No. 21-5347

IN THE SUPREME COURT OF THE UNITED STATES

DAMANTAE GRAHAM

Petitioner,

v.

STATE OF OHIO

Respondent.

ON THE PETITION FOR CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

VICTOR V. VIGLUICCI
Prosecuting Attorney
County of Portage, Ohio

PAMELA J. HOLDER
Assistant Prosecuting Attorney
Counsel of Record
Portage County Prosecutor's Office
241 South Chestnut Street
Ravenna, Ohio 44266
(330) 297-3850
(330) 297-3856 (fax)
pholder@portageco.com

Counsel for Respondent
State of Ohio

QUESTION PRESENTED

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?

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 Prosecutor Pamela J. Holder.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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 Nicholas Massa. *State v. Graham*, Portage C.P. No.2016 CR 00107 E (March 10, 2021).

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*, 2020-Ohio-6700, 2020 WL 7391565, at ¶ 217; *State v. Graham*, Portage C.P. No. 2016 CR 00107 E (March 10, 2021).

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*, 2020-Ohio-6700, at ¶ 2-19. The facts relevant to Graham's Petition for a Writ of Certiorari involve pre-trial matters regarding his jury questionnaires, individual voir dire, general voir dire, and Prospective juror Nos. 38, 195, and 64.

Jury Questionnaires

On the record at the second pretrial in May, the Prosecutor noted the parties had received a copy of the long form jury questionnaire to review. (Transcript of the May 23, 2016 Pretrial, hereinafter "5/23/16 Pretrial T.p." 5-6). The trial court confirmed that the long form questionnaire would be given to prospective jurors when they were summoned in. (5/23/16 Pretrial T.p. 6).

On the record in September, the trial court indicated that the initial jury questionnaire had been sent out. (Transcript of the September 16, 2016 Pretrial, hereinafter "9/16/16 Pretrial T.p." 4). The trial court stated any recommended corrections, notations, or changes to the long form jury

questionnaires should be presented to the Court Reporter in person by September 23, and a hearing would be set on the recommendations. (9/16/16 Pretrial T.p. 4). Graham failed to follow the court's specific instructions and filed his additional long form jury questionnaire requests with the court. The trial court quickly removed the filing and placed it under seal on October 3, 2016.

The matter proceeded to a hearing on the parties' recommendations at the beginning of October. Without objection from defense counsel, the Prosecutor recommended social media additions to the news categories and Netflix and podcasts to the true crime categories. (Transcript of the October 3, 2016 Pretrial, hereinafter "10/3/16 Pretrial T.p." 67-68). Referencing Defense Motion #58, the trial court read the first proposed racial prejudice question. (10/3/16 Pretrial T.p. 70). In response, the Prosecutor explained in a case a couple weeks earlier, "a number of jurors took great offense to almost these exact questions" causing a disruption requiring a mistrial. (10/3/16 Pretrial T.p. 70). The Prosecutor also noted, "the phraseology here and the nature of the questions is itself inflammatory." (10/3/16 Pretrial T.p. 71). Defense counsel countered that the proposed questions were not accusatory questions but designed to start conversations and allow written responses for things that were difficult to say out loud. (10/3/16 Pretrial T.p. 72). The trial court excluded all but two questions, one regarding the prospective juror's religion and another regarding clubs or memberships that excluded others on the basis of race, ethnic origin or religion. (10/3/16 Pretrial T.p. 74). The court stated defense counsel could ask all the other proposed questions during voir dire. Id.

Individual and General Voir Dire

The trial court granted defense counsel's motion for individual, sequestered voir dire and limited the topics to the issues of pretrial publicity and the death penalty. The jury commissioner scheduled 85 prospective jurors into 17 general time slots over three days, October 25, 26, and 27,

2016. (T.d. 270). Each prospective juror was questioned separately in a room containing the trial judge, court reporter, State of Ohio's counsel, defense counsel, and Graham. The trial court excused 32 prospective jurors and the remaining individuals were asked to report back to court on Friday morning, October 28, 2016, for general voir dire in the courtroom.

Prospective juror No. 38, 195, and 64

Relevant facts regarding the three prospective jurors "statements" during individual voir dire was summarized by the Supreme Court of Ohio as follows:

> ***a. Prospective juror No. 38***
>
> Prospective juror No. 38 stated in her jury 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?"
>
> During individual voir dire, defense counsel brought prospective juror No. 38's questionnaire response to the trial court's attention. Under questioning, prospective juror No. 38 explained, "Attitude. It's an attitude. I believe there's white and there's black. It has nothing to do with color. * * * I see it where I work every day. * * * [P]eople come in and they just * * * don't care about other people; just a bad attitude."
>
> During general voir dire, prospective juror No. 38 was questioned outside the presence of other jurors. She again explained her use of the N-word, stating, "[I]t's not a racial thing. I am not prejudice in any way." She added: "[T]here's white people and black people and white n[———-]s and black n[———-]s and Hispanic. I don't mean that as in disrespect." Prospective juror No. 38 was later excused for cause.
>
> ***b. Prospective juror No. 195***
>
> During individual voir dire, the trial court excused prospective juror No. 195 because the prospective juror indicated he would lean toward imposing a death sentence if the jury found the defendant guilty. The following day, prospective juror No. 187 informed the court that prospective juror No. 195 made a derogatory comment that included a racial slur in the presence of their small-group panel before prospective juror No. 195 was excused. Prospective juror No. 187 reported that prospective juror No. 195 had stated, "I wonder how much we paid for that n[———-]'s suit."
>
> Under questioning, prospective juror No. 187 stated that having heard the comment would not affect her ability to be fair and impartial. The trial court then questioned the four remaining prospective jurors from that small-group panel. Prospective juror No. 185 had heard nothing derogatory. Prospective juror Nos. 188, 193, and 194 had heard the comment, but each stated that the comment would

not affect his or her ability to be fair and impartial. None of the prospective jurors who heard prospective juror No. 195's comment served on the jury.

c. Prospective juror No. 64

During individual voir dire, the prosecutor questioned prospective juror No. 64 about his views on the death penalty:

> [The prosecutor]: * * * So the imposition of the death penalty is not automatic; is it in your mind?
>
> Prospective Juror: No. You can't just go out and lynch somebody like, you know, in 1835 or something.
>
> [The prosecutor]: Okay. Fair enough.
>
> Prospective Juror: I watch a lot of *Gunsmoke.*

Defense counsel later used a peremptory challenge to remove prospective juror No. 64 from the panel.

Graham, 2020-Ohio-6700, at ¶ 32-37.

STATEMENT OF PROCEDURAL HISTORY

Graham's procedural history is ongoing in the Ohio state court system. Postconviction proceedings are still pending in the Court of Common Pleas Portage County, Ohio (Case No. 2016 CR 107E) and a direct appeal is pending in the Court of Appeals Eleventh Judicial District Portage County, Ohio (Case No. 2012-P-00035).

After the Supreme Court of Ohio vacated his sentence of death, Graham filed an Application for Reopening Pursuant to S.Ct.Prac.R. 11.06. The State of Ohio filed a Memorandum of Law in Response. On May 11, 2021, the Supreme Court of Ohio denied the application for reopening. *State v. Graham*, Supreme Court Case No. 2016-1882.

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:

On Petition for Writ of Certiorari, Graham presents to this Court the denial of his application for reopening based on the alleged ineffective assistance of appellate counsel as "the opportunity to address the procedures that the trial court should employ * * * to be vigilant against racism." Moreover, Graham asserts that race is paramount here because of the difference in the victim and accused races, the violence of the crime and the fact that the jury had the additional burden of considering the sentence of death. However, Graham's sentence of death was vacated by the Supreme Court of Ohio and he is now serving life without the possibility of parole. *State v. Graham*, Portage C.P. No. 2016 CR 00107 E (March 10, 2021).

After the Supreme Court of Ohio vacated his sentence of death, Graham filed an application for reopening under S.Ct.Prac.R. 11.06 on the basis that appellate counsel was ineffective for failing to raise four claims including his two race-based claims at issue in this Petition. Graham's application for reopening did not demonstrate appellate counsel was deficient for failing to raise the race-based claims and did not demonstrate a reasonable probability of success had appellate counsel presented his proposed claims on appeal. Accordingly, the Supreme Court of Ohio properly denied his application for reopening under S.Ct.Prac.R. 11.06.

This Court should deny Graham's Petition for Writ of Certiorari because competent appellant counsel would not have assigned these errors under the circumstances of this case. Here, Graham did not carry his burden under S.Ct.Prac.R. 11.06 and neither this Court's decisions in *Buck v. Davis*, 137 S.Ct. 759 (2017); *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017); and *Tharpe v. Sellers*, 138 S.Ct. 545 (2018), nor a state court's 2020 decision demand a different result.

Graham Failed in His S.Ct.Prac.R. 11.06 Burden

S.Ct.Prac.R. 11.06(A) provides that an appellant in a death-penalty case "may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel in the Supreme Court." An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal. S.Ct.Prac.R. 11.06(E). The standard for assessing whether the applicant has raised a "genuine issue" is the two-pronged test in *Strickland v. Washington*, 466 U.S. 668, 668 (1984); *State v. Hill*, 740 N.E.2d 282, 283 (Ohio 2001).

To prevail on a claim of ineffective assistance of appellate counsel, the applicant must prove that his counsel was deficient for failing to raise the issues he presented on the application to reopen and that there was a reasonable probability of success had he presented those claims on appeal. *Id*. Thus, to justify reopening the appeal, the applicant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 701 N.E.2d 696, 697 (Ohio 1998). Graham failed in his S.Ct.Prac.R. 11.06 burden.

Graham proposed two race-based claims in his application for reopening. First, he faulted appellate counsel for failing to pursue a proposition of law based on the trial court's refusal to include defense counsel's proposed six race-based questions in the jury questionnaire. At the pretrial hearing on the motion the trial court stated that trial counsel would be allowed to do individual voir dire and the six questions that were not included in the jury questionnaire "Those can be asked during voir dire." (10/3/16 Pretrial T.p. 74). The second of Graham's race-based claims faulted appellate counsel for failing to pursue a proposition of law regarding trial counsel's decision to forgo voir dire questioning on possible racial bias during the general voir dire

proceedings. On Petition, Graham faults appellate counsel for failing to raise these same arguments on appeal.

The record reflects, Graham's appellate counsel did raise defense counsel's ineffectiveness during voir dire for failing to move for a new jury pool and for failing to ask a single question about race. *Graham*, 2020-Ohio-6700, at ¶ 46. The Supreme Court of Ohio noted "the record indicates that defense counsel were attuned to issues of racial bias" and found both claims lacked merit. *Id*. at ¶ 47-48. Accordingly, Graham's application for reopening voir dire claim must be viewed as the failure to raise the claim in more thorough manner not as the complete failure to raise the claim.

This Court has recognized safeguards at various stages of the trial are helpful to disclose racial bias. *Peña-Rodriguez*, 137 S.Ct. at 868. These safeguards include "[v]oir dire at the outset of trial, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after the verdict." *Id*. As these safeguards may be compromised or prove insufficient, trial courts and counsel have a dilemma when deciding whether to explore potential racial bias at voir dire. *Id*. General questions do not expose the specific biases that can poison deliberations. More pointed questions "could well exacerbate whatever prejudice might exist without substantially aiding in exposing it." *Rosales-Lopez v. United States*, 101 S.Ct. 1629, 1638 (Rehnquist, J., concurring in the result).

Ohio law holds that appellate counsel need not raise every conceivable issue on appeal. *State v. Gumm*, 653 N.E.2d 253, 267 (Ohio 1995). The process of "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail * * * is the hallmark of effective appellate advocacy." *Id*., citing *Smith v Murray*, 477 U.S. 527, 536 (1986).

Here, competent appellant counsel knew trial counsel could properly determine that an examination of potential jurors racial views following the individual voir dire examinations would be unwise when an interracial murder case did not involve any issue of racial confrontation. As summarized in the above statement of facts, the individual voir dire proceedings revealed two spoken and one written racially biased statement from three potential jurors. None of these prospective jurors sat on Graham's jury. *Graham*, 2020-Ohio-6700, at ¶ 42. Moreover, 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

Graham's interracial murder case did not involve any issues of racial confrontation. The two surviving victims and both of Graham's co-defendants testified at trial and established that Graham was the killer. The eyewitness who was seated next to Massa, described seeing a man matching Graham's description shoot Massa. *Graham*, 2020-Ohio-6700 at ¶ 12. One victim was in the bedroom with both co-defendants when the shot was fired which ruled the co-defendants out as the shooter. *Id*. Further, both co-defendants testified that Graham admitted shooting Massa. *Graham*, at ¶ 13. The get-away-driver, confirmed the co-defendant's testimony that his truck was the transportation for group to arrive and flee the scene of the crime. *Graham*, at ¶ 6, 13.

After counsel examined 88 prospective jurors individually over three days on the topics of pretrial publicity and Ohio's death penalty, the trial court excused 32 prospective jurors. 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*.

As Graham failed to satisfy his S.Ct.Prac.R. 11.06 burden, the Supreme Court of Ohio properly denied his application for reopening and his arguments on petition present nothing to warrant a different result.

Graham Fails to Show Deficient Performance

Buck, *Peña-Rodriguez*, and *Tharpe*

Graham contends that this Court's decisions in *Buck*, 137 S.Ct. 759; *Peña-Rodriguez*, 137 S.Ct. 855; and *Tharpe*, 138 S.Ct. 545, support his position that race taints criminal convictions. However, Graham's reliance on these decisions to demonstrate appellate counsel's performance was deficient is misplaced.

In *Buck*, this Court cited *Wong v. Belmontes*, 558 U.S. 15 (2009), for the proposition that "[a] jury may conclude that a crime's vicious nature call for a sentence of death." *Buck* at 776. However in *Buck*, defense counsel presented a medical expert with the opinion that black men are prone to violence that "appealed to a powerful racial stereotype." *Id*. Counsel "created a perfect storm" of factors that could support a decision for life or death on the basis of race. *Id*. *holding*

In *Peña-Rodriguez*, after a three-day criminal trial in Colorado two jurors approached counsel to report a serious instance of racial bias. *Peña-Rodriguez* at 862. H.C., a juror with law enforcement experience made racially bias statements about the defendant's guilt, the alibi witness' credibility and attempted to persuade others to follow his views. *Id*. At issue in *Peña-Rodriguez* was the no-impeachment rule and the importance of eliminating racial bias from the

jury system. *Peña-Rodriguez* at 867-868. This Court held where a juror makes a clear statement that indicates he or she relied on a racial stereotype to convict, the no-impeachment rule must give way to allow evidence of the juror's statement and any resulting denial of the jury trial guarantee. *Peña-Rodriguez* at 869.

Keith Tharpe claimed the jury that convicted him of murder included a white juror who was biased against him because he was black but he was denied a COA by the Court of Appeals. *Tharpe* at 546. Tharpe offered an affidavit of the white juror's views that "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." *Tharpe* at 546. This Court held "on the unusual facts of this case, the Court of Appeals' review should have not rested on the ground that it was indisputable among reasonable jurists that [the challenged juror's] service on the jury did not prejudice Tharpe." *Id.* This Court vacated the judgment of the Court of Appeals and remanded the matter for further consideration of the question whether Tharpe was entitled to a COA. *Tharpe* at 547.

Failure to utilize *Buck, Peña-Rodriguez,* and *Tharpe* in briefing on Graham's appeal did not demonstrate deficient appellate counsel performance. The cases would not have advanced Graham's proposed jury questionnaire or voir dire claims.

Unlike the jurors in *Peña-Rodriguez* who listened to the court's mandatory jury instructions and felt no obligation to report H.C.'s racially biased statements till post-verdict *Peña-Rodriguez* at 870, Prospective juror No. 187 in Graham's case reported a suspect issue the court the day after it happened. *Graham,* 2020-Ohio-6700, at ¶ 35. Individual voir dire was completed and the trial

court had excused Prospective juror No. 195 because of his position on the death penalty. The trial court conducted a probing examination individually of the prospective jurors that were within earshot of the statement to determine their impartiality. *Graham*, 2020-Ohio-6700, at ¶ 36. "None of the prospective jurors who heard Prospective juror No. 195 comment served on the jury." *Id*.

The record reflects two discussions occurred with Prospective juror No. 38 regarding her racially biased response to a health question on the jury questionnaire. *Graham*, 2020-Ohio-6700, at ¶ 32-34, 39. The trial court excused for cause Prospective juror No. 38. *Id*. at ¶ 34. The prosecutor's individual voir dire discussion with Prospective juror No. 64 on the death penalty led to his racist comment and familiarity with TV westerns. *Id*. at ¶ 37. These statements are unlike the "remarkable affidavit" in *Tharpe*. As Prospective juror No. 38 and 64 were not empaneled, Graham does not present an unusual set of facts where a biased juror sat on his jury.

Buck was a "perfect storm" with a medical expert expressing a racial stereotype opinion to jurors during sentencing allowing them to determine life or death on a racial basis. But for the procedural difference in Buck's case, it would have been among the group the Texas Attorney General confessed error due to the medical expert's racist opinion. *Buck* at 770. There is nothing similar to this in Graham's case.

Bates

More than a year after briefing was complete in Graham's appeal, a Supreme Court of Ohio reversed the conviction and sentence in a capital case and remanded it for a new trial finding defense counsel's performance during voir dire was objectively unreasonable and that counsel's deficient performance prejudiced the defendant by allowing the empanelment of a biased jury. *State v. Bates*, 149 N.E.3d 475, 478 (Ohio 2020). In *Bates*, the jury questionnaire answers of Prospective juror No. 31, a Caucasian woman, indicated that "there [was] a[] racial or ethnic group

that you do not feel comfortable being around" and her explanation provided "Sometimes black people." *Id*. at 482. Her questionnaire also provided she "strongly agreed" with the statement "Some races and/or ethnic groups tend to be more violent than others" and her explanation provided "Blacks." *Id*.

In Ohio, defense counsel are typically afforded wide latitude in determining how to best conduct voir dire. *State v. Hale*, 892 N.E.2d 864, 905 (Ohio 2008). In 2014, a Supreme Court of Ohio decision found no ineffective assistance of trial counsel although counsel performed deficiently for failing to question a juror about racially biased comments made on a questionnaire because there was no evidence of actual bias against the defendant himself. *State v. Pickens*, 25 N.E.3d 1023, 1065 (Ohio 2014). *Bates* overruled *Pickens* to the extent "that actual racial bias must be shown by demonstrating bias against a defendant personally." *Bates* at 484.

Bates presented a juror's admission of bias with no reassurance of impartiality. *Id.* Faced with Prospective juror No. 31's racially biased views contained in her jury questionnaire, trial counsel failed to inquire about her impartiality or strike her as a juror. *Id*. The Supreme Court of Ohio held defense counsel's performance was objectively unreasonable during voir dire and the prejudice was an actual bias juror sat on the jury denying Bates his right to an impartial jury. *Id*. at 485.

The *Bates* decision neither helped nor hindered Graham's ineffective assistance of appellate counsel claim. Rather, it was a necessary progression of the jurisprudence in Ohio that racial bias need not be demonstrated against a defendant personally because "if the juror's statement rises to a level of generality about a racial or ethnic group that indicates the juror's inability to be impartial in the particular case before him or her." *Bates* at 485.

Graham Fails to Show Resulting Prejudice

Assuming arguendo that Graham was able to demonstrate deficient appellate performance, he cannot demonstrate a reasonable probability of success had he presented those claims on appeal. Despite Graham's attempt to portray his case and trial court proceedings as having racial "red flags," his characterization fails. On Super Bowl Sunday, February 7, 2016, three friends were hanging out in an apartment in Kent, Ohio while three other friends were hanging out in a house in Ravenna, Ohio. *Graham*, 2020-Ohio-6700, at ¶ 3, 7. The one of the group in Kent sold drugs and one of the group in Ravenna planned an armed robbery. *Graham* at ¶ 4-5, 7. During the robbery of the apartment in Kent, Graham was left to guard two of the apartment friends who were seated on the couch with their hands up. One apartment friend looked at the other, words were briefly exchanged with Graham that he would shoot if the "look" happened again, he would "not shoot," and Graham shot and killed Nicholas Massa with a shot to the chest. *Id*. at ¶ 12. Race was not a factor in the murder of Massa.

Pretrial, the trial court denied racial prejudice questions on the long form jury questionnaire and stated that the excluded questions could be asked during voir dire. (10/3/16 Pretrial T.p. 74). Under Graham's jury questionnaire claim, there is no resulting prejudice when the excluded questions remained available to trial counsel during voir dire. Next, 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 individual voir dire proceedings provided the first opportunity to discuss with Prospective juror No. 38 her jury questionnaire health question response, the opportunity to remove Prospective juror No. 195 on grounds other than his racist statement, and to learn about Prospective juror No. 64 racist/TV Western views. Individual voir dire also revealed Portage

County prospective jurors follow jury instructions. Prospective juror No. 187 did not hesitate to report the racist statement she overheard while waiting her turn for individual voir dire. This allowed the trial court to question the others who were waiting and ensure impartiality.

Here, trial counsel made the decision to forgo his racial prejudice voir dire questions proposed at the jury questionnaire hearing. Circumstances had changed between the Pretrial hearing and general voir dire. Trial counsel knew this group of prospective jurors would quickly report any suspect issue, the completed long form jury questionnaires contained more information than required, and he had three days of one-on-one individual voir dire experience with this group of prospective jurors.

Contrary to Graham's contentions, a competent appellate attorney can decide to not raise an error regarding excluded race based jury questionnaire questions and more thoroughly explore on appeal the lacking voir dire questions even when the victim and accused are different races involving a capital crime. This remains true if the accused committed the crime in Portage County, Ohio, and if individual voir dire proceedings reveals three racist statements of prospective jurors who are not seated on the jury.

Graham's application for reopening did not demonstrate appellate counsel was deficient and did not demonstrate a reasonable probability of success had appellate counsel presented his proposed claims on appeal. Accordingly, the Supreme Court of Ohio properly denied his application for reopening under S.Ct.Prac.R. 11.06. 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,
VICTOR V. VIGLUICCI
Prosecuting Attorney
Portage County, Ohio

/s Pamela J Holder

PAMELA J. HOLDER
Assistant Prosecuting Attorney
Counsel of Record
Portage County Prosecutor's Office
241 South Chestnut Street
Ravenna, Ohio 44266
(330) 297-3850 (phone)
(330) 297-4594 (fax)
pholder@portageco.com

Counsel for Respondent