STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

No. 2020AP001302-CR

STATE OF WISCONSIN,
Plaintiff-Respondent

v.

TODD DI MICELI,
Defendant-Appellant

ON APPEAL FROM AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN DODGE COUNTY CIRCUIT COURT, THE HONORABLE MARTIN DEVRIES, PRESIDING

REPLACEMENT BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

Law enforcement obtained a subpoena under Wisconsin Statute §968.375, in which subsection (6) directs that the subpoena shall be served within five days of its date of issuance. The subpoena was not executed until nine days later. Under Wisconsin Statute §968.375(6), is "shall" mandatory or directory? If "shall" is mandatory, is the delayed execution of the subpoena a fundamental error or a technical one? If it is a fundamental error, does it substantially affect the rights of Mr. Di Miceli in this case?

The circuit court in this case answered that "shall" under Wisconsin Statute §968.375(6) is directory and not mandatory, and that this was a technical error. Additionally, it held that because probable cause still existed at the time of the execution of the subpoena, this delay did not substantially affect the rights of Mr. Di Miceli.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication of this case is requested as this issue has not been addressed for Wisconsin Statute §968.375. Additionally, given this is a new issue for the Court to review, oral arguments are requested.

STATEMENT OF THE CASE AND FACTS

The facts in this case are not in dispute. (R. 29:1, App. To Appellant's Br. 28.) On September 4, 2015, Special Agent in Charge Jesse Crowe with the Department of Criminal Investigation (hereinafter "DCI") was allegedly able to successfully download four files from an IP address of 68.190.154.93. (R. 22:1, App. 20.) Special Agent Crowe viewed all of these files and opined that they were images of child pornography. *Id.* Special Agent Crowe then performed a query on the IP address and discovered that the IP address was registered to Charter Communications. *Id.* On October 23, 2015, Special Agent Crowe secured a subpoena through the Attorney General's Office requesting activity on the IP

address during specific periods of time, as well as the subscriber name and address. *Id.*

On October 23, 2015, the Honorable David Flanagan, a Dane County judge, signed the subpoena directed at Charter Communications. *Id.* The document titled Findings and Orders re: Subpoena contains a section entitled Orders for Issuance, Service, and Return of Subpoena, and under that section, the Court ordered that DCI serve the subpoena within five (5) days of the date of the order. *Id.* Special Agent Jesse Crowe sent a facsimile transmission to the Charter Communications Legal Department at 11:07am on November 2, 2015, approximately nine (9) days after the date the subpoena was signed. *Id.* Charter Communications provided information via email to Special Agent Crowe on November 3, 2015. (R. 22:1-2, App. 20-21.) No evidence has been provided that Charter Communications would have otherwise surrendered information without a subpoena. This information included the account number, subscriber

name, postal address, and billing address, as well as IP logs associated with the IP address in the subpoena. (R. 22:2, App. 21.) That subscriber was identified as the defendant in this matter, Todd Di Miceli, and the service address was his residence in Hustisford, Wisconsin. *Id.*

Between November 13, 2015 and January 8, 2016, surveillance of Mr. Di Miceli's home was conducted, and additional evidence was gathered. *Id.* On January 27, 2016, Special Agent Raymond Gibbs of DCI applied for a search warrant to search the premises at Mr. Di Miceli's residence in Hustisford for any items that may contain evidence of child pornography. *Id.* In the application for the search warrant, Special Agent Gibbs listed the day in which the subpoena was issued and the date that Charter Communications returned data to Special Agent Crowe, but the date on which the subpoena was served upon Charter Communications was omitted from the warrant. *Id.* In that warrant, under the section titled Facts Supporting Issuance of Search Warrant,

Special Agent Gibbs lists Mr. Di Miceli's name and address, which is information gained from Charter Communications' compliance with the subpoena. *Id.*

The search warrant was signed by the Honorable Brian Pfitzinger on January 27, 2016. *Id.* That warrant was executed on January 28, 2016. *Id.* Police performed a search of Mr. Di Miceli's home, where numerous hard drives, computers, and other electronic storage devices were seized. *Id.* Upon searches of the equipment, Special Agents found media that was opined to be child pornography on various devices. *Id.* Mr. Di Miceli was charged with six (6) counts of Possession of Child Pornography in Dodge County. *Id.*

Mr. Di Miceli filed a motion to suppress the subpoena and evidence obtained as a results of the failure to properly execute the subpoena on September 28, 2018 with the circuit court arguing that the term "shall" was mandatory, and therefore the subpoena was illegally executed. (R. 22:1-4, App. 20-23.) The State filed its motion to deny the

motion to suppress on April 2, 2019, asking the court to deny the motion without a hearing. (R. 27:1-4, App. 24-27.) It argued that the term "shall" was directory and was therefore a technical error under Wis. Stat. §968.375(12). (R. 27:3, App. 26.) Mr. Di Miceli was further permitted to provide a response to the State's motion to deny, which provided that not only was "shall" mandatory, but that it was a fundamental error and that it substantially affected Mr. Di Miceli's rights. (R. 28:1-8, App. 28-35.)

On May 9, 2019, the trial judge issued a written decision denying Mr. Di Miceli's Motion to Suppress the subpoena. (R. 29:6, App. 41.) In its reasoning, the circuit court found that the term "shall," as it is used in Wis. Stat. §968.375(6), was directory instead of mandatory based on factors laid out in *State v. R.R.E.*, and because it was directory, no remedy was required. (R. 29:5, App. 40.) The court further assessed that because it was directory, this was a technical error and no remedy

was required under Wis. Stat. §968.375(12). *Id*. The court explained:

> "In the case at hand, after consideration of these factors, the Court finds that the word 'shall' is directory and the motion to suppress is to be denied. The purpose of the statutory scheme is to facilitate easier acquisition of electronic records. Consequences of making it mandatory include potential dismissal of serious charges. There are no penalties set forth for a violation of the 5-day service provision. Further support for denial of the motion is provided by §968.375(12) which states evidence 'shall not be suppressed because of technical irregularities or errors not affecting the substantive rights of the defendant.' There is no dispute on whether probable cause existed for issuance of the subpoena. The evidence (alleged child pornography computer) [sic] did not change. Di Miceli argues that an "expired subpoena" gave rise to an illegal search which affected his substantive rights. However, since the Court has found the 5-day provision to be directional, not mandatory, this was not an illegal search and can be considered a technical irregularity. This case differs from *State v. Poppenhagen*, 309 Wis.2d 601 (2008) where lack of probable cause implicated substantive rights."

Id. The facts were provided in written motions to the trial court and have not been contested by the State. No motion hearing took place.

STANDARD OF REVIEW

This Court is being asked to review an order denying a motion to suppress as a question of constitutional fact. The trial court's conclusions or interpretation of law are reviewed *de novo*. *City of Muskego v. Godec*, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992). Additionally, "questions of statutory interpretation are questions of law which [are reviewed] de novo." *Stockbridge School Dist. v. DPI*, 202 Wis.2d 214, 219, 550 N.W.2d 96 (1996). The facts in this case are undisputed. Trial [courts'] factual finding[s] are affirmed unless clearly erroneous. Wis. Stat. §805.17(2).

ARGUMENT

The term "shall" under Wisconsin Statute §968.375(6) is mandatory, not directory; and an error surrounding the execution of a subpoena under that statute is a fundamental error, rather than a technical error as described in Wis. Stat. §968.375(12). Further, this fundamental error

subverted Mr. Di Miceli's rights, and the subpoena in this case should be suppressed.

I. In Wisconsin Statute §968.375(6), the term "shall" is mandatory, not directory.

A. The rules of statutory interpretation in Wisconsin law support that "shall" is mandatory, as does the statute's legislative history.

In *Scanlon v. Menahsa*, 16 Wis.2d 437, 443, 114 N.W.2d 791 (1962), the Wisconsin Supreme Court held that the word "shall" is presumed mandatory when it appears in a statute.

In determining the meaning of a word in a statute, the Supreme Court of Wisconsin held that the goal of statutory interpretation is to determine the meaning of a statute so that it may be given its full, proper, and intended effect. *State ex rel. Kalal v. Circuit Court for Dane Cnty*, 2004 WI 58, ¶44, 271 Wis.2d 633, 662, 681 N.W.2d 110. Interpretation of a statute begins with an examination of the statutory language. *Id.* ¶45. "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.* ¶45. Where the statutory language is ambiguous, courts turn to extrinsic sources, such as legislative history, to help discern the meaning of a statute. *Id.* ¶51. "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.* ¶47.

While Mr. Di Miceli argues that "shall" is unambiguous, a review of the legislative history and purpose also supports that "shall" in §968.375 was to be interpreted as mandatory, rather than directory. The State argued in its response motion to the circuit court that the word "shall" is mandatory in §968.15(2), the statute for the execution of warrants, but in §968.375(6) it has a separate objective that is not mandatory. (R. 27:2, App. 25.) The State's position assumes a lack of purpose in the inclusion writing of §968.375(6). Wisconsin Statute §968.375 was not codified until

2013, whereas Wisconsin Statute §968.15, has been around long enough to be clarified by the Supreme Court of Wisconsin in *State v. Sveum*. *State v. Sveum*, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317. The case at hand is distinguishable from *Sveum*, where a warrant was executed under §968.15 requiring that the warrant be returned by law enforcement within 5 days of its execution. *Id.* ¶¶71-72. The GPS tracking device was instead left on Sveum's vehicle for 35 days, which surpassed the deadline for law enforcement to return the warrant to the court. *Id*.

Sveum stated the timely return of a warrant was a ministerial duty that did not substantially affect the rights of the defendant, and therefore "shall" as instructed in §968.15(2) was not mandatory as it related to the return of the warrant. *Id*. However, when referring to the execution of the warrant in §968.15(2), "shall" is mandatory because the legislature has ordered that the search warrant otherwise be void. Wis. Stat.

§968.15(2). Three years after this decision, the Wisconsin legislature still chose to use "shall" in Wis. Stat. §968.375(6) rather than "may," indicating that the legislature intended it to contain a mandatory deadline.

Additionally, *Sveum* only addresses the return of the warrant when it comes to the word "shall," thus distinguishing it from the execution of the warrant. *Sveum* at ¶¶71-72. It is notable that the legislature in §968.375 has done the same by addressing the execution of the subpoena in one sub-statute, the return of the subpoena in another. *See* §968.375(6) and §968.375(9). It would follow, then, that the 5-day "shall" in the return of the subpoena is directory in §968.375(9), and the 5-day "shall" in the execution of the subpoena under §968.375(6) would mirror that of the execution of the warrant.

In *State v. Edwards*, 98 Wis. 2d. 367, 370, 297 N.W.2d 12, (1980), a warrant was executed and returned approximately five days and two hours

after the warrant was signed by the judge. The defendant in *Edwards* argued the warrant as untimely executed and returned, and that therefore the warrant should have been suppressed. *Id.* at 371. The Court in *Edwards* held first that the warrant was timely executed and returned because it was still executed and returned on the fifth day of its issuance. *Id.* at 371-372. Second, the Court held that whether the execution of the warrant was reasonable depends also on whether there was still probable cause at the time the warrant was executed. *Id.* at 372-373. So, because the warrant was timely executed *and* there was probable cause at the time it was executed, the execution of the warrant was reasonable. *Id.* Annotations of *Edwards* in Wisconsin Statute §968.15 note the same interpretation.[1]

In the case at hand, the facts of this case are undisputed, and the subpoena was not executed

[1] "Execution of a search warrant is timely if in compliance with sub. (1) and if probable cause which led to issuance still exists at time of execution." Wis. Stat. Ann. §968.15.

within five days as required by the statute. The Court in *Edwards* first evaluated whether the search warrant was timely intentionally. *Id*. at 371. If the Court in *Edwards* was not concerned with whether the warrant was timely executed, then it would not have taken the time to conduct an evaluation of that aspect of the warrant.

The rules of statutory interpretation, the legislative history, and other cases' interpretations of "shall" all support that it is mandatory in §968.375 and in the subpoena used for Mr. Di Miceli's case. Shall is unambiguous and uses the same language in §968.15(2), which mandates the execution of the warrant within five days. Further, while *Sveum* defines "shall" as directory for the return of the warrant, *Edwards* had already clarified the mandatory nature of "shall" when it came to the execution of the warrant. More importantly, *Edwards* clarified that a warrant is timely executed if within the five-day requirement, and as long as probable cause still exists during

that five-day period, the warrant is valid. *Edwards* at 375-376. These clarifications by the judicial branch in §968.15(2) support the argument that "shall" is mandatory in §968.375(6), and the subpoena must be timely executed. Therefore, the execution of the warrant after nine days in Mr. Di Miceli's case was against a mandatory order given by the legislature.

B. The factors in *State v. R.R.E.* support that "shall" is mandatory because the objectives of the statute support a mandatory deadline, "shall" being interpreted as directory would further violate a citizen's right to privacy, and the statute lays out suppression as a penalty for violation of this statute.

Wisconsin Statute §968.375(6) requires that a subpoena issued under that section shall not be executed more than five days after the date of issuance. The Wisconsin Supreme Court stated in *State v. R.R.E.*, 162 Wis.2d 698, 707, 470 N.W.2d 283 (1991), that the use of the word "shall" in statutes suggests mandate; however, there are instances in which it can be directory. In

determining whether "shall" is mandatory versus directory, the Court laid out a list of factors to review including the objectives of the statute, the consequences of alternative explanations, and whether a penalty is imposed for a violation. *Id.* at 708.

In the case at hand, the trial court reviewed those factors and determined that the purpose of the statute was to facilitate easier acquisition to electronic records, the consequences of alternative explanations including the potential dismissal of serious charges, and that there was no penalty laid out for violation. (R. 29:5, App. 40.)

First, the wording of these statutes written by the legislature has a purpose other than the circuit court's holding that they support easier acquisition to electronic records. These statutes exist to ensure a citizen's right to privacy of their electronic surveillance records when they are being infringed upon. As referenced in *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI

85, ¶¶ 246-247, 363 Wis.2d 1, 866 N.W.2d 165, both §968.15, the statute regarding the execution of general search warrants, and §968.375 are considered constitutional provisions. Constitutional provisions protect citizens against the invasion of their person, belongings, or electronic communications. Wisconsin Statute §968.375 was created as part of the Wisconsin Electronic Surveillance Control Law, which prohibits electronic surveillance. Both *State v. Tentoni,* 2015 WI App 77, 365 Wis.2d 211, 871 N.W.2d 285, and *State v. Turner,* 2014 WI App 93, 356 Wis.2d 759, 854 N.W.2d 865, reference the Wisconsin Electronic Surveillance Control Law as Wisconsin Statutes §968.27 through §968.375. It also penalizes those who violate such a law. Wis. Stat. §968.31. The five-day limit on the execution of a search warrant and that of a subpoena under §968.375 should be viewed as having the same purpose. The legislature created Wis. Stat. §968.375 in 2013 with the same five-day deadline

using the same language as §968.15. *See* Wis. Stat. §§968.15, 968.375(6). This further supports the prior distinction in *Sveum* that the "shall" pertaining to the return of the warrant is more similar to §968.375(9) rather than §968.375(6), which closely mirrors the purpose of the "shall" in the execution of the warrant under §968.15(2).

Something like an IP address can change every time a router resets power. So, in the case at hand, any identifying information leading to Mr. Di Miceli could have changed at any time. Law enforcement in this case did not even seek a subpoena immediately after the child pornography was flagged. Special Agents were made aware of the possible child pornography images on September 4, 2015. (R. 22:1, App. 20.) Seven weeks later, the subpoena was applied for and obtained on October 23, 2015. *Id*. The five-day time limit is imposed by the legislature to guarantee a prompt execution to best ensure that the information remains the same from the date of the application to the date of

execution. Execution of the subpoena after nine (9) days is a violation of requirements imposed by the legislature. If the purpose of the five-day timeframe is to ensure ease of access to records, then the legislature would have imposed more lenient time restrictions than one that mirrors that of the execution of a search warrant under §968.15.

During its discussion in *Edwards*, the Supreme Court of Wisconsin echoed these sentiments by referencing a Third Circuit Court of Appeals case. It stated the following:

> In *United States v. Bedford,* 519 F.2d 650, 655 (3rd Cir. 1975), the court of appeals, reviewing the validity of a state issued search warrant, stated: "The element of time can admittedly affect the validity of a search warrant. Since it is upon allegation of presently existing facts that a warrant is issued, it is essential that it be executed promptly, `in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated.' If the police were allowed to execute the warrant at leisure, the safeguard of judicial control over the search which the fourth amendment is intended to accomplish would be eviscerated."

Edwards, 98 Wis.2d at 372. If the purpose of §968.375(6) was to give more time, these short turn around deadlines would not exist. The purpose of these statutes is correctly summed up in *Bedford*.

The second factor in *R.R.E.* is the consideration of the consequences of alternative interpretations. *R.R.E.* at 708. An alternative explanation in this case is that "shall" is directory rather than mandatory. If "shall" is read as mandatory under §968.375(6), then once the five-day time period has lapsed, law enforcement would be required to obtain a new subpoena. In this case, there would not have been any harm in considering that subpoena void and obtaining a new one. Law enforcement had already waited over six weeks to obtain the subpoena and then waited another nine days to execute it. Between the fifth and ninth days, law enforcement could have re-applied for a new subpoena. The result of voiding subpoenas after five days may result in dismissal of serious charges in some cases, but the burden on law

enforcement of obtaining a new subpoena is very low. Every citizen, regardless of how serious their charges may be, deserves the right to protection against improper surveillance of their personal electronic records.

If "shall" is interpreted merely as directory in 968.375(6), then this Court will set precedent that deadlines for obtaining private electronic communications do not deserve the same care as other protected information. Even if probable cause existed at the time of the subpoena being issued, electronic communications and information change constantly. It is just as important as a search warrant to ensure that these deadlines are met and void the subpoena when they are not. This is why §968.375 and §968.15 are considered constitutional provisions.

The third factor for the Court to consider is whether there is a penalty imposed for violation of the statute. Wisconsin Statute §968.375(6) imposes a penalty for violation in §968.375(12). The

language of the statute reads, "Evidence disclosed under a subpoena or warrant issued under this section shall not be suppressed because of technical irregularities *or* errors not affecting the substantial rights of the defendant." Wis. Stat. §968.375(12) (emphasis added). This language implies that if there *are* fundamental irregularities or errors, or if the errors affect the substantial rights of the defendant, the evidence disclosed under such a subpoena or warrant shall be suppressed. Suppression is, therefore, the penalty. It is significant to note that, while Wis. Stat. §968.375(6) does not have wording for a penalty in its same sub-statute, the penalty for a violation of §968.15 is structured similarly. The instruction that the search warrant be void is in §968.15(2), which makes the "shall" that applies to the execution of the warrant mandatory.

Even if this Court decides that suppression is not a penalty, that is only one factor to consider in this determination. While "[t]he legislature's

failure to state the consequences of noncompliance with the established time limit lends support for construing the statute as directory," the absence of a penalty for noncompliance "is only one factor to be considered in the analysis of whether the legislature intended the provision to be mandatory or directory." *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 18, 262 Wis. 2d 720, 731, 665 N.W.2d 155, 161 (quoting *Karow v. Milwaukee Cnty. Civ. Serv. Comm'n*, 82 Wis.2d 565, 571–72, 263 N.W.2d 214 (1978)).

In reviewing all three of those factors under *State of Wisconsin v. RRE*, "shall" in Wisconsin Statute §968.375(6) is mandatory, and not directory. The legislature knows what it is doing when it constructs a statute and when it uses one word instead of another. The legislative history almost insists on an interpretation that "shall" is mandatory, and not directory, which would risk the protections of this country's citizens. This is

further supported by the penalty, which is suppression of the entire subpoena.

C. Because Wis. Stat. §968.375 uses both "may" and "shall," "shall" in §968.375(6) is construed to be mandatory.

In *GMAC Mortgage Corp. v. Grisvold,* 215 Wis.2d 459, 478, 572 N.W.2d 466 (1998), the Court held that when the legislature uses the terms "shall" and "may" in the same statute, it supports a mandatory reading of the term "shall" because it is presumed that the legislature was aware of the distinct meanings of the words. *Id.* at 478. While the Court is not precluded from finding that "shall" is directory, it would have to find such "construction is demanded by the statute in order to carry out the clear intent of the legislature." *Id.* (quoting *City of Wauwatosa v. Milwaukee Co.,* 22 Wis.2d 184, 191, 125 N.W.2d 386 (1963)). As previously stated, §968.375 is a constitutional provision that was written to protect the constitutional rights of citizens.

In referencing *GMAC Mortgage Corp. v. Grisvold*, the Supreme Court of Wisconsin found in *Bank of New York Mellon v. Carson* that "shall" in §846.102 is also mandatory. 2015 WI 15, ¶27, 361 Wis. 2d 23, 859 N.W.2d 422. One of the factors it considered was the fact that "shall" and "may" were used in various sub-statutes throughout §846.102. *Id.* ¶23. When used alongside "may," the Court found that the reading of "shall" as mandatory is supported. *Id.* Similarly, in *State ex rel. Marberry*, 2003 WI 79, ¶15, 262 Wis. 2d 720, 665 N.W.2d 155, the Supreme Court looked at the fact that "shall" and "may" are used throughout the entire statute, and found that "shall" was mandatory.

The Court in *Bank of New York Mellon v. Carson*, 2015 WI 15, ¶ 21, 361 Wis. 2d 23, 859 N.W.2d 422, 427, referenced Norman J. Singer & J.D. Shambie Singer in 3 *Sutherland Statutory Construction* §57:2 (7th ed. 2008) which stated, "'Shall' is considered presumptively mandatory unless there is something

in the context or the character of the legislation which requires it to be looked at differently."

In the statute at issue, the legislature used both "shall" and "may" in §968.375. It knew its exact intention when constructing the statute with the word "shall" in §968.375(6). If the legislature wanted this sub-statute to be directory or more of a guideline, it would have used "may." Wisconsin Statute §968.375 was not constructed anywhere near the time of §968.15, it was written years later after the search warrant statute was evaluated by the judicial branch. The laws of statutory interpretation as well as case law in this area support the idea that "shall" under §968.375(6) is mandatory.

II. Because "shall" is mandatory in Wis. Stat. §968.375(6), the delayed execution of the warrant is a fundamental error, not a technical one, and it substantially affected Mr. Di Miceli's rights.

The violation in this case of the mandatory five-day time limit was a fundamental error, not technical. "To determine whether a defect is

technical or fundamental, we look to the purpose of the statute, not just its wording." *State v. Moline*, 170 Wis. 2d 531, 540, 489 N.W.2d 667 (Ct. App. 1992). "If the purpose of the rule was fulfilled, the defect was not fundamental, but technical." *Jadair Inc. v. U.S. Fire Ins. Co.*, 209 Wis. 2d 187, 208, 562 N.W.2d 401 (1997). "Where a defect prevents the purpose of the statute from being served, the [Supreme Court] has deemed the defect to be fundamental." *Am. Family Mut. Ins. Co. v. Royal Ins. Co. of Am.*, 167 Wis. 2d 524, 535, 481 N.W.2d 629 (1992). In *American Family Mutual Insurance Co. v. Royal Insurance Co. of America,* the Court held that service of an unauthenticated photocopy of an authenticated summons and complaint on a party was a fundamental error because it did not fulfill the purpose of assuring that the copies served are true copies as required by the statute. *Id.*

As another example, in *In re Gautschi*, 2000 WI App 274, ¶ 11, 240 Wis. 2d 83, 622 N.W.2d 24, the

Court specifically notes in Footnote 3 that a notice which contained the correct name, was served in a timely manner, and did not require an authentication process only constituted a technical error. This suggests that if service not been done in a timely fashion, this would be a fundamental error. The statute referenced in *Gautschi* is Wisconsin Statute §801.02, which requires a 90-day time of service. Of note, there is no sub-statute indicating that notice is void if it is not served within 90 days, so this statute did not have a penalty attached, but the Court still found it was mandatory. *Id*.

As a third example, in *State v. Schmitt,* 2012 WI App 121, ¶4, 344 Wis.2d 587, 824 N.W.2d 899, the clerk failed to completely stamp all three of the documents and left one unstamped. The Court considered that the actions of the clerk were beyond the state's control and considered this a clerical error. *Id*. ¶13. While it was considered a technical error to not follow the authentication

requirement under §961.555(2) as to the exact wording, the Court noted that it could still be fundamental error, but was not in that case because the clerk was presented with summons, complaint, and affidavit all stapled together as one document. *Id.* ¶10. It was, therefore, a technical error. *Id.* ¶13. Other examples of technical defects are signing a complaint but failure to sign a summons in *Gaddis v. La Crosse Products, Inc.*, 198 Wis.2d 396, 405, 542 N.W.2d 454 (1996), or a plaintiff's service of an unauthenticated copy of a publication summons along with authenticated copies of original and complaint. *Burnett v. Hill*, 207 Wis.2d 110, 125, 557 N.W.2d 800 (1997). Where defects are fundamental, the pleading is nullified. *Jadair Inc. v. U.S. Fire Ins. Co.,* 209 Wis.2d at 208.

In the case at hand, failure to execute the subpoena within five days is a fundamental error. This is not a case in which the date on the subpoena was wrong, and the subpoena was actually served within the five-day limit. Rather, this is an error

that goes against a clear and plain reading of the statute. The purpose of the statute is to ensure timely execution of court orders. That purpose was not accomplished. The statute, and the order granting the subpoena itself, read that the subpoena shall be executed within five days. Failure to do so is a fundamental error.

Second, this fundamental error substantially affected Mr. Di Miceli's rights. The information that resulted from that subpoena was used for a search warrant for Mr. Di Miceli's home and personal belongings. Use of the expired subpoena gave rise to an illegal search.

It is crucial to note the ease of getting a new subpoena rather than executing an expired one. There was a significant period of time between when the files were first downloaded, and when the subpoena was applied for. Further, the subpoena was signed by a Dane County judge; agents with DCI did not have to go to Dodge County to get a new subpoena. It would have been easy for Special

Agents to obtain a new subpoena, and they should have. The legislature creates laws so that they can be followed. The legislature does not write arbitrary deadlines. On the contrary, these deadlines must be met. If they cannot be met, law enforcement officers need to seek a new subpoena. If the legislature intended not to have deadlines be followed, it would not have included §968.375(6) in its writing of the law.

Similar to §968.375(6), Wisconsin Statute §973.18 requires that the Notice of Intent to Seek Post-Conviction Relief be filed within 20 days after the date of sentencing. Wis. Stat. §809.30(2)(b) The document notes that the person "shall" file it upon the appropriate parties. The same "shall" exists as in §968.375(6), and if the defense attorney needs an extension for that notice under §973.18, it needs to be filed with the court ahead of the deadline. If that deadline passes, the defendant loses their right to appeal their case even though no penalty is laid out in the statute.

Given the substantial similarity between the two statutes, it logically follows that the legislature intended this same result for the execution of a subpoena under §968.375.

The deadlines for execution were established when agents with DCI applied for a subpoena to obtain information from Charter Communications. Instead of executing their subpoena in a timely fashion as required by the legislature, the timeframe for their subpoena execution almost doubled. There has been no evidence shown that any explanation was given for the delay, nor was there any attempt to obtain a new subpoena. Nothing prevented DCI from obtaining a new subpoena, and given the timeline, no exigency existed. Once the subpoena deadline passed, DCI could have easily reapplied for a new subpoena.

III. The subpoena used to obtain Mr. Di Miceli's personal information is void and therefore the basic requirements for the search warrant were not met, thus invalidating the warrant to search his home.

The illegally obtained information from Charter Communications in this case resulted in a seizure of information that related to Mr. Di Miceli. The legislature created warrants and subpoenas to protect people from illegal searches and seizures. The resulting discovery from this case is the fruit of the poisonous tree. Police were able to obtain a search warrant for Mr. Di Miceli's home and personal belongings based on information they were only able to obtain by executing an expired subpoena. Wisconsin Statute Chapter 968 was wholly created as part of the Wisconsin Electronic Surveillance Control Law, which was originally enacted in 1969. The 1969 Assembly Bill 860 was an act to specifically repeal §885.36, to amend §885.365, and to create Chapter 968 of the statutes to "prohibit electronic surveillance by persons other than law enforcement

officers duly authorized by court order and engaged in the investigation or prevention of specific categories of offenses," and providing penalties for those who did so. Electronic Surveillance Control Act, Assembly Act 427 (1969). These statutes were designed to protect citizens from unreasonable search and seizure.

Wisconsin Statute §968.12 requires that a warrant contain a specific location for where it is to be executed. The subpoena was the source of that specific location, and without it the warrant is insufficient in its execution. Any evidence obtained from the invalid warrant is now fruit of the poisonous tree. [I]n its broadest sense, the [fruit of the poisonous tree doctrine] can be regarded ... as a device to prohibit the use of any secondary evidence which is the product of or which owes its discovery to illegal government activity." *State v. Schlise*, 86 Wis.2d 26, 45, 271 N.W.2d 619 (1978).

Because law enforcement sought a search warrant with information from an invalid subpoena, Mr. Di Miceli was the subject of an illegal search. Under the Fourth Amendment of the United States Constitution, Mr. Di Miceli has protections from this illegal search, and his recourse is the suppression of the evidence obtained from the search warrant.

CONCLUSION

For the foregoing reasons, Mr. Todd Di Miceli respectfully requests that the Court reverse the decision of the circuit court that denied Mr. Di Miceli's Motion to Suppress and find that the subpoena should be suppressed.

Dated this 1st day of December, 2020.

Respectfully submitted,

Electronically signed by
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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c), and is produced with a monospaced font. The length of this brief is 5663 words. See Wis. Stat. §809.19(8)(c)2., 809.50(4).

Dated this 1st day of December, 2020.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. §809.19(12)(f)

I hearby certify that:

I have submitted an electronic copy of their brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief field with the court and served on all parties either by electronic filing or by paper copy.

Dated this 1st day of December, 2020.

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