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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  
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**DISTRICT I**

March 29, 2022

To:

Hon. Frederick C. Rosa  
Circuit Court Judge  
Electronic Notice

George Christenson  
Clerk of Circuit Court  
Milwaukee County  
Electronic Notice

John D. Flynn  
Electronic Notice

Jaymes Fenton  
Electronic Notice

Winn S. Collins  
Electronic Notice

Michael Jamall Hill 390736  
Felmers O. Chaney Correctional Inst.  
2825 North 30th Street  
Milwaukee, WI 53210

Joseph Ehmann  
Regional Attorney Manager  
Office of the State Public Defender  
P.O. Box 7862  
Madison, WI 53707-7862

Andrea Taylor Cornwall  
Asst. State Public Defender  
735 N. Water St., Ste. 912  
Milwaukee, WI 53202

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

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2020AP1148-CRNM      State of Wisconsin v. Michael Jamall Hill (L.C. #2017CF5087)

Before Brash, C.J., Donald, P.J., and Dugan, J.

**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).**

Michael Jamall Hill appeals a judgment of conviction entered after a bench trial in which the circuit court found him guilty of two felonies: possession with intent to deliver cocaine by use of a dangerous weapon as a second or subsequent offense, in violation of

§§ 961.41(1m)(cm)1r, 939.63(1)(b), 961.48(1)(b) (2017-18);<sup>1</sup> and possession of a firearm while a felon, in violation of WIS. STAT. § 941.29(1m)(a). Attorney Jaymes Fenton filed a no-merit report stating that further pursuit of the case would lack arguable merit. *See* WIS. STAT. RULE 809.32 (2019-20). After Hill’s deadline for a response passed without action, this court determined that items were missing from the record. These included the transcript of the hearing addressing Hill’s challenge to the mandatory minimum three-year term of initial confinement for the firearms charge, as well as some of the materials that the circuit court considered in addressing that challenge. At our direction, Attorney Fenton requested preparation of the missing transcript and took the other steps required to complete the record. He then filed two supplemental no-merit reports. We have conducted an independent review of the record as required by *Anders v. California*, 386 U.S. 738 (1967), and we have considered the no-merit reports that appellate counsel filed on Hill’s behalf. We conclude that further proceedings in this matter would not be frivolous. Accordingly, we reject the no-merit reports, dismiss this appeal without prejudice, and extend the time for Hill to file a postconviction motion or notice of appeal on the merits.

Pursuant to WIS. STAT. § 941.29(4m), applicable to sentences imposed before July 1, 2020, a person who violates § 941.29(1m) is subject to a mandatory minimum three-year term of initial confinement if, as relevant here, the person previously committed a violent felony; and the person committed the current violation within five years after completing a sentence or probationary period for a felony. Section 941.29(1g)(a) defines “violent felony” to mean “any felony under ... this section.”

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

In this case, the State filed a criminal complaint in Milwaukee County alleging that on October 31, 2017, Hill committed two felonies, including possession of a firearm while a felon. The State further alleged that he was subject to the mandatory minimum three-year term of initial confinement for the firearms offense based on his 2010 conviction for possessing a firearm as a person previously adjudicated delinquent for a felonious act and his 2013 discharge from probation for that offense. Hill moved to strike the allegation that he faced a mandatory minimum sentence, arguing that the provisions of § 941.29 that required a mandatory minimum term of initial confinement were unconstitutional as applied to him. In support, he cited, among other authorities, various statutory provisions that define “violent” offenses without including the crime of felon in possession of a firearm. He further argued that another circuit court judge in Milwaukee County had recently considered arguments challenging the validity of the mandatory minimum requirement on similar grounds and had ultimately ruled for the defendant. The circuit court judge in the instant case conducted a hearing and considered the arguments of counsel and the decision of his fellow circuit court judge, then denied Hill’s motion. At a subsequent bench trial, the circuit court found Hill guilty as charged.

The matter proceeded to sentencing on September 9, 2019. A successor circuit court judge presided. Hill again urged the circuit court not to impose a three-year term of confinement for the firearms offense. However, for possession of a firearm while a felon, the circuit court imposed a concurrent, evenly bifurcated six-year term of imprisonment. Additionally, for possession with intent to deliver cocaine, the circuit court imposed an evenly bifurcated four-year term of imprisonment.

Hill, by Attorney Fenton, filed a no-merit notice of appeal. In the supporting no-merit reports, Attorney Fenton stated that, in his view, the mandatory minimum sentence was

constitutionally applied and that “it would be impossible for Hill to meet the burden of proving” otherwise. The matter is now before this court.

When we consider an appeal filed under WIS. STAT. RULE 809.32 (2019-20), the question is whether a potential issue would be “wholly frivolous.” *State v. Parent*, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915 (citation omitted). The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (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 the lawyer to prosecute the appeal. *See McCoy v. Court of Appeals*, 486 U.S. 429, 436-37 (1988).

In this case, we conclude that it would not be frivolous for Hill to pursue an appeal challenging the applicability of the mandatory minimum term of initial confinement. We are persuaded that counsel would not act unethically by seeking appellate review of the issue that Hill presented to the circuit court, including the arguments that persuaded another circuit court judge to resolve a similar claim in favor of the defense. We emphasize that we do not reach any conclusion that such arguments would or should prevail, only that they would not be frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32 (2019-20).

In light of the foregoing, we must reject the no-merit report filed in this case. We add that our decision does not mean we have reached a conclusion about the arguable merit of any other potential issue in the case. Hill is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

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

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Hill, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Hill or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Hill to file a postconviction motion under WIS. STAT. RULE 809.30 (2019-20), is extended until sixty days after the date on which this court receives notice from the State Public Defender's office advising either that it has appointed new counsel for Hill or that new counsel will not be appointed.

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*