 F.2d 1352, 1370 (7th Cir. 1992). It checks arbitrary government power by ensuring that government officials seeking a warrant tell the truth. See pp. 26-27, *supra*. Surprisingly, however, this Court has never considered the meaning of the oath requirement. See Andrew H. Bean, Comment, *Swearing by New Technology: Strengthening the Fourth Amendment by Utilizing Modern Warrant Technology While Satisfying the Oath or Affirmation Clause*, 2014 BYU L. Rev. 927, 938; *State* v. *Gutierrez-Perez*, 337 P.3d 205, 208 (Utah 2014). Absent guidance from this Court, more than two dozen state courts of last resort and federal courts of appeals have split four ways on the question presented, see pp. 11-22, *supra*, making it imperative that this Court grant review in this case.

The Warrant Clause makes no exceptions—the oath requirement must be satisfied every time a warrant issues. See *Ker* v. *California*, 374 U.S. 23, 33 (1963) (holding that the Fourth Amendment applies to states). Untold numbers of warrants issue each year. See Peter Nickeas, *There's a growing consensus in*

enforcement over no-knock warrants: The risks outweigh the rewards, CNN (Feb. 12, 2022), https://tinyurl.com/4evjp6dx. Only direction from this Court can provide consistency and clarity in these many proceedings.

The persistent split also poses troubling federalism concerns when state courts apply different tests than their corresponding federal court of appeals do. The South Dakota and Iowa Supreme Courts, for example, hold that an oath must create a sanctionable moral obligation, see pp. 15-16, *supra*, while the Eighth Circuit applies a more relaxed constructive oath test, see pp. 19-21, *supra*. Similarly, New York applies a perjury test, see p. 14-15, *supra*, while the Second Circuit applies a sanctionable-moral-obligation test, see pp. 15-16, *supra*. This disparity may lead state law enforcement to hand off prosecution of garden-variety violations of state law to federal prosecutors—at the least burdening the federal courts and at the worst creating pressure to overfederalize criminal law. As at least one member of this Court has noted, "[s]ome suggest[] that 'the federal government has [now] duplicated virtually every major state crime.'" *Gamble* v. *United States*, 139 S. Ct. 1960, 2008 (2019) (Gorsuch, J., dissenting) (second alteration in original) (quoting Edwin Meese III, *Big Brother on the Beat*: *The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 22 (1997)).

The Constitution itself, moreover, recognizes the special importance of oaths in warrant applications. Although the law has long recognized that oaths are necessary "to safeguard truth, and thereby achieve

justice," Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 Ohio St. L.J. 1, 1 (2009); see also Kathleen M. Knudsen, *The Juror's Sacred Oath: Is There a Constitutional Right to a Properly Sworn Jury?*, 32 Touro L. Rev. 489, 500-507 (2016) (examining the history of jurors' oaths at the Founding); Thomas Raeburn White, *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses*, 51 Am. L. Reg. 373, 385 (1903) (tracing the common-law witness oath back to Roman times), nothing in the Constitution requires witnesses or jurors to be sworn. The Constitution does, however, require that all evidence supporting a warrant be sworn to. That the Constitution singles out warrant applications above witness testimony and juror deliberation shows how the Founders particularly feared governmental abuse and valued truthfulness here.

Recent scholarship on the history of the Fourth Amendment's oath requirement makes this an ideal time for the Court to consider this question. See, *e.g.*, Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 Stan. L. Rev. 603 (2022); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181 (2016); Andrew H. Bean, Comment, *Swearing by New Technology: Strengthening the Fourth Amendment by Utilizing Modern Warrant Technology While Satisfying the Oath or Affirmation Clause*, 2014 BYU L. Rev. 927. This scholarship confirms that the Fourth Amendment's oath requirement—like the

particularity and probable clause requirements—responded to the injustices of the "writs of assistance, a form of general warrant wherein government officials failed to specify the precise place or person to be searched, *or to provide evidence under oath* to a third-party magistrate of a particular crime suspected." Donohue, 83 U. Chi. L. Rev. at 1194 (emphasis added); see also Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 558 (1999) (noting that "general warrants" commonly lacked "a complaint under oath"). This historical scholarship underscores the Founders' special concern. This Court has looked to history when interpreting other provisions of the Fourth Amendment and should do so here. See, *e.g.*, *Riley* v. *California*, 573 U.S. 373, 403 (2014).

This case provides, moreover, an excellent vehicle for this Court to decide this question. The facts presented aptly frame the constitutional issue: the Wisconsin Supreme Court held that the officer was under oath even though "[i]t is undisputed that [he] made no oral oath or affirmation, either before or after signing the affidavit." App., *infra*, 7a. There are no jurisdictional or factual disputes clouding the issue and it was fully briefed and decided below.

* * *

Conflicting decisions by state and federal courts make it imperative that this Court finally clarify what an oath consists of. The issue is fully developed, squarely presented, and free from any threshold questions. It warrants the Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SUPREME COURT OF WISCONSIN

CASE NO.:	2019AP2184–CR
COMPLETE TITLE:	State of Wisconsin, Plaintiff–Respondent, v. Jeffrey L. Moeser, Defendant–Appellant–Petitioner.
	REVIEW OF DECISION OF THE COURT OF APPEALS Reported at 398 Wis. 2d 795, 963 N.W.2d 576 (2021 – unpublished)
OPINION FILED:	November 23, 2022
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	September 6, 2022
SOURCE OF APPEAL:	
COURT:	Circuit
COUNTY:	Portage
JUDGE:	Robert J. Shannon

JUSTICES:
ZIEGLER, C.J., delivered the majority opinion of the Court, in which ROGGENSACK, REBECCA GRASSL BRADLEY, HAGEDORN, and KAROFSKY, JJ., joined. HAGEDORN, J., filed a concurring

opinion, in which KAROFSKY, J., joined. ANN WALSH BRADLEY, J., filed a dissenting opinion, in which DALLET, J., joined.
NOT PARTICIPATING:

ATTORNEYS:

For the defendant-appellant-petitioner, there was a brief filed by *John T. Bayer* and *Bayer Law Offices*, Milwaukee. There was an oral argument by *John T. Bayer*.

For the plaintiff-respondent, there was a brief filed by *John W. Kellis*, assistant attorney general, with whom on the brief was *Joshua L. Kaul*, attorney general. There was an oral argument *by John W. Kellis*, assistant attorney general.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2019AP2184–CR
(L.C. No. 2017CF515)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff–Respondent,

v.

Jeffrey L. Moeser,

Defendant–Appellant–Petitioner.

FILED

NOV 23, 2022

Sheila T. Reiff
Clerk of Supreme Court

ZIEGLER, C.J., delivered the majority opinion of the Court, in which ROGGENSACK, REBECCA GRASSL BRADLEY, HAGEDORN, and KAROFSKY, JJ., joined. HAGEDORN, J., filed a concurring opinion, in which KAROFSKY, J., joined. ANN WALSH BRADLEY, J., filed a dissenting opinion, in which DALLET, J., joined.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 ANNETTE KINGSLAND ZIEGLER, C.J. This is a review of an unpublished decision of the court of appeals, State v. Moeser, No. 2019AP2184–CR, unpublished slip op. (Wis. Ct. App. June 24, 2021), affirming the Portage County circuit court's[1] denial of Jeffrey Moeser's motion to suppress evidence. Moeser was convicted of operating while intoxicated (OWI) sixth offense, contrary to Wis. Stat. § 346.63(1)(a) (2019-20).[2] We affirm.

¶2 Moeser challenges the warrant which compelled him to submit to a blood draw. He argues that the warrant is constitutionally defective because the affiant was not placed under oath or affirmation when he signed the affidavit which accompanied the warrant application. According to Moeser, this omission failed to satisfy the requirement under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution that warrant applications be "supported by oath or affirmation."[3] As a result, Moeser argues that the

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[1] The Honorable Robert Shannon presided.

[2] All subsequent references to the Wisconsin Statutes are to the 2019-20 version unless otherwise indicated.

3 All subsequent references to the constitutional oath or affirmation requirements in both the United States and Wisconsin constitutions are hereinafter referred to collectively, sometimes as "the constitutional oath or affirmation

circuit court erroneously denied his motion to suppress evidence and that the court of appeals erred in affirming that decision.

¶3 We conclude that the affidavit fulfilled the oath or affirmation requirement under the United States and Wisconsin constitutions because "[t]he purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth," and here the officer was impressed with that obligation. State v. Tye, 2001 WI 124, ¶19, 248 Wis. 2d 530, 636 N.W.2d 473; accord U.S. Const. Amend. IV; Wis. Const. art. I, § 11. In other words, the constitutional guarantee is satisfied because the facts and circumstances demonstrate that Sergeant Brown executed this affidavit "in a form calculated to awaken [Sergeant Brown's] conscience and impress [his] mind with [his] duty to [tell the truth]." Wis. Stat. § 906.03(1); accord Tye, 248 Wis. 2d 530, ¶19. The United States and Wisconsin constitutions do not require that any specific language or procedure be employed in the administration of an oath or affirmation. Instead, constitutional requirements, relevant case law, and the Wisconsin Statutes all indicate that the oath or affirmation requirement is an issue of substance, not form. Here, the facts sufficiently demonstrate that the constitutional right to be free from abusive governmental searches is satisfied. Therefore, the circuit court did not err in

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requirement" or "Fourth Amendment requirement," unless otherwise noted.

denying Moeser's motion to suppress, and the court of appeals is affirmed.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

¶4 On October 14, 2017, at about 1:30 a.m., Sergeant Steven Brown of the Portage County Sheriff's Office stopped Jeffrey Moeser for suspected OWI. A record check return revealed that Moeser had five prior convictions for operating while intoxicated. Sergeant Brown administered field sobriety tests as well as a preliminary breathalyzer test. The breathalyzer test returned a blood alcohol content (BAC) of 0.195 percent. Because of his prior convictions, the legal limit for Moeser was a BAC of 0.02 percent. See Wis. Stat. § 340.01(46m)(c). Sergeant Brown then arrested Moeser for suspected drunk driving and transported him to St. Michael's Hospital in Stevens Point, Wisconsin, for a blood draw.

¶5 Once at the hospital, Moeser refused to consent to a blood draw, causing Sergeant Brown to seek a search warrant. The affidavit in support of the warrant was completed by Sergeant Brown in the presence of Lieutenant Jacob Wills, a notary public.

¶6 The document was titled, "AFFIDAVIT." At the beginning of the affidavit, Sergeant Brown handwrote his name before the text, "being first duly sworn on oath, deposes and says." The second paragraph stated, "I have personal knowledge that the contents of this affidavit are true and that any observations or conclusions of fellow officers referenced in this affidavit are truthful and reliable." Immediately

following that section, Sergeant Brown personally penned in the probable cause section, which contained facts specific to Moeser's arrest. Sergeant Brown then signed and dated the affidavit, noting that it was completed at St. Michael's Hospital before Lieutenant Wills. Sergeant Brown's signature line was immediately above the jurat,[4] which read, "Subscribed and sworn to before me." Lieutenant Wills notarized the affidavit by signing it and affixing his seal. A judicial officer came to the hospital and approved the warrant application at 3:07 a.m.

¶7 Moeser's blood was drawn pursuant to the warrant and revealed a BAC of 0.220 g/100mL. The State filed a criminal complaint charging Moeser with OWI sixth offense, contrary to Wis. Stat. § 346.63(1)(a), and operating with a prohibited alcohol concentration sixth offense, contrary to Wis. Stat. § 346.63(1)(b), both felony charges.

¶8 Moeser filed a motion to suppress the blood test evidence, arguing that the warrant did not satisfy constitutional oath or affirmation requirements because Sergeant Brown was not placed under oath or affirmation. It is undisputed that Sergeant Brown made no oral oath or affirmation, either before or after signing the affidavit. It is also undisputed that he made no such oath or affirmation before the judicial officer.

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[4] A jurat is "[a] certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made." Jurat, Black's Law Dictionary (11th ed. 2019).

¶9 The State argued that Sergeant Brown was under oath or affirmation because the language of the affidavit clearly manifested the intention to be under oath.

¶10 The circuit court heard the motion on stipulated facts and orally denied Moeser's motion to suppress. The circuit court found that "the language in the affidavit indicates . . . that Sergeant Brown swore to the truth of the information provided in the affidavit." It found that "Sergeant Brown did realize that he was swearing to the truth of what he indicated in his affidavit." The circuit court denied Moeser's motion and subsequently memorialized that ruling by written order. The order stated, "The motion to suppress blood test evidence based upon noncompliance with the oath requirement is denied." Thereafter, Moeser pled guilty to OWI sixth offense, and was sentenced.

¶11 Moeser filed a notice of appeal, and the court of appeals affirmed. Moeser, No. 2019AP2184–CR. The court of appeals concluded that Sergeant Brown's affidavit was not constitutionally defective. Id., ¶22.

¶12 Moeser petitioned this court for review, which we granted.

II. STANDARD OF REVIEW

¶13 "Review of a decision denying a motion to suppress" under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution "presents a question of constitutional fact." State v. Coffee, 2020 WI 53, ¶19,

391 Wis. 2d 831, 943 N.W.2d 845. Under a two-step standard of review, we first "uphold a circuit court's findings of historic fact unless they are clearly erroneous." State v. Dumstrey, 2016 WI 3, ¶13, 366 Wis. 2d 64, 873 N.W.2d 502. We then "independently apply constitutional principles to those facts." State v. Robinson, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463.

¶14 This case also requires us to interpret statutes. "Interpretation of a statute is a question of law that we review de novo, although we benefit from the analyses of the circuit court and the court of appeals." Est. of Miller v. Storey, 2017 WI 99, ¶25, 378 Wis. 2d 358, 903 N.W.2d 759.

III. ANALYSIS

¶15 On appeal, Moeser does not challenge whether there was probable cause to arrest him, nor does he challenge that there was probable cause in the affidavit. Rather, he argues that Sergeant Brown was not administered any oath or affirmation and, therefore, the warrant is constitutionally defective. The State responds that the oath or affirmation requirement was met because Sergeant Brown swore to or affirmed the facts of the affidavit. In other words, the State asserts that Sergeant Brown manifested "the intent to be bound by his . . . statement under circumstances that emphasize the need to tell the truth."

¶16 In analyzing these arguments, we will first discuss the oath or affirmation requirement under the United States and Wisconsin constitutions. We then

turn to relevant case law. After that, we analyze Wisconsin Statutes' oath or affirmation requirements. In short, these sources lead to the conclusion that Sergeant Brown's affidavit survives constitutional scrutiny.

A. Constitutional Requirements

¶17 The United States and Wisconsin constitutions protect and guarantee that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."[5] U.S. Const. Amend. IV; accord Wis. Const. art. I, § 11. Consequently, an oath or affirmation is an "essential prerequisite to the issuance of a valid search warrant" under both our state and federal constitutions. Tye, 248 Wis. 2d 530, ¶13 (quoting State v. Baltes, 183 Wis. 545, 552, 198 N.W.2d 282 (1924)). When it comes to the administration of an oath or affirmation, neither constitution requires that specific language or procedure be used.

¶18 The terms "oath" and "affirmation" have long been understood broadly and require no specific language or procedure. In the 1744 case of Omychund v. Barker, Lord Chief Baron Parker of the English Exchequer of Pleas expressed a broad view of oaths:

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[5] "Historically, we generally have interpreted Article I, Section 11 [of the Wisconsin Constitution] to provide the same constitutional guarantees as the Supreme Court has accorded through its interpretation of the Fourth Amendment." State v. Kramer, 2009 WI 14, ¶18, 315 Wis. 2d 414, 759 N.W.2d 598.

"[An oath's] forms are various. . . . It is plain that by the policy of all countries, oaths are to be administered to all persons according to their own opinion, and as it most affects their conscience . . . ." Omychund v. Barker, 26 Eng. Rep. 15, 29 (High Ct. Ch. 1744). Accordingly, the court held that a member of the Hindu[6] religion could swear an oath before testifying according to his own custom. Id. at 27-34. Whereas the court's usual custom was "use of the corporal ceremony, the kissing of the Evangelists," Hindus were permitted to swear oaths by touching the foot of a Hindu priest. Id. at 15, 21. In 1788, the High Court of Errors of Pennsylvania echoed this broad view. Lewis v. Maris, 1 U.S. (1 Dall.) 278, 288 (Pa. Ct. Err. & App. 1788) (recognizing oath as valid regardless of the precise ceremony performed).

¶19 During the Founding era, an "oath" was "an affirmation or denial of any thing, before one or more persons who have authority to administer the same, for the discovery and advancement of truth and right, calling God to witness, that the testimony is true." Oath, Giles Jacob, A New Law Dictionary (J. Morgan ed., 10th ed. 1782). An "affirmation" was "[a]n indulgence allowed by law to the people called quakers, who in cases where an oath is required from others, may make a solemn affirmation that what they

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[6] The English Exchequer of Pleas used a now derogatory term which referred to members of the Hindu religion. See Gentoo, Oxford English Dictionary (3d ed. 2021) (a "[n]ow historical and rare" term describing "[a] non-Muslim inhabitant of Hindustan or India; a Hindu"). We instead use the term "Hindu."

say is true; and if they make a false affirmation, they are subject to the penalties of perjury."[7] Affirmation, Jacob, supra. In fact, it was recognized during the Founding that an "oath" could be written rather than spoken: "Affidavit, Signifies in law an oath in writing; and to make affidavit of a thing, is to testify upon oath." Affidavit, Jacob, supra. These definitions do not require that any specific language or procedure be used in their administration.

¶20 "The Constitution's text does not alone resolve this case. . . . We must therefore turn to the historical background of the [text] to understand its meaning." Crawford v. Washington, 541 U.S. 36, 42-44 (2004). Originating in the 17th century, "English law required officials seeking search warrants to swear an oath as a means of controlling the unfettered discretion of the searcher." Tye, 248 Wis. 2d 530, ¶8. That requirement was removed, and general warrants, or Writs of Assistance, were prone to abuse. Id. In Gray v. Paxton, 1 Quincy 541 (Mass. Super. Ct. 1761), a case involving Writs of Assistance, Boston attorney James Otis Jr. delivered a five-hour speech where he criticized, among other things, this lack of an oath requirement: "Their menial servants may enter, may break locks,

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[7] These definitions remain largely the same today. In Black's Law Dictionary, an "oath" is "[a] solemn declaration, accompanied by a swearing to god or a revered person or thing, that one's statement is true or that one will be bound to a promise." Oath, Black's Law Dictionary, supra note 4. An "affirmation" is a "solemn pledge equivalent to an oath but without reference to a supreme being or to swearing." Affirmation, Black's Law Dictionary, supra note 4.

bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient." James Otis Jr., Against Writs of Assistance (Feb. 24, 1761). Among those in the audience was John Adams, who described the speech as having "breathed into this nation the breath of life" and "the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." Charles Francis Adams, The Life and Works of John Adams 276 (1856).

¶21 Accordingly, many states adopted oath or affirmation requirements in their constitutions. For example, Maryland's constitution provided a very general procedure for administering oaths:

> That the manner of administering an oath to any person, ought to be such as those of the religious persuasion, profession or denomination of which such person is one, generally esteem the most effectual confirmation, by the attestation of the Divine Being. And that the people . . . holding it unlawful to take an oath on any occasion, ought to be allowed to make their solemn affirmation, in the manner that quakers have been heretofore allowed to affirm . . . .

Md. Const. Decl. of Rts. art. XXXVI (1776). In contrast, Pennsylvania's constitution adopted no general procedure but did require certain specific oaths, such as for public officials: "I . . . do swear (or affirm) that I will faithfully execute the office of . . . for the . . . of . .

. and will do equal right and justice to all men, to the best of my judgment and abilities, according to law." Pa. Const. § 40 (1776). Similarly, in its first act, Congress prescribed the language and procedure to fulfill the requirement under Article VI, Section 3 that senators and representatives "be bound by Oath or Affirmation, to support this Constitution." That act stated:

> That the oath or affirmation required by the sixth article of the Constitution of the United States, shall be administered in the form following, to wit, "I, A.B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." The said oath or affirmation shall be administered within three days after the passing of this act, by any one member of the Senate, to the President of the Senate, and by him to all the members and to the Secretary . . . .

An Act to Regulate the Time and Manner of Administering Certain Oaths, ch. 1, § 1, 1 Stat. 23 (1789). These examples demonstrate a broad spectrum of how specific an oath requirement could be. The Founders knew how to write a more demanding oath or affirmation requirement. However, they did not do so in the Constitution's oath or affirmation requirement.

¶22 The historical background and definitions show that the Fourth Amendment requirement was meant to prohibit warrants that are not supported by any oath or affirmation at all, such as Writs of

Assistance. However, there is no indication that any specific language or procedure is necessary. Where the founding generation believed that specific words or procedures were required to fulfil [sic] an oath requirement, the text said so. Absent an express statement to the contrary, oaths were broadly understood—an oath could include an affidavit, swearing before God, or even touching a priest's feet.

¶23 In short, the words "oath" and "affirmation" are not specifically defined in the language of either the United States or Wisconsin constitutions, nor does either constitution mandate that any specific language or procedure be used in oath or affirmation administration.

B. Case Law

¶24 We next turn to constitutional oath or affirmation requirements in case law. The constitutional analysis in case law similarly does not support Moeser's call for rigid oath or affirmation administration requirements. Instead, case law consistently elevates substance over form when it comes to the administration of an oath or affirmation, and courts across the country have declined to impose rigid rules, "magic words" requirements, or formal procedures.

¶25 Whether the constitutional oath or affirmation administration requirement is rigid and specific was previously considered in State v. Tye, where we concluded that the requirement "is a matter of substance, not form, and it is an essential component of the Fourth Amendment and legal proceedings." Tye,

248 Wis. 2d 530, ¶19. In Tye, an investigator drafted an affidavit in support of a search warrant application but never took an oath or affirmation and also failed to sign the affidavit. Id., ¶¶4-5. Nonetheless, a judicial officer issued the warrant, and the search was conducted. Id., ¶¶5-6. The defense successfully sought to suppress the evidence obtained. Id., ¶2.

¶26 On appeal, because the affidavit in Tye was completely lacking, we affirmed the suppression. The court nonetheless recognized that "[t]he purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth." Id., ¶19. Tye rejected the call to impose rigid rules or magic words to govern the administration of oaths or affirmations. Id.; see also State v. Johnson, No. 2019AP1398–CR, unpublished slip op., ¶33 (Wis. Ct. App. Sept. 9, 2020) ("[W]e note that although the validity of an oath or affirmation is a 'matter of substance, not form,' we consider the better practice for all parties involved in the search warrant application process is to utilize the directory methods of administering an oath or affirmation that our legislature has proved in Wis. Stat. § 906.03(2) and (3) . . . . [H]owever, the failure to do so in this case did not invalidate the search warrant.") (footnote omitted) (quoting Tye, 248 Wis. 2d 530, ¶19).

¶27 We note that Tye's interpretation of the Fourth Amendment oath or affirmation requirement is consistent with oath or affirmation administration in non-Fourth Amendment contexts. The court of appeals in this case relied heavily upon Kellner v.

Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995), a civil case. Moeser, No. 2019AP2184–CR, ¶¶19-23. While not inconsistent with the principles in Tye, Kellner is nonetheless distinguishable because constitutional oath or affirmation requirements were never argued or considered. Kellner is also distinguishable because it was based upon a specific statute which is inapplicable here. That statute concerned a requirement that claims against state employees be "sworn." Kellner, 197 Wis. 2d at 194. The statute had the purpose of ensuring that the attorney general could effectively review claims in a timely and cost-effective manner. Id. Kellner, however, did reiterate that the oath must "impress the person who takes the oath with a due sense of obligation" to tell the truth. Id. at 192.

¶28 As a result, Wisconsin case law broadly recognizes that "[t]he purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth." Tye, 248 Wis. 2d 530, ¶19. There are no rigid requirements or magic words. It is a matter of substance, not form.

¶29 Moeser spends much of his argument attempting to distinguish United States v. Brooks, 285 F.3d 1102 (8th Cir. 2002), and United States v. Fredericks, 273 F. Supp. 2d 1032 (D.N.D. 2003), both of which found the oath or affirmation requirement satisfied. He argues that the cases are distinguishable because Sergeant Brown's affidavit uses different words than the affidavits in those cases. He also

argues that those cases are distinguishable because Sergeant Brown did not personally present the affidavit to the judicial officer. However, Moeser's arguments elevate form over substance, failing to acknowledge that "[t]he purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth." Tye, 248 Wis. 2d 530, ¶19.

¶30 In Brooks, the Eighth Circuit concluded that, despite not being given an oral oath, the affiant officer was deemed to be under oath because:

> [H]e intended to undertake and did undertake that obligation by the statements he made in his affidavit and by his attendant conduct. In other words, a person may be under oath even though that person has not formally taken an oath by raising a hand and reciting formulaic words.

Brooks, 285 F.3d at 1106; see also 3 Am. Jur. 2d Affidavits § 7 (2022) ("It is not essential that the affiant should hold up his hand and swear in order to make his act an oath, but it is sufficient if both affiant and the officer understand that what is done is all that is necessary to complete the act of swearing.").

¶31 The court in Fredericks, like Brooks, concluded that a person may be deemed to be under oath in the absence of a raised hand or oral recitation:

> In determining whether the Fourth Amendment's oath or affirmation requirement has been fulfilled, the Court may consider the

language used in the search warrant application as well as the applicant's conduct. [Brooks,] 285 F.3d 1102, 1105–06. As the Eighth Circuit Court of Appeals explained in [Brooks], a person may be under oath even though that person has not formally taken an oath by raising a hand and reciting formulaic words.

Almost all of the apposite cases indicate that this is the relevant inquiry because a person who manifests an intention to be under oath is in fact under oath. In Atwood v. State, 146 Miss. 662, 111 So. 865, 866 (1927), for instance, where both the law enforcement officer, who signed the affidavit in the presence of a justice of the peace, and the justice of peace, who affixed his jurat, knew an oath was required and did what they thought was necessary for the administration of an oath, the court concluded that "by construction, what occurred amounted to the taking of the necessary oath." The court added that "[o]ne may speak as plainly and effectually by his acts and conduct as he can by word of mouth." Id.

The Court finds that, under the circumstances, [the officer's] "Affidavit for Search Warrant" satisfied the oath or affirmation requirement and that the search warrant was not issued in violation of the Fourth Amendment. The Affidavit begins by stating "that the undersigned being duly sworn

> deposes and states to the Court . . . ." Additionally, the Affidavit reveals that [the officer] signed the document upon presentation to the tribal court and [the judge] attested that the Affidavit was sworn to and subscribed by [the officer] in her presence.
>
> The nature of the document as well as [the officer's] attendant conduct indicates that [the officer] realized that he was swearing to the truth of what he said. [His] recitation that he was "duly sworn" reflects his intention to be under oath. [His] conduct was also consistent with this intention as he took the document to a tribal court judge and signed it in her presence. As it is apparent that [the officer] had manifested an intent to be under oath, as such, he can be considered to be under oath for Fourth Amendment purposes.

Fredericks, 273 F. Supp. 2d at 1037–38.[8]

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[8] Moeser also finds Brooks and Fredericks distinguishable because here the Sheriff's Office had a procedure that did not require administering an oral oath, which the State conceded was erroneous. However, "we are not bound by the parties' interpretation of the law or obligated to accept a party's concession of law." State v. Carter, 2010 WI 77, ¶50, 327 Wis. 2d 1, 785 N.W.2d 516. Regardless, this does not affect our conclusion that the facts and circumstances overall demonstrate that Sergeant Brown was impressed with the need to tell the truth.

¶32 Professor Wayne LaFave has instructed that, "No particular ceremony is necessary to constitute the act of swearing . . . . It is only necessary that something be done in the presence of the magistrate issuing the search warrant which is understood by both the magistrate and the affiant to constitute the act of swearing." 2 Wayne R. LaFave, et al., Criminal Procedure § 3.4(c) (4th ed. 2021) (footnotes omitted) (quoting Simon v. State, 515 P.2d 1161, 1165 (Okla. Crim. App. 1973)). Several federal cases are in accord that "a person who manifests an intention to be under oath is in fact under oath." Brooks, 285 F.3d at 1105; accord United States v. Bueno-Vargas, 383 F.3d 1104, 1111 (9th Cir. 2004) (holding that "signing a statement under penalty of perjury satisfies the standard for an oath or affirmation, as it is a signal that the declarant understands the legal significance of the declarant's statements and the potential for punishment if the declarant lies"); United States v. Richardson, 943 F.2d 547, 549 (5th Cir. 1991) (holding a statement was not an oath or affirmation because it "did not manifest a recognition of [the affiant's] duty to speak the truth"); United States v. Mensah, 737 F.3d 789, 805-06 (1st Cir. 2013) (requiring no verbal act to find a defendant "under oath" for purposes of perjury).

¶33 Similarly, contrary to Moeser's arguments, numerous state court jurisdictions decline to impose rigid rules or procedures, instead concluding that the oath requirement is a matter of substance over form. See, e.g., Atwood, 111 So. at 866 ("The form of the oath is immaterial so long as it appeals to the conscience of

the party making it, and binds him to speak the truth."); State v. Kemp, 20 P.2d 499, 500 (Kan. 1933) (affiant not formally sworn but deemed to have been sworn when he completed an affidavit before a notary); Farrow v. State, 112 P.2d 186, 190 (Okla. Crim. App. 1941) (deputy who was not formally sworn, but read and signed an affidavit, deemed to be under oath); State v. Knight, 995 P.2d 1033, 1041-42 (N.M. Ct. App. 2000) ("[T]he important nature of the affidavits in this instance and [the officer's] exercise of the formalities in completing the affidavits sufficiently fulfilled the requirements of an oath or affirmation."); State v. Douglas, 428 P.2d 535, 538-39 (Wash. 1967) (no formal oath orally administered but text of affidavit nonetheless showed constitutional compliance); State v. Gutierrez-Perez, 337 P.3d 205, ¶¶4, 28 (Utah 2014) (although no oral oath or affirmation was made, court determined that a checked box on an electronic application for a warrant stating, "By submitting this affidavit, I declare under criminal penalty of the State of Utah that the foregoing is true and correct," was "more than enough to impress upon [the affiant] the solemnity of the occasion").

¶34 Courts in many other jurisdictions, including Alaska, California, Idaho, Iowa, Louisiana, Minnesota, Nebraska, New Jersey, Ohio, and South Carolina, "have held that a verbal admonishment is not necessary to constitute an 'oath.'" People v. Ramos, 424 N.W.2d 509, 519 n.36 (Mich. 1988) (collecting cases); Blackburn v. Motor Vehicles Div., 576 P.2d 1267, 1269-70 (Or. Ct. App. 1978) (also collecting

cases) ("[M]erely signing a form of affidavit in the presence of a notary or an official authorized to administer an oath is sufficient.").

¶35 This survey of case law hence confirms that no particular "magic words" or specific procedures are constitutionally required in order for an individual to be deemed to be under oath. Instead, cases elevate substance over form, recognizing that "[t]he purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth."[9] Tye, 248 Wis. 2d 530, ¶19.

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[9] Two other cases Moeser cites as supporting more rigid requirements are State v. Hodges, 595 S.W.3d 303 (Tex. Ct. App. 2020), and Markey v. State, 37 So. 53 (Fla. 1904). In Hodges, the Texas Court of Appeals held that an officer who completed an affidavit before a notary did not satisfy the oath or affirmation requirement because there was no oral oath. Hodges, 595 S.W.3d at 305–06. Though the affidavit stated that the affiant was "duly sworn," and the jurat said, "after being sworn by me," the court concluded that these statements were false because no oral oath was taken. Id. at 306. Wisconsin case law and many other federal and state cases do not support the rigid standard outlined in Hodges. Unlike Wisconsin's case law, Hodges appears to prioritize form over substance, and we decline to adopt that new standard.

As for the Florida Supreme Court's decision in Markey, that case is distinguishable. The issue in Markey was whether the defense could cross-examine witnesses to show that a defendant charged with perjury was not under oath. Markey, 37 So. at 59-60. The court's narrow ruling was that the phrase, "being duly sworn," was not conclusive proof of an oath for purposes of a criminal jury trial. Id. In fact, Markey recognized more generally that "[w]hile the oath must be solemnly administered, and by an officer duly authorized, it is immaterial in what form

¶36 As a result, Wisconsin is in good company in concluding that an oath or affirmation may still be constitutionally compliant absent a prescribed oral script and specific procedure. When the facts or circumstances indicate that the oath or affirmation was administered "in a form calculated to awaken the [swearing individual's] conscience and impress [his or her] mind with [his or her] duty to [tell the truth]," then the oath or affirmation requirement is satisfied. Wis. Stat. § 906.03(1). In other words, we reaffirm the principle that "[t]he purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth." Tye, 248 Wis. 2d 530, ¶19. After all, "[a]n oath is a matter of substance, not form."[10] Id.

a. Statutory Requirements

¶37 We next address the Wisconsin Statutes. Given the lack of specific constitutional requirements, we consider whether the Legislature has provided for even greater protection than that in the Constitution. However, Wisconsin Statutes likewise do not require

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it is given." Id. at 59 (quoting 2 Francis Wharton & William Draper Lewis, A Treatise on Criminal Law § 1251 (1896)).

[10] As Professor Wayne LaFave explains, "Whether the information is transmitted orally or in writing, the 'Oath or affirmation' requirement means the information must be sworn to. 'No particular ceremony is necessary to constitute the act of swearing.'" 2 Wayne R. LaFave, et al., Criminal Procedure § 3.4(c) (4th ed. 2021) (footnotes omitted) (quoting Simon v. State, 515 P.2d 1161, 1165 (Okla. Crim. App. 1973)).

any specific language or procedure for oath or affirmation administration.

¶38 For example, Wis. Stat. § 906.03, titled "Oath or affirmation," sets forth the following requirements for witnesses testifying:

> (1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so.
>
> (2) The oath may be administered substantially in the following form: Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God.
>
> (3) Every person who shall declare that the person has conscientious scruples against taking the oath, or swearing in the usual form, shall make a solemn declaration or affirmation, which may be in the following form: Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury.
>
> (4) The assent to the oath or affirmation by the person making it may be manifested by the uplifted hand.

§ 906.03 (emphases added). This statute repeatedly employs the flexible language, "may," when it considers the administration of an oath to a witness. Even though § 906.03 provides sample language in two potential versions which "may" be used in the administration of an oath or affirmation, it requires neither. The statute requires only that an oath or affirmation be "in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to [testify truthfully]." § 906.03(1).

¶39 Similarly, Wis. Stat. § 887.03, titled "Oath, how taken," states, "Any oath or affidavit required or authorized by law may be taken in any of the usual forms, and every person swearing, affirming or declaring in any such form shall be deemed to have been lawfully sworn." § 887.03 (emphases added). The language remains substantially the same since first enacted in 1849, shortly after our state constitution was ratified.[11]

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[11] Wisconsin Stat. § 887.03 was first enacted as Wis. Stat. ch. 99, § 6 in 1849:

> In all cases in which an oath or affidavit is required or authorized by law, the same may be taken in any of the usual forms, and every person swearing, affirming or declaring, in any such form, shall be deemed to have been lawfully sworn, and to be guilty of perjury for corruptly or falsely swearing, affirming or declaring in any such form.

This statute continues to provide considerable flexibility, as an oath or affirmation "may" be taken in any of the "usual forms." It also references that there are occasions where one may be "deemed to have" taken an oath: "every person swearing or declaring in any such form shall be deemed to have been lawfully sworn." As a result, § 887.03 declines to impose rigid rules governing oath administration.

¶40 More specifically, Wis. Stat. § 968.12, titled "Search warrant," states:

> (2) Warrant upon affidavit. A search warrant may be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter or under sub. (3)(d), showing probable cause therefor. [sic] The complaint, affidavit or testimony may be upon information and belief. The person requesting the warrant may swear to the complaint or affidavit before a notarial officer authorized under ch. 140 to take acknowledgments or before a judge, or a judge may place a person under oath via telephone, radio, or other means of electronic communication, without the requirement of face-to-face contact, to swear to the complaint or affidavit. The judge shall

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The only major difference is the current version no longer includes the crime of perjury. That now exists under Wis. Stat. § 946.31(1).

> indicate on the search warrant that the person so swore to the complaint or affidavit.

§ 968.12(2) (emphases added).[12] This statute, by its language, also does not impose particular language or a specific procedure for oath administration. In fact, it uses the permissive word, "may," concerning warrants based upon an affidavit. Id.

¶41 In short, the Wisconsin Statutes also do not invoke specific, mandated language or formulaic procedures in the administration of an oath or affirmation.

D. Facts and Circumstances

¶42 We next consider the facts and circumstances in this case and conclude that Sergeant Brown

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[12] Wisconsin Stat. § 968.12 also provides:

> (1) Description and issuance. A search warrant is an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property. A judge shall issue a search warrant if probable cause is shown.
>
> . . . .
>
> (3) Warrant upon oral testimony.
>
> (a) General rule. A search warrant may be based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication, under the procedure prescribed in this subsection.

§ 968.12(1), (3)(a).

satisfied the constitutional oath or affirmation requirement. Sergeant Brown's act of testifying to the court in the form of the affidavit was "calculated to awaken [Sergeant Brown's] conscience and impress [his] mind with [his] duty [to tell the truth]." Wis. Stat. § 906.03(1). We agree with the circuit court's conclusion that "the language in the affidavit indicates . . . that Sergeant Brown swore to the truth of the information provided in the affidavit." The facts in this case further support that Sergeant Brown was sufficiently impressed with his duty to tell the truth.

¶43 We consider the language in the "AFFIDAVIT" Sergeant Brown signed.[13] To review, the first sentence includes Sergeant Brown's handwritten name and states, "being first duly sworn on oath, deposes and says." The first sentence of the second paragraph says, "I have personal knowledge that the contents of this affidavit are true." Sergeant Brown then personally penned the probable cause section, detailing facts specific to Moeser's arrest. Sergeant Brown signed and dated the affidavit directly above the jurat and indicated that the affidavit was completed at the

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[13] An affidavit is, by definition, a sworn statement. See Affidavit, Giles Jacob, A New Law Dictionary (J. Morgan ed., 10th ed. 1782) ("Affidavit, Signifies in law an oath in writing; and to make affidavit of a thing, is to testify upon oath."); Affidavit, The American Heritage Dictionary of the English Language 29 (3d ed. 1992) ("A written declaration made under oath before a notary public or other authorized officer."); Affidavit, Black's Law Dictionary, supra note 4 ("A voluntary declaration of facts written down and sworn to by a declarant, usually before an officer authorized to administer oaths.").

hospital. Lieutenant Wills signed and dated the jurat as "Subscribed and sworn to before me," and affixed his notary seal.

¶44 "The purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth." Tye, 248 Wis. 2d 530, ¶19. The language in Sergeant Brown's affidavit, his signature, and Lieutenant Wills' notarization satisfy this requirement. Sergeant Brown wrote his name below the title, "AFFIDAVIT," and next to the words, "being first duly sworn on oath, deposes and says," both of which impressed that he was signing a sworn statement. Just two paragraphs down, the affidavit contained a statement expressly affirming that "the contents of this affidavit are true." Sergeant Brown completed the affidavit by verifying its contents with his signature just above the jurat, which again reminded him that the document was "sworn." Finally, in Sergeant Brown's presence, Lieutenant Wills further impressed the seriousness of the occasion by notarizing the affidavit.[14] The words in the

[14] Moeser makes much of the fact that Sergeant Brown did not himself swear before or present the affidavit to a judge. However, no constitutional language requires that procedure. Though it is "necessary that something be done in the presence of the magistrate issuing the search warrant," this requirement "should not be read literally, for 'Oath or affirmation' for Fourth Amendment purposes does not require a face-to-face confrontation between affiant and magistrate. Nor does it mean that a swearing before a notary or court clerk is insufficient." LaFave, et al., supra note 10, § 3.4(c) & n.51 (citations omitted); see also Oath, Jacob, supra note 13 (emphasis added) ("Oath . . . [i]s an affirmation or denial of any thing, before one or more

affidavit impressed Sergeant Brown with the duty to tell the truth.[15] This placed Sergeant Brown under oath or affirmation and subjected him to the possibility of criminal penalty for false swearing if he knowingly lied. See Wis. Stat. § 946.32(2); LaFave et al., supra ¶32 (quoting Simon, 515 P.2d at 1165) ("[T]he 'true test' is whether the procedures followed were such 'that perjury could be charged therein if any material allegation contained therein is false.'").

¶45 The case law supports this conclusion. Sergeant Brown's affidavit contains far more than the affidavit in Tye, where the oath or affirmation requirement was not satisfied because the officer failed to either sign or swear to the truth of the affidavit. See Tye, 248 Wis. 2d 530, ¶5.

¶46 As a result, given that "[t]he purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth," the facts and circumstances here demonstrate that Sergeant Brown executed this

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persons who have authority to administer the same . . . ."); 3 Am. Jur. 2d Affidavits § 7 (2022) (footnotes omitted) ("The affiant must swear to the affidavit, and the fact of swearing must be certified by a proper officer. The notary and affiant must be present together for giving of oath."); Wis. Stat. § 968.12(2) ("The person requesting the warrant may swear to the complaint or affidavit before a notarial officer . . . or before a judge . . . .").

[15] Moeser argues that Sergeant Brown's use of a preprinted form undermines the solemnness. This argument too elevates the affidavit's form over its substance.

affidavit "in a form calculated to awaken [Sergeant Brown's] conscience and impress [his] mind with [his] duty to [tell the truth]." Tye, 248 Wis. 2d 530, ¶19; Wis. Stat. § 906.03(1). This substance must be elevated over Moeser's complaints regarding form.

IV. CONCLUSION

¶47 Moeser challenges the warrant which compelled him to submit to a blood draw. He argues that the warrant is constitutionally defective because the affiant was not placed under oath or affirmation when he signed the affidavit which accompanied the warrant application. According to Moeser, this omission failed to satisfy the requirement under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution that warrant applications be "supported by oath or affirmation." As a result, he argues that the circuit court erroneously denied his motion to suppress evidence and that the court of appeals erred in affirming that decision.

¶48 We conclude that the affidavit fulfilled the oath or affirmation requirement under the United States and Wisconsin constitutions because "[t]he purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth," and here the officer was impressed with that obligation. Tye, 248 Wis. 2d 530, ¶19; accord U.S. const. Amend. IV; Wis. Const. art. I, § 11. In other words, the constitutional guarantee is satisfied because the facts and circumstances demonstrate that Sergeant Brown executed this

affidavit "in a form calculated to awaken [Sergeant Brown's] conscience and impress [his] mind with [his] duty to [tell the truth]." Wis. Stat. § 906.03(1); accord Tye, 248 Wis. 2d 530, ¶19. The United States and Wisconsin constitutions do not require that any specific language or procedure be employed in the administration of an oath or affirmation. Instead, constitutional requirements, relevant case law, and the Wisconsin Statutes all indicate that the oath or affirmation requirement is an issue of substance, not form. Here, the facts sufficiently demonstrate that the constitutional right to be free from abusive governmental searches is satisfied. Therefore, the circuit court did not err in denying Moeser's motion to suppress, and the court of appeals is affirmed.

By the Court.—The decision of the court of appeals is affirmed.

¶49 BRIAN HAGEDORN, J. *(concurring).* The Fourth Amendment requires that for a warrant to issue, it must be "supported by Oath or affirmation." U.S. Const. Amend. IV. The majority opinion explains that neither the amendment's text nor its original understanding mandate that an oath or affirmation follow a particular form. Rather, the historical record suggests that the Fourth Amendment's oath or affirmation requirement is satisfied when an affiant: (1) knowingly and intentionally makes a statement; (2) affirms, swears, or declares that the information in the statement is true; and (3) does so under circumstances that impress upon the affiant the obligation to tell the truth.[1]

¶50 In this case, Sergeant Brown made a statement—the affidavit—in which he affirmed he had "personal knowledge that the contents of this affidavit are true . . . ." And by signing the statement before a notary with knowledge it would be presented to a magistrate—implicating the potential consequences of swearing falsely—Sergeant Brown acted under circumstances that impressed upon him the solemn obligation to tell the truth. This was enough to pass constitutional muster— but not by much.

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[1] See State v. Gutierrez-Perez, 337 P.3d 205, ¶19 (Utah 2014); see also United States v. Turner, 558 F.2d 46, 50 (2d Cir. 1977) (defining an oath or affirmation as a "formal assertion of, or attestation to, the truth of what has been, or is to be, said."); Affirmation, Giles Jacob, A New Law Dictionary (J. Morgan ed., 10th ed. 1782) (defining an affirmation as a "[s]olemn affirmation that what they [s]ay is true").

¶51 Although I disagree with its ultimate conclusion, the dissent offers strong counterarguments that call the sufficiency of the oath into question. In particular, the affidavit could be read to suggest a separate oath had already taken place, when the record is clear that it did not. I do not view this sloppiness as fatal for the reasons already described, but law enforcement should ensure the procedures employed to obtain warrants are clear and consistent. While the oath requirement is not a high bar, it is a constitutional prerequisite to obtaining a warrant. Giving careful attention to this requirement ensures searches are conducted in a manner that respect constitutional rights and do not risk undermining otherwise lawful efforts to collect evidence. Accordingly, I concur with and join the majority opinion.

¶52 I am authorized to state that Justice JILL J. KAROFSKY joins this concurrence.

¶53 ANN WALSH BRADLEY, J. *(dissenting).* The oath or affirmation requirement is not simply a matter of good practice. It is a constitutional imperative and an essential check on governmental power.

¶54 The majority states that the purpose of the oath or affirmation requirement is to "impress upon the swearing individual an appropriate sense of obligation to tell the truth." Majority op., ¶3 (citing State v. Tye, 2001 WI 124, ¶19, 248 Wis. 2d 530, 636 N.W.2d 473). Yet in this case, it is undisputed that the first sentence of Sergeant Brown's affidavit was not true. It says Sergeant Brown was "first duly sworn on oath." He wasn't.

¶55 The majority forgives this untruth, concluding that, despite the first sentence of the affidavit being false, somehow Sergeant Brown's conscience was "awakened" and his mind was "impressed" with the duty to tell the truth. Id. In essence, "good enough under the circumstances," says the majority.

¶56 But the question is not whether it is "good enough under the circumstances." Rather, the threshold question is: what is required under the warrant clause of both the United States and Wisconsin constitutions?

¶57 Justice Scalia, although in a different context, writing on behalf of the Court in Crawford v. Washington, faced a similar dilemma of dueling methods sufficient to establish reliability of testimony. He "readily concede[d]" that admitting reliable out-of-court testimony might be a good enough way to find the truth. Crawford v. Washington, 541 U.S. 36, 67

(2004). However, he observed that the Sixth Amendment of the United States Constitution required a specific mechanism for determining the truth: confrontation. While acknowledging that confrontation is not the only way for getting at the truth, he determined that it was the one and only way the Founders chose. Id. ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we . . . lack authority to replace it with one of our own devising.").

¶58 So it is here. The swearing of an oath or making an affirmation before a judicial officer may not be the only mechanism that is sufficiently reliable to support the requisite probable cause for the issuance of a search warrant. It is, however, the mechanism that the Founders chose.

¶59 The writings of a founding father and subsequent United States Supreme Court Chief Justice, John Marshall, teach that the oath is a "solemn requirement." Laurent Sacharoff, The Broken Fourth Amendment Oath, 74 Stan. L. Rev. 603, 679 (2022) (citing United States v. Burr, 25 F. Cas. 27, 28-29 (C.C.D. Va. 1807)). Yet, the majority attempts to replace this "solemn requirement" with a malleable mechanism of its own devising. Rather than focusing on the meaning of the words of the warrant clause, it instead examines the purpose of the clause and the purported intent of the affiant to determine that there was sufficient compliance with its purpose here.

¶60 In my view, the majority errs when it eschews the constitutional imperative and instead determines that the "constitutional guarantee is satisfied" upon an

examination of Sergeant Brown's subjective intent. See majority op., ¶3. The majority arrives at this conclusion via a flawed framework and focus.

¶61 To the contrary, I determine that the constitutional oath or affirmation requirement mandates more than an examination of the affiant's intent. It commands that an oath or affirmation actually take place, whether in writing or orally, and that it is done before a judicial officer in some fashion.[1] Because, as the majority correctly acknowledges, it is "undisputed that he made no such oath or affirmation before the judicial officer," id., ¶8, Sergeant Brown's affidavit does not meet the constitutional oath or affirmation requirement. As a consequence, the warrant is invalid and the blood draw evidence must be suppressed.

¶62 Accordingly, I respectfully dissent.

I

¶63 In the early morning hours of October 14, 2017, Sergeant Steven Brown stopped Jeffrey Moeser for suspected operating while intoxicated (OWI). Majority

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[1] I recognize that pursuant to Wis. Stat. § 968.12(3), "[a] search warrant may be based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication," and I do not mean to cast aspersions on this method or suggest that it is constitutionally suspect. A real-time interaction between an affiant and a judicial officer by electronic means conducted pursuant to the statutory procedures is the functional equivalent of "before a judicial officer." Further, for purposes of "administering an oath or affirmation," a notary, although not a judge, is a "judicial officer." See Wis. Stat. § 140.01(7).

op., ¶4. After conducting field sobriety tests, as well as a preliminary breath test, Sergeant Brown transported Moeser to the hospital for a blood draw. Id.

¶64 At the hospital, Moeser refused to consent to the blood draw.[2] Id., ¶5. As a consequence, Sergeant Brown sought a search warrant. Id. To support his warrant application, Sergeant Brown completed a fill-in-the-blank form entitled, "Affidavit."

¶65 Sergeant Brown filled in his name in the blank space appearing before the pre-printed text, that stated, "being first duly sworn on oath, deposes and says." Id., ¶6. The affidavit further set forth that Sergeant Brown "ha[s] personal knowledge that the contents of this affidavit are true and that any observations or conclusions of fellow officers referenced in this affidavit are truthful and reliable." Id. He signed and dated the affidavit in the presence of his colleague, Lieutenant Jacob Wills, a notary public. The notary's jurat[3] includes the phrase, "Subscribed and sworn to before me."

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[2] As is his constitutional right. State v. Prado, 2021 WI 64, ¶47, 397 Wis. 2d 719, 960 N.W.2d 869 (explaining that "a person has a constitutional right to refuse a search absent a warrant or an applicable exception to the warrant requirement").

[3] "'Jurat' is the name given to a notary's written certificate, which should appear after the signature of a person who has given an oath, or has made a sworn statement." Estate of Hopgood ex rel. Turner v. Boyd, 2013 WI 1, ¶4 n.4, 345 Wis. 2d 65, 825 N.W.2d 273.

¶66 However, it is undisputed that Sergeant Brown made no oral oath or affirmation before signing the affidavit, and he made no oath or affirmation before any judicial officer. Id., ¶8. Despite this shortcoming, a judicial officer approved the warrant application and Moeser's blood was drawn. Id., ¶¶6–7.

¶67 Moeser later moved to suppress the blood draw evidence, arguing that the warrant did not satisfy the constitutional oath or affirmation requirement. Id., ¶8. The circuit court denied the motion, indicating that "Sergeant Brown did realize that he was swearing to the truth of what he indicated in his affidavit."

¶68 Subsequently, Moeser appealed, and the court of appeals affirmed the circuit court's decision over Judge Kloppenburg's dissent. State v. Moeser, No. 2019AP2184–CR, unpublished slip op. (Wis. Ct. App. June 24, 2021). The court of appeals concluded that "the affidavit satisfied the requirement that search warrants be supported by oath or affirmation." Id., ¶1.

¶69 Judge Kloppenburg dissented. Observing that "it is undisputed that Sergeant Brown did not swear to the truthfulness of the statements in the affidavit before either the notary or the court commissioner" and that relevant statutes and case law "plainly require that the truth of an affidavit supporting a warrant must be sworn to before either a notary or a judge," Judge Kloppenburg determined that "the warrant is void." Id., ¶42 (Kloppenburg, J., dissenting).

¶70 The majority now affirms the court of appeals. It reasons "that the affidavit fulfilled the oath or

affirmation requirement under the United States and Wisconsin constitutions because '[t]he purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth,' and here the officer was impressed with that obligation." Majority op., ¶3. In the majority's view, "the constitutional guarantee is satisfied because the facts and circumstances demonstrate that Sergeant Brown executed this affidavit 'in a form calculated to awaken [Sergeant Brown's] conscience and impress [his] mind with [his] duty to [tell the truth]." Id. The majority continues: "The United States and Wisconsin constitutions do not require that any specific language or procedure be employed in the administration of an oath or affirmation. Instead, constitutional requirements, relevant case law, and Wisconsin Statutes all indicate that the oath or affirmation requirement is an issue of substance, not form." Id.

II

¶71 Although there is disagreement in constitutional analyses about how much weight should be given to the original meaning of the constitutional text, there appears a general agreement that, no matter the approach, it deserves some weight and matters at least to some degree. See Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 742-45 (1999). Accordingly, I begin by focusing my analysis on three primary sources in determining the meaning of the constitutional oath or affirmation provision: the plain language of the text, the constitutional debates and

practices of the time, and the earliest interpretations and applications of the provision.[4]

¶72 I do not endeavor to provide an exegesis discussing these sources. Rather, the discussion below provides an abbreviated review sufficient to support the conclusion that Sergeant Brown's affidavit does not meet the constitutional imperative that an oath or affirmation actually take place. For additional support, I also examine relevant modern case law and statutes.

A

¶73 The text of the Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." This requirement is echoed by the Wisconsin constitution. Wis. Const. art. I, § 11.[5]

¶74 In an attempt to buttress its result, the majority likewise looks to the text of the constitutional

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[4] Although I recognize that a historical inquiry is established in our case law, see, e.g., Appling v. Walker, 2014 WI 96, ¶7, 358 Wis. 2d 132, 853 N.W.2d 888; Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, ¶19, 295 Wis. 2d 1, 719 N.W.2d 408, I nevertheless am wary of a legal analysis that puts a court in the position of amateur historian. Such a framework is ripe for cherry-picking historical evidence that supports a favored conclusion. See State v. C.G., 2022 WI 60, ¶111, 403 Wis. 2d 229, 976 N.W.2d 318 (Ann Walsh Bradley, J., dissenting) (quoting Ford v. Wainwright, 477 U.S. 399, 406 (1986)); see generally Erwin Chemerinsky, Worse Than Nothing (2022).

[5] Aside from minor differences in punctuation and capitalization, the Fourth Amendment and Article I, Section 11 are identical.

provision, and specifically to definitions of "oath" from the founding era. See majority op., ¶19. But in doing so, it often cites authority that supports the conclusion of this dissent.

¶75 For example, the majority cites a 1782 dictionary defining "oath" as "an affirmation or denial of any thing, before one or more persons who have authority to administer the same, for the discovery and advancement of truth and right, calling God to witness, that the testimony is true." Id. (citing Oath, Giles Jacob, A New Law Dictionary (J. Morgan ed., 10th ed. 1782)). According to this definition, apparently espoused by the majority, an oath must be accomplished before one who has authority to "administer" the oath. "Administering" an oath thus presupposes that the affiant has undertaken some sort of action before another indicating recognition of the need to tell the truth. Swearing an oath invokes the deity to be a witness to the oath and risks punishment from the divine if the truth is not told.[6]

¶76 Other founding era dictionaries confirm the active nature of an oath, i.e., it is something that must be done before another. For example, a 1775 dictionary defines an "oath," as relevant here, as "[a] solemn attestation, the form of attestation before a

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[6] See Oath, Black's Law Dictionary (11th ed. 2019) (defining "oath" as "[a] solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise"). One who falsely swears an oath also may face legal consequences, such as criminal charges for perjury or false swearing. See Wis. Stat. §§ 946.31, 946.32.

magistrate, an appeal to the Divine Being by the mention of something sacred . . . ." Oath, John Ash, The New and Complete Dictionary of the English Language (1775). This definition confirms that there must actually be an "attestation," which must be accomplished "before a magistrate."

¶77 The constitutional text thus weighs against the majority's conclusion. As will be more fully set forth below, Sergeant Brown did nothing "before" anyone that could be called a "solemn attestation," or that risked punishment from a deity if the truth is not told. In essence, he did nothing constituting an "oath" as envisioned by the constitutional mandate, "supported by oath."

B

¶78 To further examine the meaning of the text, I turn next to the constitutional debates at the time of the founding. The warrant clause of the Fourth Amendment came about as a response to Britain's use of Writs of Assistance "in the American colonies to search wherever government officials chose with nearly absolute and unlimited discretion." Tye, 248 Wis. 2d 530, ¶8; see also State v. Williams, 2012 WI 59, ¶17, 341 Wis. 2d 191, 814 N.W.2d 460. These writs were perceived by the colonists as fundamental violations of the right to be undisturbed in their person and property, and accordingly each of the state constitutions following independence guaranteed the right to be free from unreasonable searches and seizures. Tye, 248 Wis. 2d 530, ¶9.

¶79 In the process of crafting the United States Constitution, James Madison served as the drafter for the federal rights amendments. His original proposed language for the Fourth Amendment included an oath or affirmation requirement:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

Davies, supra ¶71, at 697 (citing James Madison, Speech to the House of Representatives (June 8, 1789), in 12 The Papers of James Madison 197, 201 (Robert A. Rutland et al. eds., 1977)).

¶80 The final language of the amendment likewise contained the oath or affirmation requirement, which was not altered by a subsequent committee report, the House, the Senate, or the state legislatures, where it was ratified "without any apparent controversy." Id. at 723. This consistency of the oath or affirmation language reflects the central nature of this requirement in the Fourth Amendment's text.

¶81 A similar series of events played out in Wisconsin. Even prior to statehood, the territorial legislature enacted a requirement mandating an oath in an application for a search warrant. Tye, 248 Wis. 2d 530, ¶10. And when Wisconsin attained statehood, it also included in its constitution an amendment

protecting the people against unreasonable searches and seizures. Like the Fourth Amendment, the initial proposed language of Article I, Section 11 of the Wisconsin constitution included language dictating that warrants must be "supported by oath or affirmation." Milo M. Quaife, ed., The Attainment of Statehood 228 (1928). This proposed language set forth:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants to search any place or seize any person or thing shall issue without describing, as near as may be, nor without probable cause, supported by oath or affirmation.

Id. Again, this language remained consistent through the constitutional debate. Indeed, "[i]t is evident from the debates that the adoption of Article I, Section 11 was relatively uncontroversial . . . ." Williams, 341 Wis. 2d 191, ¶25. Accordingly, Article I, Section 11 was enshrined in our state constitution. Tye, 248 Wis. 2d 530, ¶10. The debates thus reflect both the central importance of the oath or affirmation requirement and the consensus surrounding its necessity.

¶82 An examination of the practices at the time following adoption of these constitutional provisions further confirms that an oath or affirmation is an "act" done before a judicial officer.

¶83 During our nation's founding era, justices of the peace were central to the warrant-issuing process.

Indeed, they issued the majority of warrants. Sacharoff, supra ¶59, at 623 (citing 2 Matthew Hale, Historia Placitorum Coronae: The History Of The Pleas Of The Crown 107 (W.A. Stokes & E. Ingersoll eds., Philadelphia, Robert H. Small 1st Am. ed. 1847)). These justices of the peace relied upon published justice of the peace manuals, which "in turn, greatly influenced the Framers and ratifiers." Id. at 624.

¶84 The manuals for justices of the peace often contained forms for complaints to obtain a warrant, and such forms included standard language that a complainant "swears" to the information therein. Id. at 630-31. "[This] warrant process occurred before a magistrate who was required to carefully examine and assess the witness to ensure the truth of the allegations." Id. at 607.

¶85 Such forms setting forth standard language were also in use in Wisconsin. See Edwin E. Bryant, A Treatise on the Civil and Criminal Jurisdiction of Justices of the Peace, and the Powers and Duties of Constables in Executing Process in the State of Wisconsin 940 (1884). These forms likewise set forth a jurat: "Subscribed and sworn to before me, this __ day of __, A.D. 18__, ___ ___, Justice of the Peace." Id.[7] And

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[7] In full, an example form complaint for a search warrant in Wisconsin's Justice of the Peace manual sets forth:

State of Wisconsin

_____ County

C.D., being first duly sworn, complains on oath before me and says that one harness of the value of thirty dollars, and one saddle of the value of ten dollars, of the goods

even today, example forms consistently contain a statement in the jurat that the information in the affidavit was "Subscribed and sworn to before me." Indeed, the affidavit in this case was affixed with a similar jurat.

¶86 Thus, from the early days of the republic, an affidavit in support of a search warrant necessarily was accompanied by an act of swearing before a judicial officer, supporting this dissent's conclusion that an affiant must complete some sort of act to have properly sworn an oath or made an affirmation. Stated differently, the practices at the time of the founding make clear that an oath must be taken, and it must be done before a judicial officer.

> and chattels of the said C.D. were, on the ___ day of ___, A.D. 18___, feloniously taken, stolen and carried away from his premises and possession, at said county, and that the said complainant verily believes that the said stolen goods and chattels are concealed in the dwelling house of one A.B. (or, particularly describe the place to be searched), in the ____ of ____, in said county; and that the following are the reasons for and grounds of such belief: (Here set forth reasons, etc., to satisfy the magistrate that there is cause for such belief.)
>
> Subscribed and sworn to before me, this ___ day of ___, A.D. 18__, _____ _____, Justice of the Peace.

Edwin E. Bryant, A Treatise on the Civil and Criminal Jurisdiction of Justices of the Peace, and the Powers and Duties of Constables in Executing Process in the State of Wisconsin 940 (1884).

C

¶87 An examination of the earliest interpretations and applications of the constitutional oath or affirmation requirement also informs our inquiry. Early legislative enactments reinforced the need for an oath in an application for certain search warrants. Tye, 248 Wis. 2d 530, ¶11. Indeed, the Wisconsin legislature passed a statute indicating just this in 1848, the same year Wisconsin attained statehood.[8] Id. The text of this original statutory provision has been amended numerous times, but it still today refers to a "sworn complaint" or "sworn oral testimony." Id.; Wis. Stat. § 968.12 (emphasis added).[9] Additionally, the

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[8] See State v. Tye, 2001 WI 124, ¶11 n.10, 248 Wis. 2d 530, 636 N.W.2d 473; Wis. Stat. § 2, ch. 142 (1849) ("Any such magistrate when satisfied that there is reasonable cause, may also, upon like complaint made on oath, issue search warrants . . . .").

[9] In relevant part, Wis. Stat. § 968.12 provides:

> (2) Warrant upon affidavit. A search warrant may be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter or under sub. (3)(d), showing probable cause therefor [sic]. The complaint, affidavit or testimony may be upon information and belief. The person requesting the warrant may swear to the complaint or affidavit before a notarial officer authorized under ch. 140 to take acknowledgments or before a judge, or a judge may place a person under oath via telephone, radio, or other means of electronic communication, without the requirement of face-to-face contact, to swear to the complaint or affidavit. The judge shall indicate on the search warrant that the person so swore to the complaint or affidavit.
>
> (3) Warrant upon oral testimony. (a) General rule. A search warrant may be based upon sworn oral testimony

modern statute indicates that the complaint must be sworn to "before a notarial officer authorized under ch. 140 to take acknowledgments or before a judge" or may be taken telephonically in compliance with certain statutory procedures. Wis. Stat. § 968.12(2) & (3).

¶88 We find an additional example of the early application of the oath or affirmation requirement by one of the preeminent jurists in our country's history during the course of his participation in a notorious trial. As part of the trial of Aaron Burr in 1807, Chief Justice John Marshall was asked to rule on the admissibility of an affidavit. For an oath to be a "legal oath," Chief Justice Marshall commented that it must be "taken by a 'complete magistrate' who is 'qualified.'" Sacharoff, supra ¶59, at 680 (citing Burr, 25 F. Cas. at 28-29). His ruling demonstrates that an oath is "a solemn requirement that could not be relaxed." Id. at 679.

¶89 The upshot of all of this is that an oath is an "act" that must take place. The groundwork for such a premise is laid by dictionaries from the founding era and built upon through the constitutional debates and practices of the time, as well as the first interpretations and applications after enactment. The affiant must do something, and that something is to actually take an oath.

communicated to the judge by telephone, radio or other means of electronic communication, under the procedure prescribed in this subsection.

D

¶90 I turn next to examine applications of an oath or affirmation requirement in Wisconsin case law. This case law again drives home the point that an "oath" is an act that must take place.

¶91 In Kellner v. Christian, 197 Wis. 2d 183, 191, 539 N.W.2d 685 (1995), we concluded that "in order for a notice to be properly 'sworn to' under Wis. Stat. § 893.82(5), a claimant must make an oath or affirmation as to the truthfulness of the contents of the notice." In doing so, we described the oath or affirmation requirement as mandating "in some form an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath." Id. at 192 (emphasis added).

¶92 We have also distinguished an oath or affirmation from an "acknowledgement" in that "oaths and affirmations require a person to swear or affirm the truth of a statement." Estate of Hopgood ex rel. Turner v. Boyd, 2013 WI 1, ¶30, 345 Wis. 2d 65, 825 N.W.2d 273.[10] "They are solemn, formal, and signify an obligation to speak the truth." Id. We have also described an oath or affirmation as something that "must be administered." Id., ¶31; see also State v. Johnston, 133 Wis. 2d 261, 267, 394 N.W.2d 915 (Ct. App. 1986) (concluding that the defendant was under

[10] Admittedly, Hopgood, like Kellner, addressed the requirement that a notice of claim pursuant to Wis. Stat. § 893.82(5) be "sworn to," and not a search warrant. However, this is distinction without a difference. Why should it mean one thing to "swear to" a statement's truth in one context and something else in another?

oath after the oath was administered by the clerk of court). Use of the word "administer" strengthens the premise that an oath is an "act" taken by the affiant before and in interaction with another.[11]

III

¶93 With the above discussion as a guide, I turn finally to apply the teachings of the constitutional text, constitutional debates and practices of the time, earliest legislative enactments, and case law to the facts at hand.

¶94 As the historical evidence demonstrates, and as the majority correctly observes, an oath or affirmation has long been an "essential prerequisite to the issuance of a valid search warrant." Majority op., ¶17; Tye, 248 Wis. 2d 530, ¶13; State v. Baltes, 183 Wis. 545, 552, 198 N.W. 282 (1924). For a constitutional "essential prerequisite," the majority treats the oath or affirmation requirement rather loosely. There is no dispute here that Sergeant Brown did not, either orally or in writing, swear or affirm that he would tell the truth at any point in the process of filling out or signing his affidavit. The law does not support the majority's "look the other way" approach.

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[11] The majority quotes from a commonly-cited treatise on criminal procedure to support its conclusion. Majority op., ¶32 (quoting 2 Wayne R. LaFave, et al., Criminal Procedure § 3.4(c) (4th ed. 2021) (citations omitted)). However, as the majority further acknowledges, LaFave also states that "[n]o particular ceremony is necessary to constitute the act of swearing," further supporting this dissent's conclusion that an oath requires an act. See LaFave, et al., supra, § 3.4(c) (emphasis added). Thus, this treatise still supports this dissent's premise that "something must be done."

¶95 Sergeant Brown's affidavit, by itself, was insufficient to fulfill the constitutional oath or affirmation requirement. I agree with the majority that an oath need not be oral. See majority op., ¶19 (indicating that "it was recognized during the Founding that an 'oath' could be written rather than spoken"). However, nothing in the affidavit constitutes a written oath and the parties agree that no oral oath was ever "taken" before a judicial officer. If, instead of "being first duly sworn," the affidavit began with "I swear or affirm that the contents of this affidavit are true," we would likely not have this case before us. And if Sergeant Brown had made an oral oath before the notary swearing or affirming the truth of the affidavit's contents, we likely would be on solid constitutional ground.

¶96 However, neither of these things happened. The affidavit instead falsely asserts that Sergeant Brown was "first duly sworn." It is undisputed that he was not. This court has previously held that "the total absence of any statement under oath to support a search warrant violates the explicit oath or affirmation requirement." Tye, 248 Wis. 2d 530, ¶3. Such is the case here.

¶97 I further agree with the majority that an oath is a matter of substance, not form. See majority op., ¶36. But this does not mean that law enforcement can dispense with the act of an oath altogether and still call it an oath. There may not be "magic words" required, but there still must be an oath. Here, Sergeant Brown's "oath" was deficient as a matter of

substance because there was no actual oath taken by the affiant.

¶98 Indeed, there was no "oath" "taken" "before" anyone. There was no attestation, much less an attestation before a magistrate. Because Sergeant Brown did not commit any act before any other person that would indicate he was under oath at any point in the process of drafting, signing, or notarizing the affidavit, I conclude that he was not under oath for purposes of the Fourth Amendment and Article I, Section 11 of the Wisconsin constitution.

¶99 The oath or affirmation requirement is not a technicality or meaningless hoop through which law enforcement must jump. See Kellner, 197 Wis. 2d at 192 (explaining that "the requirement of an oath is not a mere technicality"); Tye, 248 Wis. 2d 530, ¶14 (agreeing with the State's acknowledgement that the "failure to swear to the information upon which a warrant is obtained cannot be dismissed as a mere failure to comply with a technicality"). It is instead a constitutional imperative. I would hold law enforcement to the constitutional standard, thereby "preserv[ing] the integrity of the search warrant process," Tye, 248 Wis. 2d 530, ¶19, and upholding the vitality of the oath or affirmation requirement.

¶100 For the foregoing reasons, I respectfully dissent.

¶101 I am authorized to state that Justice REBECCA FRANK DALLET joins this dissent.

COURT OF APPEALS DECISION DATED AND FILED

June 24, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2019AP2184–CR
Cir. Ct. No. 2017CF515

STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF–RESPONDENT,

V.

JEFFREY L. MOESER,

DEFENDANT–APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: ROBERT J. SHANNON, Judge. *Affirmed and cause remanded with directions.*

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, JJ.

¶1 NASHOLD, J. Jeffrey Moeser appeals a judgment convicting him of operating while intoxicated, sixth offense. *See* WIS. STAT. § 346.63(1)(a) (2019-20).[1] He contends that the results from chemical testing of his blood should have been suppressed because the affidavit in support of the search warrant authorizing the blood draw was not sworn to under oath by the affiant police officer, in violation of the United States and Wisconsin constitutions. We conclude that the affidavit satisfied the requirement that search warrants be supported by oath or affirmation, and therefore affirm.

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[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

BACKGROUND

¶2 The following facts are undisputed. Jeffrey Moeser was arrested by Sergeant Steve Brown for operating while intoxicated (OWI), sixth offense, in October 2017. Brown transported Moeser to a hospital where Moeser refused to comply with a blood draw, causing Brown to seek a search warrant. In Brown's presence, Lieutenant Jacob Wills, a notary public, notarized Brown's affidavit in support of the search warrant.

¶3 As germane to this appeal, the affidavit contained the following statements and characteristics. At the top of the affidavit, Brown wrote his name on a blank space preceding the phrase, "being first duly sworn on oath, deposes and says:" In the affidavit's second paragraph, Brown stated, "I have personal knowledge that the contents of this affidavit are true and that any observations or conclusions of fellow officers referenced in this affidavit are truthful and reliable." Near the bottom of the affidavit, Brown dated and signed the affidavit, and he indicated that the affidavit was made at the hospital. His signature appears immediately above a jurat[2] that reads, "Subscribed and sworn to before me."

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[2] "'Jurat' is the traditional name used to refer to the notary's written certificate, which should appear after the signature of a person who has given an oath, or has made a sworn statement." WISCONSIN DEP'T OF FINANCIAL INSTITUTIONS, NOTARY PUBLIC INFORMATION 9 (May 2020), available at https://wdfi.org/Apostilles_Notary_Public_and_Trademarks/pdf/dfi-not-102P.pdf (last visited June 9, 2021); *see also* ***Estate of Hopgood v. Boyd***, 2013 WI 1, ¶4 n.4, 345 Wis. 2d 65, 825 N.W.2d

Wills dated and signed the jurat, and he affixed his notary seal.

¶4 Wills presented the completed warrant to the on-call court commissioner, who authorized the warrant. It is undisputed that Brown made no oral statement supporting the truth of the contents of the affidavit, either while signing the affidavit in the presence of Wills or before the court commissioner.

¶5 Moeser's blood was drawn and the results from the blood test showed a blood alcohol concentration of 0.220 g/100mL. The State charged Moeser with OWI, sixth offense, and operating with prohibited alcohol concentration, sixth offense.

¶6 Moeser filed a motion to suppress the blood test results, arguing that the warrant did not satisfy constitutional requirements because, according to Moeser, Brown was not placed under oath regarding the statements made in his affidavit. Referencing an audio recording[3] taken at the hospital, Moeser noted that Brown never orally swore under oath that the allegations contained in the affidavit were true.

¶7 Wills subsequently completed a supplemental report describing his recollections regarding having notarized Sergeant Brown's affidavit. The report contains the following statement:

> Sgt. Brown completed the Affidavit. I observed Sgt. Brown sign the Affidavit. I notarized Sgt.

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273 (relying on Wisconsin Department of Financial Institution's definition of "jurat").

[3] This recording is not part of the appellate record.

> Brown's signature certifying his true and accurate identity. . . . Following the established procedure for obtaining an OWI search warrant, I did not administer an oath, nor did Sgt. Brown swear to me the facts contained in the Affidavit.[4]

¶8 The State filed a response to Moeser's motion, with Wills' supplemental report attached. The State argued that the affidavit was sworn or affirmed because language in the affidavit showed Brown's clearly manifested intention to be under oath. With respect to Wills' statement that he acted in accordance with "established procedure," the State responded,

> This office has confirmed that, indeed, this was the "established policy" of the Portage County Sheriff[']s Office. The State concedes this policy was erroneous. All law enforcement agencies in Portage County have been reminded that the better practice is to administer an oral oath upon signing the affidavit in support of a search warrant.[5]

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[4] In making this statement, Wills appears to be referring to an *oral* oath or swearing. Regardless, to the extent Wills is suggesting that no oath or affirmation took place at all, neither the State nor this court is bound by Wills' conclusion. The question of whether Brown's affidavit satisfied the oath or affirmation requirement is a legal determination to be decided by the court.

[5] Despite our conclusion explained below that the warrant issued in this case was supported by an oath or affirmation, we express our strong agreement with the statement that the "better practice" is for the notary to administer an oral oath or

¶9 Following a hearing on stipulated facts, the circuit court rejected Moeser's argument that the warrant was constitutionally infirm because Brown never recited an oral oath. The court determined that "the language in the affidavit indicates to the Court that Sergeant Brown swore to the truth of the information provided in the affidavit." The court distinguished authority upon which Moeser relied[6] and, citing ***United States v. Brooks***, 285 F.3d 1102, 1105 (8th Cir. 2002), the court determined that the warrant was not defective because "Sergeant Brown did realize that he was swearing to the truth of what

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affirmation prior to obtaining the affiant's signature on the affidavit in support of a search warrant, or, alternatively, for the circuit court judge or commissioner to require the officer to verbally swear to the contents of the affidavit before issuing the warrant. *See* ***State v. Johnson***, No. 2019AP1398-CR, unpublished slip op. ¶33 (WI App Sept. 9, 2020) ("[W]e note that although the validity of an oath or affirmation is a 'matter of substance, not form,' we consider the better practice for all parties involved in the search warrant application process is to utilize the directory methods of administering an oath or affirmation that our legislature has provided in WIS. STAT. § 906.03(2) and (3). . . . [H]owever, the failure to do so in this case did not invalidate the search warrant." (quoting ***State v. Tye***, 2001 WI 124, ¶19, 248 Wis. 2d 530, 636 N.W.2d 473)); *see also* ***United States v. Brooks***, 285 F.3d 1102, 1106 (8th Cir. 2002) (holding that "a person may be under oath even though that person has not formally taken an oath by raising a hand and reciting formulaic words" but noting that "the better practice is for an affiant orally to affirm or swear before a person authorized to administer oaths.").

[6] As he does on appeal, in the circuit court Moeser relied on ***Tye*** and ***State v. Hess***, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568, which we discuss later in this opinion.

he indicated in his affidavit." The court denied the motion to suppress the blood draw.

¶10 At a subsequent plea and sentencing hearing, Moeser pleaded guilty to sixth offense OWI. The circuit court withheld sentence and placed Moeser on probation for three years with various conditions, but stayed the sentence pending this appeal.

DISCUSSION

¶11 Moeser does not dispute that the information in the affidavit establishes probable cause for the search warrant. Rather, Moeser argues[7] that the affidavit was defective because it was not "sworn to" by Brown. Specifically, he contends that the affidavit was not "sworn to" because Brown was never "placed under oath nor did he orally swear that the contents in the affidavit were true to the best of his knowledge." The State responds that the oath or affirmation requirement was satisfied because Brown actually or constructively swore to or affirmed the facts in the affidavit. It argues that the oath or affirmation requirement was met because the circumstances

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[7] WISCONSIN STAT. RULE 809.19(8)(c)(1) provides that a party's statement of the case should be included in the word count required by RULE 809.19(8)(d). Moeser's brief-in-chief does not include the statement of the case in the word count, nor was his electronic brief provided in a text-searchable format, as required by RULE 809.19(12)(c), so that we may easily verify the word count. Because the brief as a whole does not exceed the word limit set forth by RULE 809.19(8)(c)(1), we consider the brief in its entirety, but we remind counsel that we expect full compliance with the rules of appellate procedure, including RULE 809.19(8)(d).

surrounding the search warrant application impressed upon Brown the importance of telling the truth when he supplied facts to the court commissioner. As we explain below, we conclude that, under the specific facts of this case, the oath or affirmation requirement is satisfied.[8]

I. Standard of Review and Legal Principles Governing Oaths and Affirmations

¶12 In reviewing the denial of a motion to suppress, we will uphold the circuit court's findings of

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[8] Despite the State's argument that the officers' actions in this case satisfied the oath or affirmation requirement, the dissent states at several points that it is "undisputed" that the officer seeking the warrant did not make an oath or affirmation as to the truthfulness of the affidavit before either the notary or the court commissioner. Dissent, ¶¶1-3, 10. In fact, whether an oath or affirmation occurred is not only disputed in this case, it is the *only* issue in dispute on appeal.

The dissent's statement appears to reflect its conclusion that an "oath or affirmation" necessarily means that the affiant has made an oral declaration regarding the truth of the affidavit. It appears that, under the dissent's view, a written act cannot suffice, even where, as here: (1) the affiant wrote his name preceding the phrase, "being first duly sworn on oath, deposes and says"; (2) the affiant stated in the body of the affidavit, "I have personal knowledge that the contents of this affidavit are true and that any observations or conclusions of fellow officers referenced in this affidavit are truthful and reliable"; (3) the affiant signed and dated the affidavit; (4) the affiant completed these actions in the presence of the notary; (5) the affiant's signature appears immediately above the notary's jurat that states, "Subscribed and sworn to before me"; (6) the notary dated and signed the jurat; and (7) the notary affixed his notary seal.

fact unless they are clearly erroneous, but we will review de novo the circuit court's application of constitutional principles to those facts. ***State v. Sykes***, 2005 WI 48, ¶12, 279 Wis. 2d 742, 695 N.W.2d 277.

¶13 The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." Similarly, Article I, Section 11 of the Wisconsin Constitution states that "no warrant shall issue but upon probable cause, supported by oath or affirmation." "The Wisconsin state constitutional oath provision has been reinforced by legislation," specifically, WIS. STAT. § 968.12. ***State v. Tye***, 2001 WI 124, ¶11, 248 Wis. 2d 530, 636 N.W.2d 473. Pursuant to this statutory provision, a search warrant may be based either "upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication," § 968.12(3)(a), or "upon affidavit," § 968.12(2). The warrant upon affidavit subsection provides, in pertinent part:

> (2) WARRANT UPON AFFIDAVIT. A search warrant may be based upon sworn complaint or affidavit . . . showing probable cause therefor [sic]. The complaint, affidavit or testimony may be upon information and belief. The person requesting the warrant may swear to the complaint or affidavit before a notarial officer authorized under ch. 140 to take acknowledgments or before a judge, or a judge may place a person under oath via telephone,

> radio, or other means of electronic communication, without the requirement of face-to-face contact, to swear to the complaint or affidavit. The judge shall indicate on the search warrant that the person so swore to the complaint or affidavit.[9]

Sec. 968.12(2).

¶14 The terms "oath" and "affirmation"[10] are not defined in the United States or Wisconsin constitutions, nor are the terms defined in Wisconsin statutes. WISCONSIN STAT. § 887.03, included in the chapter, "Depositions, Oaths and Affidavits," broadly provides that an oath or affidavit "may be taken in any of the usual forms, and every person swearing, affirming or declaring in any such form shall be deemed to have been lawfully sworn." However, that section does not define the terms "swearing" or "affirming," nor does it describe what is meant by "the usual forms." WISCONSIN STAT. § 906.03, entitled, "Oath or affirmation," sheds some light on what "usual forms" an oath or affirmation may take, at least

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[9] Effective April 11, 2018, WIS. STAT. § 968.12(2) was amended to include the last two sentences of this provision. 2017 Wis. Act 261, § 11m. The events leading to this appeal occurred prior to the stated effective date of this amendment. The State nonetheless relies on the new language in § 968.12(2) in its briefing to this court without addressing retroactivity, and Moeser does not challenge the application of the amendment. We note that the outcome of this case is the same regardless of whether the amendment applies.

[10] WISCONSIN STAT. § 990.01(24) provides that "'oath' includes affirmation in all cases where by law an affirmation may be substituted for an oath."

in the context of testimony by witnesses in court proceedings. Section 906.03 provides:

> Oath or affirmation.
>
> (1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so.
>
> (2) The oath may be administered substantially in the following form: Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God.
>
> (3) Every person who shall declare that the person has conscientious scruples against taking the oath, or swearing in the usual form, shall make a solemn declaration or affirmation, which may be in the following form: Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury.
>
> (4) The assent to the oath or affirmation by the person making it may be manifested by the uplifted hand.

¶15 In addition, we note that Black's Law Dictionary defines "oath" as "[a] solemn declaration, accompanied by a swearing to God or a revered person

or thing, that one's statement is true or that one will be bound to a promise," while "affirmation" is defined as "[a] solemn pledge equivalent to an oath but without reference to a supreme being or to swearing." BLACK'S LAW DICTIONARY (11th ed. 2019).

¶16 An oath or affirmation "is a matter of substance, not form, and it is an essential component of the Fourth Amendment and legal proceedings." ***Tye***, 248 Wis. 2d 530, ¶19. "The purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth." ***Id.*** (citing ***Kellner v. Christian***, 197 Wis. 2d 183, 192, 539 N.W.2d 685(1995)). "An oath or affirmation to support a search warrant reminds both the investigator seeking the search warrant and the magistrate issuing it of the importance and solemnity of the process involved." ***Tye***, 248 Wis. 2d 530, ¶19. It "protects the target of the search from impermissible state action by creating liability for perjury or false swearing for those who abuse the warrant process by giving false or fraudulent information." ***Id.*** (footnotes omitted). "[W]hen no sworn testimony exists to support a search warrant, then the warrant is void." ***Id.*** at ¶13.

II. Application of Legal Principles to the Affidavit and Warrant In This Case

¶17 Moeser argues that the Brown affidavit notarized by Lieutenant Wills did not satisfy our federal and state constitutions' oath or affirmation requirements because it did not comply with the procedures for administering an oath or affirmation set forth in WIS. STAT. § 906.03. We disagree.

¶18 First, Moeser cites no authority for the position that the procedures outlined in WIS. STAT. § 906.03, a statute governing witness testimony at court proceedings, governs the oath or affirmation requirement in the context of an affidavit for a search warrant. Moreover, even if we were to assume that these statutory procedures apply here, the subsections of the statute containing the procedures that Moeser argues are mandatory all use the word "may," indicating that the directives are permissive and not mandatory. *See* ***City of Wauwatosa v. County of Milwaukee***, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963) ("Generally in construing statutes, 'may' is construed as permissive and 'shall' is construed as mandatory unless a different construction is demanded by the statute in order to carry out the clear intent of the legislature."). Specifically, subsections (2) and (3) propose a form that an oath or affidavit *may* take, and subsection (4) indicates that the person *may* manifest assent by an uplifted hand. *See* § 906.03(2)-(4). Subsection (1) also suggests that no specific recitation or procedure is required to administer an oath or affirmation, and that instead, the focus is on ensuring the truthfulness of the statements: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so." *See* § 906.03(1). The permissive form of these provisions, combined with the directive in WIS. STAT. § 887.03 that the oath or affirmation supporting an affidavit "may be taken in any of the usual forms," leads us to

reject Brown's argument that an affidavit that does not comply with the procedures and oral recitations set forth in § 906.03 is constitutionally deficient. *See also* 2 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 3.4(c) (4th ed. 2020) ("Oath or affirmation requirement means the information must be sworn to"; however, "[n]o particular ceremony is necessary to constitute the act of swearing"; rather, "[i]t is only necessary that something be done in the presence of the magistrate issuing the search warrant which is understood by both the magistrate and the affiant to constitute the act of swearing." (footnotes omitted)).

¶19 We conclude that, under the facts present here, the search warrant was supported by Brown's oath or affirmation that the statements in his affidavit were true. We further agree with the State that ***Kellner***, 197 Wis. 2d at 191-92, is instructive in determining whether the oath or affirmation requirement was satisfied.

¶20 ***Kellner*** addresses the requirement that a written notice of claim be "sworn to" before a claimant may bring an action against a state employee under WIS. STAT. § 893.82(5). ***Kellner***, 197 Wis. 2d at 189. The court determined that "in order for a notice to be properly "sworn to" under Wis. Stat. § 893.82(5), a claimant must make an oath or affirmation as to the truthfulness of the contents of the notice." ***Id.*** at 191. The ***Kellner*** court explained that "[t]he essentials of an oath are: (1) a solemn declaration; (2) manifestation of intent to be bound by the statement; (3) signature of the declarer; and (4) acknowledgment

by an authorized person that the oath was taken." ***Id.*** at 191-92.

¶21 Although Moeser is correct that ***Kellner*** does not involve an affidavit in support of a search warrant but instead addresses notices of claims against a state employee, the four factors articulated in that case are used to determine whether an oath or affirmation occurred in the context of swearing to the contents of a written document, which is the issue here. These factors provide a useful framework for considering whether the Brown affidavit satisfied the oath or affirmation requirement. Application of these factors shows that the Brown affidavit contained the requisite oath or affirmance in support of the warrant issued in this case.

¶22 First, Sergeant Brown made a "solemn declaration," ***id.*** at 191, by writing his name on the blank space for "name of Affiant" preceding the statement "being first duly sworn on oath, deposes and says." Second, he manifested an "intent to be bound by the statement," ***id.***, in several ways: by writing his name before the statement "being first duly sworn on oath, deposes and says," as just explained; by stating in his affidavit: "I have personal knowledge that the contents of this affidavit are true and that any observations or conclusions of fellow officers referenced in this affidavit are truthful and reliable;" and by signing the affidavit in the presence of a notary public, Wills, alongside Wills' notary jurat indicating that the affidavit's contents were "[s]ubscribed and sworn to" Wills on the date indicated. Third, the affidavit bears Brown's

signature, which appears near the end of the affidavit. Fourth, the affidavit indicates an "acknowledgement by an authorized person that the oath was taken," ***id.*** at 192, as manifested by Wills' notary jurat appearing below Brown's signature and stating that the affidavit was "subscribed and sworn to" Wills, along with Wills' notary seal.

¶23 Thus, we conclude that the four ***Kellner*** factors support the conclusion that the affidavit and warrant satisfied the oath or affirmation requirement.

III. *State v. Tye* and *State v. Hess*

¶24 In support of his argument that Brown's affidavit was "unsworn," Moeser relies heavily on our supreme court's decision in ***Tye***. This reliance is misplaced. In ***Tye***, the investigator failed to sign and swear to the affidavit supporting the search warrant, and gave no sworn testimony supporting the affidavit's accuracy. ***Tye***, 248 Wis. 2d 530, ¶5. After the search warrant was executed, the investigator realized that the affidavit had not been given under oath and notified the district attorney's office of this fact. ***Id.***, ¶7. Because of this defect, the investigator prepared and swore to a second affidavit. ***Id.*** The ***Tye*** court determined that the warrant was facially deficient because the only supporting affidavit at the time of the warrant's execution did not meet the constitutional requirement of an oath or affirmation. ***Id.*** The court held that "the total absence of any statement under oath" to support the search warrant at the time of its execution violated the oath or affirmation requirement of the federal and state constitutions. ***Id.***, ¶¶3, 21.

¶25 In contrast to ***Tye***, in which there was a "total absence of any statement under oath," here, as explained above, Brown's affidavit contained numerous indicia of Brown's intent to swear or affirm to the truth of the affidavit's contents. Furthermore, unlike this case, in which the parties dispute whether the affidavit met the oath or affirmation requirement, in ***Tye*** it was undisputed that there was absolutely no oath or affirmation supporting the search warrant affidavit when the search warrant was executed. *See* ***id.***, ¶¶4-7. Moreover, the affidavit in ***Tye*** not only failed the oath or affirmation requirement, it also lacked the affiant's signature, whereas Sergeant Brown signed the affidavit at issue in this case. *See* ***id.***, ¶5.

¶26 Moeser also relies on ***State v. Hess***, 2010 WI 82, 327 Wis. 2d 524, 541, 785 N.W.2d 568 (2010). However, the arrest warrant in that case was not supported by any affidavit whatsoever, whether sworn or unsworn. ***Hess***, 327 Wis. 2d 524, ¶35. Instead, a criminal arrest warrant was issued solely on the basis of a letter from a probation agent asking that the defendant be detained to facilitate the preparation of his presentence investigation report. ***Id.***, ¶¶6-8. The parties agreed that the challenged search warrant in that case was facially defective and the court stated that the warrant was unsupported by oath or affirmation. Therefore, ***Hess*** is also distinguishable from the instant case and does not provide grounds for invalidating the search warrant that was based on Brown's affidavit.

¶27 In sum, Moeser has not provided authority that supports his position that the oath or affirmation requirement may only be satisfied if an oral statement is made and the procedures in WIS. STAT. § 906.03 followed. Indeed, as discussed below, several foreign jurisdictions have rejected such a requirement under facts similar to those here.

IV. Persuasive Authority from Other Jurisdictions

¶28 Our conclusion is further supported by case law from other jurisdictions concluding that, in the warrant context, the oath or affirmation requirement can be satisfied by written statements. For example, ***United States v. Brooks***, 285 F.3d 1102 (8th Cir. 2002), which the circuit court relied on here, involved the following facts:

> At the beginning of the affidavit the officer typed, "I, Chris Graves, being duly sworn depose[ ] and state[ ] as follows," and preceding the line for his signature he typed, "I have read this affidavit and the facts herein are true to the best of my knowledge." The warrant application began by stating that Officer Graves was "duly sworn," and later recited that "being duly sworn [he] depose[d] and state[d]" that he had "probable cause."

Brooks, 285 F.3d at 1104. Additionally, the notary public's jurat followed the officer's signature and stated, "Subscribed and sworn to me this 18 of March 2000 at 1536 p.m." ***Id.*** The officer "did not 'recall the oath that [the notary] administered,'" and he also "did

not remember the notary having him raise his right hand and solemnly swear 'to tell the truth and nothing but the truth.'" ***Id.*** However, the ***Brooks*** court determined that the affidavit's "repeated recitations" to the effect that the affiant was "duly sworn" reflected the affiant's "intention to be under oath." ***Id.*** at 1105. The court held that this intent, as manifested by the written document, satisfied the oath or affirmation requirement. *See* ***id.*** The court stated:

> [I]n this case we believe that the facts support a conclusion that [the officer] was under oath when he made the application for the warrant because he intended to undertake and did undertake that obligation by the statements that he made in his affidavit and by his attendant conduct. In other words, a person may be under oath even though that person has not formally taken an oath by raising a hand and reciting formulaic words. Even if [the officer] was not under oath, however, it is plain that his affidavit contained at the very least an affirmation of the truth of the statements in it, because it included a number of formal assertions that he was telling the truth. Thus the fourth amendment was not violated by the issuance of the warrant.

Id. at 1106; *see also* 3 AM. JUR. 2d *Affidavits* § 7 (2021) ("It is not essential that the affiant should hold up his hand and swear in order to make his act an oath, but it is sufficient if both affiant and the officer understand that what is done is all that is necessary to complete the act of swearing.").

¶29 The reasoning in ***Brooks*** is persuasive. Also persuasive are two cases cited by the ***Brooks*** court: ***State v. Douglas***, 428 P.2d 535 (Wash. 1967), and ***Atwood v. State***, 111 So. 865 (Miss. 1927). In ***Douglas***, no oral oath was administered, but the affidavit indicated the affiant was "first duly sworn on oath" and the jurat indicated the affidavit was "subscribed and sworn before [the court commissioner]." ***Douglas***, 428 P.2d at 538-39. On those facts, the ***Douglas*** court held that the United States Constitution's oath or affirmation requirement was satisfied. ***Id.*** at 539. In ***Atwood***, the affiant signed a search warrant affidavit in the presence of a justice of the peace but no oral oath was administered, nor was the affiant required to raise his hand. ***Atwood***, 111 So. at 865. Nonetheless, the ***Atwood*** court determined that the affidavit met the requirement of an oath or affirmation. ***Id.*** at 866.

¶30 Likewise in ***United States v. Fredericks***, 273 F. Supp. 2d 1032, 1037-38 (D.N.D. 2003), a federal district court, relying in part on the ***Brooks*** case, concluded that a person may be deemed to be under oath even in the absence of a raised hand and oral recitation. Because the facts in ***Fredericks***, like those in ***Brooks***, are strikingly similar to the facts in this case and the rationale persuasive, we quote the ***Fredericks*** case at some length:

> In determining whether the Fourth Amendment's oath or affirmation requirement has been fulfilled, the Court may consider the language used in the search warrant application as well as the applicant's conduct.

[***Brooks***,] 285 F.3d 1102, 1105–06. As the Eighth Circuit Court of Appeals explained in ***United States v. Brooks***, a person may be under oath even though that person has not formally taken an oath by raising a hand and reciting formulaic words.

Almost all of the apposite cases indicate that this is the relevant inquiry because a person who manifests an intention to be under oath is in fact under oath. In ***Atwood v. State***, 146 Miss. 662, 111 So. 865, 866 (1927), for instance, where both the law enforcement officer, who signed the affidavit in the presence of a justice of the peace, and the justice of peace, who affixed his jurat, knew an oath was required and did what they thought was necessary for the administration of an oath, the court concluded that "by construction, what occurred amounted to the taking of the necessary oath." The court added that "[o]ne may speak as plainly and effectually by his acts and conduct as he can by word of mouth." ***Id.***

The Court finds that, under the circumstances, Officer Standish's "Affidavit for Search Warrant" satisfied the oath or affirmation requirement and that the search warrant was not issued in violation of the Fourth Amendment. The Affidavit begins by stating "that the undersigned being duly sworn deposes and states to the Court...." Additionally, the Affidavit reveals that Officer Standish signed the document upon

> presentation to the tribal court and [the judge] attested that the Affidavit was sworn to and subscribed by Officer Standish in her presence.
>
> The nature of the document as well as Officer Standish's attendant conduct indicates that Officer Standish realized that he was swearing to the truth of what he said. Officer Standish's recitation that he was "duly sworn" reflects his intention to be under oath. Officer Standish's conduct was also consistent with this intention as he took the document to a tribal court judge and signed it in her presence. As it is apparent that Officer Standish had manifested an intent to be under oath, as such, he can be considered to be under oath for Fourth Amendment purposes.

Fredericks, 273 F. Supp. 2d at 1037-38; *see also* ***United States v. Bueno-Vargas***, 383 F.3d 1104, 1111-12 (9th Cir. 2004) ("We conclude that signing a statement under penalty of perjury satisfies the standard for an oath or affirmation, as it is a signal that the declarant understands the legal significance of the declarant's statements and the potential for punishment if the declarant lies .... [T]he declarant knew that he was making a solemn promise to the magistrate judge that all the information he was providing was true and correct. That is all the "Oath or affirmation" clause requires."); ***State v. Gutierrez-Perez***, 337 P.3d 205, 206, 213 (Utah 2014) (although no oral oath or affirmation was made, court determined that a checked box on an electronic application for a warrant stating, "By submitting this

affidavit, I declare under criminal penalty of the State of Utah that the foregoing is true and correct" was "more than enough to impress upon [the affiant] the solemnity of the occasion" and that the oath or affirmation requirement was satisfied); ***People v. Sullivan***, 437 N.E.2d 1130, 1133 (N.Y. 1982) (oath or affirmation requirement satisfied in absence of oral oath or affirmation where written warning in informant's affidavit that any false statements would be punishable as a misdemeanor under New York law "served as the procedural and functional equivalent of the more traditional type of oath or affirmation"); ***State v. Knight***, 995 P.2d 1033, 1041-42 (N.M. Ct. App. 2000) (although no formal oath ceremony, oath or affirmation requirement was met where application for wiretap warrant supported by affidavit stating, "Subscribed and sworn to or declared and affirmed to before me in the above[-]named county of the State of New Mexico" because this language "alerted" the affiant to the nature of the document).

¶31 These cases lend further support to our conclusion that, under the specific facts of this case, the search warrant was based on an oath or affirmation as to the truth of the content of the Brown affidavit.[11] As a result, Moeser has not shown that the circuit court erred in denying his motion to suppress the chemical test results of his blood.

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[11] Notably, although the dissent attempts to distinguish these cases, it provides no case law from any jurisdiction in which a court, upon analogous facts, has taken a view contrary to that taken by the majority opinion in this case.

¶32 Accordingly, we affirm the judgment of conviction and the circuit court's order denying the motion to suppress evidence, and we remand this case for the circuit court to lift the stay of the sentence.

By the Court.—Judgment affirmed and cause remanded with directions.

Not recommended for publication in the official reports.

¶33 KLOPPENBURG, J. (*dissenting*). It is undisputed that: (1) contrary to the face of the search warrant affidavit, the officer seeking the warrant did not "make an oath or affirmation as to the truthfulness of the contents of the" affidavit before the officer who notarized the affidavit, ***Kellner v. Christian***, 197 Wis. 2d 183, 191, 539 N.W.2d 685 (1995); and (2) the officer seeking the warrant did not make such an oath or affirmation before the court commissioner who issued the warrant. It is also undisputed that the officers followed a department policy that dispenses with the oath or affirmation requirement for a valid search warrant. Under the plain language of the Wisconsin Constitution's oath or affirmation requirement as "reinforced" by state statutes, ***State v. Tye***, 2001 WI 124, ¶11, 248 Wis. 2d 530, 636 N.W.2d 473, and under longstanding case law interpreting the oath or affirmation requirement, the absence of any oath or affirmation attesting to the truth of the affidavit supporting the search warrant renders the search warrant void. The majority's conclusion that the affidavit did contain an oath or affirmation is contrary to the facts and is based on a misreading of Wisconsin case law and on resort to non-Wisconsin case law that contravenes Wisconsin law. Accordingly, I respectfully dissent.

BACKGROUND

¶34 The following facts are undisputed. Moeser's blood was drawn pursuant to a search warrant issued after Moeser refused to consent to a blood draw. The warrant was supported by an affidavit submitted by Sergeant Steve Brown. At the top of the affidavit,

before Brown set out his averments, he wrote his name on a blank space preceding the phrase, "being first duly sworn on oath, deposes and says:" Near the bottom of the affidavit, Brown dated and signed the affidavit, immediately above a jurat that reads, "Subscribed and sworn to before me." Lieutenant Jacob Wills, a notary public, dated and signed the jurat and affixed his notary seal.

¶35 Sergeant Brown did not swear an oath or make a declaration or affirmation attesting to the truth of the statements contained in the affidavit, either when he signed the affidavit in the presence of Lieutenant Wills or when he appeared before the court commissioner; nor did Wills administer an oath or affirmation when he observed Brown sign the affidavit and "notarized Sgt. Brown's signature."[1] Both officers were following the "established policy" of

[1] The majority's statement in footnote 4 that this court is not bound by these facts of record is perplexing. The majority suggests that this court can properly apply legal standards to facts—the presence in the affidavit of the prefatory "being first duly sworn on oath" and the jurat reading "Subscribed and sworn to before me"—that have been proven to be inaccurate. I agree with the majority that whether the undisputed facts as to the circumstances here satisfy the oath or affirmation requirement is a question of law. However, to the extent that the majority relies on these false facts to show compliance with the oath and affirmation requirement, I explain below why that reliance is contrary to Wisconsin law. To the extent that the majority relies on these facts to show the solemnity with which the officers proceeded, I explain below that the additional fact that the officers proceeded pursuant to a department policy under which the language in the affidavit is never accurate eliminates any solemnity that could be inferred from that language.

the Portage County Sheriff's Office "for obtaining an OWI search warrant."

¶36 Moeser filed a motion to suppress the blood test results, arguing that the warrant did not satisfy the constitutional "oath or affirmation" requirement because Sergeant Brown did not make an oath or affirmation attesting to the truth of the statements in the affidavit. The circuit court denied Moeser's motion. Moeser subsequently pleaded guilty to sixth offense OWI. Moeser appeals the denial of his suppression motion.

DISCUSSION

¶37 Like the Fourth Amendment to the U.S. Constitution, Article I, Section 11 of the Wisconsin Constitution states that "no warrant shall issue but upon probable cause, supported by oath and or affirmation." Wisconsin courts have "long recognized an oath or affirmation as an essential prerequisite to obtaining a valid search warrant under the state constitution." ***Tye***, 248 Wis. 2d 550, ¶13.

¶38 An oath invokes a reference to God, while an affirmation is a solemn pledge without such a reference. *See* WIS. STAT. § 906.03(1)-(3) (2019-20)[2] (providing that, in the context of testimony by witnesses in court proceedings, to fulfill the requirement that a witness declare that he or she will testify truthfully, the witness shall either swear an oath to tell the truth "so help you God" or solemnly

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

declare and affirm that the witness will tell the truth "under the pains and penalties of perjury"); BLACK'S LAW DICTIONARY, (11th ed. 2019) (defining "oath" as "[a] solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise," and "affirmation" as "[a] solemn pledge equivalent to an oath but without reference to a supreme being or to swearing"). *See also* WIS. STAT. §§ 990.01(41) (providing that "'[s]worn' includes 'affirmed' in all cases where by law an affirmation may be substituted for an oath") and 990.01(24) (providing that "'[o]ath' includes affirmation in all cases where by law an affirmation may be substituted for an oath").

¶39 Whether the declaration "that the witness will testify truthfully" is made "by oath or affirmation," it must be "administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so." WIS. STAT. § 906.03(1). Our courts have referred to statements made under either oath or affirmation as "sworn testimony." ***State v. Baltes***, 183 Wis. 545, 552, 198 N.W. 282 (1924) ("The essential prerequisite to the issuance of a valid search warrant is the taking of sworn testimony…."); *see also* WIS. STAT. § 887.03 (providing that, with respect to making an oath or affidavit, "every person swearing, affirming or declaring in any such form shall be deemed to have been lawfully sworn").

¶40 The purpose of swearing, by oath or affirmation, is to

> impress upon the swearing individual an appropriate sense of obligation to tell the truth. An oath or affirmation to support a search warrant reminds both the investigator seeking the search warrant and the magistrate issuing it of the importance and solemnity of the process involved. An oath or affirmation protects the target of the search from impermissible state action by creating liability for perjury or false swearing for those who abuse the warrant process by giving false or fraudulent information. An oath preserves the integrity of the search warrant process and thus protects the constitutionally guaranteed fundamental right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.

Tye, 248 Wis. 2d 530, ¶19 (footnotes omitted); *see also* ***Kellner***, 197 Wis. 2d at 191 ("It is established in law that an oath is an affirmation of the truth of a statement, which renders one willfully asserting an untruth punishable for perjury.").

¶41 Our legislature has "reinforced" our constitution's oath or affirmation requirement by enacting WIS. STAT. § 968.12(2). ***Tye***, 248 Wis. 2d 530, ¶11. That statute provides, "A search warrant may be based upon *sworn* complaint or affidavit, or testimony … showing probable cause therefor [sic]." Sec. 968.12(2) (emphasis added). The statute further provides that the swearing requirement may be satisfied in one of two ways: (1) "the person requesting the warrant may swear to the complaint or affidavit

before a [notary]"; or (2) a judge may place the person under oath…to [sic] swear to the complaint or affidavit." ***Id.*** In either case, "[t]he information provided to support the issuance of a warrant 'must be sworn to.'" ***Tye***, 248 Wis. 2d 530, ¶13 (*citing* ***Baltes***, 183 Wis. at 552). "[W]hen no sworn testimony [or affidavit] exists to support a search warrant, then the warrant is void." ***Tye***, 248 Wis. 2d 530, ¶13.

¶42 In sum, the statutes and case law relevant to our constitution's rule that "no warrant shall issue but upon probable cause, supported by oath and or affirmation," WIS. CONST. art. I § 11, plainly require that the truth of an affidavit supporting a warrant must be sworn to before either a notary or a judge. Here, it is undisputed that Sergeant Brown did not swear to the truthfulness of the statements in the affidavit before either the notary or the court commissioner. Thus, the warrant is void. ***Tye***, 248 Wis. 2d 530, ¶13 (warrant unsupported by sworn testimony is void).

¶43 The majority's repeated assertions that the affidavit contained and was supported by the requisite oath or affirmation, Majority at ¶¶19 and 21, are flatly contradicted by the undisputed facts. Those facts show that the affidavit neither contained nor was supported by an oath or affirmation. In the absence of an oath or affirmation, the majority's conclusion that the affidavit nevertheless satisfied the oath or affirmation requirement and that the warrant is therefore valid is contrary to the language of our constitution, statutes, and case law cited above, all of which, as explained, require that statements in an

affidavit supporting a search warrant must be sworn to by oath or affirmation.

¶44 The majority explains away this factual and legal deficiency by citing to ***Kellner***, 197 Wis. 2d 183, which it asserts has set forth a four-factor "test" for whether the oath and affirmation requirement has been met in the absence of an actual oath or affirmation, concluding that the ***Kellner*** test has been met here. Majority at ¶¶19-22. However, the majority misreads ***Kellner***, as I now explain.

¶45 In ***Kellner***, our supreme court concluded that, where no oath or affirmation as to the truthfulness of a notice of claim had been made or administered, the statutory requirement that a notice of claim be "sworn to" was not satisfied. ***Kellner***, 197 Wis. 2d at 187-88. In that case, the claimants were asked by their attorney whether the contents of the notices of claim were true and accurate to the best of their knowledge and the claimants signed the notices before a notary who did not administer any oath or affirmation but merely signed an acknowledgement verifying that the signers were known to her to be the persons who signed the notices. ***Id.*** at 188-89.

¶46 The court expressly held that, to show compliance with the statutory "sworn to" requirement, "evidence that the contents have been sworn to must appear in the notice of claim." ***Id.*** at 194. In other words, the court held that the written document must on its face show that an oath or affirmation occurred. However, this requirement that the document reflect such an oath or affirmation is separate from the requirement that the oath or

affirmation actually occur. ***Id.*** at 198 (requirement pertaining to document is "in addition" to the requirement that "a claimant must make an oath or affirmation as to the truthfulness of the contents of the notice").

¶47 The making of the oath or an affirmation is an act. ***Id.*** at 188-89 (stating that "we agree" that "a notice of claim is 'sworn to' only when the claimant makes a formal oath or affirmation as to the truthfulness of the claim"). Quoting ***People v. Coles***, 535 N.Y.S.2d 897, 903 (1988), the ***Kellner*** court explained that "the requirement of an oath is not a mere technicality. In order to constitute a valid oath, there must be in some form an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath." ***Kellner***, 197 Wis. 2d at 192. The full text of the language from which ***Kellner*** quoted, ***Coles***, 535 N.Y.S.2d at 903 (internal citations omitted), is instructive:

> In order to constitute a valid oath, there must be in some form an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath. Merely citing in a piece of paper that one has accepted upon one's self an oath is insufficient to constitute a swearing. A jurat containing the words "being duly sworn" is evidence of the fact that an oath was in fact properly administered. However, such jurat is neither part of the oath nor conclusive evidence of its due administration and may be attacked and shown to be false.

¶48 The language in ***Kellner*** reflects this same distinction between evidence in an affidavit that an oath was administered and the administration of the oath itself: the court recognized that the affiants in that case had failed to satisfy either requirement. ***Kellner***, 197 Wis. 2d at 191 ("[we] hold that, in order for a notice to be properly 'sworn to' … a claimant must make an oath or affirmation as to the truthfulness of the contents of the notice. In addition, the notice must contain a statement showing that the oath or affirmation occurred. Because [the claimants] failed to comply with these requirements, we affirm the decision of the court of appeals.") The administration of the oath requires some degree of formality and solemnity. ***Kellner***, 197 Wis. 2d at 187-88 (endorsing position that "a notice of claim is 'sworn to' only when the claimant makes a formal oath or affirmation as to the truthfulness of the claim, and when the notice states on its face that the oath or affirmation occurred"); ***id.*** at 193 ("Requiring a formal oath impresses upon any claimant the fact that he or she is bound by the accuracy and truthfulness of the statement in the notice of claim."); ***id.*** at 191 (essential to an oath is "a solemn declaration"). "The purpose of the oath is to impress the person who takes the oath with a due sense of obligation, so as to secure the purity and truth of his or her words under the influence of the oath's sanctity." ***Id.*** at 192.

¶49 Here, where the facts show unequivocally that no oath or affirmation occurred and that the affidavit was not sworn to before the notary, the ***Kellner*** requirements were not met. Although, as the majority explains, Brown wrote "his name on the blank space"

"preceding the statement 'being first duly sworn on oath,'" Brown was in fact not "duly sworn on oath," and certainly not "in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty" to testify truthfully. WIS. STAT. § 906.03(1). As stated above, "[T]he requirement of an oath is not a mere technicality. In order to constitute a valid oath, there must be in some form an unequivocal and present act." ***Kellner***, 197 Wis. 2d at 192.[3]

¶50 The majority may be relying, in isolation from the ***Kellner*** court's affirmation of the two-part nature of the oath or affirmation requirement, on the court's rejection of the claimants' argument that the evidence that they told their attorney before they signed the notices that they swore to the truth of the notices' contents overcame the facial deficiencies in the notices. *See* ***id.*** at 193-94. However, that situation is

[3] The court in ***Kellner*** does not specify the form that the required "act" must take. However, nothing in ***Kellner*** or in the language of our constitution or statutes allows for the "act" to be dispensed with altogether, as the majority suggests in footnote 8. The officer's act of writing and signing his own name does not itself amount to an "unequivocal or present act" of swearing because it is not a "formal oath" or "solemn declaration." *See* ***Kellner v. Christian***, 197 Wis. 2d 183, 187-88, 191, 539 N.W.2d 685 (1995). This does not imply that an officer is required to speak magic words or raise his or her hand; what matters is the "sanctity," ***id.*** at 192, and "solemnity" of the oath. ***State v. Tye***, 2001 WI 124, ¶19, 248 Wis. 2d 530, 636 N.W.2d 473. "An oath is a matter of substance, not form." ***Id.*** Here, the majority points to nothing in the record to suggest that in writing and signing his name Officer Brown "consciously [took] upon himself" a solemn, sacred obligation to tell the truth. ***Kellner***, 197 Wis. 2d at 192.

just the opposite of the situation here, where the affidavit on its face satisfies the oath or affirmation requirement, but undisputed evidence presented by Moeser with his motion to suppress and by the State with its opposition to the motion establishes that the statements related to the swearing to the truth of the affidavit's contents were inaccurate. The majority points to no language in ***Kellner*** suggesting that the face of the document controls where the pertinent statements in the document are shown to be inaccurate.

¶51 Alternatively, the majority appears to reason that the court in ***Kellner*** set forth a four-factor test to determine whether, in the absence of an oath or affirmation, a document establishes substantial compliance with the oath or affirmation requirement. Majority, ¶¶20-22. Specifically, the majority points to the following language:

> It is established in law that an oath is an affirmation of the truth of a statement, which renders one willfully asserting an untruth punishable or perjury. The essentials of an oath are: (1) a solemn declaration; (2) manifestation of intent to be bound by the statement; (3) signature of the declarer; and (4) acknowledgement by an authorized person that the oath was taken.

Id. at 191-92 (citations omitted). The majority is mistaken. This language simply defines what an oath or affirmation is; there is no suggestion anywhere in the opinion that these four factors comprise a test by which to determine whether something that is not an

oath or affirmation could be so construed. To the contrary, the court explicitly held that the document "must contain a statement showing that [an] oath or affirmation occurred." ***Id.*** at 191. Here, as the majority explains in ¶22, there is no dispute that the affidavit did reflect all of the elements in the court's definition of an oath or affirmation. The problem is that none of the elements, other than the affiant's signature, actually occurred. That is, the undisputed facts of record show that three of the "essentials of an oath" did not exist here: the affiant did not swear by oath or affirmation to the truth of the affidavit's contents, the notary did not administer an oath or affirmation, and neither the notary nor the court commissioner "impress[ed] the person who takes the oath with a due sense of obligation, so as to secure the purity and truth of his or her words under the influence of the oath's sanctity." ***Id.*** at 192. The majority points to no language in ***Kellner*** supporting the proposition that the court's definition of an oath may be used as a basis for showing that, where no oath or affirmation actually occurred, the affiant and notary meant for the oath or affirmation requirement to be satisfied.[4] The requirements for the affidavit are

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[4] In footnote 5, the majority notes that we have ruled that the absence of an oath or affirmation attesting to the truth of an affidavit did not suffice to invalidate the search warrant in ***State v. Johnson***, No. 2019AP1398-CR, unpublished slip op., ¶33 (WI App Sept. 9, 2020). However, we so concluded because the officer swore to the truth of the contents of his affidavit directly to the judge. ***Id.*** at ¶¶24, 30. We concluded that the officer's exchange with the judge "sufficiently reminded both the investigator seeking the search warrant and the magistrate issuing it of the importance and solemnity of the process involved." ***Id.*** at ¶30

"in addition" to, ***id.*** at 191, 198, not in substitution for, the requirement for a "formal oath," ***id.*** at 187, 193.

¶52 The majority also points to non-Wisconsin cases for the proposition that an affidavit satisfies the oath or affirmation requirement if it reflects the affiant's solemn intent to be under oath or affirmation even in the absence of an oath or affirmation. In addition to being nonbinding, *see* ***State v. Muckerheide***, 2007 WI 5, ¶7, 298 Wis. 2d 553, 560, 725 N.W.2d 930, 933 (case law from other jurisdictions "is not binding precedent in Wisconsin, and a Wisconsin court is not required to follow it"), this case law is not persuasive in light of Wisconsin's body of law indicating that an oath or affirmation is a "formal" "present act" designed to "awaken the witness's conscience" and through which the witness "consciously takes upon himself" a "due sense of obligation" under the "oath's sanctity." ***Kellner***, 187, 192; WIS. STAT. § 906.03(1). *See also,* ***Tye,*** 248 Wis. 2d 530, ¶¶18-19 (disagreeing with State's argument that

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(internal quotations and quote source omitted). Similarly, in ***State v. Orozco-Angulo***, No. 2014AP1744-CR, unpublished slip op., ¶¶11, 14 (WI App April 8, 2015), we upheld the validity of a search warrant where the officer swore to the judge that the information that he provided in his affidavit and in his testimony was true. These cases support the conclusion here that the absence of any swearing by oath or affirmation did suffice to invalidate the search warrant. No reminders of the importance and solemnity of the search warrant application process existed here, where the statements that the contents had been sworn to were not accurate and where no such swearing had been made or administered pursuant to a department policy that had dispensed with such swearing.

absence of sworn statement is a mere matter of "formality").

¶53 Moreover, all the cases cited from other jurisdictions are easily distinguished from the case at bar. None of them appear to concern a situation where, as here, the record establishes as uncontroverted that the officers proceeded pursuant to a department policy by which an oath or affirmation was routinely *not* made or administered before signing an affidavit supporting a search warrant. The majority cites no law that permits a law enforcement agency to adopt a policy that dispenses with the oath or affirmation requirement for a valid search warrant. The oath or affirmation "is an essential component of the Fourth Amendment and legal proceedings." ***Tye,*** 248 Wis. 2d 530, ¶19. Such a policy establishes a routine that effectively eliminates the intentional solemnity of the warrant application process, in violation of the oath requirement's purpose. *See* ***Kellner***, 197 Wis. 2d 183, 192. ("The purpose of the oath is to impress the person who takes the oath with a due sense of obligation, so as to secure the purity and truth of his or her words under the influence of the oath's sanctity.").[5]

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[5] In addition, at least three of the non-Wisconsin cases concern affidavits containing statements, absent in this case, that the affiant declares or signs under penalty of perjury, or that any false statements are punishable under state law. *See* ***United States v. Bueno-Vargas***, 383 F.3d 1104 (9th Cir. 2004), ***State v. Gutierrez-Perez***, 337 P.3d 205 (Utah 2014); ***People v. Sullivan***, 437 N.E.2d 1130 (N.Y. 1982).

¶54 Finally, it is not only, as the majority notes at footnote 5, a better practice for a law enforcement agency *not* to have such a policy; such a "better practice" is constitutionally mandated. Wisconsin courts have held that acting routinely pursuant to department policy does not satisfy constitutional requirements that depend on specific facts. *See* ***State v. Guy***, 172 Wis. 2d 86, 100, 492 N.W.2d 311 (1992) (department policy of automatically frisking everyone present for weapons while executing a search warrant for drugs in a private residence does not relieve officer of constitutional requirement that the officer have a reasonable suspicion that a person was armed before frisking that person for weapons); ***State v. Kruse***, 175 Wis. 2d 89, 98, 499 N.W.2d 185 (Ct. App. 1993) (officers' testimony that they "routinely" secure other rooms incident to a felony arrest regardless of whether they have information that weapons or other persons are present in the home does not satisfy the State's burden of showing that the officer had reasonable suspicion based on articulable facts to support the search at issue).

CONCLUSION

¶55 In sum, the majority's conclusion that the affidavit did contain an oath or affirmation sufficient to satisfy the oath or affirmation requirement for a valid search warrant is contrary to the facts and is based on a misreading of Wisconsin case law and on resort to non-Wisconsin case law that contravenes Wisconsin law. Applying Wisconsin law to the facts here, I conclude that the search warrant is void because it was not supported by a sworn affidavit and,

therefore, I would reverse the circuit court's order denying Moeser's motion to suppress and remand for further proceedings. Accordingly, I respectfully dissent.

FILED
07-10-2019
Circuit Court
Portage County
2017CF000515

BY THE COURT:

DATE SIGNED: July 10, 2019

Electronically signed by Hon. Robert Shannon
Circuit Court Judge

STATE OF WISCONSIN
CIRCUIT COURT BRANCH 2
PORTAGE COUNTY

State of Wisconsin vs. Jeffrey L Moeser

Judgment of Conviction

Sentence Withheld,
Probation Ordered

Date of Birth: 10-07-1964 Case No. 2017CF000515

List Aliases: AKA Jeffrey Lee Moeser

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea
1	OWI (5th or 6th)	346.63(1)(a)	Guilty

Severity	Date(s) Committed	Trial To	Date(s) Convicted
Felony G	10-14-2017		07-10-2019

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	07-10-2019	Probation, sent withheld	3 YR	Department of Corrections	
1	07-10-2019	DOT License Revoked	36 MO		
1	07-10-2019	Ignition interlock	36 MO		
1	07-10-2019	Alcohol assessment			

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	☐Joint and Several **Restitution**
1,524.00	674.45		

Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
63.00	67.00		200.00

Conditions

Ct.	Condition	Length	Agency/ Program

Begin Date	Begin Time	Comments

CR-212(CCAP), 05/2016 Judgment of Conviction, DOC 20, (08/2007)

§§ 939.50, 939.51, 972.13, Chapter 973, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Ct.	Condition	Length	Agency/ Program
1	Jail time	8 MO	County

Begin Date	Begin Time	Comments
		*Candidate for the GPS Home Monitoring Program, if approved by jail administration (Court will not comment further) *Eligible for huber priviliges [sic] for work *Entitled to 3 days of jail credit *By agreement of the parties, the conditional jail term is STAYED pending the outcome of the expected appeal *While that conditional jail time is STAYED, the Defendant is ordered to continue to comply with the requirements of the pre-trial supervision program in terms of reporting and testing *Court indicates that if there is any significant violation of the requirements of the program, regarding defendant's use of alcohol, the Court will lift the stay and the

defendant will begin serving his conditional jail time immediately

Ct.	**Condition**	**Agency/ Program**	**Comments**
1	Fine		Pay $1,200 fine plus costs Pay DNA Surcharge *If probation is discharged with outstanding financial obligations, a civil Judgment will be entered against the Defendant in favor of restitution victims and/or governmental entities for the balance due. All available enforcement actions will be used to collect the debt.
1	Costs		*Pay Blood Draw Fee
1	Other		*Maintain absolute sobriety with regards to alcohol while driving *Pursuant to the agreement of the parties, the Court does STAY the commencement of the probationary term pending the appeal in this case

		*The sentence just imposed by the Court is STAYED in all respects pending the termination of the appeal, but the Defendant is to continue to comply with the pre-trial supervision program
1	Alcohol assessment	*AODA Assessment & comply with treatment recommendations or counseling, if any is recommended from that assessment

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:

The Defendant is ☐ is not ☐ eligible for the Challenge Incarceration Program.

The Defendant is ☐ is not ☐ eligible for the Substance Abuse Program.

CR-212(CCAP), 05/2016 Judgment of Conviction, DOC 20, (08/2007)

§§ 939.50, 939.51, 972.13,
Chapter 973, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

IT IS ADJUDGED that **3** days sentence credit are due pursuant to §973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department.

If the defendant is in or is sentenced to state prison and is ordered to pay restitution, **IT IS ORDERED** that the defendant authorize the department to collect, from the defendant's wages and from other monies held in the defendant's inmate account, an amount or a percentage which the department determines is reasonable for restitution to victims.

If the defendant is placed on probation or released to extended supervision, **IT IS ORDERED** that the defendant pay supervision fees as determined by the Department of Corrections.

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

Distribution:

Robert Shannon, Judge
Robert J Jambois, District Attorney
John Thomas Bayer, Defense Attorney

CR-212(CCAP), 05/2016 Judgment of Conviction, DOC 20, (08/2007)

§§ 939.50, 939.51, 972.13,
Chapter 973, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

FILED
11-15-2019
Circuit Court
Portage County
2017CF000515

DATE SIGNED: November 15, 2019

Electronically signed by Hon. Robert Shannon
Circuit Court Judge

STATE OF WISCONSIN
CIRCUIT COURT
PORTAGE COUNTY

STATE OF WISCONSIN

Plaintiff,

v. Case No.: 2017CF000515

JEFFREY L. MOESER,

Defendant.

ORDER

After a hearing on the defendant's motion to suppress blood test evidence based upon noncompliance with oath requirement and motion to compel discovery and for the reasons stated on the record on June 28, 2019, the Court issues the following orders:

The motion to suppress blood test evidence based upon noncompliance with oath requirement is **denied**.

The motion to compel discovery is **denied.**

Dated at Stevens Point, Wisconsin this ___day of November, 2019.

BY THE COURT:

____
Honorable Robert Shannon
Circuit Court Judge, Branch 2
Portage County

AFFIDAVIT

SGT STEVE BROWN, being first duly sworn on oath,
(*name of Affiant*) deposes and says:

1. I am a certified law enforcement officer and have been so employed as a police officer since 1998.
2. I have personal knowledge that the contents of this affidavit are true and that any observations or conclusions of fellow officers referenced in this affidavit are truthful and reliable. Your Affiant is personally familiar with the other officers referenced in this Affidavit, has worked with them previously, and has always found them to be truthful and reliable. Further your Affiant believes that any information provided by citizens is truthful and reliable inasmuch as they are citizen informant(s) and witnessed the events described.
3. I have had training to become a law enforcement officer as well as specialized training in the investigation of cases in which persons are suspected of operating motor vehicles under the influence of alcohol and/or drugs. I have previously participated in the investigation and arrest of individuals operating under the influence of intoxicants.
4. I have been trained in the administration and evaluation of field sobriety tests, and have used these field sobriety tests in the investigation of impaired driving cases, underage alcohol consumption cases and other cases involving the consumption of intoxicants.

5. I know based on my training and experience that alcohol and drugs are absorbed into the blood stream of an impaired individual and that a person's blood can be analyzed by a qualified person in a laboratory for the presence of alcohol or drugs.

6. I am seeking a warrant to draw the blood of the person below, a driver suspected of committing an operating a motor vehicle while intoxicated related crime in violation of Chapter 346 of the Wisconsin Statutes. The person has possession of and is concealing human blood, which constitutes evidence that the person committed the offense described in paragraph 10 below.

7. There is in Portage County, Wisconsin, a person described as follows:

   Name: JEFFREY L. MOESER DOB: 10/07/64

8. On the 14TH day of OCTOBER, 2017, at or about 133 o'clock p.m./a.m. the person did drive or operate a motor vehicle on CTH-DB (*name of road/highway*) in TOWN OF DEWEY (*jurisdiction of stop*), in Portage County, Wisconsin.

9. That the above named person is presently in custody of a law enforcement agency in Portage County, namely the PORTAGE COUNTY SHERIFF, which will present the person to execute the warrant requested herein.

10. On the above date, the person was arrested for a crime contrary to Chapter 346.63, Wis. Stats., or specifically the offense of:

☒ Driving or Operating a Motor Vehicle While Impaired as a First or Subsequent Offense
☒ Driving or Operating a Motor Vehicle with a Prohibited Alcohol Concentration as a First or Subsequent Offense
☐ Driving or Operating a Motor Vehicle with a Detectable Amount of a Restricted Controlled Substance
☐ Operating a Motor Vehicle While Impaired and Causing Injury
☐ Driving or Operating a Motor Vehicle with a Prohibited Alcohol Concentration and Causing Injury
☐ Operating a Motor Vehicle While Impaired with a Minor Passenger

Or

☐ Bail Jumping

11. The person was read the Informing the Accused form pursuant to the Wisconsin Implied Consent law and refused to submit to the chemical test requested by the police officer.

12. That during the investigation, police officers learned the following facts which further support probable cause. The information in this affidavit does not exhaust affiant's knowledge of this incident.

13. Prior Convictions:
A routine check of the above-named person's driver record with the Department of Transportation showed that the total number of prior convictions

that would be counted for sentencing purposes under Chapter 346 is 5.

14. The person was driving/operating a motor vehicle on the above date and time based on the following facts:
    - ☒ The person admitted to driving/operating the vehicle.
    - ☒ The person was observed to drive/operate the vehicle by a police officer.
    - ☐ The person was observed to drive/operate the vehicle by a citizen witness____________________ (*name of witness*)
    - ☐ Other____
15. The basis for the stop of the person's vehicle was:
    - ☒ Violation of state or local traffic law(s): SPEEDING 346.57
    - ☐ Involvement in crash
    - ☐ Other____ ____
16. The person made the following statements:
    - ☒ Admitted to consuming intoxicants (describe) 2 BEERS.
    - ☐ Admitted to ingesting drugs (describe)_________.
    - ☐ Other statements______________________________
17. During contact with the person, the following observations were made:

    Odor of intoxicants
    - ☒ Strong
    - ☐ Moderate
    - ☐ Faint

☐ Odor of Marijuana

Eyes

☐ Bloodshot
☐ Red/Pink
☒ Glassy
☐ Dilated
☐ Constricted

Attitude/conduct

☒ Cooperative
☐ Uncooperative
☐ Combative
☐ Drowsy/On the nod
☐ Confused
☐ Mood swings
☐ ____________________

Speech

☐ Incoherent
☐ Slurred
☐ Slow
☐ Rapid

Balance

☐ Falling
☒ Unsteady
☐ Swaying
☐ Needed support

Other Observations

☐ ____________________
☐ ____________________

18. **Field Sobriety Tests (FSTs):**
    - ☐ Refused to perform FSTs
    - ☐ Horizontal Gaze Nystagmus (HGN): 6 of 6 possible indicators of impairment
    - ☒ Walk and Turn (WAT): 6 of 8 possible indicators of impairment
    - ☐ One Leg Stand (OLS): __ of 4 possible indicators of impairment
    - ☐ Other FSTs: ______________________________
      ____

19. The person was asked to take a preliminary breath test (PBT) with a result of 195%.
    - ☐ The person refused to submit to the PBT

20. The following evidence of intoxicant or drug use was observed on scene/person:
    - ☐ Alcohol container _________________________.
    - ☐ Drugs/drug paraphernalia __________________

The following applies only for bail jumping arrests.

21. I have reviewed the Circuit Court Automated Program or comparable sources of information, which indicate the person in custody is currently a defendant in a criminal case with the following information:
    a. ________ County Case Number _______________
    b. The person was released on bond on or about _______ (date).
    c. That criminal case is still open and pending at this time.

d. Conditions of bond include the defendant is not to possess or consume alcohol and/or controlled substances.
e. The bond conditions are currently in effect.

WHEREFORE, affiant prays that a search warrant be issued to search the arrested person for blood and obtain a sample of the person's blood for chemical analysis by a proper authority, to bring the same, if found, and the person in whose possession the same is found, before the Circuit Court in Portage County, to be dealt with according to law.

Dated at 14TH ST. MICHAELS HOSPITAL PORTAGE COUNTY, Wisconsin, this 14TH day of OCTOBER, 2017.

SGT Brown /s/
Affiant/Officer

Subscribed and sworn to before me this 14th day of OCTOBER 2017.
Jacob Wills /s/
Notary Public
My commission is permanent/expires 05/28/21

JACOB WILLS
NOTARY PUBLIC
STATE OF WISCONSIN
[SEAL]

FILED
08-30-2019
Circuit Court
Portage County
2017CF000515

STATE OF WISCONSIN
CIRCUIT COURT
PORTAGE COUNTY

****

STATE OF WISCONSIN, Plaintiff,	**MOTION HEARING/ FINAL PRETRIAL**
vs.	Case No.: 17 CF 515
JEFFREY MOESER, Defendant.	

****

BEFORE:	HON. ROBERT SHANNON Circuit Court Judge – Branch II
DATE:	June 28, 2019
APPEARANCES:	Robert Jambois, Asst. District Attorney 1516 Church Street Stevens Point, WI 54481 Appearing on behalf of the State of Wisconsin
	John Bayer, Attorney-at-Law 735 North Water Street, Suite 720 Milwaukee, WI 53202

Appearing on behalf of the
Defendant, Jeffrey Moeser

Jeffrey Moeser, Defendant
Appearing in person

Catherine M. Sosnowski
Official Court Reporter

[2]

P R O C E E D I N G S

(Commencing at 11:09 a.m.)

* * *

[31]

[THE COURT:] This one, this one involves a number of issues, both factual and legal, and should never even have been an issue here in this case, but it is an issue because of the notarization situation, and that situation is adequately set out in the briefings filed by the parties so as to be easily understood by Court of Appeals that the sergeant was not sworn by a notary. The question is,

[32]

is it necessary that he be sworn by a notary?

In reading the affidavit, I believe the language in the affidavit indicates to the Court that Sergeant Brown swore to the truth of the information provided in the affidavit. I think that's a reasonable interpretation of the affidavit and the particular language used in it.

So, the question then would be whether that's sufficient and a functional equivalent to responding orally to a notary public.

That's the precise legal issue involved in the Court's view, and the case law is not clear. In other words, I'm not satisfied that any of the authorities cited is directly on point with that issue.

* * *

So, in looking at the case law that was cited, I don't believe either *Tye* or *Hess* is directly on point.

[33]

In *Tye,* the warrant there was an anonymous -- essentially an anonymous blank document submitted without any signature at all. It purportedly had been made by one or another law enforcement officer, but the signature line was blank. The functional equivalent of that is a blank form from the perspective of receipt by a court, at least that's a reasonable interpretation of the issue before the Court in that case.

And in *Hess,* while counsel was arguing, I had a chance to look at it a little closer, and I don't believe *Hess* is controlling either because that warrant was facially invalid from the outset. And so, the issue was not whether there was a sufficient solemnity to the information provided to support the warrant, but the fact that the trial court simply had no legal or constitutional authority to issue the warrant that he did.

Neither -- and it should be noted also that the Court in *Tye* made a point -- significant point -- of

advising that the facial validity of the warrant never existed. So, it was invalid on its face because it was essentially an anonymous document.

What is unanswered in that case is the case we have here, and that is the affiant makes a functional equivalent that, "I swear that the following is true,"

[34]

and signs the affidavit, but the notary doesn't utter her magic words, and I don't see any law that specifically indicates that if a notary is not present under those circumstances to utter the magic words that the warrant is facially invalid for that purpose.

Maybe the appellate courts have more time and inclination than this court -- and ability to research the law and find out if there is any more direct authority, and then decide whether that reasoning should be applied in our state.

I think a lot of the reasoning expressed in the *Brooks* case makes sense and should apply under these circumstances.

In that case, the reviewing court said that the trial court observed that the nature of the documents -- the nature of the affidavit and warrant documents indicated that the officer realized he was swearing to the truth of what he said, and I think that's the primary issue.

And in looking at this affidavit, I conclude that Sergeant Brown did realize that he was swearing to the truth of what he indicated in his affidavit.

Whether the good faith exception exists here under the circumstances, I don't think I need to address.

I will address the consent issue because this

[35]

officer believed, based on his entire contact with Mr. Moeser, that Mr. Moeser had refused to voluntarily submit to a blood test.

So, I think that's fair going forward, that there was no consent. The officer himself did not find that Mr. -- or did not believe that Mr. Moeser had consented. So, this is a nonconsensual blood warrant situation.

So, for that reason, the Court will deny the motion.

* * *