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**DISTRICT I**

June 21, 2016

To:

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

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2015AP2157-CRNM      State of Wisconsin v. Scotty Joe Peterson (L.C. # 2013CF2462)

Before Kessler, Brennan and Brash, JJ.

Scotty Joe Peterson appeals a judgment convicting him of one count of child enticement, one count of second-degree sexual assault of a child, and one count of repeated acts of sexual assault of the same child. Attorney Russell Bohach filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2013-14),<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Peterson received a copy of the report and responded to it. After conducting an independent review of the record, we conclude that there is an issue of arguable

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

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

The judgment of conviction imposes \$750 in DNA surcharges for the three convictions 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. Peterson committed the crimes in 2013. The statute in effect at the time these crimes were committed allowed only one DNA surcharge for multiple offenses. *Id.*, ¶8. Because the new DNA surcharge statute has a punitive effect as applied to Peterson, it is an unconstitutional *ex post facto* law. *See id.*, ¶35. 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 an 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 thirty days from the date of this order.

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