

IN THE SUPREME COURT OF FLORIDA

MALIK JIMER WILLIAMS,  
Petitioner,

Case No. SC16-2170

v.

L.T. Nos. 2D14-1732

STATE OF FLORIDA,  
Respondent.

292013CF003404000AHC

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On Appeal from the Second District Court of Appeal

PETITIONER'S INITIAL BRIEF ON THE MERITS

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## PREFACE

The Petitioner, Malik Jimer Williams, is the Appellant in the Second District Court of Appeal and the Defendant in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida. The Petitioner will be referred to as the Petitioner or the Defendant; the Respondent will be referred to as the State of Florida or the State. The following symbols will be used:

(R.\_\_\_\_) - Record on Appeal,

(T.\_\_\_\_) - Trial Transcript.

## JURISDICTION

This Court has jurisdiction over this direct appeal pursuant to Article V, § 3(b)(3), Florida Constitution, Fla. R. App. P. 9.030(a)(2)(A)(iv), and the order of this Court entered 03 May 2017 in this case.

## STATEMENT OF THE CASE AND FACTS

The events giving rise to the charges in this case occurred on 15 February 2013. R.090. The Defendant's date of birth is 09 September 1995. R.049, R.051, R.052, R.057. Therefore, on 15 February 2013, he was 17 years of age.

John Brown, the decedent, and Reginald Johnson, a State's witness, were friends. T.482, line 25 - T.483, line 3. Brown's date of birth was 07 May 1994;

Johnson's date of birth is 14 March 1995. R.042, R.058. Therefore, on 15 February 2013, Brown and Johnson were respectively 18 and 17 years of age.

Johnson testified that he and Brown both had "Big Ripper" bicycles. T.486, line 21 - T.487, line 4; T.487, line 20 - T.488, line 10. While riding their bicycles on 15 February 2013, Johnson and Brown encountered two other persons, the Defendant and Kito Felton. Johnson and Brown were each on their own bicycle; the Defendant and Felton were on one bicycle. T.496, lines 13-23; T.550, lines 10-14. The Defendant was riding the bicycle; Felton was seated on the handlebars. T.550, lines 15-17; T.1312, lines 6-11.

Johnson testified that the two persons on the one bicycle "were touching up" with Brown. T.497, line 9. Johnson claimed that he heard the person on the handlebars of the bicycle say "give it up" to Brown. T.497, lines 11-25. Then Brown, the Defendant, and Felton fell off the bicycles. T.498, lines 3-8. Johnson saw Brown and the Defendant fighting. T.499, line 8 - T.500, line 18. Johnson then began fighting with Felton. T.503, line 13 - T.505, line 6.

While he was fighting with Felton, Johnson heard gunshots. T.506, lines 2-14. Johnson was shot in the hand. T.509, line 20 - T.510, line 6. The parties stipulated that Brown died. T.753, lines 4-20. The medical examiner testified that Brown died as the result of a gunshot wound to the chest. T.726, lines 17-22. Brown also had a gunshot wound to the head. T.732, lines 22-24.

Johnson testified that Felton took Brown's bicycle and rode off on it. T.532, lines 21-23; T.566, lines 16-18. That bicycle was never recovered. T.766, line 12 - T.767, line 6. Johnson testified that he saw the Defendant leave on the same bicycle on which he had arrived. T.512, line 11 - T.513, line 11; T.567, lines 2-5.

The Defendant was charged by indictment with the premediated murder of Brown with a firearm, with the robbery of Johnson with a firearm, and with the attempted premediated murder of Johnson with a firearm. R.090-92.

A video recording was admitted into evidence as State's Exhibit 1. T.364, lines 23-24. The same is contained in the record on appeal at volume 13. The recording depicts the interaction of the bicyclists who were involved in the events giving rise to this case. It shows a bicycle carrying two persons proceeding, slowly, from right to left (camera 25, 21:27:16; camera 26, 21:27:09). The recording then shows two bicycles, traveling right to left, following the first bicycle (camera 25, 21:27:52). A short time later the bicycle carrying two persons is seen proceeding from left to right, followed closely by the two other bicycles (camera 25, 21:30:46; camera 26, 21:30:38). Two of the bicycles are seen to stop close together (camera 25, 21:30:49; camera 26, 21:30:49). The other bicycle is seen to reverse course and return to the vicinity of the other two bicycles already stopped (camera 25, 21:30:51; camera 26, 21:30:51). Three persons are seen on

foot in close proximity (camera 25, 21:30:53; camera 26, 21:30:58). Two different flashes of bright light are seen (camera 25, 21:31:04; camera 26, 21:31:08). Very shortly thereafter three persons are seen leaving the picture to the left (camera 25, 21:31:10).

On cross examination Johnson testified that he could see all of the bicycles together on the video recording (camera 26, 21:30:38). T.550, lines 4-6. Johnson testified that he and Brown were each on their own bicycle; the Defendant and Felton were together on a bicycle. T.550, lines 10-17. Johnson agreed that he and Brown could “maneuver better” and “go faster” than the Defendant and Felton. T.550, lines 18-24. Johnson agreed that on the video recording he could see three bicycles; he and Brown were catching up to the other bicycle and were starting to pass it. T.554, lines 5-17. Johnson agreed that he and Brown were going in the same direction and faster than the Defendant and Felton. T.556, lines 7-9. Johnson agreed that he and Brown “in fact caught up to them”. T.556, lines 10-11. Johnson also agreed that at the time he and Brown caught up to the Defendant and Felton, Johnson and Brown “were going in the opposite direction from where [they] were supposed to be going” to reach their intended destination. T.557, lines 11-14.

A “small semiautomatic two tone handgun” alleged to have been used in the shootings was recovered. T.783, lines 2-22. The gun was identified by a Florida

Department of Law Enforcement (FDLE) firearms analyst as a “Kahr manufactured semiautomatic pistol Model P40”. T.1268, lines 17-20. A FDLE latent fingerprint analyst examined the gun. No usable fingerprints were found on the gun or the magazine. T.885, lines 18-21; T.886, lines 3-24. The gun was also examined for DNA. A FDLE DNA analyst testified that the DNA of three individuals was on the gun. T.852, lines 3-8; T.867, lines 10-13. The DNA of the Defendant was determined to not be on the gun. T.854, lines 9-18; T.868, lines 1-8. Likewise the DNA of John Brown was “excluded”, meaning it was not on the gun. T.854, lines 6-18; T.868, lines 1-8. However that does not necessarily mean that neither Brown nor the Defendant ever touched the gun. T.869, lines 1-17. The analyst was unable to determine whether the DNA of Reginald Johnson was on the gun. T.853, lines 18-23; T.867, lines 14-24. Likewise the analyst was unable to determine whether the DNA of Kito Felton was on the gun. T.854, lines 3-5; T.867, lines 14-24.

The Defendant was found guilty by a jury of the first degree premeditated murder of Brown. R.248. The jury found that he actually possessed and discharged a firearm and caused a death. R.248. The Defendant was also found guilty by the jury of attempted first degree murder for the shooting of Johnson. R.250. The jury found that he actually possessed and discharged a firearm and caused great bodily harm. R.250.

At the close of the State's evidence, the Defendant moved for judgments of acquittal as to the charges of murder and attempted murder. T.1291, line 15 - T.1294, line 16. The Defendant argued, inter alia, that the State did not rebut beyond a reasonable doubt that the Defendant used force in lawful self-defense. T.1291, lines 17-22.

After considering the motion for judgment of acquittal, the trial court made, in relevant part, the following findings with respect to the charge of murder:

Based on the testimony and the law with respect to the first count, that is first-degree murder premeditated, there is evidence in the record from which this jury could conclude beyond a reasonable doubt that the defendant intentionally discharged a firearm at the deceased from a distance and obviously that was with the intent to kill him, and the jury can make that decision.

T.1303, lines 3-11. The court denied the motion T.1304, lines 1-2.

The Defendant renewed his motion for judgment of acquittal after the close of all evidence. T.1384, lines 3-23. The court again denied the motion. T.1385, line 19 - T.1386, line 2. The Defendant again renewed his motion for judgment of acquittal by a written motion filed after the conclusion of the trial. R.255-57 (the pages of the motion are out of order in the record on appeal). That motion was also denied. R.293-95.

The Defendant was adjudicated guilty. T.1539, lines 7-13, 17-21; R.310. He was sentenced on 07 March 2014. R.548-57. On the charge of first-degree

murder, the Defendant was sentenced to incarceration for 35 years with a 25 year mandatory minimum. R.553, lines 12-18; R.313-14. On the attempted murder charge, the Defendant was sentenced to incarceration for 25 years with a 25 year mandatory minimum, followed by 10 years probation. R.553, lines 19-23; R.316. The court ordered that the sentences run consecutively. R.553, line 21; R.317.

A timely notice of appeal was filed. R.338. The Second District Court affirmed the judgment and sentence of the trial court with an opinion. Williams v. State, 203 So. 3d 1020 (Fla. 2d DCA 2016). A copy of the Second District Court's opinion is attached as an appendix.

The opinion of the District Court did not address denial of the Defendant's motion for judgment of acquittal. The District Court held that the Defendant "received a sentence of thirty-five years on his conviction for first-degree murder, therefore, his sentence is not unconstitutional under Miller[ v. Alabama, 132 S.Ct. 2455, 2469 (2012)], and he is not entitled to be resentenced under the new law." 203 So. 3d at 1021. On the attempted murder, the Defendant "was sentenced to twenty-five years, with a twenty-five-year mandatory minimum, on his conviction for attempted murder. This sentence is not a de facto life sentence, and therefore is not unconstitutional under Graham[ v. Florida, 560 U.S. 48, 68 (2010)]." 203 So. 3d at 1021. Therefore the District Court affirmed the sentence. Id.

This Court granted review on 03 May 2017. The instant appeal follows.

## SUMMARY OF ARGUMENT

The trial court did not apply the proper burden or measure of proof when it denied the Defendant's motion for judgment of acquittal. The Defendant asserted the defense of self-defense. The State did not offer competent substantial evidence to rebut the Defendant's direct testimony that he acted in self-defense; some of the State's evidence corroborated the Defendant's testimony of self-defense. Therefore the denial of the Defendant's motion for judgment of acquittal by the trial court was error. On review the district court did not address denial of the Defendant's motion for judgment of acquittal by the trial court.

The Defendant objected to the sentences imposed because the trial court failed to sentence as required by the rule in Miller v. Alabama, 132 S.Ct. 2455, 2469 (2012), and the rule in Graham v. Florida, 560 U.S. 48, 68 (2010). The trial court failed to make the determinations required by Miller at 2464-65, 2468. Those provisions were later enacted by the Florida Legislature in chapter 2014-220, at 2869-2877, Laws of Florida, and codified at §§ 775.082, 921.1401, and 921.1402 Florida Statutes (2014). Subsequent Florida decisional law requires retrospective compliance with that statutory law. On review the district court erred when it affirmed the sentences under Miller and Graham.

## I. Motions for Judgment of Acquittal

### WHETHER DENIAL OF THE DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON THE CHARGES OF MURDER AND ATTEMPTED MURDER WAS REVERSIBLE ERROR.

The denial of a motion for judgment of acquittal is reviewed de novo. See Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002), citing Tibbs v. State, 397 So. 2d 1120 (Fla. 1981).

#### Action by the District Court

In its opinion entered 09 November 2016 the Second District Court did not address the denial of the Defendant's motion for judgment of acquittal by the trial court. Williams v. State, 203 So. 3d 1020 (Fla. 2d DCA 2016). Nevertheless this Court "has authority to review the entire case once jurisdiction is established..." North American Mortgage Investors v. Cape San Blas Joint Venture, 378 So. 2d 287, 290 (Fla. 1979). "Universally recognized principles of appellate review" require that a court, when exercising jurisdiction over a cause of action, "should proceed to dispose of all questions properly presented in the appeal." Lissenden v. Board of County Commissioners of Palm Beach County, 116 So. 2d 632, 636 (Fla. 1959). Fla. R. App. P. 9.040 provides: "In all proceedings a court shall have such jurisdiction as may be necessary for a complete determination of the cause."

The 1977 committee note to rule 9.040 makes clear that the “provision is intended to guarantee that once the jurisdiction of any court is properly invoked, the court may determine the entire case to the extent permitted by substantive law.”

### Motions for Judgment of Acquittal

At the close of the State’s evidence, the Defendant moved for judgments of acquittal as to the charges of murder and attempted murder. T.1291, line 15 - T.1294, line 16. The Defendant argued that the State did not rebut beyond a reasonable doubt that the Defendant used force in lawful self-defense. T.1291, lines 17-22. The Defendant asserted that the cross-examination of State’s witness Reginald Johnson affirmatively demonstrated that the Defendant acted in self-defense. T.1291, line 23 - T.1292, line 6. The Defendant also asserted that the video recording which was admitted to evidence as State’s Exhibit 1 demonstrated that the Defendant and Kito Felton, who were on the same bicycle, were overtaken and set upon by the alleged victims, who were on two different bicycles. T.1292, lines 7-10.

After considering the motion for judgment of acquittal, the trial court made, in relevant part, the following findings with respect to the charge of murder:

Based on the testimony and the law with respect to the first count, that is first-degree murder premeditated, there is evidence in the record from which this jury could conclude beyond a reasonable doubt that the defendant

intentionally discharged a firearm at the deceased from a distance and obviously that was with the intent to kill him, and the jury can make that decision.

T.1303, lines 3-11. The court denied the motion T.1304, lines 1-2.

The Defendant renewed his motion for judgment of acquittal after the close of all evidence. T.1384, lines 3-23. The court again denied the motion. T.1385, line 19 - T.1386, line 2. The Defendant again renewed his motion for judgment of acquittal by a written motion filed after the conclusion of the trial. R.255-57 (the pages of the motion are out of order in the record on appeal). That motion was also denied. R.293-95.

### Florida Law of Self-Defense

When a defendant asserts the defense of self-defense, the defendant bears the initial burden of presenting a prima facie case of self-defense. Once the defendant does so, the burden shifts to the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. See Leasure v. State, 105 So. 3d 5, 13 (Fla. 2d DCA 2012), citing Stieh v. State, 67 So. 3d 275, 278 (Fla. 2d DCA 2011). The Stieh panel quoted Behanna v. State, 985 So. 2d 550 (Fla. 2d DCA 2007), rev. den. 988 So. 2d 622 (Fla. 2008), for the rule that “[a]lthough the question of whether a defendant acted in justifiable self-defense is generally a question for the jury, ‘[w]hen the defense presents a prima facie case of

self-defense, the State has the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense.” Stieh at 278, quoting Behanna at 555.

The applicable self-defense statute is § 776.012 Florida Statutes (2012), which provides that a person is justified in using deadly force and does not have a duty to retreat when he “reasonably believes such force is necessary to prevent imminent death or great bodily harm to him or herself or another or to prevent the imminent commission of a forcible felony....”

In the trial court the Defendant cited Jenkins v. State, 942 So. 2d 910 (Fla. 2d DCA 2006). T.1292, lines 23-24 (misstating “Jenkins” as “Jacobs”); T.1293, lines 13-14 (correcting the misstatement of the name). The Jenkins panel held: “While the defendant may have the burden of going forward with evidence of self-defense, the burden of proving guilt beyond a reasonable doubt never shifts from the State, and this standard broadly includes the requirement that the State prove beyond a reasonable doubt that the defendant did not act in self-defense.” Id. at 914. The Defendant also cited Fowler v. State, 921 So. 2d 708 (Fla. 2d DCA 2006). T.1292, lines 24-25. The Fowler panel held: “when the State's evidence is legally insufficient to rebut the defendant's testimony establishing self-defense, the court must grant a motion for judgment of acquittal.” Id. at 711.

In addition the Defendant cited Harris v. State, 104 So. 2d 739 (Fla. 2d DCA 1958); Brown v. State, 454 So. 2d 596 (Fla. 5th DCA 1994); State v. Rivera,

719 So. 2d 335, 337 (Fla. 5th DCA 1998); Sneed v. State, 580 So. 2d 169, 170 (Fla. 4th DCA 1991), and Thompson v. State, 552 So. 2d 264 (Fla.2d DCA 1989).

Thompson, Sneed, and Brown are cited as authority by the Fowler panel.

In Fowler the Second District Court held: “While the defendant may have the burden of going forward with evidence of self-defense, the burden of proving guilt beyond a reasonable doubt never shifts from the State, and this standard broadly includes the requirement that the State prove that the defendant did not act in self-defense beyond a reasonable doubt.”, Fowler at 711, quoting Brown at 598.

In Rivera the Fifth District Court held:

If a defendant establishes a prima facie case of self-defense, the state must overcome the defense by rebuttal, or by inference in its case in chief. See Sneed v. State, 580 So.2d 169, 170 (Fla. 4th DCA 1991). If the state fails to sustain this burden of proof, ***the trial court is duty bound to grant a judgment of acquittal in favor of the defendant.*** See Brown v. State, 454 So.2d 596, 599 (Fla. 5th DCA), rev. denied, 461 So.2d 116 (Fla.1984).

719 So. 2d at 337 (emphasis added); see also E.L.F. v. State, 33 So. 3d 760, 763 (Fla. 4th DCA 2010), rev. den., 49 So. 3d 747 (Fla. 2010)(same, quoting Brown).

In Brown the Fifth District Court held:

While the defendant may have the burden of going forward with evidence of self-defense, the burden of proving guilt beyond a reasonable doubt never shifts from the State, and this standard broadly includes the

requirement that the State prove that the defendant did not act in self-defense beyond a reasonable doubt.

454 So. 2d at 598. Brown was superseded in part on other grounds by the “stand your ground” statute, § 776.032 et seq. Florida Statutes (2005), as explained in Thomas v. State, 918 So. 2d 327, 330 (Fla. 1st DCA 2005).

### Application to the Instant Case

In the instant case the Defendant established a prima facie showing of self-defense by his own testimony. The Defendant testified that he first saw Brown and Johnson on their bicycles going in the opposite direction. T.1315, line 24 - T.1316, line 6. Brown and Johnson turned their bicycles around and followed the Defendant and Felton. T.1319, lines 15-25. Brown and Johnson quickly caught up to the Defendant and Felton. T.1320, lines 1-25. The Defendant (and Felton) could not go as fast as Brown and Johnson because the Defendant and Felton were together on the same bicycle. T.1320, line 24 - T.1321, line 3.

The testimony of the State’s eyewitness was essentially the same. Johnson testified that he and Brown were each on their own bicycle; the Defendant and Felton were together on a bicycle. T.550, lines 10-17. Johnson agreed that he and Brown could “maneuver better” and “go faster” than the Defendant and Felton. T.550, lines 18-24. Johnson agreed that on the video recording he could see three bicycles, he and Brown were catching up to the other bicycle, and were starting to

pass it. T.554, lines 5-17. Johnson agreed that he and Brown were going in the same direction and faster than the Defendant and Felton. T.556, lines 7-9.

Johnson agreed that he and Brown “in fact caught up to them”. T.556, lines 10-11. Johnson agreed that at that time he and Brown “were going in the opposite direction from where [they] were supposed to be going” to reach their intended destination. T.557, lines 11-14.

If Johnson and Brown could “maneuver better” and “go faster” than the Defendant and Felton, then they could have avoided the Defendant and Felton all together. However they did not; Johnson testified that he and Brown “caught up to” the Defendant and Felton. T.556, lines 10-11. When Johnson and Brown did so they “were going in the opposite direction from where [they] were supposed to be going” to reach their intended destination. T.557, lines 11-14. Thus it is clear, *from the testimony of a State’s witness*, that the Defendant and Felton did not approach Johnson and Brown. Johnson and Brown choose to engage the Defendant and Felton.

The Defendant testified that he saw a gun in Brown’s hand while he was still on his bicycle. T.1323, lines 7-8. The Defendant believed that he was about to be shot. T.1323, lines 12-14. The Defendant stated: “As [Brown] was behind me and I saw the gun I hit the front brakes, which is on the left side of the bike, and tilted it down to where I could easily jump off of it without falling off the

bicycle myself.” T.1324, lines 3-6. Brown fell forward off his bicycle. T.1324, lines 7-9. Brown dropped the gun. Both Brown and the Defendant attempted to retrieve the gun; the Defendant picked it up off the ground. T.1324, line 13 - T.1325, line 8. A fight ensued. In the course of the fight the Defendant shot Brown. T.1325, line 9 - T.1326, line 5; T.1330, line 13 - T.1331, line 25. The Defendant thought Brown would kill him if Brown took the gun. Therefore he had no choice but to shoot Brown. T.1332, lines 1-6.

A Florida Department of Law Enforcement firearms examiner described the operation of the gun recovered in this case. She testified that the gun, assuming it were functioning properly, when fired would expel the fired cartridge and automatically load the next cartridge in the magazine into the firing chamber. T.1276, lines 8-11. When the last cartridge in the magazine is fired, the slide will stay in the rear position, telling the user that the magazine is empty. T.1277, lines 3-8. The firearms examiner testified that she had test fired the gun. T.1279, line 3. The firearms examiner testified that the gun was operating properly. T.1285, lines 17-19.

The firearms examiner testified that if the slide is pulled back before the magazine is empty, the unfired cartridge which was in the chamber would be expelled from the gun, and the next cartridge in the magazine would be loaded into the chamber. T.1277, lines 12-23; T.1285, lines 20-24. If the slide is pulled

back when a round is already in the chamber, a live round will be expelled by the gun. T.1286, lines 6-12. The firearms examiner explained that if one knows that there is a cartridge in the chamber, there would be no reason to pull the slide back before firing the gun again. T.1287, lines 7-14.

Two unfired cartridges were found at the scene. T.639, lines 6-13; T.642, line 24 - T643, line 1. Those unfired cartridges were compatible with the gun in this case. T.1272, lines 2-21.

If the gun were operating properly, it would not expel unfired cartridges on its own, and a person shooting the gun would have no reason to do so. However an individual who had picked an unfamiliar gun up from the ground in the midst of a fight might very well not know how to properly operate the weapon. Therefore the physical evidence is consistent with the Defendant's testimony that Brown brought the gun to the scene, then Brown dropped the gun and the Defendant picked it up off the ground. T.1324, line 13 - T.1325, line 8.

The facts in the instant case are very similar to the facts in Sneed v. State. Sneed appealed his conviction for attempted second degree murder and argued that the trial court erred in denying his motion for judgment of acquittal based upon the uncontradicted evidence of self-defense. 580 So. 2d at 170. Sneed and the victim fought over a loaded .22 calibre rifle. "As they struggled, the weapon discharged several times wounding the victim." Id. There were no eyewitnesses

to the shooting and the victim did not testify. The state's witnesses corroborated different aspects of Sneed's description of events. Id.

The Sneed court held that "[t]he state must disprove, beyond a reasonable doubt, a defense of self-defense." Id. The Sneed court quoted the opinion in Hernandez Ramos v. State, 496 So. 2d 837, 838-39 (Fla. 2d DCA 1986):

The state has the burden of proving guilt beyond a reasonable doubt, which includes proving beyond a reasonable doubt that the defendant did not act in self-defense. See Brown v. State, 454 So.2d 596, 598 (Fla. 5th DCA 1984). As in Brown, *in this case the state's evidence was legally insufficient to prove guilt beyond a reasonable doubt, because the state failed to rebut the defendant's direct testimony that he acted in self-defense and, in fact, some of the state's evidence corroborated defendant's testimony of self-defense.* See also Diaz v. State, 387 So.2d 978 (Fla. 3d DCA 1980). Accordingly, defendant's motion for judgment of acquittal should have been granted.

Sneed at 170 (emphasis added). The same is true in the instant case.

Thus in the instant case the denial of the Defendant's motion for judgment of acquittal was error because the *trial court applied the wrong standard* when it denied the motion. Where the defense of self-defense is raised, the defendant bears the initial burden of presenting a prima facie case of self-defense. The State then has the burden to rebut beyond a reasonable doubt the defendant's testimony that he acted in self-defense. Sneed at 170; Hernandez Ramos at 838-39; see Leasure at 13, Stieh at 278, Behanna at 555.

### Error by the Trial Court

In the instant case the State's evidence was legally insufficient to prove guilt beyond a reasonable doubt, because the State failed to rebut the Defendant's direct testimony that he acted in self-defense and, in fact, some of the State's evidence corroborated defendant's testimony of self-defense. See Hernandez Ramos at 838-39, Sneed at 170; Rivera at 337, E.L.F. at 763.

The Defendant's testimony in the instant case related to the confrontation between the bicyclists is corroborated by the video recording showing him and Felton being overtaken by Brown and Johnson. The testimony was undisputed that the Defendant and Felton were on the same bicycle (with Felton sitting on the handlebars) and Brown and Johnson were on their own bicycles.

The Defendant testified that he was overtaken by Brown and Johnson, and that he was less able to maneuver. T.1320, line 1 - T.1321, line 3. That was corroborated by Johnson, a State's witness, who agreed that he and Brown were going in the same direction and faster than the Defendant and Felton and "in fact caught up to them". T.556, lines 7-11. Johnson testified that he and Brown could "maneuver better" and "go faster" than the Defendant and Felton. T.550, lines 18-24. Therefore Johnson and Brown could have avoided the Defendant and Felton all together. However they did not; Johnson and Brown "caught up to" the Defendant and Felton. T.556, lines 10-11. Johnson even admitted that he and

Brown “were going in the opposite direction from where [they] were supposed to be going” to reach their intended destination. T.557, lines 11-14. Thus it is clear, from the testimony of a State’s witness, that the Defendant and Felton did not choose to approach Johnson and Brown. Johnson and Brown choose to engage the Defendant and Felton.

As in Hernandez Ramos at 838-39, and Sneed at 170, the State’s witnesses corroborated different aspects of Defendant’s description of events. As in Hernandez Ramos and in Sneed, the State’s evidence was legally insufficient to prove guilt beyond a reasonable doubt, because the State failed to rebut the Defendant’s direct testimony that he acted in self-defense and some of the state’s evidence corroborated the Defendant’s testimony of self-defense. See also Diaz v. State, 387 So. 2d 978, 980 (Fla. 3d DCA 1980). Therefore the trial court was “duty bound to grant a judgment of acquittal in favor of the defendant”. Rivera at 337, E.L.F. at 763.

In addition the State was unable to directly rebut the Defendant’s testimony that Brown brought the gun to the dispute. The Defendant testified that he first saw the gun in Brown’s hand and the Defendant believed that he was about to be shot. T.1323, lines 7-14.

Johnson affirmatively testified that he, Johnson, was not himself carrying a gun. T.493, lines 14-16. No witness claimed that Johnson had a gun at any

relevant time. However Johnson never affirmatively testified that Brown did not have a gun. The prosecutor only asked Johnson whether he saw Brown with a gun, which Johnson denied. T.493, lines 17-23. The gun in this case, a Kahr model P40, could easily have been carried in a pocket, out of the sight of others.

The only other eyewitness, Symone Watts, testified on direct examination that one of the individuals involved in the fight “pushed the other and everyone fell in the street; then one person got up really fast and pulled a gun out.” T.372, lines 20-22. “As soon as he fell, he jumped up and pulled a gun out.” T.373, lines 2-3. Later she said that she saw one of the individuals involved in the fight “reach into his pocket, pull something out, and I saw the muzzle flash. That’s when I hit the ground.” T.399, lines 21-23.

Symone Watts contradicted her own testimony on cross examination:

Q. [by Mr. Broncato, Defense Attorney] Now, you actually thought there were four bicycles involved; is that right?

A. [by Ms. Watts] I did.

Q. And in reality, you learned that there were only three; is that right?

A. Yes.

***Q. Okay. So your perception out there at that particular time of night was not fully clear, was it?***

***A. No.***

Q. In fact, out there it was very dark?

A. It was, yes.

Q. You couldn't see any faces or anything like that?

A. No.

Q. You couldn't distinguish height or weight of anyone, is that right?

A. No.

THE COURT: Wait a minute. No or no that's not right?

THE WITNESS: No. Yes, it's right.

BY MR. BRONCATO:

Q. Okay. You couldn't tell hairstyles?

A. No.

***Q. And you really couldn't distinguish one boy from the other, isn't that right?***

***A. I still can't.***

Q. Okay. The only point that you have of distinguishing is that one boy was wearing a white shirt, is that right?

A. Yes.

Q. And then everyone else was wearing dark clothing?

A. Yes.

Q. But you could have sworn there were four bikes, right?

A. Yes.

Q. But in reality, you were mistaken?

A. Yes.

Q. Now, as far as the clothing, other than it being dark, you couldn't make out any designs or anything like that on the clothing?

A. No.

Q. And you don't know which boy was with which boy?

A. No.

Q. Or whether they were even together? Whether it was two on two or three on one, you don't know?

A. No.

***Q. Okay. And you said that one of the boys pulled a gun out, is that right?***

***A. Yes.***

***Q. Okay. Now, you didn't see anyone pulling a gun out. What happened was you heard a gunshot and later on you piece back [sic] and thought they probably pulled a gun out, is that right?***

***A. I saw the muzzle fire.***

Q. Correct. You saw the muzzle fire and you heard the shot, right?

A. Yes.

***Q. But you never actually saw someone pulling the gun out before that, is that right?***

***A. Correct.***

***Q. Okay. So you don't know where the actual gun came from?***

***A. No.***

***Q. Okay. You don't know if the gun was – fell on the ground and was picked up very quickly during the time the boys fell off the bike?***

***A. No.***

***Q. You don't know if one of the boys was carrying the gun as they passed you –***

***A. No.***

***Q. – in a visible fashion because you weren't looking, right?***

***A. Right.***

***Q. You don't know if one of the boys had it in their pocket?***

***A. No.***

***Q. Okay. The first time you realized it was a gun was quite obviously when you heard the shot and you saw the muzzle, right?***

***A. Yes.***

***Q. And to this day you would not be able to tell the jury or anyone how that gun got there or whose it was?***

*A. No.*

T.382, line 24 - T.386, line 9 (emphasis added).

There is no question that Brown and Johnson were both shot. But the only reasonably reliable testimony about how the gun arrived at the fight was the Defendant's statement that he picked up Brown's gun. T.1324, line 13 - T.1325, line 18. Johnson's testimony that he did not see Brown with a gun did not establish that Brown did not have a gun concealed about his person. Ms. Watts clearly stated that she "didn't see anyone pulling a gun out" before she "saw the muzzle fire" and "heard the shot". T.384, line 25 - T.385, line 10. She admitted that she did not know "where the actual gun came from." T.385, lines 11-13. She admitted that she did not "know if one of the boys was carrying the gun as they passed" her because she was not looking. T.385, lines 18-23. She admitted that she did not know "if one of the boys had it in their pocket". T.385, line 24 - T.386, line 1. The first time Ms. Watts "realized it was a gun" was when she heard the shot and saw the muzzle [flash]. T.386, lines 2-5. Ms. Watts admitted that she was not able to say how the gun got to the scene or whose it was. T.386, lines 6-9.

The Defendant shot at Brown because he feared for his life after Brown displayed the gun and accosted the Defendant and Felton. As in Hernandez Ramos, and in Sneed, and in Diaz, the State presented no evidence in the instant case to refute the testimony by the Defendant that he acted in self-defense.

Therefore *when the trial court ruled on the Defendant's motion for judgment of acquittal, the trial court failed to hold the State to the correct measure of proof.* Here the trial court held that "there is evidence in the record from which this jury could conclude beyond a reasonable doubt that the defendant intentionally discharged a firearm at the deceased from a distance and obviously that was with the intent to kill him..." T.1303, lines 5-10. However the State had the burden of proving guilt beyond a reasonable doubt, which included proving beyond a reasonable doubt that the Defendant did *not* act in self-defense. See Brown at 598; Sneed at 170. As in Brown, and in Sneed, in the instant case the State's evidence was legally insufficient to prove guilt beyond a reasonable doubt, because *the State failed to present any competent substantial evidence at all to rebut the Defendant's direct testimony that he acted in self-defense.* In addition some of the State's evidence corroborated the Defendant's testimony of self-defense. See Hernandez Ramos at 838-39, Sneed at 170, Diaz at 980. Therefore denial of the motion for judgment of acquittal was reversible error by the trial court.

The Second District Court did not address that issue. The Second District Court erred by not reversing the denial of that motion by the trial court.

## II. Sentencing

WHETHER A SENTENCE IMPOSED ON A JUVENILE, WHICH DOES NOT PROVIDE A MEANINGFUL OPPORTUNITY FOR EARLY RELEASE AND WHICH IS LONGER THAN HIS LIFE EXPECTANCY, MAY BE IMPOSED NOTWITHSTANDING CH. 2014-220, LAWS OF FLORIDA.

“Because a motion to correct a sentencing error involves a pure issue of law, [the] standard of review is de novo.” Parkerson v. State, 163 So. 3d 683, 692 (Fla. 4th DCA 2015), quoting Smith v. State, 143 So. 3d 1023, 1024 (Fla. 4th DCA 2014); see also Salter v. State, 77 So. 3d 760, 764 (Fla. 4th DCA 2011) (same).

The events giving rise to the charges in this case were alleged to have occurred on 15 February 2013. R.090. The Defendant’s date of birth is 09 September 1995. R.049, R.051, R.052, R.057. Therefore on 15 February 2013 the Defendant would have been 17 years of age. Thus, for the purpose of violations of law, he was a juvenile. See § 985.03(6) Fla. Stat. (2012).

The Defendant was sentenced on 07 March 2014. R.548. On the charge of first-degree murder, the Defendant was sentenced to incarceration for 35 years with a 25 year mandatory minimum. R.553, lines 12-18; R.313-14. On the attempted murder charge, the Defendant was sentenced to incarceration for 25 years with a 25 year mandatory minimum, to be followed by 10 years probation.

R.553, lines 19-21; R.316. The trial court ordered that the sentences run consecutively. R.553, line 21; R.317. As explained *infra*, that sentence exceeds the Defendant's life expectancy and is a *de facto* life sentence. However, even if it is not a *de facto* life sentence, the sentence imposed in this case lacks a review mechanism to provide a meaningful opportunity for early release based upon a demonstration of the Defendant's maturity and rehabilitation.

At sentencing the Defendant objected under the rule in Miller v. Alabama, 132 S.Ct. 2455, 2469 (2012), and the rule in Graham v. Florida, 560 U.S. 48, 68 (2010). Counsel for the Defendant asked the sentencing court "to better accomplish the spirit of Graham and Miller, consider granting the possibility of parole to take in to account the fact that his brain is still developing and to give him a chance of rehabilitation". R.554, line 21 - R.555, line 1. The court denied the request: "I'll respectfully deny that request and hopefully there will be some guidance for us in the future with respect to what we should or shouldn't do." R.555, lines 21-23. This Court has since provided the necessary guidance.

#### Application of Changes in the Law to Pending Cases

In State v. Fleming, 61 So. 3d 399, 403 (Fla. 2011), this Court succinctly stated the rule for application of changes in the law to pending cases:

When the Supreme Court announces "a new rule for the conduct of criminal prosecutions," the rule must be

applied to “all cases, state or federal, pending on direct review or not yet final.” Griffith v. Kentucky, 479 U.S. 314, 328... (1987). Similarly, when this Court “announce[es] a new rule of law, or merely appl[ies] an established rule of law to a new or different factual situation,” the decision applies “in every [Florida] case pending on direct review or not yet final.” Smith v. State, 598 So.2d 1063, 1066 (Fla.1992); see Wuornos v. State, 644 So.2d 1000, 1007 n. 4 (Fla.1994) (“We read Smith to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise.”).

See also Plasencia v. State, 170 So. 3d 865, 871 (Fla. 2d DCA 2015), and cases cited therein; Lyons v. Chamoun, 96 So. 3d 456, 457 n.2 (Fla. 4th DCA 2012)(an appellate opinion explaining and applying the meaning of the law is applicable to all cases in progress and not yet final when it is released).

#### Treatment of the Sentence by the District Court

In this case the Second District Court held that the Defendant “received a sentence of thirty-five years on his conviction for first-degree murder, therefore, his sentence is not unconstitutional under Miller, and he is not entitled to be resentenced under the new law.” Williams v. State, 203 So. 3d 1020, 1021 (Fla. 2d DCA 2016). On the attempted murder, the Defendant “was sentenced to twenty-five years, with a twenty-five-year mandatory minimum, on his conviction for attempted murder. This sentence is not a de facto life sentence, and therefore is not unconstitutional under Graham.” 203 So. 3d at 1021. Therefore the district

court affirmed the sentence. Id. The district court relied upon its own opinion in Williams v. State, 197 So. 3d 569, 572 (Fla. 2d DCA 2016). 203 So. 2d at 1021.

In that case, the district court held that “Williams’ sentence is not the functional equivalent of a life sentence; it is constitutional.” 197 So. 3d at 572. However in Kelsey v. State, 206 So. 3d 5, 6 (Fla. 2016), this Court held that a sentence need not be a “de facto life” sentence for the rule in Graham to apply. But whether or not the sentence is the functional equivalent of a life sentence, as explained *infra* the sentence does not meet the requirements of Miller and Graham because it fails to provide the Defendant with a meaningful opportunity for early release based upon a demonstration of his maturity and rehabilitation,.

In addition the district court did not mention the fact that the trial court believed that consecutive sentences were mandatory. R.550, lines 2-3. Section 775.087(2)(d) Florida Statutes (2012) could be read to require consecutive sentences. Neither the trial court nor trial counsel has the benefit of this Court’s opinion in Williams v. State, 186 So. 3d 989, 993 (Fla. 2016), where this Court held that where “multiple firearm offenses are committed contemporaneously, during which time multiple victims are shot at, then consecutive sentencing is permissible but not mandatory.... In other words, a trial judge has discretion to order the mandatory minimum sentences to run consecutively, but may impose the sentences concurrently.” This Court’s opinion in Williams issued on 03 March

2016, during the pendency of this appeal, after briefing in the Second District Court was complete. Even if the Second District Court were not inclined to consider the substance of this Court’s opinion in Williams, the District Court should have recognized that treating the consecutive sentences in this case as two separate sentences as if they ran concurrently was error. For that reason alone this Court should reverse the denial of sentencing relief by the District Court.

### Constitutional Issues

In Graham v. Florida the United States Supreme Court addressed juvenile non-homicide offenders. The Court observed that because juveniles have diminished culpability and greater prospects for reform, “they are less deserving of the most severe punishments.” 560 U.S. at 68. The Court held: “A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” Id. at 75. The Court held that the Eighth Amendment does not permit a sentence which denies a juvenile “any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law.” Id. at 79.

In Miller v. Alabama the United States Supreme Court addressed juvenile homicide offenders. The Miller Court extensively cited Graham and Roper v. Simmons, 543 U.S. 551 (2005)(invalidating the death penalty for all juvenile offenders under the age of 18), for the principle that “children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, ‘they are less deserving of the most severe punishments.’” Miller at 2464, quoting Graham at 68. The Court held that Graham and Roper “relied on three significant gaps between juveniles and adults. First, children have a ‘lack of maturity and an underdeveloped sense of responsibility’ leading to recklessness, impulsivity, and heedless risk-taking.” Miller at 2464, quoting Roper at 569. “Second, children ‘are more vulnerable ... to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[l] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings.” Miller at 2464, quoting Roper at 569. “And third, a child's character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].’” Miller at 2464, quoting Roper at 570 (brackets as in Miller).

In Miller the Supreme Court observed that

Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.

Most fundamentally, Graham insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate.

Miller at 2465-66. Thus adopting the rationale of Graham, the Miller Court held “that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” 132 S.Ct. at 1469. “Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” Id.

#### Changes to the Florida Statutes following Miller

In the wake of Miller, the Florida legislature enacted chapter 2014-220, at 2869-2877, Laws of Florida, which is codified at §§ 775.082, 921.1401, and 921.1402 Florida Statutes (2014). In § 921.1401(2) the legislature addressed the significant differences between juveniles and adults, which make children

“constitutionally different” from adults for sentencing purposes, and which were discussed in Miller at 2464-65, 2468. Section 921.1401(2) provides:

In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant’s youth and attendant circumstances, including, but not limited to:

- (a) The nature and circumstances of the offense committed by the defendant.
- (b) The effect of the crime on the victim’s family and on the community.
- (c) The defendant’s age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
- (d) The defendant’s background, including his or her family, home, and community environment.
- (e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant’s participation in the offense.
- (f) The extent of the defendant’s participation in the offense.
- (g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
- (h) The nature and extent of the defendant’s prior criminal history.
- (i) The effect, if any, of characteristics attributable to the defendant’s youth on the defendant's judgment.

(j) The possibility of rehabilitating the defendant.

Those changes to the juvenile sentencing procedure adopted the rule in Miller for application to Florida juvenile offenders. The changes were approved by the Governor on 20 June 2014 and became effective 01 July 2014.

Ch. 2014-220, § 8, at 2877, Laws of Fla. Those changes became effective after the date of sentencing in the instant case, which was 07 March 2014. R.548.

#### Recent Florida Decisinal Law – Homicide Cases

In Falcon v. State, 162 So. 3d 954, 957 (Fla. 2015), Falcon, who was 15 years old at time of her offense, was convicted of murder in the first degree and received a mandatory life sentence without parole. This Court held that the rule in Miller applied retroactively. Id. at 962. Therefore resentencing is warranted when a juvenile seeks postconviction relief from sentence that was unconstitutional under Miller. Falcon at 963. This Court reasoned that Miller effectively invalidated § 775.082(1) Florida Statutes (2012) as applied to juveniles convicted of a capital felony. Falcon at 961. “Miller invalidated the only statutory means for imposing a sentence of life without the possibility of parole on juveniles convicted of a capital felony.” Id. “In other words, Miller has dramatically disturbed the power of the State of Florida to impose a nondiscretionary sentence of life without parole on a juvenile convicted of a capital felony, and thus the

decision... place[d] beyond the authority of the state the power to regulate certain conduct or impose certain penalties.” Id. at 961 (internal quotation marks omitted), quoting Toye v. State, 133 So. 3d 540, 543 (Fla. 2d DCA 2014).

Because the same reasoning applies to the instant case, application of the same rule is required. In the instant case the Defendant was sentenced on 07 March 2014. R.548. Counsel for the Defendant objected to the sentence, asking the trial court to consider the rule in Graham and the rule in Miller. R.554, line 21 - R.555, line 1. The trial court denied the request: “I’ll respectfully deny that request and hopefully there will be some guidance for us in the future with respect to what we should or shouldn’t do. R.555, lines 21-23. This Court has provided that guidance, beginning with the opinion in Falcon.

In Horsley v. State, 160 So. 3d 393, 405-06 (Fla. 2015), this Court provided guidance specific to homicide cases. Horsley was convicted of first-degree felony murder, robbery with a firearm while inflicting death, and two counts of aggravated assault with a firearm, which he possessed and discharged in the robbery. Id. at 395-96. He was sentenced to a term of life in prison without the possibility of parole under a statute in effect prior to the adoption of chapter 2014-220. Id. at 396. The statute under which Horsley was sentenced precluded individualized sentencing consideration for juvenile homicide offenders. See § 775.082(1) Fla. Stat. (2006); Horsley at 396, n.3. This Court held:

the appropriate remedy is to apply chapter 2014-220, Laws of Florida, to all juvenile offenders whose sentences are unconstitutional under Miller. We conclude that *applying chapter 2014-220, Laws of Florida, to offenders like Horsley is the only way to comply with the commandment of the United States Supreme Court and to effectuate the intent of our Legislature.*

160 So. 3d at 409 (emphasis added).

#### Recent Florida Decisional Law – Nonhomicide Cases

This Court provided further guidance in Henry v. State, 175 So. 3d 675 (Fla. 2015), cert. denied, 136 S.Ct. 1455 (2016). Henry, the seventeen-year-old defendant, was tried as an adult and convicted for committing multiple nonhomicide offenses, including three counts of sexual battery while possessing a weapon, two counts of robbery, one count of kidnapping, one count of carjacking, one count of burglary of a dwelling, and one count of possession of marijuana. Henry was sentenced to incarceration for life for the sexual battery offenses, plus an additional sixty years imprisonment for the remaining offenses, to run consecutively. Henry was thus sentenced to life plus sixty years imprisonment. Id. at 676. During the pendency of Henry’s appeal, the United States Supreme Court issued its opinion in Graham.

In Henry this Court reviewed in detail the Supreme Court opinions in Graham and Miller, and other Supreme Court precedent. This Court concluded

that “the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult.”

Henry at 680. This Court reasoned that

the Graham Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of “life in prison.” Instead, we have determined that Graham applies to ensure that *juvenile nonhomicide offenders will not be sentenced to terms of imprisonment without affording them a meaningful opportunity for early release based on a demonstration of maturity and rehabilitation*. See Graham, 560 U.S. at 75....

Henry at 680 (emphasis added). This Court concluded that Henry’s sentence was unconstitutional under Graham and that Henry “should be resentenced in light of the new juvenile sentencing legislation enacted by the Florida Legislature in 2014, ch.2014-220, Laws of Fla.” Henry at 680, citing Horsley at 395-96.

This Court provided further guidance in Gridine v. State, 175 So. 3d 672 (2015). In Gridine this Court considered a sentence of seventy years with a twenty-five-year minimum mandatory prison term imposed on a juvenile for attempted first-degree murder. Citing Graham at 75 and Henry at 679-80, this Court held that the sentence was “unconstitutional because it fails to provide him

with a meaningful opportunity for early release based upon a demonstration of his maturity and rehabilitation.” Gridine at 674.

Then in Kelsey v. State this Court applied the reasoning in Henry to a juvenile offender who plead guilty to two counts of armed sexual battery, armed burglary, and armed robbery. 206 So. 3d at 6. Kelsey was originally sentenced to two life sentences and two concurrent twenty-five-year terms for four nonhomicide offenses. After the United States Supreme Court decided Graham, Kelsey sought to withdraw his plea, which was denied. At the resentencing, the trial court imposed concurrent sentences of forty-five years. Kelsey at 7. This Court reversed that sentence, holding that sentence “was unconstitutional not because of the length of his sentence, but because it did not provide him a meaningful opportunity for early release based on maturation and rehabilitation.” Kelsey at 11. This Court applied both the rule in Henry (nonhomicide offenders) and the rule in Horsley (homicide offenders):

*our holding in Henry was not predicated on the term of the sentence but rather on the status of, and the opportunity afforded, the offender.* Indeed, the holding of Henry was unequivocal. Additionally, we determined that the remedy outlined in Horsley v. State, 160 So.3d 393, 395 (Fla. 2015), applied to cases like Henry’s. See Henry, 175 So.3d at 680.

Kelsey at 9.

In Floyd v. State, 87 So. 3d 45 (Fla. 1st DCA 2012), approved, Johnson v. State, No. SC13-711 (Fla. Apr. 20, 2017), the district court reversed an eighty-year sentence imposed upon a juvenile defendant, finding it to be the functional equivalent of a life sentence without parole. Floyd was seventeen years of age in 1998 when he committed two counts of robbery with a firearm. Id. at 45. He was convicted and sentenced to life imprisonment. More than ten years later, after Graham was decided, Floyd was re-sentenced to consecutive forty-year sentences on the two armed robbery counts. Floyd at 45-46. The First District Court reversed the new sentence, holding that the sentence imposed was

***longer than his life expectancy, is the functional equivalent of a life without parole sentence and will not provide him with a meaningful or realistic opportunity to obtain release.*** We, therefore, reverse [Floyd]’s forty-year consecutive sentences and remand for resentencing. In doing so, we encourage the Legislature to follow the Supreme Court’s guidance in Graham and to “explore the means and mechanisms for compliance” of its opinion.

Id. at 47 (emphasis added).

In Johnson v. State, No. SC13-711 (Fla. Apr. 20, 2017), this Court expressly approved the opinion of the district court in Floyd. Johnson slip opinion at 1.

Johnson was sentenced to six concurrent life sentences based on pleas of guilty to one count of armed burglary of a dwelling, three counts of armed kidnapping, one count of attempted first-degree murder, and one count of sexual battery using

force or a weapon. Johnson slip opinion at 1-2. After the United States Supreme Court issued its decision in Graham v. Florida, Johnson filed a motion to correct his illegal sentences. The trial court set aside Johnson’s life sentences and resentenced Johnson to 100 years in prison for the first count and 40 years on each remaining count, to run concurrently. Johnson appealed the 100-year sentence. Johnson slip opinion at 1-2.

The Fifth District Court of Appeal affirmed Johnson’s sentence, stating that Graham does not apply to term-of-years sentences. Johnson v. State, 108 So. 3d 1153, 1153-54 (Fla. 5th DCA 2013), quashed, No. SC13-711 (Fla. Apr. 20, 2017), citing Henry v. State, 82 So. 3d 1084 (Fla. 5th DCA 2012), quashed, 175 So. 3d 675 (Fla. 2015). The district court certified conflict; this Court granted review.

In Johnson this Court reasoned that in Graham the United States Supreme Court held that the Florida practice of sentencing juveniles to incarceration for life violated the Eight Amendment prohibition on infliction of cruel and unusual punishments. See Graham at 74-75. In response the legislature enacted chapter 2014-220, Laws of Florida, which provided judicial review for juvenile offenders who were tried as adults and received more than 20 years incarceration, with certain exceptions. Johnson slip opinion at 2.

In Johnson this Court concluded that reading Graham, Henry, and Kelsey together requires “that *juvenile nonhomicide offenders are entitled to sentences*

*that provide a meaningful opportunity for early release based on demonstrated maturity and rehabilitation during their natural lifetimes* and that gain time fails to meet those requirements.” Johnson slip opinion at 3 (emphasis added). This Court reasoned that “Graham prohibits the state trial courts from 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.” Johnson slip opinion at 4, quoting Henry at 680. Therefore “the ‘Supreme Court’s long-held and consistent view that juveniles are different’ supported the conclusion that ‘the specific sentence that a juvenile nonhomicide offender receives for committing a given offense is not dispositive as to whether the prohibition against cruel and unusual punishment is implicated.’” Johnson slip opinion at 4, quoting Henry at 680.

Accordingly this Court held that Graham was not limited to certain sentences, but rather was intended to ensure that “juvenile nonhomicide offenders will not be sentenced to terms of imprisonment without affording them a meaningful opportunity for early release based on a demonstration of maturity and rehabilitation.” Johnson slip opinion at 4, quoting Henry at 680. Therefore this Court concluded that the Eighth Amendment, as read through Graham, requires a review mechanism for evaluating this class of offenders because “any term of

imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult.” Johnson slip opinion at 4, quoting Henry at 680.

In Johnson this Court cited Henry for the rule “that Graham applies to term-of-years prison sentences, and that juvenile nonhomicide offenders’ sentences must provide an opportunity for early release that is: (1) meaningful, (2) based on a demonstration of maturity and rehabilitation, and (3) during his or her natural life.” Johnson slip opinion at 9; Henry at 680. This Court held:

*Post-Henry, we must ensure that a juvenile nonhomicide offender does not receive a sentence that provides for release only at the end of a sentence (e.g. a 45-year sentence with no provision for obtaining early release based on a demonstration of maturity and rehabilitation before the expiration of the imposed term, such as in Kelsey). Secondly, we must ensure that a juvenile nonhomicide offender who is sentenced post-Henry does not receive a sentence which includes early release that is not based on a demonstration of rehabilitation and maturity (i.e. gain time or other programs designed to relieve prison overpopulation). Last, we must ensure that a juvenile nonhomicide offender who is sentenced post-Henry does not receive a sentence that provides for early release at a time beyond his or her natural life (e.g. a 1,000-year sentence that provides parole-eligibility after the offender serves 100 years). To qualify as a “meaningful opportunity for early release,” a juvenile nonhomicide offender’s sentence must meet each of the three parameters described in Henry.*

Johnson slip opinion at 11-12 (emphasis added).

Applying the rule in Graham together with the rule in Henry and the rule in Kelsey, this Court held in Johnson “that reading these three cases together provides that that juvenile nonhomicide offenders are entitled to sentences that provide a meaningful opportunity for early release based on demonstrated maturity and rehabilitation during their natural lifetimes and that gain time fails to meet those requirements.” Johnson, slip opinion at 3. This Court summarized the rule for application of Graham:

In this Court’s discussions of Graham, we have underscored the United States Supreme Court’s emphasis on the status of the juvenile nonhomicide offender and the nature of the offense committed. See Henry, 175 So. 3d at 678 (citing Graham, 560 U.S. at 69). Accordingly, our focus has not been on the length of the sentence imposed, but the status of the offender and the possibility that he or she will be able to grow into a contributing member of society.

Johnson, slip opinion at 3.

#### Application to the Instant Case

In the instant case the Defendant was not sentenced to life in prison. However on the charge of first-degree murder, the Defendant was sentenced to incarceration for 35 years with a 25 year mandatory minimum. R.553, lines 12-18; R.313-14. On the attempted murder charge, the Defendant was sentenced to incarceration for 25 years with a 25 year mandatory minimum, to be followed by

10 years probation. R.553, lines 19-23; R.316. The trial court ordered that the sentences run consecutively. R.553, line 21; R.317.

As he was sentenced, the Defendant must serve all of the mandatory minimum portions of those sentences (50 years) because § 775.087(2)(b) Florida Statutes (2012) provides that he “is not eligible for statutory gain-time under s. 944.275 or any form of discretionary early release, other than pardon or executive clemency, or conditional medical release under s. 947.149, prior to serving the minimum sentence.” In addition he would serve a minimum of eighty-five percent of the remaining ten years of the sentence on count one. See § 944.275(4)(b)(3) Fla. Stat. (2012).

Thus the Defendant would be required serve a minimum of 58½ years of the 60 year incarcerative sentences imposed. The Defendant was 18½ years of age when he was sentenced on 07 March 2014. Therefore he would be at least 77 years of age upon release from incarceration.

The Center for Disease Control, an agency of the United States Department of Health and Human Services, publishes tables of life expectancy by age, race, and gender for persons in the United States. The tables issued in 2014 (based on 2009 data) show a life expectancy of 55.4 years for 17-18 year old black males, and a life expectancy of 54.5 years for 18-19 year old black males. Elizabeth Arias, Ph.D., United States Life Tables, 2009 at 23, Division of Vital Statistics,

Centers for Disease Control and Prevention, Washington, D.C. (Jan. 6, 2014), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62\\_07.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_07.pdf) (last visited 22 May 2017). Therefore the 60 year sentence of incarceration in this case is for all practical purposes a life sentence.

When it affirmed the sentence in the instant case in the light of Graham and Miller, *the district court ignored the mandatory aggregate sentence of 58½ years which was imposed by the trial court*. The district court approved the sentence because the Defendant “received a sentence of thirty-five years on his conviction for first-degree murder, therefore, his sentence is not unconstitutional under Miller, and he is not entitled to be resentenced under the new law.” 203 So. 3d at 1021. On the attempted murder, the Defendant “was sentenced to twenty-five years, with a twenty-five-year mandatory minimum, on his conviction for attempted murder. This sentence is not a de facto life sentence, and therefore is not unconstitutional under Graham.” 203 So. 3d at 1021. Therefore the district court affirmed the sentence. Id. However the sentence imposed requires the Defendant to serve at least 58½ years of incarceration and provides the Defendant with no meaningful or realistic opportunity to obtain release, as required by Graham and Miller. The sentence is longer than the Defendant’s life expectancy.

As in Horsley (addressing juvenile homicide offenders), this Court should require the Defendant to be resentenced because “applying chapter 2014-220,

Laws of Florida, to offenders like Horsley is the only way to comply with the commandment of the United States Supreme Court and to effectuate the intent of our Legislature.” Horsley at 409. The Defendant is “like Horsley” because both he and Horsley were convicted of both homicide and non-homicide offenses and received life sentences or the functional equivalent.

In Floyd the district court considered the consecutive forty-year post-Graham sentences imposed on a juvenile nonhomicide offender: “This situation does not in any way provide [Floyd] with a meaningful or realistic opportunity to obtain release, as required by Graham.” Floyd at 46. This Court approved. Johnson slip opinion at 1. At age 17, Floyd committed grand theft auto and two counts of armed robbery with a firearm. 87 So. 3d at 45. The district court reversed Floyd’s consecutive forty-year sentences, holding that the sentence was “longer than his life expectancy, is the functional equivalent of a life without parole sentence and will not provide him with a meaningful or realistic opportunity to obtain release.” Id. at 47. In Johnson, this Court approved the result in Floyd. In the instant case the Defendant was also sentenced to a term of years longer than his life expectancy with no meaningful or realistic opportunity to obtain release. The same result is required for the same reason.

In Johnson, this Court held that gain time does not provide an opportunity for early release based on demonstrated maturity and rehabilitation. See Johnson

slip opinion at 8. Therefore the minimal gain time which may be earned by the Defendant does not change the result required by this Court.

Addressing juvenile homicide offenders in Horsley, this Court defined “the appropriate remedy for juvenile offenders whose sentences are now unconstitutional in light of Miller.” 160 So. 3d at 397. This Court held that the appropriate remedy is to apply chapter 2014-220, Laws of Florida, to all juvenile offenders whose sentences are unconstitutional under Miller. “We conclude that applying chapter 2014-220, Laws of Florida, to offenders like Horsley is the only way to comply with the commandment of the United States Supreme Court and to effectuate the intent of our Legislature.” Horsley, 160 So. 3d at 409

Addressing juvenile non-homicide offenses in Henry, this Court held that Graham applies to term-of-years prison sentences, and that juvenile nonhomicide offenders’ sentences must provide an opportunity for early release that is: (1) meaningful, (2) based on a demonstration of maturity and rehabilitation, and (3) during his or her natural life. Henry, 175 So. 3d at 680 (“Graham prohibits the state trial courts from sentencing juvenile nonhomicide offenders to prison terms that ensure these offenders will be imprisoned without obtaining meaningful opportunities to obtain future early release during their natural lives based on their demonstrated maturity and rehabilitation.”)

## CONCLUSION

The Defendant asserted the defense of self-defense to the charges of murder and attempted murder. The State offered no competent substantial evidence to directly rebut the Defendant's direct testimony that he acted in self-defense. Therefore the denial of the Defendant's motion for judgment of acquittal by the trial court was error, and the this Court should remand the case with instructions to grant that motion and discharge the Defendant.

The Defendant objected to the sentences imposed because the trial court failed to sentence him as required by the rules in Miller v. Alabama and Graham v. Florida. The trial court failed to made the determinations required by Miller, which were later enacted by the Florida Legislature and codified at §§ 775.082, 921.1401, and 921.1402 Florida Statutes (2014). Therefore, if this Court should fail to follow the well established law addressing self-defense, this Court should remand the case for resentencing as required by the rule in Graham v. Florida, the rule in Miller v. Alabama, the rule in Horsley v. State, the rule in Gridine v. State, the rule in Henry v. State, the rule in Floyd v. State, the rule in Johnson v. State, and §§ 775.082, 921.1401, and 921.1402 Florida Statutes (2014).

WHEREFORE the Defendant requests this Honorable Court to reverse his convictions and remand this case for discharge, or if this Court is not inclined to follow the well established law regarding self-defense, to require that be

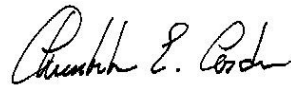
resentenced in compliance with the rule in Graham v. Florida, the rule in Miller v. Alabama, the aforesaid opinions of this Court, and the applicable Florida statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by email through the Florida Courts E-Filing Portal as provided by Fla. R. Jud. Admin. 2.516(b)(1) to the Attorney General of Florida (at [CrimAppTPA@myfloridalegal.com](mailto:CrimAppTPA@myfloridalegal.com)), on this 23rd day of May, 2017.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).



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**Malik Jimer WILLIAMS, Appellant,**

**v.**

**STATE of Florida, Appellee.**

**No. 2D14-1732.**

District Court of Appeal of Florida,  
Second District.

Nov. 9, 2016.

Appeal from the Circuit Court for Hillsborough County; William Fuente, Judge.

Howard L. Dimmig, II, Public Defender, and Christopher E. Cosden, Special Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Elba Caridad Martin-Schomaker, Assistant Attorney General, Tampa, for Appellee.

**BY ORDER OF THE COURT.**

Appellant's motion to stay mandate and motion for reconsideration is denied. On its own motion, this court withdraws the prior per curiam affirmance dated March 16, 2016, and substitutes the following

**Appendi**

opinion. No further motions for rehearing will be entertained.

KELLY, Judge.

Malik Jimer Williams appeals from his convictions and sentences for first-degree murder and attempted murder. Williams was seventeen years old when he committed the offenses. He raises two issues in this appeal, neither of which require reversal. However, we write to explain why we have affirmed his sentences.

The trial court sentenced Williams to thirty-five years in prison, with a twenty-five-year mandatory minimum term, for the first-degree murder. He also received a sentence of twenty-five years in prison, with a twenty-five-year mandatory minimum term, followed by ten years of probation for the attempted murder. Williams argues he is entitled to be resentenced under chapter 2014–220, Laws of Florida, even though his offenses were committed before the effective date of the new law. We disagree. In *Horsley v. State*, 160 So.3d 393, 395 (Fla.2015), the supreme court held that all juvenile homicide offenders whose sentences are unconstitutional under *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), are entitled to be sentenced under chapter 2014–220. *Miller* prohibits mandatory life-without-parole sentences for juvenile homicide offenders. 132 S.Ct. at 2469. Williams received a sentence of thirty-five years on his conviction for first-degree murder, therefore, his sentence is not unconstitutional under *Miller*, and he

is not entitled to be resentenced under the new law.

In *Henry v. State*, 175 So.3d 675, 680 (Fla.2015), the court held that *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), which prohibits life-without-parole sentences for juvenile non-homicide offenders, applies to lengthy term-of-years sentences that do not provide juvenile nonhomicide offenders with a meaningful opportunity for release during their lifetimes. A juvenile nonhomicide offender whose sentence is not unconstitutional under *Graham* is not entitled to resentencing under the new law. See *Williams v. State*, 197 So.3d 569, 572 (Fla. 2d DCA 2016). In this case, Williams was sentenced to twenty-five years, with a twenty-five-year mandatory minimum, on his conviction for attempted murder. This sentence is not a de facto life sentence, and therefore is not unconstitutional under *Graham*. See *id.* (holding that a sentence of fifty years with a twenty-year mandatory minimum was not a de facto life sentence and did not violate *Graham* ).

Accordingly, we affirm Williams' convictions and sentences.

LaROSE and BADALAMENTI, JJ.,  
Concur.

