No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

VICTORIA DRAIN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition of Certiorari to The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled

OFFICE OF THE OHIO PUBLIC DEFENDER

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Capital Case

QUESTIONS PRESENTED

Counsel and capital defendants frequently clash over whether and what mitigating evidence to present in support of a sentence less than death. In Ohio, this has caused counsel to start submitting mitigating evidence under seal, not to be considered by the trial court. On a capital defendant's direct review, the Ohio Supreme Court is mandated by statute to conduct an independent sentence review by considering "all the facts and other evidence disclosed in the record." Ohio Rev. Code Ann. § 2929,05(A). The questions presented are:

1. **When a capital defendant does not completely waive mitigation, does the presentation of mitigating evidence become a strategic choice left to defense counsel?**

2. **Does the Ohio Supreme Court, when reviewing a capital sentence under Ohio Rev. Code Ann. § 2929.05(A), violate a defendant's Eighth Amendment rights under *Eddings v. Oklahoma*, 455 U.S. 104 (1982) when it refuses to consider mitigating evidence that was proffered and submitted on appeal but not presented as mitigating evidence at trial?**

PARTIES TO THE PROCEEDING

Petitioner, Victoria Drain, an Ohio death row inmate, was the appellant in the Ohio Supreme Court. Respondent, the State of Ohio, was the appellee in the Ohio Supreme Court.

STATEMENT OF RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- *State v. Victoria Drain*, Slip Opinion No. 2022-Ohio-3697, Ohio Supreme Court. Judgment entered October 19, 2022.
- *State v. Victoria Drain (f.k.a. Joel M. Drain*), No. 19 CR 35870, Warren County Common Pleas Court. Judgment entered May 19, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Victoria Drain respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court in this case.

OPINIONS BELOW

The opinion of the Ohio Supreme Court affirming Drain's convictions and death sentence on direct review is published as *State of Ohio v. Victoria Drain*, 2022-Ohio-3697, and is reproduced as Appendix A at A-1. The Ohio Supreme Court's Reconsideration Entry, filed December 27, 2022, denying motion for reconsideration is reproduced as Appendix B at A-57. The Warren County Court of Common Pleas Journal Entry, *State of Ohio v. Joel M. Drain*, Case No. 19CR35870, Sentencing Opinion, filed May 19, 2020, is reproduced as Appendix C at A-58.

JURISDICTION

In this petition, Victoria Drain seeks review of the decision in which the Ohio Supreme Court affirmed her convictions and death sentence on October 19, 2022. Drain thereafter sought reconsideration, which was denied by the Supreme Court on December 27, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). Drain's petition is timely filed by March 27, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

> compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Ohio Rev. Code Ann. § 2929.05(A) provides, in relevant part:

> [T]he supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. . . . the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

INTRODUCTION

This case raises the question of who controls the presentation of mitigating evidence: a defendant or her attorneys? This question is answered differently throughout the nation, causing injustice to capital defendants. Where a capital defendant is located dictates who decides what mitigation themes to present, which witnesses will testify, and what evidence the court or jury may consider when deciding the ultimate punishment. Though courts have largely protected a defendant's right to completely waive all mitigation, most commonly the issue is not that black and white. The conflict in presenting mitigation usually arises in the gray: the defendant wants to place restrictions on mitigation, either prohibiting certain witnesses, or limiting the presentation of specific traumas. Oftentimes, the defendant

only wants to make a statement on her own behalf. Defense counsel—who are entrusted with the grave responsibility of saving their client's life—must decide what to do when faced with the impossible choice between respecting the defendant's preferences or presenting compelling mitigating evidence that their professional judgment tells them could prevent a death sentence.

The law provides no clear answer. On the one hand, courts have traditionally held that a defendant's right to control the objectives of her defense is fundamental; on the other hand, courts have repeatedly held that death is different, and capital cases require more due process, not less.

Punishment by death—and thus, the processes involved in that ultimate determination—is understood as intrinsically distinct. "The fundamental respect for humanity" underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a heightened need for reliability when determining whether death is the appropriate punishment. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988). Capital cases are the only criminal case that dedicates an entire second trial to mitigation and the sentencing determination. And capital cases require heightened protections against arbitrariness and demand reliability beyond the typical criminal case. As such, we only allow specially trained and certified defense counsel to represent capital defendants in these highly specialized bifurcated trials. *See State Standards for Appointment of Counsel in Death Penalty Cases* (A.B.A. 2021). Yet, in some jurisdictions, we simultaneously allow a capital defendant to override strategic decisions about what specific evidence to present.

Further compounding the issue in Ohio, courts have recently developed an ad-hoc system by which mitigating evidence is proffered but never considered by the court. Counsel are submitting under seal all the mitigating evidence they "would have presented." Stated or unstated is the assumption that this evidence is meant purely to shield against a future ineffective-assistance claim. Once proffered in this manner, the evidence is summarily ignored by not only the trial court, but also by the Ohio Supreme Court, making it the singular form of evidence that is disregarded by the supreme court in its independent capital sentencing review. This practice does a disservice to capital defendants in Ohio, and begs the question of whom it serves, and why Ohio courts or lawyers tolerate it.

Ohio courts are imposing and upholding death sentences by consciously turning a blind eye to mitigating evidence that would otherwise require a life sentence. When the stakes are life and death, the Eighth Amendment demands more.

STATEMENT OF THE CASE

In April 2019, Victoria Drain was housed in the Residential Treatment Unit (RTU) at Ohio's Warren Correctional Institution[1] after an incident of life-threatening self-harm. Ohio's RTUs are specialized units that provide intensive psychiatric services to offenders who need more individualized mental health care than what can be provided in general population.

[1] Drain is a transwoman who was, and still is, housed in a male prison. Her gender identity was well documented at the time of the offense but was never acknowledged during her capital trial.

On April 13, Christopher Richardson was found unresponsive in Drain's cell. A-1 at ¶¶ 4-5. Drain surrendered to prison officials immediately. *Id.* at ¶ 5. She confessed, provided details of the incident, and fully cooperated with the investigation. *See id.* at ¶¶ 6-19. Richardson ultimately died from his injuries two days later. *Id.* at ¶ 20. In August, Drain was indicted with capital aggravated murder and appointed two capitally certified defense counsel. *Id.* at ¶ 22.

Drain waived trial by jury and pled no contest to capital aggravated murder.

On January 2, 2020—less than five months after her capital indictment—Drain wrote to the trial court asking to plead no contest and waive all mitigation. Dkt. # 186, *Entry and Order on Correspondence from Defendant*, Jan. 10, 2020. At the next pretrial on February 19, the trial court discussed with Drain the mechanics of moving forward with a plea and ordered another hearing to allow the court to hear from a psychologist regarding competency. Tr. Hrg. 02/19/2020, pp. 4-12. The trial court appointed Dr. Jennifer O'Donnell, who was initially retained as Drain's mitigation psychologist, to perform the competency evaluation on behalf of the court. *See id.* The evaluation addressed whether Drain was competent to waive a trial by jury and enter a plea of no contest to the indictment. Though not the focus or referral question of the evaluation, the report briefly addressed certain pieces of mitigating evidence in Drain's case. Dr. O'Donnell determined Drain was competent to waive jury and plead no contest. Tr. Hrg. 04/16/2020, p. 6.

At the final pretrial hearing on April 16, the parties, without further testimony, stipulated to Dr. O'Donnell's competency report. Tr. Hrg. 04/16/2020, p. 3.

The court engaged in a colloquy with Drain, found her jury waiver was knowing and voluntary, and accepted the jury waiver. *Id.* at pp. 8-21.

The court also questioned Drain's intentions for presenting mitigation. *Id.* at 4-6. At that point, Drain's desire to present mitigation had evolved from her original letter to at least presenting an unsworn statement. *Id.* The court made it clear that presenting an unsworn statement was not waiving mitigation. *Id.* at 37-38. Out of an abundance of caution, however, the trial court engaged in a colloquy with Drain about her understanding of mitigation and that presenting an unsworn statement was not a mitigation waiver. *Id.* at 39-40.

The trial court then convened a three-judge panel. Ultimately, on May 18, the three-judge panel conducted a plea hearing, where Drain entered a no contest plea, and the panel found Drain guilty of all counts in the indictment. Trial Tr. 1-85. The three-judge panel proceeded to the mitigation hearing that same day. *Id.* at 90.

Drain's willingness to offer mitigation evolved over time and became more permissive.

Early in the case, in November 2019, Drain resisted even the collection of records on her behalf and refused to sign releases for her defense team. A-1 at ¶ 84. But she later changed her mind and agreed to sign the release forms. *Id.* In her January 2, 2020 letter to the court requesting to plead guilty, Drain indicated that she wanted to waive the presentation of *all* mitigating evidence. *Id.* at ¶ 85. By February 19, however, Drain indicated she wanted to waive mitigation other than an unsworn statement. *Id.* at ¶ 86. At the final pretrial on April 16, Drain still maintained that she would present an unsworn statement. Tr. Hrg. 04/16/2020, pp.

4-6, 38-39. By the following month, at her May 18 plea and sentencing hearing, Drain agreed to the presentation of several forms of mitigating evidence. Trial Tr. 92-128; *See also* A-1 at ¶¶ 192-93 (Brunner, J., dissenting) ("Overall, these changes indicate that Drain's views on the presentation of mitigating evidence were evolving and becoming more permissive.").

During the mitigation hearing, Drain's counsel presented two witnesses on Drain's behalf: her cousin Miranda Shoemaker and a lifelong friend, Andrea Stanfield. Trial Tr. 92-105. Both expressed their love for Drain and their desire not to see her executed. *See id.* Drain also made an unsworn statement. *Id.* at 106-110. In Drain's unsworn statement she stated that she explicitly prevented defense counsel from allowing her fourteen-year-old daughter to testify or present evidence of her "dysfunctional childhood or upbringing." *Id.* at 107-08. Drain's unsworn statement mostly addressed the systemic failures of the juvenile criminal system, which victimized her as a child, and the impact of solitary confinement at such a young age. *Id.* at 107-09. Defense counsel also made a closing argument. *Id.* at 117-28.

Counsel submitted mitigating evidence under seal that they believed should be presented as Defendant's Exhibit A.

After the limited mitigation presentation, defense counsel asked the court to admit "Defendant's Exhibit A" (hereinafter "Exhibit A") into the appellate record under seal. *Id.* at 110-111. Exhibit A contained a mitigation report by psychologist Dr. O'Donnell and approximately 1900 pages of documentation, which included Drain's current prison records, publicly available court records, including some

documenting Drain's lawsuit seeking gender-affirming treatment in prison, and six interviews conducted by a mitigation specialist. A-1 at ¶ 196 (Brunner, J., dissenting). Contained in those records was evidence concerning Drain's gender dysphoria, mental health issues and diagnosed disorders, history of substance abuse, medical history and its impact on her mental health and decision-making, and her time spent incarcerated in both juvenile and adult facilities. *Id.* at ¶ 190.

Trial counsel represented to the court that Drain did not want the exhibit presented. Trial Tr. 110-111. But they wanted it made part of the record without it being considered in any way: "It's our desire that we would like to have it admitted into the record under seal, just as an exhibit. Certainly would be nothing that would be deliberated by the Court, but at least it's made part of the record." *Id.* at 111.

The State agreed it would be appropriate:

> to create a record that indicates there has been an effort on the part of defense counsel to present evidence, additional evidence of mitigation, which the defendant has indicated [she] does not want presented and I think it would be appropriate to the extent that a reviewing court would know that. The bottom line, defense counsel has done their duty and their responsibility and have been effective in their representation of the defendant and the defendant has simply exercised [her] right to take that representation and not to take that advice.

Id. The court agreed that "everything should be made part of the record in capital case but it's not coming in for any substance." *Id.* at 113. The panel took it under advisement, but delayed ruling until after the conclusion of the trial. *Id.* at 113-14.

The panel, without considering any of the evidence in Exhibit A, ultimately sentenced Drain to death after a short deliberation. *Id.* at 133. After imposing the death sentence, the court addressed Exhibit A: "It's difficult for the panel to make a

determination of what should be done with evidence that we have not seen nor did we consider for the purposes of our decision." *Id.* at 150-51. Ultimately, the court ruled that it would be submitted "solely for the purpose of appeal" to the Ohio Supreme Court. *Id.* at 151.

The Ohio Supreme Court determined Drain waived the presentation of mitigation and refused to consider Defendant's Exhibit A.

Appellate courts on review now have two conundrums to work out—the extent to which Drain had a right to control the specific evidence presented at her mitigation hearing, and whether a sealed exhibit, offered for no evidentiary purpose, can be included in the Ohio Supreme Court's independent capital sentence review.

In determining who had the final say on what mitigation to present—defense counsel or Drain—the Ohio Supreme Court relied on Sixth Circuit case law that holds the Constitution does not prohibit competent capital defendants from waiving mitigation. A-1 at ¶ 75 (quoting *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005)). Similarly, Ohio case law holds that defense counsel does not render ineffective assistance when they defer to a client's wish to not present mitigation. *Id.* (citing *State v. Monroe*, 105 Ohio St.3d 384, 400-01 (2005)). The Ohio Supreme Court was not convinced that Drain's only prohibition on mitigation was Drain's daughter's testimony and Drain's childhood—rather, they extrapolated, from defense counsel's assertion that Drain did not want Exhibit A to be presented, that Drain had explicitly waived mitigation of all topics within those documents. A-1 at ¶ 86.

The Ohio Supreme Court is obligated by statute to independently review every death sentence by reweighing the aggravating circumstances and mitigating factors

during a capitally sentenced defendant's appeal as of right. Ohio Rev. Code Ann. § 2929.05(A). The statute requires the Ohio Supreme Court to independently weigh "all of the facts and other evidence disclosed in the record" when conducting that independent sentence evaluation. *Id*. The Ohio Supreme Court declined to consider Exhibit A during that independent review as "other evidence disclosed in the record." A-1 at ¶¶ 157, 163. As a result, the compelling mitigating evidence submitted in Exhibit A has not been considered by any court in Ohio.

REASONS FOR GRANTING THE WRIT

I. When there is not a complete mitigation waiver, counsel should have the final say in what mitigating evidence to present.

The question that Drain's trial counsel faced—and now the Ohio courts have faced upon review—is the extent to which Drain had a right to control the specific evidence presented at her mitigation hearing after declining to make a complete mitigation waiver. This situation is one that capital defendants and their counsel face regularly across the nation. Yet, the jurisdiction dictates the outcome. There is a conflict of authority as to whether and what extent defendants are permitted to control the presentation of mitigating evidence during the penalty phase of a capital trial.

It is true that the assistance of counsel is not an absolute or complete surrender of control. *McCoy v. Louisiana*, __ U.S. __, 138 S.Ct. 1500, 1508 (2018). At trial, a defendant has the ultimate authority to make certain decisions that are regarded as fundamental: whether to plead guilty, waive a jury, testify on her own behalf, take an appeal, or represent herself. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). And the

accused is tasked with deciding whether to assert her innocence. *McCoy*, 138 S.Ct. at 1508.

But because "trial management is the lawyer's province," counsel is responsible for making "decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" *Id.* (quoting *Gonzalez v. United States*, 533 U.S. 242, 248 (2008)). Outside of the basic rights that counsel cannot waive without a knowing and voluntary waiver by the defendant, "the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

The distinction between what is left to counsel and what is strictly reserved for the defendant goes to what the defendant's objectives are. *McCoy* at 1508 (citing *Weaver v. Massachusetts*, 582 U.S. __, 137 S.Ct. 1899, 1908 (2017). A decision regarding what the client's objectives *are* belong to the client; a strategic decision about how to best *achieve* a client's objectives belong to counsel. *Id.* Like in *McCoy*, when a defendant asserts her objective is to maintain innocence, the lawyer must abide by that objective and cannot concede guilt. *Id.* at 1509. But in order to achieve the objective of maintaining a client's innocence, counsel are not required to call every witness, or make every objection that the client insists upon. *See id.* at 1508. An attorney is also not constitutionally required to present any given issue to the court upon a defendant's insistence when counsel determines, as a manner of professional

judgment, that the issue should not be presented to the court—even when the issue would be colorable. *Barnes*, 463 U.S. at 751.

Following this logic, without a complete mitigation waiver, the question of what specific topics of mitigation to present should turn on what will best achieve the client's objective of not receiving a death sentence. But that is not the rule that courts are applying. Rather, the majority of courts appear to allow a defendant to "waive" whatever mitigating evidence the defendant prefers not to present, often without any kind of formal waiver.

In attempting to answer whether defendant or counsel control the mitigation presentation, the split among the circuit courts boils down to whether control over the presentation of mitigation is a fundamental right, giving a competent capital defendant full responsibility for choosing how to present the mitigating evidence, or whether these are strategic choices left to counsel. Generally, this issue is analyzed under *Strickland v. Washington*, 466 U.S. 668 (1984), and most courts have held that counsel do not render ineffective assistance when they concede to the defendant's restrictions on the presentation of mitigation. Though couched under *Strickland*, the ultimate conclusion turns on whether the right to waive mitigation is more aligned with a fundamental right (i.e, the right to plead guilty or testify) or whether the presentation is a matter of strategy and trial tactic. And the issue of who maintains control over mitigation strategy becomes even more important when a defendant wishes to forego some, but not all, mitigating evidence, as Drain did in this case.

Conflicting rules among jurisdictions lead to unjust results for capital defendants in a situation that arises frequently in capital cases. This case presents this Court with the opportunity to provide clear guidance on how to allocate responsibility between counsel and defendant on the questions of whether and how to present mitigation.

A. There is a split among the circuit courts about whether presenting mitigation is a fundamental right reserved for the defendant or a strategic decision left to counsel.

Circuit courts are divided on who controls the presentation of mitigating evidence. The majority grants the defendant the right to restrict or otherwise control mitigation—though the law is often muddled as to whether this is a fundamental right granted to a defendant, or merely a determination that it is not ineffective for counsel to cede to their client's wishes. The minority view does not allow capital defendants to override counsel's strategic decisions on what mitigation to present—the choice is left strictly to counsel.

The majority of circuit courts take the position that competent capital defendants have the right to control whether and how mitigating evidence is presented. The Eighth Circuit, relying on the ability of competent capital appellants to waive review of their death sentences, "see[s] no reason why a defendant may not also be found competent to waive the right to present mitigating evidence that might forestall the imposition of such a sentence in the first place." *Singleton v. Lockhart*, 962 F.2d 1315, 1322 (8th Cir. 1992).

Similarly, the Seventh Circuit allows a competent defendant to "make major decisions about his defense," if the defendant "insisted." *Wallace v. Davis*, 362 F.3d 914, 920 (7th Cir. 2004). There, the court compared presenting mitigation to presenting a defense, which is a choice reserved for the defendant. *Id.* The court disagreed that counsel should be "obliged to override the client's instructions" as long as the defendant made an informed decision. *Id.*

Though the majority view grants capital defendants the right to control the presentation of mitigation, that decision leads to unjust results. The *Wallace* court admits, "[a] good lawyer tries to persuade the accused to make a wise decision about testifying (or keeping silent) at trial, and about presenting a defense[.]" 362 F.3d at 920. But "if the decision to forbid counsel to proceed [with presenting mitigation] was unwise, [the defendant] must accept the consequences." *Id.*

In *Ryder v. Warrior*, the Tenth Circuit acknowledged "the tragic reality in this case: that Mr. Ryder's untreated mental illness may have influenced his decision to withhold mitigating evidence from the jury. Thus, the condition responsible for Mr. Ryder's unwillingness to present mitigating evidence could have been the very evidence that would have persuaded the jury not to impose the death penalty." 810 F.3d 724, 749 (10th Cir. 2016). The court lamented, "while we recognize the existence of compelling mitigating evidence that the jury never heard, controlling precedent and the narrowness of review permitted under AEDPA dictate that we must affirm the district court's denial of habeas relief on this claim." *Id.*

In jurisdictions that have granted defendants the right to control the presentation of mitigating evidence, this right has evolved primarily in an implicit fashion: through the denial of *Strickland* claims. The Sixth Circuit's piecemeal approach exemplifies the conflicting results that arise from analyzing the question in this way. The Sixth Circuit has explicitly stated that "the Constitution does not prohibit a competent capital defendant from waiving the presentation of mitigation evidence." *Tyler v. Mitchell*, 416 F.3d at 504. The court seemingly adopts the Ohio Supreme Court's determination in its opinion below that "no societal interest counterbalances [the defendant's] right to control his own defense." *Id.* (quoting *State v. Tyler*, 50 Ohio St.3d 24 (1990)). But the Sixth Circuit's apparent treatment of mitigation as a fundamental right is extrapolated from *Strickland* case law. It first determined that "counsel is not constitutionally ineffective when a competent defendant prevents the investigation and presentation of mitigation evidence." *Id.* at 503-04 (citing *Coleman v. Mitchell*, 244 F.3d 533, 544-46 (6th Cir. 2001)). From that determination, the Sixth Circuit found "it follows that" mitigation waivers are constitutional. *Id.*

Courts that apply the *Strickland* framework essentially conflate the issue—analysis under *Strickland* deems the presentation of mitigation a strategic choice left to counsel, but simultaneously grants the defendant complete control of her defense. For instance, the Eleventh Circuit grants the defendant authority to restrict counsel's presentation of mitigating evidence. *See, e.g.*, *Krawczuk v. Sec'y Fla. Dep't of Corr.*, 873 F.3d 1273, 1293-94 (11th Cir. 2017). But if an *attorney* decides not to present

mitigating evidence on behalf of her client, the Eleventh Circuit also defers to that decision as a "tactical choice." *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir. 1994) (quotation omitted)). *See also Barnes*, 463 U.S. at 751 (holding that a defendant has no constitutional duty to raise every nonfrivolous appellate issue requested by the defendant). And the Fifth Circuit has declined to find counsel ineffective when they stopped the presentation of mitigation at the request of a competent defendant because his "'directions were entitled to be followed.'" *Ramirez v. Stephens*, 641 Fed. Appx. 312, 327 (5th Cir. 2016) (quoting *Lowenfield v. Phelps*, 817 F.2d 285, 292 (5th Cir. 1987)).

How can decisions regarding the presentation of mitigation be deemed tactical, to be decided only by counsel, but then also require counsel to concede to their client's specific demands in whether, what, or who to present? Particularly when counsel, in their professional judgment, determine that there is an abundance of mitigating evidence that should be presented to fulfill a client's ultimate objective to receive a life sentence? The majority position's unquestioning acceptance of mitigation waivers papers over the reality that many defendants do not want to waive all mitigation, but only some, which will inevitably raise the question of exactly what the waiver encompassed and how granular or broad a defendant's requests must be.

The minority view among the circuits is that decisions about mitigating evidence are strategic, so counsel alone controls its presentation. In *United States v. Roof*, the defendant opposed the presentation of mental-health-related mitigating evidence, but the trial court instructed the defendant that he could not prohibit

counsel from presenting the evidence because "any competent counsel would insist on asserting a mental health defense." 10 F.4th 314, 348 (10th Cir. 2021). Rather than allow counsel to present the mental health evidence, the defendant elected to represent himself in the mitigation phase of the trial, and he was found competent to do so. *Id.* at 350. Essentially, only by acting as his own lawyer was Roof allowed to make the specific decisions of what mitigating evidence to present.

On appeal, the Fourth Circuit affirmed that Roof had no right to control his attorney's presentation of mitigating evidence. It reasoned: "When one 'chooses to have a lawyer manage and present his case,' he cedes 'the power to make binding decisions of trial strategy in many areas.'" *Id.* at 353 (quoting *Faretta v. California*, 422 U.S. 806, 820 (1975)). In response to Roof's argument that avoiding the presentation of mental health evidence was an "objective" in his case, it stated, "Roof's position would allow a defendant to exercise significant control over most important aspects of his trial—such as the presentation of particular evidence, whether to speak to a specific witness, or whether to lodge an objection—as long as he declares a particular strategy or tactic to be of high priority and labels it an 'objective.' That cannot be." *Id.*

The court also followed several other circuits in concluding that Roof's Eighth Amendment right to have mitigating mental health evidence presented did not supersede his Sixth Amendment right to represent himself; in other words, while the defendant could not prohibit counsel from presenting an effective defense, he was constitutionally permitted to forego the presentation of mental health evidence if he

represented himself. *Id.* at 356-58. The Fifth Circuit reached a similar conclusion in *United States v. Davis*, reasoning that a self-representing defendant must be "given the opportunity to employ his own strategy," as long as he was acting as his own attorney. 285 F.3d 378, 385 n.8 (5th Cir. 2002).

Similarly, in concluding that counsel's decision to not introduce additional mitigating evidence at the defendant's request was a "reasonable tactical choice," the Tenth Circuit took the position that the decision whether to present mitigation was not a "fundamental right" that requires a defendant's waiver. *Brecheen v. Reynolds*, 41 F.3d 1343, 1367-68 (10th Cir. 1994). Counsel are required to "discuss this type of strategic matter with the client, given the client's right to assist in his own defense," but the "ultimate decision whether to introduce this type of evidence is vested in trial counsel." *Id.* at 1369.

The closest this Court has come to addressing these issues was *Schriro v. Landrigan*, 550 U.S. 465 (2007). There, the defendant waived the presentation of all mitigation at trial. *Id.* at 469. Counsel attempted to present two witnesses and the trial court required counsel to proffer their testimony into the record. *Id.* at 469-70. The review of the district court's decision turned on the prejudice prong of *Strickland*, with this Court determining that Landrigan's "mitigation evidence was weak" and agreeing with the District Court's finding that Landrigan was not able to establish prejudice "based on his counsel's failure to present the evidence he now wishes to offer." *Id.* at 480-81. This Court declined to articulate any particular rule about the extent to which a capital defendant may control the mitigating evidence (particularly

where a defendant only wishes to control mitigation, not waive it completely), and it declined to articulate a procedure for what is required for a defendant to waive mitigation. *See id.* at 478-81.

Notably, there were significant problems with the investigation conducted by defense counsel in *Landrigan*, and the dissent was greatly concerned that the majority did not impose the requirement for a mitigation waiver to be knowing, intelligent, and voluntary. *Id.* at 483-87 (Stevens, J., dissenting). The dissent also demonstrates one of the great injustices that occurs in these cases—significant mitigating evidence never gets considered by sentencers, and individuals are ultimately sentenced to death who might never have received a death sentence had that evidence been presented. *Id.* at 497-99 (Stevens, J., dissenting).

Because this Court has not created a rule to explicitly determine how to handle partial mitigation waivers, the jurisdiction dictates the outcome of who gets to decide what mitigating evidence to present. The better option, which aligns more closely with the minority view, is to grant the defendant the right to completely waive mitigation, in accordance with her right to set the objectives of trial, but to grant an attorney the right and responsibility to control the presentation of mitigating evidence in the event that the defendant wants some mitigation presented to pursue a life sentence. In other words, without a *complete* mitigation waiver, counsel, utilizing their professional judgment, get to decide the specifics of the mitigation presentation. Such a rule would provide the consistency that the courts below need,

guard against the arbitrary imposition of the death penalty, and comport with the extra due process granted in capital cases.

B. Guidance is necessary to prevent the arbitrary imposition of the death penalty across the nation.

It is critical for this Court to provide guidance on the extent to which a capital defendant has the right to control her mitigation presentation. There is quite often conflict between counsel and defendant over what mitigating evidence to present, and the conflict arises even when the objective of obtaining a life sentence is the same for both counsel and defendant.

Even among the states that allow capital defendants to completely or partially waive mitigation, those mitigation hearings vary vastly. For example, in Arizona, when there is a complete waiver of mitigation, trial courts are directed to ensure competency and inquire on the record that the waiver was knowing, intelligent, and voluntary. *State v. Hausner*, 230 Ariz. 60, 85-86 (2012). Similarly in Ohio, a complete waiver of mitigation requires a defendant to be competent and a colloquy on the record to determine that the waiver is knowing and voluntary. *State v. Ashworth*, 85 Ohio St.3d 56, 62 (1999). But Ohio appellate courts have absolved trial courts of even that responsibility where the defendant presents *any* mitigation, even as little as an unsworn statement, *see e.g.,*; *State v. Barton*, 108 Ohio St.3d 402, 409-410 (2006); *State v. Monroe*, 105 Ohio St.3d 384, 396-397 (2005), or even if mitigation was elicited only during the culpability phase of the trial, *see e.g., State v. Short*, 129 Ohio St.3d 360, 370-371 (2011) ("Presentation of mitigating evidence during *either* the guilt

phase or the penalty phase of a capital-murder trial relieves the trial court of the duty to conduct an *Ashworth* inquiry.") (quoting *Barton*, 108 Ohio St.3d at 410).

Complicating the disagreement further, in North Carolina, a defendant is not required to "acquiesce in a trial strategy to present mitigating evidence where the defendant and his counsel reach *an absolute impasse*." *State v. Grooms*, 353 N.C. 50, 85 (2000) (emphasis added). North Carolina focuses on whether the conflict is a true impasse; otherwise counsel must present the mitigating evidence. *See id.* (citing *State v. Wilkinson*, 344 N.C. 198, 212 (1996)). Counsel is required to make a record of the circumstances, including "the advice given to the defendant, the reasons for the advice, the defendant's decision, and the conclusion reached." *Id.*

In contrast, South Carolina views the presentation of mitigating evidence as a "tactical decision made by [] trial counsel and [] reviewed on a case by case basis." *State v. Winkler*, 388 S.C. 574, 588 (2010). There, it is not error for counsel to present mitigating evidence that the defendant does not want introduced. *Id.* at 587-88 (defense counsel presenting mitigating social history evidence and calling the defendant's family members as mitigation witnesses over the defendant's objection was not error because it was a strategic decision for the purpose of humanizing the defendant to the jury).

With such inconsistency among jurisdictions, there is no way to ensure the death penalty is not being imposed arbitrarily in violation of the Eighth Amendment. Waiving mitigation cuts against its very purpose: the consideration of mitigating evidence is a "constitutionally indispensable part of the process of inflicting the

penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The sentencer in a capital case should "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). This Court was specifically concerned in *Lockett* about "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 605. Yet that is precisely what occurs when capital defendants can override their counsel's strategic decisions about the specific parameters of their mitigation hearings.

Without a clear path forward, the jurisdiction dictates the outcomes for capital defendants. As a result, the integrity of the most serious sentencing determinations allowed by law are at risk. When counsel is unable to present available mitigating evidence to the sentencer, the sentence cannot make an accurate and proper determination of literal life or death. The Court should announce a clear standard under which counsel control strategic decisions surrounding mitigation absent a complete waiver of mitigation by the defendant.

II. Ohio's rule violates the Eighth Amendment by disregarding available mitigating evidence on appellate review.

The evolution of this Court's jurisprudence recognizes that mitigation is essential to ensure death sentences comport with the Eighth Amendment. In 1976, this Court held that the automatic imposition of the death penalty was unconstitutional because the Eighth Amendment required consideration of mitigating evidence. *Woodson*, 428 U.S. at 304. Two years later, this Court struck

down Ohio's then-existing death penalty statute because it precluded the consideration of relevant mitigating factors, creating "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605. Then in 1982, this Court reversed a death sentence where the trial court refused to consider certain mitigating evidence that had been proffered by a defendant. *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982).

And this Court has applied the same standards to appellate courts. In 1991, this Court reversed a death sentence where the state high court affirmed a death sentence without considering the mitigating circumstances. *Parker v. Dugger*, 498 U.S. 308, 321-22 (1991). The Court commented, "[w]e have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Id.* (citing *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) and *Gregg v. Georgia*, 428 U.S. 153 (1976)). Mitigating evidence is so essential that a death sentence cannot stand if the sentencer or appellate court refused to consider any mitigating evidence.

The instant case presents a unique and troubling situation in which the Ohio Supreme Court has done just that. Ohio has now developed a structure under which mitigating evidence is proffered and placed into the appellate record under seal, but is not considered by the trial court, nor by the Ohio Supreme Court in its independent sentence review. Sealed mitigating evidence has now been submitted for no evidentiary purpose in two cases in the state. *See* A-1 at ¶ 157; *State v. Clinton*, 153 Ohio St.3d 422, 467 (2017). By acquiescing to this unusual procedure, the Ohio

Supreme Court has done exactly what Florida Supreme Court did in *Parker* and what the lower court did in *Eddings*: turned a blind eye to mitigating evidence that was available to it and that would have mandated against a death sentence.

This Court should accept jurisdiction to consider the issue of whether the Ohio Supreme Court's refusal to consider Defendant's Exhibit A, as a matter of law, subjected Drain to cruel and unusual punishment. Even if this Court concludes that Drain had the absolute right to control the mitigation presented in her case, this is a distinct issue of great importance. Because the Ohio Supreme Court disregarded Exhibit A in its independent review, it failed in its duty to consider all available mitigating evidence proffered by Drain. The Court both *could have* considered Exhibit A on appeal, and *was required to* consider Exhibit A in upholding its duties under the Eighth Amendment. The constitutional error here supports summary reversal. In the alternative, this Court should grant the petition and order full merits review of this constitutional claim.

A. The Ohio Supreme Court's specialized sentencing role in capital cases requires it to consider any and all mitigating evidence.

The Ohio Supreme Court was well within its power to consider Exhibit A in its independent sentence review. Simply put: although it was not submitted into evidence, Exhibit A was made part of the record for purposes of appeal, and the court had a statutory duty to consider the entire record in its independent sentencing determination. *See* Ohio Rev. Code Ann. § 2929.05(A). The court's statutory duty exists independently of the mitigation phase at trial. It must consider *any* mitigating evidence in the case, even if it was not submitted for that purpose at trial. *See id.* But

in the context of the evidence proffered here, the court has created an exception by which it ignores certain mitigating evidence that it was required by law to consider in determining whether death was appropriate for Drain.

The trial court unambiguously stated, "this evidence is solely for the purpose of appeal and to be preserved in the event there is a post-conviction proceeding." Trial Tr. 151. It went on to explain: "I am going to order that Exhibit A be made part of the record under seal, and that will be subject to review in this case by the Supreme Court . . . we are making a part of the record for their benefit." *Id.*

Counsel's purpose in proffering the exhibit is less clear. Defense counsel did not state the purpose of Exhibit A other than to say, "[i]t's our desire that we would like to have it admitted into the record under seal, just as an exhibit. Certainly would be nothing that would be deliberated by the Court, but at least it's made part of the record." *Id.* at 110-111. The State assumed that the exhibit was offered for the purpose of refuting a future ineffective-assistance claim, stating, "[t]he bottom line, defense counsel has done their duty and their responsibility and have been effective in their representation of the defendant." *Id.* at 111. Assuming that the State was correct that the only function of Exhibit A was to refute a future ineffective-assistance claim, this defense exhibit had no true evidentiary purpose: it was submitted to protect Drain's counsel rather than to save Drain's life.

Under Ohio law, however, the trial court's purpose for entering the mitigating evidence into the appellate record does not matter to the Ohio Supreme Court's independent sentence review. Ohio law states that in a capital case, the Supreme

Court "shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances . . . outweigh the mitigating factors in the case." Ohio Rev. Code Ann. § 2929.05(A). This provision grants the Ohio Supreme Court a unique responsibility in capital sentencing. It must make its own assessment of all the "mitigating factors present in the case," not only the evidence specifically entered for mitigation purposes. In doing so, it affords no deference to the trial court. *State v. Adams*, 144 Ohio St.3d 429, 473 (2015). The supreme court may only affirm a death sentence when it is independently "persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case." Ohio Rev. Code. Ann. § 2929.05(A)

In all other circumstances, the Ohio Supreme Court takes this directive very seriously. In its independent sentence review, the court does not limit its consideration only to mitigating evidence that was presented during the mitigation phase. In fact, the court has routinely considered mitigating evidence that was submitted for other purposes, even where a defendant waived the presentation of mitigating evidence completely. In *State v. Obermiller*, the defendant fully waived mitigation and did not even make an unsworn statement. 147 Ohio St.3d 175, 204 (2016). The court stated, "irrespective of Obermiller's decision to forgo the presentation of mitigating evidence, R.C. 2929.05(A) requires us to 'review and independently weigh *all of the facts and other evidence disclosed in the record in the*

case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case.'" *Id.*, *see also State v. Vrabel*, 99 Ohio St.3d 184, 198 (2003) (same where the defendant presented only an unsworn statement).

Other case law confirms that the Ohio Supreme Court regularly considers all "mitigating factors present in the case," not only the evidence that was submitted during the mitigation phase. Ohio Rev. Code Ann. § 2929.05(A). In *State v. Fry*, the defendant refused to present mitigation to the jury beyond a statement by trial counsel; however, counsel proffered a psychological evaluation that "outlined the mitigation that would have been presented to the jury if Fry had permitted it." 125 Ohio St.3d 163, 200 (2010). The trial court and Ohio Supreme Court both considered the evaluation in sentencing, even though the defendant had waived mitigation before the jury. *Id.* at 200-201. And the Ohio Supreme Court routinely considers competency evaluations, even when those evaluations were not presented for the purpose of mitigation. *See e.g., Clinton*, 153 Ohio St.3d at 470-74; *State v. Short*, 129 Ohio St.3d at 386; *State v. Mink*, 101 Ohio St.3d 350, 367 (2004); *Obermiller*, 147 Ohio St.3d at 204-06. The court even did so here. A-1 at ¶¶ 164-165, 176.

Thus, while Ohio law gives a defendant the ability to control what mitigating evidence is presented *at trial*, Ohio law does *not* give a defendant the ability to control what mitigating evidence is considered in the Ohio Supreme Court's independent reweighing. *Compare Windom v. Sec'y, Dep't of Corr.*, 578 F.3d 1227, 1244 n.8 (11th Cir. 2009) (noting that "although Windom agreed to waive the presentation of

mitigation evidence to the *jury*, he did not waive the presentation of mitigation evidence to the *judge*.") However, in this case—and in *Clinton* before it—the supreme court selectively declined to consider mitigating evidence that was not presented at trial but nevertheless disclosed for no evidentiary purpose.

The Ohio Supreme Court had before it approximately 1900 pages of mitigating evidence. A-1 at ¶¶ 44, 71, 94, 196. If that evidence had been presented, "its cumulative impact would have been significant and Drain likely would not have received a death sentence. She is not what is sometimes referred to as 'the worst of the worst.'" *Id.* at ¶ 197 (Brunner, J., dissenting). In failing to consider such evidence, like the *Eddings* and *Parker* courts decades ago, the Ohio Supreme Court willfully ignored mitigating evidence that it was required by law to consider.

B. The Ohio Supreme Court's refusal to consider Exhibit A runs counter to this Court's jurisprudence that a sentencer must consider mitigating evidence before sentencing a defendant to death.

The Eighth Amendment, as this Court has decreed time and again, requires consideration of *any* evidence relevant to the decision whether to sentence a defendant to death. The Ohio Supreme Court's refusal to consider substantial mitigating evidence that was filed under seal runs contrary to that dictate. The Ohio Supreme Court, based purely on its 2017 decision in *Clinton*, 153 Ohio St.3d 422, refused to consider Exhibit A as a matter of law. In doing so, it ignored "significant mitigating evidence . . . including evidence concerning her gender dysphoria, her mental-health issues and diagnosed disorders, her history of substance abuse, her medical history and the effect that it has had on her mental health and decision-

making, and her time spent in juvenile facilities and other facilities." A-1 at ¶ 195 (Brunner, J., dissenting). In closing its eyes to the mitigation at the heart of this case, the Ohio Supreme Court violated Drain's Eighth Amendment rights.

This Court has reiterated "the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308 (1991). Appellate review provides "a means to promote the evenhanded, rational, and consistent imposition of death sentences . . . ." *Jurek v. Texas*, 428 U.S. 262, 276 (1976). This is especially true in Ohio, where the highest court not only sits as an ordinary appellate court, but also conducts a complete and independent review of the aggravating circumstances and mitigating evidence. Ohio Rev. Code Ann. § 2929.05(A). Neither a sentencing court nor an appellate court may refuse to consider any constitutionally relevant mitigating evidence. *Eddings*, 455 U.S. at 113-15; *Parker*, 498 U.S. at 322.

The Ohio Supreme Court thwarted this principle when it categorically refused, as a matter of law, to consider or give any effect to the substantial mitigating evidence contained in Exhibit A. As detailed above, the court declined to consider Exhibit A on the authority of its prior holding in *Clinton*, 153 Ohio St.3d 422. There, the court refused to consider evidence submitted under seal as part of its statutory duty to consider "facts and other evidence disclosed in the record" mandated by Ohio Rev. Code Ann. § 2929.05. The court explained that "Clinton deliberately chose to present only his unsworn statement in mitigation after being fully advised of his rights to present mitigating evidence in his behalf." *Clinton*, 153 Ohio St.3d at 468.

The lower court's refusal to examine Exhibit A conflicts with this Court's directives in *Eddings* and *Parker*. In *Eddings*, this Court held that a trial court could not disregard certain mitigating evidence as a matter of law. 455 U.S. at 113-15. *See also Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (holding that the trial court could not restrict the jury's consideration to only statutory mitigating factors); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (holding that trial court could not prevent presentation of mitigating evidence regarding good behavior in jail). In *Parker*, this Court applied the same rule to appellate courts, reversing the Florida Supreme Court's affirmance of a death sentence because the court had "affirmed Parker's death sentence without considering the mitigating circumstances." *Parker*, 498 U.S. at 322. This Court held that the "affirmance was invalid because [the Florida Supreme Court] deprived Parker of the individualized treatment to which he is entitled under the Constitution." *Id.* The mitigating evidence within Exhibit A is the exact information that *Eddings* and *Lockett* require the sentencer to consider before imposing death, but the Ohio Supreme Court disregarded Exhibit A entirely in its independent sentencing evaluation. Instead, the majority was left to consider the minimal presentation by counsel and a competency evaluation that provided only a cursory discussion of Drain's mental health history in the context of whether she was competent to waive jury. A-1 at ¶ 164.

Had the court considered Exhibit A, it would have seen that the mitigating evidence in this case went far beyond the confines of the competency evaluation and the minimal evidence presented at Drain's sentencing hearing. Exhibit A would have

revealed in detail Drain's mental health struggles, her horrific treatment at youth correctional facilities, her gender dysphoria and long-established identity as a transgender woman, and other powerful mitigating factors. By their nature, competency evaluations are much different than full mitigation mental health evaluations, and one cannot be substituted for the other.

Additionally, the psychologist evaluating Drain's competency made serious errors in her assessment that would have been readily apparent by a review of the records in Exhibit A. The records explained Drain's mental health history and demonstrated the impact that her history of incarceration has had on her decision-making. And Drain's treatment records would have shown that the psychologist's dismissal of Drain's gender identity, as well as much of the trauma in her past, was a warning sign that the psychologist (and Drain's trial counsel) fundamentally did not understand central aspects of her life and identity. This, and many other mitigating aspects of Drain's life, should have been considered by the court.

The Eighth Amendment requires consideration of *any* evidence that is relevant in determining whether a person is sentenced to death. The Ohio Supreme Court created, and has now twice imposed, a rule that demonstrably violates *Eddings* and *Parker* because it tells the sentencer that "as a matter of law [it is] unable even to consider the evidence" if defense counsel proffers mitigation under seal. *Eddings*, 455 U.S. at 113. The court below, in fulfilling its statutory obligation to independently review a capital sentence, has a constitutional duty to consider all of the proffered evidence, including the material in Exhibit A.

This Court should grant the petition and summarily reverse the decision of the court below. In the alternative, this Court should grant the petition and order full merits review of this constitutional claim.

CONCLUSION

For the foregoing reasons, Petitioner Victoria Drain respectfully asks this Court to grant her petition for writ of certiorari.

Respectfully submitted,

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