No. 22-7135

In the Supreme Court of the United States

VICTORIA MICHELLE DRAIN,

Petitioner,

v.

OHIO,

Respondent.

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

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

DAVID P. FORNSHELL*
Warren County Prosecuting Attorney
**Counsel of Record*
Warren County Prosecutor's Office
520 Justice Drive
Lebanon, Ohio 45036
P: 513-695-1325
F: 513-695-2962
david.fornshell@warrencountyprosecutor.com

Counsel for Respondent
State of Ohio

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether this Court should grant a writ of certiorari to review Petitioner's claim that a capital defendant's counsel is obligated to present mitigating evidence at trial against the defendant's wishes and that counsel is constitutionally ineffective when he or she abides by the defendant's express limitations on the presentation of mitigating evidence.
2. Whether this Court should grant a writ of certiorari to review Petitioner's claim that a state supreme court, in its independent review of a death sentence, is required to consider information that the defendant chose not to present at trial.

LIST OF PARTIES

The Petitioner is Victoria Michelle Drain, an inmate at the Ohio State Penitentiary in Youngstown, Ohio.

The Respondent is the State of Ohio.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

State of Ohio v. Drain, 2022 OH 4617, 200 N.E.3d 265 (Dec. 27, 2022 Decision of Supreme Court of Ohio denying Motion for Reconsideration)

State of Ohio v. Drain, 2022 OH 3697U, -- N.E.3d -- (Oct. 19, 2022 Opinion of Supreme Court of Ohio affirming conviction and sentence)

State of Ohio v. Drain, No. 19CR35870 (May 19, 2020) (Warren County Common Pleas Court, Judgment Entry of Sentence on Aggravated Murder with Death Specifications Pursuant to R.C. § 2929.03(F))

STATEMENT OF JURISDICTION

This Court has jurisdiction to review decisions from the highest court of a State involving a federal question. 28 U.S.C. § 1257; *Pieper v. American Arbitration Ass'n, Inc.*, 336 F.3d 458, 461 (6th Cir. 2003). Section (a) of 28 U.S.C. § 1257 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction. It is Respondent's position, however, that this case is inappropriate for the exercise of this Court's discretionary jurisdiction. The state court's decision is based on the unique facts of this case, the second question presented involves, in part, the state court's application of a state statute, the decision is not repugnant to a provision of the United States Constitution, and it is not inconsistent with a decision of this Court.

STATEMENT OF STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

STATUTES

28 U.S.C. § 1257 State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Ohio Rev. Code Ann. § 2929.05(A) Appellate review of death sentence

Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The court of appeals and the 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. In determining whether the

sentenced of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or 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

A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI

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 defence.

U.S. Const. amend. VII

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

STATEMENT OF THE CASE

On Saturday, April 13, 2019, Petitioner Victoria Michelle Drain[1] (hereinafter "Defendant") murdered Christopher M. Richardson. (5/18/20 Transcript of Proceedings ("T.p") 31-32; State's Exhibit 2, 19) Both Defendant and Richardson were inmates in Unit 1C, the residential treatment unit ("RTU") of Warren Correctional Institution in Lebanon, Warren County, Ohio. (5/18/20 T.p. 31, 35, 75-76; State's Exhibit 19) On that date, Defendant was serving a prison sentence of thirty-eight years to life for aggravated murder against one victim, grand theft, and felonious assault against a separate victim in cases out of Hancock County, Ohio. (5/18/20 T.p. 72-73; State's Exhibits 19, 33, 34)

Defendant was in a single-person cell because of her security level. (5/18/20 T.p. 77; State's Exhibit 19) On April 13, 2019, at approximately 6:16 p.m., during a range check, Corrections Officer Justin Crowder observed blood drops and bloody footprints on the stairs to the second floor. (5/18/20 T.p. 34-35; State's Exhibits 2, 5, 6, 7) Officer Crowder followed the blood trail to Defendant's cell on the second floor. (5/18/20 T.p. 35, 38; State's Exhibits 2, 19) Defendant's cell door was closed and locked at that time, and there was a piece of card stock and a TV or radio antenna placed in the window to the cell door, which blocked the view of the inside of the cell. (5/18/20 T.p. 43-44) Officer Crowder and Officer Long opened the cuff port of the cell door and observed a large amount of blood inside the cell. (5/18/20 T.p. 43; State's Exhibit 9) The officers unlocked and opened the door and found Richardson laying in the corner of the cell, viciously beaten, bloody and unresponsive, with a sheet over his face. (5/18/20 T.p. 35, 43-45, 64-65; State's Exhibits 2, 9)

[1] During the pendency of Defendant's direct appeal, Defendant obtained a legal name change from "Joel M. Drain" to "Victoria Michelle Drain."

Ohio State Highway Patrol Troopers Nathan Stanfield and Joe Griffith interviewed Defendant at 11:21 p.m. (5/18/20 T.p. 30-32, 55; State's Exhibit 19) The interview was video- and audio-recorded. (5/18/20 T.p. 55-58; State's Exhibit 19) Trooper Stanfield advised Defendant that she was being investigated criminally for what she did to Richardson, who was still alive but had serious injuries, and it didn't look good. (*Id.*) He informed Defendant that she could be charged with a "range of things," including aggravated murder. (*Id.*) He read Defendant her *Miranda* rights, which Defendant stated she understood. (*Id.*) Defendant waived her rights and agreed to speak to the troopers. (*Id.*)

Defendant disclosed to the troopers that, the previous night, she began "plotting" the murder of another inmate in the unit who was not Richardson. (*Id.*) When asked why, she responded, "Just cuz. He's a child molester." (*Id.*) She devised a plan to stab the unknown inmate at evening pill call on April 13, 2019. (*Id.*) With that purpose in mind, Defendant started cutting a knife out of her window with nail clippers, but "it was taking too long," she wanted to commit the murder on April 13th, and she was getting "antsy." (*Id.*) She had a fan in her cell because she had washed and was drying another inmate's shoes. (*Id.*) On April 13th, she took the fan apart to unscrew the heavy metal square motor from the fan to use as a weapon against the unknown inmate. (*Id.*) She described to the troopers that she planned to "hit him in the head with the fan motor and strangle him to death." (*Id.*) She fashioned the fan motor into a makeshift weapon by wrapping a cord around it so that it was hanging on the cord. (*Id.*)

When the troopers asked Defendant what she did on April 13th from the time she woke up until "count" at 3:00 p.m., she stated that she talked to Richardson right before "count" about getting high in Defendant's cell. (*Id.*) Defendant informed the troopers that she knew Richardson as just an acquaintance, who she talked to more frequently than others in the unit.

(*Id.*) She described Richardson as "weirdly friendly," but remarked, "[H]e's not a bad person." (*Id.*)

Defendant advised the troopers that she had some K2, which Defendant described as being "like weed," which she offered to smoke with Richardson in her cell that day. (*Id.*) In exchange for a couple hits of the drug, Richardson was going to give Defendant some Ramen noodle soup. (*Id.*)

Defendant told the troopers that, while waiting for Richardson to come up to her cell to smoke with her, her "adrenalin [was] just running because [she] was getting closer to the time when [she] was going to do the other thing." (*Id.*) In the meantime, she killed time by chatting with another inmate named "Taylor," who was in the "rec cage" for fighting. (*Id.*) At "chow" time, Richardson came out of his cell, and Defendant went upstairs to wait for him. (*Id.*) When Richardson did not come to her cell right away, Defendant looked threw the bars to the first floor and saw that Richardson had sat down. (*Id.*) Defendant explained to the troopers, "I'm already like going crazy inside cuz I already know my adrenalin's going." (*Id.*) She asked Richardson, "[W]hat's up man, you gonna come smoke?" (*Id.*) Richardson came upstairs to her cell, and Defendant shut the door. (*Id.*)

Defendant told the troopers that her adrenalin was still going when Richardson entered her cell because she was still thinking about killing the unknown inmate. (*Id.*) Defendant described to the troopers, "I'm ready to go now. I just want to do something to somebody you know what I mean." (*Id.*) According to Defendant, she cleared the chair in her cell so that Richardson could sit down. (*Id.*) Defendant explained to the troopers that, when Richardson sat down, she thought about how easy it would be to kill him. (*Id.*) She revealed to the troopers

what was going through her mind: "I can still carry out my plan but, you know what I mean, I can kill him and the other guy." (*Id.*)

Defendant told the troopers,

> I already had the fan motor in my hoodie pocket that was sitting on my bed because that's what I was gonna wear downstairs at pill call to get the other guy. So I just seen the cord hanging out of the pocket of my hoodie on the bed and I just grabbed it out and hit [Richardson] with it ... somewhere in his head.

(*Id.*) Holding the fan motor by the cord that she had wrapped around it, she swung it down, striking a seated Richardson in the head. (*Id.*) She explained to the troopers,

> Once I hit him, he fell over ... onto like one knee. ... I just kept hitting him, just kept hitting him ... til eventually it broke, the cord snapped ... off the motor so I grabbed the motor and started using my hand bashing his head. ... Then I grabbed a colored pencil and shoved it in his eye and kicked it into his eye. ... I wrapped a cord around his neck, try to choke him to death, strangle him.

(*Id.*) Defendant stated that she used two cords to strangle Richardson – the cord to the fan and, when that broke, a cable cord that "you put in the back of your TV * * * to get reception." (*Id.*) Defendant continued,

> I had blood all over me and the motor had broke so I knew I would, I went through every cord I had, you know what I'm saying, so I wasn't going to be able to put it back together so I was like pissed off, you know what I mean, so I kicked him a bunch of times in his throat ... stomped his throat a bunch of times cuz now I can't do the guy I was originally going to do.

(*Id.*)

Defendant "c[ould]n't count" how many times she hit Richardson with the fan motor, but she believed it was "probably about twenty * * * altogether." (*Id.*) She kicked the pencil into his eye just once. (*Id.*) She estimated to the troopers that she strangled Richardson for three or four minutes until she "didn't see him breathing," and she stomped his throat "probably ten times." (*Id.*)

Because Defendant had Richardson's blood all over her at that point, she "put the hoodie on that was on [her] bed on the top bunk and … walked out, shut the door." (*Id.*) Defendant told the troopers that she "went and talked to Taylor [in the rec cage]. I told him I just smoked some K2 and I'm fucked up and just acted like a dumbass." (*Id.*) Defendant clarified to the troopers that she never actually smoked the K2. (*Id.*) She stated, "I just told [Taylor] that cuz I looked crazy when I came out, probably," because her "adrenalin [was] rushing" and she was all worked up over what she had just done. (*Id.*) She did not tell Taylor about Richardson. (*Id.*)

Around that same time, Defendant saw "the cops looking for [her] shoe prints." (*Id.*) She told Taylor, "I'll be right back," and she went into the computer room, "threw the hoodie down and just put [her] hands up." (*Id.*) Defendant informed the troopers, "I knew what I did." (*Id.*) She also "knew what [the officers] seen" when they looked in her cell and that the officers "knew it was [her] cell." (*Id.*) She advised the troopers that she put her hands up "cuz I know these cops trying to think I'm gonna do something to them all the time." (*Id.*)

She reiterated to the troopers that her plan was to kill the unknown inmate by hitting him with the fan motor and strangling him. (*Id.*) She disclosed to the troopers that, when Richardson came in, "I thought I'd be able to get two instead of one." (*Id.*) She described that, the entire time she was striking Richardson with the fan motor, kicking the pencil in his eye, strangling him, and stomping on him, her intent was to kill him. (*Id.*) However, the plan did not work out the way she intended "[b]ecause the fan broke and [she] wasn't able to do the original plan." (*Id.*)

About a month-and-a-half after her interview, Defendant gave more information, which clarified her motive for killing Richardson and provided more detail about "EXACTLY what

[she] did." (State's Exhibit 38) (emphasis in original). In a voluntary written statement provided to Correction Lieutenant Joseph Santha, Jr., Defendant wrote:

> When I got to 1C at Warren (R.T.U.), I planned on finding a child molester to murder. I've made no attempt at hiding that fact. I made several attempts at [Southern Ohio Correctional Facility in] Lucasville and one at Madison [Correctional Institution], and I feel no reason to lie when I go to R.I.B./S.M.P. (my inst. record will show). So I run across the perfect victim, and he's on my range when I first get there, so it won't be hard. Then he moves downstairs, a couple cells away from Richardson.
>
> I approach Richardson soon after the move. Mainly because he had already spoken to me and I could see he'd be easy to manipulate. I tell him I need him to do me a favor in a couple of days. I tell him I'm gonna need him to coax this inmate to his cell because me and the dude have beef from another place, and I'm trying to confront him. And because of my reputation for assaulting people, I know he wouldn[']t come in my cell. He listens, and agrees. I could tell that he was hes[i]tant so I told him it won[']t be anytime soon. He's cool with that.

(State's Exhibit 38) Defendant indicated that her plan was to "stab the other inmate to death" in Richardson's cell. (*Id.*) She continued:

> But when I bring the topic of luring the inmate back up to him, he goes into a self[-]righteous Christian rant about how he doesn[']t want to get involved for[r]eal. Basically like he doesn[']t judge people. And he's trying to stay out of trouble[.] ... I also feel as if he might just tell his mental health couns[e]l[o]r, or a doctor in order to get me sent back to Lu[casville], or not have to worry (if he did think I was serious)
>
> Now I feel like I'm running out of time. But it[']s a weekend (4-13-19). So no doctors, or secret meetings can/will take place to give him an opportunity.

(*Id.*)

Defendant explained her preparation for the crime that she intended specifically against Richardson:

> I have a friend[']s fan in my cell to dry shoes I washed. I go into my cell. Break the motor out of it. And put a makeshift handle on it. I move all my shit into positions that will keep Richardson from using them to help him make noise, or defend himself. Then I go tell him I got a joint to smoke with him after dinner. He agrees.

> My plan is to kill him after I show him why all crimes are NOT the same, (I had pulled out 3 brand new, sharpened color pencils and set them to the side at count time to help prove this point.) Then I was going to go downstairs and kill the child molester since I could do so in the open now since my plans were forced to change. Count clears. Dinner comes. I call Richardson up. He comes in. My cell window is already covered. I shut the door w/o locking it. As soon as he sees me, I can tell he knows he fuck[e]d up. I pull out the fan motor and tell him to get on his knees. He does. He started crying, saying "please don't." I hit him in the side of his head. It knocked him over. His ear & head were bleeding bad. I pull him up I ask him why he'd save a pedophile? He[']s crying. I hit him again in the face. He falls back on his ass against the wall. I grab the pencil and put it in his face and tell him since it[']s "all the same," I'm about to fuck him with this. I pull his pants down. But it[']s dirty as fuck down there and stunk bad. He's shaking and crying. I jam the pencil in his right eye & stomp it all the way in. I think he's no longer consc[i]ous after this. I hit several more times in his face and head after I pull his pants up. The handle on the motor breaks. But I've been in the cell awhile now, & I think they may do a round soon. So I wrap a cable chord around his neck to stop the shallow breath. Then I stand up and stomp on his adam[']s apple (throat) a bunch of times. I heard keys jingle. So I throw on my hoodie. Try & wipe of[f] the visible blood on my shoes. And walk out and lock my cell door.

(*Id.*) (emphasis in original).

The evidence found in Defendant's cell after the murder of Richardson was consistent with Defendant's statements. (5/18/20 T.p. 45-46) There were pieces of speaker or audio wire and half of a broken pencil on the floor in the area of Richardson's head. (5/18/20 T.p. 49-50, 53-54; State's Exhibit 14) On the bottom bunk in the cell, there was black cable wire, more audio wire, and a fan motor with suspected blood on them. (5/18/20 T.p. 50, 52-53; State's Exhibits 12, 13) Three colored pencils were neatly lined up in a row on the bed. (5/18/20 T.p. 51, 62; State's Exhibit 12) The shoes that Defendant was wearing and Defendant's hands were covered with suspected blood. (5/18/20 T.p. 54-55, 58-60; State's Exhibits 20, 21) Trooper Stanfield did not observe any injuries on Defendant as he interviewed her, and Defendant specifically denied having any injuries other than a "little cut" on her finger. (5/18/20 T.p. 68-69; State's Exhibit 19) The Bureau of Criminal Investigation tested blood from the broken

pencil on the floor and the right interior cuff of the hoodie from the computer room in Unit 1C. (5/18/20 T.p. 67; State's Exhibit 32) The DNA profiled obtained from both was consistent with Richardson. (5/18/20 T.p. 67-68; State's Exhibit 32) Defendant was tested for drugs, which was negative, consistent with Defendant's statement that she did not smoke the K2, and the offer to smoke K2 was a ruse to get Richardson into her cell. (5/18/20 T.p. 59-60)

Richardson had very low respirations when officers found him in Defendant's cell on April 13, 2019. (5/18/20 T.p. 46) He never regained consciousness. (5/18/20 T.p. 46) He was care-flighted to the hospital and lived for a period of time, but he was pronounced dead on April 15, 2019. (5/18/20 T.p. 62) His cause of death was "[m]ultiple blunt force and sharp force injuries to the head and neck." (5/18/20 T.p. 64) A piece of broken pencil that appeared to connect to the broken pencil on the floor of Defendant's cell was removed from Richardson's body during his autopsy. (5/18/20 T.p. 65-67) The pencil had penetrated the left lateral nasal wall by three and three quarter inches. (5/18/20 T.p. 65)

A Warren County Grand Jury indicted Defendant on two counts of aggravated murder and one count of possession of a deadly weapon while under detention for having committed the crime of aggravated murder. *State v. Drain*, 2022 OH 3697U, -- N.E.3d --, ¶22. Count 1 charged Defendant with purposely, and with prior calculation and design, causing the death of Richardson. (*Id.*) Count 2 charged Defendant with purposely causing the death of Richardson while under detention for a felony. (*Id.*) Attached to both counts of aggravated murder were the same two death-penalty specifications that charged that: (1) Defendant committed the offense while under detention; and (2) prior to the offense at bar, Defendant was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another. *Id.* Each of the two counts of aggravated murder also included a repeat-violent-offender specification. *Id.*

The case was set for trial. Approximately five months prior to trial, Defendant sent a letter to the trial judge, informing the judge that, against the suggestion and advice of her defense counsel, she wished to plead no contest and waive the presentation of mitigating evidence. (1/2/20 Correspondence from Defendant) At a hearing on February 19, 2020, the judge inquired of Defendant in open court about her letter and the statements made therein. (2/19/20 T.p. 3-4) Defendant reiterated that she wished to enter a plea of no contest and waive the presentation of mitigating evidence, aside from offering an unsworn statement from herself. (2/19/20 T.p. 3-4) Her counsel confirmed Defendant's intention to proceed in that way. (2/19/20 T.p. 7-8) The court ordered further examination of Defendant by her appointed psychologist, Dr. Jenny O'Donnell, to determine Defendant's capacity to waive her right to a jury trial, plead no contest, and waive mitigation. (2/19/20 T.p. 8-11)

On May 18, 2020, Defendant waived her right to a jury trial, and a three-judge panel was selected to hear the case. *State v. Drain*, 2022 OH 3697U, -- N.E.3d --, ¶23. The parties entered stipulations to the admissibility of various items of evidence and agreed that "the rules of evidence will not bar the admission of testimony and/or documentary evidence." *Id.* At the plea/evidentiary hearing required by Ohio law, Defendant entered a plea of no contest to all counts and specifications, and the State presented testimony and evidence to prove Defendant's guilt beyond a reasonable doubt. *Id.* After examining the witness and considering the State's evidence and the stipulations, the three-judge panel unanimously determined that Defendant was guilty of each count and specification. *Id.* ¶24.

The case proceeded to the sentencing phase. *Id.* ¶25. Defendant presented two witnesses and made an unsworn statement. *Id.* ¶25. In her unsworn statement, she started by saying,

> Your Honors, this is the time most people in similar circumstances may offer up some type of empty apology or make a pathetic plea for forgiveness while trying

> to capture the Court's sympathy by presenting all the troubles of my childhood and past troubles. I personally have decided to spare everyone involved of those fake formalities and myself, the lack of integrity[.]

(5/18/20 T.p. 106-07) Defendant accepted responsibility for the murder of Richardson and stated that she "blame[d] nothing on no one." (5/18/20 T.p. 107-08) Defendant continued:

> My defense team has tirelessly tried to convince me to allow my fourteen year old daughter to testify during these mitigation proceedings, but I've elected to block these attempts because I'd rather be sentenced to death than to use the only part of me that's truly innocent and good to elicit anyone's empathy or mercy. My daughter has absolutely nothing to do with my criminal behavior, my faults or my shortcomings and I refuse to allow her to be used as a human shield or a way to humanize me.
>
> I've also decided to not allow my defense team to present testimony or evidence of my dysfunctional childhood or upbringing. I see no true relevance in rehashing the trauma I went through as a child, so many years after the fact. While I acknowledge, we assume it's our motive for the different things we go through in life and our human experiences is what manipulates our perception and builds our character, I feel the issues of my life lessons hold very little, if no weight at all in my present situation.

(5/18/20 T.p. 107-08) Defendant then spoke about her time in the juvenile system. (5/18/20 T.p. 108-09) Defendant stated:

> As far as mitigation goes, the only real mitigating evidence ironically enough is you. You being the same system who now is considering my potential execution. How crazy is that? But it's true. I'm not offering up some fake hypothetical or far-fetched medical mental health excuses. I've not attempted to justify my behavior or pretend of any mental defects. I'm simply exposing the facts and your system for what it is and explaining it's contribution to those experiences in which molded me in my perceptions and it in itself is my choice form of mitigation.

(5/18/20 T.p. 109-10) Defendant closed by saying, "Murder is murder, no matter how pretty you make it or how justifiable you paint the picture for the public. The killer in me is the same one inside of you and if there's a hell, I'll see you there." (5/18/20 T.p. 110)

After Defendant's unsworn statement, her defense counsel addressed the court regarding Defendant's Exhibit A, which defense counsel moved to admit under seal. (5/18/20 T.p. 110-14)

Defendant's Exhibit A consisted of approximately 2,000 pages of materials that included the mitigation report of Dr. O'Donnell (Defendant's appointed psychologist), along with documentary materials that Dr. O'Donnell relied on to reach her conclusions. (5/18/20 T.p. 112) Defense counsel explained:

> [Drain] has indicated [s]he does not want it presented, as [s]he referenced in h[er] [unsworn] statement. 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.

(5/18/20 T.p. 111) Counsel then rested, stating that the defense had no exhibits to present other than its proffer of Exhibit A as an exhibit to be placed under seal, which counsel confirmed the three-judge panel was not to consider. (5/18/20 T.p. 114)

The three-judge panel unanimously found beyond a reasonable doubt that the aggravating circumstances Defendant was found guilty of committing outweighed the mitigating factors and sentenced Defendant to death for aggravated murder. *State v. Drain*, 2022 OH 3697U, -- N.E.3d --, ¶26. The three-judge panel also sentenced Defendant to eleven years in prison for Defendant's possession of a deadly weapon under detention, to be served concurrently with the sentence imposed for aggravated murder, and a ten-year, consecutive prison term for the repeat-violent-offender specification. *Id.*

Following the three-judge panel's deliberation in the sentencing phase and its pronouncement of its sentencing verdict, the court granted defense counsel's request to file Exhibit A under seal. (5/18/20 T.p. 151) The court's discussion established that it did not consider Exhibit A whatsoever in rendering its sentencing verdict. (5/18/20 T.p. 150-51)

Defendant filed a direct appeal in the Supreme Court of Ohio. *State v. Drain*, 2022 OH 3697U, -- N.E.3d --, ¶1. On October 19, 2022, the Supreme Court of Ohio affirmed Defendant's convictions and the death sentence. *Id.* ¶¶3, 188. The Supreme Court of Ohio denied

Defendant's motion for reconsideration on December 27, 2022. *State v. Drain*, 2022 OH 4617, 200 N.E.3d 265.

On March 27, 2023, Defendant filed a petition for a writ of certiorari ("Petition") and a motion for leave to proceed *in forma pauperis* in this Court. The State of Ohio hereby responds.

ARGUMENT

Reasons for Denying the Writ

I. Defendant's First and Second Questions Presented should be denied because the Supreme Court of Ohio applied governing state and federal case law to the unique facts of this case in a way that is consistent with, and not repugnant to, the Sixth and Eighth Amendments.

In her petition for a writ of certiorari, Defendant challenges (1) her counsel's failure to present mitigating evidence contained in Defendant's Exhibit A during the sentencing phase of her trial and (2) the Supreme Court of Ohio's decision not to consider the information contained in Defendant's Exhibit A in its independent sentencing review.

A. Factual Background

Defendant's Exhibit A contained extensive information about Defendant that the defense team had compiled in anticipation of the sentencing phase – the mitigation report of Defendant's appointed psychologist, Dr. Jenny O'Donnell, along with approximately 2,000 pages of materials that Dr. O'Donnell relied on to reach her conclusions. (5/18/20 T.p. 110-13)

Approximately five months prior to trial, Defendant sent a letter to the trial judge, informing the judge that, against the suggestion and advice of her defense counsel, she wished to plead no contest and waive the presentation of mitigating evidence. At a hearing on February 19, 2020, the judge inquired of Defendant in open court about her letter and the statements made therein. (2/19/20 T.p. 3-4) Defendant reiterated that she wished to enter a plea of no contest and waive the presentation of mitigating evidence, aside from offering an unsworn statement from

herself. (2/19/20 T.p. 3-4) Her counsel confirmed Defendant's intention to proceed in that way. (2/19/20 T.p. 7-8) The court ordered Defendant to be further examined by Dr. O'Donnell to determine Defendant's capacity to waive her right to a jury trial, plead no contest, and waive mitigation. (2/19/20 T.p. 8-11) At the same time, the court made it very clear to Defendant that she could change her mind at any point because her counsel were "still going to be doing the work that they have been doing" with regard to the investigation and preparation of mitigating evidence for trial. (2/19/20 T.p. 12)

On April 10, 2020, Dr. O'Donnell issued a comprehensive report finding that Defendant did not suffer from a severe mental illness or intellectual disability and was competent to stand trial, waive her right to a jury, plead no contest, and waive mitigation. (4/16/20 T.p. 3, 6; Court's Exhibit 4-16-10 I) On April 16, 2020, in open court, the court engaged in an extensive colloquy with Defendant regarding her waiver of her right to a jury trial, and she executed a written jury waiver in open court, which the court accepted as voluntary, knowing, and intelligent. (4/16/20 T.p. 9-10) The court also engaged Defendant in another extensive colloquy in open court concerning her waiver of mitigation. (4/16/20 T.p. 36-40) The court found that Defendant's decision to waive her right to investigate and present mitigating evidence was voluntary, knowing, and intelligent. (4/16/20 T.p. 39-40)

At the sentencing phase on May 18, 2020, Defendant's unsworn statement included references to the tireless efforts of her defense counsel to convince her to allow them to present mitigating evidence on her behalf, which she had persistently rebuffed. (5/18/20 T.p. 107) Specifically, she stated:

> Your Honors, this is the time most people in similar circumstances may offer up some type of empty apology or make a pathetic plea for forgiveness while trying to capture the Court's sympathy by presenting all the troubles of my childhood

and past troubles. I personally have decided to spare everyone involved of those fake formalities and myself, the lack of integrity[.]

(5/18/20 T.p. 106-07) She continued:

> My defense team has tirelessly tried to convince me to allow my fourteen year old daughter to testify during these mitigation proceedings, but I've elected to block these attempts because I'd rather be sentenced to death than to use the only part of me that's truly innocent and good to elicit anyone's empathy or mercy. My daughter has absolutely nothing to do with my criminal behavior, my faults or my shortcomings and I refuse to allow her to be used as a human shield or a way to humanize me.
>
> I've also decided to not allow my defense team to present testimony or evidence of my dysfunctional childhood or upbringing. I see no true relevance in rehashing the trauma I went through as a child, so many years after the fact. While I acknowledge, we assume it's our motive for the different things we go through in life and our human experiences is what manipulates our perception and builds our character, I feel the issues of my life lessons hold very little, if no weight at all in my present situation.

(5/18/20 T.p. 107-08) She told the three-judge panel, "I'm not offering up some fake hypothetical or far-fetched medical mental health excuses. I've not attempted to justify my behavior or pretend of any mental defects. ..." (5/18/20 T.p. 109-10) The only evidence that Defendant permitted counsel to present was testimony from a cousin and a friend, with whom she was very close, and her unsworn statement. (5/18/20 T.p. 91-111)

After Defendant's unsworn statement in the sentencing phase, defense counsel addressed the court regarding Defendant's Exhibit A, which defense counsel moved to admit under seal. (5/18/20 T.p. 110-14) Defense counsel explained their request to submit Defendant's Exhibit A under seal:

> [Drain] has indicated [s]he does not want it presented, as [s]he referenced in h[er] [unsworn] statement. 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.

(5/18/20 T.p. 111) Counsel then rested, stating that the defense had no exhibits to present other than its proffer of Exhibit A as an exhibit to be placed under seal, which they confirmed the three-judge panel was not to consider. (5/18/20 T.p. 114) Following the three-judge panel's deliberation in the sentencing phase and its pronouncement of its sentencing verdict, the court granted defense counsel's request to file Exhibit A under seal. (5/18/20 T.p. 151) The court's discussion established that it did not consider Defendant's Exhibit A whatsoever in rendering its sentencing verdict. (5/18/20 T.p. 150-51)

The Supreme Court of Ohio also did not consider Defendant's Exhibit A in its independent review of Defendant's sentence. *State v. Drain*, 2022 OH 3697U, -- N.E.3d --, ¶¶157, 163. The supreme court explained that, since Defendant chose not to present that information during the sentencing phase of her trial, she thereby waived her right to have the court consider that evidence on direct appeal. *Id.* ¶161.

B. Law and Argument

Defendant argues in her petition for certiorari that, because she did not waive the presentation of *all* mitigating evidence but, rather, presented some evidence in mitigation, she had no right to control her defense counsel's decisions about what mitigating evidence to present. She asserts that her counsel were obligated to present the information in Exhibit A against her wishes and also that they were ineffective when they ceded to her restrictions on the presentation of mitigation. She also argues that the state supreme court was required to consider Exhibit A, notwithstanding her voluntary decision not to present that information in the sentencing phase.

The Supreme Court of Ohio rejected these arguments on direct appeal. *State v. Drain*, 2022 OH 3697U, -- N.E.3d --, ¶¶75, 157, 161, 163. The state supreme court stated:

> "[T]he Constitution does not prohibit a competent capital defendant from waiving the presentation of mitigation evidence." *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005). Hence, "[a]n attorney does not render ineffective assistance by declining, in deference to a client's wishes, to present mitigating evidence." *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 10.

State v. Drain, 2022 OH 3697U, -- N.E.3d --, ¶75. On the issue of whether it was required to consider Defendant's Exhibit A, the state supreme court found that, since Defendant chose not to present that information in the sentencing phase, she waived her right to have the reviewing court consider that information on direct appeal. *Id.* ¶161.

Respondent State of Ohio asks this Court to deny Defendant's petition. The Supreme Court of Ohio applied governing state and federal case law to the unique facts of this case in a way that is consistent with, and not repugnant to, the Sixth and Eighth Amendments.

To the extent that Defendant argues that counsel should have ignored her instructions not to present the information in Defendant's Exhibit A and presented it against her will, there is no support for her argument. It is well-established that a defendant is allowed to waive the presentation of mitigating evidence. *See Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005), cert denied, *Tyler v. Anderson*, 547 U.S. 1074, 126 S.Ct. 1774, 164 L.Ed.2d 523 (2006); *Singleton v. Lockhart*, 962 F.2d 1315, 1322 (8th Cir. 1992); *State v. Vrabel*, 99 Ohio St.3d 184, 2003 OH 3193, 790 N.E.2d 303, ¶40; *State v. Ashworth*, 85 Ohio St.3d 56, 65, 1999 OH 204, 706 N.E.2d 1231. Even where a defendant chooses not to present *any* mitigating evidence, there is no constitutional requirement compelling the defendant to present mitigating evidence, and a defendant's voluntary choice not to present mitigating evidence does not violate the Eighth Amendment. *Ashworth*, 85 Ohio St.3d at 63-64 ("the United States Supreme Court has never suggested that [the Eighth Amendment] requires or justifies forcing an unwilling defendant to accept representation or to present an affirmative penalty defense in a capital case").

Defendant partially waived the presentation of mitigating evidence, which was her right. She did so only after being examined by her appointed psychologist, who found her competent to waive mitigation, and after multiple discussions with the court and her counsel, who advised her of her right to present mitigating evidence, the purpose and importance of presenting mitigating evidence, and the risks of waiving it.

Furthermore, counsel is not ineffective in abiding by the wishes of his client in the presentation of mitigating evidence. "[W]here the defendant does not want to present mitigating evidence, no societal interest counterbalances the defendant's right to control his own defense." *State v. Vrabel*, 99 Ohio St.3d 184, 2003 OH 3193, 790 N.E.2d 303, ¶39. "An attorney does not render ineffective assistance of counsel by declining, in deference to a client's desires, to present mitigating evidence." *State v. Monroe*, 105 Ohio St.3d 384, 2005 OH 2282, 827 N.E.2d 285, ¶100. *Accord Shelton v. Carroll*, 464 F.3d 423, 439 (3d Cir. 2006), cert denied, *Shelton v. Phelps*, 555 U.S. 943, 129 S.Ct. 395, 172 L.Ed.2d 284 (2008); *Campbell v. Polk*, 447 F.3d 270, 283 (4th Cir. 2006), cert denied, 549 U.S. 1098, 127 S.Ct. 834, 166 L.Ed.2d 669 (2006); *Burns v. Epps*, 342 Fed.Appx. 937, 938 (5th Cir. 2009), cert denied, 561 U.S. 1013, 130 S.Ct. 3473, 177 L.Ed.2d 1069; *Tyler*, 416 F.3d at 503-504; *Jones v. Page*, 76 F.3d 831, 847 (7th Cir. 1996), cert denied, 519 U.S. 951, 117 S.Ct. 363, 136 L.Ed.2d 254 (1996); *Davis v. Greer*, 13 F.3d 1134, 1139 (7th Cir. 1994), cert denied, 513 U.S. 933, 115 S.Ct. 328, 130 L.Ed.2d 287 (1994) (defendant who prevented his lawyer from presenting evidence of alleged mental illness, retardation, and troubled family background could not later challenge these decisions as ineffective assistance of counsel); *Wallace v. Ward*, 191 F.3d 1235, 1248 (10th Cir. 1999), cert denied, *Wallace v. Gibson*, 530 U.S. 1216, 120 S.Ct. 2222, 147 L.Ed.2d 253 (2000), modified on other grounds by *McGregor v. Gibson*, 248 F.3d 946 (10th Cir. 2001); *State v. Cowans*, 87 Ohio

St.3d 68, 81, 1999 OH 250, 717 N.E.2d 298. Courts have reached this conclusion even when the defendant's waiver of mitigating evidence was not a complete waiver of *all* mitigating evidence, and counsel presented some mitigating evidence at trial. *See Shelton*, 464 F.3d at 439; *Campbell*, 447 F.3d at 282; *Tyler*, 416 F.3d at 503; *Davis*, 13 F.3d at 1140; *Monroe*, 105 Ohio St.3d at ¶¶98, 100; *Vrabel*, 99 Ohio St.3d at ¶¶22, 36.

Likewise without merit is Defendant's argument that Ohio Rev. Code Ann. § 2929.05(A) and the Eighth Amendment obligated the state supreme court to consider Defendant's Exhibit A in its independent review of Defendant's sentence, notwithstanding that Defendant prohibited her counsel from presenting it. Ohio Rev. Code Ann. § 2929.05(A) requires the reviewing court 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, and whether the sentence of death is appropriate." *State v. Clinton*, 153 Ohio St.3d 422, 2017 OH 9423, 108 N.E.3d 1, ¶249 (emphasis in original).

The Supreme Court of Ohio relied on *Clinton* in rejecting Defendant's argument. *State v. Drain*, 2022 OH 3697U, -- N.E.3d --, ¶157. In *Clinton*, the Ohio Supreme Court found that the mitigating information submitted to the trial court under seal was not "facts and other evidence disclosed in the record," as set forth in Ohio Rev. Code Ann. §2929.05(A). *Clinton*, 153 Ohio St.3d at ¶253. The supreme court explained that the defendant "deliberately chose to present only his unsworn statement in mitigation after being fully advised of his rights to present mitigating evidence in his behalf." *Id.* ¶254. Defense counsel's stated purpose for submitting the mitigating information was to "make the record clear" that the defendant was voluntarily waiving mitigation and that, if he changed his mind, his defense team was ready to present

mitigating evidence. *Id.* ¶253. The Ohio Supreme Court stated that "[t]he independent weighing process at each appellate level required by R.C. 2929.05 does not contravene the role of the jury in the penalty proceeding; rather the statutory scheme provides a procedural safeguard against the arbitrary imposition of the death penalty." *Id.* ¶254. Applying *Clinton* to this case, the Supreme Court of Ohio found that, like the defendant in *Clinton*, Defendant chose to withhold mitigating evidence and thereby waived her right to have the state supreme court consider that mitigating evidence on direct appeal. *State v. Drain*, 2022 OH 3697U, -- N.E.3d --, ¶161.

Defendant cites to *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), arguing that the state supreme court "turned a blind eye to mitigating evidence that was available to it," which this Court prohibited in *Parker* and *Eddings*. However, in those cases, the mitigating evidence was presented during the sentencing phase. *Parker*, 498 U.S. at 310, 313-314; *Eddings*, at 107, 114-115. In this case, it was not presented. Defendant specifically blocked it from being presented.

Defendant argues that the Eighth Amendment forbids the imposition of a death sentence by a sentencer who has not been apprised of possible mitigating factors. However, "[t]he Eighth Amendment compels no one to present mitigation against his will." *State v. Cowans*, 87 Ohio St.3d 68, 1999 OH 250, 717 N.E.2d 298. In *Eddings*, this Court held that a sentencer may not refuse to consider any relevant mitigating evidence. *Id.* at 114. However, this Court did not hold that a sentencing judge is constitutionally required to independently seek out and consider additional mitigating evidence against the express wishes of the defendant, which the defendant did not present or proffer as mitigating evidence in the sentencing phase of trial. The Eighth Amendment right to the consideration of mitigating evidence is not violated when it is the

defendant's choice to waive the presentation of such evidence. *Tyler v. Mitchell*, 416 F.3d 500, 503 (6th Cir. 2005).

"[T]he constitutional requirement that mitigation be considered by the sentencer is rooted in the desire to protect the defendant's interest in individualized sentencing." *State v. Ashworth*, 85 Ohio St.3d 56, 65, 1999 OH 204, 706 N.E.2d 1231. "That interest is protected by giving the defendant an opportunity to introduce available mitigating evidence and requiring the sentencer to consider it. *Id.* "But where the defendant chooses to forgo that opportunity, no societal interest counterbalances his right to control his own defense." *Id.* "The prerequisite to consideration of mitigating evidence by the sentencer is the proffer of evidence by the defendant." *Id.*

Defendant did not present or proffer Defendant's Exhibit A. It was her voluntary choice not to present that information. (5/18/20 T.p. 110-12) Defense counsel made it clear that, pursuant to Defendant's instructions, they were not offering Exhibit A for the three-judge panel's consideration in sentencing, and the panel did not consider it. (5/18/20 T.p. 114, 150-51) It was only submitted as an exhibit for the purpose of showing that defense counsel conducted a thorough mitigation investigation, which yielded mitigation information that they were ready to present in the sentencing phase, had Defendant not prohibited them from doing so. (5/18/20 T.p. 110-13) Since Defendant did not present the information and the three-judge panel did not consider it, it does not qualify as "facts and other evidence disclosed in the record" that the Supreme Court of Ohio was required to consider under Ohio Rev. Code Ann. § 2929.05(A). Nor was the supreme court obligated to consider it under the Eighth Amendment, in light of Defendant's voluntary decision not to present it. The State asks this Court to deny Defendant's petition for a writ of certiorari.

CONCLUSION

This case does not present compelling reasons for granting a writ of certiorari. Defendant's First and Second Questions Presented should be denied because the Supreme Court of Ohio applied governing state and federal case law to the unique facts of this case in a way that is consistent with, and not repugnant to, the Sixth and Eighth Amendments. For the reasons set forth in the above argument, Respondent asks this Court to deny Defendant's petition for a writ of certiorari.

Respectfully Submitted,

DAVID P. FORNSHELL*
Warren County Prosecuting Attorney
*Counsel of Record
Warren County Prosecutor's Office
520 Justice Drive
Lebanon, Ohio 45036
P: 513-695-1782
F: 513-695-2962
david.fornshell@warrencountyprosecutor.com

Counsel for Respondent
State of Ohio