No.

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY L. MOESER,
Petitioner

v.

STATE OF WISCONSIN,
Respondent

APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

To the Honorable Amy Coney Barrett, Associate Justice and Circuit Justice for the Seventh Circuit: Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.2 of this Court, Jeffrey L. Moeser respectfully requests a 60-day extension of time, to and including April 22, 2023, in which to file a petition for a writ of certiorari in this Court. The Supreme Court of Wisconsin entered judgment on November 23, 2022. See *Wisconsin* v. *Moeser*, 982 N.W.2d 45. (A copy of the Wisconsin Supreme Court's opinion is attached as the Appendix.) Mr. Moeser's time to file a petition for certiorari in this Court will currently expire on February 21, 2023. This application is being filed more than 10 days before that date.

The case presents an important issue of Fourth Amendment law over which the federal courts of appeals and state supreme courts have deeply split: What constitutes an "oath or affirmation," U.S. Const. amend. IV, sufficient to support probable cause in a warrant application. In the present case, the Wisconsin Supreme Court held that although no oath or affirmation was actually taken the law enforcement officer and a magistrate's separate signing of statements that an oath had been duly sworn satisfies the oath or affirmation requirement because those statements "impressed [the officer] with the duty to tell the truth." App., *infra*, 26. Some jurisdictions hold similarly. See, *e.g.*, *State in Interest of R.R.*, 398 A.2d 76, 82 (N.J. 1979) (holding affirmation requirement satisfied when applying officer reminded that he "has a special obligation to speak the truth,").

Some other jurisdictions hold that even without being impressed with the duty to tell the truth the applying officer's mere signing of a statement that he had been duly sworn—when, in fact, he had not been—satisfies the oath or affirmation requirement. *State* v. *Howard*, 167 N.W.2d 80, 86-87 (Neb. 1969) ("If the attention of the person making the affidavit is called to the fact that it must be sworn to and [he signs it], the instrument constitutes a statement under oath"). *Farrow* v. *State*, 112 P.2d 186 (Okla. Crim. 1941) (similar).

Others take stricter positions. Some hold that a warrant application is supported by oath or affirmation when the applying officer can be prosecuted for perjury for any false statements made in the application. See, *e.g.*, *People* v. *Sullivan*,

437 N.E.2d 1130, 1134 (N.Y. 1982) ("Although perhaps less formal in nature than the more traditional methods of verification, a statement containing * * * a warning [that false statements were punishable under law] is, practically as well as theoretically, no different than a statement under oath. It follows that a subscribed statement which contains a warning to the effect that knowingly providing false information is punishable under [law] may be relied upon by a magistrate when determining probable cause without violating the constitutional mandate that warrants only be issued upon proof 'supported by oath or affirmation'".); *Simon* v. *State*, 515 P.2d 1161, 1165 (Okla. Crim. App. 1973) ("True test of sufficiency of complaint or affidavit to warrant issuance of search warrant is whether it has been drawn in such a manner that perjury could be charged thereon if any material allegation contained therein is false.") (quoting *Mason* v. *State*, 64 P.2d 1238, 1240 (Okla. Crim. App. 1937)).

Still other jurisdictions hold that the oath or affirmation requirement is satisfied whenever "a person signifies that he is bound in conscience to act truthfully." See, *e.g.*, *Anchorage Sand & Gravel Co.* v. *Wooldridge*, 619 P.2d 1014, 1016 (Alaska 1980); *Atwood* v. *State*, 111 So. 865, 866 (Miss. 1927) (holding that signing of a statement that "appeals to the conscience of the party making it, and binds him to speak the truth" satisfies requirement).

And others allow constructive oaths and affirmations. These jurisdictions hold that the requirement is satisfied even if no oath is actually administered so long as both the applying officer and the magistrate know that an oath is necessary and share

an intent to fulfill the requirement. See, *e.g.*, *State* v. *Douglas*, 71 Wash. 2d 303, 310 (Wash. 1967) (quoting *Atwood* v. *State*, 111 So. at 866 (holding requirement satisfied "[a]lthough not a word was said by either in reference to an oath, they both knew an oath was necessary and both intended that the necessary thing should be done in order to obtain the search warrant.")).

Petitioner has engaged the University of Virginia School of Law's Supreme Court Litigation Clinic to file *pro bono* a petition for certiorari. The clinic is working diligently, but respectfully submits that the additional time requested is necessary to prepare Mr. Moeser's petition. Substantial work remains to master the full record of the case, to fully explore the split below, and to prepare the petition and appendix for filing.

In addition to this case, the clinic is handling several other cases before this Court. It has filed a petition for certiorari in *Rodriguez* v. *Burnside,* No. 22-594, and is doing initial work on the cert reply. It has also worked on another petition for certiorari expected to be filed in two months. In addition, counsel leading this project for the clinic, Daniel R. Ortiz, has been busy working pro bono as an expert witness for the Disciplinary Counsel in Washington, DC on a long-standing proceeding which is still underway.

Wherefore, Petitioner respectfully requests that an order be entered extending the time to file a petition for writ of certiorari up to and including December 4, 2021.

Respectfully submitted,

/s/ Daniel R. Ortiz

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