CASE NO. SC12-647
L.T. CASE NO. 4D11-4645

IN THE SUPREME COURT OF FLORIDA

WAYNE TREACY,
Petitioner,

v.

AL LAMBERTI, as Sheriff of Broward County, Florida,
***Respondent*.**

On Appeal from the District Court of the State of Florida,
Fourth District

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Wayne Treacy, the Petitioner, awaits trial in Broward County for the attempted first degree murder of Josie Lou Ratley. It is alleged that Treacy knocked the fifteen-year-old girl to the ground, and stomped on her head with his steel-toe boots.

In *Treacy v. State*, No. 4D11-4645, 2012 WL 204487 (Fla. 4th DCA Jan. 25, 2012), the Fourth District Court of Appeal denied Petitioner's contention that he was entitled to bond based on the United States Supreme Court's decision in *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), holding that a juvenile cannot be sentenced to life in prison for a non-homicide crime without some reasonable possibility for parole. The Fourth District Court of Appeal adopted the well-reasoned order of Judge David Haimes, which concluded that the crime of Attempted First Degree Murder (Premeditated) with the use of a deadly weapon is plainly an "offense punishable by life imprisonment" as those words are used in Article 1, section 14 of the Florida Constitution, and the *Graham* decision does not affect that classification of offense.

SUMMARY OF THE ARGUMENT

The State urges this Court to decline Petitioner's invitation to invoke its discretionary jurisdiction to review the instant case. The decision below, adopting

the well-reasoned order of Judge David Haimes, gives proper consideration to Florida's expressed intent that bond be denied for individuals who stand accused of life felonies.

ARGUMENT AND CITATIONS OF AUTHORITY

THE FOURTH DISTRICT COURT OF APPEAL'S OPINION BELOW PROPERLY CONCLUDED THAT THE *GRAHAM* OPINION HAS NO AFFECT ON FLORIDA'S EXPRESSED INTENT THAT BOND BE DENIED FOR INDIVIDUALS WHO STAND ACCUSED OF COMMITTING LIFE FELONIES. (RESTATED)

Initially, Respondent notes, as he did below, Petitioner's entire argument is based on the faulty premise that the United States Supreme Court's opinion in *Graham*, which addresses only the sentencing consequences for juveniles convicted of certain crimes, somehow altered the classification of those crimes as determined by the Florida Legislature.

As the trial court reasoned, there is no need to resort to legislative intent when determining that pretrial release may be denied to those charged with "an offense punishable by life imprisonment." While Graham requires that a juvenile sentenced to life imprisonment be given a "realistic opportunity to obtain release," ***Graham* does not prohibit the imposition of a life sentence on a juvenile who**

commits a nonhomicide crime. Moreover, even if the *Graham decision* is read as prohibiting imposition of a life sentence in Florida, because parole is not available, this ruling affects only the sentencing consequences for an individual ultimately convicted of attempted first degree murder, not the pretrial release consequences faced by that individual. *Graham* did not act to alter the seriousness of any crime, much less the heinous crime of which Petitioner is accused. Graham did not change the seriousness of Attempted First Degree Murder (Premediated) With a Deadly Weapon.

The categorical rule of *Graham* is that a juvenile offender who commits a non-homicide offense must be given a meaningful **opportunity** for parole at some point during his/her incarceration. The Court explicitly recognized that in any given case, a juvenile may never be fit to re-enter society, and therefore it is permissible to allow a juvenile to serve a life sentence. That specific determination cannot be made at the outset of a juvenile's sentence. Rather, at some point during incarceration, parole/release must be considered, **and only considered**, rather than forever foreclosed from consideration.

Examination of the *Graham* decision shows that the Court's decision was based on a concern for the circumstances of the criminal - not the nature of the crime with which the juvenile is charged. The Court in *Graham* expressly

recognized that depending on the circumstances of the crime, a juvenile may indeed pose an immediate risk to the public, and the Court's concern focused on the possibility that a juvenile may eventually demonstrate growth and maturity necessary to reenter society:

> Here **one cannot dispute that this defendant posed an immediate risk**, for he had committed, we can assume, serious crimes early in his term of supervised release and despite his own assurances of reform. **Graham deserved to be separated from society for some time in order to prevent what the trial court described as an "escalating pattern of criminal conduct,"** App. 394, but it does not follow that he would be a risk to society for the rest of his life. Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. **A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity**. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.
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> *Graham*, 130 S. Ct. at 2029 (emphasis supplied).

The *Graham* decision, and its mandate regarding meaningful opportunity for a juvenile convicted of a non-homicide offense punishable by life imprisonment to be considered for parole/release at some point in the incarceration period, has no relevance whatsoever to the question of whether the standards of *State v. Arthur*, 390 So.2d 717 (Fla. 1980) should apply to a juvenile charged with one of the most serious of offenses. Attempted premeditated murder committed with a deadly

weapon is a life felony. The crime itself is not converted to a non-life felony because of the age of the person who commits it. The United States Supreme Court in *Graham* did not change the classification of that life felony under Florida law.

The Florida Constitution and Florida Legislature use the language "capital offense or offense punishable by life imprisonment" to indicate the seriousness of the crimes for which pretrial release will not be available. Recognizing that the more serious the crime, the less likely a defendant will show up for trial, bond may be denied to those charged with the most serious of crimes, among them the life felony of attempted first degree murder with a deadly weapon. The fact that an individual of a certain age who is ultimately convicted of attempted first degree murder with a deadly weapon may no longer be sentenced to life imprisonment without the possibility for parole, does not alter the seriousness of the crime. Thus, consistent with the plain meaning of the law, an individual charged with one of the most serious of crimes may be denied pretrial release.

The classification of a life felony, and the attendant pretrial consequences, are not altered merely because the sentencing consequences as to a certain category of offenders have been altered. *Graham's* determination that a sentence of life without the possibility of parole for a juvenile who commits a nonhomicide offense

is prohibited by the constitutional prohibition against cruel and unusual punishment has no bearing on the interpretation of the legislatively enacted pretrial consequences for that same crime. Pretrial consequences of a charged crime, and sentencing consequences following a conviction for that crime, are the proverbial apple and orange, and thus not comparable. The right to bond is based on article I, section 14 of Florida's Constitution, not on Federal Constitutional principals.

CASE LAW SUPPORTS THE TRIAL COURTS DENIAL OF BOND

As the trial court recognized in its order, in *Batie v. State*, 534 So. 2d 694 (Fla. 1988) the Florida Supreme Court held that although a sentencing consequence attached to an offense becomes unavailable, remaining consequences of that offense, including bond, remain intact. Respondents urge this Court to decline to exercise its discretionary jurisdiction in this case because the Fourth District opinion below is consistent with the reasoning of *Batie*, *Buford v. State*, 403 So. 2d 943 (Fla. 1981) , State v. Hogan, 451 So. 2d 844 (Fla. 1984), *Florida Parole Comm'n v. Criner*, 642 So. 2d 51 (Fla. 1st DCA 1994) *Selph v. State*, 553 So. 2d 344 (Fla. 4th DCA 1989)(affirming denial of bail pending appeal as it is intent of legislature to deny bond to defendant convicted of sexual battery of child regardless of fact that sentence of death is not an option), that a change to the sentencing consequences of the crime of First Degree Murder (Premeditated) With

a Deadly Weapon has no impact on the pretrial release consequences facing an individual charged with that crime.

CONCLUSION

Based upon the foregoing argument and citations of authority, the State respectfully requests this honorable Court decline Petitioner's invitation to invoke its discretionary jurisdiction to review the Fourth District's opinion in *Treacy*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Respondent's Brief on Jurisdiction was served by mail this 8th day of May, 2012, on JASON T. FORMAN, ESQ., Law Offices of Jason T. Forman, P.A., 633 South Andrews Avenue, Suite 201, Fort Lauderdale, FL 33301.

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CERTIFICATE OF COMPLIANCE

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

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