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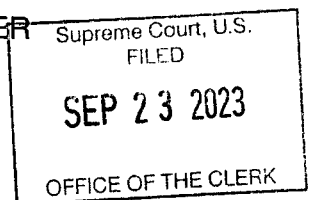
23-5795

IN THE
SUPREME COURT OF THE UNITED STATES

Benjamin D. Morrow — PETITIONER
(Your Name)

VS.

United States of America — RESPONDENT(S)



ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

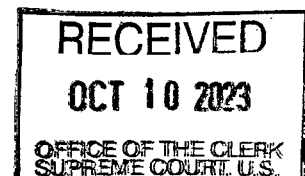
PETITION FOR WRIT OF CERTIORARI

Benjamin D. Morrow, Reg. #55742-048
(Your Name)

3600 Guard Road
(Address)

Lompoc, CA 93436
(City, State, Zip Code)

(805) 736-4154
(Phone Number)



QUESTION(S) PRESENTED

I.

Whether 28 U.S.C. § 1746 requires, in writing, an affirmative statement that the declaration's contents are "true" to support, establish, or prove that the matter subscribed to is true under penalty of perjury.

II.

Whether a statutorily deficient declaration, under 28 U.S.C. § 1746, that is unsupported by a verbal oath, can satisfy the Fourth Amendment's Oath or Affirmation Clause.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Morrow, No. 3:19-CR-00041-MMD-WGC (D. Nev.)
Judgement entered March 25, 2021 (Appendix B).

United States v. Morrow, No. 21-10242 (9th Cir.)
Judgement entered May 16, 2023 (Appendix A).

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 16, 2023.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 20, 2023, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"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."

28 U.S.C. § 1746:

"Wherever, under any law of the United States or under any rule, regulation, order or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)'.

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)'."

STATEMENT OF THE CASE

In August 2019, Petitioner Benjamin Morrow was indicted with two counts of distribution of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2) and (b)(1), one count of advertising child pornography in violation of 18 U.S.C. §§ 2251(d)(1)(A) and (e), one count of receipt of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2) and (b)(1), and four counts of possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2). On November 16, 2020, Petitioner moved to suppress the evidence recovered during the search of his residence on April 20, 2019 by Lyon County, Nevada, Sheriff Sergeant Ryan Powell, and FBI Special Agent Cassie Redig. Oral arguments were heard on February 9, 2021, where Petitioner emphatically argued in support of his suppression claim that the search warrant was "constitutionally deficient because it was not made under oath or affirmation."

A suppression hearing, pursuant to Franks v. Delaware, 438 U.S. 154 (1978), was held on March 3, 2021 to challenge (1) whether sworn facts supported the warrant; (2) whether a false exigency was created to justify a nighttime search; (3) whether a sufficient nexus linked the online activity to Petitioner; and (4) whether the source of expert opinion was misrepresented. The district court denied Petitioner's motion to suppress on March 25, 2021. Appendix B. Following the denial of his motion, Petitioner entered a conditional guilty plea to the distribution charges (counts one and two), preserving his ability to appeal the denial of his suppression motion to the Ninth Circuit Court of Appeals. Despite Petitioner's insistence of no sworn facts, the Ninth Circuit found no constitutional violations and affirmed the district court's decision on May 16, 2023 (Appendix A) and denied Petitioner's request for a rehearing on July 20, 2023 (Appendix C). This petition for a writ of Certiorari follows and raises important questions for statutory interpretation and rights against government intrusion protected under the Fourth Amendment.

REASONS FOR GRANTING THE PETITION

Granting a writ of certiorari is appropriate here for the following reasons:

1. There is a circuit split among the courts of appeal on whether an unsworn declaration requires, in writing, a statement that its subscribed contents are "true," to be in compliance with 28 U.S.C. § 1746. Sup. Ct. Rule 10(a).
2. The Court should exercise its supervisory power to clarify the statutory elements required for an unsworn declaration, because such documents are used not only for criminal proceedings, but also for civil, bankruptcy, military, immigration, veteran's, tax, international trade, and administrative law. Rule 10(a).
3. The question whether the Fourth Amendment's Oath or Affirmation Clause is satisfied when a warrant's supporting declaration is statutorily defective is "an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c).

Argument

I. The Statutory Language in 28 U.S.C. § 1746 Requires, in Writing, an Affirmative Statement that the Declaration's Contents are "True" to Support, Establish, or Prove That the Matter Subscribed to is True Under Penalty of Perjury.

In 1976, Congress passed 28 U.S.C. § 1746 for the purpose of allowing the use of unsworn declarations given under the penalties of perjury in lieu of affidavits in all federal proceedings -- criminal, civil, bankruptcy, military, immigration, administrative law, U.S. Tax Court, Court of International Trade, Court of Veteran's Claims, and for official documents. See H.R. Rep. No. 94-1616, 94th Cong., 2d Sess. at 1 (1976). According to statute, wherever any matter in a federal proceeding "is required or permitted to be supported, evidenced, established, or proved" by an affidavit, the same matter may, "with like force and effect," be supported, evidenced, established, or proved by an unsworn declaration -- in writing -- that the matter subscribed to is "true" under penalty of perjury, in substantially the following form:

"If executed within the United States . . . : 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date) _____ (signature).'" 28 U.S.C. § 1746 (emphasis added).

Thus, the essential elements for a valid unsworn declaration are: (1) an assertion that the facts are "true"; (2) an averment that the first assertion is made under penalty of perjury; and (3) that the declaration is signed and dated (executed). United States v. 8 Gilcrease Lane, 587 F. Supp. 2d 133, 139 (D.D.C. 2008)(citing Nissho-Iwai Am. Corp. v. Kline, 845 F.2d 1300, 1306 (5th Cir. 1988)).

A. There is a Circuit Court Split on the Required Elements for a Valid Unsworn Declaration.

This is a question of first impression on the Court and the lower courts are split on § 1746's statutory requirements. Some Circuits (including courts of appeal and district courts) hold that the statutory language is unambiguous and requires an assertion, in writing, that the subscribed contents are "true" to be admissible in a federal proceeding. Whereas, other circuits opine that Congress did not intend for courts to be hypertechnical and that courts are free to accept an unsworn declaration without any assertion of truth.

This unresolved Circuit Court split has resulted in an unfair disparity on whether critical evidence is admissible or statutorily deficient -- resulting in unequitable outcomes arbitrarily based upon the location of federal proceedings.

1. Circuits Holding a Contextual Interpretation of the Statutory Language.

A majority of Circuits agree that the statutory language in § 1746 does require a written assertion of truthfulness. For example, the Third Circuit has disregarded unsworn declarations for failing to state that its contents are "true," subject to penalty of perjury. Phillis v. Harrisburg Sch. Dist., 430 Fed. Appx. 118, 112 (3d Cir. 2011), cert. denied, 565 U.S. 1196 (2012). The

Fifth Circuit applies a strict adherence to the statutory language, requiring that the "contents stated to be true and correct . . . under penalty of perjury." Nissho-Iwai, 845 F.2d at 1306; See also Massay v. Fed. Corr. Inst. - Texarkana, 243 Fed. Appx. 871, 874 (5th Cir. 2007).

The Sixth Circuit will consider an unsworn declaration as valid under § 1746, only if it "is made under penalty of perjury, certified as true and correct, dated, and signed." Pollock v. Pollock, 154 F.3d 601, 611 n.20 (6th Cir. 1998)(citing Williams v. Browman, 981 F.2d 901, 904-05 (6th Cir. 1992)). Similarly, the Eighth Circuit "mandates that the affiant declare, under penalty of perjury, that the facts contained in the affidavit are true." Elder-Keep v. Aksamit, 460 F.3d 979, 984 (8th Cir. 2006)(emphasis added); See also Roberson v. Hayti Police Dept., 241 F.3d 992, 994095 (8th Cir. 2001)(holding "a complaint signed and dated as true under penalty of perjury satisfies the requirements of a verified complaint, 28 U.S.C. § 1746.")).

In Roy v. Ivy, 53 F.4th 1338, 2022 U.S. App. LEXIS 32111 (11th Cir. 2022), the Eleventh Circuit listed the "statutory requirements for an unsworn statement" to include "(1) date and sign the document, and (2) subscribe its contents as 'true,' (3) under 'penalty of perjury,'" and (4) that it substantially conform to the quoted pattern-language in 28 U.S.C. § 1746(2). Id. at *14 (emphasis added).

The district courts within these respective circuits have also applied the above statutory interpretation. See Brown v. Smith, 2019 U.S. Dist. LEXIS 64149, at *17 (W.D. Mich. 2019)(an unsworn declaration must be "under penalty of perjury that the foregoing is true and correct"); Schneider v. Chertoff, 245 F.R.D. 422, 423-24 (D. Neb. 2007)(affiant must declare, under penalty of perjury, that the asserted facts are "true"); Ladner v. Litespeed Mfg., Co., 2009 U.S. Dist. LEXIS 140491, at *17 (N.D. Ala. 2009)("as long as the unsworn declaration includes the phrase 'under penalty of perjury,' and states the

document is "true," the verification requirements of 28 U.S.C. § 1746 will be satisfied") (quoting In re Muscatell, 106 B.R. 307, 309 (Bkrtcy. M.D. Fla. 1989)); and 8 Gilcrease Ln., 587 F. Supp. 3d at 139 (the "essential" statements under § 1746 require an averment that the declared assertions are "true," subject to penalty of perjury).

2. Circuits Applying a Liberal Construction of the Statute.

A minority of Circuits do not require a declarant to aver that the asserted facts are "true," because they opine that such requirement of adherence is unnecessary to be made under penalty of perjury. Goldman, et al., v. Medfit Int'l, Inc., 982 F.2d 686, 689-90 (1st Cir. 1993).

The Second Circuit does not require a written averment of "truth" for an unsworn declaration to be "substantially" compliant under 28 U.S.C. § 1746(2). LeBoeuf, et al. v. Worsham, 185 F.3d 61, 65 (2d Cir. 1999). Furthermore, the Seventh Circuit in Pfeil v. Rogers, held that "a district court should not be unnecessarily hyper-technical and overly harsh on a party who unintentionally fails to make certain that all technical, non-substantive requirements of execution are satisfied." 757 F.2d 850, 859 (7th Cir. 1985).

The district courts within these respective circuits have applied a mixed, and intra-conflicting, interpretation of § 1746's statutory requirements. See Farook. V. Bailey, 2007 U.S. Dist. LEXIS 52748, at *6 (S.D.N.Y. 2007) ("The lack of an explicit reference to the 'truth' of the content is not a sufficient basis for exclusion of the" declaration); compare with Cox v. German Kitchen Ctr., LLC., 2020 U.S. Dist. LEXIS 160418, at *22 (S.D.N.Y. 2020) (holding to comply with § 1746, that it must be subscribed "as true under penalty of perjury") (emphasis in original); and Barlow v. Connecticut, 319 F. Supp. 2d 250, 257 (D. Conn. 2004) (Same). See also Davis v. Frapolly, 756 F Supp. 1065, 1067 (N.D. Ill. 1991) (holding that "under penalty of perjury deposes and states," without any averment of truth "may properly be considered"); compare with Ghazi v.

Fiserv, Inc., 904 F. Supp. 823, 827 (N.D. Ill. 1995)(holding that compliance with § 1746 requires the affiant to declare the contents "to be true under the penalty of perjury"); and Apex Colors Inc. v. Chemworld Int'l, Ltd., 2015 U.S. Dist. LEXIS 196219, at *9 (N.D. Ind. 2015)(an unsworn declaration must be subscribed as "true" under penalty of perjury, and dated, in the substantial form under 28 U.S.C. § 1746(2))(emphasis in original). Thus, even within the circuits that apply a liberal construction of § 1746, there are district courts with substantially conflicting opinions, which is why the Court must resolve this inter and intra circuit conflict.

3. The Ninth Circuit Misapplied 28 U.S.C. § 1746's Statutory Requirements.

Here, the Ninth Circuit both offended the statutory requirements for an unsworn declaration under § 1746, and contravened Ninth Circuit precedent in United States v. Bueno-Vargas, 383 F.3d 1104, 1111 (9th Cir. 2004)(holding that a declaration under penalty of perjury must manifest "that the contents of the statement were 'true'").

a. At a hearing held by the district court on February 9, 2021, Petitioner's Counsel correctly noted that Sergeant Powell's affidavit "was not a declaration," and was "Constitutionally deficient" to support a search warrant application. See Transcript of Motion Hearing at 8, United States v. Morrow, No. 3:19-CR-00041-MMD-WGC (D. Nev. Feb. 9, 2021), ECF No. 82. Notably, the government "conceded that . . . the search warrant affidavit and application was not signed when it was e-mailed over to" Judge Kassebaum, id. at 8, nor did it contain an averment to be "true and correct." See Appendix D. Thus, it cannot properly be construed as an unsworn declaration in lieu of an affidavit.

b. At a subsequent Franks hearing, it was established by Sergeant Powell's testimony that his "search warrant application and affidavit" was never affirmed as being "true and correct under penalty of perjury." See Transcript of Evidentiary Hearing at 60, United States v. Morrow, No. 3:19-CR-00041-MMD-WGC (D. Nev. Mar.

3, 2021), ECF No. 116. In fact, the exact verbiage used:

"I, Sergeant Ryan Powell . . . Being first duly sworn, and under penalty of perjury, on oath say and depose the following on this 20th day of April, 2019;" id. at 125,

does not comply with 28 U.S.C. § 1746's required statutory elements for a valid unsworn declaration. Although § 1746 "does not mandate strict compliance with the exemplary clause provided in the statute[,] the statute specifically states the unsworn declaration must be '. . . in writing of such person which is subscribed to him, as true under penalty of perjury ...'. Thus, as long as the unsworn declaration includes the phrase, 'penalty of perjury,' and states the document is true, the verification requirements of 28 U.S.C. § 1746 will be satisfied." Muscatell, 106 B.R. at 309 (emphasis in original)(citation omitted).

c. The district court did not address the affidavit's written deficiencies, as discussed above, that make it invalid. Appendix B at 10-12. Instead, the district court focused its opinion on the purported verbal oath, which is discussed in Part II.B below. The Ninth Circuit affirmed the district court's denial of Petitioner's motion to suppress, and based its erroneous conclusion on Bueno-Vargas, 383 F.3d at 1109-12, for the proposition that Sergeant Powell's application for a warrant "was executed under penalty of perjury, [] and was therefore supported by the requisite commitment to truth." Appendix A at 2.

However, the Ninth Circuit's contention in Petitioner's case is in direct conflict with the very case cited in their opinion. For example, (1) the Ninth Circuit in Bueno-Vargas held that "the 'true test' for whether a declaration is made under oath or affirmation 'is whether the procedures followed were such that perjury could be charged therein if any material allegation contained therein is false.'" Bueno-Vargas, 383 F.3d at 1111 (quoting 2 Wayne R. LaFave, Search and Seizure § 4.3(e), at 474-75 (3d ed. 1996)(internal quotation marks omitted)). Here, without a written averment of truth, Sergeant Powell's "unsworn statement, as drafted, would allow him to circumvent the penalties for perjury [under

18 U.S.C. § 1621] in signing onto intentional falsehoods." Roy, 2022 U.S. App. LEXIS 32111, at *19 (citation omitted). See Part I.B.2 below for a detailed discussion on the in pari materia between 18 U.S.C. § 1621, et seq. (the perjury statute) and 28 U.S.C. § 1746.

And (2), the law enforcement agent in Bueno-Vargas had actually declared, in writing, "that the contents of the statement were 'true and correct.'" 383 F.3d at 1111. This is not what Sergeant Powell subscribed to in his affidavit. Appendix D. This was neither a sworn affidavit (because there was no verbal oath as to the content's truthfulness), nor an unsworn declaration (because of its statutory deficiencies under § 1746); it was a constitutionally defective warrant application. The Bueno-Vargas case cited by the three-judge panel illustrates how the district court erred, and why the warrant's application is insufficient to support a search warrant. Sergeant Powell did not "mak[e] a solemn promise to the magistrate judge that all the information he was providing was true and correct; That is all the 'oath or affirmation' clause requires." Bueno-Vargas, 383 F.3d at 1112 (emphasis added). Accordingly, this was a statutorily defective document, and the Court should reverse the Ninth Circuit's erroneous findings and hold that an averment of truth to the facts used for probable cause is required prior to the issuance of the warrant. See Part II.A below.

B. The Court Should Hold that 28 U.S.C. § 1746 Unambiguously Requires All Essential Elements to be in Writing for a Valid Unsworn Declaration.

As explained above, the majority of circuits agree that an averment of truthfulness is required to be subscribed in writing for a declaration to be valid. However, it is (1) the minority of circuits, (2) the inter and intra circuit conflict, and (3) the Ninth Circuit's erroneous holding in this case that should compel the Court to grant certiorari and provide needed clarification of the statute.

1. The Text of 28 U.S.C. § 1746 is Unambiguous.

When Congress passed § 1746 into law, it kept the statutory requirements for an unsworn declaration simple to understand. Wherever any matter is required or permitted to be supported, evidenced, established, or proved by a sworn affidavit, such matter may -- with like force and effect -- be supported, evidenced, established, or proved with an unsworn declaration. 28 U.S.C. § 1746.

The statute explicitly requires "in writing of the person making the same," and "in writing of such person which is subscribed to him," to declare "as true under penalty of perjury, and dated" in the substantial form below:

"I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
_____ (signature)." See 28 U.S.C. § 1746(2) (emphasis added).

Thus, when following the text of the statute as authored by Congress, a declarant is required to aver in writing that his or her assertions are true. Roy, 2022 U.S. App. LEXIS 32111, at *17-*19. It is the Court's duty to "interpret the words consistent with their ordinary meaning . . . at the time Congress enacted the statute." Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2070 (2018) (citation omitted). Importantly, "only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process[.]" Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020). Such a result would "deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." Id.

The law in this matter is clear: an averment of truthfulness is required under § 1746 to be declared "under penalty of perjury."

2. The In Pari Materia Between 28 U.S.C. § 1746 and 18 U.S.C. § 1621, et seq. ("The Perjury Statute").

Consequently, an unsworn declaration which does not include an averment that its contents are "true," would allow the declarant "to circumvent the penalties for perjury in signing onto intentional falsehoods." Roy, 2022 U.S. App. LEXIS 32111, at *19 (quoting Nissho-Iwai, 845 F.2d at 1306). See also Dickinson v. Wainwright, 626 F.2d 1148, 1186 (5th Cir. Unit B 1980) ("One who subscribes to a false statement under penalty of perjury pursuant to section 1746 may be charged with perjury under [18 U.S.C. § 1621], just as if the statement were made under oath.").

The perjury statute, 18 U.S.C. §§ 1621, 1623, is unequivocally dependant upon the intentional misrepresentation of truthfulness. United States v. Yoshida, 727 F.2d 822, 823 (9th Cir. 1983); See also United States v. McKenna, 327 F.3d 830, 838 (9th Cir. 2003) (knowingly making a false material declaration is a crime under 18 U.S.C. § 1623(a)).

Whoever in an unsworn declaration "willfully subscribes as true any material matter which he does not believe to be true[,] is guilty of perjury. . ." 18 U.S.C. § 1621(2) (emphasis added). Similarly, providing a false declaration before a court is subject to prosecution under 18 U.S.C. § 1623, which also requires a false material assertion that the declarant knows to be untrue. Thus, without a written averment that the declarant's assertions are "true," one cannot be implicated for perjury under the criminal statute. Cf. Bronston v. United States, 409 U.S. 352, 357-59 (1973). This would compromise official proceedings by allowing declarants to willfully make material false statements; thereby circumventing any prosecution for perjury. McNeal v. Macht, 763 F. Supp. 1458, 1461 (E.D. Wis. 1991). See also Roy, 2022 U.S. App. LEXIS 32111, at *16.

Accordingly, the Court should hold that a written averment of "truth" is a required element for a valid unsworn declaration under 28 U.S.C. § 1746;

therefore, Sergeant Powell's warrant application cannot be a valid affirmation.

II. A Statutorily Deficient Declaration, Under 28 U.S.C. § 1746, That is Unsupported by a Verbal oath, Cannot Satisfy the Fourth Amendment's Oath or Affirmation Clause.

The Fourth Amendment to the United States Constitution provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation." U.S. Const. amend. IV. There are four separate requirements that a warrant must meet: (1) it must be based on probable cause, (2) supported by a sworn affidavit, (3) particularly describe the place of the search, and (4) particularly describe the persons or things to be seized. Groh v. Ramirez, 540 U.S. 551, 557 (2004). A failure to meet even one of these requirements will render a warrant as unconstitutional. Id. See also Stanford v. Texas, 379 U.S. 476 (1965).

A. The Requirement for a Valid Verbal Oath.

An "oath" is defined as a "solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true." United States v. Brooks, 285 F.3d 1102, 1405 (8th Cir. 2002) (quoting Black's Law Dictionary at 1099 (7th ed. 1999) (emphasis added)).¹ Importantly, for Fourth Amendment purposes, one must "personally vouch [] for the truth of the facts set forth in the [affidavit] under penalty of perjury." Kalina v. Fletcher, 522 U.S. 118, 121 (1997).

The facts supporting probable cause must be averred as true under penalty of perjury, whether in writing or by a verbal oath. This did not happen in Petitioner's case.

B. The Warrant Application was Not Supported by a Verbal Oath.

The Ninth Circuit erred when it opined that Sergeant Powell's warrant application was "supported by the requisite commitment to truth" by oath or

Footnote 1: "'Oath' includes affirmation, and 'sworn' includes affirmed." 1 U.S.C. § 1.

affirmation. Appendix A at 2. There was no verbal oath as to the truthfulness of the warrant application's contents. Here, Judge Kassebaum telephonically administered the following:

"Do you swear to tell the truth, the whole truth, nothing but the truth, so help you God?" Appendix D.

However, Judge Kassebaum did not inquire as to the truthfulness contained within the warrant's application, as required under the Fourth Amendment. See United States v. Anderson, 453 F.2d 174, 177 n.5 (9th Cir. 1971)(observing that an administered oath is valid to cover only what is explicitly "sw[orn] under oath that the information given in this affidavit is true . . .")(emphasis in original).

Thus, the verbal oath administered by Judge Kassebaum did not cover "the truthfulness of the statements contained in the affidavit," because Judge Kassebaum did not explicitly ask Sergeant Powell whether the statements contained in the warrant application were true. Anderson, 453 F.2d at 177 (Compare with Appendix D).

Moreover, Judge Kassebaum did not grant permission for Sergeant Powell to sign for the warrant application ("affidavit"), because Sergeant Powell had only asked to sign for the warrant alone.

Sgt. Powell: ". . . I will print off the search warrant applic- or I'm sorry, just the search warrant itself and then . . . do I have your permission (Judge Kassebaum) to sign your name to it?" Appendix D.

The district court erred when it opined that Judge Kassebaum consented to the signing of both the warrant application and the warrant. Judge Kassebaum never manifested approval for Sergeant Powell to sign his name to the "sworn and subscribed" provision of the warrant application and affidavit; nor could he, as the contents of the affidavit were never actually subscribed and sworn to as being "true," which is the essential purpose of administering an oath.²

Footnote 2: The warrant states, "The affidavit in support of this search warrant . . . was sworn to and subscribed before me this 20 day of April, 2019 at 2135 PM." Appendix D (Warrant at 6).

This renders the warrant itself as unconstitutional, in violation of the Fourth Amendment's Oath or Affirmation Clause.

C. The Court Should Hold the Warrant's "Application and Affidavit" Was Constitutionally Defective.

There was neither a verbal nor written attestation of truth to support the facts of the warrant's application. This issue alone renders the warrant itself as unconstitutional. Groh, 540 U.S. at 557; See also Kalina, 522 U.S. at 121 (personally vouching for the truth of the facts contained in the affidavit is required). Importantly, the Court has held that swearing "to be true" is not merely used as a term of art, but has an actual meaning and legal effect. United States v. Ambrose, 108 U.S. 336, 340-41 (1883).

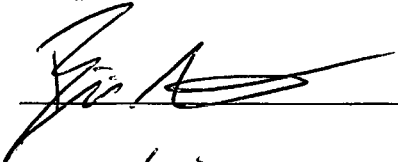
"The Fourth Amendment cannot be avoided or evaded by the issuance of search warrants with no written sworn declaration to support them, or on affidavits or depositions which leave no one responsible for misstatements or misinformation. If that sort of a thing were sanctioned, the Fourth Amendment would become practically useless . . ." United States v. Keleher, 2 F.2d 934, 935 (D.C. Cir. 1924); Roy, 2022 U.S. App. LEXIS 32111, at *19 (holding without a written averment of "truth" in an unsworn declaration, that the declarant may circumvent prosecution for perjury); See also Part I.B.2 above.

Accordingly, the Court should find that a statutorily deficient declaration, as here, that is unsupported by a verbal oath -- because the warrant application's contents were not explicitly sworn to -- fails to satisfy the Fourth Amendment's Oath or Affirmation Clause. The Court should remand to the lower court with instructions consistent with its opinion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: September 21, 2023