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**SUPREME COURT**

STATE OF WISCONSIN

SUPREME COURT

Case No. 2020AP001302-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent

v.

TODD DI MICELI,  
Defendant-Petitioner

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**PETITION FOR REVIEW**

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**PETITION FOR REVIEW**

Todd Di Miceli, petitioner, hereby petitions the Supreme Court of the State of Wisconsin, pursuant to Wis. Stat. §808.10 and Wis. Stat §(Rule) 809.62 to review the decision of the Court of Appeals, District IV, in case no. 2020AP001302-CR, filed on September 16, 2021.

**ISSUES PRESENTED FOR REVIEW**

The issues presented for review are:

Is the delay of service of a subpoena issued under §968.375 remedied by suppression of the subpoena and any derivative evidence that comes therefrom? By delaying service of the subpoena, were Mr. Di Miceli's substantial rights affected? Was this noncompliance with timely serving the subpoena a fundamental error or a technical one?

The Court of Appeals decided the issues as follows:

The delay of service of a subpoena under that statute is not remedied by suppression. Mr. Di Miceli's substantial rights were not affected. Noncompliance with service of a subpoena under §968.375 was a technical error, not a fundamental one.

The reasons the Supreme Court should grant review are:

The court of appeals erred in its holding. Additionally, the petition for review demonstrates a need for the Supreme Court to consider establishing, implementing, or changing a policy within its authority. A decision by the Supreme Court will help develop, clarify, or harmonize the law, and the question presented is a novel one, the resolution of which will have statewide impact.

The circuit court and the court of appeals refused to suppress the results of the subpoena. This Court should grant review and reverse.

#### **STATEMENT OF THE CASE AND FACTS**

The facts in this case are not in dispute. (R. 29:1, App. To Petitioner's Br. 36.) 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 these four 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-Petitioner 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 contain child pornography on various devices. *Id.* Mr. Di Miceli was charged with six (6) counts of Possession of Child Pornography in Dodge County. *Id.*

On September 28, 2021, Mr. Di Miceli filed a motion with the circuit court to suppress the subpoena and evidence obtained therefrom as a result of the failure to properly execute the subpoena, 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 order, 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.) 162 Wis.2d 698, 470 N.W.2d 293, (1991). The court further reasoned that because it was directory, this was a technical error and not a fundamental one under Wis. Stat. §968.375(12). *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.

Mr. Di Miceli was sentenced on March 5, 2020, after pleading guilty to two counts of Possession of Child Pornography.

On October 9, 2020, Mr. Di Miceli filed his brief appealing the circuit court's decision, and then a Replacement Brief on December 2, 2020. The respondent filed its brief on February 1, 2021, and Mr. Di Miceli replied on February 12, 2021. On September 16, 2021, the court of appeals in District IV issued its decision affirming the circuit court's decision. (App. 42-56).

### **ARGUMENT**

This Court should grant review and reverse the holding by the court of appeals and circuit court.

**I. The court of appeals erred in its affirmation of the circuit court's holding.**

In affirming the circuit court's decision, the court of appeals agreed that law enforcement was noncompliant with §968.375(6). However, it found that this noncompliance did not affect Mr. Di Miceli's substantial rights. It also found that law enforcement's noncompliance was a technical error, not a fundamental one, and therefore the subpoena and the evidence derived therefrom should not be suppressed.

In determining whether the error was technical in the case at hand, the court reviewed the purpose of the five-day service requirement with guidance from *State v. Edwards*. 98 Wis. 2d. 367, 297 N.W.2d 12 (1980). The lower court in this

case concluded that “The purpose of §968.375(6)’s five-day service requirement is to ensure prompt service so that a subpoena, which must be supported by probable cause at the time it is issued, continues to be supported by probable cause at the time it is served” and therefore nine days was a technical error. *State v. DiMiceli*, Wis. Ct. App. 20AP1302 at 12, ¶25.

In *Edwards*, a warrant was executed and returned approximately five days and two hours after the warrant was signed by the judge. *Edwards* at 370. The defendant in *Edwards* argued the warrant was untimely executed and returned, and therefore the warrant should have been suppressed. *Id.* at 371.

The Court in *Edwards* did a two-step analysis. First it had to evaluate whether the warrant was timely executed; in fact, it referred to the timeliness of the execution as a threshold issue. *Id.* In *Edwards*, the warrant was executed five days and two hours after it was signed. *Id.* at 370. In its evaluation, the Court evaluated the timeliness based on the bright line rule issued by the Wisconsin Legislature and made the finding that it met that five-day deadline. *Id.* at 371.

Only after meeting the threshold that the warrant was executed timely did the Court analyze whether the execution

of the warrant was reasonable. *Id.* at 372. In the second step of this analysis, it reviewed whether probable cause still existed at the time the warrant was executed. *Id.* at 372-373. Because the warrant was timely executed and there was probable cause at the time of its execution, the Court found it to be reasonable. *Id.* Annotations of *Edwards* in Wisconsin Statute §968.15 note the same interpretation with a two-step analysis.<sup>1</sup> If the Court in *Edwards* was not concerned with whether the warrant was timely executed, then it would not have taken the time to do the two-step analysis. *Edwards* would have had a different holding if law enforcement waited until the ninth day to execute the warrant. The Court did not intend to create any blank check for law enforcement.

In the case at hand, the facts are undisputed. Law enforcement did not comply with the law, and the subpoena was not executed within five days as required by the statute. If this Court uses the same two-step analysis in *Edwards* in the case at hand, as it should, the evaluation does not make it past the initial threshold of whether the subpoena was timely executed. The fact that probable cause still existed at the time the subpoena was executed is only secondary to whether

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<sup>1</sup> "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.

it was timely executed, and it was not. This Court should reverse both lower courts' findings.

By using this correct interpretation of *Edwards* and therefore re-analyzing the purpose of §968.375(6), the delay in the execution of the subpoena was a fundamental error, and not a technical one. This is a threshold issue, and law enforcement did not make it over the initial threshold of timely execution. Because this was a fundamental error, the remedy in the case at hand is suppression.

**II. In assessing the criteria for review under §809.62(1r), this Court should review the case at hand.**

This case poses an opportunity to clarify the execution of service of electronic subpoenas and how long the existence of probable cause can carry a subpoena, regardless of how long it takes to execute. Subpoenas for records of an electronic communication service will become more prevalent as the law catches up with technology.

**A. The decision this Court makes will not only impact cases of child pornography, but it will impact anyone who provides their contact information to an Internet Service Provider.**

Contact information for the subscriber of an internet service provider (hereinafter "ISP") is relevant to countless cases. As law enforcement and the legislature catch up with

technology, more cases will require that police obtain internet subscriber information. This issue is not one that only applies to child pornography cases; it has farther-reaching implications.

For many reasons, individuals do not advertise their contact information on the internet willingly, and some go so far as to create fake profiles or email addresses to hide their identity. In order to obtain contact information for the internet user, police can start by executing a subpoena under §968.375 to obtain contact information for the internet subscriber who is connected with the IP address attached to the online activity. The subpoenaed contact information can lead to the issuance of a search warrant as in the present case, cellular data, and many other avenues to institute criminal prosecution. Prompt and timely execution of the subpoena is an important first step to investigating and prosecuting potential criminal activity, thus helping to ensure the safety of the community.

While this information is relevant to child pornography cases, it is also relevant to a host of other potential prosecutions. These could include, but are not limited to, cases of cyberbullying, stalking, human trafficking, or hate crimes. More time-sensitive cases that would use subpoenas for ISPs could include, for example, allegations of terrorist

plots or school shootings, when the emergency exception does not exist. This could also include situations where police are investigating pre-meditation in a homicide investigation. If law enforcement is not required to execute these subpoenas in a timely fashion as commanded in §968.375(6), it could lead to a delay in the rest of the investigation, or possibly allow for time to erase pertinent evidence.

This issue needs to be reviewed by this Court because it will become more prevalent in a wide array of cases that can affect rights of both defendants and victims in criminal matters.

**B. A decision by this Court will provide clarity to a statute which, as it stands, could lead to an indefinite window for execution of subpoenas for electronic records.**

"A subpoena or warrant issued under this section, [after a finding of probable cause,] shall be served not more than 5 days after the date of issuance" under Wis. Stat. §968.375(6). If it is not executed within five days, "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). In this case, the court of appeals found that, because probable cause still

existed at the time of the execution, law enforcement's noncompliance with §968.375(6) did not substantially affect Mr. Di Miceli's rights. It also found that this noncompliance was a technical error instead of a fundamental one by finding that the purpose of the deadline was to ensure that probable cause did not dissipate. If this Court does not grant review and clarify this statute, the result could lead to subpoenas being issued with the five-day requirement, but effectively being open-ended subpoenas as long as probable cause still exists at execution. These time limits have a purpose, which is to protect the rights of people from government intrusion indefinitely.

In its opinion, the court of appeals found that service of the subpoena after nine days was permitted because it was "sufficiently prompt." *DiMiceli*, at 14, ¶27. This finding leads to a slippery slope without any additional guidance on what "sufficiently prompt" may mean. With the logic currently imposed by the court of appeals' decision, and without further clarity, law enforcement could take thirty days to execute a subpoena under §968.375 as long as probable cause still exists when it is executed. By granting review and clarifying this statute, this Court can prevent a scenario in which subpoenas are open-ended, ensure that the timeliness requirement under



§968.375(6) has meaning, and if “sufficiently prompt” becomes the standard, decide what “sufficiently prompt” means.

The legislature added the time frame for a reason: to protect citizens from government intrusion. 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).

These statutes and deadlines exist for a reason. If law enforcement is permitted to circumvent these laws without remedy to the public, then there is no purpose to such a law's existence.

As more cases involve subpoenas for ISP subscriber information, this Court will have to continue to address this issue until it creates further clarity and determine what remedy exists if not suppression.

**CONCLUSION**

For the foregoing reasons, Mr. Todd Di Miceli respectfully requests that this Court grant review and reverse the decision of the court of appeals, and that it remand to the circuit court with directions that the evidence be suppressed.

Dated this 11th day of October, 2021.

Respectfully submitted,

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**CERTIFICATION**

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and is produced with a monospaced font. The length of this brief is 15 pages and 2904 words. See Wis. Stat. §809.19(8)(c)2., 809.50(4).

Dated this 11th day of October, 2021.

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

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 11th day of October, 2021.

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