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110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT II**

April 13, 2016

To:

Hon. Wayne J. Marik  
Circuit Court Judge  
Racine County Courthouse  
730 Wisconsin Avenue  
Racine, WI 53403

Samuel A. Christensen  
Clerk of Circuit Court  
Racine County Courthouse  
730 Wisconsin Avenue  
Racine, WI 53403

W. Richard Chiapete  
District Attorney  
730 Wisconsin Avenue  
Racine, WI 53403

Matt Last  
Gamino Law Offices  
1746 S. Muskego Ave.  
Milwaukee, WI 53204

Gregory M. Weber  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Alejandro Arroyo 590662  
Columbia Corr. Inst.  
P.O. Box 900  
Portage, WI 53901-0900

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

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2015AP709-CRNM      State of Wisconsin v. Alejandro Arroyo (L.C. # 2009CF1206)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Alejandro Arroyo appeals from a judgment of conviction and an order denying his motion for postconviction relief. Arroyo's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Arroyo received a copy of the report, was advised of his right to file a response, and has elected not to do so. After reviewing the record and counsel's report, we conclude that there are no issues with

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version.

arguable merit for appeal. Therefore, we summarily affirm the judgment and order. WIS. STAT. RULE 809.21.

In April 2012, Arroyo pled no contest to aggravated battery and robbery with use of force, both as a party to a crime. The charges stemmed from his role in an extremely violent attack in the city of Racine. According to the criminal complaint, Arroyo and an accomplice repeatedly punched and kicked a man before taking stereo equipment from his car. One witness observed Arroyo kick the man in the head “approximately 15 times.” The man suffered significant injuries, which left him in a vegetative state. Nine additional counts were dismissed and read-in.<sup>2</sup> The circuit court sentenced Arroyo to a total of twenty years of initial confinement followed by ten years of extended supervision.

After sentencing, Arroyo filed a motion for postconviction relief. In it, he sought resentencing on the ground that he received ineffective assistance of trial counsel. Specifically, he blamed his attorney for failing to carry out his alleged desire to accept an earlier plea offer from the State that was more favorable to him. Alternatively, Arroyo sought sentence modification on the ground that a new factor<sup>3</sup> existed regarding his mental health. Following a hearing on the matter, the circuit court denied the motion. This no-merit appeal follows.

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<sup>2</sup> The additional counts against Arroyo included two counts (first-degree reckless injury and criminal damage to property) in this case. They also included seven counts (two counts of conspiracy to commit felony intimidation of a witness, two counts of criminal damage to property, two counts of disorderly conduct, and one count of battery by a prisoner) in four other cases.

<sup>3</sup> A new factor is “a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted).

The no-merit report addresses whether Arroyo's no contest pleas were knowingly, voluntarily, and intelligently entered. The record shows that the court engaged in a colloquy with Arroyo that satisfied the applicable requirements of WIS. STAT. § 971.08(1) and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. A signed plea questionnaire and waiver of rights form was entered into the record along with attachments detailing the elements of the offenses. Although Arroyo was receiving treatment for a mental illness at the time of the plea hearing, he answered the court's questions appropriately and denied that his condition or medications interfered with his ability to understand the proceeding. We agree with counsel that a challenge to the entry of Arroyo's no contest pleas would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In making its decision, the court considered the seriousness of the offenses, Arroyo's character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by the brutal nature of the crimes,<sup>4</sup> the total sentence imposed does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to the circuit court's decision at sentencing would lack arguable merit.

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<sup>4</sup> At sentencing, the circuit court judge remarked, "[I]n my 27 years on the bench this may be the most brutal and aggravated physical beating of another human being that I've ever seen."

The no-merit report also addresses whether the circuit court properly denied Arroyo's request for resentencing. As noted, Arroyo sought resentencing on the ground that he received ineffective assistance of trial counsel.<sup>5</sup> Specifically, he blamed his attorney for failing to carry out his alleged desire to accept an earlier plea offer from the State that was more favorable to him. At the hearing on his motion, Arroyo's attorney denied receiving an earlier plea offer from the State. Based on this testimony, the court found that no earlier plea offer existed and that counsel was not ineffective for failing to schedule a change of plea hearing sooner. Because the record supports these findings, we agree with counsel that any challenge to the decision denying the request for resentencing would lack arguable merit.

Finally, the no-merit report addresses whether the circuit court properly denied Arroyo's request for sentence modification on the ground that a new factor existed regarding his mental health. Prior to his no contest pleas, Arroyo entered pleas of not guilty by reason of mental disease or defect (NGI). A court-appointed examiner evaluated Arroyo and concluded that he suffered from a mental disorder. However, she also concluded that Arroyo was malingering and did not lack substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Arroyo subsequently retained another examiner to conduct a separate evaluation. That examiner disagreed that Arroyo was malingering but could not conclude that Arroyo was a suitable subject for an NGI plea. Arroyo did not pursue the NGI issue further and did not submit his examiner's report to the court.

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<sup>5</sup> Arroyo went through several attorneys before resolving his case. His claim of ineffective assistance is directed at his second appointed attorney.

At the hearing on his motion, Arroyo argued that his retained examiner's report was a new factor because it provided additional insight into the validity of his mental illness. The circuit court disagreed. In doing so, the court noted that it already had insight into Arroyo's mental health status from multiple reports<sup>6</sup> and had recognized it as a treatment need. The court also disputed that the issue of malingering was highly relevant to the imposition of its sentence. Although the court did reference the court-appointed examiner's opinion in its sentencing comments, it did so only to convey that Arroyo's mental illness was not so severe as to reduce his criminal culpability. The court then reiterated that its sentence was based on "the savageness of the crimes and the need to adequately protect the community." Again, because the record supports the circuit court's remarks, we agree with counsel that any challenge to the decision denying the request for sentence modification would lack arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Matt Last of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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<sup>6</sup> In addition to the NGI report submitted by the court-appointed examiner, the circuit court received two earlier reports regarding Arroyo's competency. Both reports concluded that, based upon the medication he was receiving, Arroyo was competent to proceed. Arroyo did not challenge the reports' conclusions.

IT IS FURTHER ORDERED that Attorney Matt Last is relieved of further representation of Arroyo in this matter.

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*Diane M. Fremgen  
Clerk of Court of Appeals*