No. 20-8075

IN THE SUPREME COURT OF THE UNITED STATES

DAMANTAE GRAHAM,

Petitioner,

v.

STATE OF OHIO,

Respondent.

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

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. After an appellate court assumes a trial court's admission of irrelevant victim impact testimony was error, is it required to grant a new trial?
2. 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?

LIST OF PARTIES

The Petitioner is Damantae Graham, an inmate at the Ross Correctional Facility. Graham is currently serving life in prison without the possibility of parole consecutive to 64 years in prison.

The Respondent is the State of Ohio, represented by the Portage County Prosecutor Victor V. Vigluicci and Assistant Prosecuting Attorney Pamela J. Holder.

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STATEMENT OF THE CASE

Petitioner Damantae Graham is not on death row.

Graham is serving life without the possibility of parole for the aggravated murder of Nick Massa. *State v. Graham*, Portage C.P. No. 2016 CR 00107 E (March 10, 2021). He was also convicted and sentenced to consecutive prison terms for aggravated burglary, aggravated robbery, three counts of kidnapping and two firearm specifications for holding the occupants of an apartment at gunpoint during a robbery and burglary where he fatally shot Massa. *State v. Graham*, 2020-Ohio-6700, 2020 WL 7391565, ¶ 217; *State v. Graham*, Portage C.P. No. 2016 CR 00107 E (March 10, 2021).

Statement of the Facts

The Supreme Court of Ohio summarized the facts that established Graham's guilt beyond a reasonable doubt:

> Evidence introduced at trial showed that Graham, a 19-year-old, shot Nicholas Massa during the robbery of an apartment in Kent, Ohio. The state presented the testimony of, among others, the two surviving robbery victims and Graham's three co-defendants.
>
> ***A. Kremling plans to rob Haithcock***
>
> Connor Haithcock, a 19-year-old, and Justin Lewandowski, a 20-year-old Kent State University student, were roommates at the Ryan Place apartments in Kent. Massa, an 18-year-old Kent State University student, often visited the apartment.
>
> Haithcock sold marijuana and "dabs," a concentrated form of tetrahydrocannabinol, also known as THC, from the apartment. Haithcock sold marijuana to 17-year-old Ty Kremling, his former high school classmate, on two occasions. On those occasions, Kremling noticed that Haithcock kept marijuana and a significant amount of money in a lockbox in the apartment.
>
> Soon after his second purchase of marijuana, Kremling decided to rob Haithcock. On Super Bowl Sunday, February 7, 2016, he began planning the robbery for later that day. Kremling asked two of his

friends, Graham and 17-year-old Marquis Grier, if they would like to take part in a robbery. Kremling told them it would be easy, and he shared details with them: the location of the apartment, the valuable items in the apartment, and the intended target of the crime (Haithcock) and how he knew him. Graham and Grier agreed to participate.

Kremling then called 17-year-old Anton Planika, a friend who owned a truck. Kremling told Planika that he needed a ride to Kent to commit a robbery. Planika later testified that Kremling had told him that it was a "sure thing" and had asked him if he "wanted in on it." Planika agreed to participate.

Kremling, Grier, Graham, and Planika met at a house on McElrath Avenue in Ravenna. According to Planika, Kremling said they were going to take everything from Haithcock. Planika testified, "He [Kremling] said that he'd been there over the weekend and they had an Xbox One and money and drugs." They planned to use bandanas and hoodies cinched tightly to cover their faces. According to Grier, he and Graham each had a .380-caliber High Point semiautomatic handgun to use during the robbery.

B. Massa is killed during the planned robbery

On the afternoon of February 7, Haithcock, Lewandowski, and Massa were at Haithcock's and Lewandowski's apartment. Haithcock and Massa were playing Xbox, and Lewandowski was hanging decorations on the wall, using a hammer.

Shortly before 4:00 p.m., Planika, Kremling, Grier, and Graham arrived at the Ryan Place apartment building. Planika backed into a parking space at a nearby business and stayed in the truck. Kremling, Graham, and Grier entered the building, partially covered their faces with bandanas and hoodies as planned, and proceeded to Haithcock's and Lewandowski's third-floor apartment. Despite their disguises, Kremling, Grier, and Graham could be distinguished from each other by their physical characteristics: Kremling is tall and light-skinned, Grier is shorter that Kremling and is light-skinned, and Graham is short and dark-skinned.

According to Kremling, Graham knocked on the apartment door and Lewandowski opened it. Graham and Grier barged into the living room with their guns drawn. Graham ordered Lewandowski to drop the hammer he was holding. He dropped it and put his hands in the air.

Graham ordered Haithcock, Lewandowski, and Massa to sit on the living-room couches. According to Haithcock, the short, dark-skinned man (later identified as Graham) was doing the talking. He asked Haithcock, "Where's the money[?] [W]here's the dope[?]" Haithcock said that it was all in the lockbox on the kitchen table. Grier took the dabs and marijuana from the lockbox. Graham put a gun to

Haithcock's head demanding money. Haithcock gave Graham $500 or $600 from his pocket. The robbers then demanded more money.

Haithcock told the robbers that there might be more money in his bedroom. Graham told Grier to take Haithcock to the bedroom to look. Kremling accompanied them. Meanwhile, Graham stayed in the living room guarding Massa and Lewandowski, who remained seated on the couch with their hands up. At trial, Lewandowski described what happened next:

> Nick [Massa] looked over at me and the short dark skinned male [Graham] said, what the f[---] are you looking at him for? If you look over at him again I'm gonna shoot you. And Nick immediately replied you're not going to shoot me. And as soon as he did that, the short, dark-skinned male shot him [in the chest].

C. ***Perpetrators flee the scene and split up***

After hearing the gunshot, Grier and Kremling hurried into the living room and saw that Massa had been shot. According to Kremling, Grier asked Graham if he had just shot him, and Graham said, "[Y]eah." The three of them ran out of the apartment and fled in Planicka's truck. According to Planicka, Grier asked Graham, "[W]hy do you have to always be doing hot sh[--] like that[?]" and Graham replied, "he thought sh[--]was sweet and I wasn't playing." Graham then gave each of them $100, from what he had taken from Haithcock.

They returned to the house in Ravenna, where they divided up the marijuana. Graham told them that they did not have to worry about getting caught, because the gun had jammed, so the shell casing had not ejected. He showed them the casing. The four of them left the house separately. Graham told Grier a couple days later that he had broken up the gun and thrown it in a wooded area.

D. Police Investigation

After the three robbers left his apartment, Lewandowski called 9-1-1 and reported the shooting. Haithcock got on the phone and told the operator that Ty Kremling was one of the robbers. During the trial, Haithcock testified that he had recognized Kremling by "[h]is height, * * * his build, the way he carried himself, [and] the way he walked." Shortly after the 9-1-1 call, the police and medics arrived, and Massa was pronounced dead at the scene.

On the afternoon of February 7, Detective Richard Soika began looking for Kremling and the getaway truck – Planicka's green, four-door truck had been captured on video by a camera positioned near Haithcock's and Lewandowski's apartment. Soika contacted AT&T and requested that he receive alerts on the location of Kremling's phone. Police located Kremling in the Stow area and arrested him. The next morning, Kremling admitted his involvement in the robbery. Kremling

> said that he had not intended to kill anyone but that he had intended to rob Haithcock for drugs and money. Kremling would not disclose the names of the other perpetrators.
>
> On February 8, the police learned that Planicka had been the getaway driver. Further investigation identified Graham and Grier as suspects, and the police obtained physical descriptions and photos. On February 10, Grier was arrested. Grier admitted his involvement in the robbery but claimed that he had not expected anyone to get hurt. Meanwhile, the police learned that Graham was staying at a house in Ravenna, and a task force found him hiding in a room inside that house.
>
> On February 12, Soika interviewed Graham at the Portage County sheriff's office. Graham said, "I wasn't there," when he was questioned about his involvement in the robbery and murder.
>
> ***E. Medical examiner's testimony***
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> Dr. George Sterbenz, the chief deputy medical examiner for Summit County, conducted Massa's autopsy. He testified that Massa died from a single bullet that entered his chest and traveled at a downward angle through his heart, aorta, and left lung. Dr. Sterbenz stated that the wound was consistent with the shooter's having stood over Massa while he was seated. Based on the injuries to Massa's body and the lack of gunshot residue on Massa's clothing, Dr. Sterbenz said that the muzzle of the handgun was at least six inches from Massa when he was shot.

Graham, 2020-Ohio-6700, at ¶ 2-19.

Statement of the Procedural History

Graham's procedural history is still ongoing in the Ohio state court system. Supreme Court Rule 15.2

On April 8, 2021, Graham filed a direct appeal of his resentence in the Eleventh District Court of Appeals. This first level of state review of his sentence pursuant to the Supreme Court of Ohio's remand order is currently pending.

Postconviction proceedings are a secondary review of the trial proceedings. On October 17, 2018, Graham filed a petition for postconviction relief in the trial court and the State of Ohio filed an answer. On April, 16, 2019, new counsel for Graham

filed another petition for postconviction relief and the State of Ohio filed an answer. Postconviction proceedings are currently pending at the trial court level in this matter.

The State of Ohio now responds to Graham's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

Reasons to Deny the Writ of Certiorari Regarding Graham's First Question Presented:

The evidence at trial established Graham fired the fatal shot into Nick Massa during an active robbery and burglary of an apartment. The jury heard testimony from everyone, co-defendants and victims, who were present inside the apartment during the crimes except Graham and Massa. The jury also heard from Massa's father. It is the father's testimony that gives rise to Graham's First Question Presented.

Graham contends that because the Supreme Court of Ohio assumed the trial court admitted irrelevant victim impact testimony it is required to grant him a new trial. Graham invites this Court to grant Certiorari to review the admission of victim-impact evidence submitted at the trial (guilt) phase of a capital case by criticizing the Supreme Court of Ohio's decision and likening his case to *Satterwhite v. Texas*, 486 U.S. 249 (1988).

Here, the Supreme Court of Ohio made no assumptions. The court held the father's victim-impact trial evidence was irrelevant, subject to a prejudicial review, and a new trial was not warranted. *Graham*, 2020-Ohio-6700, at ¶ 119-120, 134. This Court should deny Graham's Writ of Certiorari regarding his First Question

Presented for two reasons. First, Graham is nothing more than defendant dissatisfied with the outcome of a Supreme Court of Ohio's decision based on sound state law. Second, this is an attempt to create law for a party who will not benefit from the action

A. Decision based on state law regarding victim-impact trial evidence was sound

(1) Ohio permits victim-impact evidence at trial phase in limited circumstances that were not present in Graham's trial

"The victims cannot be separated from the crime." *State v. Lorraine*, 613 N.E.2d 212, 218-219 (Ohio 1993). Ohio has a long history of respecting victim's rights while ensuring the defendant receives a fair trial proceeding.

This Court has held there was no per se bar to the introduction of victim-impact evidence and argument. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Payne* reviewed victim-impact evidence in the context of the sentencing (mitigation) phase of a capital case. The bar in *Payne* was whether the admission of the victim-impact evidence at the sentencing phase was so unduly prejudicial that it rendered the trial fundamentally unfair. *Id*. at 825.

A few years after *Payne*, the Supreme Court of Ohio was asked whether evidence regarding a murdered couples advanced age, length of their marriage, physical weaknesses, the wife's mental alertness, the couple's suffering, and the lack of clothing on one of the victims when found constituted prejudicial victim-impact evidence. *Lorraine*, 613 N.E.2d at 218. The appellant argued the character evidence illustrated the victims' lifestyle and would cause the jury to empathize with the

elderly couple. *Id.* at 219. The court held viewing the record as a whole, "the presentation of the lifestyles of the victims can hardly be deemed prejudicial." *Id.*

The next year in *Loza*, the court found a prosecutor's comments that a group of murder victims included a pregnant woman and constituted the loss of "many years" of combined life expectancy did not violate Ohio's law as improper victim-impact evidence at the sentencing phase of a capital case. 641 N.E.2d 1082, 1105 (Ohio 1994). The *Loza* court stated, without explanation, that while the use of victim-impact evidence to argue for a death penalty in the sentencing phase was improper "the same evidence may be admissible, relevant evidence in the guilt phase of the proceedings." *Id.*

The following year, the Supreme Court of Ohio provided clarification of its limited victim-impact evidence discussion in *Loza*. *State v. Fautenberry*, 650 N.E.2d 878, 883 (Ohio 1995). The prosecutor's comments in *Loza* "fit within the fairly broad definition of victim-impact evidence contemplated in *Payne* [and] they also represent a recitation of the facts and circumstances surrounding the offense that were introduced during the guilt phase of the trial." *Id.* The Supreme Court declared that "true victim-impact evidence" as intended in Ohio's Revised Code would be "considered by the trial court prior to imposing sentence upon a defendant, not during the guilt phase." *Id.* The *Fautenberry* court continued to explain that the prosecutor's comments in Loza were properly admitted because, "[E]vidence which depicts both the circumstances surrounding the commission of the murder and also impact of the

murder on the victim's family may be admissible during both the guilt and the sentencing phases." *Id*.

The Supreme Court of Ohio limits the use of true victim-impact evidence to consideration at sentencing by the trial court at the sentencing phase. *Fautenberry* at 883. However, evidence illustrative of the nature and circumstances of the crime at the trial phase may be victim-impact evidence involving the physical condition and circumstances of the victim and its impact on the family when relevant to the crime as a whole. *Id*. These circumstances were not presented at Graham's trial. Accordingly, the father's victim-impact evidence was "irrelevant and should not have been admitted at trial." *Graham*, 2020-Ohio-6700, at ¶ 119.

As erroneous evidence was admitted at trial, the Supreme Court of Ohio reviewed Graham's trial proceedings to determine whether the defendant's substantial rights were affected warranting a new trial. *See e.g. State v. Arnold*, 62 N.E.3d 153 (Ohio 2015). Here, the father's testimony did not meet the limited circumstances for permissible victim-impact trial evidence, the Supreme Court engaged in a review of the trial proceedings for prejudice affecting Graham's substantial rights, and found a new trial was not warranted. *Graham*, 2020-Ohio-6700, at ¶ 119-120. The Supreme Court of Ohio's review of Graham's trial proceedings for prejudice is discussed next.

(2) Graham's victim-impact trial evidence was not prejudicial

Contrary to Graham's assertions, the Supreme Court of Ohio conducted a sound legal analysis and found the victim-impact trial evidence was not prejudicial.

Graham, 2020-Ohio-6700, at ¶ 134. The Supreme Court ascertained whether the trial court's error affected Graham's substantial rights requiring a new trial. *Id*. at ¶ 120. To consider the impact of the father's evidence on the verdict, the court focused on whether the testimony was overly emotional by reviewing: (1) the length of the testimony, (2) whether there were physical signs of emotion during the testimony, (3) the detail and depth of the victim-impact testimony with regard to the murder victim, (4) whether emotionally charged language was used, (5) the number of victim-impact witnesses, and (6) precedent regarding similar cases involving allegedly overly emotional victim-impact testimony. *Id*. at ¶ 126.

The factors in relation to the father's testimony revealed that his testimony was not overly emotional. *Graham*, 2020-Ohio-6700, at ¶ 127. Mr. Massa's testimony was 10 pages of a 562-page transcript where the father responded to 20 questions from the prosecutor and sometimes spoke in uninterrupted narrative form. *Id*. at ¶ 128. The record did not indicate any physical manifestation of grief from this single victim-impact witness. *Id*. at ¶ 129. The State's last witness left the jury "with a loving father's last memory of his only son prior to the state resting its case." *Id*.

Comparison to similar Ohio capital cases that were also found to be not overly emotional included: a son who became so distraught discussing the loss of his mother he was unable to respond to the prosecutor's questions; a mother discussing the loss of her daughter in terms of her early childhood accomplishments, school years, and family ties across the states and then summarizing "It's been about nine months now since our daughter Winda was brutally murdered. It has been an extremely bad time

for all of us and will be from now on. She'll never leave our hearts;" and a grief stricken sister who briefly eulogized her sister on direct-examination. *State v. Reynolds*, 687 N.E.2d 1358, 1368-1369 (Ohio 1998)(no plain error found in four propositions of law raised regarding victim-impact evidence at the sentencing phase); *State v. Hartman*, 754 N.E.2d 1120, 1171-1172 (Ohio 2001)(no error regarding lack of limiting jury instruction on mother's victim-impact evidence); and *State v. Wilks*, 114 N.E2d 1092, 1113 (Ohio 2018)(sister's brief testimony not overly emotional as she did not mention the effect of victim's death on the family or possible penalty).

In *Payne*, this Court sought to protect the fundamental fairness of the appellant's trial by ensuring the admission of the victim-impact evidence at the sentencing phase was not unduly prejudicial *Payne* at 825. In Ohio, victim-impact trial evidence is limited to certain circumstances and when they are not present, like in Graham's case, the admission of victim-impact trial evidence is erroneous. Here, Graham's victim-impact trial evidence was irrelevant, subject to a prejudicial review, and a new trial was not warranted. *Graham*, 2020-Ohio-6700, at ¶ 120, 127. While Graham may be dissatisfied with the results of this decision, dissatisfaction alone is not grounds to challenge a decision based on state law regarding victim-impact trial evidence.

(3) Graham's comparison with *Satterwhite* is without merit

In an attempt to further discredit the Supreme Court of Ohio's decision, Graham makes a simplistic comparison to a legal argument rejected in *Satterwhite,* 486 U.S. 249. However, the final witness in the State of Ohio's case in chief against

Graham was nothing like Dr. Grigson, the government's final witness in *Satterwhite*. The distinct nature of the victim-impact evidence in these two cases makes Graham's comparison meritless.

In *Satterwhite*, Dr. Grigson was the only licensed physician at trial and he had impeccable educational background and qualifications. *Satterwhite*, 486 U.S. at 259. The doctor provided an expert medical opinion on the precise issue the sentencing jury was considering. In Dr. Grigson's expert opinion, Satterwhite "will present a continuing threat to society by continuing acts of violence" he has "a lack of conscience" and is "as severe a sociopath as you can be." *Id*. Regarding the issue of sentencing and future dangerousness, Dr. Grigson's "most devastating opinion of all: he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation." *Id*. at 259-260. The prosecutor emphasized the doctor's opinions in his closing reminding the jury that this was Satterwhite's personality not a disease or an illness that was capable of being cured. As future dangerousness was significant to the sentencing jury, Dr. Grigson was the only psychiatrist to testify, and the prosecutor placed important weight on his powerful testimony, this Court found it impossible to say beyond a reasonable doubt that the doctor's opinions on Satterwhite's future dangerousness did not influence the sentencing jury. *Id*. at 260.

In *Graham*, a Kent State University student was fatally shot inside an apartment during an active robbery and burglary where everyone inside the apartment testified for the State of Ohio except the defendant and the deceased. The State of Ohio presented Mr. Massa to establish proof of life. As the last witness in the

State of Ohio's case in chief against Graham, Mr. Massa was not a relevant fact witness and the trial court's admission of his evidence was error. *Graham*, 2020-Ohio-6700, at ¶ 116, 119.

Unlike the unequivocal and powerful testimony from the only medical expert who offered a devastating opinion on the very issue facing the sentencing jury in *Satterwhite*, the Graham victim-impact evidence was not prejudicial. First, the evidence did not inflame the passion of the jury to determine Graham's guilt on a purely emotional basis. *Id*. at 210. Second, the evidence when excised from the trial allowed a reviewing court to say Graham was guilty from the properly admitted evidence beyond reasonable doubt. *Id*. Such a determination was not possible in *Satterwhite* due to the nature of Dr. Grigson's testimony, the relevancy of his subject matter and the sentencing jury's specific duty being largely dependent on Satterwhite's future dangerousness. *Satterwhite*, 460 U.S. at 260. The vast differences between nature of the testimony offered by Mr. Massa and Dr. Grigson renders Graham's comparison of two cases meritless.

B. Avoid creating law for a party who cannot benefit from the action

Graham's proposition of law alleging error from the admission of the father's victim-impact evidence sought "a new trial, or in the alternative, a new mitigation trial." Here, the Supreme Court of Ohio vacated Graham's sentence, on other grounds, and ordered a remand to the trial court for resentencing consistent with the Ohio Rev. Code 2929.06. *Graham*, 2020-Ohio-6700, at ¶ 217. In Ohio, Rev. Code 2929.06 governs the resentencing of an individual after the sentencing of death has

been set aside, nullified or vacated. On remand, trial court resentenced Graham to life without the possibility of parole. *State v. Graham*, Portage C.P. No. 2016 CR 00107 E (March 10, 2021).

Graham is no longer a capital defendant. Any extension of *Payne* to victim-impact evidence during the trial (guilt) phase of capital proceedings would be a remedy that Graham could not take advantage of in Ohio. Contrary to contentions made on petition, Graham's case does not present the opportunity he claims regarding victim-impact evidence. Accordingly, this Court should deny Graham's Writ of Certiorari regarding his First Question Presented because the invitation to expand *Payne* is a meritless challenge from a dissatisfied defendant to a decision based on state law and an attempt to create law for a party who will not benefit from the action.

Reasons to Deny the Writ of Certiorari Regarding Graham's Second Question Presented:

In his petition for Writ of Certiorari, Graham referenced 4 sections of the Supreme Court of Ohio's decision and several circuit court opinions as support for his Second Question Presented. As trial counsel did not object to 3 of the 4 issues Graham intended to rely on as support, the review of these claims was limited to plain error on direct appeal. Unlike an objected error reviewed under the harmless error standard were the State bears the burden of demonstrating that the error did not affect the substantial rights of the defendant, errors not raised at trial are limited to a plain error standard of review. Ohio Crim.R. 52(A, B). Under the plain error standard of review, the defendant bears the burden of demonstrating that the plain

error affected his substantial rights. Ohio Crim.R. 52(B). Graham failed in his plain error burden. Despite that failure he asserts a novel proposition as a Second Question Presented.

Graham's proposition is that a reviewing court's recognition of multiple constitutional errors and instances of erroneously admitted evidence triggers a requisite cumulative error analysis. Contrary to Graham's contentions, his case does not contain multiple constitutional errors and the doctrine of cumulative error does not permit review of multiple "instances of erroneously admitted evidence." The reasons to deny this Second Question Presented include: (1) multiple perceived misstatements of fact and law, (2) Graham's failure under his plain error burden, and (3) the nature of his trial court proceedings.

A. Rule 15.2 obligation to address any perceived misstatements of fact or law

The State of Ohio begins by noting several perceived misstatements of fact and law contained within Graham's petition.

(1) Racial bias claim not proven

Contrary to Graham's bald assertion his venire was not racist. At defense counsel's request, the trial court conducted individual voir dire of 88 perspective jurors on the issues of pretrial publicity and the death penalty over 3 days and then reconvened to conduct general voir dire. Graham claims a racist venire by citing three prospective jurors, two who made comments while alone with the judge and attorneys and the last prospective juror questioned whose group was not considered during

general voir dire. *Graham*, 2020-Ohio-6700, at ¶ 39-40. "Graham points to no evidence showing that any other prospective juror harbored racial bias." *Id*. at ¶ 43.

Regarding Graham's claim that Prospective Juror No. 38's statements may have been overheard by other prospective jurors, the Supreme Court of Ohio found "the record does not support a finding that the jury was tainted by prospective juror No. 38's comments and slurs, because those comments and slurs were not made or referred to in the presence of other perspective jurors." *Id*. at ¶ 39. Rather, the record demonstrated that the trial court stated at the beginning of individual voir dire "At this time, we are going back into the jury room and *you will be brought in one at a time* to be questioned by the court an then by the attorneys. (Emphasis added)" *Id*.

Regarding Graham's claim that Prospective Juror No. 195 influenced other prospective jurors. The Supreme Court of Ohio found "[B]ecause prospective juror No. 195 was the last prospective juror to be questioned during individual voir dire, the number of prospective jurors who were able to hear his comment was quite small, as many had left the courtroom after participating in individual voir dire." *Graham*, 2020-Ohio-6700, at ¶ 40. Moreover, Graham's entire jury and alternates was sat by prospective juror No. 100, none of the prospective jurors attending the October 27, 2016, individual voir dire proceedings with prospective juror No. 195 were "considered for selection before the jury was seated." *Id*.

Regarding Graham's claim that Prospective Juror No. 64's habit of watching the Gunsmoke television show and his comment about lynching's in 1835 was racist, the Supreme Court of Ohio held "no other prospective jurors heard this comment"

and "there is also no support that prospective juror No. 64's comment tainted the jury." *Id.* at ¶ 41.

Without evidence that other prospective jurors harbored racial bias, Graham presented nothing more than speculation as to bias which does not justify quashing an entire venire. *Graham*, 2020-Ohio-6700, at ¶ 43. Further, trial counsel was without grounds to move for a new venire as the court excused prospective juror No. 38 and the small group of prospective jurors exposed to prospective juror No. 195 were questioned and stated they could be fair and impartial. *Id.* at ¶ 47. Further, prospective juror #64 was removed from the panel by a defensive peremptory challenge. *Id.* at ¶ 37.

Another perceived misstatement is the reason why the Supreme Court of Ohio rejected Graham's proposition of law regarding racial bias. Graham failed to carry his burden under plain error that "any seated juror actually harbored racial bias" not that the 3 challenged prospective jurors were kept off his jury. *Id.* at ¶ 51. Accordingly, the plain error standard of review in relation to his case is the next area needing addressed pursuant to Rule 15.2

(2) Graham's plain error failures regarding other-acts evidence and prosecutorial vouching claims

At trial, Graham failed to object to the alleged racial bias, other-acts evidence and prosecutorial vouching thereby waiving all but plain error. *Graham*, 2020-Ohio-6700, at ¶ 31, 64, 95. To establish plain error, Graham was required to show "that an error occurred, that the error was plain, and that the error affected the outcome of the trial." *State v. Barnes*, 759 N.E.2d 1240, 1247 (Ohio 2002), citing *United States v.*

Olano, 507 U.S. 752, 732, (1993)(interpreting Ohio Crim.R. 52(B)'s identical federal counterpart, Fed.Crim.R. 52(b)).

As previously stated, Graham failed to show error regarding his racial bias claim because he did not show any error under the first prong of the plain error review. *Id*. at ¶ 39-41. Graham also failed under the third prong of his plain error burden on appeal to establish an affect to the outcome of his trial due to the strength of the State's case at trial. The third prong failures appear in his other-acts evidence and prosecutorial vouching claims.

The challenged other-acts evidence included a comment made by the prosecutor during opening statement, Kremling's testimony that he knew Graham to carry a gun was and the admission of a photograph depicting Graham smiling while posing with two handguns at the McElrath Avenue house a few days before the incident. The Supreme Court of Ohio held only Kremling's testimony and photograph were improper. *Id*. at ¶ 74, 78, 92. However, under a plain error standard of review Graham failed to establish plain error regarding Kremling's testimony or the photograph. *Id*. at ¶ 93.

Graham failed to establish plain error under the third prong of plain error review due to the overwhelming evidence of guilt presented at his trial. *Graham*, 2020-Ohio-6700, at ¶ 93. "Such evidence included Lewandowski's eyewitness testimony describing the shooter, a description that matched Graham, and Grier's and Kremling's testimony that Graham admitted that he had shot Massa during the robbery. Thus, no plain error occurred." *Id*. The Supreme Court of Ohio held

"Graham cannot meet his burden to prove that the prosecutor's statement, Kremling's testimony, or the introduction of the photo prejudiced him by affecting the outcome of the trial, in light of the remaining evidence of Graham's guilt." *Id*. Similarly, Graham's prosecutorial vouching claim failed under plain error. *Id*. at ¶ 98-100.

Unfortunately, 3 of Graham's 4 references intended to support his Second Question Presented fail because they were limited to a plain error standard of review on appeal as dictated by trial counsel's performance at trial. Upon finding Graham's claims of racial bias, other-acts evidence and prosecutorial vouching did not rise to level of plain error, the Supreme Court of Ohio considered whether trial counsel's conduct regarding those issues as well and many others cumulatively deprived Graham of his constitutional right to a fair trial. *Id*. at ¶ 169-173. The Court found that it did not. *Id*. at ¶ 172-173.

(3) Misplaced reliance on circuit court opinions

Another perceived misstatement that needs addressed under Rule 15.2 is Graham's reliance on three circuit court cases in support of his claim that his conviction requires reversal despite the appellate attorney's failure to raise cumulative error in the Supreme Court of Ohio. *United States v. Azmat*, 805 F.3d 1018 (11th Cir.2015); *United States v Rivera*, 900 F.2d 1462 (10th Cir.1990); and *United States v. Canales*, 744 F.2d 413 (5th Cir.1984). In *Azmat*, the court found Dr. Azmat's "final claim necessarily fails, as there can be no cumulative error where there

are no individual errors." *Azmat*, 805 F.3d at 1045. Dr. Azmat raised the issue of cumulative error in the Eleventh Circuit and was unsuccessful. *Id.*

Similarly, in *Canales*, the court reviewed "certain factors, common to most of appellants' claims of improper argument and alleged prosecutorial misconduct" was "that the cumulative effective of several incidents of improper argument or misconduct may require reversal." *Canales*, 744 F.2d at 430. Although common to most all of the Canales' claims, the Fifth Circuit did not find cumulative error. *Id*. In both *Azmat* and *Canales*, the appellants raised the cumulative-error arguments on appeal. These do not support Graham's position that sua sponte a reviewing court is required to conduct a cumulative-error review upon identification of more than one harmless error.

Moreover, in *Rivera*, the defendant completely failed to demonstrate the existence of any error in the conduct of his trial once the Tenth Circuit denied a challenge to the government's use of evidence on two specific transactions. *Rivera*, 900 F.2d at 1471. The circuit court was left to review the cumulative effect of rulings that may have contributed to a conviction but did not amount to error. *Id*. The Tenth Circuit found "there is no holding of error, no error to cumulate, and no occasion to apply a cumulative-error analysis." *Id*. at 1472. While providing guidance on the doctrine of cumulative error, *Rivera* does not stand for the proposition asserted by Graham on petition. Accordingly, Graham's reliance on these cases is misplaced.

B. Cumulative error analysis is proper only when multiple errors exist

In Ohio, the doctrine of cumulative error was first recognized in *State v. DeMarco*, a case that involved a fraudulent insurance claim where the defendant alleged his automobile had been stolen. 509 N.E.2d 1256 (Ohio 1987). The Supreme Court of Ohio held the cumulative effect of three separate instances of hearsay testimony regarding misconduct by the defendant (alleged bank fraud and delinquent loan accounts) was prejudicial. *Id*. "Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *DeMarco*, paragraph 2 of the syllabus. As the doctrine developed, the court held that it was inapplicable when there were not multiple instances of harmless error. *State v. Garner*, 656 N.E.2d 623, 6378-638 (Ohio 1995). Error alone is always troubling but error alone does not support reversal. Graham was required to show prejudice of some kind arose from the claimed error. Here, Graham failed singularly and cumulatively.

C. Nature of proceedings – the record on appeal was limited to plain error standard of review

Among the reasons for granting his Writ of Certiorari, Graham suggests appellate review without cumulative error analysis is only half complete resulting in review for "overwhelming evidence of guilt" rather than a fair trial. Graham's suggestion reveals a misunderstanding of the record on review. As stated above, 3 of Graham's 4 references to the decision were items that trial counsel did not object to during the trial court proceedings. *Graham*, 2020-Ohio-6700, at ¶ 74, 78, 92. Without

an objection, the trial court did not have the opportunity to rule on the issue and the matter was limited to a plain error standard of review on appeal. *Id.* at ¶ 31, 64, 95. Under plain error, the burden was upon the defendant not the state to establish prejudice. Ohio Crim.R. 52(B).

When Graham also raised the issue of ineffective assistance of counsel for failing object at trial, the Supreme Court of Ohio found Graham failed establish the prejudice prong of the test announced by this Court in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *Graham*, 2020-Ohio-6700, at ¶ 51, 112. On appeal, Graham's appellate counsel asserted the cumulative affect of trial counsel's performance failings rendered his service below the permissible constitutional standard causing prejudice consistent with *Strickland*. The Supreme Court of Ohio reviewed all claims of ineffective assistance of counsel raised throughout the various propositions of law including several new claims asserted for the first time in Graham's cumulative-error proposition of law. Counsel's only deficient performance was failing to object to the admission of the photograph depicting Graham holding the guns but "that error did not result in prejudice that deprived him of a fair trial." *Id.* There was no merit with Graham's ineffective assistance of counsel cumulative-error claim because there were not multiple errors to review. *Graham*, 2020-Ohio-6700, at ¶ 172.

Many of the issues Graham complains of on petition were not preserved in his trial court proceedings. The trial court did not have the opportunity to react to an objection and address the legal issue. The lack of objections at trial limited the majority of Graham's issues to plain error review on direct appeal. Graham failed in

his plain error burden to demonstrate plain error. Moreover, his guilt was established beyond a reasonable doubt by the testimony of the co-defendants and victims. A fatal shot was fired inside an apartment during an active robbery and burglary and the State's witnesses include everyone who was present inside the apartment except the defendant and decedent. Graham's guilt was established beyond a reasonable doubt by the testimony of the co-defendants and victims. Rather than present this Court with multiple constitutional errors that require a cumulative error analysis, Graham has presented this Court with multiple perceived misstatements of fact and law and multiple plain error failures. This Court should deny Writ of Certiorari regarding Graham's Second Question Presented.

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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