No. _____

In the Supreme Court of the United States

D'AMANTAE GRAHAM,
Petitioner,

v.

STATE OF OHIO
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court recently cautioned trial courts to be especially vigilant against "particularly noxious strain[s] of racial prejudice," *Buck v. Davis*, 137 S.Ct. 759, 776, (2017), and further observed that racism "remains a familiar and recurring evil." *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 862, 868 (2017); *see also Tharpe v. Sellers*, 138 S.Ct. 545, 546 (2018).

D'Amantae Graham's capital case had red flags from the start that all participants must be vigilant against racism. Yet, the trial court denied defense counsel's request to include race-related questions on the juror questionnaire and defense counsel failed to voir dire about race even after three instances of racism occurred during jury selection.

This case presents this Court with the opportunity to address the procedures that trial courts should employ, *albeit* through the lens of appellate ineffectiveness of counsel, to be vigilant against racism:

> **Is capital appellate counsel ineffective under the Sixth and Fourteenth Amendments when they do not raise that both the trial court and trial defense counsel failed to address the issue of race with prospective jurors when the three victims were white, the three co-defendants were Black, the county from which the prospective jurors were drawn was ninety percent white, and three prospective jurors in voir dire made racist statements?**

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's Entry Denying Graham's Application to Reopen his Direct Appeal: *State v. Graham*, *05/11/2021 Case Announcements*, 2021-Ohio-1606.

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The decision of the Supreme Court of Ohio below denying Graham's application to reopen his direct appeal reported at *State v. Graham*, *05/11/2021 Case Announcements*, 2021-Ohio-1696, is attached hereto as Appendix A. The opinion of the Supreme Court of Ohio, reported as *State v. Graham*, Slip Opinion No. 2020-Ohio-6700, is attached hereto as Appendix B. 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 C. The trial 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 D. 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 E.

JURISDICTIONAL STATEMENT

The Supreme Court of Ohio denied Graham's application to reopen his direct appeal on May 11, 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

Trial Proceedings

D'Amantae 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 defendant 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.

Prior to trial, counsel filed a motion to supplement the trial court's standard questionnaire with issues concerning race. *Defendant's Motion for Additional Juror Questions, Motion #58*, Sept. 27, 2016. The motion contained the following proposed questions and statements: (1) Have you ever been in the presence of individuals who exhibited racial, sexual, religious and/or ethnic discrimination or prejudice? (2) Some races and/or ethnic groups tend to be more violent than others, (3) Are you a member of any organization that is concerned with racial issues? (4) Are you a member of any private club, civic, professional, or fraternal organization? (5) Describe which choice below best fits your attitude towards African-Americans, (6) How serious of a problem

do you think racial discrimination is in Ohio? (7) In your opinion, what is the most important message of the religion you hold? (8) If you have a personal philosophy that can be expressed in a few sentences, or a favorite saying that reflects your personal philosophy, what is it? *Id.*[1]

The trial court entertained oral argument on the motion. (10/03/16 Pretrial Tr. 69-75). Trial counsel—who did not bring a copy of the motion to the argument—asserted in favor of the motion:

> However, Your Honor, I think that ignoring -- ignoring a few things that -- well, *here's the big elephant in the room, my client is an African-American man. The victim in this case is a Caucasian man.* It is what it is, Your Honor. And, unfortunately, I wished we lived in a perfect world, but even now in today's age there are issues of race all over the country right now and we hear about it on -- in the newspapers and on the TV.

Id. at 72 (emphasis added).

The trial court excluded questions, 1, 2, 3, 5, 6, and 8—all of the proffered questions addressing race. *Id.* at 73-74. The trial court included in its questionnaire only the proffered fourth and seventh two questions: (4) Are you a member of any private club, civic, professional, or fraternal organization, and (7) In your opinion, what is the most important message of the religion you hold? *Id.*

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[1] The trial court, at the request of the prosecution ordered that the motion for additional juror questions (Motion # 58) be filed under seal. (R. 419, Tr. 75). Graham in his pro se March 8, 2019, motion for leave to amend his merit brief filed in the Supreme Court of Ohio attached a copy of motion No. 58 and the trial court's order requiring that the motion be sealed. The motion remains on the Supreme Court of Ohio's public online docket. Motion 58 as attached to Graham's motion does not contain any personal information or identifiers. It simply contains a list of suggested questions and the reasons that the court should include those questions in its the questionnaire that it submits to the prospective jurors.

After ruling on the proffered questions, the court assured trial counsel that they could pursue the excluded questions in voir dire. *Id.* at 74. Trial counsel never pursued those questions in either individual or group voir dire.

Portage County has a population of about 162,466, that is 90.8% White and 4.8% Black.[2] All but three of the 80 prospective jurors were white. None of the non-white prospective jurors were on Graham's jury.

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 much we paid for that n[———-]'s suit." Appendix B, ¶ 35.

A second 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.

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.

During trial, the victims used skin tone to identify each suspect. Haithcock described T.K as "the tall one. And the lighter one . . . the, like, lighter-skinned one."

[2] 2019 Census QuickFacts, available at: https://www.census.gov/quickfacts/portagecountyohio

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 these 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. *Id.* at 157-58.

The witnesses continuously referred to the shooter as "short and dark-skinned" throughout the trial. *See e.g., Id.* at 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 B, ¶¶ 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 B, ¶ 67.

Direct Appeal Proceedings

The trial court appointed two attorneys to represent Graham on his direct appeal to the Supreme Court of Ohio. Counsel submitted a 60-page brief, 11 pages of which contained the statement of the facts. Counsel raised 14 propositions of law in the remaining 49 pages. *Id.* Six of the propositions consisted of two pages or less. *Id.* Counsel supported eight of the propositions with citation to four cases or less. *Id.*

Appellate counsel raised numerous errors that were contradicted by the direct appeal record. Some of the more egregious errors of appellate counsel include:

> In Proposition of Law No. II, appellate counsel argued in part that trial counsel was ineffective for failing to object to the trial court's pretrial order permitting juror to consume alcohol during sequestration. Exhibit B, ¶ 155. The Supreme Court of Ohio Court found that Graham "cannot show that defense counsel was ineffective by failing to object to this order, since the jury was never sequestered in the evening during deliberations." *Id.* at ¶ 158.
>
> In Proposition of Law No. V, appellate counsel asserted that the trial court committed plain error and counsel were ineffective when they failed to object to the testimony concerning Graham's demeanor after his arrest. *Id.* at ¶ 53. The Supreme Court of Ohio concluded that the ineffective assistance of counsel claim "lacks merit because, as noted above, defense counsel did object to" the testimony at issue *Id.* at ¶ 62.
>
> In Proposition of law No. VIII, appellate counsel argued that trial counsel was ineffective for not making any effort to demonstrate the required particularized need to obtain the grand jury testimony. *Id.* at ¶ 24. Appellate counsel emphasized the importance of obtaining the grand jury testimony of the co-defendants. *Id.* at ¶ 28. The Supreme Court of Ohio concluded "because none of Graham's codefendants testified before the grand jury, counsel cannot be found deficient for failing to present a sufficient argument to demonstrate a particularized need for the nonexistent grand-jury testimony." *Id.* at ¶ 29.

> Proposition of Law No. XIV, appellate counsel faulted the trial court's sentencing opinion because it did not mention that "he is African American" and "the racial slurs and racist comments that were made by some members of the jury pool." *Id. at* ¶ 177. The Supreme Court of Ohio found that there was no such need for this analysis because the trial court excused all of the prospective jurors who indicated racial bias. *Id.* at ¶ 177.

The Supreme Court of Ohio granted Graham sentencing relief: "Thus, based upon an independent review of the evidence, we cannot conclude that the aggravating circumstances that Graham was found guilty of committing outweigh the mitigating factors present in the case beyond a reasonable doubt. O.R.C. § 2929.05(A). Therefore, a sentence of death is not appropriate in this case." *Id.* at ¶ 216.[3] The Supreme Court of Ohio reached its conclusion after conducting a nine-page review of the mitigating factors. *Id.* at ¶¶ 192-216. Appellate counsel did not raise the "winning" issue, nor did they argue it at oral argument. Appellate counsel in its statement of the facts limited its review of the mitigating factors to a single paragraph. *State v. Graham*, Supreme Court of Ohio Case No. 2016-1882, Appellant's Merit Brief, p. 11.[4]

Application for Reopening Graham's Direct Appeal

The Supreme Court of Ohio created a procedure for appellants in direct appeals in capital cases to raise appellate ineffective assistance of counsel claims. *See* Ohio S.Ct.Prac.R. 11.06. Counsel must file an application for reopening the direct appeal

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[3] The Court remanded Graham's case for a resentencing hearing. 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. Appendix C.

[4] Available electronically at:
https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=844398.pdf

with the Supreme Court of Ohio within 90 days of the court's issuance of the mandate. *Id.*

The Supreme Court of Ohio appointed counsel for Graham to prepare and file his application for reopening. *State v. Graham*, *05/11/2021 Case Announcements*, 2021-Ohio-289.

Newly appointed counsel timely filed an application supported by two affidavits. Counsel asserted that appellate counsel were ineffective for failing to raise the following issues on direct appeal:

> Proposition of Law No. 1
>
> Trial Counsel Failed to Provide Effective Assistance of Counsel and the Accused is Prejudiced When They Fail to Object to the Conducting of Individual Voir Dire in the Jury Room and not in Open Court. U.S. Const. amends V, VI, VIII, and XIV; Ohio Const. art. I, §§ 2, 9, 10, and 16.
>
> Proposition of Law No. 2
>
> A Trial Court Commits Prejudicial Error When It Precludes Relevant Questions Concerning Race on a Jury Questionnaire When the Victim is White, and the Accused is Black. U.S. Const. amends V, VI, VIII, and XIV; Ohio Const. art. I, §§ 2, 9, 10, and 16.
>
> Proposition of Law No. 3
>
> Trial Counsel's Performance is Deficient, and the Accused is Prejudiced, When Trial Counsel Fails to Voir Dire About Race and the Facts of the Case Involve a Violent Crime Where the Victim is a Different Race Than the Accused. U.S. Const. amends V, VI, VIII, and XIV; Ohio Const. art. I, §§ 2, 9, 10, and 16.
>
> Proposition of Law No. 4
>
> Trial Counsel's Performance is Deficient, And the Accused is Prejudiced When Trial Counsel Fails to Object to the Admission

> of Inflammatory Testimony and Exhibits. U.S. Const. amends V, VI, VIII, and XIV; Ohio Const. art. I, §§ 2, 9, 10, and 16.

State v. Graham, Application for Reopening under S.Ct.Prac.R. 11.06, Feb. 26, 2021.[5]

The Supreme Court of Ohio denied the application. Appendix A, reported at *05/11/2021 Case Announcements*, 2021-Ohio-1606. Justice Donnelly dissented from the denial. *Id.*

It is from this May 11, 2021, entry that Graham seeks a grant of writ of certiorari.

REASONS FOR GRANTING THE WRIT

Graham had the constitutional right to the effective assistance of counsel in his direct appeal to the Supreme Court of Ohio challenging his capital conviction and sentence. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956); Douglas v. California, 372 U.S. 353, 357 (1963); *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985); *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000). To perform as a constitutionally effective advocate, appellate counsel must "fully perform [] their duty to support their clients' appeal to the best of their ability." *Penson v. Ohio*, 488 U.S. 75, 82 (1988) (citing *McCoy v. Court of Appeals of Wisconsin*, 386 U.S. 429, 439 (1988)).

Whether an appellant has been denied the effective assistance of appellate counsel is determined by applying the well-known two-pronged analysis of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Smith v. Robbins*, 528 U.S. at 285. To prevail, a petitioner must show that appellate counsel's performance fell below the

[5] Available electronically at https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=899660.pdf

standard of care (i.e., that of a reasonably competent appellate attorney) and that but for counsel's unprofessional errors it is reasonably likely that a more favorable outcome would have been obtained. *Strickland*, 466 U.S. at 688.

The performance of appellate counsel, like that of trial counsel, is assessed by measuring counsel's performance against "the professional norms prevailing when the representation took place." *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009). Standards and guidelines promulgated by professional associations, such as the American Bar Association, are "valuable measures of the prevailing professional norms of effective representation . . . ." *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010). Ohio courts have also looked to the ABA guidelines as the norms by which to assess the effectiveness of capital defense representation. *See*, *e.g.*, *State v. Herring*, 28 N.E.3d 1217 (Ohio 2014). Pursuant to the 2003 American Bar Association's Guidelines for the Appointment and Performance of Attorneys in Death Penalty Cases, Guideline 10-15.1(C), the applicable prevailing professional norm provided that appellate counsel to "should seek to all issues, whether or not previously presented, that are arguably meritorious."

Counsel is charged with having an adequate knowledge of the applicable laws and rules. *See White v. McAninch*, 235 F.3d 988. 997 (6th Cir. 2000). Here, appellate counsel filed Graham's merit brief[6] on May 7, 2018, and his reply brief[7] on November

[6] Available electronically at https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=844398.pdf
[7] Available electronically at https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=856191.pdf

8, 2018. In the year prior to the filing of Graham's merit brief, this Court found in three separate cases that race tainted criminal convictions. *Buck v. Davis*, 137 S.Ct. 759, 776, (2017) (the state courts used race as a defining factor in whether the defendant received the death penalty and this Court cautioned courts to be especially vigilant against "particularly noxious strain[s] of racial prejudice."); *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 862, 868 (2017) (This Court ruled that trial courts must consider in a motion for a new trial evidence that jurors relied on racial stereotypes or animus in convicting a defendant and that racism "remains a familiar and recurring evil."); *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (A juror who voted to convict and sentence the Black petitioner to death believed "there are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls.").

Despite the race issues present in Graham's case, appellate counsel did not cite any of these three recent cases in Graham's merit brief.[8] In Graham's reply brief,[9] counsel cited only *Peña-Rodriguez v. Colorado.*

[8] Available electronically at https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=844398.pdf

[9] Available electronically at https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=856191.pd

I. Appellate counsel violated the two-part *Strickland* test when they failed to raise the trial court's refusal to include questions concerning race in the jury questionnaire.

Prior to trial, counsel filed a motion to supplement the trial court's standard questionnaire with issues concerning race. *Defendant's Motion for Additional Juror Questions, Motion #58*, Sept. 27, 2016. The initial draft of the questionnaire did not include any questions concerning race. This was despite the case having garnered a great deal of local media coverage, and the fact that the three victims were white, and Graham was Black. The motion contained the following proposed questions:

> 1. Have you ever been in the presence of individuals who exhibited racial, sexual, religious and/or ethnic discrimination or prejudice? ( ) Yes ( ) No
> a. If yes, please explain
> _____
> b. If yes, would this experience impact your ability to serve as a juror in this case? ( )Yes ( )No
>
> 2. Some races and/or ethnic groups tend to be more violent than others.
> a. ( ) Strongly Agree
> b. ( ) Agree
> c. ( ) No Opinion
> d. ( ) Disagree
> e. ( ) Strongly Disagree
>
> 3. Are you a member of any organization that is concerned with racial issues?
> ( ) Yes ( ) No
> a. If yes, please identify the group(s) or organization(s):
> _____
>
> 4. Are you a member of any private club, civic, professional, or fraternal organization
> limits its membership on the basis of race, ethnic origin, sex, or religious convictions?
> ( ) Yes ( ) No
> a. If yes, please identify the club(s) or organization(s):
> _____

5. Describe which choice below best fits your attitude towards African-Americans:
a. ( ) I am biased against African-Americans.
b. ( ) I have no negative feelings whatsoever towards African-Americans.
c. ( ) While I am not biased against African-Americans, I do have the following concerns about African-Americans:
_____

6. How serious of a problem do you think racial discrimination is in Ohio?
a. ( ) A very serious problem.
b. ( ) A somewhat serious problem.
c. ( ) Not too serious.
d. ( ) Not a problem.

7. In your opinion, what is the most important message of the religion you hold?
_____

8. If you have a personal philosophy that can be expressed in a few sentences, or a favorite saying that reflects your personal philosophy, what is it?
_____
_____

Id.

The trial court, after entertaining argument on the proffered questions, ruled that it would include only questions 4 and 8 in its questionnaire. (10/03/16 Pretrial, Tr. 73-74). Of the two questions the Court elected to keep, one dealt in part with race, the other did not address the issue of race:

4. Are you a member of any private club, civic, professional, or fraternal organization limits its membership on the basis of race, ethnic origin, sex, or religious convictions?
( ) Yes ( ) No
a. If yes, please identify the club(s) or organization(s):
_____

7. In your opinion, what is the most important message of the religion you hold?
_____

"The jury is a central foundation of our justice system and our democracy." *Peña-Rodriguez*, 137 S. Ct. at 860. It is "especially pernicious" when racial bias infiltrates that sacred space. *See Rose v. Mitchell*, 443 U.S. 545, 555 (1979). And even more so, when a jury is charged with the awesome responsibility of deciding life or death, which requires "a heightened standard of reliability." *See State v. Scott*, 746 N.E.2d 1124 (Ohio 2001) (Pfeiffer, J., concurring)

The jury is an "essential instrumentality – an appendage of the court, the body ordained to pass upon guilt or innocence." *Sinclair v United States*, 279 U.S. 749, 765 (1929). It serves as the "prized shield against oppression." *Glasser v. United States*, 315 U.S. 60, 84 (1942). As such, it is imperative that the jury be impartial. *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988). The Constitution expressly guarantees as much, assuring criminal defendants "the right to a . . . trial, by an impartial jury . . . ." U.S. Const. amend. VI. An impartial jury is one in which each juror is "capable and willing to decide the case solely on the evidence before [him or her]." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (internal quotation marks omitted)). In Ohio, a state that requires jury unanimity for a death sentence, a single juror's unconstitutional bias can make the difference between life and death. *See* O.R.C. § 2929.04(A).

This Court has held in a number of decisions that trial courts are required during voir dire to pose questions concerning race. This Court first addressed the issue in *Aldredge v. United States* 283 U.S. 308 (1931). In *Aldredge,* the defendant, who was Black, was capitally charged with the murder of a police officer who was

white. The trial court denied counsel's request to have the prospective jurors questioned as to race. The defendant was convicted and sentenced to death. This Court reversed the defendant's conviction:

> The argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.
>
> We are of the opinion that the ruling of the trial court on the voir dire was erroneous, and the judgment of conviction must for this reason be reversed.

Id. at 314-15.

This Court revisited the issue in *Ham v. South Carolina*, 409 U.S. 524 (1973). The trial court declined to ask the prospective jurors any of the proffered questions concerning race. This Court reversed the defendant's conviction. *Id.* at 529 ("Because of the trial court's refusal to make any inquiry as to racial bias of the prospective jurors after petitioner's timely request therefore, the judgment of the Supreme Court of South Carolina is reversed.").

This Court subsequently limited the *Ham* holding. *Ristaino v. Ross*, 424 U.S. 589 (1985). It found that the Constitution did not require the court to voir dire as to race every time that the defendant was Black, and the victim was white. Instead, this Court looked to whether any "circumstances" necessitated the questioning of prospective jurors concerning race. This Court found the existence of special circumstances in *Ham*—the defense asserted that he was framed because he was a

civil rights activist. *Id.* at 596-97.

In *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) this Court applied the special circumstances test with respect to the constitutional requirement that state trial courts voir dire jurors on the issue of race. *Id.* at 190 ("Absent such circumstances, the Constitution leaves it to the trial court, and the judicial system within which that court operates, to determine the need for such questions."). The Court found that no race-based questioning was warranted: "[n]either did the circumstances of the case reveal a violent criminal act with a victim of a different racial or ethnic group. In fact, petitioner was accused of a victimless crime: aiding members of his own ethnic group to gain illegal entry into the United States." *Id.* at 192.

The need for jury questionnaires to address the issue of race became vividly evident in *State v. Bates*, 149 N.E.3d 475 (Ohio 2020). In that case trial counsel did not meaningfully address the issue of race in voir dire. But the court had required that the jury questionnaire include questions concerning race. Trial counsel evidently did not read the questionnaires or give them much thought if they did read them. Juror No. 31's questionnaire reflected:

> One of the questions on the written juror questionnaire asked, "Is there any racial or ethnic group that you do not feel comfortable being around?" Juror No. 31, a Caucasian woman, answered "yes" and in the space allotted for explanation wrote: "Sometimes black people." Another question started with the statement, "Some races and/or ethnic groups tend to be more violent than others," then asked the jurors to choose among the options of "strongly agree," "agree," "strongly disagree," "disagree," and "no opinion." Juror No. 31 indicated that she strongly agreed and then wrote "Blacks" in the space allotted for explanation.

Id. at 482. "Juror No. 31 was never questioned about Bates's race even considering her responses on the juror questionnaire." *Id.* at 483. The court reversed Bates's convictions and death sentence due to Juror No. 31's responses on the questionnaires concerning race. *Id.* at 485-86. Without the questionnaire addressing the issue of race, Bates would have remained on Ohio's death row due the product of a conviction and sentence tainted by racism.

The above holdings of the United States Supreme Court placed appellate counsel on notice as to the viability of the potential constitutional violation involving the trial court's refusal to include the proposed questions on race in the questionnaire. Special circumstances existed in Graham's case, namely a violent criminal act and the victims were of a different race than Graham.

When the trial court ruled that it would not include the proffered race-related questions in its questionnaires, it did indicate that counsel could voir dire on the issue. 10/6/17, Tr. 74 ("And, again, I will allow you to do individual voir dire, you'll be able to ask."). But trial counsel did not ask questions in voir dire. *See* Section II, *infra.* This should have further alerted appellate counsel for the need to raise the trial court's refusal to include the proffered questions in the questionnaire as well as trial counsel's ineffectiveness for not accepting the court's invitation to voir dire on race.

II. Appellate counsel violated the two-part *Strickland* test when they did not raise trial counsel's failure to voir dire as to race.

One of defense counsel's most essential responsibilities is to protect the accused's constitutional right to a fair and impartial jury. "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an

impartial jury will be honored." *Rosales-Lopez*, 451 U.S. at 188. Counsel should use voir dire to ensure an impartial jury by asking questions that permit the intelligent exercise of both challenges for cause and peremptory challenges. *United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973) (citing Wright, 2 Federal Practice and Procedure, P. 382 (1969)). *See also Mu'Min v. Virginia,* 500 U.S. 415, 431 (1991) (voir dire "serves the dual purpose of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges").

Here, the record reveals that trial counsel did not address the issue of race in voir dire. Yet the facts and circumstances of *this capital case* presented obvious risks for festering racial biases to overwhelm the fairness and impartiality. *Pena-Rodriguez*, 137 S.Ct. at 868; *Turner v. Murray*, 476 U.S. 28 (1986). The failure to sufficiently question prospective jurors on issues such as racial bias can constitute ineffective assistance of counsel. *See, e.g., Butler v. Hosking*, 47 F.3d 1167, 1995 U.S. App. LEXIS 3760 (6th Cir. 1995). The voir dire must include questions specifically directed to racial prejudice in order to meet the constitutional requirement that the accused's guilt be decided by a fair and an impartial jury. *See, e.g*., *Turner*, 476 U.S. at 36-37; *Mu'Min*, 500 U.S. at 424.

The Supreme Court of Ohio recently held that "counsel performs deficiently under *Strickland* when they fail to question a juror about racially biased comments made on a questionnaire." *Bates*, 149 N.E.3d at 483 (citing *State v. Pickens,* 25 N.E.3d 1023 (Ohio 2014)). There, the prospective juror's responses on the jury questionnaire documented her racial bias, which was obvious to anyone who read the questionnaire.

Id. at 485. But racial bias is usually much more subtle than in *Bates*. Because Graham's counsel failed to voir dire on the race issue, it is impossible to determine if Graham's race played a part in the jury's verdicts in the trial phase.

The failure of Graham's counsel to voir dire on the issue of race was not a reasonable strategic decision. The facts of the case, a violent offense and that Graham and the victim were of different races, contravenes such a finding. *Rosales-Lopez*, 451 U.S. at 192 ("There were, then, no 'special circumstances' of constitutional dimension in this case. Neither did the circumstances of the case reveal a violent criminal act with a victim of a different racial or ethnic group.").

Trial counsel's own statements also preclude a finding that counsel's absence of questioning was a strategic decision. In their motion for the trial court to include race-related questions in its questionnaire, trial counsel asserted, "The Defendant believes that the above-listed questions, in conjunction with the Court's own juror questionnaire, will shed sufficient light on the jurors' biases and prejudices, thereby ensuring an impartial jury of the Defendant's peers." *Defendant's Motion for Additional Juror Questions, Motion #58*, Sept. 27, 2016.

The trial court entertained oral argument on the motion. 10/03/16, Tr. 69-75. Trial counsel argued in favor of the motion:

> However, Your Honor, I think that ignoring -- ignoring a few things that -- well, *here's the big elephant in the room, my client is an African-American man. The victim in this case is a Caucasian man.* It is what it is, Your Honor. And, unfortunately, I wished we lived in a perfect world, but even now in today's age there are issues of race all over the country right now and we hear about it on -- in the newspapers and on the TV.

Id. at 72 (emphasis added).

Between the trial court's ruling on the motion and the commencement of voir dire, no intervening event occurred that reduced the necessity of conducing voir dire as to race. The race of Graham and the victim did not change. The facts did not change. The big elephant remained in the room. Trial counsel clearly recognized the necessity of conducting voir dire as to race when it filed and argued the motion. Yet they failed to raise the race issue in voir dire, even though the trial court gave them latitude to address the issue with prospective jurors.

The State may respond, citing *Graham, supra* at ¶ 48-51, that appellate counsel raised this issue, the Supreme Court of Ohio addressed the merits of the issue, and therefore counsel did not perform deficiently. But appellate counsel devoted one sentence of the merit brief to trial counsel's failure to voir dire on the issue of race: "A review of the voir dire transcript shows that Graham's lawyers did not ask a single question about race during multiple days of voir dire".[10] This did not constitute a legal argument but simply a statement as to what transpired during voir dire. Appellate counsel did not cite any caselaw in support of the one sentence. *Id.* Appellate counsel placed that single sentence in a proposition that addressed the trial court's treatment of two jurors who expressed racial bias. *Id.* at 12-17. The Supreme Court of Ohio without the benefit of briefing concluded:

> Defense counsel elected not to question prospective jurors about race. But the record indicates that defense counsel were attuned to issues of racial bias. Defense counsel spotted prospective juror No. 38's racist comment on her questionnaire and brought it to the court's attention.

[10] Available electronically on page 12 at https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=844398.pdf

> Defense counsel also filed a motion to include additional questions on the juror questionnaire about possible racial bias. Because counsel were alert to the possibility of racial bias, their decision not to question jurors on that topic appears to have been a deliberate tactical choice.

Appendix B at ¶ 49.

The trial court overruled Graham's motion to include specific questions on the questionnaire concerning race. 10/03/16 Pretrial, Tr. 73-74. Therefore, to the degree that trial counsel anticipated that the questionnaires would identity those prospective with racist views, counsel's perception was unreasonable. That counsel was attuned to the issues of racial bias, knew the questionnaire were not going to address the issue and then chose not to conduct no voir dire on the issue does not reflect a reasonable deliberate tactical choice. If appellate counsel had raised the issue, the Supreme Court would have issued addressed the issue in a much different manner.

Appellate counsel's one-sentence argument either did not raise this issue or raised the issue in a manner that was not reasonable, both of which constituted deficient performance.

CONCLUSION

The case had racial tones from the very beginning. A black defendant killed a white victim and, in the process, robbed two other victims who were also white. The jury given the racial makeup of the county, was most likely to be all white. During voir dire at least two prospective jurors made statements evincing extreme racial bias. Yet the trial court, other than excusing those two prospective jurors and trial counsel did nothing to ensure that the proceedings were free of racial bias.

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

Respectfully submitted,

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