STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2019AP517-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN A. PLENCNER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN RACINE COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL J. PIONTEK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the postconviction court soundly deny without a hearing Brian Plencner's motion alleging ineffective assistance of counsel?

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs should adequately set forth the necessary facts, and this Court may resolve the issue presented by applying well-settled legal principles to those facts.

INTRODUCTION

Plencner is not entitled to a hearing on his postconviction motion. He claims that his two trial counsels were ineffective when they sought dismissal of child pornography possession counts that the State charged him with—rather than suppression of the child pornography evidence—based on law enforcement's multi-year delay in searching Plencner's computers. But because Plencner did not show that his proposed suppression motion would have succeeded, the postconviction court soundly exercised its discretion when it denied Plencner's motion without a *Machner* hearing. This Court should affirm.

SUPPLEMENTAL STATEMENT OF THE CASE

On March 29, 2010, Racine police opened an investigation of Plencner after his 15- or 16-year-old stepdaughter alleged that he sexually assaulted her. (R. 1:6; 34:8.) The victim also told police that she had walked in on Plencner watching pornography on his computer and that the

pornography appeared to feature underage children. (R. 14:4.)[1] The police arrested Plencner; on March 30, they executed a search warrant of Plencner's home and seized a laptop computer, a computer tower, a digital camera, a Blackberry cell phone, zip disks, and external hard drives. (R. 14:2.) The Racine police sent the computer and other items to the Wisconsin Department of Justice Division of Criminal Investigations (DCI) on April 8, 2010. (R. 5:1; 8; 33:8–9.)

Between the sexual assault and the child pornography investigations against Plencner, the sexual assault case resolved first. The State charged Plencner with second-degree sexual assault of an unconscious victim, to which Plencner pleaded no contest in August 2010.[2] Plencner received a jail sentence and eight years' probation with a withheld prison sentence.[3]

As for the child pornography investigation, it was delayed. According to Plencner's recitation of facts in a motion to suppress, on September 19, 2013, Toby Carlson, a DCI analyst, contacted the investigator in Plencner's case and explained that due to a series of staff turnovers at DCI, he had been just assigned the forensic review of Plencner's computers. (R. 8:3.) Carlson told the investigator that he still had the 2010 warrant for the search but requested that the

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[1] The complaint contains limited underlying facts as to the child pornography allegations and charges. For the limited purpose of supplementing those facts, the State also cites the presentence investigation. (R. 14.) This case also involved two search warrants; neither the warrants nor the affidavits in support of them were entered in the record. The State provides facts relevant to those warrants based on the parties' circuit court filings referencing those documents.

[2] *See* Wisconsin Circuit Court Access, *State of Wisconsin v. Brian A. Plencner*, Racine County Case No. 2010CF464.

[3] *Id.*

investigator seek a new warrant. (R. 8:3.) The investigator did so, and a new warrant issued on September 24, 2013. (R. 8:3.)

On December 11, 2013, Carlson reported to the investigator that he found child pornography on one of Plencner's hard drives. (R. 1:6; 8:3.) Five of those video files formed the basis for a criminal complaint issued on August 5, 2014, charging Plencner with five counts of possession of child pornography. (R. 1:4–7.)

Plencner filed a motion to dismiss. In it, he argued that "the state's precharging delay violated the rights guaranteed by the 4th, 5th, 6th, and 14th Amendments to the United States Constitution; article I, section 7, 8, and 11 of the Wisconsin Constitution; and *State v. Wilson*, 149 Wis. 2d 878, 904–05, 440 N.W.2d 534 (1989)." (R. 5:1.) Specifically, Plencner argued that the State's charging delay violated his right to due process under *Wilson*, because he suffered actual prejudice and the State's delay in executing the warrant arose from an improper motive or purpose. (R. 5:3.) He also argued that the 2013 warrant was invalid based on stale information, i.e., the same probable cause supporting the 2010 warrant. (R. 5:5.)

The circuit court did not immediately rule on Plencner's motion. Instead, at an October 2015 hearing, the court explained that Plencner's burden to show actual prejudice was central to his challenge claiming that he was denied "due process due to a late prosecution." (R. 33:10.) It further noted that such prejudice "is a difficult thing to assert in this case because computers retain accurately, which is fairly common knowledge, information that's stored on them." (R. 33:10.) The court explained that under the law, the State had a right to charge the child pornography possession charges within the statute of limitations, and that it issued the charges here within the relevant statute. (R. 33:11–12.)

Because of that, the court explained, Plencner had to demonstrate actual prejudice from the delay, which had "not been asserted here." (R. 33:12.) The court reserved ruling on the motion, asking Plencner's counsel "to revisit that issue." (R. 33:12.)

Plencner's counsel submitted a follow-up motion, arguing that Plencner suffered actual prejudice because the State could not establish a proper chain of custody of the computers in the years that it held them. (R. 8:4.) He discussed a newspaper article reporting issues at DCI where staff negligence and "lack of attention to duty" delayed the analysis of computers in another child pornography case. (R. 8:4–6.) Plencner posited that his computers were likely with DCI at the same time it had allegedly mishandled the other case, and that "Plencner suffered actual prejudice from not being able to cross examine any agents who may have mishandled his computer." (R. 8:6.) He also reiterated his argument that the information supporting the 2013 warrant was dated and stale because it was the same information that supported the 2010 warrant. (R. 8:6.)

The State responded that Plencner's chain-of-custody assertion was speculative, and that he did not identify "a single person that's actually touched this computer that is no longer available" to him. (R. 34:5–6.) The State continued that there was "no indication that anyone else" beyond Carlson "actually touched that computer" or that someone had tampered with the computer. (R. 34:6.) And as for Plencner's staleness challenge, the State argued that under the circumstances, the 2010 information, which established probable cause that the seized items contained child pornography in 2010, still established probable cause that the evidence remained on the devices that had stayed in DCI's continued possession through 2013. (R. 34:7.)

The court denied Plencner's motion. It rejected the staleness challenge, holding that the State filed the child pornography charges within the statute of limitations and that there was no evidence that the delay in charging resulted in actual prejudice through "a missing witness or someone that is necessary to the defense." (R. 34:10.) Accordingly, the court held that it saw no "prohibition to the State proceeding on the complaint." (R. 34:11.)

Plencner entered no contest pleas to two possession counts; the remaining counts were dismissed and read in. (R. 17:1–2.) The court sentenced him to five-year sentences on each count to be served consecutively. (R. 17:1.)

Plencner filed a postconviction motion alleging that his trial counsels were ineffective for not pursuing "suppression of the evidence based on the length of time that the police held" his computer and drives. (R. 21:1.) He claimed that counsel should have argued that suppression was warranted because the "nearly" four-year duration of the State's holding Plencner's computer rendered the seizure unreasonable and that no exceptions to the exclusionary rule applied.[4] (R. 21:5–10.)

The postconviction court denied the motion without a hearing. It wrote that Plencner's original motion "contained essentially the same arguments raised" in the postconviction motion, i.e., the original motion effectively raised the issue "as to whether the precharging delay was cause for the Court to dismiss the charges" in the child-pornography case. (R. 22:2.)

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[4] The time between the State's seizure of the computer (March 30, 2010) and its obtaining the second warrant (September 24, 2013) was three years and about six months. Carlson reported finding specific child pornography files just over two-and-a-half months later, on December 11, 2013.

After obtaining permission to file a supplemental postconviction motion regarding a sentence credit issue, Plencner filed that motion and in it also asked the court to reconsider its ruling on his previous postconviction motion. (R. 23:1.) The postconviction court granted the sentence credit request but summarily denied the motion to reconsider. (R. 24:1.)

Plencner appeals from the judgment of conviction and the February 19, 2019, order denying reconsideration.[5] (R. 26:1.)

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[5] Under the circumstances, Plencner's notice of appeal was timely, but he should have designated the June 13, 2018, order denying his postconviction motion in his notice. (R. 26:1.) "An appeal from a final judgment does not include orders entered after the judgment." *See* Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, § 4.21 at 4-19–4-20 (7th ed. 2016) (citing *Chicago & N.W. R.R. v. LIRC*, 91 Wis. 2d 462, 473, 283 N.W.2d 603 (Ct. App. 1979), *aff'd* 98 Wis. 2d 592, 297 N.W.2d 819 (1980)). "Final postjudgment orders are appealable but must be specified if appealed within the prior judgment." *Id.*

The February 19, 2019, order, which Plencner identified in his notice of appeal, involved a favorable decision on sentence credit and a summary denial of Plencner's request for reconsideration. A defendant has no right to appeal "from an order denying a motion to reconsider which presents the same issues as those determined in the order or judgment sought to be reconsidered." *State v. Edwards*, 2003 WI 68, ¶ 8, 262 Wis. 2d 448, 665 N.W.2d 136 (cited sources omitted). Plencner's identifying the February order in the notice of appeal did not bring the June order before this Court.

That said, the error appears to be inadvertent, and the State proceeds assuming that Plencner's notice of appeal may be liberally construed to include the June 13, 2018, order in his notice. *See, e.g.*, *Tyler v. River Bank*, 2007 WI 33, ¶ 25, 299 Wis. 2d 751, 728 N.W.2d 686 (appellate courts should liberally construe ambiguities to preserve the right to appeal).

ARGUMENT

The circuit court soundly denied Plencner's postconviction motion without a hearing.

In essence, Plencner claims that trial counsel raised the wrong claims. Here, his trial counsel had filed a motion to dismiss the counts alleging that (1) the State's delay in charging him violated due process and (2) the information supporting the 2013 warrant was stale. Plencner asserts that counsel should have filed a motion to suppress the child pornography evidence on a theory that the duration of the State's seizure of his computers was unreasonable under the Fourth Amendment. Accordingly, Plencner asserts, trial counsel was ineffective for not pursuing suppression.

Because Plencner cannot demonstrate that his proposed suppression motion would have succeeded, he is not entitled to a hearing on his motion.

A. A *Machner* hearing is not required when the record conclusively demonstrates that the defendant is not entitled to relief.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the Court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id.*

To show prejudice, the defendant must prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Id.* at 693. More than merely showing that the error had some conceivable effect on the outcome, "the defendant must show that there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (quoting *Strickland*, 466 U.S. at 694); *see also Harrington v. Richter*, 562 U.S. 86, 112 (2011) ("The likelihood of a different result must be substantial, not just conceivable.").

A *Machner*[6] hearing is a prerequisite to this Court's vacating the conviction based on ineffective assistance of counsel. *See State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). Hence, the question here is whether Plencner was entitled to a *Machner* hearing on his ineffective assistance claim.

A circuit court must conduct a *Machner* hearing on a claim of ineffective assistance when the defendant alleges sufficient material facts that, if true, entitle him or her to relief. *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W. 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972). Thus, "the motion must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *Bentley*, 201 Wis. 2d at 314) (brackets in *Allen*).

[6] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

If the defendant fails to raise facts in the motion sufficient to entitle him to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the postconviction court has discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310–11; *Nelson*, 54 Wis. 2d at 497–98.

Accordingly, this Court reviews whether the motion alleged sufficient facts and whether the record conclusively demonstrates no entitlement to relief de novo. *See Allen*, 274 Wis. 2d 568, ¶ 9. It reviews whether the postconviction court soundly denied the motion without a hearing under the erroneous-exercise standard. *See id.*

B. Plencner's proposed suppression claim is based on unsettled law; therefore, counsel cannot have been ineffective for failing to raise it.

Trial counsel's failure to raise a novel argument does not render his or her performance constitutionally ineffective. *State v. Lemberger*, 2017 WI 39, ¶ 18, 374 Wis. 2d 617, 893 N.W.2d 232 (quoted sources omitted). Put differently, the constitutional guarantee that criminal defendants received competent representation "does not insure that defense counsel will recognize and raise every conceivable constitutional claim." *Id.* (quoted sources omitted). Similarly, counsel's forgoing "arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services" outside the broad range of what constitutes professionally competent assistance. *Id.* (quoted sources omitted).

Here, Plencner asserted in his postconviction motion that his trial counsel should have sought suppression of the child pornography files by arguing that the duration of the State's seizure of his computers was unreasonable. (R. 21:5–

8.) He invoked several cases for support,[7] but none of them address a warrant-based police seizure of a computer and hard drives.

Neither *United States v. Place*, 462 U.S. 696 (1983), nor *Segura v. United States*, 468 U.S. 796 (1984), supported Plencner's claim. *Place* involved a duration-based challenge to the reasonableness of law enforcement's warrantless seizure of the defendant's luggage. *See Place*, 462 U.S. at 709–710. There, because the seizure was justified by only reasonable suspicion—a "less than probable cause" standard, the police had only narrow authority to briefly detain the luggage and dispel their suspicions. *Id.* at 711. *Place* does not address when a seizure of computer pursuant to a warrant under the probable cause standard becomes unreasonable.

Nor does *Segura*. In that case, police illegally entered a residence and remained there 19 hours while other officers sought a warrant. 468 U.S. at 800–01. There, the question was whether an exception from the exclusionary rule applied, that is, whether the fruits of the later-executed warrant were sufficiently attenuated from the illegal entry or whether police had an independent source that would have allowed untainted discovery of the evidence. *Id.* And there, the Court held that law enforcement's 19-hour delay in securing the warrant was not unreasonable under the circumstances. *Id.* at 812. Again, that case did not address the reasonableness of a law-enforcement delay in examining computers seized pursuant to a valid warrant.

Finally, *Gant* is not on point. There, police seized and held Gant's computer for 10 months before obtaining a

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[7] *See* R. 21:5–7 (discussing *United States v. Place*, 462 U.S. 696 (1983); *Segura v. United States*, 468 U.S. 796 (1984); *State v. Gant*, 2015 WI App 83, 365 Wis. 2d 510, 872 N.W.2d 137).

warrant to search it. *State v. Gant*, 2015 WI App 83, ¶¶ 5–7, 365 Wis. 2d 510, 872 N.W.2d 137. There, this Court declined to address whether the duration of that pre-warrant seizure was unreasonable. *Id.* ¶ 14. Instead, it held that suppression was not required based on the independent source and attenuation doctrines. *Id.*

None of those cases assess the reasonableness of law enforcement's delay in executing a search on an item they seized pursuant to a valid warrant. Nor do they address reasonableness in the context of law enforcement's valid seizure of a computer where police have probable cause to believe that it contains child pornography. Rather, the *Gant* court declined to decide whether the duration was unreasonable. Moreover, the seizures in *Segura* and *Place* were distinguishable because they were both based on mere reasonable suspicion. Accordingly, when the Court considered the reasonableness of the seizure's duration, it was based on law enforcement's more-narrow authority under reasonable suspicion, not the broader probable cause standard.

Plencner, in his brief to this Court, advances *United States v. Burgard*, 675 F.3d 1029, 1033 (7th Cir. 2012) (Plencner's Br. 7–8) for support, but that case likewise does not offer persuasive guidance. *Burgard*, like *Gant*, involved a law enforcement delay in obtaining a warrant to search a cell phone, not in executing it. Again, here, the police seized the computers pursuant to a valid warrant; they renewed that warrant in 2013 when Carlson was able to start analyzing them.

Nor has the State identified any controlling authority that would support a suppression motion based on law enforcement's delay in executing the warrant of a validly seized computer. Accordingly, Plencner's trial counsel cannot have been ineffective for failing to advance a Fourth Amendment claim that lacked controlling Wisconsin or United States Supreme Court authority.

C. Alternatively, Plencner cannot demonstrate that the suppression claim would have succeeded.

Counsel is not ineffective for failing to make meritless arguments. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Had counsel claimed that the duration of law enforcement's retention of the computer before executing the warrant was unreasonable, the challenge would have failed.

The Fourth Amendment does not mandate when police must execute a warrant or place upper limits on the duration of a warrant-based seizure. *See United States v. Gerber*, 994 F.2d 1556, 1559 (11th Cir. 1993). Again, there is no controlling authority in Wisconsin governing this type of claim. That said, federal courts considering such challenges "consistently 'permitted some delay in the execution of search warrants involving computers because of the complexity of the search." *United States v. Jarman*, 847 F.3d 259, 266–67 (5th Cir. 2017). And to that end, those courts have focused their analysis on whether law enforcement's delay in executing the warrant rendered the probable cause supporting the warrant stale. *See id.*; *see also United States v. Brewer*, 588 F.3d 1165 (8th Cir. 2009); *United States v. Syphers*, 426 F.3d 461, 469 (1st Cir. 2005).

Here, Plencner's trial counsel was not ineffective. Counsel raised a staleness challenge to the second warrant; the circuit court correctly held that the probable cause was not stale. (R. 34:11.) Thus, assuming that the reasonableness of the search required a determination of staleness, counsel committed no failure because she advanced a staleness challenge to the warrant. Additionally, regardless whether counsel advanced the challenge in a motion to dismiss or a motion to suppress, the probable cause supporting the 2013

warrant was not stale. If the evidence of child pornography was present on Plencner's devices when police seized them in 2010, nothing about law enforcement's retention of the devices through 2013 would change that. Hence, counsel was not ineffective for not filing a suppression motion that the record demonstrates would have failed.

Plencner asserts that the balancing test from *Place* would apply, which requires courts to assess the reasonableness of a seizure by weighing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." 462 U.S. at 703. Specifically, seizures of property by law enforcement "generally are considered less intrusive than searches" because the rights that a seizure infringes upon are "only the person's possessory interests." *Segura*, 468 U.S. at 806; *see also State v. Brereton*, 2013 WI 17, ¶ 23, 345 Wis. 2d 563, 826 N.W.2d 369.

Place's balancing test does not appear to be the correct test to apply. As discussed, *Place* and its line of cases address warrantless seizures and delays in law enforcement's obtaining a warrant. They do not address law enforcement's delay in executing a warrant to search a validly seized computer, which by its nature requires more time and resources to search than other physical items. *See Jarman*, 847 F.3d at 266–67.

Moreover, Plencner cannot establish that the *Place* test would have resolved in his favor, primarily because he had reduced possessory interests in his computers and hard drives under the circumstances. After Plencner was convicted of the sexual assault charge in 2010 and placed on probation, his probation rules prohibited him from possessing or using any device capable of accessing the Internet without agent

approval. (R. 14:4, 11.) Accordingly, even though Plencner appeared to request the return of his devices in 2011 (R. 8:2), it is not apparent how he could have received them without violating his rules of probation. Thus, during the time that DCI retained Plencner's devices, Plencner did not appear to have a significant possessory interest in items he was generally prohibited from possessing.

In contrast, the government's interest in seizing the items was substantial. To start, the police seized the computers pursuant to a valid warrant and therefore, based on probable cause that Plencner was using the computers to commit a crime. Law enforcement and the public have a substantial interest in investigating crimes and preventing further ones. *See Brereton*, 345 Wis. 2d 563, ¶ 28. Further, "Wisconsin has a significant interest in restricting the proliferation of child pornography." *State v. Bruckner*, 151 Wis. 2d 833, 853, 447 N.W.2d 376 (Ct. App. 1989); *see also New York v. Ferber*, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.") Accordingly, the police here had a significant interest in continuing to hold Plencner's computers until they could confirm the presence of child pornography and prevent any further distribution of it.

In sum, even if the *Place* test applied, law enforcement's interest here greatly outweighed Plencner's diminished possessory interest in the computers.

D. Even if the Fourth Amendment claim had merit, Plencner cannot demonstrate that counsel's not raising it prejudiced him because the good faith exception would have barred suppression.

Here, Carlson obtained the evidence of child pornography shortly after obtaining the September 2013

warrant. Hence, even if the State's delay in investigating the computers until 2013 was unreasonable under the Fourth Amendment, the question is whether Carlson relied in good faith on the new warrant in executing his search.

The good-faith exception to the exclusionary rule applies when a police officer acts in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate. *United States v. Leon*, 468 U.S. 897, 920 (1984). In Wisconsin, to show that the good-faith exception applies, the State must demonstrate "that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." *State v. Eason*, 2001 WI 98, ¶ 63, 245 Wis. 2d 206, 629 N.W.2d 625.

The *Eason* test offers an awkward fit to this case. That case involved a facially valid warrant that issued based on an insufficient affidavit. *Id.* ¶ 64. Here, there is no dispute that the 2010 warrant was valid and supported by probable cause, and that the 2013 warrant was likewise valid and relied on the same—and not stale—probable cause. So, to the extent that the *Eason* test would ask for an analysis of the underlying investigation into probable cause or review, there is no challenge to the sufficiency of the original investigation or claim that the application process in 2010 lacked adequate review.

Moreover, Carlson objectively reasonably relied on the 2013 warrant. To start, when he was assigned the task of reviewing the computers in 2013, he noticed that the warrant was issued in 2010. (R. 8:3.) Carlson contacted the Racine police department investigator and asked him to obtain a new warrant. (R. 8:3.) That investigator subsequently followed up

with the district attorney's office, which likewise advised him to obtain a new warrant. (R. 5:2.) The investigating officer then applied for a new warrant based on the same probable cause that supported the 2010 warrant and an explanation that Carlson had just been assigned the review of Plencner's computers after it had been assigned to two previous specialists who had left DCI. (R. 8:3.) Further, Carlson was aware that he was searching for child pornography files on a computer that had been held by the police since its initial seizure. He had every reason to believe that the computers, which had been retained by DCI since their initial seizure, contained the same files in 2013 as they contained in 2010, and that accordingly, the 2013 warrant was valid.

To be sure, the roughly three-year delay between the State's seizure of Plencner's devices in 2010 and the State's obtaining the new warrant to search them in 2013 was far from ideal. But it did not violate the Fourth Amendment or justify suppression of the evidence Carlson found pursuant to a new warrant. The State obtained no benefit from the delay, and Plencner likewise demonstrated no prejudice resulting from the State's retaining his computers during that time.

In sum, counsel raised the appropriate due process and staleness-based challenges under the circumstances. Because counsel had no duty to advance what would have been an unsettled, meritless, and unfruitful Fourth Amendment claim, counsel neither performed deficiently nor prejudiced Plencner. Accordingly, Plencner was not entitled to an evidentiary hearing on his claim, and the postconviction court soundly exercised its discretion in denying his motion without one.

CONCLUSION

This Court should affirm the judgment of conviction and orders denying postconviction relief.

Dated this 4th day of December, 2019.

Respectfully submitted,

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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 4,445 words.

_____
SARAH L. BURGUNDY
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 Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of December, 2019.

_____
SARAH L. BURGUNDY
Assistant Attorney General