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**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT I**

July 3, 2014

To:

Hon. Kevin E. Martens  
Circuit Court Judge  
Safety Building Courtroom, # 502  
821 W. State Street  
Milwaukee, WI 53233-1427

John Barrett  
Clerk of Circuit Court  
Room 114  
821 W. State Street  
Milwaukee, WI 53233

Carl W. Chesshir  
Chesshir Law Office  
S101 W34417 Hwy LO, Ste. B  
Eagle, WI 53119

Karen A. Loebel  
Asst. District Attorney  
821 W. State St.  
Milwaukee, WI 53233

Gregory M. Weber  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Joevone Martell Jordan 480030  
Waupun Corr. Inst.  
P.O. Box 351  
Waupun, WI 53963-0351

Jeremy C. Perri  
First Asst. State Public Defender  
735 North Water Street, Suite 912  
Milwaukee, WI 53202

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

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2013AP1225-CRNM      State of Wisconsin v. Joevone Martell Jordan (L.C. #2009CF2927)

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

A jury found Joevone Martell Jordan guilty of first-degree intentional homicide and attempted armed robbery. He is pursuing an appeal with the assistance of Attorney Carl W. Chesshir. Appellate counsel filed a no-merit report, and Jordan filed a response. *See WIS. STAT.*

RULE 809.32 (2011-12);<sup>1</sup> *see also Anders v. California*, 386 U.S. 738 (1967). In the no-merit report, appellate counsel examines the sufficiency of the evidence and the circuit court's exercise of sentencing discretion. At our request, appellate counsel filed a supplemental no-merit report discussing whether the circuit court erroneously admitted evidence at trial of Jordan's July 31, 2009 jailhouse telephone conversation with his mother. Jordan had unsuccessfully sought to exclude this evidence on the ground that the conversation included his summary description of his custodial statement to police, a statement that the circuit court suppressed. Appellate counsel asserted in the supplemental no-merit report that an appellate challenge to the circuit court's ruling admitting the July 31, 2009 telephone conversation would lack arguable merit because, in counsel's view, the issue is governed by *State v. Schlise*, 86 Wis. 2d 26, 46, 271 N.W.2d 619 (1978) ("admissibility of a statement should be determined by fundamental voluntariness concepts and not on the 'poisonous tree' rule"). In *Schlise*, the supreme court discussed the analysis for determining the admissibility of later confessions after an initial confession is deemed inadmissible. *See id.* This court concludes that efforts to distinguish the instant case from the circumstances discussed in *Schlise* would not be wholly frivolous.

Appellate counsel also asserts in the supplemental no-merit report that further pursuit of a challenge to admission of the July 31, 2009 telephone call would lack arguable merit because the issue is moot. In support, counsel points to the cross-examination that Jordan conducted in regard to his jailhouse telephone calls. The court is not satisfied that Jordan's cross-examination moots this issue.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

When counsel files a no-merit report, the question presented to this court is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. *See Anders*, 386 U.S. at 744. The test is not whether the attorney should expect the argument to prevail. *See* SCR 20:3.1, comment (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for counsel to prosecute the appeal. *See McCoy v. Court of Appeals*, 486 U.S. 429, 436 (1988).

Jordan is entitled to postconviction and appellate proceedings that analyze the potential issues. Therefore, we reject counsel's no-merit report, dismiss this appeal without prejudice, and extend the deadline for Jordan to file a postconviction motion or a notice of appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender for the possible appointment of new counsel, any such appointment to be made within forty-five days.<sup>2</sup>

IT IS FURTHER ORDERED that the Office of the State Public Defender shall notify this court within five days after new counsel is appointed or within five days after the state public defender concludes that no change in counsel will be made.

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<sup>2</sup> We express no opinion as to whether successor counsel should be appointed.

IT IS FURTHER ORDERED that the deadline for Jordan to file a postconviction motion or notice of appeal is extended until forty-five days after the date on which the public defender advises this court as to the status of Jordan's representation.<sup>3</sup>

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>3</sup> Jordan's counsel is free, of course, to take whatever steps counsel believes is appropriate in pursuit of postconviction and appellate relief for Jordan on grounds in addition to those discussed in this order.