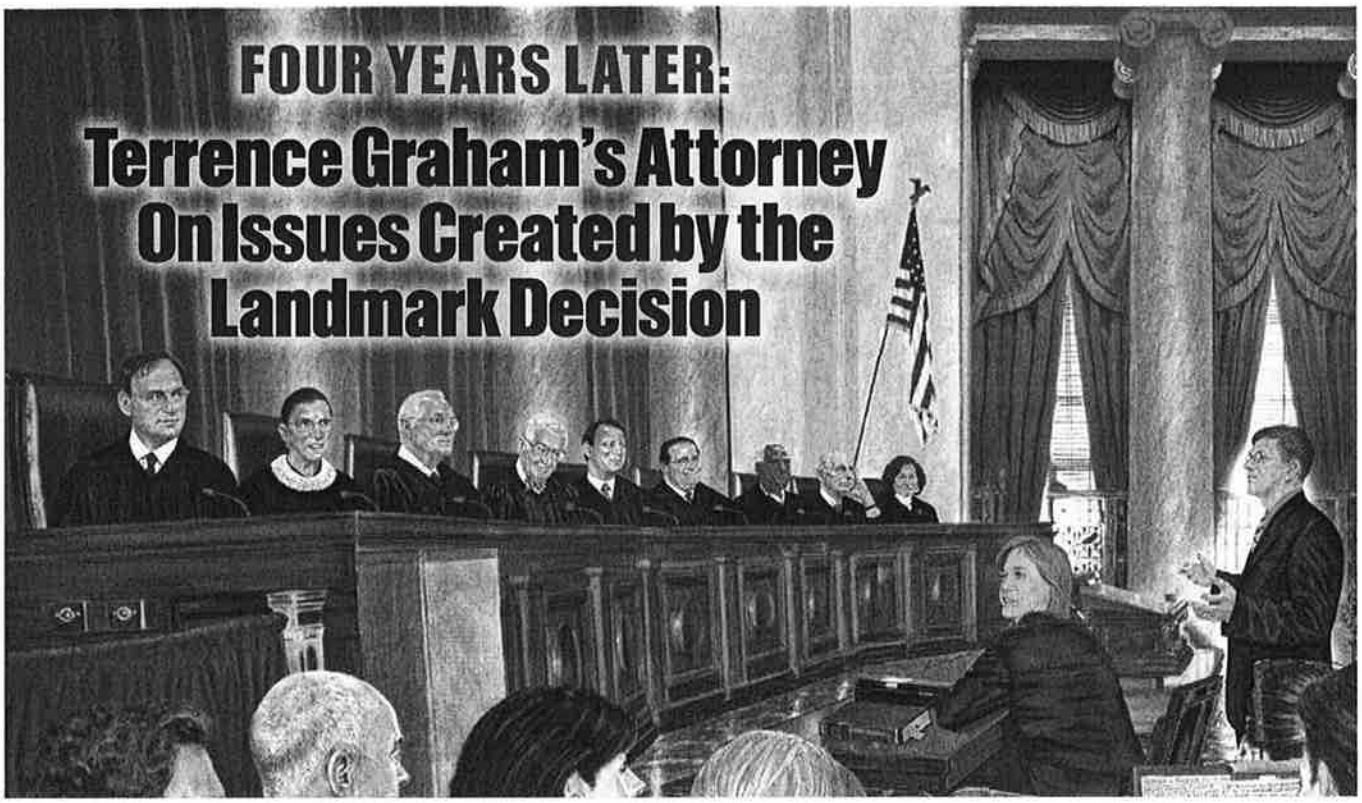
FOUR YEARS LATER: Terrence Graham's Attorney On Issues Created by the Landmark Decision



Jacksonville attorney Bryan Gowdy (far right) successfully argues *Graham v. Florida* before the United States Supreme Court in November 2009.

by Bryan Gowdy

A little over four years ago, on November 9, 2009, I orally argued in the Supreme Court of the United States the case of *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010). When I walked out of the argument that day, I was elated and relieved. I believed that my work on the case was largely complete, as typically oral argument is the last major piece of work to be done on a case by an appellate lawyer like me. With hindsight, I know now that I was gravely mistaken. Little did I know then that my work on the *Graham* case—both Terrance Graham's personal case and the larger issues created by *Graham*—really was just beginning.

After the Supreme Court issued its decision on May 17, 2010, my colleague Jessie Harrell and I wrote an article for this magazine analyzing the decision and predicting the issues to be litigated. That article took an academic, objective approach. In this article, I take a more personal approach—that is, how I have experienced *Graham* the last four years. Hardly a day has gone by in the last four years without someone—another attorney, a child advocate, a juvenile offender, a family member, etc.—contacting me and asking me some question related to *Graham*. (In fact, as I was writing this article, an email just popped into my inbox from a FACDL member asking me for assistance on a *Graham* re-sentencing.) So far, I've tried to answer every inquiry, and I hope that I can keep doing so. I hope that my discussion herein of these personal experiences will help those of you who, either as criminal defense practitioners or judges, are handling cases involving children charged with serious crimes in our criminal justice system.

After *Graham* was decided, Terrance, of course, had to be re-sentenced. Though I never had handled a sentencing hearing before, I decided that I would "stay on" for Terrance's case. Hank Coxe agreed to help, and so did our public defender in the Fourth Judicial Circuit as Terrance's court-appointed counsel. It took nearly 20 months for the re-sentencing to occur. This delay was attributable to many factors, including the prosecutor's decision to re-file charges against Terrance that had been dropped in 2006 shortly after he was originally sentenced to life without parole. The re-filed charges were for the home invasion robbery discussed in *Graham* and that served as the basis for the violation of probation on the armed burglary charge for which he received life without parole.

The re-filed charges caused the public defender to be conflicted off the case, and it brought onto the case Waffa Hanania of the Regional Conflict Counsel. It also caused several other private attorneys to step forward and volunteer to help me ensure that the hard-fought victory in the U.S. Supreme Court was not lost as a practical matter in the Fourth Judicial Circuit. Beside Hank, the private counsel included:

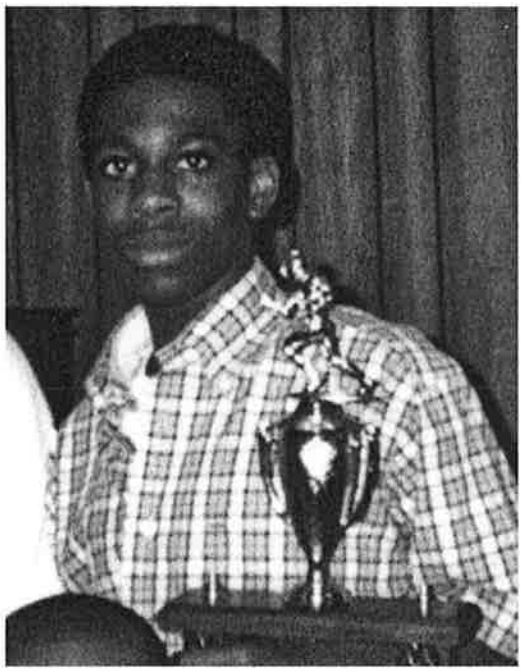
Melissa Nelson, a former prosecutor and commercial litigator at McGuire-Woods LLP; George "Buddy" Schulz, the head of Holland & Knight's pro bono department; and Gray Thomas who had recently left Bill Sheppard's firm to start his own practice and who now is of counsel with my firm. These and other talented lawyers helped in getting the prosecutor to drop the re-filed charges. These private volunteers would also form the basis of a new team to help a 12-year-old child, Cristian Fernandez, who was about to be charged in the Fourth Judicial Circuit with first-degree murder. More on that in a moment.

Once we got the re-filed charges dropped, we finally got to have Terrance re-sentenced. For the re-sentencing, we focused the trial judge—Judge Lance Day, the same judge who sentenced Terrance in 2006 to life without parole—on what *Graham* required the State of Florida to provide Terrance: "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 130 S. Ct. at 2030. We had to show Judge Day a game plan to get Terrance back into society, or as I called it, a pathway for re-entry. But before we showed the judge this pathway, we first had to show him from where Terrance had come. So, we broke the re-sentencing hearing into three phases: 1) the hard reality of Terrance's life and circumstances before his juvenile offenses, a reality that had not been adequately brought to Judge Day's attention at the time of the original sentencing; 2) Terrance's conduct while he had been incarcerated since the original sentencing; and 3) Terrance's plan to succeed outside of prison upon his release.

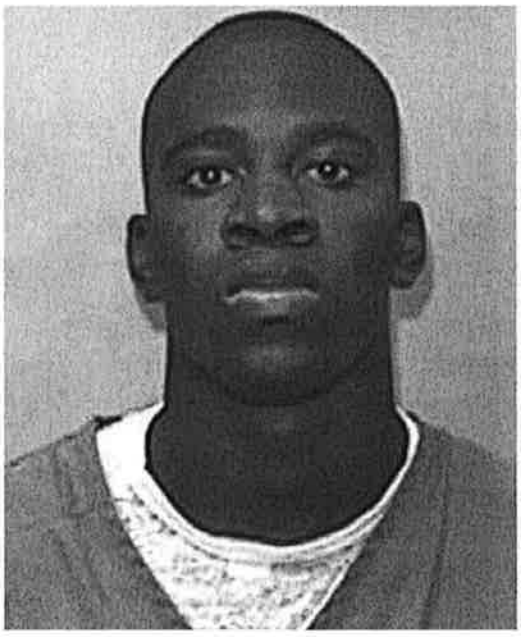
The first phase involved exposing the unfortunate mitigating circumstances of his childhood. Family members may not have wanted such personal circumstances exposed in a public court. But, I believed, these mitigating circumstances had to be exposed for Terrance's benefit, no matter how painful that exposure may have been. This phase showed to me why children can be especially vulnerable in adult court if not represented by counsel who are willing to contest what the child's parents may desire. Exposing the mitigating circumstances of a child's childhood may not put the parents in the best light, but it may help to persuade a judge to impose a lesser sentence. In this first phase, however, defense counsel must strike a balance and should not make the juvenile offender to appear to have such a completely broken upbringing so as to create a fear in the sentencing judge that the offender cannot be rehabilitated and safely returned to society.

The second phase was hard work because it involved interviewing personnel within the Department of Corrections who, absent a subpoena, likely would be very reluctant to even speak with defense counsel, much less testify in open court in support of a criminal defendant. Fortunately, I had a very skilled mitigation specialist, Sara Flynn, who was able to talk to Terrance's prison guards and ultimately persuade them to testify about Terrance's positive maturation while in prison.

The third phase involved bringing persons from the community—in particular, persons who assist offenders re-enter the community. These persons could show the judge that, once released, Terrance would not be on his own but would have help re-integrating to society. However, the difficulty with this third phase is that re-entry resources are limited and often not made available to violent offenders. This third phase also involved having a former juvenile offender convicted of a serious violent felony (murder) testify about his own personal experience re-entering society after being released. So often, our judges see only the people who re-offend and return to court. I wanted Judge Day to see an example of a good story with a good ending—a violent juvenile offender who had reformed himself and was contributing to society in a meaningful way outside of prison.

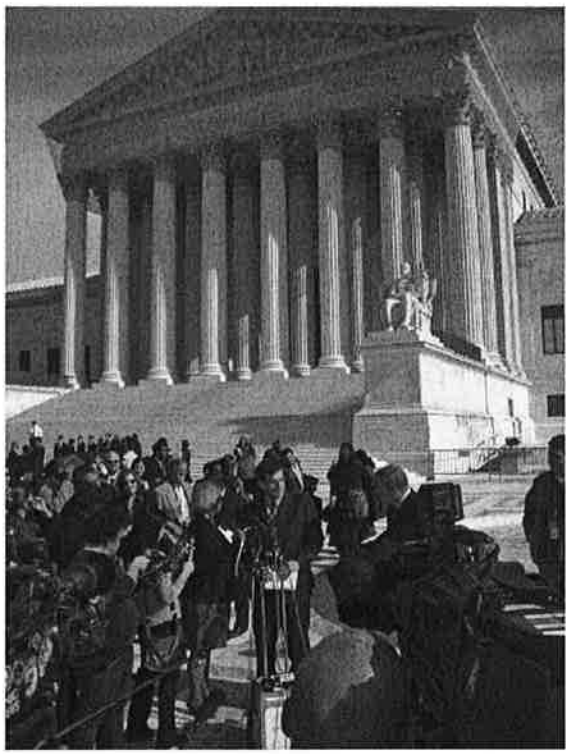


Terrance Graham poses with a sports trophy just two months shy of his 16th birthday and about nine months before committing the crime that resulted in his life-without-parole sentence.



What sentence did Terrance ultimately receive? I asked Judge Day to sentence him to 15 years concurrent to a 15-year sentence he had received for the attempted armed robbery charge arising

out of the same incident. I also asked Judge Day to impose a lengthy post-incarceration probation period of ten years. Many experienced criminal practitioners may raise an eyebrow at my probation proposal, given the risk of re-offending once on probation. However, given the lack of parole currently in Florida, I argued to Judge Day that probation was the closest mechanism we have in Florida for fulfilling *Graham*'s mandate. *Graham*'s mandate is not that a juvenile offender be guaranteed freedom. *Id.* at 2130. It is merely that the juvenile offender has a meaningful opportunity to freely live in society. *Id.*



NPR's Nina Totenberg interviews Bryan Gowdy following oral arguments before the U.S. Supreme Court on November 9, 2009.

Judge Day did not adopt my proposal. Instead, he sentenced Terrance to 25 years of prison followed by two years of community control and three additional years of probation. While I was disappointed, this was, all things considered, a sentence that can provide Terrance an opportunity to live outside of prison. With gain time, Terrance should be released in about a dozen years, before his fortieth birthday. When he is released then, he will require more help then to ensure a successful re-entry. I look forward to being there at that time.

Contemporaneous to Terrance's re-sentencing proceedings, a new, disturbing case was being prosecuted in the Fourth Judicial Circuit and Jacksonville. Cristian Fernandez was indicted for a first-degree murder that occurred when he was barely 12 years old. The press reported that he was the youngest person ever to be charged with murder in the county. A team of private lawyers at first assisted the public defender and later assumed representation of Cristian. Besides the persons I already have mentioned, the team included two other attorneys from McGuireWoods: Don Anderson, an environmental lawyer, and Nancy Johnson, a former prosecutor and public defender who now handles primarily employment litigation. I was honored to be part of this team.

What I learned in Cristian's case is that far superior results can be obtained if, in our advocacy, we apply the central rationale of *Graham*—that "kids are different"—much earlier in the process and consistently throughout the process. The *Fernandez* team used the same brain science that supported the *Graham* decision to successfully argue that many of Cristian's statements to the police had to be excluded because he did not knowingly, voluntarily, and intelligently waive his *Miranda* rights in large part because of his young age. Another smart decision in the *Fernandez* case was to appoint Cristian a guardian—separate and apart from his legal team—to effectively serve as Cristian's parent in making the many weighty decisions he faced. Ultimately, Cristian received a sentence pursuant to a plea agreement that will allow him to be free and re-enter society at age 19.

I expect my *Graham* experience to continue in the foreseeable future and to be rewarding. I currently have two clients on whose behalf I am trying to advance the rationale of *Graham* and its successor case, *Miller v. Alabama*, 132 S. Ct. 2455 (2012). What has been most rewarding, however, is observing the former juvenile offenders directly impacted by the *Graham* ruling. Last week at a conference, I observed someone a couple years younger than me who grew up in St. Petersburg, not far from where I grew up in Tampa. When this individual was a teenager, he was sentenced to a life-without-parole sentence on a narcotics charge, and he had spent almost the last quarter century in prison on that charge. That, of course, is a lot of lost time. But, last week, this individual was very blessed to be out of prison, spending time with his mother, in part because of the *Graham* decision and in part because of the hard work of advocates like many of you who ensured that the *Graham* decision was justly applied in his case. Watching this individual spend time with his mother was all the reward and motivation one needs to continue to work on these cases.

BRYAN S. GOWDY is a board-certified appellate specialist who practices in Jacksonville. His practice is limited exclusively to civil and criminal appeals, trial support,and post-conviction matters. Gowdy is a past chairperson of the appellate law section of the Jacksonville Bar Association, and has chaired the pro bono committee of The Florida Bar's Appellate Practice Section. He was a law clerk for Judge Susan H. Black of the Eleventh Circuit and Judge Maurice M. Paul of the Northern District of Florida. He attended the University of Florida College of Law, where he was first in his class, a member of the Order of the Coif and managing editor of the Florida Law Review. He can be reached at bgowdy@appellate-firm.com