STATE OF WISCONSIN
IN SUPREME COURT

CASE NO. 2019AP002184 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. MOESER,

Defendant-Appellant-Petitioner.

DEFENDANT-APPELLANT-PETITIONER'S FIRST BRIEF AND APPENDIX

REVIEW OF THE APPEAL AFFIRMING THE ORDER DENYING MOTION TO SUPPRESS BLOOD TEST BASED UPON NONCOMPLIANCE WITH OATH REQUIREMENT, ENTERED ON NOVEMBER 15, 2019, AND THE JUDGMENT OF CONVICTION FILED ON JULY 10, 2019, THE HONORABLE ROBERT SHANNON, PRESIDING, IN THE PORTAGE COUNTY CIRCUIT COURT.
PORTAGE COUNTY CASE NO. 2017CF000515

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STATEMENT OF THE ISSUE

1. Whether the language of the affidavit and the conduct of the affiant Sgt. Steve Brown in obtaining a search warrant to draw Moeser's blood pursuant to an OWI Sixth Offense arrest fulfilled the Oath requirement under the US and Wisconsin constitutions that guarantee a search warrant be issued only upon Oath?

   The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Through its grant of review, this Court has indicated that oral argument and publication are appropriate.

INTRODUCTION

The State of Wisconsin violated Moeser's rights under the Fourth Amendment of the US Constitution and under art. I, § 11 of the Wisconsin Constitution that guarantee that a search warrant be issued only upon Oath after Moeser's arrest for OWI Sixth Offense by Sgt. Brown of the Portage County Sheriff's Office on October 14, 2017. After arresting Moeser for OWI Sixth Offense, Sgt. Brown obtained a search warrant to draw the blood of Moeser. Sgt. Brown used an affidavit to obtain the warrant and wrote his name on the affidavit next to words that said 'being first duly sworn on oath, deposes and says' and then signed the affidavit before another police officer that was a notary, Lt. Jacob Wills, of the Portage County Sheriff's Office. Lt. Wills then signed the affidavit in the notary jurat which read 'subscribed and sworn to before me' and also sealed the document with his notary seal. Lt. Wills did not administer an oral oath to Sgt. Brown in regards to the affidavit nor did Sgt. Brown swear to the affidavit in the presence of Lt. Wills. Lt. Wills subsequently presented the affidavit to Court Commissioner Roberts. Court Commissioner

Roberts signed the search warrant to draw the blood of Moeser. The question before this Court is whether the language in the affidavit used to obtain the search warrant and the attendant conduct of the affiant Sgt. Brown fulfill the state and federal constitutional requirement that the search warrant was issued under Oath.

This court should reverse the decision of both the trial court and the court of appeals and remand this case back to the trial court with instructions to grant the motion to suppress evidence based upon noncompliance with oath requirement.

Sgt. Brown never swore an oral oath before the notary Lt. Wills and Lt. Wills never administered an oath to Sgt. Brown when the affidavit to search Moeser's blood was signed by Lt. Wills and Sgt. Brown. The Fourth Amendment does not require that an oral oath be administered for a search warrant to be valid. In order to determine if an 'oath' occurred to fulfill the oath requirement for a valid search warrant under the Fourth Amendment, courts must look to the conduct of the affiant and the language used in the affidavit and decide if it reflects a manifest intention on the part of the affiant to be under oath and if so the court can conclude the Oath requirement of the Fourth Amendment was fulfilled despite the affiant failing to recite a formulaic, oral oath. In the present case, the main reasons that the conduct of Sgt. Brown and the language of the affidavit do not amount to an Oath under the Fourth Amendment for a valid search warrant are that:

1. The language in the affidavit, 'being first duly sworn' suggested that the affiant was sworn prior to filling out the affidavit which was not true. This language is not suggestive of language that an affiant would use who intended to be sworn by the act of setting forth the facts contained in the affidavit and signing the affidavit.

2. The affiant, Sgt. Brown, never personally presented the affidavit to Court Commissioner Roberts and obtained the search warrant. Sgt. Brown signed the affidavit in the presence of the notary, Lt. Wills, and it was the notary Lt. Wills who presented the affidavit to Court Commissioner Roberts who then signed and issued the search warrant.

3. It was the policy of the Portage County Sheriff's Office to never administer an oral oath or swear to the contents of the affidavit under these circumstances, i.e. when a police officer affiant has an affidavit for a search warrant OWI blood draw notarized by a notary police officer. The State has conceded that this policy was erroneous.

STATEMENT OF THE CASE

Jeffrey Moeser was arrested on October 14, 2017 by Sgt. Steve Brown of the Portage County Sheriff's Office for OWI Sixth Offense. (R.5:1; APP004). The State filed a Criminal Complaint on October 25, 2017 charging Moeser with one count of OWI Sixth Offense and one count of Operating with Prohibited Alcohol Concentration Sixth Offense. *Id.*

Moeser filed a Motion to Suppress Blood Test Evidence Based upon Noncompliance with Oath Requirement in the Portage County Circuit Court on March 18, 2019. (R.39:1; APP008). The State filed a Response to the Defendant's Motion to Suppress Blood Test Results on May 24, 2019. (R.41:1; APP012). The parties stipulated to the facts and the circuit court heard argument and denied Moeser's Motion to Suppress Blood Test Evidence Based Upon Noncompliance with Oath Requirement on June 28, 2019. (R.70:35; APP061). The circuit court judge Honorable Robert Shannon signed a written order denying Moeser's Motion to Suppress Blood Test Evidence Based Upon Noncompliance with Oath

Requirement on November 15, 2019. (R.62:1; APP025). The court based its decision on the rationale that Sgt. Brown intended to be under oath according to circumstances surrounding the signing of the affidavit and its contents and therefore Sgt. Brown was functionally under oath as he did realize that he was swearing to the truth of what he indicated in his affidavit. (R.70:34; APP060).

Moeser entered a plea of guilty to OWI Sixth Offense on July 10, 2019 and sentence was withheld as the court placed Moeser on 3 years' probation and as conditions of probation the court ordered 8 months of jail, $1,200 fine plus costs, AODA Assessment, 36 month license revocation and 36 months of Ignition Interlock Device. (R. 52:1; APP001).

Moeser appealed the adverse decision on the Motion to Suppress Blood Test Evidence Based Upon Noncompliance with Oath Requirement; *see* Wis. Stat. § 971.31(10). (appeal from suppression ruling viable despite guilty plea). Moeser argued to the court of appeals that an oral oath was required to be administered by the notary police officer to the affiant police officer for an OWI search warrant to be considered sworn under the Fourth Amendment. (APP083). The State argued that when no oral oath is administered the analysis should focus on the intent of the affiant and if it appears that the affiant's intention was to be under oath the court should conclude a constructive oath occurred and the Oath requirement under the Fourth Amendment was fulfilled. *Id.* The Court of Appeals, District IV, in a two to one decision, affirmed the decision of the circuit court. (APP096). The Court of Appeals adopted the rationale for its decision from US v. Brooks, 285 F.3d 1102 (2002), which holds that when no oral oath is administered to make an affidavit sworn when obtaining a search warrant the Oath requirement can be fulfilled if it is clear from the conduct of the affiant and the statements made in the affidavit that the affiant intended to be under oath. *Id.* at 1106. The court of appeals also based its decision that the affidavit used by the affiant

Sgt. Brown was a sworn document because the circumstances surrounding the signing of the affidavit by the affiant in the presence of the notary and the language used in the affidavit passed a four part test from *Kellner v. Christian*, 197 Wis.2d 183 (1995) for what constitutes an oath. (APP088). In *Kellner* a four part test was used in order to determine if an oath can be considered to have been administered: (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 191-192. (APP088).

Moeser argues herein that the blood test results should be suppressed because no oral oath was administered as to the truthfulness of the affidavit and the language of the affidavit and the conduct of the affiant Sgt. Brown did not constitute what amounts to a 'sworn' affidavit and thus the search warrant is in violation of the Oath requirement under the Fourth Amendment of the US and Wisconsin Constitutions.

STATEMENT OF FACTS

On October 14, 2017, Moeser was arrested for OWI Sixth Offense by Sgt. Brown of the Portage County Sheriff's Office. (R.41:1; APP012). After Sgt. Brown read to Moeser the "informing the accused" form, Moeser refused to voluntarily consent to provide a blood sample. (*Id.*) Sgt. Brown then completed an affidavit for a search warrant to search the blood of the defendant for BAC evidence. (R.41:3; APP014). The affidavit which Sgt. Brown filled out stated "Sgt. Steve Brown, being first duly sworn on oath, deposes and says…" and then after describing the basis of probable cause for the OWI search warrant, the affidavit stated "Subscribed and sworn to before me" in a jurat for a notary. (R.42:3; APP020). This affidavit was signed by Sgt. Brown in the presence of the notary Lt. Jacob Wills of the Portage County Sheriffs Office. (R.42:7; APP024). The affidavit was then given to Lt. Wills who signed and sealed his notary stamp on the affidavit. (Id). Lt. Wills, the

notary officer, subsequently presented the affidavit to Court Commissioner Roberts who authorized a warrant to draw the defendant's blood. (*Id.*). There was an audio recording of Sgt. Brown and Lt. Wills signing the affidavit which demonstrated that Sgt. Brown did not audibly swear to the truthfulness of the content of the affidavit nor did Lt. Wills administer an oath to Sgt. Brown. (*Id.*). Lt. Wills confirmed in reports that he followed 'established procedure' for obtaining an OWI search warrant: Lt. Wills did not administer an oath, nor did Sgt. Brown swear to the facts contained in the affidavit. (*Id.*). The State concedes that this was the established procedure of the Portage County Sheriff's Offices in obtaining OWI blood draw search warrants. (R.41:3; APP014). The State further concedes that this policy is erroneous and has reminded all law enforcement agencies in Portage County that the better practice is to administer an oral oath upon signing the affidavit in support of a search warrant. (*Id.*).

Moeser contends herein that the circuit court's finding was erroneous and the appellate court's finding was erroneous because the affiant officer's Sgt. Brown's statements used in the affidavit and attendant conduct in obtaining the search warrant did not fulfill the oath requirement under the Wisconsin and US constitutions. Thus, the search warrant is constitutionally invalid, and Moeser therefore urges this Court to reverse the circuit court and appellate court's contrary conclusions.

ARGUMENT

I. MOESER'S BLOOD TEST RESULTS SHOULD HAVE BEEN SUPPRESSED BECAUSE THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT TO DRAW MOESER'S BLOOD WAS NOT SWORN TO BY THE AFFIANT SGT. BROWN AS REQUIRED BY THE US AND WISCONSIN CONSTITUTIONS

A. Standard of Review

The Fourth and Fourteenth Amendments to the United States Constitution and art. I, § 11, of the Wisconsin Constitution guarantee Wisconsin citizens freedom from 'unreasonable searches and seizures.' *State v. Griffith*, 2000 WI 72, ¶ 25, 236 Wis.2d 48, 613 N.W.2d 72 (2000). The question whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. *Id.* at ¶ 23. On review this, court gives deference to the trial court's findings of evidentiary or historical fact, but determines the question of constitutional fact independently. *Id.*

B. WI and US Constitutional Law Require the Affidavit by Sgt. Brown be Sworn to Under Oath for a Valid Search Warrant to be Issued

A warrant authorizing a search under the Fourth Amendment must be supported by a statement under oath or affirmation. *State v. Tye*, 248 Wis.2d 530, 533, 636 N.W.2d 473 (2001). The Fourth Amendment to the US Constitution provides, in relevant part, 'that no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.' *Id.* The total absence of any statement under oath to support a search warrant violates the explicit oath or affirmation requirement of both the federal and state constitutions. *Id.*

This Court held the Oath requirement as essential to a valid search warrant in the *Tye* decision. *Id.* at 538. The *Tye* court discusses the history of the Oath provision to the search warrant process and cites to *State v. Baltes*, 183 Wis.2d 545, 198 N.W.282 (1924) as the authority for the longstanding proposition that a valid search warrant requires an oath or affirmation in Wisconsin. *Tye*, 248 Wis.2d 530, 538 (2001). 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. *Id.* at 539. The oath or affirmation requirement 'is so basic to the Fourth Amendment that the court simply can't look at it as a technical irregularity not affecting the substantial rights of the defendant. *Id.*

The Wisconsin Legislature has also codified the oath requirement pertaining to affidavits for search warrants in Wis. Stat. §968.12(2) which requires a person requesting a search warrant to swear to the truth of the affidavit to a notarial officer or a judge and that the judge must indicate that the person so swore to the affidavit. *See* Wis. Stat. §968.12(2).

In the instant case, Sgt. Steve Brown of the Portage County Sheriff's Office prepared an affidavit for a search warrant to search the blood of the defendant for blood alcohol content following an OWI Sixth Offense arrest. (R.41:3; APP014). Sgt. Brown presented the affidavit to Lt. Jacob Wills of the Portage County Sheriff's Office and signed the affidavit in the presence of Lt. Wills and Lt. Wills provided a notary signature and stamp to the affidavit. *Id.* At no time during this procedure was the affiant Sgt. Brown placed under oath by Lt. Wills nor did he orally swear that the contents in the affidavit were true to the best of his knowledge. *Id.* The language of the affidavit stated, 'Sgt. Steve Brown, being first duly sworn on oath, deposes and says' and it also contained a notary jurat which stated 'Subscribed and sworn to before me' which was signed by the notary Lt. Wills. (R.42:3-7; APP020-APP024). Lt. Wills subsequently presented the affidavit to Portage County Court

Commissioner Roberts who authorized a search warrant for the search of Moeser's blood. *Id.* Lt. Wills further reported that he was following the established procedure for obtaining an OWI search warrant and specifically that it was the established procedure of the Portage County Sheriff's Office to not administer an oath nor swear to the contents of the affidavit. (R.41:3; APP014). The State has conceded that this policy was erroneous and has advised all law enforcement agencies in Portage County that the better practice is to administer an oral oath upon signing the affidavit in support of a search warrant. *Id.*

C. The Language of the Affidavit and the Attendant Conduct of the Affiant Sgt. Brown in Obtaining the Search Warrant do not Amount to Compliance with the Constitutional Oath Provision for a Valid Search Warrant

This Court in *Tye* described an oath as a matter of substance, not form, and it is an essential component of the Fourth Amendment and legal proceedings. *Tye*, 248 Wis.2d 530, 540 (2001). The *Tye* court held that

> The purpose of an 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.

Id. at 540-541. Here the *Tye* court describes the procedure of the Oath as a substantive procedure with its purpose serving the integrity of the process. The *Tye* court never addressed the issue of what constitutes an

oath when no oral oath is administered pursuant to an affidavit for an OWI search warrant which is the issue in the present case and there is no precedent in Wisconsin case law directly on point. The court of appeals found instructive in its opinion the rationale from *Kellner v. Christian*, 197 Wis.2d 183 (1995) in determining what constitutes an oath. (APP088). This is a misreading of *Kellner*. The issue in *Kellner* is limited as follows: "The sole issue before this court is to determine what Wis. Stat. §893.82(5) requires when it states that a written notice of claim must be 'sworn to' by a claimant before the claimant can bring an action against a state employee." *Id.* at 189. The court in *Kellner* limited the issue to whether the statute dealing with how a State employee can be held liable for injuries under Wis. Stat. §893.82(5) was sworn to which is distinguishable from the issue before this Court, which is whether the affidavit that Sgt. Brown supplied to obtain a warrant to search Moeser's blood pursuant to an OWI sixth offense arrest was 'sworn to' and in compliance with constitutional oath provisions. The statute at issue in the present case is Wis. Stat. §968.12(2) which requires a person requesting a search warrant to swear to the truth of the affidavit to a notarial officer or a judge and that the judge must indicate that the person so swore to the affidavit. *See* Wis. Stat. §968.12(2). The court in *Kellner* rested its reasoning on the purpose of the statute at hand in *Kellner* which was case specific to the issue in *Kellner* and the specific statute which purposes was to ensure the Attorney General can effectively review claims against state employees in a timely and cost effective manner. *Id.* at 194. The *Kellner* Court described the essentials of an oath as: (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 191-192. The Court in *Kellner* adopted these factors from *McKnight v. State Land Bd.*, 14 Utah 2d 238, 381 P.2d 726, 734 (1963). What makes *Kellner* and *McKnight* distinguishable from the present case is that *Kellner* and *McKnight* addressed the issue of what are the requirements of what makes a written document a

'sworn' document for legal purposes and business purposes but these cases did not address the issue of what constitutes a fulfillment of the Oath requirement under the US and Wisconsin constitutions when obtaining a search warrant. The Oath requirement embedded in the Fourth Amendment of the US Constitution and the Oath requirement embedded in Article I, Section 11 of the Wisconsin Constitution must be interpreted in accordance with principles derived from constitutional law. There is no binding precedent which exists in Wisconsin that delineates a test to determine when an affidavit is 'sworn' for purposes of fulfillment of the constitutional oath provision. The persuasive authority reveals that the standard in this situation to adopt is that the Court must analyze the affiant and determine if the affiant exhibited a manifest intent to be under oath and swear to the contents of the affidavit by the outward appearance of the language of the affidavit and the attendant conduct of the affiant in obtaining the search warrant.

D. Foreign Case Law Provides Persuasive Authority for this Court to Hold that The Language of the Affidavit and the Attendant Conduct of the Affiant Sgt. Brown in Obtaining the Search Warrant do not Amount to Compliance with the Constitutional Oath Provision for a Valid Search Warrant

A case which can provide guidance for this Court in adopting a standard in Wisconsin for what satisfies the constitutional Oath requirement when a police officer obtains a search warrant is *US v. Brooks*, 285 F.3d 1102, 1105 (2002). In *Brooks*, the Eighth Circuit US Court of Appeals decided the issue of whether the Oath requirement can be fulfilled when a police officer affiant applies for a search warrant and the affiant does not swear an oral oath as to the truthfulness of the contents of the affidavit, and the *Brooks* court held that despite the fact that the police officer (affiant) did not recall an oral oath being administered to him prior to signing the affidavit before a notary nor did he

remember the notary make him raise his right hand and solemnly swear to tell the truth and nothing but the truth, the *Brooks* court held that the affidavit itself saying 'duly sworn' and the affiant's conduct were consistent with the intention of being under oath. *Id.* The police officer (affiant) in *Brooks* both signed the affidavit before an individual authorized to administer oaths and he presented to a judge for signature a warrant that acknowledged that the warrant application was 'duly verified by oath or affirmation.' *Id.* The *Brooks* court held that the oath requirement was satisfied because the facts support a conclusion that the police officer (affiant) 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. *Id.* The *Brooks* court held that the Federal Oath requirement can be satisfied even if the affiant does not swear an oral oath as long as the affidavit contains at the very least an affirmation of the truth of the statements in it. *Id.* The *Brooks* court did not articulate a specific test to determine if the constitutional oath provision has been fulfilled when no oral oath is administered, but rather made its decision based on a focus on the 'evident state of mind' of the affiant to determine whether the facts support a conclusion that the affiant was under oath when making the application for a search warrant because the intent to be under oath was made manifest by the statements in the affiant's affidavit and the attendant conduct of the affiant. *Id* at 1105-1106.

The present case is distinguishable from *Brooks* because in the present case the facts do not present a circumstance in which the language of the affidavit and the conduct of the affiant reveal a manifest intent by the affiant to be bound by the statements in the affidavit under oath. In *Brooks*, it is important to note the specific facts which the *Brooks* court rested its decision on were such that it was clear from the specific language of the affidavit and the conduct of the affiant that the affiant intended to be bound under oath by the statements contained in the affidavit. The

police officer affiant in *Brooks* typed the affidavit in present tense language regarding his intent for the statements to be under oath, as the affidavit stated: "I, Chris Graves, being duly sworn depose and state as follows... and the warrant application began by stating that Officer Graves was 'duly sworn' and later recited that 'being duly sworn he despose(d) and state(d) that he had probable cause." *Id.* at 1104. Additionally, the *Brooks* court focused on the attendant conduct of the affiant Chris Graves and specifically that after the affiant had the affidavit signed by the notary that the affiant presented to a judge for signature a warrant that acknowledged that the warrant application was 'duly verified by oath or affirmation.' *Id.* at 1105.

In the present case, the language of the affidavit and the attendant conduct of the affiant Sgt. Brown do not display a manifest intent to be bound under oath. The language of the affidavit in the present case states: 'Sgt. Steve Brown, being first duly sworn on oath, deposes and says:" (R.42:3; APP020). This language contemplates that the affiant Sgt. Brown was placed under oath prior to making the statements in the affidavit by stating 'being first' duly sworn on oath. This language is markedly different from the language in the affidavit from *Brooks* which contemplate the affiant intending to be sworn in present time as he is writing the statements in the affidavit by stating: 'being duly sworn.' Additionally, the conduct of the affiant Sgt. Brown was markedly different than the conduct of the affiant in *Brooks*. In *Brooks,* the affiant presented to the judge the warrant for signature which also contained language that the warrant application was verified by oath whereas in the present case the affiant Sgt. Steve Brown signed the affidavit in the presence of the notary Lt. Wills and left the affidavit with Lt. Wills and it was Lt. Wills that presented the affidavit and search warrant application to Commissioner Roberts for signature. (R.42:7; APP024). Lastly the solemnity of the process the court found distinct in *Brooks* is distinguishable from the present case, as *Brooks* discusses the officer affiant's 'evident state of mind' when signing the

affidavit and search warrant application must be designed to insure the truth will be told by insuring that the witness or affiant will be impressed with the solemnity and importance of his words and that the theory is 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 or been so impressed. *US v. Brooks*, 285 F.3d 1102, 1105-1106 (2002). The *Brooks* court found that the circumstances which caused the affiant Officer Chris Graves to believe he was signing under oath would also have impressed upon him the importance of his words. *Id.* In the present case, the solemnity of the search warrant process for OWI blood draws was compromised because the administration of the oath itself was missing from the procedure as the notary Lt. Wills admitted that according to established procedure he did not administer an oath nor did the affiant swear to the contents of the affidavit. (R.42:7; APP024). The State itself admitted the established policy was erroneous and suggested the better practice is to swear an oral oath to the contents of the affidavit upon signing it. (R.41:3; APP014). Therefore, due to the aforementioned marked distinctions between the present case and *Brooks*, this Court should find that under the rationale of *Brooks* the affidavit was not made under oath in the present case.

It is important to note that the *Brooks* court adopted its rationale from the landmark case which articulated the standard for the Fourth Amendment's Oath requirement when no oral oath is administered which is *Atwood v. State*, 146 Miss. 662 (1927). In *Atwood* the Supreme Court of Mississippi decided the issue of whether the facts before the court were enough to constitute an oath for purposes of the oath requirement for search warrants under the constitution when the affidavit for the search warrant was signed in the presence of the Justice of the Peace for the purpose of obtaining a search warrant yet the affiant did not hold up his hand to be sworn nor was there any formal administration of an oath. *Id.* at 865. The *Atwood*

court decided that on the facts before the court the oath requirement was fulfilled because "by construction, what occurred amounted to the taking of the necessary oath by the affiant." *Id.* at 866. The *Atwood* court described aptly what an oath is:

> "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. Whenever the attention of the affiant is called to the fact that his statement is not mere assertion, but must be sworn to, and he is then called upon to do so some corporal act, and does it, this is sufficient to constitute an oath. It is not necessary to have the affiant hold up his hand when taking the oath."

Id. The *Atwood* court further describes an oath and states that "some unequivocal act must be done to distinguish between an oath and a bare assertion; an act clothed in such form as to characterize and evidence it as an oath." *Id.* The *Atwood* court then analyzed the facts before it and decided that an unequivocal act had been done because the affiant went to the Justice of the Peace for the avowed purpose of obtaining a search warrant, both knew the oath was necessary and both did what they believed to constitute an oath: the affiant signed the affidavit and the Justice of the Peace affixed his jurat and then issued the search warrant. *Id.* Although the two men did not say a word to each other regarding an oath, the evidence before the court was clear that both men knew an oath was necessary and both intended the necessary thing should be done in order to obtain the search warrant. *Id.* The *Atwood* court held that by construction what occurred was the taking of the necessary oath by the affiant. *Id.*

When the facts of the present case are analyzed under the *Atwood* standard for what constitutes an oath this Court should hold that the affiant Sgt. Brown was not under oath for purposes of obtaining a valid search warrant under the Fourth Amendment. An important point to highlight from *Atwood* is that simply because the *Atwood* court decided not to enforce a strict rule that an oath must take on an oral form to be valid does

not mean that a simple signing of the affidavit is automatically sufficient to constitute the constitutional oath requirement either. The facts in *Atwood* were such that it was the intended ceremony of the Justice of the Peace to not recite an oral oath: "The Justice of the Peace, in his testimony, stated that he did not have the affiant hold up his hand and be sworn, because he did not think it was necessary, and that it was not customary for him to do so in such a case; that the signing of the affidavit by the affiant and the affixing of the jurat by him was 'just like acknowledging a land deed.' The facts of the present case do not present the same intentional ceremony by the affiant and official administering the oath: in the present case the affiant Sgt. Brown did not swear to the affidavit which was not intentional, but rather admittedly unintentional, as the State has admitted the policy to not recite an oral oath was erroneous in the present case and that the better practice is to orally swear to the affidavit before the notary. (R.41:3; APP014). Additionally the language of the affidavit, 'being first duly sworn' makes it appear that an oral oath was administered to the affiant prior to the statements being made in the affidavit which did not occur in the present case making the ceremony in the present case appear disingenuous and unintentional. Lastly, unlike as in *Atwood* where the affiant personally appeared before the official issuing the search warrant, in the present case the affiant Sgt. Brown did not personally appear before the court Commissioner Roberts who authorized the search warrant. (R.42:7; APP024). For these reasons, this Court should find that in applying the principles from *Atwood* to the facts of the present case, that no constructive oath occurred for Fourth Amendment purposes.

Another case which can serve as guidance in assessing what constitutes an oath when no oral oath is administered is *US v. Fredericks*, 273 F.Supp.2d 1032 (2003). The *Fredericks* court applied the principles stemming from *Atwood* and *Brooks* and decided after analyzing the language of the affidavit and the attendant conduct of the affiant that under the facts

before it a constructive oath occurred for Fourth Amendment purposes. *Id.* at 1037-1038. The principle the *Fredericks* court applied to determine if an oath occurred was: that a person need not recite formulaic words or raise a hand because a person who manifests an intention to be under oath is in fact under oath. *Id.* at 1037. Moeser points out to this Court that the word 'manifest' is important to note because it calls for a requirement that the intent of the affiant to be sworn must be clear and obvious and not esoteric. The language of the affidavit in *Fredericks* was written in present tense terms and it is obvious from the language itself that the affiant intended the statements to be sworn as the affidavit states: "The undersigned being duly sworn deposes and states to the court." *Id.* Additionally, the affiant in *Fredericks* signed the affidavit upon presentation to the tribal court and Judge Conklin attested that the affidavit was sworn to and subscribed by the affiant in her presence. *Id.* The *Fredericks* court found after analyzing the nature of the document and the conduct of the affiant that it was apparent that the affiant manifested an intent to be under oath and as such he can be considered to be under oath for Fourth Amendment purposes. *Id.* at 1037-1038. The facts of the present case are distinguishable. The language of the affidavit, 'being first duly sworn' makes it appear that an oral oath was intended and failed to be administered to the affiant prior to the statements being made in the affidavit. (R.42:3; APP020). Additionally, the other major distinguishable fact in the present case is that the affiant Sgt. Brown in the present case did not personally appear before the court Commissioner Roberts who authorized the search warrant. (R.42:7; APP024). In *Fredericks*, the affiant appeared personally before tribal judge El Marie Conklin with the affidavit and judge Conklin issued the warrant. *Fredericks*, 273 F.Supp.2d 1032, 1035 (2003). For these reasons, this Court should find that in applying the principles from *Fredericks* to the facts of the present case, that no constructive oath occurred for Fourth Amendment purposes in the present case.

Another case which can provide guidance is *People v. Sullivan*, 56 N.Y.2d 378 (1982) which held that in order to fulfill the constitutional oath requirement in the usual case there will be a formal swearing before a notary to the truth of the information provided but this procedural formality is not an absolute requirement and under the facts before the court in *Sullivan* which were such that the affiant used an affidavit which alerted the affiant to the fact that he is acknowledging the truthfulness of the facts contained in the affidavit under penalty of perjury that this method of verification of knowing acceptance of criminal consequences for perjury is enough to satisfy the oath requirement. *Id.* at 382-383. The present case is distinguishable from *Sullivan* because the language of the affidavit used in the present case did not warn the affiant that penalty for providing false information is a criminal consequence anywhere on the affidavit or the search warrant application. (R.42:1-7; APP018-APP024).

The case *Markey v. State*, 47 Fla. 38 (1904), is a perjury case but adds persuasive authority to the present issue because the court in *Markey* dealt with the issue of whether it was clear from the language of an affidavit whether the affiant was under oath or not when the language used was 'being duly sworn,' and the court held that this language does not provide unequivocal intent to be under oath whereas language such as 'I do hereby solemnly swear..' is stronger in showing present intent by the affiant to be under oath. *Markey*, 47 Fla. 38, 60 (1904). In the present case language such as 'I do hereby solemnly swear' was not used in the affidavit and the language that was used was insufficient to demonstrate unequivocally that the affiant Sgt. Brown intended to be bound under oath.

The case *State v. Hodges*, 595 S.W.3d 303 (2020) also provides guidance for this Court as even though *Hodges* is a lower Texas state court decision the decision nonetheless applies Texas state law in the context of factual circumstances almost identical to the present case. In *Hodges*, the defendant was arrested

for DWI and the affiant police officer made an affidavit to obtain a search warrant for the blood draw and had the affidavit signed in the presence of another police officer that was a notary and the notary officer then signed the jurat that read 'subscribed and sworn to before me' and the preamble on the affidavit stated 'the undersigned officer...being duly sworn on oath makes the following statements. Hodges, 595 S.W.3d 303, 304-305 (2020). The affiant officer presented the affidavit to the magistrate and neither the magistrate issuing the warrant nor the notary officer administered an oath or asked any words regarding the truthfulness of the statements contained in the affidavit. *Id.* The *Hodges* court found the facts before it as: "no one with authority to administer an oath actually administering one in any way, shape, or form. Nor did anyone with authority to administer an oath actually inquire into the truthfulness of the affiant officer's statements within the affidavit. *Id.* at 305-306. The *Hodges* court analyzed the language of the affidavit and found it as disingenuous because the language reflected that an oral oath took place which in fact never occurred as the affidavit in *Hodges* stated: the jurat read subscribed and sworn to before me but in fact the affidavit was never actually sworn before the notary. *Id.* The *Hodges* court held that for an oath there must be, at the very least, the affiant to visually manifest through conduct his intent to be truthful and on the facts before *Hodges* where, the affiant officer did not verbally take an oath affirming the truthfulness of his statements, was not asked in some way by anyone if the statements were true and correct and did not personally represent in or outside the affidavit that the representations were true the *Hodges* court did not find a manifest intent on the affiant to be under oath and thus found the conduct insufficient to fulfill the constitutional oath provision. *Id.* at 306. Lastly, the facts in *Hodges* were such that it was the admitted practice of the affiant that he is not required to take an oath prior to submitting an affidavit and the admitted practice of the notary officer to not administer an oath to an affiant seeking a search warrant for a suspects blood in a DWI investigation. *Id.* 307. The facts in the *Hodges* case are almost

identical to the facts of the present case with the exception that in the present case the affiant never personally appeared before the magistrate issuing the warrant, Court Commissioner Roberts. (R.42:7; APP024). This Court should follow the rationale from *Hodges* and similar to *Hodges* this Court should find that a constructive oath was not administered to Sgt. Brown in the present case.

E. The Court Should Suppress the Blood Test Results

As described above, the affidavit in the instant case was unsworn and the search warrant was issued in violation of Moeser's rights in both the federal and state constitutions that a warrant only be issued upon oath or affirmation. The *Tye* court held in such a circumstance the proper remedy is suppression of evidence. *State v. Tye*, 248 Wis.2d 530, 534 (2001). The *Tye* court analyzed and rejected the State's arguments against suppression: that the failure to administer an oath is a mere technical defect; an investigator's second affidavit that is sworn but issued after the search remedies the absence of a sworn affidavit before the search; failure to administer an oath is an unintended mistake and does not vitiate the warrant and cause suppression; the good faith exception to the exclusionary rule should apply. *Id.* at 539-544. This court should follow precedent in the instant case and order suppression of the results of the blood test.

CONCLUSION

For the aforementioned reasons, Moeser asks this court to reverse both the court of appeals and the circuit court and hold that the circuit court should have suppressed the results of the blood draw as resulting from a violation of the constitutional requirement that a warrant be issued only upon oath. Moeser further requests that this Court remand his case for proceedings consistent with this holding.

Dated at Milwaukee, Wisconsin on January 29, 2022.

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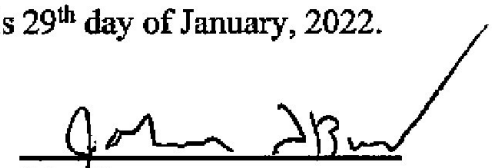
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is **7,178** words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19 (12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Respectfully submitted this 29th day of January, 2022.



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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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

Respectfully submitted this 30th day of January, 2022

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