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**DISTRICT I**

March 22, 2016

To:

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Circuit Court Judge  
Courthouse, Branch 23  
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You are hereby notified that the Court has entered the following opinion and order:

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2015AP128-CRNM      State of Wisconsin v. Faizel Ka Ri (L.C. #2012CF2297)

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

Faizel Ka Ri was convicted after a jury trial of two counts of physical abuse of a child, recklessly causing great bodily harm. Attorney John T. Wasielewski was appointed to represent Ri for postconviction and appellate proceedings. Attorney Wasielewski filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)<sup>1</sup> and *Anders v. California*, 386 U.S. 738, 744 (1967). Ri received a copy of the report and was advised of his right to respond, but did not do

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

so. Our independent review of the record discloses an issue of arguable merit regarding the DNA surcharges imposed on Ri. Therefore, we reject the no-merit report.

The judgment of conviction imposes \$500 in DNA surcharges for the crimes, which Ri committed between November 3, 2010, and January 28, 2011. The dates of the crimes, not the dates of conviction or sentencing, control the imposition of DNA surcharges. *State v. Radaj*, 2015 WI App 50, ¶1, 363 Wis. 2d 633, 866 N.W.2d 758. The statute in effect at the time these offenses were committed allowed only one DNA surcharge for multiple offenses. *Id.*, ¶8. Here, the sentencing court imposed two surcharges. Moreover, the decision to impose a surcharge was not mandatory at the time Ri committed these crimes, unless the underlying conviction was for certain sex crimes not applicable here. Instead, the decision was committed to the circuit court's discretion. *See State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. The sentencing court did not explain why it imposed the surcharge or otherwise indicate that it exercised discretion in the matter. 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*