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August 22, 2007

To:

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

2007AP178-CR

State of Wisconsin v. William Demetrius Hamilton
(L.C. # 2003CF7355)

Before Anderson, P.J., Nettesheim and Snyder, JJ.

William Hamilton appeals from an order imposing an additional fourteen months of reconfinement following the revocation of extended supervision. Hamilton's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2005-06),¹ and *Anders v. California*, 386 U.S. 738 (1967). Hamilton received a copy of the report, was advised of his

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

right to file a response, and has elected not to do so. Our independent review of the record reveals an issue of arguable merit. Therefore, we reject the no-merit report.

The determination of Hamilton's reconfinement term was made by a different circuit court judge than the judge who imposed Hamilton's original sentence. The record fails to demonstrate that the court determining the term of reconfinement considered the transcript of Hamilton's original sentencing as required by *State v. Gee*, 2007 WI App 32, ¶15, 729 N.W.2d 424.² This omission constitutes an issue of arguable merit which may result in the reversal of the reconfinement order and a remand for a new reconfinement hearing. *See id.*

We may affirm a conviction in a no-merit appeal only if there are no issues with arguable merit.³ We cannot afford appellate relief because a claim that the circuit court failed to consider the original sentencing transcript is not properly before this court. Before the issue can be considered on appeal, it must be raised in the circuit court by a postconviction motion. *See State v. Norwood*, 161 Wis. 2d 676, 680, 468 N.W.2d 741 (Ct. App. 1991). Therefore, we reject the no-merit report and require counsel to advise the clerk of this court within sixty days of the date of this order whether Hamilton desires postconviction proceedings under WIS. STAT. RULE

² At the commencement of the reconfinement hearing, the circuit court only makes reference to a letter from a member of the clergy, the memo to the court from the department of corrections, and the administrative law judge's decision on the revocation of extended supervision. The circuit court later refers to a letter Hamilton wrote the court prior to his original sentencing. There is no mention of having reviewed the transcript of the original sentencing hearing.

³ In addition to addressing whether the circuit court properly exercised its discretion in determining the reconfinement term, the no-merit report addresses whether there is arguable merit to a claim that the determination is based on inaccurate information. We conclude that the report properly determines that the latter issue lacks arguable merit. *State v. Gee*, 2007 WI App 32, ¶15, 729 N.W.2d 424, was decided after the no-merit notice of appeal was filed in this case and applies on the issue of whether the circuit court properly exercised its discretion. The no-merit report does not discuss *Gee*.

809.30. If Hamilton desires such proceedings, we will dismiss this appeal and reinstate the RULE 809.30 postconviction motion period.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected.

IT IS FURTHER ORDERED that within sixty days of the date of this order, counsel shall file the response required by this order.

David R. Schanker
Clerk of Court of Appeals