NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ELIJAH DONCREEZE MACK, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D18-3113

Opinion filed July 17, 2020.

Appeal from the Circuit Court for Pinellas County; Michael F. Andrews, Judge.

Howard L. Dimmig, II, Public Defender, and Richard J. Sanders, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and David Campbell, Assistant Attorney General, Tampa, for Appellee.

NORTHCUTT, Judge

Elijah Mack appeals following his postconviction resentencing proceeding under section 921.1401, Florida Statutes (2018), which governs the imposition of life imprisonment sentences on juvenile offenders. We conclude that the sentence imposed

by the postconviction court violates the Eighth Amendment to the United States Constitution, and we reverse.

In 1980, Mack was convicted of first-degree murder, burglary with an assault, and sexual battery with actual physical force likely to cause serious personal injury. The trial court sentenced him to life imprisonment for the murder, with a concurrent life sentence for the burglary and a consecutive life sentence for the sexual battery.

Mack committed his crimes in a single episode when he was seventeen years old. In 2016, he filed a motion to correct his sentences pursuant to Florida Rule of Criminal Procedure 3.800(a). He asserted that the sentences were illegal under principles enunciated in Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S. 460 (2012). Together those decisions hold that the Eighth Amendment precludes sentencing a juvenile offender to life imprisonment without some meaningful opportunity for the offender to obtain release based on demonstrated maturity and rehabilitation. 560 U.S. at 75; 567 U.S. at 479. The Florida Legislature responded to Graham and Miller when it adopted chapter 2014-220, Laws of Florida, which is codified in sections 775.082, 921.1401, and 921.1402, Florida Statutes. State v. Purdy, 252 So. 3d 723, 725 (Fla. 2018).[1]

[1]Although the effective date of these 2014 laws was prospective, the Supreme Court of Florida has held that they apply retroactively. Purdy, 252 So. 3d at 725 (citing Falcon v. State, 162 So. 3d 954, 962 (Fla. 2015), and Horsley v. State, 160 So. 3d 393, 405–06 (Fla. 2015)).

The postconviction court granted Mack's rule 3.800(a) motion, and it conducted a new sentencing hearing pursuant to section 921.1401. Thereafter, the court vacated Mack's sentences, and in a carefully reasoned order, it again sentenced Mack to concurrent life sentences on the murder and burglary convictions and to a consecutive life sentence on the sexual battery conviction. Under sections 921.1402(2)(a) and 775.082(1)(b), Mack is entitled to a review of the sentence on the murder conviction after he serves twenty-five years of it. Sections 775.082(3)(c) and 921.1402(2)(d) grant him the right to sentencing reviews after he serves twenty years of his burglary and sexual battery sentences, respectively, and, if he is not resentenced as to them in his initial review proceedings, another review ten years thereafter. Under section 921.1402(7), if at a sentencing review the court determines that the offender "has been rehabilitated and is reasonably believed to be fit to reenter society," the court must modify the sentence, and it must also impose a term of probation of at least five years.

During the instant appeal of the new sentencing order, Mack unsuccessfully moved to correct the sentence pursuant to Florida Rule of Criminal Procedure 3.800(b). In that motion and on appeal, he has pointed out that the sentencing scheme imposed by the postconviction court precludes his release based on demonstrated maturity and rehabilitation in any review of his murder and burglary sentences. This is so because even if a review were to produce a finding that Mack is fully rehabilitated and must be released from incarceration under those sentences, he must then begin serving his consecutive life sentence for the sexual battery offense. He would be ineligible for a review of that sentence for another twenty years.

Mack argues that the consecutive life sentence imposed for the sexual battery offense committed in the same episode as that of the two other crimes violates the Eighth Amendment. We agree, for two reasons. First, as the plurality concluded in Purdy, when conducting a review of Mack's murder and burglary sentences a court would have no statutory authority to consider all three of his sentences in the aggregate. See Purdy, 252 So. 3d at 728–29. Thus, as to those two offenses the mandated opportunity for release would be wholly illusory. At best—even if a reviewing court modified those sentences so that they were immediately completed—the consecutive life sentence would render him ineligible to seek his release from incarceration for another two decades. Manifestly, review of the murder and burglary sentences would not and could not satisfy the Eighth Amendment's requirement that Mack be afforded a meaningful opportunity to obtain his release by demonstrating his maturity and rehabilitation.

Second, as Justice Pariente noted in her dissent from the Purdy plurality decision,

> a "sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." Graham, 560 U.S. at 71, 130 S. Ct. 2011. When continued incarceration advances no penological purpose, the punishment runs afoul of the Eighth Amendment's prohibition of cruel and unusual punishment. See id. at 59, 130 S. Ct. 2011.

Purdy, 252 So. 3d at 731 (Pariente, J., dissenting). Here, Mack's consecutive life sentence for an offense arising from the same criminal episode as the others advances no penological purpose. As a practical matter, its only effect is to eliminate any meaningful opportunity for him to gain release from incarceration under the murder and burglary sentences.

When denying Mack's rule 3.800(b) motion to correct illegal sentence, the postconviction court relied on two appellate court authorities that, in fact, did not justify the court's ruling. First, the court found "guidance" from the Fourth District's decision in Wharthen v. State, 265 So. 3d 695 (Fla. 4th DCA 2019), which involved a challenge to consecutive sentences arising from separate cases. As the postconviction court noted, Wharthen rejected the defendant's position that consecutive prison terms for unrelated homicide and nonhomicide offenses was an aggregate sentence implicating the Eighth Amendment. "Indeed," the Wharthen court wrote, "our supreme court decided in a plurality decision that a defendant's aggregate sentence arising from the same case did not implicate Graham and Miller. Purdy, 252 So. 3d at 729." Id. at 697.

But Purdy held no such thing. To the contrary, the Purdy plurality went to pains to emphasize that its holding was strictly based on a construction of the applicable juvenile offender sentencing statutes. It expressly did not weigh in on the Eighth Amendment implications of aggregate juvenile offender sentences vis-à-vis the offenders' opportunities to obtain release.

> [B]ecause the statute limits the review provisions and does not deal with the overall sentence, there will be other cases, like this one, where the sentencing court is required to consider whether the offender "is rehabilitated and is reasonably believed to be fit to reenter society" even though the offender will continue to be incarcerated irrespective of the outcome of the hearing. Amicus points out that the continued incarceration of an offender on offenses arising from a single criminal episode under these circumstances—long after a judicial determination that the juvenile offender is rehabilitated—may raise additional Eighth Amendment issues.

Purdy, 252 So. 3d at 728–29. In a footnote to that passage, the court made clear that it did not pass on those constitutional questions: "Cognizant of these issues, we observe

that our decision today only addresses the statutory construction issue presented and does not foreclose Purdy from challenging his consecutive 112.7-month sentences in the trial court on Eighth Amendment grounds." Id. at 729 n.2.[2] Thus, the Wharthen court and the postconviction court below simply were mistaken in believing that Purdy resolved the Eighth Amendment issues contrary to Mack's position.

The postconviction court also cited Hernandez v. State, 43 Fla. L. Weekly D1079 (Fla. 3d DCA May 16, 2018).[3] But that opinion, announced before Purdy was decided, did not address the issue before us. Rather, the court considered four arguments directed to a juvenile offender's life sentence for first-degree murder followed by a consecutive thirty-year sentence for attempted murder, imposed at a resentencing under section 921.1401. Id. at *2-3. Of the four issues considered, all but the last

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[2]Notably, Purdy did just that. On remand, he filed in circuit court an amended motion for relief from his aggregate consecutive nonhomicide sentences, challenging them as violative of the Eighth Amendment. The State argued that his sentences were constitutional but informed the circuit court that it would not object to a resentencing order that released Purdy from prison. The circuit court held that Purdy having been found to be rehabilitated and fit to return to society in a review of his forty-year first-degree-murder sentence, his aggregate nine-year consecutive sentence for a nonhomicide offense lacked any penological purpose and therefore violated the Eighth Amendment. The court modified Purdy's consecutive sentence to permit his immediate release from incarceration. State v. Purdy, No. 1995-CF-006887, 2019 WL 2424073 (Fla. Cir. Ct. June 7, 2019).

[3]The efficacy of the opinion in Hernandez is unclear. It was announced in May 2018, three months prior to the Purdy decision. Yet it still has not been released for publication in the permanent law reports, and so it remains subject to revision or withdrawal. As such, its precedential weight is questionable at best. See Gawker Media, LLC v. Bollea, 170 So. 3d 125, 133 (Fla. 2d DCA 2015) (citing Citizens Prop. Ins. Corp. v. Ashe, 50 So. 3d 645, 651 n. 3 (Fla. 1st DCA 2010) (observing that unpublished dispositions have no precedential value)).

related to the procedure and the evidence received at the resentencing hearing. The court described the last issue as follows:

> Whether Hernandez's 30-year sentence on the attempted murder conviction, to be served consecutive to the life sentence on the murder count, amounts to a de facto life sentence in violation of Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010), Henry v. State, 175 So. 3d 675 (Fla. 2015),[4] and Stephenson v. State, 197 So. 3d 1126 (Fla. 3d DCA 2016).

Id. at *3.

Having framed the issue based on the length of the sentence, the Hernandez court observed that the consecutive thirty-year sentence might imprison Hernandez until he was sixty-nine years old even if he was released from the first-degree-murder sentence based on his demonstrated maturity and rehabilitation. Id. at *5. For this reason, the court agreed that the sentence was unconstitutional, but only insofar as it omitted a separate twenty-five-year right of review on the consecutive sentence. Id. It remanded with directions to include a right of review in the consecutive thirty-year sentence. Id. at *6.

As is apparent, the Hernandez court was concerned only with whether that defendant's incarceration was potentially so lengthy that it amounted to a de facto life sentence under the holdings in Henry and Stephenson. The court did not address the

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[4]In Henry the Florida Supreme Court set aside as unconstitutional consecutive sentences imposed on a nonhomicide juvenile offender that in the aggregate totaled ninety years. Henry, 175 So. 3d at 679–80. The court held that Graham does not permit sentencing juvenile nonhomicide offenders to prison terms that "ensure these offenders will be imprisoned without obtaining a meaningful opportunity to obtain future early release during their natural lives based on their demonstrated maturity and rehabilitation." Id. at 680. Stephenson also concerned the constitutionality of aggregate juvenile offender sentences that totaled ninety years. Stephenson, 197 So. 3d at 1126.

issues before us, i.e., the absence of any penological purpose to be served by Mack's consecutive life sentence for sexual battery and that sentence's nullification of Mack's meaningful opportunity to obtain release from incarceration under his murder and burglary sentences.[5]

For the reasons described, we conclude that the consecutive life sentence imposed by the postconviction court on Mack's sexual battery conviction violates the Eighth Amendment. We therefore reverse the sentence on the sexual battery conviction and remand to the postconviction court with instructions to reimpose it to run concurrently with the sentences on the other two offenses.

Reversed and remanded.

KELLY and SLEET, JJ., Concur.

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[5]Neither did the Hernandez court tackle the "aggregate sentence review" issue presented in Purdy. In a footnote the court stated:

> For the avoidance of doubt, we are not authorizing or requiring a single review of both sentences (on Count I and on Count II) after Hernandez has served 25 years on the Count I sentence. That question is pending before the Florida Supreme Court in Purdy v. State, No. SC17-843 (Fla. filed May 5, 2017) (certified as a question of great public importance; oral argument held Dec. 6, 2017) (reviewing Purdy v. State, —- So. 3d —-, 42 Fla. L. Weekly D967, 2017 WL 384094 (Fla. 5th DCA 2017)[)].

Id. at *6, n.8.