STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2022AP204-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DONALD A. WHITAKER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, BRANCH III, THE HONORABLE KRISTINE E. DRETTWAN PRESIDING, TRIAL COURT CASE NO. 19-CT-481

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER MR. WHITAKER'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WAS VIOLATED WHEN THE ARRESTING OFFICER SPOKE TELEPHONICALLY WITH THE JUDGE WHO ISSUED THE WARRANT TO SEIZE A SAMPLE OF MR. WHITAKER'S BLOOD BUT DID SO WITHOUT MAKING ANY WRITTEN OR ELECTRONIC RECORD OF THEIR INTERACTION?

> Trial Court Answered: NO. The trial court concluded that "[t]here is no requirement under this process nor under the way this warrant was obtained for this defendant that required it to be voice recorded or transcribed and I think that the defense puts way too much emphasis or concern on the fact thar the sergeant said when he called the judge he informed him of the incident. . . . So I don't think there was any reason here that this interchange over the telephone that it is required by statute or by the constitutional protections of the Fourth Amendment to be recorded." R45 at 61:12-18 & 63:11-16; D-App. at 110-11.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents questions of law based upon an uncontroverted set of facts which can be addressed by the application of legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the issue before this Court is premised upon the unique facts of the case and is of such an esoteric nature that publishing this Court's decision would likely have little impact upon future cases.

STATEMENT OF THE CASE

Mr. Whitaker was charged in Walworth County with Operating a Motor Vehicle While Under the Influence of an Intoxicant-1st Offense with Minor

Passenger, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration-First Offense with Minor Passenger, contrary to Wis. Stat. § 346.63(1)(b), arising out of an incident which occurred on June 25, 2019. R4 at pp. 1-2.

Mr. Whitaker retained private counsel who entered a plea of Not Guilty on his behalf to both of the foregoing counts, after which counsel for Mr. Whitaker filed a pretrial motion challenging whether certain misinformation contained within the affidavit in support of the search warrant which was issued in this case violated the *Franks-Mann*[1] rule. R14. The court denied Mr. Whitaker's motion. R31 at 17:6 to 19:14.

Shortly thereafter, Mr. Whitaker substituted his original counsel for Melowski & Singh, LLC. R23; R24; R25; R27; R33. Mr. Whitaker's new attorneys filed a motion challenging whether his Fourth Amendment rights and his concomitant rights under Wis. Stat. § 968.12(3) had been violated when it was discovered that the arresting officer in this case made telephonic contact with the judge who issued the warrant to seize a sample of Mr. Whitaker's blood without that contact having been recorded either electronically or in writing. R35.

An evidentiary hearing was held on Mr. Whitaker's motion on October 28, 2020, before the Walworth County Circuit Court, the Honorable Kristine Drettwan presiding. R45. The State offered the testimony of a single witness, Sergeant Derrick Goetsch of the Village of Fontana Police Department. R45 at pp. 4-37.

At the conclusion of the hearing, the court issued an oral decision denying Mr. Whitaker's motion. R45 at 54:13 to 63:21; D-App. at 103-12. The court expressly found that neither the Fourth Amendment nor § 968.12 had been violated based upon the fact that the telephonic exchange between the judge and the officer was likely "not much . . . [j]ust a quick information about what the violation was." R45 at 58:10-11.

Subsequent to the court's decision, Mr. Whitaker changed his plea to one of No Contest upon which he was found guilty and sentenced on February 3, 2022. R54.

[1]*Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

It is from the adverse decision of the lower court that Mr. Whitaker appeals to this Court by Notice of Appeal filed on February 9, 2022. R59.

STATEMENT OF FACTS

On June 25, 2019, Mr. Whitaker was stopped and detained in the Village of Fontana, Walworth County, by Sergeant Derrick Goetsch of the Fontana Police Department for having passengers seated in the boat he was transporting at the rear of his vehicle. R45 at 5:15 to 6:10s.

After being detained, Sgt. Goetsch observed an odor of intoxicants emanating from Mr. Whitaker's breath and that he had red and glassy eyes. R45 at 8:8-10. Based upon these observations, Sgt. Goetsch had Mr. Whitaker submit to a battery of field sobriety tests. R45 at 9:24 to 10:1. Upon completion of the field sobriety tests, Mr. Whitaker was arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). R45 at 10:14-16.

Subsequent to his arrest, Sgt. Goetsch asked Mr. Whitaker to submit to an implied consent test of his blood. R4 at p.3. Mr. Whitaker declined to submit to the requested test. *Id*. Sgt. Goetsch then sought a warrant to obtain a sample of Mr. Whitaker's blood and executed an affidavit in support thereof. R16. The affidavit contained several egregious and incontrovertible misstatements of fact, including the officer's misrepresentation that Mr. Whitaker had a prior conviction for an operating while intoxicated offense (he did not); that he was subject to operating only those vehicles equipped with an ignition interlock device (he was not); and that he was restricted to operating a motor vehicle with no more than a .02 blood alcohol level (he was not). R45 at 28:5-12; 29:1-10; 29:11-19. In fact, not a single one of those allegations was true. This was Mr. Whitaker's **first-ever OWI arrest** and the only reason it was a criminal offense was the presence of the minor passenger in the boat being towed. Nevertheless, the warrant application was ultimately granted.

After completing his affidavit, Sgt. Goetsch made telephonic contact with Judge David M. Reddy. R45 at 12:10-13; 16:3-5. At the evidentiary hearing held on Mr. Whitaker's motion challenging the sufficiency of the warrant application process, Sgt. Goetsch testified that he made this contact to "inform[] him of the

incident." R45 at 31:3-5. When pressed on cross-examination whether he recalled what he told Judge Reddy during their telephonic communication, Sgt. Goetsch admitted that he could "[n]ot specifically" recall. R45 at 31:15-18. Counsel then asked Sgt. Goetsch whether "it would not be unusual in this situation to give [the judge] a little bit of a back story about [this] incident," to which Sgt. Goetsch replied, "Most of the time it's just going to be a quick synopsis of this is what it's involved and the impairment of the juvenile [*sic*]." R45 at 31:19-24.

Upon further examination, Sgt. Goetsch conceded that on some occasions, "the judge wants to clarify something" such as "want[ing] a little bit more information about a particular fact that [he has] alleged in the affidavit; . . . ." R45 at 32:14-22. Sgt. Goetsch then proffered that he did not "remember [Judge Reddy] asking a single question as far as any of the other detailed information." R45 at 33:12-13.

Based upon Sgt. Goetsch's admission that judges do, on occasion, request additional information regarding "particular fact[s] . . . alleged in the affidavit" and that he could "not specifically" recall whether Judge Reddy did so in this case, Mr. Whitaker moved to suppress the blood test result on the ground that communications with warrant-issuing magistrates, no matter how seemingly innocuous, must be recorded. R45 at 45:17 to 48:9. The court denied Mr. Whitaker's motion, but found that Sgt. Goetsch "doesn't recall what was said specifically but that it was not much. Just a quick information about what the violation was. He doesn't believe anything else was discussed." R45 at 58:8-12.

Mr. Whitaker now appeals from the circuit court's adverse decision to this Court, alleging that the Fourth Amendment does not permit courts simply to accept the officer's non-specific recollections about what conversations may have occurred between the officer and a warrant-issuing magistrate during the application process. Mr. Whitaker argues below that permitting undisciplined practices such as these sets a dangerous precedent for future cases.

STANDARD OF REVIEW ON APPEAL

The question presented to this Court relates to whether Mr. Whitaker's Fourth Amendment rights were violated when the arresting officer in the instant case spoke telephonically with the judge who issued the warrant to seize a sample

of Mr. Whitaker's blood but did so without having any electronic or written record of that conversation documented. This is a question of law based upon an undisputed set of facts, and therefore, merits *de novo* review by this Court. *State v. Drogsvold*, 104 Wis. 2d 247, 311 N.W.2d 243 (Ct. App. 1981).

ARGUMENT

I. INTRODUCTION TO THE ISSUES PRESENTED.

The case at bar presents two underlying questions for this Court. The first of these is whether Mr. Whitaker's Fourth Amendment rights were violated when the judge who issued the warrant in this case spoke telephonically with the law enforcement officer who executed the affidavit in support of the petition for the warrant without having the exchange between the two recorded either electronically or in writing. The second question concerns whether § 968.12 was violated when a record of the telephonic portion of the warrant application was not made. Each of these issues is examined in turn below.

II. THE FAILURE EITHER TO MAKE AN ELECTRONIC RECORDING OR A WRITTEN RECORD OF THE TELEPHONIC PORTION OF THE APPLICATION FOR A WARRANT IN THE INSTANT CASE VIOLATES THE FOURTH AMENDMENT'S WARRANT REQUIREMENT AND WIS. STAT. § 968.12.

A. The Fourth Amendment in General.

The Fourth Amendment to the United States Constitution provides:

> 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. The Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

With respect to the breadth and importance of the protections afforded by the Fourth Amendment, the U.S. Supreme Court has warned:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property **should be liberally construed**. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. **It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon**.

Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971)(emphasis added), quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886).

The Wisconsin Constitution affords protection which is coextensive with the Federal Constitution. Wis. Const. art. I, § 11. Wisconsin courts interpret the protections granted by Article I, § 11 of Wisconsin Constitution identically to those under the Fourth Amendment as defined by the United States Supreme Court. *State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, ¶ 21, 577 N.W.2d 794 (1998).

B. Seizures by Warrant.

1. Statement of the Law.

Among the most fundamental constitutional requirements relating to the process for obtaining a warrant is that a warrant only be issued by a "neutral and detached magistrate." *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971); *United States v. United States Dist. Court*, 407 U.S. 297, 316 (1972); *Katz v. United States*, 389 U.S. 347, 356 (1967). The U.S. Constitution requires that "inferences of probable cause be drawn by 'a neutral and detached magistrate'" before a search warrant may issue. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

The seminal case in Wisconsin which examines the necessity of strict compliance with the Fourth Amendment when it comes to the issuance of a warrant is *State v. Tye*, 2001 WI 124, 248 Wis. 2d 530, 636 N.W.2d 473. In *Tye*, the issue before the Wisconsin Supreme Court was whether evidence seized pursuant to a warrant which was not supported by an affidavit made under "Oath or Affirmation" must be suppressed. *Id*. ¶ 3. More specifically, Mr. Tye was charged with drug

possession when law enforcement officers discovered heroin in his residence after searching his home pursuant to a warrant issued by the Racine County Circuit Court. *Id.* ¶ 6.

The investigator who presented his affidavit to the circuit court for purposes of obtaining the warrant "failed, . . . , to sign and swear to the truth of the affidavit . . . and failed to give sworn testimony attesting to the accuracy of the statements in the affidavit." *Id.* ¶ 5. This failure was discovered after the warrant had been executed and, in an effort to remedy the problem, the investigator swore out a second affidavit and in the second affidavit, averred "that the contents of the initial affidavit were true." *Id.* ¶ 7. Despite this second affidavit, the circuit court in which Mr. Tye's Fourth Amendment challenge was initially mounted suppressed the evidence seized pursuant to the unsworn affidavit. *Id.* ¶ 2.

On appeal, the State mounted a four-pronged attack which included the following arguments: (1) Wis. Stat. § 968.22 allowed for admission of the evidence seized during the search because it provided that evidence should not be suppressed for "technical irregularities" in a warrant if the substantial rights of the accused are not affected; (2) the second affidavit remedied the defect in the first affidavit; (3) *State v. Nicholson*, 174 Wis. 2d 542, 497 N.W.2d 791 (Ct. App. 1993), stood for the proposition that an error in a warrant does not require suppression of the evidence; and (4) the drug evidence should be admitted pursuant to the good-faith exception to the exclusionary rule. *Id.* ¶ 15.

In rejecting every one of the State's arguments, the *Tye* court first observed that the Wisconsin Supreme Court "has long recognized an oath or affirmation as an essential prerequisite to obtaining a valid search warrant under the constitution." *Id.* ¶ 13, citing *State v. Baltes*, 183 Wis. 545, 198 N.W. 282 (1924); *Walberg v. State*, 73 Wis. 2d 448, 455, 243 N.W.2d 190 (1976); *State ex rel. Pflanz v.County Court*, 36 Wis. 2d 550, 561, 153 N.W.2d 559 (1967); *Kraus v. State*, 226 Wis. 383, 385, 276 N.W. 303 (1937); *Glodowski v. State*, 196 Wis. 265, 268, 220 N.W. 227 (1928); *Bergeman v. State*, 189 Wis. 615, 617, 208 N.W. 470 (1926); *Hansen v. State*, 188 Wis. 266, 268, 205 N.W. 813 (1925); *State v. Blumenstein*, 186 Wis. 428, 430, 202 N.W. 684 (1925).

With respect to the State's argument that the need for an oath or affirmation is a "mere formality" which, if not made, does not affect "the substantial rights of the defendant," the *Tye* court concluded that "[a]n oath is a matter of substance, not form, and it is an essential component of the Fourth Amendment and legal

proceedings." *Id.* ¶ 19. The *Tye* court further commented that "[a]n 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 . . . ." *Id.*

The *Tye* court then rejected the State's second argument that the subsequently executed affidavit cured the defects in the first affidavit as "eviscerate[ing] the oath or affirmation requirement." *Id.* ¶ 21. The court observed that "[a]n after-the-fact oath or affirmation disregards the historical importance of the oath or affirmation as the basis upon which a neutral magistrate issues a warrant." *Id.*

Regarding the State's position that *Nicholson*, 174 Wis. 2d 54, saved the evidence obtained during the search of Tye's premises from suppression because it was an "unintended mistake," the *Tye* court noted that even though the warrant in the *Nicholson* case had the wrong address written on it, the officers still searched the correct premises because it had been described with sufficient particularity, and therefore, the defect was a technical irregularity as opposed to a failure of the required constitutional process. *Id.* ¶ 23.

In rejecting the State's final position, that the good-faith exception to the exclusionary rule saved the ill-gotten evidence from suppression, the *Tye* court held that it would not extend that exception to a circumstance in which a warrant was issued on the basis of an unsworn statement. *Id.* ¶ 24. This last point is of particular relevance to Mr. Whitaker's case.

2. Application of the Law to the Facts.

Frankly, there is no constitutionally-compliant universe in which citizens should have to rely on a law enforcement officer's representations that nothing substantive was discussed between the officer and a judge during an unrecorded conversation at the time the officer applied for the warrant. Nevertheless, that is *precisely* what is being requested in the instant matter.

It is undisputed that this case presents a factual circumstance in which the officer who applied for the warrant to seize a sample of Mr. Whitaker's blood (1) admitted he had telephonic contact with the issuing judge and (2) conceded that he could "not specifically" recall what was discussed between the two of them, but (3) thought it was "not much . . . [j]ust a quick information about what the violation was."

Mr. Whitaker must rhetorically ask: Why should we accept Sgt. Goetsch's averment that his discussion with Judge Reddy was "not much"? Where is there any clause in the Fourth Amendment which states that when there is an acknowledged communication between a law enforcement officer and a warrant-issuing magistrate above-and-beyond the officer's affidavit one should simply assume, accept, or acquiesce that no substantive information affecting the probable cause determination was exchanged? If ever there was a "slippery slope" for potential abuse, permitting such conversations beyond the four corners of an affidavit to go unrecorded provides a torrent of water to muddy that very slope.

Part of the reason it is so important for there to be a record of the conversation which occurred between Sgt. Goetsch and Judge Reddy is because the absence of any record thwarts Mr. Whitaker's ability to ascertain whether any of the information which Sgt. Goetsch cannot "specifically" recall impacted upon the probable cause determination undertaken by the judge. This is especially true given the numerous demonstrably false misstatements contained in the Goetsch affidavit. Although Sgt. Goetsch characterized these misstatements as innocent mistakes, who is to say that he did not double down on those misstatements to the judge during their "off the record" conversation? For example, it is hardly inconceivable that the judge may have questioned (given the false allegation that Mr. Whitaker was subject to a .02 restriction) if his driver record confirmed the existence of three prior OWI convictions? Given how much lower the "probable cause bar" is for individuals subject to such a restriction, this is hardly a stretch. Under these circumstances, Mr. Whitaker will never be in a position to challenge the warrant on *Tye*, probable cause, additional *Franks-Mann*, *etc.*, grounds because he simply does not know what information was exchanged between the judge and the officer. This is constitutionally intolerable, especially given that Sgt. Goetsch conceded that he could "[n]ot specifically" recall the conversation and that "it would not be unusual in this situation to give [the judge] a little bit of a back story about [this] incident."

This is neither a state nor country in which "Star Chambers" are permitted. Secret cabals between officers and magistrates regarding the issuance of warrants is repugnant to every freedom the citizens of this nation enjoy under the Fourth Amendment to the United States Constitution. How can a court be watchful against "stealthy encroachments" on Mr. Whitaker's Fourth Amendment rights if neither it, nor the accused, have access to the information provided by Sgt. Goetsch to the judge when they telephonically conversed? If this Court glosses over the problem inherent in the unrecorded conversation between Judge Reddy and Sgt. Goetsch, it

will be putting its imprimatur of approval on future practices by law enforcement officers during which they speak freely and with great detail to the judge to whom they have submitted affidavits but simply avoid legal complications by averring that their conversation amounted to "not much" as Officer Goetsch claimed in this case.

Apart from the foregoing, this is a day-and-age in which recording devices—whether they be body-cameras, microphones linked to squad cameras, recorded land lines, smartphones capable of recording conversations, *etc.*—abound and make the ease of recording a conversation an act of nothing more than pushing a button. Should the integrity of the warrant process be sacrificed because courts do not want to impose a duty upon either a law enforcement officer or a judge to push a button? This hardly seems just or constitutional.

C. Statutory Requirements Regarding Warrant Applications.

As noted above, the Fourth Amendment expressly recognizes the permissible seizure of evidence by a duly obtained warrant. The constitutional authority to seek and obtain a warrant is not, however, free from legislatively imposed rigors. More specifically, the process for securing a warrant to seize evidence in Wisconsin is codified in Wis. Stat. § 968.12. Section 968.12(3)(a) allows for a warrant to be applied for by oral testimony communicated to a judge telephonically as was admittedly done, at least in part, by Sgt. Goetsch in the instant case. This process, however, is not without its own demands. If a warrant application is telephonically made, several specific procedural safeguards which ensure the integrity of the process must be followed. In relevant part, these include the following:

> The person who is requesting the warrant may prepare a duplicate original warrant, but in so doing, ***must*** **read the duplicate original warrant, verbatim, to the judge.**
>
> If the application is telephonic, the judge **shall have the record transcribed and the transcript must be certified as accurate by the judge and filed with the court along with the original voice recording.**

Wis. Stat. § 968.12(3)(b)1. & (3)(d) (2021-22)(emphasis added).[2]

When construing a statute, it is well settled that (1) it should be given its plain meaning and (2) the construction of a statute which renders any part or all of it superfluous should be avoided. *State ex rel. Kalal v. Circuit Court for Dane County*,

[2]Although Mr. Whitaker recognizes that his offense occurred in 2019, he refers to the 2021-22 session of the Wisconsin Statutes throughout this brief for purposes of convenience as there have been no substantive changes to the statutes in the intervening period.

2004 WI 58, ¶ 49, 271 Wis. 2d 633, 681 N.W.2d 110.

The foregoing pronouncement is clear. If there is to be a telephonic application for a search warrant, it must be recorded. Section 968.12 does not state, or allow for, a conversation regarding the issuance of a warrant to go unrecorded simply because there is a concomitantly filed affidavit. This would make no sense. Mr. Whitaker's point in this regard is perhaps best made by an argument *reductio ad absurdem*. Assume, *arguendo*, a law enforcement officer executes an affidavit in support of a search warrant seeking to search a home for illicit narcotics. Further assume that the four corners of the affidavit *seemingly* establishes probable cause, however, when the officer telephonically contacts the judge to confirm receipt of the same by the court, or to be sworn, or for any other reason regarding the warrant, the officer informs the judge that the subject of the warrant is his noisy neighbor whom he wants to do nothing more than get even with for keeping him up all night. It goes without saying that if this was the case, a serious *Franks-Mann* issue exists because the officer has knowingly pled falsehoods. If the judge nevertheless signs the warrant—perhaps because he lives on the opposite side of this noisy neighbor—without a transcript or record of the conversation between the officer and the judge, the noisy neighbor has no way of determining that the *Franks-Mann* issue exists. Mr. Whitaker will grant that this is an extreme example of how a process can be abused when circumstances such as those in his case go unexamined, but that is the point of an argument *reductio ad absurdum*.

Just as problematic as the foregoing is the fact that Sgt. Goetsch testified on direct examination that he signed Judge Reddy's name to the actual warrant in this case. R45 at 13:9-16. If that is the case, then the warrant in this matter is considered a "duplicate warrant" and not an "original warrant." If this is the case, then § 968.12(3)(b)1. requires the preparing officer to read a copy of the warrant verbatim to the judge. Wis. Stat. § 968.12(3)(b)1. (2021-22). Because no recording or transcript of the contact between Sgt. Goetsch and Judge Reddy was ever made, there is no way in which Mr. Whitaker can confirm that there has been compliance with this legislatively-imposed directive (note that this is not a legislative "suggestion," but rather an express requirement).

This latter point is worth emphasizing. The instant case deals with a legislatively-imposed prerequisite to the constitutional issuance of a search warrant, namely: the need for the warrant to be read to the judge verbatim and for a telephonic application for the warrant to be recorded. One must ask in this case: How can a court be watchful of Mr. Whitaker's statutory due process rights if Sgt. Goetsch

never followed the required procedures by reading the warrant to Judge Reddy when they telephonically conversed? This is not a circumstance of elevating "form over substance" because the statute, *i.e.*, § 968.12, ***requires a verbatim reading of the warrant to the issuing judge.***

If this Court elects to treat the violation of the statute in this case as nothing more than a "mere technicality," it will literally be eviscerating the statute. Without some remedy to be imposed for a violation of § 968.12(3), the legislatively-enacted condition attendant to telephonic applications for search warrants might not as well exist because it will be a "law without teeth." This Court is not authorized to act as a "super legislature" and read requirements imposed at law by duly-elected representatives of the citizens of the State of Wisconsin "off the books." Such an outcome violates not only Mr. Whitaker's rights, but violates the Separation of Powers Doctrine as well.

If there exists no sanction for a violation of § 968.12, then the requirements set forth in that statute are literally unenforceable. This certainly is not an outcome the legislature could have intended. The absence of any remedy under law would render the entirety of § 968.12 superfluous, and the construction of a statute which renders any part or all of it superfluous is a construction to be avoided. *State ex rel. Kalal*, 2004 WI 58, ¶ 49.

D. Further Exacerbation of the Problem.

The evidentiary hearing in this matter revealed what is potentially a significant—to say the least—problem inherent in the warrant application procedures employed by Walworth County. As discussed above, it is a long-standing principle of Fourth Amendment jurisprudence that warrants are only to be issued by "neutral and detached magistrates." *Coolidge*, 403 U.S. at 449. It is not the role of the judiciary to usurp, or become involved in, the role of the executive branch when it comes to the application of warrants to seize or search a person or their property. Nevertheless, despite this fundamental proposition, the following was adduced at the motion hearing in this case:

> When Sgt. Goetsch was asked whether he "told [the judge] a little story about what happened [in this case] and why [he was] calling him," he testified that the judge "asks what it's in regards to. I said it's in regards to an OWI offense regarding a juvenile and then [the judge] will continue to review it from there and then **he'll let you know whether or not he has approved it** and everything like that." R45 at 31:6-14 (emphasis added).

While the foregoing at first blush appears innocuous, Sgt. Goetsch later admitted that:

> [D]uring the search warrant process **if the judge requests you to add information into the affidavit of the search warrant [he was] able to do that**" and he "would have to **redo a new one**. R45 at 35:22 to 36:3 (emphasis added).

Finally, when issuing her decision from the bench, Judge Drettwan reflected on the warrant process in Walworth County and stated:

> The officer then calls the on-duty judge or commissioner; that Court official directs the officer to send the affidavit and warrant via e-mail. The Court official reviews it. **If it is sufficient the Court officer swears the officer**—and by Court officer, again, what I mean is a Judge or commissioner, swears the law enforcement officer in over the phone. R45 at 56:1-9 (emphasis added).

Clearly, the lower court's characterization of the foregoing warrant-application procedures betrays that in those circumstances in which an affidavit is *insufficient* to establish probable cause, the officer is *not* even sworn. When this process is examined in light of Sgt. Goetsch's admissions, it becomes apparent that the issuing magistrate, who should remain neutral and detached, "let[s the officer] know whether or not he has approved it" and then "requests [that] information [be added] into the affidavit" if it is insufficient so that the officer can "redo a new one."

By not swearing an officer when an affidavit is submitted, the reviewing magistrate is sending a clear signal to the officer that says, in lay terms: "I'm not going to swear you to review what you submitted because I don't believe your affidavit is sufficient to establish probable cause." The magistrate in Walworth County can then "request" that additional information be added to the warrant so that the officer can submit a "new one," allowing the reviewing judge to then presumably approve the application the second time around. One must ask: What about this process is "neutral and detached" when the magistrate first ascertains whether the officer should even be sworn and then has the authority to request additional information and allow the officer to "redo" their affidavit?

It appears from the foregoing that the procedures in Walworth County extend the role of what is supposed to be the "neutral and detached magistrate" to being a collaborator in the drafting of affidavits in support of warrant applications. The notion of being "neutral and detached" requires "**severance and disengagement from activities of law enforcement**," it does not leave any room for collaboration, association, or partnership. *Shadwick v. Tampa*, 407 U.S. 345, 350 (1972)(emphasis added).

For example, in *Coolidge* the Supreme Court was faced with the question of whether the Attorney General of New Hampshire, who under the prevailing state law at the time was deemed a "justice of the peace" with the authority to issue warrants, could authorize a warrant to search Coolidge's vehicle even though the Attorney General "had personally taken charge of all police activities relating to" the case in which Coolidge was a suspect. *Coolidge*, 403 U.S. at 447. Coolidge argued that the evidence seized from his vehicle had been unconstitutionally obtained on a theory that the Attorney General was not acting as a "neutral and detached magistrate" when he issued the warrant to search his car. *Id.* at 449.

In concluding that the mixing of the two functions, *i.e.*, that of investigator with that of the neutral magistrate, was constitutionally abhorrent, the *Coolidge* Court favorably quoted *Wolf v. Colorado*, 338 U.S. 25 (1949), observing that "'[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.'" *Coolidge*, 403 U.S. at 453, quoting *Wolf*, 338 U.S. at 27, *overruled on other grounds, Mapp v. Ohio*, 367 U.S. 643 (1961).

The *Coolidge* court recognized that the "security of one's privacy against arbitrary [government] intrusion" must be protected because the police are engaged in a "competitive enterprise" and the reviewing court should *not* be. The *Coolidge* Court stated:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Coolidge, 403 U.S. at 449, quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

It is in recognizing that a law enforcement officer is engaging in a competitive enterprise which precludes magistrates from inserting themselves into that process lest the Fourth Amendment be rendered mere constitutional flotsam. Yet, in the instant case, the procedures which are followed in Walworth County give

the appearance that judges and court commissioners are doing that which is prohibited. According to Sgt. Goetsch, officers sometimes "redo a new" affidavit "if the judge requests you to add information into the affidavit of the search warrant." Judge Drettwan herself acknowledged that this is the procedure followed in Walworth County when she stated that "[i]f [the affidavit] is sufficient the Court officer swears the officer." The admission of an oath should not first be predicated upon Judge Drettwan's conditional "if" statement, *i.e.*, "**[i]f** [the affidavit] is sufficient" *then* the officer is sworn. Constitutionally proper procedures first require an officer to swear that the facts he is putting before the court are true and then—and *only* then—should the court make its determination regarding the sufficiency of those facts to support a warrant. No truly "neutral and detached magistrate" should ever interpose themselves in the process to, in effect, "warn" the applying officer "Hey, I'm not going to sign this warrant unless you first change X, Y, or Z."

The procedures adopted by Walworth County with respect to the approval of warrant applications represents the "slight deviations from legal modes of procedure" of which the Supreme Court was wary in *Coolidge* and *Boyd*. It is a "stealthy encroachment" upon the rights of the citizen when a judge who is expected to be neutral and detached will not even swear an officer if, upon the initial submission of the officer's affidavit, the judge does not deem the affidavit to provide probable cause. The whole point of the judge's review is to make that determination *without* injecting themselves into the process by suggesting that changes be made to the application. The judiciary should not invest itself into making "more perfect applications" for warrants. Instead, its role should be either to grant or deny the application based upon the information put before it. Regrettably for individuals who are detained in Walworth County, they are denied the full force and effect of this constitutionally-mandated procedure.

Finally, while Mr. Whitaker acknowledges that it is of little consequence to the issue he raises herein, it should not be lost on this Court that the problems he identifies above were further compounded by the fact that Sgt. Goetsch's affidavit itself contained *numerous misrepresentations of fact*. For example, the affidavit erroneously averred that Mr. Whitaker had a prior conviction for an operating while intoxicated offense; that he was subject to operating only those vehicles equipped with an ignition interlock device; and that he was restricted to operating a motor vehicle with no more than a .02 blood alcohol level, implying he had at least three prior OWI convictions on his record. R45 at 28:5-12; 29:1-10; 29:11-19. While not dispositive of the issue Mr. Whitaker raises in this appeal, these

misrepresentations certainly cast an even longer, darker shadow upon the fairness of the process involved in his case. If the judge inquired about any one of the several misstatements averred in the affidavit, Mr. Whitaker will never know. This is simply constitutionally intolerable

E. Other Considerations.

In closing, it is worth emphasizing that the parties to this appeal are *not* "starting on a level playing field." That is, from the first instance the scales in the instant matter are heavily weighted in Mr. Whitaker's favor because it is well-settled that Fourth Amendment "provisions for the security of persons and property should be **liberally construed**." *Mapp*, 367 U.S. at 647 (citation omitted; emphasis added). It has been said of the Fourth Amendment's protections that "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973). The only sure method of protecting Mr. Whitaker's Fourth Amendment rights is for this Court to reverse the decision of the court below.

CONCLUSION

Mr. Whitaker respectfully requests that this Court reverse the decision of the court below on the ground that his right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution, Article I, § 11 of the Wisconsin Constitution, and Wis. Stat. § 968.12 were violated when Sgt. Goetsch's conversation with Judge Reddy went unrecorded.

Dated this 29th day of April, 2022.

Respectfully submitted:
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CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,188 words.

I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) 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.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on April 28, 2022. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 29th day of April, 2022.

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