

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*

REPLY TO 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

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY	1
I. An error is not harmless beyond a reasonable doubt when the appellate court determines it to be a “close call.”	1
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.	2

TABLE OF AUTHORITIES

CASES

<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991)	1
<i>State v. Graham</i> , 2020-Ohio-6700	1, 2
<i>State v. Hartman</i> , 754 N.E.2d 1150 (Ohio 2001)	1
<i>State v. Reynolds</i> , 687 N.E.2d 1358 (Ohio 1998)	1
<i>State v. Wilks</i> , 114 N.E3d 1092 (Ohio 2018)	2

RULES

Rule 15.2	4
-----------------	---

REPLY

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

Graham focused this argument exclusively on the admission of the father’s testimony in the trial phase of his capital case. The testimony provided background information concerning the victim and had no relevancy concerning the issues of Graham’s guilt. Although this is the exact type of testimony this Court ruled admissible in the sentencing phase of a capital case (*Payne v. Tennessee*, 501 U.S. 808, 827-29 (1991)), this Court has never addressed whether this type of evidence is admissible in the trial phase of a capital case.

The State concedes that the father’s testimony was “irrelevant and should not have been admitted” in the trial phase of Graham’s case. Brief in Opposition, p. 8 (quoting *State v. Graham*, Slip Opinion No. 2020-Ohio-6700, at ¶ 119). The State clearly recognized that the issue here involves the admission of the father’s testimony in the trial phase and not in the sentencing phase. But the State never attempts to reconcile that recognition with its earlier reliance in its brief on cases decided by the Supreme Court of Ohio that addressed the admission of similar testimony in the sentencing phase, rather than the trial phase. *Id.* at 7-8. Which, as the State recognized, is not the issue in this case.

The State’s later case-related analysis fares no better. *Id.* at 10. Two of the cases on which it relies addressed testimony in the sentencing phase, which again, is not the issue. *State v. Reynolds*, 687 N.E.2d 1358, 1368-69 (Ohio 1998); *State v. Hartman*, 754 N.E.2d 1150, 1171-72 (Ohio 2001). The Supreme Court of Ohio

addressed the admission of testimony in the trial phase in *State v. Wilks*, 114 N.E3d 1092, 1113 (Ohio 2018). The court described the testimony at issue as, “Traniece’s brief testimony [in the trial phase] was not overly emotional. She did not mention the effect that Ororo’s death had on their families.” *Id.* at 1113. The Supreme Court’s description of the father’s testimony at Graham’s trial was quite different. It summarized the ten pages of the father’s testimony, in response to approximately twenty questions posed by the prosecutor as, “the victim’s father, testified 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.” *Graham*, 2020-Ohio-6700, ¶ 105.

The State argues that Graham would not benefit from the First Question Presented because the Supreme Court of Ohio granted him sentencing relief. Brief in Opposition, p. 11. The State does not explain the manner in which the sentencing phase error can cure the trial court’s wrongful admission of testimony in the trial phase. Regardless of Graham’s current sentence, because Graham did not receive a fair trial, he is entitled to a new one.

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.

Graham demonstrated that the following errors occurred in the trial phase of his case: (a) the jury was tainted with racial bias, (b) the trial court admitted improper

other acts evidence, (c) the prosecutor improperly vouched for the credibility of its witnesses, and (d) the improper admission of victim impact testimony in the trial phase. Cert Petition, pp. 19-22. Graham's Second Question Presented asserted that the Supreme Court of Ohio should have engaged in a cumulative error analysis when assessing whether the four errors constituted harmless error. Cert Petition, p. 22-23.

The State alleges that Graham made multiple misstatements of fact and law concerning the second issue. Brief in Opposition, pp. 13-22. That is incorrect. That the State disagrees with Graham's factual and legal analysis does not convert those arguments into misstatements of the law and fact.

Graham discussed the impact that race had on the jury that decided his guilt and sentence. Cert Petition, pp. 19-20. In support of this argument, Graham quoted the answers of the prospective jurors in voir dire. *Id.* at 19. Further, Graham cited word-for-word the relevant part of the Supreme Court of Ohio's opinion addressing this issue. *Id.* at 20. The State offers no explanation as to the way Graham's arguments constitute misstatements of fact given that he relies on direct quotations from the trial transcript and the Supreme Court of Ohio's opinion.

The State's arguments regarding plain error demonstrate a misunderstanding of Graham's Second Question Presented. Graham argued that because the Supreme Court of Ohio identified that there was improper other acts evidence, improper vouching, and improper victim-impact evidence, an appellate court should be required to review the erroneously admitted evidence cumulatively and conduct a cumulative error analysis.

The State countering Graham's arguments with its own arguments is not the same as correcting misstatements of the law and facts. The same must be said for "misplaced reliance on circuit court opinions." Brief in Opposition, pp. 18-19.

Graham's petition did not contain misstatements of law or fact needing corrected pursuant to Rule 15.2. Those allegations made by the State are deceitful.

For the reasons detailed in Graham's petition, 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