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DISTRICT I

December 4, 2017

To:

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

2015AP593-CRNM State of Wisconsin v. Robert Michael Christophel
(L.C. # 2013CF5130)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Robert Michael Christophel is appealing from judgments of conviction, entered upon a jury's verdicts, on one count of first-degree intentional homicide and one count of burglary, both as party to a crime. Appellate counsel, Michael J. Backes, filed a no-merit report, pursuant to WIS. STAT. RULE 809.32 (2013-14) and *Anders v. California*, 386 U.S. 738 (1967).

By order dated February 25, 2016, this court directed counsel to file a supplemental no-merit report. Upon this court's independent review of the record and the no-merit report, we observed that the circuit court had imposed two mandatory DNA surcharges at sentencing, apparently contrary to *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758. We also questioned whether under *State v. Loomis*, appeal No. 2015AP157-CR, the circuit court's use of a COMPAS report at sentencing gave rise to an arguably meritorious issue.¹

On May 22, 2017,² counsel filed the supplemental report addressing the *Radaj* and *Loomis* issues as requested. As relevant to the present order, counsel writes:

[C]ounsel now finds that there may be merit in challenging the second DNA surcharge received by Mr. Christophel at his sentencing. This in that Mr. Christophel committed his crime in 2013, when the DNA surcharge was discretionary, and was sentenced in 2014, after the surcharge became mandatory.

....

Counsel believes there is merit in seeking to reduce the DNA surcharge in Mr. Christophel's case to a single charge for \$250.00. ... Counsel, therefore, seeks to dismiss this no merit appeal and file a post conviction motion in the Trial Court for the sole purpose of addressing the DNA surcharge issue.

Because a no-merit report is only appropriate if counsel is convinced that further proceedings would be wholly frivolous, *see McCoy v. Court of Appeals*, 486 U.S. 429, 437

¹ At the time of our order, the supreme court had granted certification in *Loomis*. The case has since been decided. *See State v. Loomis*, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749.

² Shortly after our February 25, 2016 order, Christophel attempted to discharge counsel, although he later agreed to continue with counsel's representation. By order dated May 10, 2016, we extended the time for Christophel to respond to the no-merit report, and we extended the deadline for counsel to file a supplemental no-merit report so that he could address any issues Christophel might raise in his response. After several extensions, Christophel's response was accepted for filing on March 23, 2017.

(1988), we will dismiss this appeal and extend the time for Christophel to file a postconviction motion in the circuit court.³

Upon the foregoing,

IT IS ORDERED that the previously imposed hold in this matter is lifted.

IT IS FURTHER ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that Christophel shall file a postconviction motion within thirty days of the date on which remittitur occurs. *See* WIS. STAT. RULE 809.82(2)(a) (2015-16).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals

³ Our rejection of the no-merit report is based on counsel's request and does not mean this court has reached a conclusion about the merit of any other potential issues in the case. Christophel is not precluded from raising any additional issues in the postconviction proceedings that counsel may now believe have merit.