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DISTRICT II/IV

October 24, 2016

To:

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You are hereby notified that the Court has entered the following opinion and order:

2015AP807-CRNM State of Wisconsin v. Todd M. Valiquette (L.C. # 2013CF1219)

Before Lundsten, Higginbotham, and Blanchard, JJ.

Todd Valiquette appeals a judgment convicting him, after entry of a no contest plea, of delivery of a scheduled non-narcotic drug to a minor, second-degree sexual assault of a child, and causing a child to view or listen to sexual activity. Attorney Bradley Lochowicz has filed a no-merit report seeking to withdraw as appellate counsel, Valiquette has filed a response, and Lochowicz has filed a supplemental no-merit report. WIS. STAT. RULE 809.32 (2013-14);¹ *see also Anders v. California*, 386 U.S. 738, 744 (1967); and *State ex rel. McCoy v. Wisconsin*

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Court of Appeals, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). Because an arguably meritorious appellate issue exists with regard to the court-imposed DNA surcharge, we reject the no-merit report.

The crimes for which Valiquette was convicted were committed between August 30, 2013, and September 1, 2013. Valiquette was sentenced on November 10, 2014. Because he was sentenced after January 1, 2014, Valiquette was subject to the revised DNA surcharge statute, WIS. STAT. § 973.046(1r)(a). *See* 2013 Wis. Act 20, §§ 2355, 9426(1)(am). That revision provides for a mandatory DNA surcharge of \$250 per felony conviction. *See State v. Radaj*, 2015 WI App 50, ¶1, 363 Wis. 2d 633, 866 N.W.2d 758. If Valiquette had been convicted and sentenced before January 1, 2014, he would have been subject to a discretionary \$250 DNA surcharge rather than a mandatory DNA surcharge of \$750. *See id.*, ¶¶4-5.

In *Radaj*, we held that the new mandatory, per-conviction, DNA surcharge was an unconstitutional ex post facto law as applied to a defendant convicted of multiple felonies after January 1, 2014, when the underlying crimes were committed before January 1, 2014. *Id.*, ¶35. The timeline for Valiquette's crimes and convictions mirrors that found unconstitutional in *Radaj*. Thus, it appears that a challenge to the imposition of the \$750 DNA surcharge would be meritorious and, accordingly, we reject the no-merit report.

Because there is a basis to reject the no-merit report, we have not completed an independent review of the entire record. We have merely reviewed the no-merit report's discussion of other issues and considered the points made in Valiquette's response and the supplemental no-merit report. Neither the report, supplemental report, nor Valiquette's response gives rise to any other potential issue on which we would reject the no-merit report. By rejecting

the no-merit report, we do not foreclose Valiquette's counsel from raising any other issue he now believes has arguable merit.

Therefore,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice. Attorney Lochowicz or a successor counsel appointed by the State Public Defender shall continue to represent Valiquette.

IT IS FURTHER ORDERED that the time for Valiquette to file a postconviction motion is extended to December 11, 2016.

Diane M. Fremgen
Clerk of Court of Appeals