STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,	)	
	)	
Plaintiff-Respondent,	)	
	)	
-vs-	)	Appeal No. 2016 AP 1538-CR
	)	
	)	
GUY S. HILLARY,	)	
	)	
	)	
Defendant-Appellant.	)	

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appeal of the denial of the Motion to Suppress and Judgment of Conviction entered

Walworth County Circuit Court Case No. 15 CF 167

The Honorable David M. Reddy Presiding

Respectfully Submitted:

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STATEMENT OF THE ISSUES

1. Do electrical usage records enjoy any expectation of privacy, either under the Federal Constitution or the Wisconsin Constitution?

The trial court answered NO.

2. If records are obtained via a subpoena under Wis. Stat. § 968.135, regardless of the nature of those records, are they nevertheless protected by statute if there is a violation of the statute, specifically, if the records were obtained without the requisite probable cause for the subpoena?

The trial court answered NO.

3. If a reviewing court quashes a subpoena for lack of probable cause pursuant to Wis. Stat. § 968.135, does it follow that the search warrant that was granted due to the information secured from the subpoena should also be suppressed, under a reading of *State v. Popenhagen*, 309 Wis.2d 601, 749 N.W.2d 611 (2008)?

The trial court answered NO.

4. In evaluating whether probable cause existed to grant a search warrant, may a court consider what an affiant could have, should have, or would have included in the affidavit?

The trial court answered YES.

STATEMENT ON ORAL ARGUMENT

The defendant-appellant believes oral argument may be helpful in this case. Pursuant to Rule 809.22(2)(b), while the briefs may develop and explain the issues, arguments pertaining to interpretation of *Popenhagen* may be better elucidated in oral argument.

STATEMENT ON PUBLICATION

Pursuant to Rule 809.23(1)(b), the defendant-appellant believes publication of this case would clarify existing law, specifically with regards to the issue of whether *Popenhagen* can be extended to apply to search warrants. This is not a routine application of law to a common fact situation.

STATEMENT AND FACTS OF THE CASE

On July 13, 2014, law enforcement received an anonymous tip that the defendant, Guy S. Hillary, had a large marijuana growing operation. (R1). The tip allegedly came from an individual who was at Mr. Hillary's residence to repair a vehicle. The tip did not include any other details, such as when the anonymous tipster observed this grow operation, at what specific location, or how he knew the defendant.

Based on the anonymous tip, a subpoena of the defendant's residence's electrical usage records was applied for and was granted on June 26, 2014, pursuant to Wis. Stat. § 968.135. (App. 102-103; App. 104-105). The subpoena yielded records that noted the defendant's residence used significantly higher than average kilowatts per month. Information regarding the defendant's electrical usage was included in an affidavit for a search warrant ((App. 107-109), which was applied for on July 7, 2014, granted on the same date, and was ultimately executed on July 9, 2014. (App. 110-112). Various items of

evidence were seized, including numerous marijuana plants, which contained THC, as well as other drug paraphernalia. A criminal complaint was filed and the defendant was charged with Manufacturing THC, Possession of THC with Intent to Deliver, and Possession of Drug Paraphernalia. (R1).

Hillary, via his first attorney, filed a Motion to Suppress the Search Warrant for lack of probable cause on September 9, 2015. (R9). A stipulation for substitution of attorney was filed (R12), and successor counsel filed a supplemental Motion to Suppress Evidence from Subpoena (R15), pursuant to *State v. Popenhagen*, 309 Wis.2d 601, 749 N.W.2d 611 (2008), on November 9, 2015, upon grounds that the subpoena lacked probable cause to issue. Additional authorities discussing the relevant case law were filed by the parties. (R16-R19). A motion hearing was held by the trial court on November 23, 2015, and the court seemed to have held that the subpoena lacked the requisite level of probable cause to issue, as it was based solely on the anonymous tip, which should be excised. (R42 at 17-18). However, the parties were asked to brief the issue of whether electrical usage records enjoyed any expectation of privacy or were protected by a right to privacy. (R42 at 18-24).

On January 15, 2016, a second hearing was conducted by the trial court. (R43). After considering the arguments made on the record and in the briefs, the trial court denied Hillary's motion, finding that electrical usage records were distinguishable from bank records, which were the subject of suppression in *Popenhagen.* (R43 at 37-38). The trial court further held that electrical usage records did not enjoy any expectation of privacy, and in holding as such, determined that the police would have eventually obtained

information about the defendant's high electricity usage, as it likely would have been publicly available on the internet. (R43 at 38). The circuit court issued a written order denying the defendant's motion on March 11, 2016. (R26). An Interlocutory (permissive) appeal was applied for, which was denied by this Court on April 22, 2016. (R28). Under the defendant's direct appeal rights, the defendant-petitioner requests this Court to review and reverse the Circuit Court's decision, suppressing for use all evidence seized pursuant to the subpoena and search warrant in this case.

ARGUMENT

II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE INFORMATION ALLEGED IN THE WARRANT AFFIDAVIT WAS DERIVED FROM AN INVALID SUBPOENA IN VIOLATION OF WIS. STAT. § 968.135 BECAUSE IT LACKED PROBABLE CAUSE TO ISSUE.

Wis. Stat. § 968.135 reads,

> Upon the request of the attorney general or a district attorney and upon a showing of probable cause under s. 968.12, a court shall issue a subpoena requiring the production of documents, as specified in s. 968.13 (2). The documents shall be returnable to the court which issued the subpoena. Motions to the court, including, but not limited to, motions to quash or limit the subpoena, shall be addressed to the court which issued the subpoena. Any person who unlawfully refuses to produce the documents may be compelled to do so as provided in ch. 785. This section does not limit or affect any other subpoena authority provided by law.

Wis. Stat. § 968.135 protects the interests of persons whose documents are sought in addition to protecting the interests of the person on whom a subpoena is served. The statute prevents unwarranted fishing expeditions. *State v. Popenhagen*, 309 Wis. 2d 601, ¶25 (2008). "The objectives of § 968.135 are to limit strictly the conditions under which a subpoena may be obtained in order to protect persons whose records are being sought. The

enumerated motions in § 968.135 make clear that when the State fails to comply with the statute's strict requirements, the State's subpoena may be quashed or limited, removing the State's ability to obtain the documents demanded in the subpoena and their use in evidence. *Id*., at ¶84."

At issue in this case is the extent and reach of the statute, and whether it affords protections to defendants beyond any expectations of privacy provided by the federal or state constitutions. Under the legal precedent established from *Popenhagen*, it follows that the statute affords strict and specific protection to defendants for any records obtained in violation of the statute.

h) The Subpoena Was Issued Without Probable Cause.

The first step in the analysis for this Court's review is to examine the subpoena at issue in this case, which yielded information that was utilized by law enforcement to secure a search warrant. The subpoena affidavit (App. 104-105) fails to establish the reliability or veracity of the tip from the anonymous informant, and therefore the subpoena (App. 102-103) should not have been granted. The trial court seemed to have ruled that the subpoena lacked probable cause to issue. (R42 at 17-18). For good measure, counsel has included a discussion of probable cause in regards to the subpoena below.

In evaluating any evidence provided by "persons supplying hearsay information," a court must evaluate the veracity of the hearsay declarant as well as the "basis of the declarant's knowledge." *State v. Popp,* 357 Wis.2d 696, 715 (2014). A court must be able to evaluate either the credibility of the declarant or the reliability of the particular information furnished. *Id.*

Credibility is commonly established on the basis of the declarant's past performance of supplying information to law enforcement. *Id*. Even if this cannot be established, the facts still may permit the warrant-issuing officer to infer that the declarant has supplied reliable information on a particular occasion. *Id.* The reliability of the information may be shown by corroboration of details; this corroboration may be sufficient to support a search warrant. *Id*. "The wealth of details communicated by a declarant, for example, may be sufficient to permit an inference that the basis of the declarant's knowledge is sound." *Id*.

Reviewing the subpoena affidavit, it establishes that an anonymous tip was received on June 13, 2014. (App. 104). It does not state when the anonymous informant allegedly went to Hillary's residence. The anonymous informant does not describe the defendant's property or state the defendant's address. He merely states that he was shown a large marijuana grow operation in a garage on Hillary's "property." He further stated that there were several grow rooms with several large marijuana plants. There were no additional details provided, such as other equipment seen, description of the plants or of the rooms, any information about the bulbs used, or other details that would lend credibility to his observations. No details were given about the garage, number or descriptions of the plants, other objects observed, design, room, or layout information, or any other details that would establish veracity to the claim.

Furthermore, law enforcement had to "lookup" the defendant's address, as the caller did not provide any information about where his property was located. Essentially, there was no information provided by the anonymous informant that would corroborate

that he had even been to the property – he could have simply been stating what he heard based on rumor or hearsay. No details were disclosed as to how he knew the defendant, for how long, or how many times he had been to the residence. The affidavit only establishes that he had been there to fix a vehicle. But the anonymous tipster cannot even tell the address or general location of the defendant's residence. In conclusion, there were no specific details as to time, place, basis of knowledge, or anything that would lend credibility to the claims made by the anonymous tipster.

The subpoena lacked probable cause to issue. The trial court implicitly made such findings regarding the subpoena during the hearings. (R42 at 18).

i) Because the Information Secured from the Subpoena was Unlawfully Obtained, the Information in the Warrant Affidavit Pursuant to the Subpoena must be Excised.

Because of the utter lack of sufficient detail to establish veracity or reliability of the anonymous tip, the subpoena lacked probable cause to issue. Thus, under *Popenhagen*, any information in the subsequent search warrant affidavit must be excised.

In *Popenhagen*, the State sought to use the defendant's incriminating statements, which were derived from bank records obtained by subpoena, which was nevertheless granted in violation of the statute. The *Popenhagen* court remarked, "If a person were permitted to bring a motion to quash the subpoena for bank documents unlawfully obtained but not permitted to bring a motion to suppress incriminating statements derived directly from the unlawfully obtained bank documents, the person would not get the full benefit of the protections of the statute, and the underlying objectives of the statute would be defeated. *Id*., at ¶ 86. The *Popenhagen* Court went on to explain that, "it is absurd and

unreasonable to allow the State to use incriminating statements derived directly from such a subpoena and to gain an advantage by violating the statute." *Id*., at ¶87.

In Hillary's case, the trial court seemingly held that the subpoena of the defendant's electricity records lacked the requisite level of probable cause to be issued (in violation of the statute), as it was issued solely based on an anonymous tip from June 2014, which lacked indicia of reliability or veracity. (R42 at 17-18). As a result, the court implicity quashed the subpoena, as it indicated that the paragraph containing the tip should be excised. Without any tip information, the subpoena lacked probable cause to issue. Similarly, the trial court also held that the same anonymous tip from June 2014, which was used within the warrant affidavit, should be excised from the warrant upon a probable cause analysis. However, the trial court fell short of excising the electrical usage information from the subpoena, although it should have done so under *Popenhagen*. This Court must review the trial court's ruling, because to hold otherwise would render the statute meaningless and would be contrary to *Popenhagen*.

The State may argue that the facts in this case are distinguishable from *State v. Popenhagen*, 309 Wis.2d 601 (2008), in that the subpoena involves the defendant's electrical records instead of arguably more private records, such as bank statements, which enjoy a right to privacy. The State may also refer to *United States vs. Miller*, 425 U.S. 435 (1976). In *Miller*, the court held that there was no privacy interest in third-party bank records. However, the Supreme Court was only interpreting the Fourth Amendment to the Federal Constitution and statutes.

However, our jurisdiction is Wisconsin, which on top of the Federal Constitution, defendants enjoy rights afforded to them by statute and the state Constitution. Therefore, this Court should consider the Wisconsin Supreme Court's ruling in *State v. Popenhagen*, 309 Wis.2d 601 (2008), as it is controlling authority.

This case, like *Miller*, involved the suppression of bank records, which ultimately were held to be subject to suppression, once our Supreme Court applied such a remedy to Wis. Stat. § 968.135. As discussed in the case, the objective of the statute is "to allow the State to acquire and use documents while also ensuring that the State meets statutory requirements that protect the privacy interests of persons affected by the subpoena." *Id*., at 639. Hence, Mr. Hillary's privacy interests in any records sought by subpoena within our state are protected by the statute, not the Fourth Amendment. As we all know, the Federal Constitution acts as a floor, not a ceiling. The Fourth Amendment was not discussed in *Popenhagen*, as it is not relevant to the analysis because statutory interpretation is at the crux of the analysis. Wis. Stat. § 968.135 essentially creates the protection to the defendant, as everything obtained under a subpoena enjoys a privacy right.

Under the statute and *Popenhagen*, what governs within our jurisdiction is whether there was probable cause for the issuance of the subpoena. In Mr. Hillary's case, since there was not a showing of probable cause, the subpoena must be quashed under the statute and any suppression is an available remedy for evidence obtained as a result. If the State was correct about there being no privacy rights to third-party records such as those in *Miller*, then the *Popenhagen* court would not have ruled the way it did, allowing suppression of bank records and subsequent evidence obtained as a result of their use.

c. Even if the Electricity Usage Information Derived from the Subpoena is not Excised, the Warrant Affidavit Fails to Establish Probable Cause. Moreover, the Affidavit Fails to Lay the Proper Foundation for why Higher Electricity Usage is Indicative of an Indoor Marijuana Grow Operation.

In reviewing whether there was probable cause for the issuance of a search warrant, a Court accords great deference to the determination made by the warrant-issuing magistrate. *State v. Ward*, 231 WIs.2d 723, 734-35 (2000). The magistrate's determination will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding. *Id*. It is the duty of the reviewing court to ensure that the magistrate had a substantial basis to conclude that the probable cause existed. *Id*.

Also, standing alone, evidence of a significantly higher electricity usage is not sufficient to issue a search warrant. *See United States v. Field*, 855 F.Supp. 1518, 1520 (W.D.Wis.1994); *State v. Loranger*, 250 Wis.2d 198, 212 (2001).

Even if this Court does not decide to excise paragraphs (e), (f), and (g) of the warrant affidavit (App 108-109), the warrant affidavit still lacked probable cause to issue. Here, the reviewing judge(s) did not have a substantial basis to conclude that probable cause existed, for either the subpoena or the warrant. Reviewing the warrant affidavit, it establishes the electrical usage records for the defendant's residence at W1434 County Road B, Bloomfield, WI, from January 2013 to June 2014. It also compares these records with the records of two neighboring properties at W1434 and W1442, and concludes that the defendant's residence utilizes significantly higher electrical power in terms of kilowatts. It further attempts to establish that according to Jeff Hale of CEASE, because the average monthly usage of a single family residence in Wisconsin is between 750 to 800

kilowatts per month, the defendant's electrical usage is indicative of an indoor marijuana grow operation.

The statement regarding Jeff Hale of CEASE in paragraph (j) of the warrant affidavit lacks foundation to support probable cause. (App 109). First, this is a conclusory opinion without the proper foundation in the affidavit. Nothing in the affidavit discusses other factors such as heat source and lifestyle that may affect such statistics, and no other documentation was submitted with the affidavit to establish reliability of the expert's opinion. Finally, the affidavit does not even establish why – that is, the connection or nexus between the indoor cultivation of marijuana and the need for heat or strong lights (and as a result, more electricity) high electrical usage is indicative of a grow operation. There are also no details of what CEASE specifically is or how Jeff Kale of CEASE is qualified to render such an opinion.

d. Review of Precedent from Other Jurisdictions Support the Defendant's Analysis of Probable Cause in this Case.

At the trial court level, the State cited *State v. Kluss*, 125 Idaho 14 (App.1993). In that case, the Court interpreted the Idaho Constitution and reached a conclusion that their constitution does not preclude a utility company from voluntarily disclosing electrical records if it so chooses without a subpoena.

However, in Wisconsin, there is a subpoena procedure that requires a showing of probable cause pursuant to Wis. Stat. § 968.135. This is the analysis that this Court should conduct – whether the strict statutory requisites to issue a subpoena were adhered to.

Yet, even if the *Kluss* opinion the State cited is considered by this Court, it is helpful in analyzing probable cause in this case: "High power usage may be caused by any one of

the numerous factors: hot tubs, arc welders, poor insulation, ceramic or pottery kilns, or indoor gardening under artificial lights." *Kluss* at 21. This is precisely one of the main arguments of the defendant's motion to suppress the search warrant. The warrant affidavit lacked probable cause because, as previously raised, there are no facts in the affidavit to establish why high power consumption is indicative of a marijuana grow operation, when in fact, as the State cites from *Kluss*, could be due to numerous other factors. Additionally, the affidavit relies on expert testimony to establish that high power consumption is indicative of a marijuana grow operation. However, this was done in a conclusory fashion because there are no facts from the expert about his training and experience or any facts to establish any foundation for this opinion.

Finally, there are no facts in the affidavit for either the subpoena or warrant that establish reliability or veracity of the informant. For example, the informant did not give any information about the number or presence of high-energy grow lights. Nor did the officers corroborate the presence of marijuana by any direct investigative means – such as garbage picks (for the detection of marijuana plant material, residue, evidence of grow equipment and other organic materials/solvents), controlled buys, surveillance, or other witness' statements. There is no direct corroboration of what the informant told law enforcement before they secured a subpoena.

On the other hand, in *Kluss*, for example, the informant specifically provided information that the defendant was using "high energy grow lights" and also had on his property to divert suspicion of his electrical consumption with the following: an arc welder, electric heat, and a Jacuzzi. He provided information over the course of several calls with

very specific details. These details were extensively corroborated by law enforcement in the case, with an investigation including:

- A review of a blueprint of Kluss' building and discussion with the county building inspector to verify the descriptions given by the informant, regarding a venting system.
- Checking Kluss' utility application for power at the rural site, which indicated use of an arc welder, electric heat, and sauna/Jacuzzi, all high energy appliances.
- Corroboration of information about the construction of a trench between a house and pole barn to hide an electrical cable, which was visually verified by law enforcement
- Law enforcement picking up garbage from outside Kluss' residence on two separate occasions, which revealed minute amounts of fresh and old plant material, which were found to be marijuana.

Kluss, 867 P.2d at 256.

Conversely, no such investigation was done here to corroborate the informant's tip.

e. The Warrant Nevertheless Lacks Probable Cause Because the Anonymous Tips from June 2014 and November 2012 Both Lack Indicia of Reliability and Veracity. The Crime Stoppers tip from 2012 is also too Stale to Establish Probable Cause, even with the Electrical Usage Information.

In evaluating any evidence provided by "persons supplying hearsay information," a court must evaluate the veracity of the hearsay declarant as well as the "basis of the declarant's knowledge." *State v. Popp*, 357 Wis.2d 696, 715 (2014). A court must be able to evaluate either the credibility of the declarant or the reliability of the particular information furnished. *Id.*

Credibility is commonly established on the basis of the declarant's past performance of supplying information to law enforcement. *Id*. Even if this cannot be

established, the facts still may permit the warrant-issuing officer to infer that the declarant has supplied reliable information on a particular occasion. *Id.* The reliability of the information may be shown by corroboration of details; this corroboration may be sufficient to support a search warrant. *Id*. "The wealth of details communicated by a declarant, for example, may be sufficient to permit an inference that the basis of the declarant's knowledge is sound." *Id*.

Similar to the trial court's findings regarding the June 2014 tip, the November 2012 tip should also be excised because it lacks any indicia or reliability or veracity. The November 2012 tip merely states that an anonymous tip was received in which it was claimed the defendant had an ongoing marijuana grow operation. (App. 108). This tip lacked any indicia of reliability nor was it corroborated in any fashion. Therefore, the tip must be excised, as information obtained from an illegal search must be excised from the affidavit made in support of the search warrant. *State v. Popp*, 357 Wis.2d 696, ¶26 (2014).

Also, the 2012 tip is stale. "Although search warrants may not rest on stale evidence, whether evidence is stale is not determined by counting the time between the occurrence of the facts relied upon and the issuance of the warrant." *State v. Loranger*, 250 Wis. 2d at 212 (citations omitted). Timeliness depends on the nature of the underlying circumstances, and because marijuana growing is of a continuous nature, greater lapses of time are justified. *Id*.

Paragraph (h) of the affidavit (App. 109) establishes that a Crime Stoppers tip came into the Bloomfield Police Department with information that the defendant resides

at W1434 County Road B and has an ongoing marijuana grow operation. This was not corroborated by electrical records, as records from only January 2013 were pulled.

With both tips being excised from the warrant affidavit, for lacking in reliability, veracity, or general credibility, as well as staleness, all that remains in support of the warrant is the electrical usage information obtained via subpoena, paragraphs (c) through (g). Standing alone, evidence of a significantly higher electricity usage is not sufficient to issue a search warrant. *See State v. Loranger*, 250 Wis.2d 198, ¶23 (2001) (citing *United States v. Field*, 855 F.Supp. 1518, 1520 (W.D.Wis.1994). In Hillary's case, the information the reviewing magistrate relied on was the defendant's residence's use of significantly higher electricity. Such information is not enough to sustain a probable cause finding according to case law.

f. In Denying the Defendant's Motion to Suppress, the Trial Court Erred When it Found What Law Enforcement Could Have, Would Have, or Should Have Included in the Affidavit Was Relevant to the Analysis of Whether the Warrant had the Requisite Level of Probable Cause to Issue.

The standard of review for a challenge to the issuance of a search warrant requires a court to determine "whether the magistrate was apprised of sufficient facts to excite an honest belief in a reasonable mind that the object sought is linked with the commission of a crime." *Bast v. State*, 87 Wis.2d 689, 692–93, 275 N.W.2d 682 (1979). "The magistrate's finding must stand unless the proof is clearly insufficient.... The evidence necessary for a finding of probable cause is less than that required at a preliminary examination or for a conviction." *Id.*

At the motion hearing, law enforcement testified that, although they did not seek to obtain electricity usage information via other means besides the subpoena, such information may have been publicly available via the internet. (R43 at 22-24). Such testimony was speculative, as no showing was made as to what information specifically could or would have been shown. It was also irrelevant. Essentially, the State made an argument as to after-the-fact what other information it could have placed in the affidavit. However, such information was never placed within the four-corners of the affidavit, and as such, the reviewing magistrate was not presented with any alternative source of information regarding the defendant's significantly higher electricity usage.

If such testimony is permissible and relevant to the analysis, law enforcement can always speculate after-the-fact what else it could have done to justify a search, seizure, or arrest. However, such after-the-fact offers of proof are irrelevant to any inquiry as to whether a defendant's rights were violated at the time the warrant was issued. A "would've, could've, should've" argument should be completely disregarded by this Court. This information was never placed within the warrant affidavit, and is therefore irrelevant to the analysis. The trial court erred in considering the availability of such information.

g. Even if This Court Believes that After-the-Fact Information is Relevant, that Information is Distinguishable Because the High, Low, and Average amounts of Electricity Usage do not Demonstrate an Ongoing Marijuana Grow Operation.

The warrant affidavit in this case lists the defendant's electricity usage from a period between January 2013 to June 2014, and compares it to two other neighboring residences. (App. 107-109). If it is speculated that law enforcement had not obtained the

information via the subpoena statute, but rather, looked up the defendant's electricity information that was publicly available online, it may have discovered the defendant's residence's high, low, and average kilowatt consumption between June 2013 and June 2014. Law enforcement also may have seen similar information for the neighboring residences.

This information is not factually as thorough or accurate as the information in the affidavit to show that an ongoing marijuana operation is in place, which was what was initially reported to law enforcement. With simply high, low, and average kilowatt consumption, the reviewing magistrate would have been deprived of month-to-month totals that showed a continuing operation, as indicated monthly in each year, in the warrant affidavit. (App. 108-109). This is especially important when contrasted to month-to-month totals of neighboring residences. For example, it can be assumed that in certain months, energy consumption will be higher due to air conditioning or perhaps for heating, depending on the system. The reviewing magistrate would not have been able to see such numbers in their respective months, in comparison to other households nearby, had the internet information been included – he would have only seen that the defendant's residence has high average kilowatt usage for the year. Without any specific information as to what sort of appliances or electronics, etc., a target residence may or may not have or use power for, such average kilowatt usage is simply not enough to sustain a probable cause finding, as the *Loranger* case dictates.

h. The Trial Court Erred Because There is no Controlling Authority that Holds that Electricity Records do not Enjoy a Privacy Right nor is There

any Controlling Authority that Distinguishes Bank Records from Electricity Records.

The trial court held generally that there was no privacy interest in electricity records, and that such records were distinguishable from the records in *State v. Popenhagen*, which were bank records. 309 Wis.2d 601 (2008). (R43 at 37-38). However, the trial court's ruling cannot be squared with the proposition from *Loranger*: that evidence of significantly higher electricity usage is not sufficient to issue a search warrant. *Id*. at ¶23. To hold to the contrary would produce absurd results, with warrants being issued against all households with higher than average electricity consumption, and resulting in a trampling of citizen's rights to be free from government entanglements.

Regardless of the trial court's ruling on what type of records enjoy a right to privacy, there is no controlling authority in our State that holds electricity records do not enjoy protection. While the Federal Constitution does not appear encompass such privacy rights, any records obtained via Wis. Stat. § 968.135 enjoy the protections of the statute, as clearly expressed by the Supreme Court of Wisconsin in *Popenhagen*. *Popenhagen*, ¶86. Because law enforcement obtained the defendant's electricity records via the statute, it was required to follow the strict requirements of the statute – a showing of probable cause. Because it did not do so, it would be a violation of state law to allow the State to nevertheless benefit from the violation with evidence that was illegally obtained from a warrant that lacked probable cause.

If the Court were to adopt the State's position, essentially the State could subpoena or obtain everyone's electric records and secure warrants for all households simply on this basis. This would lead to absurd results, as the probable cause standard requires much more

and is determined on case-specific facts. To hold otherwise in this case would move our State increasingly more towards a surveillance state in violation of the Fourth Amendment.

CONCLUSION

The evidence in this case must be suppressed, in summary, because, all of the defendant's electrical usage information should be excised from consideration due to an invalid subpoena. Even if this Court does not excise such information, the warrant affidavit still lacks probable cause because the anonymous tips from July 2014 and November 2012 both lack indicia of reliability or veracity, as there was no corroboration of such details. Because electrical usage records alone do not establish probable cause, the warrant must be quashed and the resulting evidence must be suppressed.

For the foregoing reasons, the Defendant-Appellant respectfully requests this Court to vacate his conviction, reverse the trial court's denial of his motion to suppress, and remand the matter for further proceedings, or other relief as deemed appropriate by this Court.

Dated this ____ day of December, 2016.

Respectfully Submitted:
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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 12 point type and the length of the brief is _____ words.

Dated this ___ day of December, 2016.

Respectfully submitted,

ANEEQ AHMAD, ATTORNEY AT LAW

By:_____

Aneeq Ahmad
State Bar No. 1074512
Attorney for Defendant-Appellant

CERTIFICATION AS TO CONTENTS OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 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 or 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 ___ day of December, 2016.

Respectfully submitted,

ANEEQ AHMAD, ATTORNEY AT LAW

By: _____

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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 ___ day of December, 2016.

Respectfully submitted,

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CERTIFICATE OF DELIVERY AND PROOF OF SERVICE

I hereby certify that this brief and appendix was served upon the opposing party **Charlotte Gibson, Office of the Attorney General, P.O. Box 7857, Madison, WI, 53707-7857**, by mail on December 22, ___, 2016.

Dated this ___ day of December, 2016.

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By: _____

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APPENDIX
Guy S. Hillary
16 AP 1538-CR