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**DISTRICT I**

April 21, 2016

To:

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

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2015AP1964-CRNM      State of Wisconsin v. Lenard A. Rivera (L.C. #2013CF2515)

Before Curley, P.J., Brennan and Brash, JJ.

Lenard A. Rivera was convicted after a jury trial of one count of attempted armed robbery and four counts of armed robbery, all as a party to a crime. His appointed appellate counsel, Attorney Patrick Flanagan, 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). Rivera received a copy of the report and responded to it. Rivera's response raises an issue of arguable merit regarding the DNA

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

surcharges imposed on him. Therefore, we reject the no-merit report and dismiss this appeal without prejudice to allow counsel to file a postconviction motion.

The judgment of conviction imposes \$1250 in DNA surcharges on Rivera for the five crimes, \$250 for each conviction, based on a new DNA surcharge statute that applies to all defendants sentenced on or after January 1, 2014. *See* 2013 Wis. Act 20, §§ 2355, 426(1)(am); WIS. STAT. § 973.046(1r)(a); *State v. Radaj*, 2015 WI App 50, ¶1, 363 Wis. 2d 633, 866 N.W.2d 758. Rivera committed the crimes in 2013. The statute in effect at the time these crimes were committed allowed only one DNA surcharge for multiple offenses. *Radaj*, 363 Wis. 2d 633, ¶8. Because the new DNA surcharge statute has a punitive effect as applied to Rivera, it is an unconstitutional *ex post facto* law. *See id.*, ¶35. Moreover, the decision to impose a DNA surcharge was not mandatory at the time Rivera committed these crimes, unless the underlying conviction was for certain sex crimes; the decision was committed to the circuit court's discretion. *See id.*, ¶38; *State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. The sentencing court did not explain why it imposed the surcharges or otherwise indicate how it exercised discretion in the matter. Therefore, imposition of the DNA surcharges creates an issue of arguable merit.

The DNA surcharge issue is not currently preserved for appellate review because no postconviction motion was filed raising it. *See State v. Barksdale*, 160 Wis. 2d 284, 291, 466 N.W.2d 198 (Ct. App. 1991). Because we have concluded that there is *at least one arguably meritorious issue* that must be raised in the circuit court by postconviction motion, we dismiss this appeal without prejudice and direct counsel to file a postconviction motion.

IT IS ORDERED that the no-merit report is rejected.

IT IS FURTHER ORDERED that this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline for filing a postconviction motion under WIS. STAT. RULE 809.30 is extended until sixty days from the date of this order.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*