



to it. After conducting an independent review of the record, we conclude that there is an issue of arguable merit regarding the DNA surcharges imposed on Crump. 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 directs Crump to provide a DNA sample and orders him to pay \$650 in DNA surcharges for the three crimes, \$200 for each of the misdemeanor convictions and \$250 for the felony conviction. The DNA surcharges are based on a new 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) and (b); *State v. Radaj*, 2015 WI App 50, ¶9, 363 Wis. 2d 633, 866 N.W.2d 758. Crump committed these crimes in 2012 and 2013. The statute in effect at the time the crimes were committed allowed only one DNA surcharge to be imposed for multiple offenses, and it applied only to felony offenses, not misdemeanors. *See id.*, ¶8; WIS. STAT. § 973.046(1g) (2011-12). Because the new DNA surcharge statute has a punitive effect as applied to Crump, it is an unconstitutional *ex post facto* law. *See Radaj*, 363 Wis. 2d 633, ¶35. Moreover, the decision to impose a DNA surcharge was not mandatory at the time Crump 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 its exercise of discretion. 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*