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**DISTRICT III**

March 26, 2024

To:

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Circuit Court Judge  
Electronic Notice

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

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2022AP1010-CRNM      State of Wisconsin v. Joshua M. Riden (L. C. No. 2019CF3)

Before Stark, P.J., Hruz and Gill, 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).**

Attorney Roberta Heckes, appointed counsel for Joshua Riden, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2021-22),<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). As discussed further below, we conclude that there

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

is an issue of arguable merit relating to Riden’s no-contest plea. Accordingly, we reject the no-merit report, dismiss this appeal, and extend the time to file a postconviction motion.

Riden pled no contest to one count of child enticement, and he was convicted on the basis of his plea. The circuit court sentenced him to an eight-year term of imprisonment, consisting of three and one-half years of initial confinement followed by four and one-half years of extended supervision.

Appellate counsel filed this no-merit appeal and no-merit report. Riden filed responses to the report that included allegations relating to his understanding of the effect of his plea under the “two strikes” law. These allegations form the basis for our rejection of the no-merit report.<sup>2</sup>

The two strikes law is set forth in WIS. STAT. § 939.62(2m) and is summarized in our supreme court’s decision in *State v. Radke*, 2003 WI 7, 259 Wis. 2d 13, 657 N.W.2d 66. Under this law, an offender is a “persistent repeater” if the offender was previously convicted of a “serious child sex offense” and is being sentenced for another such offense. *Radke*, 259 Wis. 2d 13, ¶18. A “serious child sex offense” under the law includes child enticement. Sec. 939.62(2m)(a)1m.a. Finally, a “persistent repeater” is subject to a mandatory life sentence without the possibility of parole or extended supervision. Sec. 939.62(2m)(c); *Radke*, 259 Wis. 2d 13, ¶18.

In his response, Riden alleges that his trial counsel incorrectly advised him that a child enticement conviction would not count as a strike under the two strikes law. He also alleges that

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<sup>2</sup> The response with the most relevant allegations is Riden’s August 3, 2023 response. Riden titled the document as a habeas petition, but in an order dated August 7, 2023, we construed the document as a response to the no-merit report and accepted it for filing on that basis.

he would not have entered his plea if he had known that it would count as a strike. There are portions of the existing record that appear to be at least arguably consistent with Riden's allegations. In a letter that trial counsel filed prior to the plea hearing, counsel appears to assert that Riden could not receive a strike by pleading no contest to child enticement. Additionally, there were multiple discussions on the record relating to strikes, including discussions during the plea hearing.

Upon review of Riden's allegations and the record, this court required appellate counsel to provide further input on the potential issue of whether Riden could seek plea withdrawal based on his alleged misunderstanding of the effect of his plea under the two strikes law. *See State v. James Brown*, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906 (“When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea.”). Our order noted that the potential issue might be framed alternatively as whether Riden could withdraw his plea based on ineffective assistance of trial counsel. *See State v. Villegas*, 2018 WI App 9, ¶19, 380 Wis. 2d 246, 908 N.W.2d 198 (A defendant “may argue that the plea is infirm” based on “ineffective assistance of counsel.”).

In response to our order, appellate counsel filed a supplemental no-merit report. Counsel argues in the supplemental report that Riden's allegations do not support plea withdrawal because a defendant need not be informed of a plea's collateral consequences, which include whether an offense counts as a strike. This argument does not persuade us that it would be frivolous for Riden to pursue plea withdrawal because, although there may be no general right to be informed of collateral consequences, a defendant may seek plea withdrawal when the circuit court or trial counsel *misinforms* the defendant regarding a collateral consequence. *See State v. Charles Brown*, 2004 WI App 179, ¶¶8-13, 276 Wis. 2d 559, 687 N.W.2d 543.

In arguing that a claim for plea withdrawal would lack arguable merit, appellate counsel also relies on an affidavit from Riden’s trial counsel filed with the supplemental no-merit report. In the affidavit, trial counsel avers that he did not advise Riden that “pleading to Child Enticement would not constitute a strike” and that “[o]ur conversations were only around if he ple[]d to the count of Child Enticement[,] would he be in prison for the rest of his life.” The affidavit does not persuade us that it would be frivolous for Riden to pursue plea withdrawal because the affidavit and Riden’s allegations show that there are one or more factual disputes, potentially involving credibility determinations, relating to the advice that counsel provided to Riden and Riden’s understanding of that advice. This court cannot resolve factual disputes or make credibility determinations.

For these reasons, we conclude that it would not be frivolous for Riden to file a postconviction motion seeking plea withdrawal. Accordingly, we reject the no-merit report, dismiss this appeal, and extend the time to file a postconviction motion.

Therefore,

IT IS ORDERED that the no-merit report is rejected and that this appeal is dismissed.

IT IS FURTHER ORDERED that, if successor counsel is to be appointed by the State Public Defender, the appointment shall be made within thirty days of the date of this order.

IT IS FURTHER ORDERED that the time to file a postconviction motion is extended to ninety days from the date of this order.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*