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**DISTRICT IV**

February 5, 2019

To:

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

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2018AP1360-CRNM      State of Wisconsin v. Justin W. Griffis (L.C. # 2016CF107)

Before Lundsten, P.J., Sherman and Kloppenburg, 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).**

Justin Griffis appeals from a judgment of conviction and an order denying his motion for postconviction relief. Attorney Christopher August filed a no-merit report and a supplemental no-merit report concluding that further postconviction or appellate proceedings would lack

arguable merit. *See* WIS. STAT. RULE 809.32 (2017-18)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Griffis has filed multiple responses to the no-merit report.

In a letter dated November 21, 2018, Attorney August requested that the no-merit appeal be placed on hold pending a decision in *State v. Trammell*, No. 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). On November 13, 2018, the Wisconsin Supreme Court granted a petition for review in *Trammell* to address whether the holding in *State v. Avila*, 192 Wis. 2d 870, 532 N.W.2d 423 (1995)—that it is “not reasonably likely” that WIS JI—CRIMINAL 140 reduces the State’s burden of proof—is good law; or whether *Avila* should be overruled on the ground that it stands rebutted by empirical evidence. Consequently, an issue of arguable merit exists from the use of WIS JI—CRIMINAL 140 at Griffis’s trial. Until *Trammell* is decided, it cannot be determined whether further appellate proceedings on that issue would lack arguable merit.

In addition, we have completed our independent review of the record as mandated by *Anders*, 386 U.S. 738, and we conclude that an arguably meritorious issue exists with respect to sentence credit. Therefore, we reject the no-merit report, dismiss the instant appeal without prejudice, and extend the deadline for filing a postconviction motion.

Griffis was convicted, after a jury trial, of one count of first-degree sexual assault of a child. He was sentenced to four years of initial confinement and six years of extended supervision. Griffis also received 82 days of sentence credit. According to the pretrial incarceration credit form filed in the circuit court on the same day as Griffis’s sentencing

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

hearing, the 82 days of credit included five days of credit for time spent in custody from the date of his arrest until the date he was released on bail. The form lists the date of arrest as January 8, 2016, and the date of release on bail as January 12, 2016. However, the police report attached as an exhibit to Griffis's initial no-merit response states that Griffis was arrested for sexual assault on January 7, 2016. This is consistent with Griffis's own assertion that he was arrested on January 7, 2016, handcuffed, and taken to the police station on that date. If the date of Griffis's arrest was indeed January 7, 2016, and not January 8, 2016, as listed on the pretrial incarceration credit form, he may be entitled to additional sentence credit.

In a WIS. STAT. RULE 809.32 no-merit appeal, we can only affirm a conviction if an appeal would lack arguable merit. RULE 809.32(3). The question of how much sentence credit Griffis is entitled to is not self-evident from the materials before this court. To determine whether there would be arguable merit to a sentence credit claim, we would have to make findings based upon the record and the supplemental materials. We are precluded from finding facts. *Kovalic v. DEC Int'l*, 186 Wis. 2d 162, 172, 519 N.W.2d 351 (Ct. App. 1994).

Because the record on appeal and the supplemental materials do not permit us to conclude that there are no issues of arguable merit, we reject the no-merit report, dismiss this appeal, and extend the deadline for filing a postconviction motion in this matter. If the circuit court is asked to address sentence credit, the circuit court shall make detailed findings of fact regarding all aspects of the sentence credit claim to provide this court with an adequate record for a future review. Griffis also may pursue postconviction relief on grounds other than those discussed in this order.

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice. Attorney August or a successor appointed by the State Public Defender shall continue to represent Griffis.

IT IS FURTHER ORDERED that the time for Griffis to file a postconviction motion or notice of appeal is extended to 60 days from the date the Wisconsin Supreme Court issues a decision in *State v. Trammell*, No. 2017AP1206-CR.

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*