

No. 23-6975

**IN THE SUPREME COURT OF THE UNITED STATES**

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D'AMANTAE GRAHAM

*Petitioner,*

v.

STATE OF OHIO

*Respondent.*

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

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**BRIEF IN OPPOSITION TO THE  
PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Can a trial court deny a criminal defendant the right of self-representation solely because he was designated a sovereign citizen?

## LIST OF PARTIES

The Petitioner is Damantae Graham, an inmate at Richland Correctional Institution. 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 Prosecutor Pamela J. Holder.

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## **STATEMENT OF THE CASE**

Petitioner Damantae Graham is serving life without the possibility of parole for the aggravated murder of Nicholas Massa. *State v. Graham*, Portage C.P. No. 2016 CR 00107 E (Dec. 8, 2022).

Graham 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*, 172 N.E.3d 841, 234 (Ohio 2020); *State v. Graham*, Portage C.P. No. 2016 CR 00107 E (Dec. 8, 2022).

## **STATEMENT OF THE FACTS**

Evidence introduced at trial established beyond reasonable doubt that on February 7, 2016, Graham shot and killed Massa during the robbery of an apartment in Kent, Ohio. *Graham*, 172 N.E.3d at 187-191. The facts relevant to Graham's Petition for a Writ of Certiorari involve a remand from the appellate court for a resentencing to allow a mitigation expert to testify in person. *State v. Graham*, 2022-Ohio-1140 (11th Dist.Ct.App.), ¶ 70-71, 75.

## **STATEMENT OF PROCEDURAL HISTORY**

The Eleventh District Court of Appeals summarized the relevant substantive and procedural history of Graham's case as follows:

### ***[2016 Trial and Review]***

In 2016, Mr. Graham shot and killed 18-year-old college student Nicholas Massa during the robbery of an apartment in Kent, Ohio. Mr. Graham had turned 19 the month before he committed the offenses.

Following the jury trial in the Portage County Court of Common Pleas, Mr. Graham was found guilty of aggravated murder (count 1); three death-penalty specifications accompanying count 1; aggravated burglary (count 2); aggravated robbery (count 3); three counts of kidnapping (counts 4, 5, and 6); and six firearm specifications accompanying the six counts.

The jury recommended that Mr. Graham be sentenced to death on count 1. The trial court accepted the jury's recommendation and sentenced Mr. Graham accordingly. It also imposed an aggregate prison term of 61 years on the remaining counts and specifications.

Mr. Graham filed a direct appeal of right in the Supreme Court of Ohio raising 14 propositions of law. While his appeal was pending, Mr. Graham instituted postconviction proceedings in the trial court alleging 48 grounds for relief. In December 2020, the Supreme Court of Ohio affirmed Mr. Graham's convictions, vacated the death sentence, and remanded the matter to the trial court for resentencing consistent with R.C. 2929.06. See *State v. Graham*, 164 Ohio St.3d 187, 2020-Ohio-6700, 172 N.E.3d 841, ¶ 217 ("*Graham I*").

### ***Prehearing Matters***

The Supreme Court of Ohio's mandate was filed in the trial court on January 6, 2021. On the same date, Mr. Graham, through counsel, filed a motion for appointment of counsel for purposes of resentencing. Mr. Graham requested the appointment of two attorneys who were certified in capital cases to serve as "trial lead counsel" and "trial co-counsel," respectively, and a third attorney to sit as "third chair" who would not bill for her time. The next day, the trial court scheduled Mr. Graham's resentencing hearing for March 8.

On January 26, Mr. Graham, through counsel, filed a motion to continue the March 8 resentencing hearing until at least October, indicating that he intended to file a petition for certiorari in the Supreme Court of the United States. The state filed a response opposing Mr. Graham's motion. On February 10, the trial court filed a judgment entry denying Mr. Graham's motion, stating, "The Court finds that based on the motion of the Defendant and the Response of the State, the motion is not well taken and hereby denied."

Meanwhile, on January 21, Mr. Graham's counsel filed a motion in the Supreme Court of Ohio requesting appointment for the purpose of preparing and filing an application to reopen Mr. Graham's direct appeal pursuant to S.Ct.Prac.R. 11.06, which the court granted on February 3. Mr. Graham subsequently filed an application for reopening on February 28, alleging that he had received ineffective assistance of counsel.

On the same date, Mr. Graham, through counsel, filed a "renewed" motion in the trial court to continue the March 8 resentencing hearing. As grounds, Mr. Graham stated that (1) his application for reopening in the Supreme Court of Ohio created a "serious question" regarding the trial court's "authority" to resentence him; (2) his third attorney was scheduled to receive surgery on March 1 and would be unable to travel for at least two months; and (3) Dr. Arcelis Rivera ("Dr. Rivera"), a psychologist who evaluated Mr. Graham and filed a report during his postconviction proceedings, was unavailable to testify on March 8.

The state filed a response opposing Mr. Graham's "renewed" motion, which was identical to its response to Mr. Graham's first motion. On March 2, the trial court filed a judgment entry denying Mr. Graham's motion, again stating, "The Court finds that based on the motion of the Defendant and the Response of the State, the motion is not well taken and is hereby denied."

On March 4, Mr. Graham filed a resentencing memorandum, attaching reports from Dr. Rivera and a second psychologist, Dr. Laurence Steinberg (“Dr. Steinberg”).

On the same date, Mr. Graham filed a petition in this court seeking a writ of prohibition enjoining Judge Pittman from resentencing him on March 8. Mr. Graham argued that Judge Pittman patently and unambiguously lacked jurisdiction as a result of his pending application to reopen his direct appeal in the Supreme Court of Ohio. Judge Pittman filed a motion to dismiss Mr. Graham’s petition. In *State ex rel. Graham v. Pittman*, 11th Dist. Portage No. 2021-P-0023, 2021-Ohio-665 (“*Graham IP*”), we granted Judge Pittman’s motion, finding that Mr. Graham did not establish that there are not set of facts under which the trial court could have jurisdiction. *Id.* at ¶ 10.

### ***March 2021 Resentencing***

At the sentencing hearing, the defense presented testimony from Dr. Steinberg, who stated a person’s brain continues to mature into his or her early 20s and the characteristics the Supreme Court of the United States has identified as mitigating against a sentence of death for juveniles also applies to life sentences without parole for 18- to 20-year-olds. The defense also presented statements from Mr. Graham’s family members in a video and asserted several mitigating factors for the trial court’s consideration. The defense requested the trial court resentence Mr. Graham to an aggregate prison term of 28 years to life.

The state presented testimony from the victim’s father, mother, and sister. The state requested the trial court resentence Mr. Graham to a prison term of life without the possibility of parole to run consecutively to the 61-year aggregate prison term previously imposed.

The trial court sentenced Mr. Graham to prison terms of life without parole and three years on the accompanying firearm specification to run consecutively to each other and to the 61-aggregate prison term previously imposed.

### ***[2021 Appeal and Remand]***

Mr. Graham appealed to this court, raising, among other argument, that the trial court abused its discretion by denying his motion to continue the resentencing hearing. *State v. Graham*, 11th Dist. Portage No. 2021-P-0035, 2022-Ohio-1140 (“*Graham IIP*”), we reversed the trial court’s judgment denying Mr. Graham’s motion for a continuance. *Id.* at ¶ 75. We determined the trial court should have granted a continuance to permit Dr. Rivera’s testimony. *Id.* at ¶ 70-71. Accordingly, we vacated Mr. Graham’s sentence and remanded for resentencing. *Id.* at ¶ 75.

### ***June 2022 Status Hearing***

Upon remand, the trial court scheduled a status hearing and the resentencing hearing. Defense counsel moved to continue the resentencing hearing and requested the parties schedule a new date at the status hearing.

Two days before the status hearing, Mr. Graham filed a pro se “Notice of Special Appearance and Removal of Counsel.” He attached a letter he sent to his



trial counsel stating he is “competent” to “handle [his] own affairs” and that they are “hereby declared incompetent” and “fired.”

The prosecutor and defense counsel appeared in person at the status hearing, and Mr. Graham appeared via zoom. Defense counsel requested a continuance of six months for the purpose of hiring expert witnesses.

The trial court referenced Mr. Graham’s pro se “notice of special appearance” and asked him to elaborate. It appears there were periodic technological glitches when Mr. Graham spoke. However, the transcript indicates Mr. Graham stated he is present “upon special appearance”; he does not “consent to a video hearing”; and he would “move forward upon proof that an actual controversy gives the Court jurisdiction to proceed.” The prosecutor responded that there is no question regarding the trial court’s jurisdiction. The trial court stated it would deny Mr. Graham’s “motion.”

The trial court next asked Mr. Graham to elaborate on his “notice of removal” of defense counsel, and the following exchange occurred:

“[MR. GRAHAM]: I present myself as a live man – as a live man (inaudible) representation.

“[THE COURT]: Again, I’m going to deny your motion.[Defense counsel] will remain on this case \* \* \*.

“[MR. GRAHAM]: Your Honor, are you (inaudible) your post and violating your oath? [”]

“[THE COURT]: Mr. Graham, I’m not playing games here. We’re trying to make sure that you get a fair sentencing hearing.”

The trial court confirmed defense counsel could continue representing Mr. Graham and stated it would continue the matter for at least six months so they could hire expert witnesses. Following the status hearing, the trial court filed a judgment entry denying Mr. Graham’s pro se filing. The trial court subsequently granted defense counsel’s motion to continue and rescheduled the resentencing hearing for December 6, 2022.

### ***December 2022 Resentencing***

The day before the resentencing hearing, defense counsel filed a resentencing memorandum, attaching reports from Mark D, Cunningham, Ph.D., ABPP (“Dr. Cunningham”), and Dr. Riveria, as well as affidavits from family members.

The day of the hearing, Mr. Graham filed a pro se “Affidavit of Truth.” Mr. Graham averred he sent a letter to the prosecutor entitled “Conditional acceptance for Value-request for proof of claim” and provided 30 days for a response. When the prosecutor did not respond, Mr. Graham sent a “Final Notice of default and Res Judicata.” Mr. Graham contented “[a]s an operation of law,” the judgment against him is void, and he must be immediately released and paid restitution. Mr. Graham attached copies of the letters he sent to the prosecutor.

At the beginning of the hearing, defense counsel informed the trial court that Mr. Graham requested to represent himself. The trial court addressed Mr. Graham, and the following exchange occurred:

“THE COURT: How old are you now, Mr. Graham?

“MR. GRAHAM: I’m 25 years old.

“THE COURT: 25 already. Okay. Mr. Graham, it has been brought to my attention that you would like to proceed on your own behalf without counsel; is that correct?

“MR. GRAHAM: That’s correct.

”THE COURT: Do you understand that – the famous saying of somebody who represents themselves has a fool for a client?

“MR. GRAHAM: I do.

“THE COURT: Do you understand that you have very learned counsel that are working in your best interest?

“MR. GRAHAM: I do.

“THE COURT: And you would still like to proceed without counsel?

“MR. GRAHAM: Yes.”

The trial court asked one of Mr. Graham’s defense attorney’s to speak. Defense counsel stated Mr. Graham believes he is a “sovereign citizen” (Mr. Graham objected to this statement) and the trial court does not have jurisdiction over him. Defense counsel stated they were prepared to move forward but requested Mr. Graham be permitted to make a record of his request and rationale. The trial court asked Mr. Graham to explain his rationale, at which time the following exchange occurred:

“MR. GRAHAM: - - I am here under special appearance in propria persona. I’m only here to settle this matter once and for all. Now, an affidavit was submitted to this court exhibiting an administrative remedy that I executed with the prosecutor speaking on behalf of the state, which he agreed upon stipulation, that the judgment sentence rendered in 2016 CR 107 E is based upon fraud and is void.

“THE COURT: And that’s your rationale?

“MR. GRAHAM: That’s what happened.”

Defense counsel and the prosecutor declined to respond to Mr. Graham’s statement. The trial court stated, “Okay, I’m going to deny your motion. We will proceed. Go have a seat. Thank you.”

Defense counsel presented testimony from Dr. Rivera and Dr. Cunningham. Dr. Rivera testified that several risk factors in Mr. Graham’s environment increased the likelihood he would engage in criminal activity, including his rebelliousness, family neglect, poor parenting, substance abuse, poor academic achievement, racial discrimination, and association with adults who engaged in criminal activity. Dr. Cunningham testified adolescence incorporates the time period in which physiological and brain development occurs, and this development continues until age 25. Juveniles and persons between the ages of 18 and their early 20s are less capable of mature judgment, which is often exhibited in misconduct like delinquency and criminal activity. Dr. Cunningham opined that Mr. Graham’s life status at the time of his offenses is consistent with “marked adolescent immaturity.” Defense counsel requested the trial court resentence Mr. Graham to an aggregate prison term of 28 years to life.

The state did not present any witnesses but requested the trial court consider the prior testimony of the victim's family. The state requested the trial court resentence Mr. Graham to a prison term of life without the possibility of parole.

Mr. Graham spoke on his own behalf, stating as follows:

"Your Honor, you have blatantly disregarded my unequivocal exercise of the privilege of self representation. So I just want the record to reflect that I do not consent to continuing this hearing with appointed counsel. So I expect to be back again for another pony show, but know this, I will not let you or anybody else stop me from liberating myself."

The trial court again sentenced Mr. Graham to prison terms of life without parole and three years on the accompanying firearm specification to run consecutive to each other and to the 61-year aggregate prison term previously imposed.

Mr. Graham filed a notice of appeal and a motion for the appointment of appellate counsel. This court granted Mr. Graham's motion and appointed him new counsel.

*Graham III*, 2022-Ohio-1140 at ¶ 10-20 and *State v. Graham*, 2023-Ohio-2728 (11th Dist.Ct.App.), ¶ 11-47. ("*Graham IV*").

### ***2022 Appeal and Affirm***

On the most recent appeal to the Eleventh District Court of Appeals, Graham raised one assignment of error relevant to this Writ. He argued the trial court erred in failing to address his request for the removal of counsel and self-representation contrary to the United States and Ohio Constitutions. *Graham IV* at ¶ 50. The appellate court affirmed the judgment of the trial court finding no error in the two purported requests Graham made for self-representation. *Id.* at ¶ 70, 81. Graham's first request did not clearly and unequivocally assert his right to self-representation. *Id.* at ¶ 62. Regarding his second request, the record shows the trial court's inquiries were legally sufficient under the circumstances. *Id.* at ¶ 65, 68. As a request for self-representation may be denied when circumstances indicate the request is made for purposes of delay or manipulation of the trial process, the trial court did not abuse its discretion to deny Graham's self-representation request. *Id.* at ¶ 69.

The Supreme Court of Ohio declined jurisdiction to review Graham's case on December 12, 2023. *State v. Graham*, 223 N.E.3d 489 (Ohio 2023).

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 Question Presented:**

The Supreme Court of Ohio spared Graham the death penalty and remanded the case to the trial court for resentencing. A 2021 sentencing hearing occurred without mitigation expert, Dr. Rivera. Although a full mitigation hearing was not required, the Eleventh District Court of Appeals held Graham was entitled to mitigation testimony from a relevant expert witness and remanded the case to the trial court for resentencing. A 2022 resentencing occurred with Dr. Rivera. It is the remand ordered 2022 resentencing that gives rise to Graham's Question Presented in his third Writ of Certiorari to this Court.

Graham contends that the trial court denied a request to proceed without counsel on the basis of being "designated a sovereign citizen." His Writ counsel claims this case raises the issue of how courts should assess a defendant's request for self-representation when the defendant, in part, intends to make sovereign citizen type arguments.

Here, the trial court denied Graham's request to proceed at his 2022 hearing without counsel because the trial court sought to provide Graham with a fair resentencing hearing without delay or manipulation of the process. Contrary to the Writ's contentions, the trial court's inquiry with Graham revealed that his self-representation request was to delay and manipulate the resentencing process. This Court should deny Graham's Writ of Certiorari on his Question Presented for two reasons. First, the trial court's ruling was sound under the State and Federal

Constitutions. Second, Graham is a defendant dissatisfied with the outcome of the Eleventh District Court of Appeal's decision.

### Constitutional Challenge Failure

At issue is Graham's constitutional right to self-representation. In *Faretta v. California*, this Court held "Although not stated in the amendment in so many words, the right to self-representation is to make one's own defense personally[.]" 422 U.S. 806, 819-820 (1975). Self-representation heightens the risk of an unfavorable outcome and champions individual freedom of choice. *Id.* at 820. "The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. *McKaskle v. Wiggins*, 465 U.S. 168, 176-177 (1984).

An assertion of the right to self-representation must be clear and unequivocal. *Faretta* at 819. The right to self-representation is not absolute, and "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez v. Court of Appeals of Cal.*, 528 U.S. 152, 162 (2000). "For this reason, courts must 'indulge in every reasonable presumption against waiver' of the right to counsel." *Brewer v. Williams*, 430 U.S. 387, 404 (1977).

Neither Graham's June 13, 2022 Notice of Special Appearance and Removal of Counsel nor his elaboration of this filing at the status hearing the following day was a clear and unequivocal self-representation request. (Pt.App. F, A-173 to A-175; Pt.App. G, A-163 to A-171). On December 6, 2022, defense counsel did alert the trial court Graham was interested in self-representation at a sidebar before the hearing started. (Pt.App. H, A-173 to A-175). The trial court personally inquired of Graham regarding his current age, intentions regarding self-representation, the fact that he had very qualified counsel representing his interests and the foolishness of self-

representation. (Pt.App. H, A-174). When the trial inquired of defense counsel, he stated “I have spoken to Mr. Graham and he is of the belief that he is a sovereign citizen and this court” Graham interrupted counsel stating “Objection. I never, I never said that.” (Pt.App. H, A-176 to A-177). Counsel clarified, “It was my understanding. Okay. His contention is that this Court doesn’t have jurisdiction over him and the case must be dismissed. I think I’m paraphrasing that.” (Pt.App. H, A-177). Counsel assured the court his team was prepared to proceed, had reviewed the relevant law with Graham, and his request for self-representation with the court. (Pt.App. H, A-177). The court and Graham engaged in further discussion regarding Graham’s own explanation of his rationale, rather than counsel’s “paraphrasing.” Graham described an administrative remedy he had executed to demonstrate his sentence in the present case was fraudulent and therefore void. (Pt.App. H, A-177 to A-178). The prosecutor declined to comment, the trial court denied Graham’s motion and the matter proceeded with Graham represented by the two highly competent counsel. (Pt.App. H, A-178). The trial court heard testimony from two mitigation experts including Dr. Rivera, family members, and Graham’s statement before imposing sentence.

There was no question regarding jurisdiction in the trial court for the sentencing. The Eleventh District Court was clear in the remand opinion “Our decision must not be taken as a diminishment of the brutal crimes committed by Mr. Graham. Our determination that the failure to grant a short continuance so a mitigation expert could testify constituted prejudicial error only mandates a new sentencing hearing; it does not limit the trial courts options in reimposing sentence.” *Graham III*, 2022-Ohio-1140 at ¶ 8. The purpose of the remand was to allow Dr. Rivera to testify as a mitigation witness. *Id.* at ¶ 70-71. Graham’s self-representation request was made to challenge the jurisdiction of his conviction as a delay tactic to manipulate the sentencing process and had no connection to his mitigation witness’s testimony. The trial court properly denied the

request to ensure the integrity and efficiency of the court system. Neither the Ohio nor Federal constitution was violated. Graham failed to establish a constitution violation at the trial court level.

As Graham sought to delay and manipulate the court system, he is an individual dissatisfied with the Eleventh District Court decision affirming the trial court's denial of his motion. Contrary to the Writ's contentions, Graham's own objection at the December 2022 hearing confirms that he does not identify as a sovereign citizen. (Pt.App. H, A-176 to A-177). As neither the defendant nor the trial court based their positions on Graham being a "sovereign citizen," the arguments in support of Graham's Writ are without merit.

Accordingly, the Supreme Court of Ohio properly denied Graham's memorandum for jurisdiction to review his case. Nothing in Graham's Petition for Writ of Certiorari warrants a different result.

### **CONCLUSION**

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

Respectfully submitted,  
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