

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 DAVID MICHAEL MICHAUD,)
)
 Respondent.)
 _____)

Case No. 2D20-1287

Opinion filed December 30, 2020.

Petition for Writ of Certiorari to the
Circuit Court for Pinellas County;
Nancy Moate Ley, Judge.

Ashley Moody, Attorney General,
Tallahassee, and Kiersten E. Jensen,
Assistant Attorney General, Tampa, for
for Petitioner.

Bob Dillinger, Public Defender, and
Maria DeLiberato, Stacey M. Schroeder
and Patrick Marshall Brannon, Assistant
Public Defenders, Clearwater, for
Respondent.

MORRIS, Judge.

The State seeks certiorari review of a circuit court order granting David
Michaud's application for sentence review filed pursuant to Florida Rule of Criminal
Procedure 3.802 and section 921.1402, Florida Statutes (2019). We grant the petition

because the circuit court's order departs from the essential requirements of the law set forth by the Florida Supreme Court.

Michaud was charged with committing a murder in 1983 when he was a juvenile. He pleaded guilty and was sentenced to life in prison with the possibility of parole after twenty-five years. In 2016, Michaud sought relief under Florida Rule of Criminal Procedure 3.850, claiming that he was entitled to a resentencing hearing under Miller v. Alabama, 567 U.S. 460 (2012), and Graham v. Florida, 560 U.S. 48 (2010). The postconviction court denied the motion in 2019, concluding that Michaud's sentences are not unconstitutional because he is eligible for parole. See State v. Michel, 257 So. 3d 3, 4 (Fla. 2018) (holding "that juvenile offenders' sentences of life with the possibility of parole after 25 years do not violate the Eighth Amendment of the United States Constitution as delineated by the United States Supreme Court" in Miller and Graham); see also Franklin v. State, 258 So. 3d 1239, 1241 (Fla. 2018) ("As in Michel, because Franklin's sentences include eligibility for parole there is no violation of the categorical rule announced in Graham.").

Then Michaud filed an application under rule 3.802, claiming that he is entitled to a sentence review under section 921.1402.¹ The circuit court granted his application, relying on this court's decision in Elkin v. State, 249 So. 3d 1316 (Fla. 2d DCA 2018). The State seeks certiorari review of the order, arguing that the circuit court

¹Rule 3.802 permits "[a] juvenile offender, as defined in section 921.1402(1), Florida Statutes, [to] seek a modification of sentence pursuant to section 921.1402 . . . by submitting an application to the trial court requesting a sentence review hearing." This rule was added in 2015 and "derives from the enactment of section 921.1402." In re Amendments to Fla. Rules of Crim. P. & Fla. R. App. P. 9.140, 176 So. 3d 980, 981 (Fla. 2015).

did not have jurisdiction to grant a sentence review under section 921.1402 when Michaud's sentence is not unconstitutional under Miller/Graham.

The State does not have the ability to appeal an order granting relief under rule 3.802, even though a defendant may appeal the denial of relief under rule 3.802. Compare Fla. R. App. P. 9.140(c)(1)(j) (allowing the State to appeal orders "granting relief under Florida Rules of Criminal Procedure 3.801, 3.850, 3.851, or 3.853"), with In re Amendments, 176 So. 3d at 981 (amending rule 9.140(b)(1)(D) to "add new rule 3.802 to the list of postconviction rules in which the orders in such cases may be appealed after relief is denied"); and Fla. R. App. P. 9.140(b)(1)(D) (providing that a defendant may appeal an order denying relief under rule 3.802). However, a circuit court loses jurisdiction to modify a legal sentence after sixty days, Fla. R. Crim. P. 3.800(c); State v. Garcia, 45 Fla. L. Weekly D1213 (Fla. 3d DCA May 20, 2020), and "[c]ommon law certiorari is the proper vehicle to review whether the lower court acted in excess of its jurisdiction," Hudson v. Hofmann, 471 So. 2d 117, 118 (Fla. 2d DCA 1985) (first citing Ford Motor Co. v. Edwards, 363 So. 2d 867 (Fla. 1st DCA 1978); then citing Wright v. Sterling Drugs, Inc., 287 So. 2d 376 (Fla. 2d DCA 1973)).

The circuit court's granting of Michaud's application departs from the established principle of law set forth in Michel. See Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 721 (Fla. 2012) ("[A] party seeking review through a petition for writ of certiorari must demonstrate: (1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a 'depart[ure] from the essential requirements of the law.' " (quoting Belair v. Drew, 770 So. 2d 1164, 1166 (Fla. 2000))). Michel held that a juvenile offender

sentenced to life with the possibility of parole after twenty-five years is not entitled to relief under section 921.1402, the sentencing review statute under which Michaud sought relief in his rule 3.802 motion. See Michel, 257 So. 3d at 4 (holding that "juvenile offenders' sentences of life with the possibility of parole after 25 years do not violate the Eighth Amendment of the United States Constitution as delineated by the United States Supreme Court" in Miller/Graham and that "[t]herefore, *such juvenile offenders are not entitled to resentencing under section 921.1402*" (emphasis added)). The defendant in Michel committed his offenses before the effective date of section 921.1402 but was denied relief under section 921.1402 because his sentences did not run afoul of Miller/Graham. Michel, 257 So. 3d at 4.

The circuit court granted relief to Michaud under the authority of Elkin, 249 So. 3d 1316, but this case is distinguishable because the Elkin opinion did not address whether Elkin's sentence of twenty-five years was unconstitutional under Miller/Graham. Here, the circuit court properly ruled that Michaud's sentence was constitutional under Miller/Graham. Elkin does not apply to cases such as this one, where a juvenile offender's sentence has been ruled constitutional under Miller/Graham. Michaud is not entitled to relief under section 921.1402 because his sentence is constitutional, see Michel, 257 So. 3d at 4, and the circuit court departed from the essential requirements of law in granting his rule 3.802 motion.

Petition granted; order quashed.

CASANUEVA and LABRIT, JJ., Concur.