No. 21-5347

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

REPLY TO PETITION FOR WRIT OF CERTIORARI

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REPLY

D'Amantae Graham's cert petition raised a single constitutional error from his trial—the failure of both the trial court and trial counsel to address race with prospective jurors in voir dire. Because the question raises an issue within an issue, Graham will divide this reply into two parts: (a) the trial court's and trial counsel's failures to address the issue of race and (b) appellate counsel's failure to raise those trial errors on direct appeal. Prior to responding on those two issues, Graham will address two other issues.

First, the State of Ohio cited the fact that the Supreme Court of Ohio vacated Graham's death sentence and remanded the case for the trial court to impose a sentence of less than death. Brief in Opposition, p. 1. That Graham is no longer serving a sentence of death, but instead serving a sentence of life without parole plus sixty-one years does not cure the failures of the trial court and trial counsel to address the issue of race in voir dire, or appellate counsel's failure to raise those issues on direct appeal.[1] His convictions for capital murder, aggravated robbery, aggravated burglary and three counts of kidnapping were returned by a jury that had not been voir dired as to the issue of race.

In addition, the State, in detail, discusses the racially tinged statements made by prospective jurors Nos. 38, 64, and 195. Brief in Opposition, pp. 3-4. The rulings of the trial court and the Supreme Court of Ohio concerning those prospective jurors is not the focus of Graham's petition. Those statements, however, are relevant to the

[1] Petition for Certiorari, Exhibit C.

issue that Graham raised because they placed both the trial court and counsel on notice concerning the need to voir dire on the issue of race.

I. The Trial Court Erred When It Excluded the Proffered Questions Concerning Race in its Jury Questionnaire and Trial Counsel Compounded that Error When They Failed to Question Prospective Jurors Concerning Race.

The State argues that trial counsel made an informed decision not to voir dire on the subject of race:

> Familiar with the facts and circumstances of the case, the law, and this pool of prospective jurors, trial counsel was uniquely situated to determine "that the examination of jurors' racial views during voir dire would be unwise, since the subject of racial prejudice is sensitive to most people and raising it during voir dire could cause some jurors to be less candid if confronted with direct questions attempting to discern any hint of racial prejudice." *State v. Smith*, 731 N.E.2d 645, 652 (Ohio 2000). Trial counsel made the decision to forgo racial prejudice questioning during general voir dire. As this is a choice best left to the capital litigator, competent appellate counsel need not challenge it in any specific manner on appeal. See *Id.*

Brief in Opposition, pp. 8-9.

The State's argument cannot be squared with trial counsel's filing of the pretrial motion requesting that the trial court include questions involving race in the jury questionnaire. The State's argument is also directly contradicted by trial counsel's statement that "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.*" 10/03/16, Tr. 72 (emphasis added).

In a similar vein, the State claims that "[i]n Ohio, defense counsel are typically afforded wide latitude in determining how to conduct voir dire." Brief in Opposition p. 8 (citation omitted). While that may be an accurate statement of the law, it does

not apply in this case given counsel's motion and statements concerning the need to voir dire as to race. Here, trial counsel, in the exercise of their wide latitude, correctly determined that voir dire should address the issue of race but then failed to pursue the subject with relevant questions.

The State twice cites the trial court's decision to conduct individual voir dire. Brief in Opposition, p. 8 ("the trial court and counsel had three very long days of one-on-one discussions with the prospective jurors during individual voir dire to observe their demeanor, conduct, and nature before determining how to approach general voir dire"), p. 13 ("individual voir dire proceedings introduced the court and parties in an intimate setting to the prospective juror pool prior to the general voir dire"). The conducting of lengthy individual voir dire is not an adequate substitute for conducting voir dire on the issue of race.

The State argues that the intervening event, the single prospective juror raising the racist comments of other prospective jurors, reaffirmed for the trial court and counsel that they did not need to raise the subject of race. Brief in Opposition, p. 14. The jury commissioner divided prospective jurors into seventeen separate groups encompassing a three-day period when prospective jurors were to report for individual voir dire. *Id.* at p. 2. That one prospective juror in one of those seventeen groups reported blatant racist statements did not warrant either the trial court or trial counsel continuing to forgo all questioning concerning race on the assumption that prospective jurors in the other sixteen groups would report the existence of racism too. Even if this assumption was correct, it fails to recognize that most racism

will be much more subtle to detect and will only be identified through pointed questions in voir dire.

The State quotes the Supreme Court of Ohio's finding that "the record indicates that defense counsel were attuned to issues of racial bias." Brief in Opposition, p. 7 (citing *State v. Graham,* 2020-Ohio-6700, ¶ 49). While defense counsel was arguably attuned to issues of racial bias when they asked the court to expand its jury questionnaire, they abandoned that attunement when they failed to pursue any questioning concerning race.

The trial court erred when it did not address the issue of race in its questionnaire. Trial counsel erred when they did not address the issue of race in voir dire. Thus, the trial court participants who were charged with insuring that Graham's convictions were not tainted by race, failed to fulfill their obligations to be especially vigilant against "particularly noxious strain[s] of racial prejudice." *Buck v. Davis*, 137 S.Ct. 759, 776, (2017).

II. Appellate Counsel's Failure to Raise the Errors Involving the Lack of Questioning Concerning Race by the Trial Court and Trial Counsel Constituted Deficient Performance that Prejudiced Graham.

The State initially argues that appellate counsel raised trial counsel's failure to voir dire on the subject of race and therefore Graham's argument should be "viewed as the failure to raise the claim in a more thorough manner not as a complete failure to raise the claim." Brief in Opposition, p. 7. In support of this argument the State cites the portion of the Supreme Court of Ohio's opinion that "the record indicates that defense counsel were attuned to issues of racial bias" *Id.* (citing *State v. Graham*,

2020-Ohio-6700, ¶ 46). The State fails to acknowledge that appellate counsel limited their reference to a single sentence, "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."[2] A one-sentence observation, without citation to the record or any supporting authority, constitutes a complete failure to raise the claim.

Later in its response, the State acknowledged that appellate counsel intentionally decided not to raise trial counsel's lack of questioning on the subject of race, "Here, competent appellant counsel knew trial counsel could properly determine that an examination of potential jurors [sic] racial views following the individual voir dire examinations would be unwise when an interracial murder case did not involve any issue of racial confrontation." Brief in Opposition, p. 8. The State does not explain the manner in which appellate counsel could have known trial counsel's decision-making process on this issue. It is not contained in the record. In fact, the filing of the motion to expand the trial court's jury questionnaire and trial counsel's argument in favor of the motion displayed a different mindset—that trial counsel knew race was a critical issue that needed discussed with the prospective jurors.

The State ultimately falls back on the position that "appellate counsel need not raise every conceivable issue on appeal." Brief in Opposition, p. 7 (citing *State v. Gumm*, 653 N.E.2d 253, 267 (Ohio 1995)). And the State quotes *Gumm* relying on

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

Smith v. Murray, 477 U.S. 527, 536 (1986) for the proposition that "The process of "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail * * * is the hallmark of effective appellate advocacy." Brief in Opposition, p. 7. As an initial matter, the omitted issue is not at all a weaker argument than those actually raised by appellate counsel. Moreover, while winnowing claims may be the guiding principle in non-capital cases, it is not the prevailing standard in capital litigation. "Post-conviction counsel should seek to litigate all issues, whether or not previously presented that are arguably meritorious under the standards applicable to high quality capital defense representation." 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.1C. "'Winnowing' issues in a capital case can have fatal consequences . . . When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited," *Id.* at Commentary, p. 1083. Graham was still serving a death sentence when appellate counsel represented him.

In assessing ineffective assistance of counsel claims, it is necessary to compare the claims that counsel failed to raise with the claims that counsel did raise. *See Mapes v. Coyle,* 171 F.3d 408, 427 (6th Cir. 1999) (appellate court should assess whether the omitted issues were clearly stronger that those presented); *McFarland v. Yukins*, 356 F.3d 686, 711 (6th Cir. 2004) (the omitted issue was much stronger than the issues appellate counsel presented). Here, this analysis is quite easy because appellate counsel raised issues that were not supported by the record. Appellate counsel raised

the following flawed propositions that were contradicted by the record: (a) the trial court's pretrial order that limited the juror's consumption of alcohol during the sequestration even though the jurors were never sequestered, (b) trial counsel's failure to object to the admission of testimony concerning Graham's demeanor after his arrest, even though trial counsel had objected to the admission of that testimony, and (c) trial counsel failed to show a particularized need to access the grand jury testimony of the co-defendants even though the co-defendants did not testify before the grand jury.

Given the race of Graham and the victims, as well as other factors present in this case, the potential existed for the jury's verdicts to be tainted by race. Yet the participants did not invoke any of the safeguards that preclude tainted verdicts. Prior to appellate counsel filing Graham's merit brief, this Court had issued three decisions recognizing the need to be on alert to the existence of the recurring evil of racism. *Buck v. Davis*, 137 S.Ct. 759, 776, (2017); *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 862, 868 (2017); *Tharpe v. Sellers*, 138 S.Ct. 545, 546 (2018). Yet appellate counsel cited only one of those cases and that was in the reply brief. Appellate counsel performed deficiently, and Graham was prejudiced was a result.

CONCLUSION

For the reasons detailed in Graham's petition, this Court should grant the writ.

Respectfully submitted,

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