STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2020AP1302-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TODD DIMICELI,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN DODGE COUNTY CIRCUIT COURT, THE HONORABLE MARTIN J. DEVRIES, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 294-2907 (Fax)
latorracadv@doj.state.wi.us

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ISSUE PRESENTED

A judge determined that probable cause supported the issuance of a Wis. Stat. § 968.375(2) subpoena to an internet service provider (ISP) for subscriber information related to an internet protocol (IP) address associated with a computer used to access and possess child pornography. Section 968.375(6) provides that a subpoena "shall be served not more than 5 days after" its issuance," but the subpoena was not served on the ISP until 9 days after the judge issued it. Based on the information that the ISP provided, agents obtained a search warrant for Todd DiMiceli's residence and executed it.

Did the State's untimely service of the subpoena on Charter Communications affect DiMiceli's substantial rights, thus warranting suppression of his subscriber information obtained through the subpoena and child pornography later seized at his residence?

The circuit court answered: No, based on its application of Wis. Stat. § 968.375(12), which provides that evidence should not be suppressed for errors that do not affect a defendant's substantial rights.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State agrees that publication may be appropriate because few cases reference, much less interpret, section 968.375. The State welcomes oral argument if the Court would find it helpful.

STATEMENT OF THE CASE

The investigation. Special agents from the Wisconsin Department of Justice's Division of Criminal Investigation (DCI) investigated DiMiceli for possession of child pornography. (R. 11:4–15.) According to the complaint,

Special Agent in Charge Jesse Crowe was investigating the sharing of child pornography on the Ares P2P file sharing network.[1] (R. 11:4.) On September 4, 2015, Crowe identified a computer associated with the IP address[2] 68.190.154.93 as a possible source for files of investigative interest based on key word searches or hash value[3] searches related to child pornography. (R. 11:4.) Crowe downloaded four files from the computer at this IP address, and based on what he observed, Crowe believed these files constituted child pornography. (R. 11:4–5.) Crowe determined that the IP address was registered to Charter Communications and that the IP address "geo-locate[d]" to Beaver Dam. (R. 11:5.)

On October 23, 2015, Crowe obtained a subpoena for subscriber information from the Honorable David Flanagan, a Dane County Circuit Court judge. (R. 11:5.) While the subpoena is not included in the record, the circuit court made several factual determinations about the subpoena when it later denied DiMiceli's suppression motion, including:

- On October 23, 2015, Judge Flanagan issued a subpoena under Wis. Stat. § 968.375(2) "requesting

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[1] "P2P [peer-to-peer] file sharing is a means by which computer users share digital files with other users around the world." *State v. Baric*, 2018 WI App 63, ¶ 3, 384 Wis. 2d 359, 919 N.W.2d 221. To access a P2P file sharing network, the user must have an internet connection and P2P software. *Id.*

[2] "An IP address is a 'unique address that identifies a device on the Internet.'" *Baric*, 384 Wis. 2d 359, ¶ 4 (citation omitted). Because an internet connection is required to connect to a P2P network, the user makes his or her IP address available to connect to other users on the network to share files. *Id.* An internet service provider (ISP) maintains records of IP addresses assigned to a customer. *United States v. Christie*, 624 F.3d 558, 563 (3d Cir. 2010).

[3] A hash value is a unique digital signature assigned to a file shared on a P2P network. *Baric*, 384 Wis. 2d 359, ¶ 5. A file's hash value "remains constant, even if the file name is changed." *Id.*

activity on the IP address and the subscriber name and address." (R. 29:2.)

- "The subpoena stated it was to be served within five days." (*Id.*)
- Agent Crowe faxed the subpoena to Charter Communications on November 2, 2015, nine days after Judge Flanagan signed the subpoena. (*Id.*)
- On November 3, 2015, Charter Communications informed Agent Crowe by email that it identified "the subscriber as Todd Di Miceli, N4606 Lake Dr, Hustisford, Dodge County, Wisconsin." (*Id.*)
- On January 27, 2016, a Dodge County circuit court judge issued a search warrant for DiMiceli's home. (*Id.*)
- On January 27, 2016, the warrant was served, and "the alleged child pornography was found on devices purportedly belonging to Di Miceli." (*Id.*)

The charges. The State charged DiMiceli with six counts of possession of child pornography, contrary to Wis. Stat. § 948.12(1m). (R. 1:1–3.)

DiMiceli's motion to suppress. DiMiceli moved to suppress evidence seized following the execution of a search warrant at his residence. (R. 22:1.) He asserted that the search warrant relied on subscriber information obtained from Charter Communications under a section 968.375(2) subpoena and that the subpoena was not served within the five-day period specified for service under section 968.375(6). (R. 22:2.) Therefore, DiMiceli argued that the warrant was defective because it was based on information obtained through a void subpoena. (R. 22:4.)

The State asked the circuit court to deny DiMiceli's motion without a hearing. (R. 27:3.) It argued that, even assuming that the subpoena was not served within five days of its issuance, delayed service did not affect DiMiceli's substantial rights. (R. 27:1.) Therefore, under section

968.375(12), suppression was not a remedy from delayed service of the subpoena. (R. 27:2–3.)

The circuit court denied DiMiceli's suppression motion. (R. 29:6.) While noting that the subpoena was not served on Charter Communications within the five-day period specified in section 968.375(6), it determined that the delay in service did not affect DiMiceli's substantial rights, a prerequisite to suppression under section 968.375(12). (R. 29:3, 5.) In its decision, the circuit court noted that DiMiceli did "not allege a lack of probable cause or issues with the manner of service" and that there was "no dispute on whether probable cause existed for issuance of the subpoena." (R. 29:3, 5.)

DiMiceli's plea and sentence. After this Court denied DiMiceli's petition to appeal the circuit court's nonfinal suppression order,[4] DiMiceli pleaded guilty to two counts of possession of child pornography. (R. 69:2–3.) The circuit court imposed an eight-year term of imprisonment, consisting of a three-year term of initial confinement and five-year term of extended supervision on each count. (R. 46:1.) It ordered the sentences to be served concurrently with each other. (R. 70:25.) The circuit court granted DiMiceli's motion to stay his sentence pending an appeal. (R. 70:29.)

DiMiceli appeals.

STANDARD OF REVIEW

To resolve DiMiceli's appeal, this Court must interpret Wis. Stat. § 968.375 and the Fourth Amendment. This Court independently reviews both questions of statutory and constitutional interpretation. *State v. Popenhagen*, 2008 WI 55, ¶ 163, 309 Wis. 2d 601, 749 N.W.2d 611.

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[4] *State v. Todd Di Miceli*, No. 2019AP951-CRLV (Wis. Ct. App. June 21, 2019).

With respect to DiMiceli's motion to suppress, this Court employs a two-step standard of review when it analyzes a motion to suppress. *State v. Roberson*, 2019 WI 102, ¶ 66, 389 Wis. 2d 190, 935 N.W.2d 813. First, this Court will uphold the circuit court's historical findings of fact unless they are clearly erroneous. *Id.* Second, it independently applies constitutional principles to the facts. *Id.*

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "This Court begins statutory interpretation with the language of [the] statute." *State v. Quintana*, 2008 WI 33, ¶ 13, 308 Wis. 2d 615, 748 N.W.2d 447. "If the meaning of the statute is plain," this Court "ordinarily stop[s] the inquiry and give[s] the language its 'common, ordinary, and accepted meaning . . . .'" *Id.* (citation omitted). Because a statute's context is important to its meaning, this Court may consider related statutes when it construes a statute's plain meaning. *State v. Harrison*, 2020 WI 35, ¶ 35, 391 Wis. 2d 161, 942 N.W.2d 310.

Section 968.375 uses terms that are defined in Wis. Stat. § 968.27, which defines words and phrases used in the Wisconsin Electronic Surveillance Control Law (WESCL), Wis. Stat. §§ 968.27–.33, which regulates the interception of certain communications. *State v. Duchow*, 2008 WI 57, ¶ 1, 310 Wis. 2d 1, 749 N.W.2d 913. Because the WESCL was patterned after Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520, Wisconsin courts benefit from federal decisions interpreting Title III. *State v. Gilmore*, 201 Wis. 2d 820, 825, 549 N.W.2d 401 (1996).

ARGUMENT

The circuit court properly denied DiMiceli's suppression motion because any delay in serving the section 968.375(2) subpoena on Charter Communications did not violate his substantial rights.

A. Wisconsin Stat. § 968.375 establishes procedures for obtaining records from telecommunications and internet service providers.

Wisconsin Stat. 968.375 creates a statutory scheme for the State to obtain certain records from "an electronic communication service" provider. Before it discusses section 968.375's procedures for obtaining subpoenas and warrants, the State defines several statutory terms and discusses the Stored Communications Act (SCA), 18 U.S.C. §§ 2701–2712, which limits access by federal and state authorities to records of an "electronic communications service."

1. Definitions

"Wire communications," as defined under Wis. Stat. § 968.27(17), generally refers to transmissions of the human voice, like telephone conversations. Comput. Crime & Intellectual Prop. Section, U.S. Dep't of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, 162–63 (3d ed. 2009) [hereinafter *Searching and Seizing Computers*], https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf.

Subject to certain exceptions, "electronic communication" includes "any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature wholly or partially transmitted by a wire, radio, electromagnetic, photoelectronic or photooptical system." Wis. Stat. § 968.27(4). Electronic communications do not contain a

human voice and include communications like email. *Searching and Seizing Computers*, *supra* at 164–65.

Under Wis. Stat. § 968.27(5), an "'[e]lectronic communication service' means any service that provides its users with the ability to send or receive wire or electronic communications." Section 968.27(5)'s definition of "electronic communication service" tracks the definition of "electronic communication service" under 18 U.S.C. § 2510(15). Federal courts have concluded that the term "electronic communications service" refers to telecommunications providers, Internet Service Providers (ISP), email providers, and electronic bulletin board systems (BBS). *See St. Johns Vein Ctr., Inc. v. StreamlineMD LLC*, 347 F. Supp. 3d 1047, 1063–64 (M.D. Fla. 2018); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1057 (N.D. Cal. 2012).

2. The Stored Communications Act

The Stored Communications Act (SCA), 18 U.S.C. §§ 2701–2712, establishes procedures for obtaining information from electronic communication service providers, including an ISP, for the disclosure of customer communications and records. *See generally Searching and Seizing Computers, supra* at 115–50.

18 U.S.C. § 2702(a)(1) generally prohibits the provider of electronic communications from disclosing the contents of communications in electronic storage. 18 U.S.C. § 2702(b) recognizes certain exceptions for disclosures of these communications, including the process that satisfies 18 U.S.C. § 2703's requirements. 18 U.S.C. § 2703(c)(2) allows a provider to disclose subscriber information including name, address, and any "temporarily assigned network address," with a subpoena "authorized by a Federal or State statute . . . or trial subpoena or any means available under paragraph [2703(c)](1)."

Under 18 U.S.C. § 2703(d), a "court of competent jurisdiction" may issue an order for information requested under 2703(c). A "court of competent jurisdiction" includes "a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants." 18 U.S.C. § 2711(3)(B). However, a court may not issue an order authorizing a provider to disclose this information to a "State governmental authority . . . if prohibited by the law of such State." 18 U.S.C. § 2703(d). At least one federal court has determined that the SCA preempts state statutes that require disclosure of subscriber information without a subpoena. *Telecommunications Regulatory Bd. of Puerto Rico v. CTIA-Wireless Ass'n*, 752 F.3d 60, 68 (1st Cir. 2014).

3. Section 968.375 subpoenas and warrants

Consistent with the SCA's requirements, section 968.375 establishes procedures for the State to obtain information from an ISP. The type of records that the State seeks from an ISP determines whether it must apply for a section 968.375(2) subpoena or a section 968.375(3) warrant.

The State uses a section 968.375(2) subpoena to obtain customer or subscriber information for the user of an electronic communications service. Subscriber information includes a name, address, dates of service, length of service, "subscriber number or identity, including any temporarily assigned network address." *Id*. The subscriber data available through a section 968.375(2) subpoena tracks the type of subscriber data that the government may obtain through a subpoena that complies with 18 U.S.C. § 2703(c)(2).

In contrast, when the State seeks to obtain the contents of electronic communications or wire communications or track a device's location, the State must generally apply for a warrant under section 968.375(3). A section 968.375(3) warrant was unnecessary in DiMiceli's case because the State

sought neither communication nor location data. The State does not discuss the warrant provision further.

A judge may issue a section 968.375(2) subpoena only upon (1) the request of the attorney general or district attorney and (2) a probable cause showing.[5] Like a search warrant under Wis. Stat. § 968.12, probable cause may be established through an affidavit or sworn testimony. Wis. Stat. § 968.375(4). The subpoena must provide a reasonable time for the provider to disclose the subpoenaed information. Wis. Stat. § 968.375(2).

Section 968.375 includes several provisions guiding the service of process. First, the provider is subject to service and execution of the subpoena if they are doing business in Wisconsin. Wis. Stat. § 968.375(1). Second, the State may serve the subpoena on the provider as provided under Wis. Stat. § 801.11(5) or through mail, delivery service, telephone facsimile, or electronic transmission. Wis. Stat. § 968.375(5). Third, a law enforcement officer's presence is not required to serve a subpoena. Wis. Stat. § 968.375(8). Fourth, section 968.375(6) specifies: "TIME FOR SERVICE: A subpoena or warrant issued under this section shall be served not more than 5 days after the date of issuance."

The State's noncompliance with section 968.375's requirements does not mandate suppression in all cases. Rather, section 968.375(12) provides: "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*."

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[5] While a section 968.375(2) subpoena requires a probable cause showing before a judge, a section 2703(c)(2) subpoena does not require a probable cause showing and may be issued administratively without judicial involvement.

B. The untimely service of the section 968.375(2) subpoena on Charter did not affect DiMiceli's substantial rights.

DiMiceli contends that the circuit court should have granted his motion to suppress because section 968.375(6)'s five-day service requirement is mandatory and that noncompliance with it rendered the subpoena void. (DiMiceli's Br. 9, 33.) DiMiceli's focus on whether section 968.375(6) mandates service within five days is misplaced. This Court need not resolve whether "shall" is mandatory or directory to determine that DiMiceli was not entitled to suppression of evidence based on delayed service of the subpoena. *See State v. Smiter*, 2011 WI App 15, ¶ 9, 331 Wis. 2d 431, 793 N.W.2d 920 (this Court may affirm a circuit court's decision on different grounds).

Section 968.375(12) determines whether suppression is the remedy for the State's noncompliance with section 968.375's requirements, including 968.375(6)'s five-day service requirement. Section 968.375(12) provides: "TECHNICAL IRREGULARITIES: 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."

Thus, section 968.375(12)'s plain language, "Evidence . . . shall not be suppressed," creates a presumption against the suppression of evidence based solely on a finding that the State violated section 968.375's requirements. Rather, suppression is appropriate only if the error affects a defendant's "substantial rights." Wis. Stat. § 968.375(12.) In DiMiceli's case, suppression is not appropriate for the untimely service of the section 968.375(2) subpoena on Charter for information identifying a subscriber and location associated with an IP address because it did not violate DiMiceli's substantial rights.

1. Cases interpreting Wis. Stat. § 968.22's substantial rights requirement support the conclusion that delayed service did not violate DiMiceli's substantial rights.

No Wisconsin court has interpreted the term "substantial rights" as it is used in section 968.375(12). However, the legislature has promulgated other statutes that prohibit suppression unless a defendant's "substantial rights" are implicated. For example, similar to section 968.375(12), Wis. Stat. § 968.22 provides: "No evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant." Several decisions interpreting section 968.22 should guide this Court's application of section 968.375(12), as there is no indication that the legislature intended a different interpretation under section 968.375(12).

In *State v. Tye*, 2001 WI 124, ¶ 2, 248 Wis. 2d 530, 636 N.W.2d 473, the State appealed the circuit court's order suppressing evidence because a search warrant's supporting affidavit was not executed under oath. Because the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution both prohibit the issuance of a warrant unless it is "supported by oath or affirmation," the absence of the oath rendered the warrant "constitutionally infirm" and required suppression. *Id*. ¶¶ 2–3. Because the oath is an essential component under the Fourth Amendment, the supreme court rejected the State's argument under section 968.22 that the absence of the oath did not affect Tye's substantial rights. *Id*. ¶¶ 15–19.

DiMiceli's case stands in stark contrast to *Tye*. The error in *Tye* concerned a constitutional violation, i.e., the requirement that the probable cause statement is made on oath or affirmation. *Tye*, 248 Wis. 2d 530, ¶¶ 15–19. The

delayed service of the subpoena implicates none of the core constitutional requirements for a search warrant. *See State v. Sveum*, 2010 WI 92, ¶ 20, 328 Wis. 2d 369, 787 N.W.2d 317 (three constitutional requirements for a search warrant include issuance by a neutral and detached magistrate, demonstration of probable cause made on oath or affirmation, and the particularity requirement).

Further, not every violation of a statute related to the issuance and execution of a search warrant implicates a defendant's substantial rights that mandates suppression of evidence under section 968.22. In *State v. Elam*, 68 Wis. 2d 614, 620, 229 N.W.2d 664 (1975), the untimely filing of a transcript of search warrant testimony did not prejudice Elam, and, therefore, did not violate his substantial rights and require suppression of the evidence seized through the warrant.

In *State v. Raflik*, 2001 WI 129, ¶ 3, 248 Wis. 2d 593, 636 N.W.2d 690, a judge issued a search warrant based on telephonic testimony. When the officers and the prosecutor realized that the testimony had not been recorded, the issuing judge conducted a hearing and reconstructed the application for the warrant. *Id.* ¶¶ 8–10. The circuit court denied Raflik's motion to suppress, determining that Raflik's substantial rights had not been prejudiced and that the failure to record the warrant was a technical irregularity. *Id.* ¶ 12. The supreme court affirmed, determining that reconstruction of the record protected Raflik's due process rights and right to a meaningful appeal. *Id.* ¶ 42.

In *Sveum*, 328 Wis. 2d 369, ¶¶ 5–8, 71, officers obtained a warrant to install a GPS device on Sveum's car, placing the device on his car a day after the judge issued the warrant and then retrieving the GPS device 35 days after the judge issued it. The supreme court determined that the State's failure to comply with Wis. Stat. §§ 968.15's and 968.17's requirements that a warrant be executed and returned within five days did

not prejudice Sveum's substantial rights; therefore, under section 968.22, the supreme court concluded that "suppression of the evidence obtained here [was] not permissible." *Id.* ¶ 72.

Finally, in *State v. Nicholson*, 174 Wis. 2d 542, 544, 497 N.W.2d 791 (Ct. App. 1993), this Court characterized an incorrect street address on a warrant that otherwise accurately described the place to be searched as a technical irregularity that did not affect a defendant's substantial rights.

Taken together, *Tye*, *Raflik*, *Sveum*, and *Nicholson* stand for the proposition that not every violation of statutes related to the execution of a search warrant violates a defendant's substantial rights. Absent a direct constitutional violation as in *Tye*, a violation of a statute related to the issuance and execution of a search warrant does not violate a defendant's substantial rights unless the defendant can establish that the State's noncompliance with these statutory provisions prejudiced him.

Applying these principles to DiMiceli's case, DiMiceli has not demonstrated how the delayed service of a section 968.375(2) subpoena implicated his substantial rights, either through a violation of his constitutional rights or a demonstration that delayed service of the subpoena on Charter prejudiced him. Therefore, the circuit court appropriately denied DiMiceli's suppression motion.

2. DiMiceli's lack of a reasonable expectation of privacy in the ISP's records undermines his claim that delayed service violated his substantial rights.

Delayed service did not violate DiMiceli's substantial rights because he lacked a reasonable expectation of privacy in subscriber information that he provided to an internet

service provider or the IP address assigned to his account. Although Wisconsin courts have not squarely addressed the issue, federal courts have generally declined to recognize that a subscriber for internet services has a reasonable expectation of privacy in subscriber and IP address information.

Under the third-party doctrine, the Supreme Court has held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties . . . even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Smith v. Maryland*, 442 U.S. 735, 744 (1979) (citations omitted) (declining to find subscriber had a reasonable expectation of privacy in numbers dialed on his phone). Relying on the third-party doctrine, federal courts have "uniformly held" that a subscriber does not have a protected Fourth Amendment interest in the subscriber information that they voluntarily conveyed to a third-party like an ISP. *See United States v. Christie*, 624 F.3d 558, 573–74 (3d Cir. 2010) (and cases cited therein). Likewise, recognizing that IP addresses are broadcast through normal internet use, federal courts have declined to recognize that a subscriber has a reasonable expectation of privacy in an assigned IP address. *Id*. at 574; *United States v. Caira*, 833 F.3d 803, 807 (7th Cir. 2016). Applying these principles, DiMiceli lacked a reasonable expectation of privacy in his subscriber information or his assigned IP address.

In assessing whether delayed service implicated DiMiceli's substantial rights, this Court should consider the nature of the information sought through the subpoena, i.e., subscriber information related to an IP address associated with a device that made files publicly available to others like Agent Crowe on a P2P network. In *State v. Baric*, 2018 WI App 63, 384 Wis. 2d 359, 919 N.W.2d 221, this Court concluded that Baric lacked a reasonable expectation of

privacy in the files he shared through the P2P network. *Baric*, 384 Wis. 2d 359, ¶¶ 17, 21. Likewise, this Court also determined that Baric failed to show that "he had a reasonable expectation of privacy in either his IP address, which he made publicly available in order to access the P2P network, or his geolocation." *Id.* ¶ 25. Therefore, this Court held that the investigator's warrantless viewing of the files that Baric offered for download through the P2P network did not violate his Fourth Amendment right to be free from unreasonable searches and seizures. *Id.* ¶¶ 1, 17–26.

Applying *Baric*, DiMiceli had no reasonable expectation of privacy in the files on his device that Agent Crowe accessed through the P2P network. And the section 968.375(2) subpoena was even less intrusive than Agent Crowe's initial investigative actions because the subpoena did not seek access to files DiMiceli possessed but made available to others. The subpoena merely sought information from Charter, an ISP, that would identify the subscriber using an IP address associated with the public dissemination of child pornography through a P2P network. Therefore, if (under *Baric*), DiMiceli lacked a reasonable expectation of privacy in the files Agent Crowe accessed on DiMiceli's computer through the P2P network, DiMiceli could have no reasonable expectation of privacy in the information that Charter maintained about the IP address through which files were shared or the subscriber information associated with that address.

The section 968.375(2) subpoena only sought information in Charter's possession about the identity of a subscriber associated with an IP address on a specific date. DiMiceli did not have a reasonable expectation of privacy in Charter's information about his status as a subscriber or the assignment of an IP address to his residence. Because the subpoenaed information did not implicate DiMiceli's Fourth Amendment rights, it did not intrude on his substantial

rights, and, therefore, did not warrant suppression under section 968.375(12).

3. Statutory violations rarely implicate a party's "substantial rights" in a manner that requires suppression.

Absent a constitutional violation, a court may still suppress evidence based on a violation of a statute when suppression is necessary to achieve the statute's objectives. *Popenhagen*, 309 Wis. 2d 601, ¶ 62. However, this is rare.

Popenhagen illustrates the rare situation when suppression may be appropriate for a statutory violation. There, the district attorney requested the circuit court to issue subpoenas for bank records. *Id*. ¶ 7. But the district attorney did not use the investigatory subpoena process under Wis. Stat. § 968.135 that requires a showing of probable cause to obtain documents. *Popenhagen*, 309 Wis. 2d 601, ¶ 10. Instead, the district attorney's subpoena request relied on statutes used to secure the appearance of witnesses along with documents in their possession for court proceedings. *Id*. ¶¶ 8–9.

Without relying on section 968.22's substantial right's language, the supreme court reasoned that suppression was appropriate because noncompliance with section 968.135's probable cause requirement rendered its safeguards meaningless. *Popenhagen*, 309 Wis. 2d 601, ¶¶ 13 n.10, 54. Suppression was fitting because the State completely disregarded section 968.135's requirements, including the State's failure to submit evidence of probable cause to the court and the court's failure to make the requisite probable cause findings. *Id*. ¶ 98 (Prosser, J., concurring). "[T]his was a subpoena, which at every juncture of the entire process, was defective." *Id*. ¶ 141 (Ziegler, J., concurring in part, dissenting in part).

Although the supreme court did not rely on section 968.22's substantial right's language to decide *Popenhagen*, its analysis is nonetheless useful in deciding whether suppression is an appropriate remedy in DiMiceli's case. In contrast to *Popenhagen*, DiMiceli's case is simply not one where the State completely disregarded section 968.375's process in order to avoid its substantive requirements. To the contrary, except for the untimely service, the State and the issuing judge complied with section 968.375's requirements. Indeed, DiMiceli does not argue that the judge had no authority to issue the subpoena because the State did not make the requisite probable cause showing. (R. 29:3.) Nor does DiMiceli challenge section 968.375(5)'s provisions regarding the manner of service on Charter. (R. 29:3.) His only complaint is that the State violated section 968.375(6)'s timely-service requirement, which is merely ancillary to section 968.375(2)'s primary objective of ensuring that a neutral and detached magistrate authorize subpoenas only on a showing of probable cause.

* * * * *

In sum, the State's four-day delay in serving the section 968.375(2) subpoena on Charter for its records did not implicate DiMiceli's substantial rights. Therefore, the circuit court properly applied section 968.375(12) when it declined to suppress the records seized through the subpoena and the evidence seized subsequently through the execution of a search warrant at his residence.

C. Whether the evidence obtained through the subpoena should be suppressed turns on whether it affected DiMiceli's substantial rights, not whether "shall," as used in section 968.375(6), is mandatory or permissive.

DiMiceli contends that the subpoena suppression is warranted because the word "shall" as used in section 968.375(6) is mandatory, not permissive. (DiMiceli's Br. 9–15.) DiMiceli's focus on "shall" is misplaced for two reasons.

First, even if DiMiceli is correct and "shall," as used in section 968.375(6), creates a mandatory obligation concerning the time frame for serving a subpoena, section 968.375(6) does not provide for suppression as a remedy for this violation. Rather, section 968.375(12)'s plain language limits when a court may suppress evidence for a violation of section 968.375's provisions. *See supra* Section B.1.–3. DiMiceli has not shown that the State's four-day delay in serving the subpoena on Charter affected his substantial rights. Because the State's noncompliance with section 968.375(6)'s five-day service requirement did not implicate DiMiceli's substantial rights, suppression was not a remedy for a violation of the service requirement. Therefore, this Court need not even decide if "shall" is directory or mandatory to decide this case.

Second, if this Court does reach this issue, the circuit court correctly determined that "shall," as used in section 968.375(6), is directory or permissive, not mandatory. (R. 29:4–5.) "Under general principles of statutory construction, the word 'shall' in a statute setting a time limit is ordinarily presumed to be mandatory." *Eby v. Kozarek*, 153 Wis. 2d 75, 79, 450 N.W.2d 249 (1990). But Wisconsin courts have occasionally "held that statutory time limits are merely directory despite the use of the word 'shall.'" *Id.* In determining whether the legislature intended a statutory provision to be mandatory or directory, courts consider

several factors including: (1) the statute's objectives; (2) its history; (3) the consequences that would follow from alternative interpretations; and (4) whether a penalty is imposed for its violation. *State v. R.R.E.*, 162 Wis. 2d 698, 708, 470 N.W.2d 283.

To be sure, section 968.375(2)'s and (3)'s requirement that subpoenas and warrants for records sought may only be issued on a determination of probable cause protects providers and their customers from indiscriminate searches of the provider's records. But section 968.375's other provisions are intended to facilitate the production of the provider's records for legitimate law enforcement purposes.

For example, section 968.375 protects ISPs by (1) limiting the jurisdictional reach of legal process under this section to ISP's doing business in this state, (2) limiting the circumstances when judges can order the production of records by requiring a probable cause showing, (3) proscribing the manner of service on the record holder, (4) allowing the ISP to move to quash a subpoena or warrant, and (5) providing immunity from civil liability to the ISP for acts or omissions associated with its compliance with the section. Wis. Stat. § 968.375(1), (2), (3), (5), (7), and (11). In addition, other provisions protect law enforcement's investigatory interests by allowing a judge to order the ISP not to disclose the existence of the subpoena to the customer. Wis. Stat. § 968.375(10). When viewing section 968.375 as a whole, the circuit court reasonably concluded that section 968.375's purpose is to "facilitate easier acquisition of electronic records." (R. 29:5.)

Section 968.375's history supports the circuit court's assessment that section 968.375's primary purpose is to facilitate the acquisition of electronic records. The preamble to 2009 Wis. Act 349, which created section 968.375, describes the act as "relating to: subpoenas and warrants requiring providers of electronic communications services or of remote

computing services to provide customer information or disclose contents of wire or electronic communications." Again, section 968.375 primarily focuses on the provider's rights and responsibilities and not the subscriber's.

The circuit court also considered the consequences that would follow from treating "shall" as mandatory rather than permissive. *R.R.E.*, 162 Wis. 2d at 708. "Consequences of making it mandatory include potential dismissal of serious charges." (R. 29:5.) Indeed, as the Supreme Court has observed, "Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" *Davis v. United States*, 564 U.S. 229, 240 (2011) (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)). The exclusion of evidence and possible dismissal of a DiMiceli's prosecution for possession of child pornography based on the State's late service of a subpoena on a third-party would constitute an unreasonably harsh sanction and is not worth the price to be paid by the justice system.

Finally, in determining that "shall" was not mandatory, the circuit court reasonably noted the absence of a penalty for violating section 968.375(6)'s five-day service requirement. *R.R.E.*, 162 Wis. 2d at 708. (R. 29:5.) And, to close the circle, section 968.375(12) limits the circumstances when a court may suppress evidence to those limited circumstances when an error in complying with section 968.375's requirements implicates a defendant's substantial rights. A four-day delay in failing to comply with section 968.375(6)'s five-day requirement for serving a subpoena on Charter did not violate DiMiceli's substantial rights.

The circuit court properly applied *RRE*'s four factors when it determined that "shall," as used in section 968.375(6) is permissive or directory and not mandatory. The circuit

court properly denied DiMiceli's suppression motion on this basis. (R. 29:5–6.)

D. Untimely service of the subpoena did not render it void.

DiMiceli contends that the State's failure to comply with section 968.375(6)'s five-day service requirement rendered the section 968.375(2) subpoena void and requires suppression of the information obtained through the subpoena and evidence obtained through the execution of the warrant at his residence. (DiMiceli's Br. 33–35.)

In advancing this argument, DiMiceli notes Wis. Stat. § 968.15's requirements guiding the timely execution of a search warrant. (DiMiceli's Br. 11–12.) Section 968.15(1) requires a search warrant to be executed within "5 days after the date of issuance." And section 968.15(2)—unlike section 968.375(2)—provides that "Any search warrant not executed within the time provided in sub. (1) shall be void and shall be returned to the judge issuing it." Thus, the untimely execution of a search warrant renders it void and requires its return to the judge who issued it.

To be sure, like section 968.15(1), section 968.375(6) provides that a subpoena or warrant under section 968.375 "shall be served not more than 5 days after the date of issuance." But in contrast to section 968.15(2), section 968.375 contains no language that declares an untimely served subpoena or warrant void and requires its return to the issuing judge.

Thus, unlike section 968.15(2), section 968.375 creates no penalty, i.e., a declaration that a subpoena is void, for the untimely service of a subpoena.

Had "the legislature had intended to accomplish" what DiMiceli urges, "the legislature knew how to draft that language and could have done so had it wished." *See Journal*

Sentinel v. City of Milwaukee, 2012 WI 65, ¶ 36, 341 Wis. 2d 607, 815 N.W.2d 367. That is, the legislature could have included language in section 968.375, as it did in section 968.15(2), that renders an untimely served subpoena void and requires its return to the judge. By declining to incorporate a "voiding" requirement into section 968.375(6)'s five-day service requirement, the legislature limited suppression to situations where noncompliance with section 968.375's provisions affected a defendant's "substantial rights." Wis. Stat. § 968.375(12).

Because there is no express statutory provision in section 968.375 declaring an untimely subpoena void, the subpoena here is more akin to the untimely return of a search warrant after it is executed. Under Wis. Stat. § 968.17(1), a search warrant return "shall be made within 48 hours after execution to the clerk designated in the warrant." The supreme court has characterized a warrant's timely return as a "ministerial duty which [does] not affect the validity of the search absent prejudice to the defendant." *Sveum*, 328 Wis. 2d 369, ¶ 69 (citation omitted).

Further, the supreme court has declined to extend section 968.15(2)'s "void" language beyond search warrants issued under Wis. Stat. § 968.12. In *State v. Pinder*, 2018 WI 106, ¶¶ 1–2, 384 Wis. 2d 416, 919 N.W.2d 568, the State obtained a warrant authorizing the installation of a "Global Positioning System" ("GPS") tracking device on a car. However, the investigator did not install the tracking device on Pinder's car until 10 days later. *Id.* ¶ 9. The supreme court rejected Pinder's argument that the investigator's failure to install the device within section 968.15(1)'s five-day execution requirement rendered the warrant void under section 968.15(2). *Id.* ¶¶ 1–2. The supreme court held that a GPS tracking warrant is a warrant issued under its inherent authority rather than a warrant authorizing the seizure of designated property under section 968.12. *Id.* ¶ 2. Because the

GPS tracking warrant was not issued pursuant to a statute, the warrant was not subject to sections 968.15's and 968.17's execution and return requirements. *Id*. ¶ 62. Therefore, the warrant was otherwise constitutionally sufficient, and the results of the warrant were not subject to suppression.

Similarly, because a section 968.375(2) subpoena is not subject to section 968.15's execution requirements, it is not subject to the consequences that flow from its untimely service, i.e., a declaration that the subpoena is void. The untimely service of the subpoena on Charter did not affect DiMiceli's substantial rights and does not render the subpoena void.

E. Notwithstanding DiMiceli's other arguments, delayed service did not violate his substantial rights and does not warrant suppression of evidence.

DiMiceli implicitly suggests that noncompliance with section 968.375 violated his substantial rights because of the penalties imposed under section 968.31 for violations of the WESCL. (DiMiceli's Br. 17.) Subject to certain exceptions, section 968.31(1) penalizes individuals who unlawfully intercept and disclose protected communications. Although related to the WESCL, section 968.375 is not part of the WESCL.[6] But even if it were, noncompliance with sec. 968.375's requirements does not trigger liability under section 968.31(1).

DiMiceli's case has nothing to do with the interception and disclosure of protected communications. The State merely sought to obtain Charter's information related to a subscriber

[6] The SCA, under 18 U.S.C. §§ 2701–2712, is related but separate from Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Similarly, while section 968.375 relies on section 968.27's definitions, it is distinct from the WESCL act.

and not the subscriber's communications through the section 968.375(2) subpoena. None of the State's actions, including the untimely service of the subpoena on Charter, triggered criminal liability under section 968.31(1), and, therefore, does not support DiMiceli's suggestion that untimely service implicated his substantial rights.

DiMiceli asserts that an IP address can change every time a router resets power and, therefore, timely service is needed to "best ensure that the information remains the same from the date of the application to the date of execution." (DiMiceli's Br. 18–19.) The subpoena is not part of the record in DiMiceli's case. But DiMiceli has not suggested that the subpoena requested subscriber information for a date other than September 4, 2015, the date that Agent Crowe accessed publicly available files through a P2P network associated with the IP address 68.190.154.93. Nor could DiMiceli suggest otherwise, because when the record is incomplete, this Court must assume that the missing material supports the circuit court's decision. *See State v. Provo*, 2004 WI App 97, ¶ 19, 272 Wis. 2d 837, 681 N.W.2d 272.

Even assuming IP addresses change, *arguendo*, as DiMiceli suggests, then Agent Crowe would have only been interested in locating subscriber information related to the account that was assigned this specific IP address on September 4 and not a different date. DiMiceli cannot reasonably argue that the four-day delay in serving the subpoena would have changed Charter's records regarding the subscriber associated with this IP address on September 4. While IP addresses might change, DiMiceli has offered no evidence that Charter's records regarding the assignment of the IP address on the date in question changed such that Charter would have disclosed inaccurate information in response to an untimely served subpoena. Absent such evidence, DiMiceli has not demonstrated that the delay impacted his substantial rights.

Relying on *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, 363 Wis. 2d 1, 866 N.W.2d 165, DiMiceli broadly asserts that section 968.375 was enacted "to ensure a citizen's right to privacy of their electronic surveillance records when they are being infringed upon." (DiMiceli's Br. 16.) DiMiceli's reliance on *Two Unnamed Petitioners* is misplaced. First, the reference to section 968.375 that DiMiceli relies upon appears in Section V of Justice Prosser's concurrence. *Two Unnamed Petitioners*, 363 Wis. 2d 1, ¶¶ 240, 247 (Prosser, J., concurring). Only one other member of the supreme court joined this part of his concurrence. *Id.* ¶ 306.

Second, section 968.375 certainly provides some protection for things that a person might want to keep quiet like email or the location of a mobile phone. While section 968.375 may provide statutory protections to subscribers, it does not mean that a person has a Fourth Amendment expectation of privacy in all activities he or she engages in while using an ISP's services. *See State v. Silverstein*, 2017 WI App 64, ¶ 5, 378 Wis. 2d 42, 902 N.W.2d 550 (noting legal duty of ISP to forward information about images and users' accounts to the National Center for Missing and Exploited Children when the provider finds suspected child pornography in a user's account). As the State argued, *supra* Section C., section 968.375's procedures are primarily designed to facilitate the production of documents from providers rather than protect subscribers.

DiMiceli's arguments do not undermine section 968.375(12)'s plain language that limits suppression to circumstances that violate his substantial rights. Suppression was not a remedy for any error that occurred in DiMiceli's case because he has not shown that the error violated his substantial rights.

F. If error occurred, the remedy is remand.

Should the Court determine that a four-day delay in serving the subpoena on Charter may have violated DiMiceli's substantial rights, then it should remand the matter to the circuit court.

In response to DiMiceli's motion, the State argued that the circuit court should dismiss the motion without an evidentiary hearing because, even assuming his assertions were true, he was not entitled to relief. (R. 27:1.) The circuit court denied DiMiceli's motion challenging the section 968.375 subpoena without an evidentiary hearing. (R. 29:6.) Neither the subpoena nor the subsequently issued search warrant that DiMiceli challenges are part of the appellate record. And without this information in the record, it is unclear whether the evidence seized during the execution of the search warrant would constitute derivative evidence subject to suppression.

Further, even if untimely service violated DiMiceli's substantial rights, section 968.375(12) only allows the suppression of "[e]vidence disclosed under a subpoena or warrant issued under this section." Section 968.375(12) does not expressly provide for the suppression of evidence subsequently *derived* through a violation of section 968.375's requirements. That is, in DiMiceli's case, section 968.375(12) only allows suppression for the information Charter provided in response to the subpoena, not the evidence produced through the search warrant.

If untimely service violated DiMiceli's constitutional rights, then suppression may be appropriate under the fruit of the poisonous tree doctrine, assuming the State exploited the illegality. *See Wong Sun v. United States*, 371 U.S. 471, 485–88 (1963). But as the State argued, *supra* Section B.1.–3., untimely service, at most, violated his statutory rights. And suppression for a nonconstitutional violation does not

ordinarily provide a basis to suppress evidence unless the statute expressly provides for suppression or, in rare cases, when noncompliance rendered the statute's safeguards meaningless. *Popenhagen*, 309 Wis. 2d 601, ¶¶ 13 n.10, 54. The legislature could have provided for suppression of evidence. *See, e.g.,* Wis. Stat. 972.085 (prohibiting "use of evidence *derived* from compelled testimony or evidence" as well as the use of compelled testimony). And unlike *Popenhagen*, DiMiceli's case is not one where noncompliance with the five-day service requirement otherwise rendered section 968.375's protections meaningless. Therefore, suppression of the evidence seized through the warrant based solely on a violation of section 968.375's timely service requirement would be inappropriate.

Further, even if delayed service *theoretically* could have implicated DiMiceli's substantial rights, the evidence in the limited record does not support such an assertion. Therefore, if this Court believes that delayed service, at least in some cases, might implicate a subscriber's substantial rights, then it should direct the circuit court to conduct an evidentiary hearing on DiMiceli's motion, applying the legal framework that this Court identifies for resolving the case. *See State v. McCallum*, 208 Wis. 2d 463, 479, 561 N.W.2d 707 (1997), *holding modified by State v. Kivioja*, 225 Wis. 2d 271, 592 N.W.2d 220 (1999) (recognizing remand may be the wiser course so that the circuit court may apply the proper legal standard after a hearing).

Finally, even if DiMiceli can demonstrate that delayed service implicated his substantial rights, the circuit court should decide whether he is entitled to plea withdrawal. The circuit court should grant plea withdrawal only if the State cannot meet its burden of demonstrating that the circuit court's error in refusing to suppress evidence was harmless, guided by the factors this Court identified in *State v. Semrau*, 2000 WI App. 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376.

CONCLUSION

This Court should affirm DiMiceli's judgment of conviction and the circuit court order denying his motion to suppress evidence.

Dated this 1st day of February 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 294-2907 (Fax)
latorracadv@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7378 words.

Dated this 1st day of February 2021.

Electronically signed by:

s/ Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 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 filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 1st day of February 2021.

Electronically signed by:

s/ Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General