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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP2184-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. MOESER,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A DECISION OF
THE COURT OF APPEALS AFFIRMING A
JUDGMENT OF CONVICTION ENTERED IN
THE CIRCUIT COURT FOR PORTAGE COUNTY,
THE HONORABLE ROBERT J. SHANNON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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INTRODUCTION

Our state and federal constitutions command that a search warrant be issued only upon a showing of probable cause supported by oath or affirmation. Courts across the country have declined to impose rigid rules governing how an oath or affirmation must be administered, recognizing that raising one's hand and uttering magic words is not required; what is essential is that the search warrant applicant manifest the intent to be bound by his or her statement under circumstances that emphasize the need to tell the truth.

Moeser's arguments ignore this fundamental principle. He seeks suppression of his blood test results because the officer who applied for the search warrant of his blood did not engage in the formulaic ceremony that Moeser associates with a traditional oath. But the Fourth Amendment requires no such ritual, and by recognizing the same, the court of appeals joined a long list of state and federal courts that realize an oath's value derives from its function, not its form. Guided by that principle, this Court should affirm the court of appeals' decision that rightly held that the oath or affirmation requirement was satisfied in Moeser's case.

ISSUE PRESENTED

Did the police officer who applied for the search warrant for Moeser's blood sample affirm the truth of his affidavit's contents, satisfying the oath or affirmation requirement?

The circuit court answered yes.

The court of appeals answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case for which this Court grants review, oral argument and publication are warranted.

SUPPLEMENTAL STATEMENT OF THE CASE

I. Factual Background

Sergeant Steve Brown stopped Moeser for speeding down a country road around bar time. (R. 5:2.) Although Moeser insisted he consumed only two beers with dinner, field sobriety testing revealed numerous clues of impairment, and a preliminary breath test estimated Moeser's blood alcohol concentration at nearly ten times his legal limit.[1] (R. 5:2–3.)

Moeser refused to submit to a blood test following his arrest, leading Sergeant Brown to prepare a search warrant to secure a sample of his blood. (R. 5:3; 7:1.) With that search warrant, Sergeant Brown submitted an affidavit describing his law enforcement training and detailing his observations that prompted Moeser's arrest. (R. 7:2–5.) The affidavit also contained several averments that the facts alleged were true.

Beginning at the top of the affidavit's opening page, Sergeant Brown wrote his name alongside predicate language, "being first duly sworn on oath, deposes and says." (R. 7:2.) Then, in the second paragraph, Sergeant Brown declared that he had personal knowledge that the affidavit's contents were true. (R. 7:2.) Finally, on the affidavit's last page, Sergeant Brown signed his name beside a jurat that read, "Subscribed and sworn to before me," followed by the

[1] Moeser's preliminary breath test result was .195. (R. 5:3.) Given his multiple prior OWI convictions, Moeser could not lawfully drive a motor vehicle on Wisconsin's highways with a blood alcohol concentration at or exceeding .02. Wis. Stat. § 340.01(46m)(c).

date and name of the Notary Public who notarized the affidavit. (R. 7:5.)

A court commissioner authorized the search warrant, (R. 7:1), the execution of which revealed that Moeser's blood alcohol concentration was 0.220 g/100 mL (R. 23:1).

II. Procedural History

The State charged Moeser with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited alcohol concentration, each as a sixth offense. (R. 5:1.)

Before trial, Moeser moved to suppress his blood test results, arguing that the search warrant authorizing his blood draw was invalid because Sergeant Brown did not swear under oath to the accuracy of his affidavit's contents. (R. 38.) In support, Moeser referenced an audio recording between Sergeant Brown and Lieutenant Jacob Wills, the Notary Public who notarized the affidavit, which revealed that Sergeant Brown did not "swear under oath to Lt. Wills that the allegations contained in the affidavit are true, in other words at no point in time is Sgt. Brown placed under oath in regards to the statements made in the affidavit." (R. 38:2.) Accordingly, Moeser insisted Sergeant Brown's affidavit was "invalid for noncompliance with the constitutional Oath requirement, and thus the search warrant is defective and in violation of the defendant's rights." (R. 38:2.)

The State filed a response advancing three grounds to deny Moeser's motion: (1) Moeser ultimately consented to a blood draw, removing any need for a search warrant; (2) the affidavit supporting the search warrant for Moeser's blood was sufficiently affirmed despite Sergeant Brown not raising his right hand or uttering an oral oath or affirmation; and (3) police acted in good faith reliance on the search warrant for Moeser's blood. (R. 41:4–5.)

With its response, the State filed a copy of the underlying search warrant, Sergeant Brown's supporting affidavit, and a police report prepared by Lieutenant Wills. (R. 42.) In that report, Lieutenant Wills admitted, "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." (R. 42:7.)

The circuit court denied Moeser's motion in an oral ruling, adopting the State's second argument in its written response. (R. 70:31–35.) Relying on the Eighth Circuit's rationale in *Brooks*,[2] the court held, "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." (R. 70:34.) The court later issued a written decision denying Moeser's suppression motion. (R. 62.)

Moeser appealed, challenging the circuit court's adverse suppression decision. *State v. Moeser*, No. 2019AP2184-CR, 2021 WL 2589158 (Wis. Ct. App. June 24, 2021) (unpublished). The court of appeals affirmed, holding that the search warrant for Moeser's blood "was supported by [Sergeant] Brown's oath or affirmation that the statements in his affidavit were true." *Id.* ¶ 19. Bolstering that decision, the court recognized that the four factors applied in *Kellner*[3] were instructive when assessing whether an oath or affirmation occurred, and it also compiled persuasive authority from other jurisdictions which have held that an oath or affirmation occurred absent a formal ceremony. *Id.* ¶¶ 19–23, 28–31.

Moeser petitioned for review, which this Court granted.

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[2] *United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir. 2002).

[3] *Kellner v. Christian*, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

STANDARD OF REVIEW

When reviewing a "circuit court's denial of a suppression motion," this Court "uphold[s] the circuit court's findings of historical fact unless they are clearly erroneous, . . . [while] independently apply[ing] constitutional principles to those facts." *State v. Burch*, 2021 WI 68, ¶ 14, 398 Wis. 2d 1, 961 N.W.2d 314.

ARGUMENT

The circuit court properly denied Moeser's motion to suppress his blood test results.

Moeser insists that the search warrant that yielded evidence of his excessive intoxication was void, and his blood test results should have been suppressed, because Sergeant Brown's affidavit and "attendant conduct" did not satisfy the oath or affirmation requirement under the state and federal constitutions. (Moeser's Br. 13–15.)[4] The court of appeals properly rejected those same arguments, holding that the search warrant for Moeser's blood "was supported by Brown's oath or affirmation that the statements in his affidavit were true." *Moeser*, 2021 WL 2589158, ¶ 19.

To show why the court of appeals is correct, the State first describes the vital roles that oaths and affirmations maintain in our criminal justice system. Next, the State will explain how jurisdictions across the country, including this Court, have recognized that the value of an oath or affirmation derives not from their form but from their function. The State will then show how Sergeant Brown satisfied the oath or affirmation requirement by confirming the accuracy of his affidavit's contents under circumstances underscoring the need to tell the truth. Finally, the State

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[4] The State cites to the electronic page numbers of the petitioner's brief and not the page numbers at the bottom of the brief.

concludes by defeating Moeser's weak attempts to distinguish foreign authority that plainly undercuts his arguments.

A. Oaths and affirmations play a vital role under our state and federal constitutions.

In *State v. Tye*, this Court offered a valuable history lesson supporting its proclamation that "[a]n oath is a matter of substance, not form, and it is an essential component of the Fourth Amendment and legal proceedings." 2001 WI 124, ¶¶ 8–12, 19, 248 Wis. 2d 530, 636 N.W.2d 473. Originating in 17th century Europe, "English law required officials seeking search warrants to swear an oath as a means of controlling the unfettered discretion of the searcher." *Id.* ¶ 8. Unfortunately, when that requirement was briefly removed, search warrants—or Writs of Assistance—were prone to abuse as government officials conducted searches "with nearly absolute and unlimited discretion." *Id.* ¶ 8.

That intrusive practice led American colonists to view Writs of Assistance "as fundamental violations of their basic right to be undisturbed in their person and property," leading each state, upon independence, to guarantee individuals the right to be free from unreasonable searches and seizures in their respective state constitutions. *Id.* ¶ 9. This important requirement was eventually incorporated into the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. *Id.* ¶¶ 9–12.

For nearly a century, this Court has recognized oaths and affirmation as "essential prerequisite[s] to obtaining a valid search warrant under the state constitution." *Id.* ¶ 13 (citing *State v. Baltes*, 183 Wis. 545, 198 N.W. 282 (1924)). In reaffirming that principle, this Court flatly rejected the notion that an oath or affirmation is mere technical formality while highlighting their vital roles in our legal system:

> 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. ¶ 19 (footnotes omitted).

B. No specific ceremony or script is necessary to constitute a valid oath or affirmation.

Given the integral role of oaths and affirmations, addressing Moeser's arguments naturally requires an understanding of what an oath or affirmation is, and how it is administered. The court of appeals provided a detailed analysis in search of those answers, examining constitutional texts, analogous supreme court precedent, statutory authority, secondary sources, and persuasive authority from other jurisdictions. *Moeser*, 2021 WL 2589158, ¶¶ 14–16, 18–20, 28–30.

As a logical starting point, the court observed that "[t]he terms 'oath' and 'affirmation' are not defined in the United States or Wisconsin constitutions, nor are the terms defined in Wisconsin statutes." *Id.* ¶ 14 (footnote omitted). While Wis. Stat. §§ 887.03 and 906.03 provide some insight, the court aptly noted that neither statute defines what "swearing" or "affirming" mean, nor do they dictate "the usual forms" an oath or affirmation must take. *Id.* And, while the statutes provide some examples of how an oath or affirmation may be

administered, at least in the context of courtroom testimony, the court was quick to recognize that the recurring use of "may" in those sections revealed "permissive and not mandatory" directives. *Id.* ¶ 18.

Absent explicit constitutional or statutory direction, the court of appeals reasonably turned to secondary sources. *Id.* ¶¶ 15, 18. Black's Law Dictionary defines an "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." *Oath, Black's Law Dictionary* (11th ed. 2019). It defines an "affirmation" as "[a] solemn pledge equivalent to an oath but without reference to a supreme being or to swearing; a solemn declaration made under penalty of perjury, but without an oath." *Affirmation, Black's Law Dictionary* (11th ed. 2019).

Seeking additional guidance, the court also reviewed this Court's prior precedent, which does not impose unyielding rules governing the administration of oaths or affirmations; on the contrary, *Tye* teaches us that it is not the *form* that an oath takes that matters but its substance or purpose. *Tye*, 248 Wis. 2d 530, ¶ 19. That said, this Court has provided some baseline instruction on what an oath requires, albeit outside of the warrant context, when it announced 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." *Kellner v. Christian*, 197 Wis. 2d 183, 191–92, 539 N.W.2d 685 (1995) (citing *McKnight v. State Land Bd.*, 381 P.2d 726, 734 (Utah 1963)). Notably, however, as the Supreme Court of Utah in *McKnight* reminded us, "The administration need not follow any set pattern. The ritual is of secondary importance and does not affect the validity of the oath. The manner of delivery may add to the solemnity, but nothing to the honesty of the declarer." *McKnight*, 381 P.2d at 734.

Utah courts are clearly not alone in that assessment; Professor LaFave reminds us that "[n]o particular ceremony is necessary to constitute the act of swearing" and that "[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." 2 Wayne R. LaFave, et al., *Criminal Procedure* §3.4 (c) (4th ed. 2021) (footnotes omitted).

Many federal courts are in accord. *United States v. Mensah*, 737 F.3d 789, 806 (1st Cir. 2013) (recognizing no verbal statement is required to administer an oath); *United States v. Bueno-Vargas*, 383 F.3d 1104, 1111 (9th Cir. 2004) ("signing a statement under penalty of perjury satisfies the standard for an oath or affirmation"); *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.").

State courts across the country have also followed suit. Nearly a century ago, in *Atwood v. State*, the Supreme Court of Mississippi set out to answer the questions, "What is an oath, and how is it made?" 111 So. 865, 866 (Miss. 1927). The court recognized, much like federal courts would restate decades later, "[t]he 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." *Id.* Applying those principles to the facts before it, the court recognized that, although not a word was spoken between the affiant and justice of the peace referencing any oath, the affidavit still met the requirement of an oath or affirmation as the parties were aware an oath was necessary and "both intended that the necessary thing should be done in order to obtain the search warrant." *Id.*

Years later, the Oklahoma Court of Criminal Appeals reached the same conclusion, reaffirming that "no set formula is required to constitute an oath or to impose the obligation of

an oath." *Farrow v. State*, 112 P.2d 186, 189 (Okla. Crim. App. 1941). The court eloquently explained,

> Where a deputy sheriff testifies on a motion to suppress the evidence that he was not formally sworn to the affidavit by raising his hand and invoking the deity, but that he had read the affidavit and signed the same, and handed it to the magistrate to procure a search warrant, and the magistrate places his jurat upon the affidavit and issues a search warrant based thereon, such affidavit is not subject to the objection that the deputy sheriff was not formally sworn to said instrument.

Id. at 187.

Thereafter, the Supreme Court of Washington, citing *Atwood* with approval, determined that an oath took place where a detective signed an affidavit for a search warrant in a court commissioner's presence, the text of which began that the affiant "being first duly sworn on oath deposes and says." *State v. Douglas*, 428 P.2d 535, 538–540 (Wash. 1967). Notably, the court arrived at that conclusion despite "[t]he court commissioner testif[ying] frankly to the absence of any formal oath." *Id.* at 539.

More recently, in *State v. Knight*, 995 P.2d 1033 (N.M. Ct. App. 2000), the New Mexico Court of Appeals affirmed a decision denying a defendant's motion to suppress evidence gathered pursuant to a wiretap authorized based on a police agent's affidavit. There, the agent signed his supporting affidavit in the Notary Public's presence alongside the language, "Subscribed and sworn to or declared and affirmed to before me in the above named county of the State of New Mexico." *Id.* at 1041. Despite the Notary Public's testimony conceding "that she never had sworn a witness before notarizing a witness' signature," the New Mexico Court of Appeals determined that "the important nature of the affidavits in this instance and Agent Skinner's exercise of the

formalities in completing the affidavits sufficiently fulfilled the requirements of an oath or affirmation." *Id.* 1041–42.

Bolstering its analysis, *Knight* cited with approval *Blackburn v. Motor Vehicles Division*, 576 P.2d 1267, 1269 (Or. Ct. App. 1978), where the Oregon Court of Appeals determined that a police officer "merely signing a form of affidavit in the presence of a notary or an official authorized to administer an oath [or affirmation] is sufficient." *Id.* at 1269–70. Notably, in *Blackburn*, the court expressly recognized that an affiant's deviation from a statutory, model script used for administering oaths or affirmation was not fatal. *Id.* at 1270. In the end, however, the court joined several sister jurisdictions, including the North Dakota Supreme Court, the Washington Supreme Court, the Mississippi Supreme Court, the Oklahoma Court of Appeals, and the Louisiana Court of Appeals in recognizing that "merely signing a form of affidavit in the presence of a notary or an official authorized to administer an oath is sufficient." *Id.* 1269–70; *see also State v. Carr*, 877 P.2d 1192, 1195 (Or. 1994) (holding that the trial court was entitled to find a defendant guilty of perjury where the defendant signed a statement before a notary that he had been "duly sworn" and that statements were "true and correct as I verily believe").

Ultimately, this survey of cases illustrates that whether an oath or affirmation occurred does not depend on a formal ceremony or prescribed script; where the affiant takes action under circumstances that impress the need to tell the truth, the oath or affirmation requirement is satisfied.

C. Sergeant Brown sufficiently affirmed the contents of his affidavit.

Whether applying *Kellner*'s more defined requirements or following the lead of other state and federal courts that merely gauge whether an affiant-officer intended to be under oath under circumstances that impress the need to tell the

truth, the constitutional oath or affirmation requirement was met in Moeser's case, the search warrant for his blood was lawfully authorized, and the circuit court correctly denied Moeser's suppression motion.

1. Sergeant Brown's affidavit met all four *Kellner* requirements to constitute a valid oath or affirmation.

While Moeser seemingly faults the court of appeals for its reliance on *Kellner*, he offers no reason why this Court should ignore past precedent when assessing whether an oath or affirmation occurred in his case. (Moeser's Br. 14–15.) Instead, he draws a futile (and confusing) distinction between what it means for a written document to be sworn "for legal purposes and business purposes" as opposed to being sworn to satisfy the oath or affirmation requirements under the state and federal constitutions. (Moeser's Br. 14–15.) In so doing, Moeser fails to explain why an oath supporting a notice of claim of injury in a civil suit should be assessed differently than an oath supporting a criminal search warrant.

While his reasoning leaves something to be desired, Moeser's motivation for discouraging *Kellner*'s application is clear: Sergeant Brown's affidavit met all four requirements which this Court deemed necessary to constitute an oath. First, Sergeant Brown made a "solemn declaration." *Kellner*, 197 Wis. 2d at 191. This was not a situation where a police officer rattled off facts to a friend or colleague in an informal context; Sergeant Brown reduced his observations to writing in a formal affidavit that were sent to a court commissioner for review, and he detailed his observations after writing his name on a space preceding the ceremonial statement "being first duly sworn on oath, deposes and says." (R. 7:2–5.)

Second, Sergeant Brown manifested his intent to be bound by his statement in several ways. *Kellner*, 197 Wis. 2d at 191. In his affidavit's second paragraph, Sergeant Brown

confirmed that he had personal knowledge that the contents of his affidavit were true. (R. 7:2.) As previously noted, he also wrote his name alongside predicate language that he intended to make his statement upon oath. (R. 7:2.) And he signed his name next to a notary jurat indicating that the affidavit's contents were "[s]ubscribed and sworn to" on that date, (R. 7:5), thus satisfying the additional requirement that the affidavit bear the signature of the declarer. *Kellner*, 197 Wis. 2d at 192.

Finally, there was an "acknowledgment by an authorized person that the oath was taken." *Id.* at 192. Again, Lieutenant Wills notarized the affidavit, asserting that it was subscribed and sworn to him on that date. (R. 7:5.) While Lieutenant Wills later made clear that he did not "administer an oath," (R. 42:7), his own subjective belief of whether Sergeant Brown's affidavit or his attending conduct met the legal definition of an oath or affirmation certainly does not control this Court's decision.

In short, Sergeant Brown's affidavit met all four *Kellner* requirements to constitute a valid oath or affirmation, and Moeser offers no coherent argument revealing why this Court should abandon *Kellner* in the search warrant context.

2. Authority from other jurisdictions confirms that Sergeant Brown affirmed the contents of his affidavit.

As the above survey of persuasive authority reveals, courts across the country have found an oath or affirmation based on facts strikingly similar to those in Moeser's case. *See supra* pp. 11–15. While this Court is certainly not bound by the decisions of its sister jurisdictions, that numerous other courts have recognized the existence of an oath or affirmation on comparable facts only supports the court of appeals' decision that Sergeant Brown's affidavit and conduct passed constitutional muster in Moeser's case.

Like in *Brooks*, Sergeant Brown used language in his affidavit demonstrating that he intended to be under oath, writing his name alongside predicate language "being first duly sworn on oath, deposes and says," and signing his signature next to a notary jurat that read, "Subscribed and sworn to before me." (R. 7:2, 5.) And while Sergeant Brown may not have been the person who clicked "send" on a computer of fax machine, it's clear from the language of the affidavit and corresponding search warrant that Sergeant Brown planned for a judicial official to review his materials and authorize his requested warrant, just like in *Brooks*. 285 F.3d at 1105. Ultimately the Eighth Circuit would seemingly agree that Sergeant Brown's affidavit and behavior satisfied the oath or affirmation requirement.

Moreover, other state courts—particularly those in *Knight*, *Carr*, *Blackburn*, *Douglas*, *Atwood*—would similarly recognize that Sergeant Brown's affidavit was sufficiently sworn or affirmed given that (1) he asserted in that very document that the contents of the document were true, (R. 7:2), (2) he wrote his name alongside language indicating that he was offering facts "being first duly sworn on oath," (R. 7:2), (3) he signed his name next to a notary jurat stating that the document was "[s]ubscribed and sworn to," (R. 7:5), and (4) the document was only prepared to convince a court commissioner to authorize a search warrant.

Thus, even if this Court were to decide that the four *Kellner* requirements were unsuitable for assessing whether an oath or affirmation had been made to support the issuance of a search warrant, a holding that Sergeant Brown's affidavit was nevertheless affirmed would place this Court in good company among jurisdictions that understand that the Constitution requires no formal ceremony or script to administer an oath or affirmation.

D. Moeser's efforts to distinguish analogous foreign authority should not persuade.

To his credit, Moeser has done his homework scouring the country for cases in hopes to convince this Court that Sergeant Brown's affidavit was not properly sworn or affirmed. (Moeser's Br. 15–24.) Try as he might, neither the authority he offers nor the arbitrary distinctions he draws from it should convince this Court that the constitutional oath or affirmation requirement went unmet in his case.

For starters, Moeser seemingly takes issue with the court of appeals' reliance on *Brooks* and *United States v. Fredericks*, 273 F. Supp. 2d 1032 (D.N.D. 2003), dedicating nearly one-third of his overall argument to explaining how those two cases are inapposite. (Moeser's Br. 15–18, 20–21.) The critical differences he offers to distinguish those cases? For *Brooks*, he offers three: (1) Sergeant Brown's verb tense in his affidavit; (2) Lieutenant Wills sent Sergeant Brown's affidavit to the issuing magistrate; and (3) Lieutenant Wills believed he did not administer an oath to Sergeant Brown or that Sergeant Brown swore to the facts in his affidavit. (Moeser's Br. 17–18.) And for *Fredericks*, he offers two: (1) Sergeant Brown's verb tense in his affidavit; and (2) Sergeant Brown's failure to physically appear before the magistrate who authorized the warrant. (Moeser's Br. 20–21.)

The State fails to see how those differences show that Sergeant Brown lacked intent to affirm the truth of his affidavit's contents under circumstances that impressed the need to tell the truth. Beginning with Moeser's fixation on verb tense, whatever distinction he attempts to draw is lost on the State. Recall that Sergeant Brown began his affidavit by writing his name alongside predicate language, "being first duly sworn on oath, deposes and says." (R. 7:2.) In *Brooks*, the officer's affidavit began, "I, Chris Graves, being duly sworn depose[ ] and state[ ] as follows." 285 F.3d at 1104 (alterations in original). And in *Fredericks*, the officer's affidavit began

"the undersigned being duly sworn deposes and states to the Court...." 273 F. Supp. 2d at 1037. While admittedly not identical, nothing in the language of those three affidavits suggests that the affiants in *Brooks* and *Fredericks* meant to affirm their affidavits' contents, yet Sergeant Brown did not.

Nor does the State see how either the identity of the person who sends the supporting affidavit to the magistrate or the affiant's physical location affects the equation. Whether he personally delivered documents to the court commissioner or entrusted a colleague to send them, Sergeant Brown clearly prepared his affidavit and search warrant with the intent that a magistrate would review the former and grant the latter. It is absurd to suggest that Sergeant Brown would believe either that he was not bound by his affidavit's contents *unless* he personally escorted the physical paperwork to the responsible judicial official or that he was free to lie as he pleased so long as he was not face-to-face with that official.

Indeed, Professor LaFave has clarified that the requirement that "something be done in the presence of the magistrate issuing the search warrant" is not to be read literally. LaFave, § 3.4(c) & n.51. And courts have flatly rejected arguments that an oath or affirmation ceases to be simply because it is taken over the phone, as opposed to during face-to-face contact. *See, e.g., United States v. Turner*, 558 F.2d 46, 50–51 (2d Cir. 1977). Moreover, Wis. Stat. § 968.12(2) plainly establishes that face-to-face contact between the affiant and judicial officer is not necessary during a search warrant application. Simply put, Moeser's list of arbitrary distinctions fails to demonstrate why his case warrants a different result than *Brooks* or *Fredericks*.

Moeser's attempts to distinguish *Atwood* fare no better. (Moeser's Br. 18–20.) He concedes that, in *Atwood*, despite the officer-affiant's never raising his hand or speaking a word to the warrant-issuing magistrate, the Mississippi Supreme Court determined that, "by construction, what occurred

amounted to the taking of the necessary oath by the affiant." (Moeser's Br. 18–19 (quoting *Atwood*, 111 So. at 866).) Still, much like his failed attempts to distinguish *Fredericks*, he focuses largely on verb tense and the affiant's physical location, neither of which helps him. *See supra* pp. 19–20.

The only other difference Moeser offers is that the police agency that employed Sergeant Brown had instituted a policy not to administer formal oaths. (*See* Moeser's Br. 13, 20.) But, as the court of appeals correctly pointed out, (1) Lieutenant Wills appeared to be referring to the lack of an *oral* oath or swearing, and (2) whether Lieutenant Wills subjectively believed an oath or affirmation took place was not binding on the State or the court. *Moeser*, 2021 WL 2589158, ¶ 7 n.4. Whether Lieutenant Wills believed that Sergeant Brown's affidavit and conduct were sufficient to satisfy constitutional mandate is of no consequence, and Moeser offers no other reason his case warrants a different result from *Atwood*.

Next up, Moeser offers *People v. Sullivan*, 437 N.E.2d 1130 (N.Y. 1982), for the principle that an unsworn statement may satisfy the Fourth Amendment's oath or affirmation requirement where the statement contained a warning that a false statement could subject him to criminal penalties. (Moeser's Br. 22.) But nowhere did the New York Court of Appeals suggest that a person is not under oath unless he or she is first warned that making false statements might trigger criminal charges. The court merely recognized that this was but *one* method that "served as the procedural and functional equivalent of the more traditional type of oath or affirmation." *Sullivan*, 437 N.E.2d at 1133. Given that the court restated "[t]here is no constitutional prescription as to the particular form of the 'oath or affirmation' or the exact manner in which it is to be administered," *id.*, *Sullivan* clearly does not help Moeser.

Moeser also presents the 117-year-old decision of *Markey v. State*, 37 So. 53 (Fla. 1904), from which he draws a

rule that an affidavit language stating, "I do hereby solemnly swear," shows stronger intent to be under oath than affidavit language reflecting that the affiant was "duly sworn." (Moeser's Br. 22.) Moeser seems to misread *Markey*. The Supreme Court of Florida did not hold that an oath must be administered using particular magic words, as Moeser seemingly contends. (Moeser's Br. 22.) The court held just the opposite, clarifying that the form in which an oath is administered is "immaterial." *Markey*, 37 So. at 60. In fact, the court went as far as to hold that written documentation indicating that the defendant was "duly sworn" and that his testimony was "sworn to and subscribed" would have been enough to support a perjury conviction. *Id.* at 60.

In all, Moeser's survey of cases only confirms what the State argued all along: there is no magic script or ceremony needed for an individual to swear to or affirm the contents of his or her affidavit. The most persuasive authority Moeser offers to challenge that principle is *State v. Hodges*, 595 S.W.3d 303 (Tex. App. 2020), where the Texas Court of Appeals held that an officer's affidavit was not sworn. But Moeser ignores a critical difference setting his case apart from *Hodges*.

In *Hodges*, the court observed that an affiant could manifest his intent to be truthful in his affidavit in several different ways, including "personally represent[ing] in or outside the affidavit that the statements were true." 595 S.W.3d at 306. Because the officer-affiant did not do so, and did not verbally take an oath affirming the truthfulness of his statements, the court was "left speculating on the nature of the visible conduct in which Officer One engaged to manifest his intent to be truthful." *Id.* But that didn't happen here. Sergeant Brown asserted in his affidavit that the information offered was true. (R. 7:2.) Thus, even under *Hodges*, Sergeant Brown satisfied the constitutional oath or affirmation requirement in Moeser's case.

The State recognizes that this Court is not bound by the foreign authority offered by either party, regardless of its persuasive value. Moreover, the State agrees with the court of appeals that, during a search warrant application, a "better practice" very well may be for either the notary or judicial official to also require the affiant-officer to verbally swear to or affirm the truth of his affidavit's contents. *Moeser*, 2021 WL 2589158, ¶ 8 n.5. But this case is not about *better* or *best* practices; this case concerns threshold requirements under the state and federal constitutions, and neither require *verbal* oaths or affirmations.

In sum, this Court is confronted with a choice. It can stay true to its holding in *Tye* that an oath or affirmation is a matter of substance, not form, maintain its alliance with the numerous state and federal jurisdictions that recognize the same, and affirm because Sergeant Brown confirmed that his affidavit's contents were true under circumstances that impressed the need to tell the truth. Or it can abandon *Tye*, decide an oath's form is more important than its function, impose upon circuit courts an arbitrary rule governing how oaths or affirmations must be administered in every case, and reverse Moeser's conviction on that basis.

Respectfully, that choice should not be a difficult one.

CONCLUSION

This Court should affirm the court of appeals' decision that affirmed Moeser's judgment of conviction.

Dated this 22nd day of March 2022.

Respectfully submitted,

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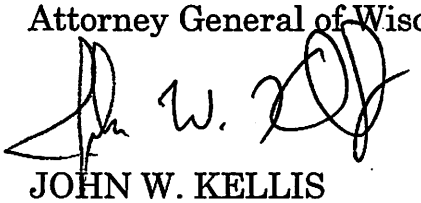

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5584 words.

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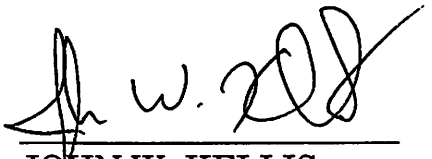

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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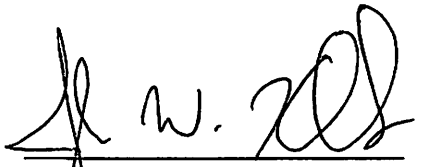

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