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IN THE SUPREME COURT OF FLORIDA
CASE NOS.: SC12-578 & SC12-1223

LEIGHDON HENRY,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

Appeal No.: SC12-578
L.T. Case Nos.: 5D10-3021
5D08-3779

SHIMEEK DAQUIEL GRIDINE,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

Appeal No.: SC12-1223
L.T. Case Nos.: 1D10-2517

ON APPEAL FROM THE DISTRICT COURTS OF APPEAL,
FIRST & FIFTH DISTRICTS, STATE OF FLORIDA

AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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STATEMENT OF AMICUS IDENTITY AND INTEREST

The Florida Association of Criminal Defense Lawyers ("FACDL") files this amicus curiae brief in support of Petitioners. The FACDL is a voluntary statewide organization representing over 2,000 members, all of whom are criminal defense practitioners.

FACDL has an interest in this case because the members of FACDL serve as counsel for juvenile defendants who are affected by *Graham v. Florida*, 130 S. Ct. 2011 (2010) and will be affected by the outcome of this case. The FACDL has worked, in conjunction with the Juvenile Life Without Parole Resource Center at Barry University School of Law, to provide representation, often on a pro bono basis, to the many juvenile offenders in Florida who are being re-sentenced in light of *Graham*.

SUMMARY OF ARGUMENT

This brief makes three points. First, this Court and the judiciary – in the absence of any legislative or executive action – must act to ensure that Florida complies with the federal constitution and honors the constitutional rights of juvenile non-homicide offenders as established by *Graham v. Florida*, 130 S. Ct. 2011 (2010). Second, this Court's rule-making history demonstrates that this Court has the authority to provide the procedural mechanism by which the constitutional right established in *Graham* is implemented. Third, this Court

should consider instructing the Criminal Procedure Rules Committee to study and recommend a rule under which *Graham*'s right to a "meaningful opportunity" for release "based on demonstrated maturity and rehabilitation" can be implemented.

ARGUMENT

In *Graham v. Florida*, 130 S. Ct. 2011 (2010), the Supreme Court of the United States established a new constitutional right for certain children. The federal constitution now requires Florida and the other States to give children convicted of non-homicide crimes "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2030. The Court in *Graham* found that Florida, more than any other state, has violated this constitutional right of children.[1] The Court, nevertheless, left it up to Florida "in the first instance, to explore the means and mechanisms" to remedy its unconstitutional practice of sentencing certain children to die in prison. *Id.* If Florida fails "in the first instance" to prescribe the constitutional "means and mechanisms," the U.S. Supreme Court may have to intervene again and order

[1] *See Henry v. State*, SC-1223, Petitioner's Initial Br. 17-18 (citing *Graham*, 130 S. Ct. at 2023-26 and study by Professor Paolo G. Annino, available at http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf).

Florida to implement certain concrete "means and mechanisms" to comply with the federal constitution.[2]

Petitioners in the instant cases have suggested that one mechanism for complying with *Graham* is to invalidate the Florida Legislature's current prohibition on parole as it applies to juvenile non-homicide offenders. (*See Henry v. State*, SC-1223, Petitioner's Initial Br. 35-50; *Gridine v. State*, SC-1233, Petitioner's Initial Br. 29-30.) The FACDL agrees with Petitioners for the reasons argued in their briefs that this Court has the power to invalidate the legislative prohibition on parole as a means to ensure compliance with the federal constitution.

The FACDL acknowledges that *a* parole system *could* be a mechanism for complying with *Graham*. The FACDL, however, has serious reservations whether Florida's current parole system would, in fact, provide the "meaningful opportunity" required by *Graham*. For instance, the current parole system has a scoring regulation that penalizes an offender if his crime was committed before his eighteen birthday. *See* Fla. Admin. Code R. 23-21.007(4). If this Court adopts the parole mechanism advocated by Petitioners, the FACDL would urge the Court to

[2] *Cf. Brown v. Plata*, 131 S. Ct. 1910 (2011) (affirming lower federal court's intervention in California's correctional system and its order directing the release of California prisoners because of California's inability to comply with the Eighth Amendment on its own).

leave open, and not decide, the question of whether Florida's parole system, in fact and as a matter of practice, provides the "meaningful opportunity" required by *Graham.*

The purpose of this brief is to alert this Court that there is another non-parole mechanism by which Florida can provide *Graham*-eligible offenders a "meaningful opportunity" for release "based on demonstrated maturity and rehabilitation." The non-parole mechanism may be prescribed by this Court's rule-making authority. *Infra* Parts II and III. Before arguing why this Court should consider adopting such a mechanism, this brief first explains what Florida has done so far to ensure compliance with *Graham* (virtually nothing) and why this Court must act in light of the inaction by the other branches of government.

I. FLORIDA'S JUDICIARY MUST ACT TO ENSURE THAT FLORIDA COMPLIES WITH THE FEDERAL CONSTITUTION AND HONORS THE CONSTITUTIONAL RIGHT ESTABLISHED BY *GRAHAM.*

With the third anniversary of the *Graham* decision approaching in two months, Florida's three branches of government have done very little to comply with the decision and honor the constitutional right that *Graham* established for certain children. Two regular sessions of the Florida Legislature have come and gone since *Graham* was decided, and as of the writing of this brief, the Legislature was conducting its third regular session since *Graham* was decided. The

Legislature has done nothing in response to *Graham*. The Florida Executive – other than participate in *Graham* re-sentencings – also has done nothing.

The Florida Judiciary has done very little. Granted, the Judiciary has re-sentenced approximately two thirds of the juvenile offenders eligible for relief under *Graham*,[3] and some of these sentences have passed constitutional muster. But all too often the Judiciary has imposed new sentences that – under any reasonable reading – cannot plausibly provide a child the "meaningful opportunity" for release that the federal constitution requires.[4]

Some members of Florida's Judiciary have allowed these long, *de facto* life sentences to stand because, in their view, either the Legislature or the U.S. Supreme Court must first prescribe the means and mechanisms by which the Judiciary honors the constitutional right of certain children to a "meaningful

[3] FACDL represents this estimate to the Court based on its collaboration with the Juvenile Life Without Parole Resource Center at Barry University School of Law in Orlando (the "Center"). The Center assists counsel representing *Graham*-eligible offenders. Many FACDL members have served as counsel at *Graham* re-sentencings, often on a pro bono basis.

[4] *Walle v. State*, 99 So. 3d 967 (Fla. 2d DCA 2012) (affirming consecutive sentences totaling ninety-two years imposed on a 13-year-old for non-homicide offenses); *Henry v. State*, 82 So. 3d 1084 (Fla. 5th DCA 2012) (affirming ninety-year sentence for juvenile non-homicide offender); *Gridine v. State*, 89 So. 3d 909 (Fla. 1st DCA 2011) (affirming seventy-year sentence for juvenile non-homicide offender); *Thomas v. State*, 78 So. 3d 644 (Fla. 1st DCA 2011) (affirming fifty-year sentence for juvenile non-homicide offender); *Mediate v. State*, 5D11-4424, 2013 WL 757623 (Fla. 5th DCA 2013) (affirming 130-year sentence for juvenile non-homicide offender); *see also Smith v. State*, 93 So. 3d 371 (Fla. 1st DCA 2012) (affirming 80-year sentence for juvenile non-homicide offender in light of potential gain-time).

opportunity" for release.[5] These viewpoints are misguided. Florida cannot continue to violate the constitutional rights of certain children simply because of inaction by the Legislature and Executive and simply because of the Judiciary's belief that it is up to some other branch of government or the federal courts to prescribe the constitutional remedy.

Florida – including Florida's Judiciary – must comply with the federal constitution. *See, e.g., Smith v. O'Grady*, 312 U.S. 329, 331 (1941) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that [federal] Constitution.") It must do so now. Not later. In the absence of legislative and executive action, the Judiciary must provide the "means and mechanisms" for constitutional compliance.

[5] *See Gridine*, 89 So. 3d at 911 (Wolf, J. dissenting) (stating that "the only logical way to address the concerns expressed by [*Graham*] is to provide parole opportunities for juveniles" but opining that only "[t]he Legislature, not the judiciary, is empowered to create a provision for parole"); *Henry*, 82 So. 3d at 1089 ("Without any tools to work with, however, we can only apply *Graham* as it is written. If the [U.S.] Supreme Court has more in mind, it will have to say what that is."); *Thomas v. State*, 78 So. 3d 644, 647 (Fla. 1st DCA 2011) ("This Court lacks the authority to craft a solution to this problem. We encourage the Legislature to consider modifying Florida's current sentencing scheme to include a mechanism for review of juvenile offenders sentenced as adults as discussed in *Graham.*")

II. AS HISTORY DEMONSTRATES, FLORIDA'S JUDICIARY HAS THE POWER THROUGH ITS RULE-MAKING AUTHORITY TO CREATE THE MECHANISM BY WHICH *GRAHAM*'S "MEANINGFUL OPPORTUNITY" IS PROVIDED.

This Court has the exclusive power to promulgate procedural rules of the court.[6] Art. V, § 2, Fla. Const. Many times in its history, this Court has promulgated rules to ensure compliance with substantive federal or state law. Below are some examples.

A. *Ford v. Wainwright*

Ford v. Wainwright, 477 U.S. 399 (1986) ruled that the Eighth Amendment prohibited the execution of insane inmates. *Id.* at 409. Before *Ford*, the Florida Legislature had prescribed the mechanisms by which Florida determined whether an inmate was sane or not. *See id.* at 412-13 (citing § 922.07, Fla. Stat. (1985 & Supp. 1986)). The U.S. Supreme Court declared that Florida's mechanisms for determining the sanity of an inmate were "inadequate." *Id.* However, the Court "[left to] the State [of Florida] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.*

[6] While the Florida Constitution did not specifically grant the Florida Supreme Court rulemaking authority until 1957, James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. Miami L. Rev. 507, 513 (2002), the Court has recognized that it always had the inherent power to establish any and all necessary rules, *see id.* at 512-13; *Humphries v. Hester & Stinson Lumber Co.*, 141 So. 749 (1932).

In response to *Ford*, this Court developed appropriate ways to enforce the constitutional restriction on executing the insane. This Court did not wait for the Legislature to remedy Florida's unconstitutional scheme. This Court acted without haste at the request of the Governor. *See In re Emergency Amendment to Florida Rules of Criminal Procedure (Rule 3.811, Competency to be Executed)*, 497 So. 2d 643 (Fla. 1986). Less than five months after *Ford* was decided, this Court wrote an emergency rule, Florida Rule of Criminal Procedure 3.811, that it adopted as an interim measure while it also tasked the Florida Bar to draft permanent rules through the normal rule-making process. *See id.* Eighteen months after *Ford* was decided, this Court adopted permanent rules, Rule 3.811 and Florida Rule of Criminal Procedure Rule 3.812. *See In re Amendments to Florida Rules of Criminal Procedure*, 518 So. 2d 256 (Fla. 1987). In contrast, the Legislature never acted in response to *Ford*. It never remedied the constitutionally defective mechanisms in its statute for determining the sanity of an inmate before execution.[7]

B. *Atkins v. Virginia*

Atkins v. Virginia, 563 U.S. 304 (2002) ruled that the Eighth Amendment prohibited the execution of a mentally retarded person. Shortly before this

[7] The Legislature did not amend the pertinent statute until ten years later, and none of its amendments remedied the constitutional defects identified by the U.S. Supreme Court in *Ford*. *Compare* ch. 96-213, § 3, Laws of Fla. *and* ch. 97-102, § 1839, Laws of Fla. *with Ford*, 477 U.S. at 413-16.

decision, the Florida Legislature enacted a statute that exempted the mentally retarded from the death penalty and provided a method for determining whether a capital defendant is mentally retarded. *See State v. Herring*, 76 So. 3d 891, 894 (Fla. 2011) (citing § 921.137, Fla. Stat. (2001)). This Court, in response to these substantive changes in the law, adopted a rule of criminal procedure, Rule 3.203, that effectively mirrored the substantive changes in law from *Atkins* and the new statute. *See id.*

C. *Gideon v. Wainwright*

Gideon v. Wainwright, 372 U.S. 335 (1963) established, of course, the substantive constitutional right to counsel for all indigent defendants. *Gideon* required new trials for thousands of inmates. *See* Paul M. Rashkind, *A 40th Birthday Celebration and the Threat of A Midlife Crisis*, 77 Fla. B.J. 12, 14 (March 2003). To cope with the onslaught of *Gideon* petitions, this Court created Rule 1, the predecessor to what today is Florida Rule of Criminal Procedure 3.850. *See id.* The Court later created a host of other procedural rules to ensure compliance with *Gideon*'s mandate and the constitutional right to counsel.[8] *See id*. (citing Fla. R. Crim. P. 3.111, 3.130(c), and 3.160(e)).

[8] The Legislature also reacted to *Gideon* by creating the public defender system. *See* Bruce R. Jacob, *50 Years Later: Memories of Gideon v. Wainwright*, 87 Fla. B.J. 10, 17 (Mar. 2013).

D. Other examples of this Court adopting rules to respond to changes in the substantive law.

Some other examples of this Court adopting rules to respond to changes in the substantive law are the following:

- In 1999, the Florida Legislature enacted section 390.01115, Florida Statutes, which required parental notification before a minor could receive an abortion. To ensure this change in the substantive law was implemented, this Court had to create an emergency rule to determine the proper procedure for notification. *See Amendments to the Florida Rules of Civil Procedure; etc.*, 756 So. 2d 27 (1999).
- In 1988, this Court created rules in response to legislation that required minors to obtain a court order before they could receive an abortion. *See In re Emergency Amendments to Rules of Civil Procedure and Rules of Appellate Procedure*, 532 So 2d. 1058 (1988). One rule, an appellate rule, prescribed a stringent time deadline (ten days) for the appellate court to review an order denying permission to obtain an abortion, and it automatically reversed the order in the event there was no decision from the appellate court by that deadline. *See id.* at 1059.
- In 1971, the Florida Legislature amended section 918.015, Florida Statutes to read, "In all criminal prosecutions the state and the defendant shall have the right to a speedy trial." The statute also directed this Court

to prescribe procedures through which both the statutory and state constitutional right to a speedy trial could be guaranteed. To accommodate the new statute, this Court created an emergency rule, Rule 1.191, the predecessor to current Florida Rule of Criminal Procedure 3.191. *See In re Florida Rules of Criminal Procedure*, 245 So. 2d 33 (Fla. 1971), *order amended* 251 So. 2d 537 (Fla. 1971). That rule prescribed very specific times by which an accused had to be brought to trial. *See id.* By adopting this rule, this Court allowed Florida courts to avoid the case-by-case "balancing or totality-of-the-circumstances approach" required by the constitutional right to speedy trial. *See* Michael E. Allen, *Florida Criminal Procedure* § 14:5 (2013 ed.)

III. THIS COURT SHOULD CONSIDER ADOPTING A RULE TO ENFORCE A JUVENILE NON-HOMICIDE OFFENDER'S RIGHTS UNDER *GRAHAM*.

The Eighth Amendment does not prohibit a life sentence for a child convicted of a non-homicide. *Graham*, 130 S. Ct. at 2030. But it does prohibit a sentencing judge from determining "at the outset" of a child's life that a life sentence is appropriate. *Id.* The reason for this prohibition is that sentencing judges – no matter how diligent or professional they may be – cannot "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id.* at 2031-32.

This distinctive feature – a child's inherent capacity for change – is what requires a different approach, under the Eighth Amendment, when imposing a sentence on a child. *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (instructing sentencing judges, in the context of juvenile homicide offenders, that they must "take into account how children are different, and how those differences counsel against irrevocably sentencing [children] to a lifetime in prison"). *Graham* imposed its categorical rule to "give[] all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." *Graham*, 130 S. Ct. at 2032. The 90-year and 70-year sentences imposed in these cases, as well as the other long sentences imposed by Florida's courts on children, *see supra* note 4, provide no realistic or meaningful chance for the juvenile offender to demonstrate maturity and reform.

In the absence of an appropriate parole system, the only "meaningful opportunity" by which a juvenile offender may demonstrate "maturity and reform" is to have him re-appear before the sentencing judge later in life. At the outset of his life shortly after the offense, a juvenile offender cannot possibly demonstrate maturity and reform. This demonstration can be made only after an offender has developed and fully formed. *See Graham*, 130 S. Ct. at 2029 ("Even if [the sentencing judge's] judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, [Graham's life] sentence was still disproportionate because that judgment was made at the outset"). Notably, in the

two cases before this Court, the defendants were very young and had almost no adult record by which the sentencing judges could possibly assess their maturity and reform. In contrast, in other cases where *Graham*-eligible juvenile offenders have had time to develop and fully form and been re-sentenced much later in life at an older age, the new sentences imposed have not always been as draconian as the long sentences in the instant cases.[9]

This Court should instruct the Criminal Procedure Rules Committee to examine and study a rule that would allow a child's conviction and sentence for a non-homicide to be reviewed by a judge sometime later in life after the child has developed and fully formed. What time precisely later in life this review should occur is, of course, subject to debate. Petitioner Gridine has suggested that, in the case of mandatory minimum sentence, the review should occur when the child has served the mandatory minimum term of years. (*Gridine v. State*, SC-1233, Petitioner's Initial Br. 28-29.) In contrast, the American Academy of Child & Adolescent Psychiatry, which filed an amicus brief in support of Mr. Graham in

[9] For example, two juvenile offenders who committed horrible rapes in May 1994 were able to demonstrate – at a *Graham* re-sentencing hearing in late 2011 – that, in the intervening seventeen years since their crimes, they had matured and reformed. Accordingly, the re-sentencing judge – with the perspective of the defendants' adult and juvenile histories – reduced their life sentences to less than thirty years each. *See* James Musgrave, *Judge reduces men's life sentences in 1994 rape to less than 30 years*, Palm Beach Post (Dec. 20, 2011), http://www.palmbeachpost.com/news/news/crime-law/judge-reduces-mens-life-sentences-in-1994-rape-to-/nL2bx/ (last visited March 11, 2013).

the U.S. Supreme Court, has recommended that juvenile offenders serving life without parole have their sentences reviewed no later than their twenty-fifth birthday and thereafter every three years or less.[10] The precise benchmark for this later review is something the Committee should study, debate, and recommend to this Court.

Members of this Court, or the State, may be concerned that the FACDL's proposal for a rule will involve an improper encroachment by this Court into the substantive law. *See, e.g., State v. Garcia,* 229 So.2d 236, 238 (Fla. 1969) ("The rules adopted by the Supreme Court are limited to matters of procedure, for a rule cannot abrogate or modify substantive law.") But the FACDL's proposal for a rule does not seek to abrogate, modify, or expand substantive law. Instead, it seeks to *implement* the substantive federal law mandated by the Eighth Amendment and *Graham*. The rule should provide the "means or mechanism" for giving the juvenile non-homicide offender a "meaningful opportunity" for release based on "demonstrated maturity and rehabilitation." *See Graham*, 130 S. Ct. at 2030.

Analogies can be drawn to current rules. For example, Rule 3.850 provides the procedural mechanism in Florida by which defendants vindicate their Sixth Amendment right to counsel, as well as other constitutional rights that cannot be

[10] *See* Policy Statement: Juvenile Life Parole: Review of Sentences (April 2011) (available at http://www.aacap.org/cs/root/policy_statements/juvenile_life_without_parole_review_of_sentences (last visited on March 11, 2013).

vindicated during the trial and direct appeal.[11] *See* Fla. R. Crim. P. 3.850(a)(1). Rule 3.850 does not abrogate, modify, or expand the substantive constitutional law. Changes to the substantive constitutional law are from the evolution of cases like *Gideon*,[12] *Strickland*,[13] and *Brady*.[14] Rule 3.850 merely permits a court – after a conviction and sentence have become final – to review the constitutional soundness of the conviction and sentence in light of the newly developed facts that were unknown at the time of the direct appeal and come to light only later. These later developed facts – that typically support a *Strickland* ineffective-assistance-of-counsel claim or a *Brady* prosecutorial misconduct claim – normally come to light only after a post-trial investigation into the actions and omissions of the defense counsel and the prosecutor.

In a similar vein, FACDL is proposing that this Court adopt a rule for a juvenile non-homicide offender that allows him to vindicate, not expand or modify, his Eighth Amendment rights under *Graham*. It would permit a sentencing court to later review the juvenile offender's sentence – based on facts learned from the offender's later development and formation in adulthood – to determine whether the offender has changed or not. These later developed facts will come to light

[11] In contrast, the analogues to Rule 3.850 in the federal system are legislative statutes, not judicial rules. *See* 28 U.S.C. §§ 2254, 2255.
[12] *Gideon v. Wainwright*, 372 U.S. 335 (1963).
[13] *Strickland v. Washington*, 466 U.S. 668 (1984).
[14] *Brady v. Maryland*, 373 U.S. 83 (1963).

only after a review and investigation of the offender's post-conviction record and conduct while imprisoned. This later review will allow the sentencing court to assess, with sufficient accuracy, whether the juvenile non-homicide offender is so incorrigible that he is not "fit to reenter society," or instead has demonstrated in prison the necessary "maturity and rehabilitation" to reenter society. *See Graham*, 130 S. Ct. at 2030.

Members of this Court, or the State, may also question whether this Court has the power through its rule-making authority to set the time at which the *Graham* review of a juvenile non-homicide offender's sentence should occur. But this Court already has set similar times under the current rules. For instance, the Court has established that post-conviction motions challenging the constitutionality of a conviction must be filed within two years of the offender's conviction becoming final. *See* Fla. R. Crim. P. 3.850(b). For motions challenging illegal sentences, this Court has adopted a rule allowing such motions to be filed "at any time." Fla. R. Crim. P. 3.800(a).

Similarly, to effectuate the right of speedy trial, which also is both a constitutional and statutory right, this Court has set a series of firm times by which defendants must be tried. *See* Fla. R. Crim. P. 3.191. The adoption of the speedy trial rule, with specific times by which defendants must be tried, was not substantive law-making by this Court. Instead, the Court's adoption of the rule

"merely provide[d] the procedures through which the constitutional right to a speedy trial is enforced in [Florida]." *State ex. rel. Maines v. Baker*, 254 So. 2d 207, 208 (Fla. 1971). The FACDL asks for something similar here – a rule to provide the procedures through which a juvenile non-homicide offender's constitutional right to a "meaningful opportunity" to release can be enforced in Florida.

CONCLUSION

The Florida Association of Criminal Defense Lawyers requests that the Court vacate the sentences of the Petitioners and direct the Criminal Procedure Rules Committee to study and report to this Court on the adoption of a rule to implement a juvenile non-homicide offender's constitutional right to a "meaningful opportunity" for release "based on demonstrated maturity and rehabilitation." *See Graham*, 130 S. Ct. at 2030.

Respectfully Submitted,

/s/ Bryan S. Gowdy

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email to: Peter Webster, pwebster@carltonfields.com, and David Luck, dluck@carltonfields.com, (Counsel for Petitioner Henry); Gail Anderson, gail.anderson@flpd2.com (Counsel for Petitioner Gridine); and Kelllie Anne Nielan and Wesley Harold Heidt, CrimAppDAB@myfloridalegal.com (Office of the Attorney General), on this 11th day of March, 2013.

/s/ Bryan S. Gowdy
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Bryan S. Gowdy
Attorney