No. _____

In the Supreme Court of the United States

_____

DAMANTAE GRAHAM,
Petitioner,

v.

STATE OF OHIO
Respondent.

_____

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

_____

PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE OHIO PUBLIC DEFENDER
Michelle Umaña [0093518]
Assistant State Public Defender
Death Penalty Department
Counsel of Record

Randall Porter [0005835]
Assistant State Public Defender
Death Penalty Department

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Ph: (614) 466-5394
Fax: (614) 644-0708
Michelle.Umana@opd.ohio.gov
Randall.Porter@opd.ohio.gov
Counsel for Damantae Graham

QUESTIONS PRESENTED

This Court ruled that, before a federal constitutional error can be deemed harmless, the prosecution must establish by proof beyond a reasonable doubt that the error was harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967). In *Payne v. Tennessee,* 501 U.S. 808, 827-29 (1991), this Court addressed the admission of testimony concerning the victim's background in the sentencing phase of a capital case. This Court has yet to address the admission of similar testimony in the trial phase of a capital case. This case presents this Court with that opportunity.

After an appellate court assumes a trial court's admission of irrelevant victim impact testimony was error, is it required to grant the defendant a new trial?

When a court recognizes multiple constitutional violations and instances of erroneously admitted evidence, should it be required to assess the errors cumulatively before dismissing them all as harmless?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. The Supreme Court of Ohio Direct Appeal Opinion: *State v. Graham*, Slip Opinion No. 2020-Ohio-6700.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

The Office of the Ohio Public Defender, on behalf of Petitioner Damantae Graham, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio below, reported as *State v. Graham*, Slip Opinion No. 2020-Ohio-6700, is attached hereto as Appendix A. Two journal entries from the Portage County Court of Common Pleas are attached. The court's journal entry re-sentencing Graham to life without the possibility of parole, *State v. Graham*, Journal Entry, Portage Cty Common Pleas Ct. Case No. 2016 CR 107E (Mar. 10, 2021), is attached as Appendix B. The court's original journal entry sentencing Graham to death, *State v. Graham*, Journal Entry, Portage Cty Common Pleas Ct. Case No. 2016 CR 107E (Nov. 15, 2016), is attached as Appendix C. The findings of facts and conclusions of law regarding imposition of that original death sentence, *State v. Graham*, Findings of Facts and Conclusions of Law, Portage Cty Common Pleas Ct. Case No. 2016 CR 107E (Nov. 15, 2016), is attached as Appendix D.

JURISDICTIONAL STATEMENT

The Supreme Court of Ohio issued its opinion on the merits on December 17, 2020. By this Court's order on March 19, 2020, the filing deadline for this petition extends to May 17, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. The Sixth Amendment, which provides in pertinent part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

B. The Fourteenth Amendment, which provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Damantae Graham was a Black 19-year-old teenager when he was convicted of Aggravated Murder and sentenced to death in Portage County, Ohio for a drug-related robbery turned fatal. The victim of the aggravated murder, Nick Massa, was a white 19-year-old college student, who attended the local university that is the center of the small county. The two robbery victims at the scene, Connor Haithcock and Justin Lewandowski, were also white 19 and 20-year-old men who lived on campus. Graham's indictment to conviction spanned only nine months in 2016—unusually fast for a capital trial. The evidence against Graham, the only teenager over the age of 18 among his three co-defendants at the time of the crime, was purely testimonial. No physical evidence linked him to the crime.

Graham's three juvenile co-defendants testified against him as part of their plea agreements for lesser offenses. Haithcock and Lewandowski identified the shooter as "short and dark-skinned," and Haithcock identified one of the juvenile co-defendants, T.K., from a previous encounter based on "[h]is height, . . . his build, the way he carried himself, [and] the way he walked." Trial Vol. I, p. 110; Appendix A, ¶ 15.

During trial, T.K. admitted that it was his plan to rob a local drug dealer who he knew. Trial Vol. IV, p. 13-17. He recruited Graham, M.G., and A.P. to participate. *See id.* The testimony at trial established that Graham, T.K. and M.G. entered the apartment with bandanas and hoodies covering their faces. Trial Vol. I, pp. 103-05, 140-41. Graham and M.G. reportedly had guns drawn. *Id.* at 104, 141. Graham

ordered Massa and Lewandowski to sit on the living-room couches, while M.G. and T.K. went with Haithcock to find the rest of the Haithcock's hidden money. *Id.* at 104-10, 142-44. At trial, Lewandowski testified that Graham shot the victim after the victim said, "You're not going to shoot me." *Id.* at 144.

After hearing the gunshots, T.K. and M.G. ran into the room. Trial Vol. IV, pp. 30-31, 81-82. Two witnesses testified that was the moment when Graham said "yeah" in response to M.G. asking if Graham shot the victim. *Id.* at 30, Trial Vol. I, p 145. Graham and the co-defendants fled the scene. Appendix A, ¶ 13. The victim died almost instantly from a single gunshot wound that entered his chest, going through his heart, aorta, and left lung. *Id.* at ¶ 18.

The robbery victims called 9-1-1 and Haithcock identified T.K., from knowing him previously, as one of the robbers. *Id.* at ¶ 15. T.K. was found and arrested later that day. *Id.* at ¶ 16. At the time, he would not disclose the names of the other perpetrators. *Id.* The next day, A.P., the get-away driver, was identified and arrested. *Id.* at ¶ 17. A few days later, M.G. was also identified and arrested, admitting his involvement in the robbery. *Id.* Five days after the shooting, Graham was arrested and told police he "wasn't there" when questioned. *Id.* at ¶ 18.

Nine months later, voir dire began for Graham's capital trial. Portage County has a population of about 162,466, that is 90.8% White and 4.8% Black.[1] During voir dire, there were three documented instances of racist comments and slurs. One prospective juror commented to a small group of venire members, "I wonder how

[1] 2019 Census QuickFacts, available at: https://www.census.gov/quickfacts/portagecountyohio

much we paid for that n[——-]'s suit." *Id.* at ¶ 35. Another prosecutive juror, in response to a question about whether the death penalty should automatically be imposed, said, "No. You can't just go out and lynch somebody like, you know, in 1835 or something." *Id.* at ¶ 37. A third prospective juror wrote on her questionnaire, "Do not like n[——-]s" in response to the question, "Do you have any specific health problems of a serious nature that might make it difficult or uncomfortable for you to sit as a juror in this case?" *Id.* at ¶ 32. When further probed, she elaborated that it was "an attitude," and "there's white people and black people and white n[——-]s and black n[——-]s and Hispanic." *Id.* at ¶ 33-34. Because none of those prospective jurors sat on the jury, the Supreme Court of Ohio determined that those instances did not result in prejudice to Graham. *Id.* at ¶ 51.

During trial, the victims used skin tone as the identifiers for each suspect. Haithcock described T.K as "the tall one. And the lighter one . . . the, like, lighter-skinned one." Trial Vol. I, p. 103. "Then there was like a kind of my height, I guess, and he was medium, I guess you want to call it. And then there was a shorter one and he was the darkest." *Id.* at 103-04. The prosecutor reiterated these descriptions, asking Haithcock to describe the skin complexion of "the shorter one" again. *Id.* at 104. Haithcock testified, "He was the darkest one." *Id.* Haithcock's testimony continued using those same identifiers throughout. He admitted that he could not see the suspects' faces. *Id.* at 104.

Lewandowski, the other robbery victim, testified in the same manner. He described the suspects as, "three African-American males. One short—or one tall and

light-skinned, one medium height and he was light-skinned as well, and then the short one was dark-skinned." *Id.* at 141. Lewandowski was also unable to describe or see their faces because they were covered with hoods and bandanas. Trial Vol. I, p. 157-58. Graham was continuously referred to as "short and dark-skinned" throughout the trial. *See e.g.,* Trial Vol. I, p, 104, 141, 144, 145, 154, 157.

In conjunction with the racial undertones of the trial, the State piled on its violent image of Graham. It presented inadmissible other acts evidence that Graham was known to carry a gun. Trial Vol. IV, p. 22. The State asked co-defendant T.K. if Graham was known to carry a gun, to which he replied, "Yeah, I knew he had one." *Id.* Co-defendant M.G. also testified that Graham had a gun, gave M.G. a gun, and always had a gun. *Id.* at 66-67; *see also* Appendix A, ¶¶ 66-68. The State took this imagery further with State's Exhibit 18, a photograph from T.K.'s phone of a smiling Graham holding two guns pointed at the camera. Trial Vol. IV, pp. 37-39; *see also* Appendix A, ¶ 67.

The State continued to elicit improper testimony by asking two of the co-defendants whether they were telling the truth before their credibility was attacked on cross-examination. Trial Vol. IV, pp. 38-40, 92-93; *see also* Appendix A, ¶¶ 100-01.

The trial concluded with inadmissible heart-wrenching victim-impact testimony by the victim's father. Trial Vol. V, pp. 53-63; *see also* Appendix A, ¶¶ 105-112. The victim's father testified that "Nick was the ideal son; fun, very curious, so I had the full-time job teaching Nick 'cause he was constantly full of questions, constantly wanting to learn . . . ." *Id.* at 54-55. He described him as "a mama's boy 'til

he got older and then he started to become a daddy's boy." *Id.* at 55. The State asked about the victim's interests in high school, including after-school activities, favorite subjects, jobs, and future plans for employment. The father explained that his son, "became more and more of wanting to be successful and making us proud to the point where, you know, he pretty much vowed that he would have a great job and buy us a home in Florida." *Id.* at 56.

After detailing the victim's future aspirational plans, the father went on for two of his ten-page testimony about the victim's interest in their elaborate fish tank. *Id.* at 56-57. The father explained that he had a saltwater fish tank as a "young boy" and the victim had talked him into getting one for them to set up too. *Id.* "And then after we set up our saltwater tank, and what he – what he did was unbelievable. I mean, we have a – he installed a system where our tank is in our family room and the lines go down into the basement where there's a sump. I can't even – I'm learning." *Id.* at 57. Then, "Nick has left me with a lot with this fish tank. I'm having to learn on my own, but I'm getting there." *Id.* at 58.

The State concluded by asking, "When is the last contact you had with Nick?" *Id.* 59. In a four-page narrative, the father explained that he saw the victim the day before he died when the victim surprised his parents by visiting home. *Id.* at 59. The father testified that he invited his son to stay with them instead of returning to school. *Id.* at 62. And his last words to his son were, "I said Nick, you have no idea how proud I am of you and how much I love you. And he hugged me and said I love

you, too, dad. And that's the last time I got to talk to him. He—he was my best friend." *Id.* at 62.

The defense had no questions on cross-examination for the father. But the State stopped the witness from stepping down by saying, "I'm sorry. I forgot the photo," and the trial court responded, "I thought so." *Id.* at 63. The State then displayed State's Exhibit 23, which was a professional photograph of the victim. The father testified, "This is my son Nick and I know he's with me right now." *Id.* The State then rested its case. *Id.* at 64.

The next day, following closing arguments, the jury convicted Graham of all charges. After being found guilty of Aggravated Murder and the additional felony charges, Graham was sentenced to death on November 15, 2016. On November 16 and 17, about two weeks after testifying against Graham, all three juvenile co-defendants pled to lesser offenses. T.K., the mastermind and coordinator of the offense, pled to Murder and received a sentence of 15 years to life. M.G., also pled to Murder and received a sentence of 15 years to life. A.P., the getaway driver, pled to Attempted Murder, and received 11 years of incarceration.

In conducting its mandatory independent sentence evaluation, however, the Supreme Court of Ohio vacated Graham's death sentence on direct review, finding that the aggravating circumstances did not outweigh the mitigating factors to warrant a death sentence. Graham's case was remanded for a resentencing hearing, where the Portage County trial court imposed a sentence of Life Without the

Possibility of Parole consecutive to the 61 years for Graham's other felony convictions stemming from the same events.

REASONS FOR GRANTING THE WRIT

I. An error is not harmless beyond a reasonable doubt when the appellate court determines it to be a "close call."

"Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967) . The prosecution bears the burden of proof to demonstrate that the error was harmless beyond a reasonable doubt. *Id.* at 26.

Here, the Supreme Court of Ohio determined that Graham's rights were violated when the trial court admitted victim impact testimony in the trial phase in violation of his constitutional right to a fair trial as guaranteed by the Fourteenth Amendment. The testimony in question spanned ten pages of the guilt-phase transcript and included approximately twenty questions by the State specifically about the victim. Appendix A, ¶¶ 104-112. The Supreme Court of Ohio, however, erred when it found the error harmless.

This Court has never addressed the admissibility of victim impact evidence outside the context of the sentencing phase of a capital trial. This case provides this Court with that opportunity.

A. There should be heightened judicial scrutiny for victim-impact evidence during trial.

The sentencers in the criminal justice system are judges. By definition, a judge is "a public official appointed or elected to hear and decide legal matters in court; a judicial officer who has the authority to administer justice." JUDGE, Black's Law Dictionary (11th ed. 2019). In contrast, a jury is "a group of persons selected according

to law and given the power to decide questions of fact and return a verdict in the case submitted to them." JURY, Black's Law Dictionary (11th ed. 2019). It is a judge, not a jury, who ultimately imposes the sentence upon a criminal defendant. In non-capital trials, the jury plays no role in determining sentence. In capital trials in Ohio, a jury recommends a sentence, but the judge is the ultimate decision-maker. *State v. Mason*, 108 N.E.3d 56 (Ohio 2018); OHIO REV. CODE ANN. § 2929.03 (West 2021). This is the lens through which victim-impact testimony must be viewed.

Thirty years ago, this Court overturned its own precedent and held that there is no *per se* Eighth Amendment bar to victim-impact testimony during the penalty phase of a capital trial. *Payne v. Tennessee*, 501 U.S. 808, 827-829 (1991). In *Payne*, the context was the sentencing phase of a capital trial, and this Court determined that evidence about the victim and the impact of their death could be relevant to a jury's decision about whether a death sentence should be imposed. *Id.* at 827.

Courts are still bound, however, by earlier precedent precluding opinions of the victim's family members from commenting on the appropriate sentence in a capital case. *Bosse v. Oklahoma*, __ U.S. __, 137 S.Ct. 1 (2016), *Booth v. Maryland*, 482 U.S. 496 (1987). And it is a due process violation when the victim impact evidence is so unduly prejudicial that it renders the trial fundamentally unfair. *Payne*, 501 U.S. at 825.

Victim impact evidence has been justified as relevant because a capital jury in the penalty phase is assessing "the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the

specific harm caused by the defendant." *Id.* at 825. Yet, that is not the jury's purpose in the culpability phase of a capital trial, and it is never the jury's purpose in a noncapital trial.

Though this Court has never addressed the admissibility of victim impact evidence outside the context of the sentencing phase of a capital trial, the *Payne* rationale has been applied to reject challenges to victim impact evidence in the culpability phase as well. *See Byrd v. Collins*, 209 F.3d 486, 532 (6th Cir. 2000) (explaining that the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief when victim impact evidence is introduced that renders the trial fundamentally unfair.). Other circuits have followed that logic, also in capital cases. *Black v. Collins*, 962 F.2d 394, 408 (5th Cir. 1992) (holding that victim impact argument presented during both culpability and sentencing phases did not render trial fundamentally unfair); *Bennett v. Angelone*, 92 F.3d 1336, 1348 (4th Cir. 1996) ("Thus *Payne* suggests that limited victim background evidence may be admitted—indeed, may have to be admitted—at the guilt phase of trial.").

Victim impact evidence **may be** potentially relevant during sentencing proceedings because it is "simply another form or method of **informing the sentencing authority** about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Payne*, 501 U.S. at 825 (emphasis added). Accordingly, victim-impact testimony has its place—during sentencing proceedings in front of the judge imposing sentence. Not in front of juries determining whether a criminal defendant has or has not in fact committed a crime.

A jury is specifically instructed not to discuss the possible sentence or impact of any conviction during its deliberations on guilt or innocence. See e.g., Ohio Jury Instructions, 2-OJI-CR 425.35(5) ((non-capital cases: "You may not discuss or consider the subject of punishment. Your duty is confined to deciding the guilt or innocence of the defendant. In the event that you make a finding of guilty, the duty to decide punishment is placed by law upon this Court."), and 2-OJI-CR 425.35(6) (capital case trial phase: "You may not discuss or consider the subject of punishment.")). The jury's role is fact-finding and a determination of guilt or innocence, therefore, there should be heightened scrutiny for irrelevant evidence intended to elicit the juror's sympathy.

If there is a case where victim impact evidence is admissible, it should be narrowly tailored to only the specific and limited testimony that is relevant to whether the defendant committed the crimes charged. Because this court has been silent on how far victim impact can go in the guilt phase of a trial, it should take this case to address how victim impact testimony violates a defendant's due process rights.

B. The trial court admitted highly inflammatory, prejudicial, irrelevant testimony in the guilt phase.

The last piece of evidence that the jury heard prior to finding Graham guilty of Aggravated Murder was irrelevant testimony from the victim's father about his grief over losing his son. Appendix A, ¶¶ 104-112. The Supreme Court of Ohio summarized the testimony as,

> about his son's life, expressing great pride in his son's achievements, acknowledging the future plans and dreams that his son had and that he had for his son, conveying to the jury the immense amount of love and admiration he had for his son, and identifying some of the ways in which his life has changed as a result of his son's death and some of the difficulties that a life without him will bring.

Id. at ¶ 105. The testimony spanned ten pages of the guilt-phase transcript and included approximately 20 questions by the State specifically about the victim. *Id.*

The jury was given specific details about the victim, including that he was a "mama's boy 'til he got older and then he started to become a daddy's boy," information about the victim and his father's hobbies together, the victim's education and career aspirations, and the victim's passion for a caring for an elaborate fish tank. *Id.* at ¶¶ 106-109. The victim's father then described in painful detail how he saw the victim that day, the mood he was in, how he verbally expressed his pride and love to his son that day, and their very last words to each other. *Id.* at ¶¶ 109-11.

The victim's father ended his testimony with, "And that's the last time I got to talk to him. He—he was my best friend." Trial Vol. V, p. 62. The defense had no cross, but the State "forgot the photo" to which the Court commented, "I thought so." *Id.* at 63. The State then displayed a photo of the victim and the father testified, "That is my son Nick and I know he's with me right now." *Id.* The State rested its case. *Id.* at 64.

The Supreme Court of Ohio deemed all that testimony inadmissible because "[t]he state elicited victim-impact testimony from a justifiably grieving father during the guilt phase of the trial, and much of that testimony had nothing to do with the

crime." Appendix A, ¶ 119. Yet, all that inadmissible evidence was ultimately deemed not "overly emotional" and therefore not prejudicial to Graham. It did, however, admit that Graham's case was a "close call." *Id.* at ¶ 127.

C. The Supreme Court of Ohio did not find that the admission of the father's testimony constituted harmless error.

This Court has stated that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. The burden is on the State to demonstrate that, beyond a reasonable doubt, the error did not contribute to the conviction. *Id.* at 26.

When that showing cannot be made, the defendant should be awarded a new trial. *Id.* ("Petitioners are entitled to a trial free from the pressure of unconstitutional inferences."), *see also Smith v. Texas*, 550 U.S. 297, 316 (2007). "[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Berger v. United States*, 295 U.S. 78, 89 (1935).

The Supreme Court of Ohio found that whether Graham was entitled to a new trial was "a close call." Appendix A, ¶127. The Court found that the testimony was "irrelevant," and "impactful." *Id.* at ¶¶ 134, 135. It admonished trial courts: "it is essential that we emphasize that the proper time for victim-impact evidence is at sentencing. . . . When such evidence is improperly admitted in the guilt phase of the proceedings, it increases the likelihood that arbitrary factors will influence the jury's

decisions, which increases the possibility that a reversal will be required." *Id.* at ¶ 136.

For the purpose of its ruling, the Supreme Court of Ohio assumed "that the error was not harmless." *Id.* at ¶ 134. Yet, the Supreme Court of Ohio erred when it found that the strength of the State's case trumped the harmless error analysis. It determined, once the "improper testimony is excised, the remaining evidence properly admitted at trial established Graham's guilt beyond a reasonable doubt." *Id.*

This Court rejected a similar argument, *albeit* in the sentencing phase of a capital case. *Satterwhite v. Texas*, 486 U.S. 249, 259 (1988). There, the lower court found that the improper admission of the expert testimony was harmless because "'the properly admitted evidence was such that the minds of an average jury would have found the State's case [on future dangerousness] sufficient.'" *Id.* at 258 (quoting *Satterwhite v. State*, 726 S.W.2d 81 (Tex. Crim. App. 1986)).

This Court, quoting *Chapman,* ruled "[t]he question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 259 (quoting *Chapman*, 386 U.S. at 24). This Court concluded "having reviewed the evidence in this case, we find it impossible to say beyond a reasonable doubt that Dr. Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the jury." *Id.* at 260.

This Court's holding in *Satterwhite* concerning the correct harmless error analysis is not limited to sentencing errors in capital cases. *Chapman*, 386 U.S. at 25 (Court finds that prosecutor's improper comments warranted a new trial even though the State's case "presented a reasonably strong 'circumstantial web or evidence' against petitioners."); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) ("Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.").

Here, the Supreme Court of Ohio assumed that the prosecution failed to establish by proof beyond a reasonable doubt that the wrongful admission of the father's testimony was not harmless error. Given that assumption, the Court erred when it ruled that the father's inadmissible testimony did not influence the jury.

II. When a Court recognizes multiple constitutional violations and instances of erroneously admitted evidence, it should be required to assess the errors cumulatively before dismissing them all as harmless.

There is a longstanding premise that "the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. State of Texas*, 385 U.S. 554, 563-64 (1967) (citing *Tumey v. State of Ohio*, 273 U.S. 410 (1927); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Estes v. State of Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); cf. *Griffin v. People of State of Illinois*, 351

U.S. 12 (1956). Rooted in the Due Process Clause is the cumulative error doctrine, which teaches that, "errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983) (citing *United States v. Jones*, 482 F.2d 747 (D.C.Cir. 1973); *Newsom v. United States*, 311 F.2d 74 (5th Cir. 1962); *United States v. Maroney*, 373 F.2d 908 (3rd Cir. 1967)); *see also United States v. Hughes*, 505 F.3d 578, 597 (6th Cir. 2007).

This Court has similarly supported a cumulative review to determine a trial's fundamental fairness. *Taylor v. Kentucky*, 436 U.S. 478, 487-88 & n. 15 (1978) (deciding cumulative effect of error violated due process); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (consideration of prosecutorial misconduct in context of entire trial).

Because due process requires that a criminal trial be fundamentally fair, it violates a defendant's Sixth Amendment rights when a reviewing court does not engage in a cumulative error analysis after more than one constitutional error is identified. Without analyzing the cumulative effect of the constitutional violations, an appellate court will only engage in half of the process in determining whether the resulting trial was fair. By only addressing each error individually, then "overwhelming evidence of guilt" becomes a dispositive phase to prevent relief even in the face of multiple constitutional violations. Graham's case is the ideal vehicle to demonstrate the importance of a cumulative error analysis.

A. Racist venire

During Graham's voir dire, three prospective jurors made racial slurs and racist comments. First, Prospective Juror No. 38 stated in her jury questionnaire: "Do not like n[———-]s" in response to the question, "Do you have any specific health problems of a serious nature that might make it difficult or uncomfortable for you to sit as a juror in this case?" Appendix A at ¶ 32. In response to further questioning, she explained, "Attitude. It's an attitude. I believe there's white and there's black. It has nothing to do with color. . . . [I]t's not a racial thing. I am not prejudice in any way. . . . [T]here's white people and black people and white n[———-]s and black n[———-]s and Hispanic. I don't mean that as in disrespect." *Id.* at ¶¶ 33-34. She was later excused for cause.

Second, Prospective Juror No. 195 made a racist derogatory comment before a small-group panel of prospective jurors. Prospective Juror No. 187 reported that, No. 195 said, "I wonder how much we paid for that n[———-]'s suit." *Id.* at ¶ 35. Among that small group, one prospective juror indicated they did not hear anything derogatory, but three other prospective jurors heard the comment. Of those that heard the comment, they agreed they could still be fair and impartial. No one who heard the racist comment served on the jury. *Id.* at ¶ 36.

And a third prospective juror, No. 64, in response to his views on whether the death penalty should be automatic, made a lynching comment: "No. You can't just go out and lynch somebody like, you know, in 1835 or something." *Id.* at ¶ 37. Defense counsel used a peremptory challenge to remove Prospective Juror No. 64.

One cannot argue that these racist slurs and remarks were not inappropriate. From at least these interactions, there is evidence that racism existed in the venire members for Graham's trial. Yet, under the circumstances, the Supreme Court of Ohio was unable to conclude that his jury was tainted or any jurors harbored bias because none of these individuals sat on the jury. The Supreme Court of Ohio further concluded that counsel were not ineffective for failing to voir dire on racial bias because "there is no evidence that any seated juror actually harbored racial bias." *Id.* at ¶ 51. But those comments are evidence of racial bias in the venire. It just so happened that in this case none of the **seated jurors** outwardly admitted to such blatant racism on the record. The evidence of the rampant racism occurring during Graham's voir dire should be considered among the other constitutional violations in his case.

B. Improper other acts evidence

The Supreme Court of Ohio determined that the State improperly introduced other-acts evidence two different ways during the guilt-phase of Graham's trial. First, the State elicited testimony from a co-defendant that Graham was known to carry a gun. *Id.* at ¶¶ 75-78. And the State improperly admitted a photograph from a co-defendant's phone depicting a smiling Graham holding two handguns pointed at the camera. *Id.* at ¶¶ 79-92.

Despite that this highly prejudicial evidence was inadmissible, the Supreme Court of Ohio determined in only three sentences that Graham could not meet his burden that the evidence "prejudiced him by affecting the outcome of the trial, in light

of the remaining evidence of Graham's guilt." *Id.* at ¶ 93. That "remaining evidence of guilt" included testimony describing the shooter as short and dark-skinned (which describes Graham and certainly millions of other individuals), and testimony that Graham allegedly said "yeah" he shot the victim during the incident. *Id.*

C. Improper vouching

The next instance of what should not have happened at trial was the prosecutor's improper questioning of two of the co-defendant witnesses. The prosecutor asked both witnesses—before their credibility had been attacked on cross-examination—"Are you telling the truth today?" *Id.* at ¶ 101. The Supreme Court of Ohio admitted that, "that question should not have been asked," but concluded that it did not ultimately bolster their credibility because they already promised to tell the truth before testifying. Further, the court again was unable to find prejudice in a single sentence "given the overwhelming evidence of his guilt." *Id.* at ¶ 102.

D. Improper victim-impact evidence

Finally, as fully detailed, *supra*, the victim-impact testimony of the victim's father was improper in Graham's case. But again, the Court afforded Graham no relief. *Id.* at ¶ 136 ("Although it is clear that the trial court erred in admitting Mr. Massa's testimony in this case, we conclude that the admission of the testimony did not constitute reversible error.").

In making that determination, the Supreme Court of Ohio provided only a three-sentence analysis to conclude there was no prejudice. *Id.* at ¶ 134. The court concluded the testimony was irrelevant but not overly emotional. *Id.* The court

justified that Graham was not prejudiced in the guilt-phase because "the remaining evidence properly admitted at trial established Graham's guilt beyond a reasonable doubt." *Id.* Again—the court cited to the robbery victim observing the shooter as someone who matched Graham (short and dark-skinned), and his co-defendant testifying against him—before he pled to a lesser offense and received lighter a sentence—that Graham admitted he shot the victim during the crime. *Id.*

E. No cumulative error analysis

In spite of these errors and missteps, the court did not engage in a cumulative error analysis except in regard to ineffective assistance of counsel, because appellate counsel for Graham failed to raise cumulative error below. But convictions must be reversed when the cumulative effort is prejudicial, even if the prejudice of each individual error was harmless. *United States v. Azmat*, 805 F.3d 1018, 1045 (11th Cir. 2015); *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990); *United States v. Canales*, 744 F.2d 413, 430 (5th Cir. 1984). The cumulative error analysis is an extension of the harmless-error rule—both based to ensure the fundamental fairness of criminal trials. *Rivera*, 900 F.2d at 1469.

Courts are not required to cumulate the detrimental effects of events at trial that are non-errors, in part because that would make appellate courts unpredictable and potentially overflow reviewing courts. *Id.* at 1471. Yet, appellate courts are already permitted to conduct a cumulative error analysis. *Id.* at 1470 ("A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative

effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.").

Imbedded in the Sixth Amendment right to a fair trial is the necessity for an appellate court to engage in a cumulative error analysis after identifying more than one error occurred. Accordingly, this Court should accept Graham's case to specifically require a cumulative error analysis when a court recognizes multiple errors before dismissing them all as harmless.

CONCLUSION

Victim-impact testimony has its place—at sentencing proceedings before the sentencer. Such testimony is prejudicial to defendants when presented before juries deciding only guilt or innocence. It cannot be deemed harmless error to admit improper victim-impact testimony in a case that is determined to be a "close call." Additionally, when a reviewing court finds multiple instances of error, the cumulative effect of those errors should be considered before deeming them all harmless. The constitutional right to a fair trial mandates this analysis.

For the foregoing reasons, this Court should grant the writ.

Respectfully submitted,

/s/ Michelle Umaña
Michelle Umaña [0093518]
Assistant State Public Defender
Death Penalty Department
Counsel of Record

/s/ Randall Porter
Randall Porter [0005835]
Assistant State Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
Ph: (614) 466-5394
Fax: (614) 644-0708
Michelle.Umana@opd.ohio.gov
Randall.Porter@opd.ohio.gov
Counsel for Damantae Graham