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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2016AP1464-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

SAMUEL SILVERSTEIN,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON JUNE 13, 2016, IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE ELLEN R. BROSTROM, PRESIDING.
MILWAUKEE COUNTY CASE NO. 2015CF2778

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

STATEMENT OF THE CASE 2

I. NATURE, PROCEDURAL STATUS, AND DISPOSITION BELOW 2

II. STATEMENT OF RELEVANT FACTS 3

ARGUMENT 10

I. THE SEARCH OF SILVERSTEIN'S HOME WAS UNCONSTITUTIONAL BECAUSE THE SUPPORTING WARRANT WAS BASED ON AN AFFIDAVIT THAT FAILED TO STATE PROBABLE CAUSE. 10

A. Summary of Argument and Standard of Review 10

B. The Affidavit in the Instant Case was Insufficient to Establish Probable Cause Because it did not Present a Substantial Basis for Crediting Tumblr's Hearsay Statements. 11

1. The affidavit was insufficient because it was based on incredible, uncorroborated hearsay. 13

2. The affidavit was insufficient because it provided no assessment of Tumblr's reliability. 15

3. The affidavit was insufficient because it failed to assert sufficient facts to evaluate the basis of Tumblr's allegation. 19

i. There is no explanation as to how Tumblr came by its information. 20

ii. The affidavit was based on suspicions and conclusions unsupported by what the attached paperwork showed. 20

II. SILVERSTEIN SHOULD NOT HAVE BEEN SUBJECT TO A MANDATORY MINIMUM SENTENCE FOR HIS OFFENSE; HE SHOULD HAVE A NEW SENTENCING HEARING. 23

A. Whereas the Circuit Court was not Required to Impose a Mandatory Minimum Sentence, Silverstein was Sentenced on Inaccurate Information. 23

1. The plain meaning of the relevant sentencing statute permitted imposition of less than three-years' initial confinement in the instant case. 23

2. Sentencing Silverstein under the erroneous belief that a mandatory minimum applied was a due process violation based on inaccurate information. 29

B. Silverstein's constitutional due process right to fair warning notice of criminal penalties was violated when the circuit court applied a mandatory minimum sentence that neither the statute nor any prior judicial decision fairly disclosed at the time of his sentencing. 31

CONCLUSION 34

CERTIFICATION 36

CERTIFICATION OF APPENDIX CONTENT 37

CERTIFICATION OF FILING BY THIRD- PARTY COMMERCIAL CARRIER.....38

TABLE OF AUTHORITIES

CASES

Aguilar v. Texas, 378 U.S. 108 (1964)..... 10, 12, 34

Bast v. State, 87 Wis. 2d 689,
275 N.W.2d 682 (1979)..... 21

Beaver Dam Cmty. Hospitals, Inc. v.
City of Beaver Dam, 2012 WI App 102,
344 Wis. 2d 278, 822 N.W.2d 491..... 28

Bouie v. City of Columbia, 378 U.S. 347 (1964) 31

Illinois v. Gates, 462 U.S. 213 (1982)..... 10, 11, 13, 34

McBoyle v. United States, 283 U.S. 25 (1931) 31

Owens v. United States, 387 F.3d 607
(7th Cir. 2004)..... 19

Rabe v. Washington, 405 U.S. 313 (1972)..... 31

Smith v. Goguen, 415 U.S. 566 (1974) 32

State ex rel. Kalal v. Circuit Court
for Dane County, 2004 WI 58,
271 Wis. 2d 633, 681 N.W.2d 110..... 25, 26, 28, 29

State v. Dowdy, 2012 WI 12, 338 Wis. 2d 565,
808 N.W.2d 691 28

State v. Doyle, 96 Wis. 2d 272,
291 N.W.2d 545 (1980)..... 15, 16, 17, 18

State v. Holcomb, 2016 WI App 70,
___ Wis. 2d ___, ___ N.W.2d ___ 1, 23, 26

State v. Kerr, 181 Wis. 2d 372,
511 N.W.2d 586 (1994)..... 13

State v. Kolk, 2006 WI App 261,
298 Wis. 2d 99, 726 N.W.2d 337 ..... 14, 15, 20

State v. Lalicata, 2012 WI App 138,
345 Wis. 2d 342, 824 N.W.2d 921 ..... 26, 27

State v. Miller, 2012 WI 61,
341 Wis. 2d 307, 815 N.W.2d 349 14

State v. Pittman, 174 Wis. 2d 255,
496 N.W.2d 74 (1993) 32

State v. Princess Cinema of Milwaukee, Inc., 96 Wis. 2d 646,
292 N.W.2d 807 (1980) 32

State v. Romero, 2009 WI 32,
317 Wis. 2d 12, 765 N.W.2d 756 .....passim

State v. Tiepelman, 2006 WI 66,
291 Wis. 2d 179, 717 N.W.2d 1 ..... 29, 30

State v. Travis, 2013 WI 38,
347 Wis. 2d 142, 832 N.W.2d 491 ..... 29, 30

State v. Ward, 2000 WI 3,
231 Wis. 2d 723, 604 N.W.2d 517 ..... 10, 11

Townsend v. Burke, 334 U.S. 736, 741 (1948) 29

United States v. Jones, 362 U.S. 257 (1960) 12, 34

United States v. Lanier, 520 U.S. 259 (1997). 31

United States v. Wilhelm, 80 F.3d 116
(4th Cir. 1996) 18, 19

Weeks v. United States, 232 U.S. 383 (1914) 12

Wong Sun v. United States, 371 U.S. 471 (1963) 11

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV 12, 19

U.S. Const. Amend. V 29

Wis. Const. Art. 1 § 8 29

Wis. Const. Art. 1 § 11 12

STATUTES

Wis. Stat. § 939.616 26

Wis. Stat. § 939.617 .....passim

Wis. Stat. § 948.12 ..... 23, 32

Wis. Stat. § 968.12(1) 12

OTHER SOURCES

2011 Wisconsin Act 272 ..... 27, 32

https://en.wikipedia.org/wiki/Tumblr (last visited Sep. 30, 2016) 3

Tumblr, *About*, https://www.tumblr.com/about (last accessed Oct. 5, 2016) 14

STATEMENT OF THE ISSUES

I. Whether the search of Silverstein's home was unconstitutional and the evidence obtained thereby subject to suppression insofar as the warrant affidavit was based on uncorroborated hearsay, included key misrepresentations about the informant's hearsay statements, and failed to include supporting documentation that the affiant purportedly attached?

The trial court concluded that the affidavit set forth sufficient probable cause to support the warrant, and thus denied Silverstein's motion to suppress.

II. Whether Silverstein was subject to a mandatory minimum penalty based on his conviction for possession of child pornography and, if so, whether applying that penalty in the instant case violated his constitutional due process rights?[1]

The trial court concluded that the mandatory minimum penalty applied and that Silverstein's constitutional rights were not violated by its application in the instant case.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Silverstein would welcome oral argument if it would assist the panel to understand the issues presented or answer any unanswered questions that

[1] Silverstein is aware that this Court has recently held that the relevant penalty provision is mandatory as applied to defendants like Silverstein, thus deciding that claim against him. *State v. Holcomb*, 2016 WI App 70, ___ Wis. 2d ___, ___ N.W.2d ___. He nonetheless raises the issue to preserve it because Holcomb's petition for supreme court review is pending at the time of filing this brief, and that court may decide the issue differently. Importantly, *Holcomb* did not decide the related due process issue that Silverstein herein asserts.

may arise, unbeknownst to counsel, during the panel's review of the briefing.

Silverstein does not believe the Court's opinion in the instant case will meet the criteria for publication because resolution of the issues will involve no more than the application of well-settled rules of law and controlling precedent, with no call to question or qualify said precedent.

STATEMENT OF THE CASE

I. NATURE, PROCEDURAL STATUS, AND DISPOSITION BELOW

Silverstein is on direct appeal from his conviction for possession of child of pornography. (R.27, R.29.) During trial court proceedings, he brought two motions relevant to the instant appeal. (R.8, R.14.)

First, he moved to suppress evidence seized from his home on the ground that the warrant was not supported by probable cause. (R.8.) The State filed a written response. (R.9.) The circuit court held a hearing on Silverstein's motion at which neither party presented evidence. (R.31.) The circuit court denied Silverstein's motion, finding that the police had gathered and deciphered tips as required by law using a resource "that's relied on regularly." (*Id.*:14, 16.) Silverstein sought leave to appeal, which this Court denied. (R.13.)

Silverstein's second motion challenged whether he was subject to a mandatory minimum penalty of no less than three-years' imprisonment. (R.14.) He made a two-part argument: (1) a plain reading of the statute accommodated something less than three years and (2) sentencing him under a mandatory minimum scheme violated his constitutional right to fair notice. (*Id.*) Again the State responded in writing (R.15), and again the circuit court held a hearing at which no evidence

was presented (R.32). The circuit court disagreed with Silverstein, concluding that the mandatory minimum applied to him and its application was not unconstitutional. (R.17.)

Silverstein pled guilty (R.33:5) and was sentenced to a seven-year term of imprisonment (three-years' initial confinement and four-years' extended supervision) (R.34:44). He appeals. (R.29.)

II. STATEMENT OF RELEVANT FACTS

On July 9, 2015, the National Center for Missing and Exploited Children (NCMEC)[2] told police that Tumblr[3] told NCMEC that there was child pornography on one of Tumblr's blogs. (R.8:24, A-Ap 44.) An investigation ensued in which law enforcement never questioned Tumblr about its suspicion of child pornography nor directly viewed the blog at which Tumblr reported child pornography. (*See id.*:24-28, A-Ap 44-48.) Instead, police took as true the things that NCMEC told police that Tumblr told NCMEC. (*Id.*) That investigation eventually led police to Silverstein's house. (*See id.*:23, A-Ap 45.)

About a month after police received NCMEC's allegation, Glendale Police Detective Bryan Bichler submitted an affidavit for a warrant to search Silverstein's home. (*Id.*:24-39, A-Ap 44-59.) According to the affidavit, police were notified by NCMEC that child pornography had been posted to "'tumblr.com', a social media site, originating from an IP address of

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[2] "NCMEC" is often pronounced "nikmik."

[3] "Tumblr (stylized on its home page as tumblr.) is a microblogging and social networking website founded by David Karp in 2007, and owned by Yahoo! since 2013. The service allows users to post multimedia and other content to a short-form blog. Users can follow other users' blogs. Bloggers can also make their blogs private. For bloggers, many of the website's features are accessed from a 'dashboard' interface. As of September 1, 2016, Tumblr hosts over 312.2 million blogs. As of January 2016, the website had 555 million monthly visitors." https://en.wikipedia.org/wiki/Tumblr (last visited Sep. 30, 2016) (footnotes omitted).

99.185.140.72 from the Internet Service Provider AT&T U-Verse." (*Id.*:24, A-Ap 44.) Det. Bichler averred that "[t]he NCMEC Cybertip listed the reporting agency was Tumblr. Said report indicated on 06/01/15 at about 17:45:00 UTC, Tumblr created a report regarding 'Child Pornography' related to URL: 'famousenemyland.tumblr.com' with email ssilver58@,att.net and IP Address 99.185.140.72." (*Id.*:27, A-Ap 47.) Det. Bichler additionally reported that an officer from a different department had reviewed the NCMEC tips and determined that the reported child pornography consisted of "eight photos and one video file which were posted to Tumblr.com using account name 'famousenemyland'. The posts were made primarily from IP Address 99.185.140.72, which was created using the email address ssilver58@att.net." (*Id.*:24, A-Ap 44.) In support of those assertions, Det. Bichler attached to the warrant affidavit a copy of the NCMEC paperwork purportedly restating what he alleged that Tumblr had reported. (*See id.*:27, 29-39, A-Ap 47, 49-59.)

The NCMEC paperwork to which Det. Bichler referred and submitted with the warrant affidavit does not contain the information that the detective suggested it did. (*Compare id.*:24-25, 27, A-Ap 44-45, 47, *with id.*:29-39, A-Ap 49-59.) Namely, there is nothing in the attached NCMEC paperwork indicating that Tumblr reported that child pornography was posted to famousenemyland.tumblr.com from email address ssilver58@att.net and IP Address 99.185.140.72. (*See id.*:29-39, A-Ap 49-59.) Nor is there anything in the paperwork connecting ssilver58@att.net to IP Address 99.185.140.72. (*See id.*) Nor is there anything showing that the suspicious posts were "made primarily from IP Address 99.185.140.72, which was created using the email address ssilver58@att.net." (*See id.*:25, A-Ap 45.) As for Det. Bichler's claim that NCMEC reported that Tumblr had reported nine instances of child pornography—eight pictures and one video—the

attached NCMEC paperwork shows only seven reported instances of child pornography—six pictures and one video. (*Compare id.*:24, A-Ap 44 *with id.*:31, A-Ap 51.) In other words, Det. Bichler's representations regarding what NCMEC's allegations contained were inconsistent with the contents of the attached documents meant to show NCMEC's allegations.

Consistent with Det. Bichler's assertions, the attached NCMEC paperwork does list the date and time on which Tumblr submitted a report to NCMEC regarding child pornography. (*Id.*:29, 36, A-Ap 49, 56.) However, the paperwork does not include any allegation by Tumblr that the child pornography was associated with IP address 99.185.140.72. (*See id.*:29-39, A-Ap 49-59.) The single reference to that IP address occurs in the NCMEC paperwork under a section entitled "Section B: Automated Information Added by NCMEC Systems." (*Id.*:34, A-Ap 54.) According to that portion of the NCMEC paperwork, "When a Reporting [electronic service provider] voluntarily reports an IP address for the 'User or Person Being Reported,' NCMEC Systems will geographically resolve the IP address via publicly-available online search." (*Id.*:32, A-Ap 52.) Later in the NCMEC paperwork, the following disclaimer occurs: "The CyberTipline cannot confirm the accuracy of Information found in public records or whether the results are affiliated with any parties relating to this report." (*Id.*:39, A-Ap 59.)

There is nothing in Det. Bichler's affidavit or any attachments thereto describing any steps undertaken by police to confirm the veracity of Tumblr's accusation—provided to police by NCMEC—that child pornography was located at famousenemyland.tumblr.com or was posted there from IP address 99.185.140.72. (*See id.*:24-39, A-Ap 44-59.) The affidavit does not describe any attempt by police to contact Tumblr or the individual employee of

Tumblr named in the CyberTipline report as the reporting individual. (*See id.*:24-28, A-Ap 44-48.) The affidavit is mute with regard to any steps undertaken by police to independently verify that the child pornography Tumblr purportedly located at famousenemyland.tumblr.com actually existed at that location. (*See id*.) The affidavit is similarly mute as to whether police obtained from Tumblr the blog's contents or personally viewed the same to confirm Tumblr's allegations. (*See id*.) It does not describe any attempt by police to contact Tumblr for the same purpose. (*See id*.)

Likewise, the affidavit does not explain how Tumblr came to suspect what Det. Bichler alleged Tumblr had said: that child pornography was posted to famousenemyland.tumblr.com from IP address 99.185.140.72. (*See id*.) There is a complete dearth of information in the affidavit regarding the genesis of Tumblr's suspicion of criminal activity or the manner of its investigation subsequent to forming that suspicion. (*See id*.) Nor does it explain how Tumblr eventually located the child pornography that it sent to NCMEC or what steps were undertaken by Tumblr to ensure the accuracy of its investigative results or the reporting of the same to NCMEC. (*See id*.)

The full extent of the affidavit's reference to Tumblr occurs in three paragraphs, which are here quoted in their entirety:

> 5. On July 9th, 2015 the Bayside Police Department received two Cybertips from the National Center for Missing and Exploited Children (NCMEC). The NCMEC Cybertips were numbered 5034297 and 5044912. These tips reported photos and video of underage females exposing their breasts and genitals posted to 'tumblr.com', a social media site, originating from an IP address of 99.185.140.72 from the Internet Service Provider AT&T U-Verse.

> 6. Bayside Police Officer Ryan Bowe, a member of the Wisconsin Internet Crimes against Children Task Force (ICAC), received and reviewed the above tips from NCMEC. The NCMEC Cybertip included explicit photographs which PO BOWE viewed. The images consisted of eight photos and one video file which were posted to Tumblr.com using account name 'famousenemyland'. . . .
>
> 11. The NCMEC Cybertip listed the reporting agency was Tumblr. Said report indicated on 06/01/15 at about 17:45:00 UTC, Tumblr created a report regarding 'Child Pornography' related to URL: 'famousenemyland.tumblr.com' with email ssilver58@,att.net and IP Address 99.185.140.72.

(*Id.*:24-25, 27, A-Ap 44-45, 47.) Again, the NCMEC paperwork attached to the affidavit does not validate the representations that Det. Bichler made in those three paragraphs about either the Cybertips or Tumblr's accusations reportedly therein. (*Compare id. with id.*:29-39, A-Ap 49-59.)

Certainly, the affidavit explains the steps undertaken by police to identify the AT&T subscriber to whom IP address 99.185.140.72 was assigned, including the address associated with that subscription. (*Id.*:25, A-Ap 45.) But it does not explain or offer any reason to believe that Tumblr or the employee named as the reporting individual was truthful or accurate in the purported allegation to NCMEC—unsupported by the attached paperwork—that child pornography was posted to famousenemyland.tumblr.com from IP address 99.185.140.72. (*See id.*:24-28, A-Ap 44-48.)

With regard to the investigation into IP address 99.185.140.72, Det. Bichler averred that Bayside police had ascertained subscription information "[t]hrough subpoenas and search warrants regarding the IP address," and he claimed that "a copy of the Bayside Police Department's Affidavit and Subpoena for Documents" was "[a]ttached" and "used as a basis

for th[e] search warrant." (*Id.*:25, A-Ap 45.) Despite those representations, no such affidavits or subpoenas were attached to the affidavit.

Thus, according to the affidavit, Det. Bichler suspected that Silverstein's house may have child pornography in it because NCMEC had told police that Tumblr had told it that child pornography was uploaded from an IP address that police later determined that AT&T had assigned to Silverstein who lived in Glendale. However, police had done nothing to verify or corroborate Tumblr's accusation. The entirety of the police work detailed in the affidavit was purposed on confirming (1) that the reported illicit images constituted child pornography (*id.*:25-28, A-Ap 45-48), (2) to whom IP address 99.185.140.72 belonged (*id.*:24-25, A-Ap 44-45), and (3) where IP address 99.185.140.72 was geographically located (*id.*:24-25, 27, A-Ap 44-45, 47). However, documents referenced in the affidavit and relevant to the related police work—the NCMEC paperwork and Bayside's affidavits and subpoenas—were withheld or their attached contents favorably misrepresented. (*Compare id. with id.*:29-39, A-Ap 49-59.) The latter set of materials, the affidavits and subpoenas, were meant to undergird two of the three things police did: find out the who and where of IP address 99.185.140.72. (*Id.*25, A-Ap 45.) But, they are not attached to the affidavit.

Additionally, police never spoke to Tumblr. (*See id.*:24-28, A-Ap 44-48.) Police never saw the blog that Tumblr allegedly affiliated with Silverstein's IP address; indeed, Tumblr had terminated it so it could not be publicly accessed. (*See id.*) Police never even obtained from Tumblr the contents of that blog, despite Tumblr's clear willingness to provide such information and detail in the Cybertip on how it could be obtained. (*See id.*; *see also id.*:30, A-Ap 50.) And, police never attested to the believability of Tumblr or its employees or vouched for Tumblr's investigative

methods. (*See id.*:24-28, A-Ap 44-48.) It was similarly mute regarding NCMEC. (*See id.*)

Based on the evidence seized from his home, Silverstein was arrested and charged with ten counts of possessing child pornography. (R.1.) Following negotiations, Silverstein pled guilty to three counts; the State dismissed and read-in the remaining seven counts. (R.33:5, 9.) Prior to sentencing, Silverstein challenged whether the relevant statute required that he be sentenced to no less than three-years' confinement. (R.14.) The circuit court concluded that there was a mandatory minimum sentence for Silverstein's offense and it applied to him. (R.17.)

At sentencing, the court gave Silverstein that mandatory minimum term of initial confinement. (R.34:44, A-Ap 106.) All parties at sentencing accepted—pursuant to the circuit court's prior decision—that Silverstein was subject to the mandatory minimum. (*Id.*:16-17, 32, 43, A-Ap 78-79, 94, 105.) The State's attorney lobbied for more initial confinement than the mandatory minimum (*id.*:4, A-Ap 66), but the court rejected that argument (*id.*:43-44, A-Ap 94-95). The court "d[id] not think more than the mandatory minimum of three years initial confinement is necessary to meet [the court's sentencing] goal," "[g]iven [Silverstein's] character, given his lack of prior criminal involvement, and all of the other factors." (*Id.*).

He appeals. (R.29.)

ARGUMENT

I. THE SEARCH OF SILVERSTEIN'S HOME WAS UNCONSTITUTIONAL BECAUSE THE SUPPORTING WARRANT WAS BASED ON AN AFFIDAVIT THAT FAILED TO STATE PROBABLE CAUSE.

A. Summary of Argument and Standard of Review

Upon a challenge to probable cause, the "reviewing court examines the totality of the circumstances presented to the warrant-issuing commissioner to determine whether the warrant-issuing commissioner had a substantial basis for concluding that there was a fair probability that a search of the specified premises would uncover evidence of wrongdoing." *State v. Romero*, 2009 WI 32, ¶ 3, 317 Wis. 2d 12, 765 N.W.2d 756. While the standard for reviewing a magistrate's decision to issue a warrant is deferential, a reviewing court "must still insist that the magistrate perform his [or her] 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Aguilar v. Texas*, 378 U.S. 108, 111 (1964) (overruled on other grounds by *Illinois v. Gates*, 462 U.S. 213 (1982)). When deciding whether probable cause existed for the issuance of a search warrant, a reviewing court is "confined to the record that was before the warrant-issuing commissioner." *Romero*, 2009 WI 32, at ¶ 18, n.11. "[A] probable cause determination must be based upon what a reasonable magistrate can infer from the information presented by the police. . . . The subjective experiences of the magistrate are not part of the probable cause determination." *State v. Ward*, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517. The probable cause standard for search warrants is a practical, nontechnical conception that requires trial courts to deal with "'the factual and practical considerations of everyday life on which reasonable and prudent men,

not legal technicians, act.'" *Id.* ¶ 17 (quoting *Gates,* 462 U.S. at 231).

In the instant case, under the totality of the circumstances, the affidavit was clearly insufficient to support the magistrate's probable cause finding. First, police failed to explain a substantial basis for crediting Tumblr's original report to NCMEC, which NCMEC in turn reported to police. Second and relatedly, the affidavit included key misrepresentations about Tumblr's hearsay allegation when the affidavit's language is juxtaposed against the contents of the attached NCMEC tip. Finally, the affidavit attempted to rely on police work done by the Bayside PD to support the warrant and suggested attachments that could demonstrate the same, but those materials were not actually presented to the reviewing magistrate. When coupled with the failure of law enforcement to verify Tumblr's hearsay statements, the misrepresentations in and omissions from the affidavit bear directly on the credibility Tumblr's allegation and the facts necessary to establish probable cause. In light of those facts, the warrant should not have issued. The search of Silverstein's home was therefore unconstitutional and the evidence seized as a result—both direct and derivative—should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 485, 488 (1963) (fruit of poisonous tree doctrine). Accordingly, this Court should reverse the circuit court's denial of Silverstein's suppression motion.

He offers the following in support.

B. The Affidavit in the Instant Case was Insufficient to Establish Probable Cause Because it did not Present a Substantial Basis for Crediting Tumblr's Hearsay Statements.

Both the state and federal constitutions accord to private citizens protections against unreasonable

searches and seizures by government agents. U.S. Const. Amend. IV, Wis. Const. Art. 1 Sec. 11. Intrinsic to those protections is the longstanding principle that the right to privacy in one's home is a "sacred right." *Weeks v. United States*, 232 U.S. 383, 391 (1914). "The Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction." *Id.* at 394 (quoted authority omitted).

It is out of respect for that sacred right that government agents who seek judicial permission to violate the sanctity of one's home must offer sufficient information demonstrating probable cause to believe that the place they intend to search will contain evidence of a crime. *Romero*, 2009 WI 32, ¶ 16; *see also* Wis. Stat. § 968.12(1). To establish probable cause, government agents may rely on hearsay information from an informant, and "[a]n affidavit is not to be deemed insufficient" simply because it relies on hearsay. *United States v. Jones*, 362 U.S. 257, 269 (1960). If an affiant relies on two levels of hearsay to establish probable cause, the affidavit must establish a substantial basis for crediting the hearsay of both informants. *Romero*, 2009 WI 32, ¶¶ 24-26. It is not enough to merely establish the reliability of the one informant that actually communicated with police. *Id.*

"Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that" the implements of criminal activity "were where he [or she] claimed they were." *Aguilar*, 378 U.S. at 114. Indeed, any affidavit that relies on hearsay must provide the magistrate with "a substantial basis for crediting the hearsay." *Jones*, 362 U.S. at 269. Absent such information, probable cause will not exist. *Id.*

The affidavit in support of the request for the search warrant in the instant case was clearly insufficient to support the magistrate's probable cause determination. The affidavit (1) was based on two layers of hearsay, (2) lacked attestation to the believability of Tumblr's accusation or any police work verifying it, (3) contained significant discrepancies between what Det. Bichler's affidavit alleged Tumblr to have reported and what the attached NCMEC paperwork actually reflected that Tumblr had reported, and (4) excluded Bayside PD documents that Det. Bichler averred were to have been submitted in support of probable cause. The circuit court erred in denying Silverstein's suppression motion, and this Court should reverse.

1. The affidavit was insufficient because it was based on incredible, uncorroborated hearsay.

Ultimately, when presented with a warrant affidavit that relies on hearsay information,

> [t]he task of the warrant-issuing commissioner "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . ., including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

Romero, 2009 WI 32, ¶ 19 (quoting *State v. Kerr,* 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994)) (footnote omitted). A hearsay declarant's veracity and basis of knowledge should be understood to be "'closely intertwined issues that may usefully illuminate the commonsense, practical question'" of whether probable cause exists. *See id*. ¶ 20 (quoting *Gates*, 462 U.S. at 230). To establish a declarant's veracity, "facts must be brought to the warrant-issuing officer's attention to enable the officer to evaluate either the

credibility of the declarant or the reliability of the particular information furnished." *Id*. ¶ 21.

When it comes to reliability, not every declarant is equal. A "citizen informant" is "'someone who happens upon a crime or suspicious activity and reports it to police.'" *State v. Miller*, 2012 WI 61, ¶31 n.18, 341 Wis. 2d 307, 815 N.W.2d 349 (quoting *State v. Kolk*, 2006 WI App 261, ¶ 12, 298 Wis. 2d 99, 726 N.W.2d 337). Citizen informants are "generally considered among the most reliable informants." *Id*. On the other hand, "an anonymous informer [is] one whose identity is unknown even to the police and whose veracity must therefore be assessed by other means, particularly police corroboration." *Kolk*, 2006 WI App 261, ¶ 12.

Tumblr's report is the uncorroborated tip of an anonymous informant and therefore unreliable. Nothing in the affidavit or attached NCMEC paperwork indicates who at Tumblr came to suspect criminal activity. Similarly, that material says nothing about who it was that generated the report or even how the report was generated. While "Mahashraya Sundararaman" is listed as the "Submitter," nothing in Det. Bichler's affidavit or attached NCMEC paperwork indicates that Sundararaman in fact generated the report. There is no police work detailed in the affidavit confirming that Sundararaman even knew about the report's contents. Tumblr is comprised of 402 individual employees. Tumblr, *About*, https://www.tumblr.com/about (last accessed Oct. 5, 2016). The affidavit reported no police investigation undertaken to confirm which of those 402 employees generated the report or which employee originally located the suspected child pornography. It is presently unknown how many of Tumblr's employees participated in the hearsay chain from initial suspicion to report. Furthermore, the affidavit does not demonstrate that police dispelled any possibility that the report was improperly or

maliciously submitted by a Tumblr employee. The Tumblr employees who reported illegal activity should not get a free pass to hide their identities behind the corporation that employs them. Tumblr's report to NCMEC is properly understood as coming from an anonymous informant because the person who created that report's "identity is unknown even to the police." *Kolk*, 2006 WI App 261, ¶ 12. Tips from anonymous informants need independent police corroboration. *Id.*; *see also Romero*, 2009 WI 32, ¶¶ 10, 43 (detailing substantial involvement of police in investigation involving anonymous informant and concluding probable cause existed based on it). The veracity of Tumblr's tip therefore necessitated corroboration, which did not occur in the instant case. The affidavit failed to establish probable cause on those grounds alone.

2. The affidavit was insufficient because it provided no assessment of Tumblr's reliability.

Even if Tumblr is not a purely anonymous informant, the credibility and reliability of its report cannot be measured by the affidavit's contents. Even for citizen informants, who do not have to show a proven record of reliability, it is nonetheless required that "there *must be some type of evaluation of the[ir] reliability*." *State v. Doyle*, 96 Wis. 2d 272, 287, 291 N.W.2d 545, 552 (1980) (emphasis added). A citizen informant's reliability

> should be evaluated from the *nature of his report, his opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation*. However, there must be some safeguard, and *this can be satisfied by verification of some of the details of the information reported*, but it need not be to the same degree as required in evaluating the 'tips' of a [confidential informant].

> Essentially, the search for reliability in the case of a citizen informer is shifted . . . from personal reliability to "observational" reliability.

Id. (quoted authority and textual alteration omitted) (emphasis added). Thus, even if this Court views Tumblr as a citizen informant, review must turn to the "nature of [Tumblr's] report, [Tumblr's] opportunity to hear and see the matters reported, and the extent to which [Tumblr's tip] can be verified by independent police investigation." *Id.* No such verification took place here.

First, the nature of the report is suspect by virtue of the discrepancies between Det. Bichler's description of it and the actual contents of the attached paperwork. While Det. Bichler alleged that Tumblr said that child pornography was posted to famousenemyland.tumblr.com from ssilver@att.net and IP address 99.185.140.72, the actual attached report does not support that allegation. Thus, to the reviewing magistrate, the precise contours of Tumblr's allegation would have been unknown. If anything, the magistrate should have viewed Det. Bichler's representations about Tumblr's tip as suspect because what he said was not confirmed, indeed was unsupported, by the attached NCMEC paperwork.

Second, the affidavit provides no information about Tumblr's "opportunity to hear and see the matters reported." *Doyle*, 96 Wis. 2d at 287, 291 N.W.2d at 552. In fact, the affidavit includes only three references to Tumblr. Not one of those three paragraphs details how Tumblr came upon its suspicion of criminal behavior, let alone how it witnessed the alleged pornography. Thus, the affidavit and its attachments did not inform the magistrate how it is that Tumblr came to suspect child pornography at famousenemyland.tumblr.com. The attached tip is itself mute on the issue, and no independent police investigation resolving it is detailed in the affidavit. Effectively, the affidavit—but not the attached

paperwork—tells the magistrate that Tumblr knew about child pornography on one of its blogs because Tumblr was reporting that there was child pornography on one of its blogs. There are absolutely no details about how Tumblr came to know that child pornography was where Tumblr said that it was. There is not even a statement in Det. Bichler's affidavit indicating some familiarity with the way Tumblr finds child pornography on its sites. The omission of any such information means that the affidavit failed to provide the magistrate with any knowledge of how Tumblr came by the information it reported to police.

Third, the affidavit does not say police took any steps to verify Det. Bichler's allegation—unsupported by the attached paperwork—that Tumblr alleged that child pornography was located at famousenemyland.tumblr.com. The affidavit details no steps undertaken to view the contents of the blog, to contact Tumblr, or to obtain the contents of the blog. Instead, the affidavit shows a flow of information in only one direction: from Tumblr to NCMEC to police.

In *Doyle*, a case that applied the citizen informant test, police were deemed to have reasonably relied on citizen informants because those informants were reliable and their tip independently verified. 96 Wis. 2d at 289-90, 291 N.W.2d at 553. Two named informants witnessed what they suspected was marijuana being loaded into a vehicle. *Id.* at 275, 291 N.W.2d at 546. Those informants contacted the police and reported their suspicions. *Id.* Police, by independent investigation, found the vehicle and stopped it for a traffic violation. *Id.* at 275-76, 291 N.W.2d at 546-47. The two informants were then brought to that vehicle where they confirmed that the vehicle and its occupants were the genesis of their report. *Id.* Police then took the informants back to the scene of the crime and found marijuana. *Id.* Only thereafter were the suspects arrested and a warrant

obtained. *Id.* Probable cause existed because police (1) confirmed with one of the informants that he had prior experience with marijuana and (2) independently verified by investigation details provided in the informants' tip. *Id.* at 289-90, 291 N.W.2d at 553.

Silverstein's case is markedly different. Unlike the instant case, police in *Doyle* had direct contact with the citizen informants and substantially involved them in their investigation of the tip. That direct contact allowed police to ascertain the informant's familiarity with the contraband allegedly witnessed. Through independent police work and with the assistance of the informants after the tip, police verified what the informants originally told them. However, in the instant case, neither the affidavit nor the attached paperwork shows police had any contact with Tumblr after receiving NCMEC's report. They did not independently verify Tumblr's report—as characterized by Det. Bichler—that there was suspected child pornography on one of its blogs. And neither the affidavit nor the attached paperwork shows that Tumblr has familiarity or expertise with child pornography. The instant case is thus favorably distinguishable from *Doyle* and demonstrates that the affidavit fails to establish sufficient facts whereby the magistrate could evaluate the veracity of Tumblr's report.

This case parallels *United States v. Wilhelm*, 80 F.3d 116 (4th Cir. 1996). There, the magistrate issued a warrant based on an officer's statement that "a concerned citizen" told him that within the previous forty-eight hours he had seen marijuana being sold in Wilhelm's home. The citizen provided directions to Wilhelm's home, which the officer confirmed. *Id.* at 117-18. The Fourth Circuit found the application for the warrant was insufficient because it contained vague information from an unnamed informant whose reliability the officer had not verified (other than stating that he was a "mature person with personal

connections with the suspects," who "projected a truthfull [sic] demeanor."). *Id.* at 120. The court concluded:

> [T]his affidavit fell far short of providing probable cause for a search warrant. Upholding this warrant would ratify police use of an unknown, unproven informant—with little or no corroboration—to justify searching someone's home. The right to privacy in one's home is a most important interest protected by the Fourth Amendment and a continuing theme in constitutional jurisprudence.

Id. at 120-121 (citations omitted)*; see also Owens v. United States*, 387 F.3d 607, 608 (7th Cir. 2004), (finding insufficient residential search warrant supported by affidavit that alleged only that an unknown quantity of cocaine had been sold at the residence one time some three months before, with no indication of the amount sold or the reliability of the informant).

Whereas the affidavit in the instant case lacked sufficient information allowing the magistrate to measure Tumblr's reliability, it failed to state probable cause justifying a warrant.

3. The affidavit was insufficient because it failed to assert sufficient facts to evaluate the basis of Tumblr's allegation.

"To demonstrate the basis of a declarant's knowledge, facts must be revealed to the warrant-issuing officer to permit the officer to reach a judgment whether the declarant had a basis for his or her allegations that evidence of a crime would be found at a certain place." *Romero* ¶ 22. This is "most directly shown by an explanation of how the declarant came by his or her information." *Id.* It can also be shown "indirectly" in circumstances where a "wealth of detail" is communicated by the declarant. *Id.*

i. There is no explanation as to how Tumblr came by its information.

In the same way that affidavit is mute as to how Tumblr witnessed the child pornography, it is mute regarding how Tumblr came to possess the content of its tip, and is therefore insufficient. *See supra* § I.B.2. "Where an informant does not give some indication of how he or she knows about the suspicious or criminal activity reported, . . . it bears significantly on the reliability of the information." *Kolk*, 2006 WI App 261, ¶15. Pursuant to the affidavit and its attachments, there is no information indicating how Tumblr knew about the crime it reported. Tumblr's tip "might have been based on first-hand knowledge, but it might also have been the product of rumor or speculation. We do not know, [and neither did the issuing magistrate,] either because [Tumblr] did not tell the police or because the police did not tell the [reviewing magistrate]." *Id.* As such, the absence of any explanation of how Tumblr came by its information impugns the reliability of its purported tip and the application for the search warrant here was clearly insufficient to support the probable cause finding.

ii. The affidavit was based on suspicions and conclusions unsupported by what the attached paperwork showed.

Det. Bichler's affidavit overstated the content of Tumblr's report to NCMEC, as that report is reflected in the documents that he submitted to the reviewing magistrate. Det. Bichler said that Tumblr had reported eight images and one video; the attached tip reflects only six images and one video. He said that Tumblr had reported the child pornography originating from a certain IP address and certain email address. The section of the attached NCMEC paperwork reflecting what Tumblr actually reported

to NCMEC does not contain that information. (R.8:30-31, 37-38, A-Ap 50-51, 57-58.) While it is true that the IP address and email address to which Det. Bichler referred do appear in the paperwork, those details occur outside of the section detailing Tumblr's actual report. Instead, those facts occur in sections of the report that NCMEC itself created, not Tumblr. (*Compare id.* (section entitled "Reported Information") *with id.*:32-34, 39, A-Ap 52-54, 59 (section entitled "Automated Information Added by NCMEC systems"). Nothing in the section detailing Tumblr's report connects child pornography with the blog famousenemyland.tumblr.com or a particular IP address or a particular email address. But Det. Bichler said that it did.

The paperwork that Det. Bichler attached to his affidavit thus does not sustain his allegations that Tumblr's tip connected the blog in question and the child pornography allegedly posted there with ssilver58@att.net and IP address 99.185.140.72. Perhaps Bichler merely suspected this to be the case; from what was submitted to the reviewing magistrate, one cannot know. A magistrate may not base a probable cause finding on an affiant's suspicions and conclusions. *Bast v. State*, 87 Wis. 2d 689, 692-93, 275 N.W.2d 682 (1979). The aforementioned discrepancies substantially undercut any assessment of the wealth of detail in Tumblr's tip.

A straightforward review of the NCMEC paperwork attached to Det. Bichler's affidavit that commenced the criminal investigation underlying this case shows that Tumblr submitted little information in its tip other than the alleged child pornography. The remainder of the information in the NCMEC paperwork was added by NCMEC itself. Thus, there is very little information in Tumblr's tip, as it is stated in the NCMEC paperwork.

Even if the discrepancies between the affidavit and its attachments are set aside—which should not be done under the applicable totality of the circumstances test—there is still not a substantial amount of information in Tumblr's report. The affidavit and the attached NCMEC paperwork do not indicate when the illegal postings supposedly occurred, either specifically or generally. The only dates referred to in the attached NCMEC paperwork are (1) the date that Tumblr's tip was received by NCMEC and (2) the date that NCMEC processed the report. However, those dates are nowhere correlated to the purported criminal activity. What is more, Det. Bichler's affidavit indicates that "[t]he posts *were primarily from* IP Address 99.185.140.72, which was created using the email address ssilver58@att.com." (R.8:24-25, A-Ap 44-45 (emphasis added).) That language indicates that some of the posts identified as involving of child pornography had been posted from an IP address other than 99.185.140.72 and an email address other than ssilver58@att.com. The attached NCMEC paperwork does not indicate to the contrary, and thus the affidavit and its attachments leave open the precise number of reported posts that are even attributable to IP Address 99.185.140.72. Finally, Tumblr expressly withheld information from its tip stating that it was "unable to provide additional information about Tumblr accounts, users, or blogs without a court order, subpoena, or warrant." (R.8:30, A-Ap 50.) Tumblr thus provided only a "representative sample of the blog's contents." (*Id.*) There is thus not a wealth of detail in Tumblr's tip, even when Det. Bichler's representations of it are credited, despite the omissions in the attached NCMEC paperwork. The affidavit therefore failed to establish probable cause.

Under the totality of the circumstances detailed above, there was not a sufficient basis for crediting Tumblr's hearsay allegations set forth in the affidavit. The magistrate's contrary determination was nothing

more than a rubber stamp for police, and this Court should reverse the circuit court's finding otherwise.

II. SILVERSTEIN SHOULD NOT HAVE BEEN SUBJECT TO A MANDATORY MINIMUM SENTENCE FOR HIS OFFENSE; HE SHOULD HAVE A NEW SENTENCING HEARING.

A. Whereas the Circuit Court was not Required to Impose a Mandatory Minimum Sentence, Silverstein was Sentenced on Inaccurate Information.

Subsequent to Silverstein's filing the instant appeal, this Court decided that a circuit court may not impose a sentence of less than three-years' initial confinement unless the defendant is not more than forty-eight months older than the victim. *State v. Holcomb*, 2016 WI App 70, ¶ 1, ___ Wis. 2d ___, ___ N.W.2d ___. Silverstein is not amongst that class of defendants, and thus *Holcomb*'s reasoning applies in the instant case. As noted above, Silverstein herein disputes *Holcomb*'s holding—and thus the accuracy of the information on which he was sentenced—because *Holcomb* is now pending before the Wisconsin Supreme Court.

1. The plain meaning of the relevant sentencing statute permitted imposition of less than three-years' initial confinement in the instant case.

Silverstein was convicted of possessing of child pornography, contrary to Wis. Stat. § 948.12. Sentencing for a conviction under that statute necessitates compliance with the penalty provision set forth in Wis. Stat. § 939.617. In relevant part, Section 939.617 reads:

> **939.617 Minimum sentence for certain child sex offenses. . . .**
>
> (2) If the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record, *the court may impose a sentence that is less than the sentence required under sub. (1) or* may place the person on probation under any of the following circumstances:
>
> (a) If the person is convicted of a violation of s. 948.05, the person is no more than 48 months older than the child who is the victim of the violation.
>
> (b) If the person is convicted of a violation of s. 948.12, the person is no more than 48 months older than the child who engaged in the sexually explicit conduct.

(Emphasis added.)

Read plainly, the operative clause in subsection (2) above states that if the court otherwise finds the best interest exceptions apply "the court may impose a sentence that is less than the sentence required under sub. (1) *or* may place the person on probation" under certain circumstances (emphasis added). "Or" is the disjunctive, not the conjunctive "and." The language preceding "or" allows the court to impose a sentence of less than three years. The language that follows "or" restricts the court from placing a person on probation unless the factors in (2)(a) or (2)(b) apply. Thus, the plain meaning of the statute is to give a court two separate and independent options of sentencing below the minimum three-years' prison set forth in subsection (1) when the court finds the best interest of the community will be served and the public will not be harmed – a sentence of less than three years, or probation if the defendant is within the 48 month age differential. Controlling principles of statutory interpretation support this conclusion.

A leading case on statutory interpretation is *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110. In *Kalal*, the court emphasized that the statutory text itself is the most important consideration because a court's role is to determine what a statute means rather than determine what the legislature intended. *Id.* ¶ 44.

> It is . . . a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. *It is the enacted law, not the unenacted intent, that is binding on the public*. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.

Id. (emphasis added).

The court explained that statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id.* ¶ 45. This general rule "prevents the use of extrinsic sources of interpretation to vary or contradict the plain meaning of a statute . . .." *Id.* ¶ 51. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* (citations omitted). The court also added:

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation

> to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. *Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage*. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute."

Id. ¶ 46 (emphasis added) (citations omitted).

The most recent case to discuss the language of § 939.617—before *Holcomb*—was *State v. Lalicata*, 2012 WI App 138, 345 Wis. 2d 342, 824 N.W.2d 921. The question was not the same in *Lalicata* as here because that court was actually interpreting the mandatory minimum 25 year prison sentence in a neighboring statute, Wis. Stat. § 939.616. But the court noted that the "surrounding or closely related statute" at issue in this case was part of the context in which it was used. The *Lalicata* court stated:

> The very next statute, Wis. Stat. § 939.617, is entitled, "Minimum sentence for certain child sex offenses." This title contrasts with the prior statute's title because the word "mandatory" is omitted and the statute is directed at "certain" child sex offenses. What's more, this statute expressly allows probation for certain crimes: "[T]he court may impose a sentence that is less than the [minimum], or may place the person on probation, only if the court finds that the best interests of the community will be served and the public will not be harmed." Sec. 939.617(2) (emphasis added). Thus, § 939.617 shows that the legislature knew very well how to create exceptions allowing probation for crimes that ordinarily trigger a minimum sentence of confinement. And when it did so, the legislature helpfully omitted the word "mandatory" from the statute's title.

Id. at ¶ 12.

Indeed, the legislature showed that it knew very well how to create or restrict exceptions when it amended Section 939.617(2), by 2011 Wisconsin Act 272, effective April 24, 2012, to restrict the opportunities for probation to an age differential of 48 months. This amended version is the one applicable in this case. But it is important to note that the legislature did not eliminate the "or" in the statute. Although it struck language at the beginning of that portion of subsection (2) that contained the "or" disjunctive, it restated it again in its rewording of the statute, while eliminating the word "only." The redlined version is as follows:

> **2011 Wisconsin Act**
>
> SECTION 1m. 939.617 (2) of the statutes is renumbered 939.617 (2) (intro.) and amended to read:
>
> 939.617 (2) (intro.) If ~~a person is convicted of a violation of s. 948.05, 948.075, or 948.12, the court may impose a sentence that is less than the sentence required under sub. (1), or may place the person on probation, only if~~ the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record~~.~~, the court may impose a sentence that is less than the sentence required under sub. (1) or may place the person on probation under any of the following circumstances:
>
> SECTION 1p. 939.617 (2) (a) and (b) of the statutes are created to read:
>
> 939.617 (2) (a) If the person is convicted of a violation of s. 948.05, the person is no more than 48 months older than the child who is the victim of violation.
>
> (b) If the person is convicted of a violation of s. 948.12, the person is no more than 48 months

> older than the child who engaged in the sexually explicit conduct.

Case law indicates that "[t]he ordinary meaning of "or" is disjunctive, meaning that a category that is included in a list of categories linked by the term "or" is one alternative choice. *Beaver Dam Cmty. Hospitals, Inc. v. City of Beaver Dam*, 2012 WI App 102, ¶ 10, 344 Wis. 2d 278, 822 N.W.2d 491. By keeping the disjunctive "or" in the reworded statute, the unambiguous, plain meaning of the text is that the court has two options for imposing a sentence less than three years imprisonment, only one of which (probation) is restricted by the age differential.

Again, "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Kalal* 2004 WI 58, ¶ 46. Here, if the statute is interpreted to bar even a lesser prison sentence unless there is no more than four years age differential, then the phrase "the court may impose a sentence that is less than the sentence required under sub (1)" would be complete surplusage. The same could have been accomplished by deleting that entire phrase and instead stating "If the court finds that the best interest of the community will be served and the public will not be harmed and if the court places its reasons on the record, the court may place the person on probation under any of the following circumstances." But that is not how the statute reads, and to interpret it in that manner renders an entire phrase in the statute needless, contrary to long-standing rules of statutory interpretation. *See State v. Dowdy*, 2012 WI 12, ¶ 36, 338 Wis. 2d 565, 808 N.W.2d 691 ("We cannot interpret §973.09(3)(a) in a manner that renders an entire phrase of the statute needless").

It is no answer to claim that the legislature intended the minimum three-year prison sentence to apply in all cases unless the defendant met the age differential. "[I]t is the *enacted law*, not the *unenacted*

intent that is binding on the public." *Kalal*, 2004 WI 58, ¶ 46 (emphasis added). The statute in this case is unambiguous given its plain reading. That reading shows that a court may impose less than the three-year prison term if it is in the best interest of the community and the public will not be harmed.

Silverstein therefore asks this Court to conclude that Section 939.617(2) allows for a sentence of less than three-years' initial confinement in cases like Silverstein's, provide that such a sentence would be in the best interests of the community and the public not harmed.

2. Sentencing Silverstein under the erroneous belief that a mandatory minimum applied was a due process violation based on inaccurate information.

If Silverstein was not subject to the mandatory minimum, he should have a new sentencing hearing on the grounds that he was sentenced based on inaccurate information. *See State v. Travis*, 2013 WI 38, ¶¶ 26-27, 347 Wis. 2d 142, 832 N.W.2d 491.

A defendant has a constitutional right to be sentenced according to true and accurate information. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1, U.S. Const. Amend. V, Wis. Const. Art. 1 § 8. A sentencing court's reliance on inaccurate information when crafting a sentence can violate the defendant's due process right. *See Townsend v. Burke*, 334 U.S. 736, 741 (1948). A criminal sentence based upon materially untrue or inaccurate information, whether caused by carelessness or design, is inconsistent with due process and cannot stand. *Travis*, 2013 WI 38, ¶17. A defendant bears the initial burden to show a due process violation at sentencing that improper information was before the sentencing court and that the court actually relied upon that

information during sentencing. *Tiepelman*, 2006 WI 66, ¶ 26. A court actually relies upon information when in the context of the entire sentencing hearing, the court gave it explicit attention and it formed part of the basis for the sentence. *Travis*, 2013 WI 38, ¶¶ 28, 31.

If the mandatory minimum sentence did not apply in the instant case, Silverstein is just like the defendant in *Travis*, who was sentenced under the erroneous belief that he was subject to a mandatory minimum sentence. *Id.* ¶¶ 26-27. On those facts, *Travis* concluded that the defendant could show inaccurate information at sentencing because "information relevant to the defendant's sentencing, namely a mandatory minimum period of confinement, was inaccurate and was presented to the circuit court at sentencing." *Id.* ¶ 27. In Silverstein's case, the circuit court concluded that a mandatory minimum sentence applied and sentenced him to that minimum. Thus, if no such penalty actually applied, Silverstein was sentenced on inaccurate information like the defendant in *Travis*.

Silverstein can show that the circuit court actually relied on that inaccurate information insofar as it sentenced him in accordance with the believed mandatory minimum. The circuit court expressly recognized that minimum when articulating Silverstein's sentence, saying that no more than that would be required to satisfy its sentencing goal. And, the circuit court rejected the State's argument for more than the mandatory minimum. As such, the court actually relied inaccurate information when sentencing Silverstein, and he should have a new sentencing hearing.

B. Silverstein's constitutional due process right to fair warning notice of criminal penalties was violated when the circuit court applied a mandatory minimum sentence that neither the statute nor any prior judicial decision fairly disclosed at the time of his sentencing.

Assuming that this Court holds that the mandatory minimum provision in Section 939.617 is applicable in cases such as Silverstein's, he submits that application of it in his case was barred by the constitutional due process requirement of definiteness.

Definiteness is also known as the "fair warning doctrine" and is related to the vagueness doctrine which bars enforcement of a statute which fails to provide notice of a prohibited act or fails to provide sufficient guidelines for those who enforce the law. *United States v. Lanier*, 520 U.S. 259, 265-66 (1997). This is what Justice Holmes spoke of as "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *Id.* (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). Due process also bars courts "from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.*; *see also Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964); *Rabe v. Washington*, 405 U.S. 313 (1972) (state obscenity law conviction reversed because it rested on an unforeseeable judicial construction of the statute. "[A]ffected citizens lacked fair notice that the statute would be thus applied").

A party's challenge to the vagueness of a statute involves a two-prong test:

> The first prong of the vagueness test is concerned with whether the statute sufficiently warns persons "wishing to obey the law that [their] . . . conduct comes near the proscribed area." The second prong is concerned with whether those who must enforce and apply the law may do so without creating or applying their own standards.

State v. Pittman, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993) (citations omitted). The vagueness doctrine, "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis. 2d 646, 657, 292 N.W.2d 807 (1980) (quoting *Smith v. Goguen*, 415 U.S. 566, 572–73 (1974)).

A sampling of other cases applying Section 939.617(2) in other counties around the state demonstrates the arbitrary manner in which the statute was enforced from one case to another. Several other circuit courts around the state concluded that when a defendant meets the "best interest" exception, a sentence less than three years in prison can be imposed even if the defendant does not meet the age restrictions required for probation. *See State v. Jason P. Thomas*, Dane County Case No. 2014CF170, *State v. Brandon Dvorak*, Clark County Case No. 2013CF92, *State v. Brandon Neeman*, Langlade County Case No. 2014CF167.

A review of CCAP records reveals many additional cases where defendants received sentences less than three years in prison, who were more than 48 months older than a child and were convicted of one or more counts of possession of child pornography, in violation of § 948.12, with offense dates later than the April 24, 2012, effective date of 2011 Wisconsin Act 272 (which enacted the language at issue). *See, e.g., State v. Steward Stauber, Jr.*, Wood County Case No. 2014CF92 (defendant age 37, offense date 10-17-13, 24-months' initial confinement (IC)); *State v. Barry*

Parson, Wood County Case No. 2013CF119 (age 66, offense date 11-29-12, 12 mos. IC); *State v. Nicholas Zoerner*, Kenosha County Case No. 2013CF1267 (age 22, offense date 3-17-13, 1 year IC); *State v. Adam Juslen*, Outagamie County Case No. 2014CF114 (age 31, offense date 10-31-13, 28 mos IC on 10 counts).

As further evidence of the arbitrary application of Section 939.617, other defendants have continued to receive probation even for offenses committed after the effective date of the Act, although they clearly do not meet the 48 month age restriction of the statute. *See, e.g.*, *State v. Gerald Marello*, Douglas County Case No. 2014CF258 (age 69, offense date 10-20-13, 3 yrs prison stayed, 10 yrs probation); *State v. Steven Lindholm*, Dunn County Case No. 2013CF313 (age 57, offense date 10-20-13, sent withheld, 4 yrs probation); *State v. Paul Gill*, Kewaunee County Case No. 2012CF48 (age 43, offense date 9-10-12, 3 yrs prison imposed and stayed,5 yrs probation); *State v. Allen Doering*, Outagamie County Case No. 2014CF414 (age 32, offense date 3-31-14, 3 yrs prison stayed, 8 yrs probation); *State v. Daniel Servais*, Rock County Case No. 2012CF2215 (age 66, offense date 7-31-12, sentence withheld, 7 yrs probation).

Clearly, at the time that Silverstein was sentenced, Wis. Stat. § 939.617 was statute that was interpreted differently depending upon the county or judge involved. That is the very sort of arbitrariness precluded by the constitution. This is indicative that the statute's language did not sufficiently warn persons about the penalties that will be imposed or provide clear guidelines for those who enforce and apply the law. The application of an interpretation of Section 939.617(2) contrary to the one proposed by Silverstein—*viz.* one reading it to require a mandatory minimum penalty—thus violated Silverstein's constitutional due process. He should have a new sentencing hearing at which the court would be allowed to impose a penalty other than three years'

initial confinement, provided that the best-interests exception is met.

CONCLUSION

In pursuit of a search warrant that relies on hearsay from an informant, police must offer the reviewing magistrate "a substantial basis for crediting the hearsay [that] is presented." *Jones*, 362 U.S. at 272; *see also Gates*, 462 U.S. at 239 ("[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." (quoting *Jones*, 362 U.S. at 271)). While the standard for reviewing a magistrate's decision to issue a warrant is deferential, a reviewing court "must still insist that the magistrate perform his [or her] 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Aguilar*, 378 U.S. at 111.

As detailed above, there were significant problems with the search warrant affidavit submitted to the magistrate in the instant case. The affiant's failure to adequately establish the reliability of its informant or the information provided by that informant eviscerates probable cause. The warrant in the instant case should not have issued because the totality of the circumstances then before the magistrate did not offer a substantial basis for crediting Tumblr's hearsay statements.

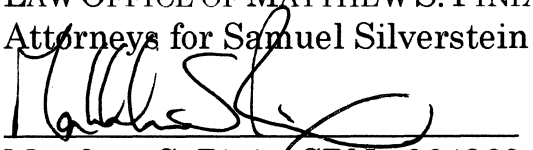
Silverstein therefore asks this Court to conclude that the search of his home was unconstitutionally done insofar as the warrant authorizing the search was issued on less than probable cause and reverse the circuit court's denial of Silverstein's suppression motion.

In the alternative, he asks this Court to remand his case to the circuit court for resentencing, at which time the circuit court can determine whether the best interests of the community would be served by

imposition of a penalty on Silverstein less than three-years' initial confinement.

Dated this 5th day of October, 2016.

LAW OFFICE OF MATTHEW S. PINIX, LLC
Attorneys for Samuel Silverstein



Matthew S. Pinix, SBN 1064368

CERTIFICATION

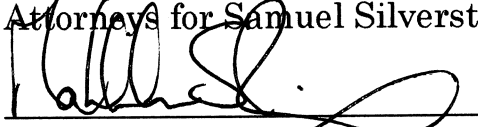
I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 9,339 words, as counted by the commercially available word processor Microsoft Word.

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

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

Dated this 5th day of October, 2016.

LAW OFFICE OF MATTHEW S. PINIX, LLC
Attorneys for Samuel Silverstein



Matthew S. Pinix, SBN 1064368

CERTIFICATION OF APPENDIX CONTENT

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

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

Dated this 5th day of October, 2016.

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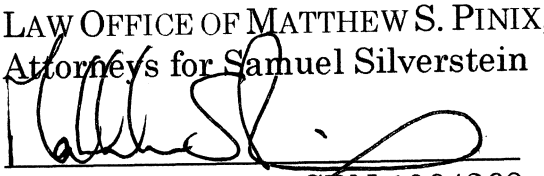

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CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Short Appendix will be delivered to a FedEx, a third-party commercial carrier, on October 5, 2016, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, within three calendar days. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 5th day of October, 2016.

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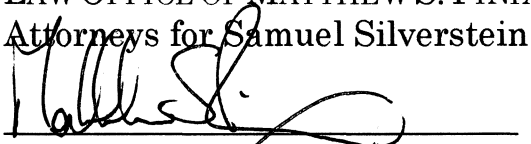

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