IN THE SUPREME COURT OF OHIO

State of Ohio, *Plaintiff-Appellee*,	
	Case No. 2020-0652
v.	
	[CAPITAL CASE]
Joel M. Drain, *Defendant-Appellant*.	

On Appeal from the Warren County Court of Common Pleas
Case No. 19CR35870

MERIT BRIEF OF DEFENDANT-APPELLANT JOEL M. DRAIN

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STATEMENT OF THE FACTS[1]

Victoria Michelle[2] Drain ("Drain") was born in 1981. Drain was assigned male at birth but is a transwoman. The trajectory of Drain's life clearly led her to where she is today and highlights the institutional failures that occurred along the way. Had someone truly stepped in and meaningfully given Drain the care and assistance she desperately needed and deserved; she would not be on death row. There were many such opportunities along the way, but time and again the system brushed Drain aside and locked her away.

A. Beginning at age 13, Drain was locked up for twenty hours a day and was failed by the institutions meant to help her.

Drain was in and out of institutions for most of her life. (Def. Ex. A at 59). As a youth, off and on from at least 1995 to 1999, Drain was incarcerated at various institutions in the Ohio Department of Youth Services ("DYS"), including at the now infamous Training Institute of Central Ohio ("TICO"). (Ex. 04.16.20 I, p. 7); (State's Ex. 19); (Def. Ex. A at 1218). Starting at age 13, she was often locked up alone for twenty hours a day. (05.18.20 Hrg. Tr. 110). Drain has also served multiple prison sentences as an adult and has been incarcerated for all but a few months of her life since 2008 (from 2008 to 2010 (Ohio), from 2010 to 2016 (Florida), and from 2016 to the present (Ohio)).

[1] Additional facts will be provided where relevant to individual propositions of law.

[2] The defendant is a transgender person whose preferred name is Victoria Michelle. Misgendering a transgender person is not only a verbal error, but an act that is extremely distressing to that individual. *See* Chan Tov McNamarah, *Misgendering As Misconduct*, 68 UCLA L. Rev. Discourse 40, 43 n.6 (2020) (collecting cases finding that misgendering "displays hostility," is "degrading, invalidating, and mentally devastating," is "laden with discriminatory intent," and is "objectively offensive behavior") (internal citations omitted). Therefore, throughout this document, the defendant will be referred to by pronouns consistent with her gender identity.

In addition to these prison terms, Drain was in and out of mental health and substance abuse institutions and was diagnosed with several mental illnesses. At DYS in 1997, she was diagnosed with conduct disorder, polysubstance abuse, and a victim of child abuse. (Def. Ex. A at 1238, 1241, 1245). Notes from DYS also indicated that she began mental health counseling at age 9, and she exhibited homicidal ideations toward her father—who was one of the perpetrators of the sexual abuse she suffered. (*Id.* at 1238). While in DYS, Drain reported that she had recreationally used marijuana, cleaning products, alcohol, Ritalin, cocaine, LSD, mushrooms, and muscle relaxers. (*Id.* at 1251).

After leaving DYS, records indicate a diagnosis of Schizophrenia and psychiatric hospitalization. (Ex. 04.16.20 I at 6); (Def. Ex. A at 36). As an adult, Drain attended Alcoholics Anonymous meetings and was in and out of recovery and treatment centers. (Def. Ex. A at 58). Recent prison records indicate that Drain has also been diagnosed with Gender Dysphoria, Post-Traumatic Stress Disorder, and Borderline and Antisocial Personality Disorders. (Ex. 04.16.20 I at 7). Prison records also reflect Drain's severe self-injurious behavior. At times, she swallowed razor blades, cut her lower arms to the point of cutting arteries, and on two occasions, she inflicted very serious injuries to her penis. (Def. Ex. A at 37). She was first treated for cutting herself at age 9. (*Id.* at 36).

Drain has also suffered from a myriad of physical health issues. In 2004, Drain was diagnosed with a benign pituitary tumor. (Ex. 04.16.20 I, p. 7). While incarcerated in Florida in 2011 and 2012, Drain was diagnosed with testicular cancer and was treated with four cycles of chemotherapy. (*Id.*). And while incarcerated in Ohio in 2016, Drain was diagnosed with HIV. (*Id.*). To this day, Drain struggles to manage her HIV status and treatment. (*Id.*).

Despite all of the institutions involved in Drain's life and the significant challenges she has faced, no one ever offered substantive help or provided her with the tools she needed to succeed. In fact, the exact opposite occurred. (*See* Def. Ex. A at 1239-1240, 1245-1246) (DYS treatment summary indicating "[t]here were no mental health issues dealt w/ this youth" despite earlier DYS reports listing sexual abuse by her father and that she had homicidal ideations about him).

B. Drain's family background and history were fraught with trauma, including sexual abuse, violence, drugs, and alcohol.

Drain's upbringing was dysfunctional and traumatic, fraught with drugs, alcohol, violence, and sexual abuse. Drain was assigned the male gender at birth and was raised as a boy. (Def. Ex. A at 45-51). Her parents, Edwin and Susan Drain, divorced when Drain was three years old after Edwin had an affair, at which time Drain lost contact with her father until she was 9 or 10. (*Id.* at 31-32). After the divorce, Susan moved with Drain and her older brother, Brandon, into the home of Susan's mother, Carolyn Gusler. (*Id.*). This home life was relatively mundane in the beginning, although Carolyn was never particularly warm toward her grandchildren. (*Id.* at 50). Susan tried to maintain a normal life for her children, taking them on vacations and involving them in local activities. (*Id.*). As the children grew older, however, things changed.

Around the age of 9, Drain reconnected with her father. (Ex. 04.16.20 I, p. 7). At the same age, she also began using alcohol. (*Id.*). Around the fourth grade, at the age of 10, Drain began acting out and was placed in supervised classes due to disruptive behavior. (*Id.* at 6). At some point during these years, Susan enrolled herself, the children, and her mother in family counseling. (Def. Ex. A at 47). But by the age of 9, Drain started cutting herself, a self-injurious behavior that has continued into adulthood. (*Id.* at 36).

Yet, Drain's poor behavior continued, and when the kids were around 12-13 years old, they started sneaking out at night while Susan was working third shift. (*Id.* at 46). Susan handled this

by telling Carolyn to call the police because there was nothing Susan could do while working. (*Id.*).

Drain's early adolescence was replete with victimization and violence. Drain was first victimized by her older brother Brandon and others. (*Id.* at 34-35). Brandon was violent toward Drain and would taunt her if she did not agree to participate in his nefarious activities. (*Id.* at 34). There are reports of Drain's involvement with gangs and fighting in the streets. (*Id*. at 34, 1218). Brandon beat Drain and bullied her when she wanted to go home after sneaking out. (*Id.* at 55). Drain also stuttered as a child and was teased and bullied because of it. (*Id.* at 60).

Eventually, Carolyn asked Susan and the children to move out because "she'd had enough." (*Id.* at 46, 50). Around this time, at the request of the children, Susan invited Edwin to stay at her house while recovering from knee surgery. (*Id.* at 32). While staying at her home, Edwin beat Susan, injuring her so badly she had to be hospitalized for a couple weeks due to a brain bleed. (*Id.* at 32, 46). Susan has never fully recovered from the incident. (*Id.*) While she was recovering, Susan sent the kids to live with Edwin in Tennessee, though she maintained legal custody. (*Id.* at 32). Nevertheless, after that time, Susan lost control of her children and never lived with Drain again for any appreciable period. (*Id.*).

At the age of 13, Drain was confined for significant periods of time in and out of DYS, never again spending more than a year at a time at home. (*Id.* at 50-51); (Hrg. 05.18.20 Tr. 110). The limited records available indicate that Drain was in and out of DYS custody from at least 1995 to 1999. (Ex. 04.16.20 I, p. 7); (State's Ex. 19); (Def. Ex. A at 1218).

In 1996, Edwin became the primary custodian of Drain. (Def. Ex. A at 33, 1293-1296). Edwin and his new wife, Betty, provided Drain with drugs and alcohol. (*Id.* at 33). While living with them, both Edwin and Betty sexually abused Drain. (*Id.* at 33, 1225, 1238, 1241, 1245-1246,

1347). At this time of Drain's life, Edwin, Betty, and the outside world, considered Drain to be a young boy. Edwin would force Drain to have sex with Betty while he watched. (*Id.* at 33, 47, 1245-1246). While supposedly caring for Drain, Edwin and Betty used sex as punishment and forced Drain to engage in sexual acts by means of blackmail. (*Id.* at 33). One such circumstance involved Edwin and Betty forcing Drain to have sex with Betty in exchange for not filing charges against Drain for stealing Betty's car. (*Id.* at 33). When Drain told her mother about the abuse, she did not believe Drain. (*Id.* at 52-53).

The sexual abuse and exploitation continued into late adolescence and adulthood when older men, who viewed Drain as a young and malleable boy, started to target her. (*Id.* at 35). These men would groom and intimidate her into having sex with them. (*Id*.). One such man, Randy Grose, paid Drain to have sex with him and other men when Drain was just a teenager. (*Id.* at 57). Drain was only 16 years old when she met Grose, while Grose was in his thirties. (*Id.* at 35).

In 1998, Drain went AWOL from her home monitoring and ended up in New Mexico. (*Id.* at 1218). After that incident, Drain was again incarcerated in DYS. (*Id.*) She eventually aged-out of the system and was released to a halfway house. (Ex. 04.16.20 I, p. 6); (Def. Ex. A at 33).

C. Drain's adult life was filled with institutionalization, increasing mental and physical health problems, and abusive and unhealthy relationships.

For the next two decades, as an adult, Drain drifted between Ohio and Florida, and was in and out of prison in both states. (Def. Ex. A at 33). Sometime between 2002 and 2005, Drain was psychiatrically hospitalized and diagnosed with Schizophrenia. (*Id.* at 36). Drain lived in Toledo from 2003 to 2005 and was in a relationship during that time. (*Id.* at 35). That relationship involved domestic violence and ended with the partner filing a protection order against Drain. (*Id.*) As with her father and Grose, Drain has experienced violence in many of her relationships with men, but

there are no reports of violence in her relationships with women (e.g., high school girlfriends and her wife, Gina Stokes). (*Id.*)

Sometime thereafter, Drain moved to Florida. Drain's maternal grandfather and his wife lived there, so she stayed with them for a while. (*Id.* at 57). In 2005, Drain met Gina Stokes and later married her. (Ex. 04.16.20 I, p. 6). Though Drain is a transwoman, at birth she was assigned male and therefore she lived periods of her life as a male, including having two biological children with Gina. (*Id.*). Gina gave birth to their daughter in 2006. (Def. Ex. A at 57). At the time, they were all living with Drain's grandparents, but a few months after the birth, Gina came home from work and was told by Drain's grandparents that they had to leave. (*Id.*). During some sort of incident between Drain and her grandfather, Drain allegedly made a threat, and Drain's grandparents took out a protective order against Drain and Gina. (*Id.*).

Drain and Gina went to live with Gina's parents for a time, but shortly thereafter they got their own place. (*Id.*). Drain's relationship with Gina was no fairytale, but Gina reported that Drain was always very sweet and never physically abused her, and Gina still cares about Drain very much. (*Id.* at 57-60).

At some point during their relationship, Drain's grandmother Carolyn passed away, and Drain and Gina came to Ohio for the funeral. (*Id.* at 57). Upon their return to Florida, everything changed. (*Id.* at 58). Gina began to recognize symptoms of Drain's mental illnesses, and this began affecting their lives. For example, one day Gina came home after leaving their daughter in Drain's care to find Gina's teenage son from a previous relationship watching the baby. (*Id.*). Drain had apparently left without warning, even though up until that point she had been a loving and devoted parent. (*Id.*).

Eventually Drain returned home, and the couple picked up where they left off. (*Id.*). But Drain started seeking extra-marital relationships with men, which Gina initially tolerated, but ultimately Drain's continued interest in relationships with men ended their marriage. (*Id.*). On multiple occasions, Drain left Gina for periods of time to pursue male relationships and drugs. (*Id.*). In late 2007 or early 2008, Drain came back to Ohio. (*Id.*). After Drain left, Gina discovered she was pregnant again. (*Id.*).

While Drain was in Ohio, Gina received a phone call from Drain's cousin, Miranda Shafer, saying that Drain was suicidal. (*Id.*). Gina believed that Drain was subsequently institutionalized. (*Id.* at 59). At some point around this time, Gina called the Findlay police and asked them to do a welfare check on Drain. (*Id.*). Findlay Police responded, and Drain told them she was fine. (*Id.*). But later that same day, Gina received a call from Drain during which Gina could hear sirens in the background because Drain was in a high-speed chase. (*Id.*). Gina called the police again asking them to ensure Drain would not be shot because she believed Drain was attempting suicide by cop. (*Id.*). Drain was sentenced to two years in prison for this incident. (*Id.*).

Upon her release in 2010, Drain called Gina. (*Id.*). Drain was living with the mother of another inmate and was back into drugs. (*Id.*). Gina called a local mental health program in Florida, Lifestream, and arranged for Drain to be admitted to their in-patient program. (*Id.*). Drain got someone to buy her a bus ticket, and she made her way to Florida. (*Id.*). Gina picked Drain up at the bus station, and on the way to Lifestream, they stopped by Gina's house so she could introduce Drain to their son. (*Id.*).

Drain began the program at Lifestream but went AWOL from the treatment center multiple times. (*Id.*). Ultimately, Gina received a call from the county sheriff saying they had Drain in custody for stealing pills from a Walgreens. (*Id.*). Drain received a six-year prison sentence and

was incarcerated in Florida from 2010 to 2016. (*Id.* at 39, 59); (State's Ex. 35). After being released in March 2016, Drain came back to Ohio. (Def. Ex. A at 39).

Only weeks later, in April 2016, Drain confronted her father about the sexual and other abuse he inflicted on her, and Drain ended up injuring her father by stabbing him. (*Id.* at 35, 39, 52). Shortly after that incident, Drain argued with Grose about whether he snitched on her regarding the attack on her father. (*Id.*). Ultimately, Drain attacked Grose as well, killing him. (*Id.*).

Drain was charged with and pleaded guilty to felonious assault for the attack on her father and to aggravated murder for killing her former sexual abuser Randy Grose. (*Id.*); (State's Exs. 33-34). Drain was sentenced to 38 years to life, and she has been incarcerated in the Ohio Department of Rehabilitation & Correction ("DRC") from that time until the present. (State's Exs. 33-34).

D. If Drain is the fire, the system is the gasoline.

Drain's upbringing was tumultuous, traumatic, and marred by sexual abuse, drugs, alcohol, and violence. This upbringing caused Drain to not only self-soothe by cutting herself and abusing substances but Drain also developed serious mental illnesses and personality disorders as a result. Further, Drain's early substance use and self-injurious behaviors were indicative of how extensively Drain's formative years affected her.

Drain's years in DYS did nothing but exacerbate her problems. As she moved into adulthood—armed with little to no healthy coping mechanisms and with serious untreated mental illnesses and personality disorders affecting her every move—Drain all but gave up on life. As Drain stated in her unsworn statement: "My death sentence was handed down long ago when Juvenile Judge Alan H. Davis decided the best way to deal with me, was to throw me in a cell and

left me to figure everything out for myself." (Hrg. 05.18.20 Tr. 109). Drain added: "But, if I'm the fire, your system is gasoline." (*Id.*). In this case, the system and all involved—including trial counsel, the trial court, and the State—poured gasoline on that fire. (*Id*. at 108). From her childhood to now, the entire system failed Drain.

STATEMENT OF THE CASE

A. Warren Correctional Institution

In April of 2019, Drain was incarcerated at Warren Correctional Institution ("Warren").[3] She had been transferred from the Lucasville Correctional Facility to the Residential Treatment Unit ("RTU") at Warren only a few weeks before. (State's Ex. 19). The RTU is a specialized unit that provides "intensive psychiatric services to some of the most troubled of Ohio's prison inmates."[4] Drain was given an individual cell due to her security level. (*Id.*).

B. The Incident

On April 13, 2019, Christopher Richardson was also incarcerated in the RTU. Drain and Richardson were on different timetables to be out of their cells, but everyone was allowed out at mealtimes. (*Id.*). After eating lunch, Richardson went into Drain's cell on the top range of the unit. (State's Ex. 2). Around fifteen minutes later, Drain emerged from the cell alone. (*Id.*). Drain proceeded down to the main communal area of the unit. (*Id.*). After speaking briefly to a friend in the recreation cage, Drain proceeded to the unit manager's desk. (*Id*.). At the same time, the unit guards went to Drain's cell door and Drain got down on her knees and put her hands in the air. (*Id.*). Unit guards then found Richardson unconscious in Drain's cell. (*Id.*). Drain was handcuffed,

[3] Drain was assigned male at birth. DRC housed Drain as a male prisoner while at Warren.
[4] *Scarnati v. Ohio Unemployment Compensation Board of Review*, 86 Ohio App.3d 589, 590 (10th Dist. 1993). *See also* DRC 1361, Residential Treatment Units and Day Treatment Programs 10/5/2020. Found at: https://drc.ohio.gov/Portals/0/Policies/DRC%20Policies/67-MNH-23%20(Oct%202020).pdf?ver=c5vhysf3x8wJLYaq0LoVLw%3d%3d

and medics were called to attend to Richardson. (State's Exs. 2, 40). Richardson was taken to Atrium Medical Center and then to Miami Valley Hospital where he died two days later. (Hrg. 05.18.20 Tr. 32-33); (State's Exs. 42-43).

Immediately after the incident, Drain was interrogated by officers from the Ohio State Highway Patrol. (State's Ex. 19). She immediately confessed to the officers, answered all of their questions, and gave them details about the incident. (*Id.*).

C. Pretrial Proceedings

Drain was indicted on August 19, 2019. (R. 1). The indictment charged two counts of aggravated murder, each with two death specifications. (*Id.*). Drain was also charged with one count of possession of a deadly weapon while under detention. (*Id.*). On August 30, 2019, Drain was arraigned and entered a plea of not guilty. (R. 16). John C. Kaspar and Richard G. Wendel II were appointed to represent her. (R. 15). Between September 17, 2019, and April 16, 2020, the trial court held five pretrial hearings. Drain appeared in person at only three of these five hearings, appearing by video at the others. (PT 09.27.19 Tr. 3); (PT 11.14.19 Tr. 3); (PT 01.02.20 Tr. 3); (PT 02.19.20 Tr. 3); (PT 04.16.20 Tr. 3).

On January 2, 2020—less than five months after her capital indictment and on the same date as the third pretrial hearing—Drain wrote to the trial court asking to plead no contest. (R. 186). A fourth pretrial hearing was held on February 19, 2020, to address Drain's letter. (PT. 02.19.20 Tr.). The court discussed with Drain the mechanics of moving forward with a plea, and it was determined that another hearing would be held to allow the court to hear from a psychologist and discuss jury waiver. (*Id.* at 3-11). Then, days later, the world was paralyzed by COVID-19, and all in-person interactions, including courtroom proceedings, were reevaluated due to this public health crisis.

On March 9, 2020, Ohio Governor Mike DeWine signed Executive Order 2020-01D, declaring a state of emergency due to the COVID-19 pandemic. Executive Order 2020-01D. On March 16, 2020, the Warren County Common Pleas Court issued an order restricting the use of the courthouse and imposing health care guidelines and screening mechanisms. *See* Temporary Order in Response to the COVID-19 (Coronavirus) Public Health Crisis filed 03.16.20 20MS000328 (All Court Facilities).[5] On March 23, 2020, the court issued a supplemental order increasing courthouse restrictions, including mandating health screenings for all members of the public, litigants, and attorneys attempting to enter the building. *See* Supplemental Entry and Order for certain restrictions to the use, occupancy and traffic for the Courthouse Facility located at 500 Justice Drive, Lebanon, Ohio following Director's Stay at Home Order March 22, 2020 filed 03.23.20 20MS000328.[6] A similar, updated order was issued on May 4, 2020. *See* Second Supplemental Entry and Order for certain restrictions to the use, occupancy and traffic for the Courthouse Facility located at 500 Justice Drive, Lebanon, Ohio following Director's Stay at Home Order March 22, 2020 filed 05.01.20 20MS000328.[7] Among other things, this order addressed the wearing of masks in the courthouse, which were permitted but not required unless ordered by a judge or magistrate for a specific hearing. *Id.*

In the midst of this unprecedented global pandemic, the court held a final pretrial hearing on April 16, 2020. At this hearing, the court addressed Drain's competency, as evaluated by Dr. Jennifer O'Donnell, and deemed Drain competent to waive a trial by jury. (PT 04.16.20 Tr. 6-13).

[5]Accessible at https://www.co.warren.oh.us/commonpleas/TemporaryOrder.pdf (last accessed March 5, 2021).
[6]Accessible at https://www.co.warren.oh.us/commonpleas/SupplementalOrder032320.pdf (last accessed March 5, 2021).
[7]Accessible at https://www.co.warren.oh.us/commonpleas/SecondSupplementalOrder050120.pdf (last accessed March 5, 2021).

Various stipulations and evidentiary issues were also discussed, though it is unclear exactly what the parties stipulated to, and many of the items of evidence that were eventually admitted against Drain were irrelevant to the incident. (*Id.* at 22-32). The court also took judicial notice of the COVID-19 pandemic at this hearing. (Ex. 04.16.20 II). The case then proceeded to a plea in front of a three-judge panel on May 18, 2020, at which Drain entered a plea of no contest. (R. 214).

D. No Contest Plea

After the no contest plea was entered, both the State and defense waived opening statements. (Hrg. 05.18.20 Tr. 29). During the State's presentation of evidence, Trooper Nathan Stanfield from the Ohio State Highway Patrol testified. He described receiving a call to investigate an injured inmate, Christopher Richardson, who was unconscious but breathing and being taken to the hospital. (*Id.* at 31-32). Trooper Stanfield then went to Atrium Medical Center and was told by medical staff that Richardson's injuries were life-threatening. (*Id.* at 32-33).

Trooper Stanfield then responded to Warren to begin his investigation. (*Id.* at 34). He spoke to investigator Brian Baker, who related that during a range check, Corrections Officer Justin Crowder observed blood and footprints on the stairs leading up to Unit 1C. (*Id.* at 34). The officer followed the blood trail to cell 215, observed an inmate lying unconscious and bloody in the cell, and called a medical emergency. (*Id.* at 35). Corrections Officers at the scene all described how Drain got down on her knees and placed her hands in the air to surrender. (State's Ex. 40, Hrg. 05.18.20 Tr. 35). Drain was then escorted out of the block by Corrections Officer Christopher Ballard. Hrg. (05.18.20 Tr. 35). Drain admitted to Ballard that she wished Richardson had died, and that she had planned the assault the day before. (*Id.*).

The State then played the prison's video of surveillance footage from Warren during the time of the incident. (Hrg. 05.18.20 Tr. 37); (State's Ex. 2). Next, Trooper Stanfield testified to

various photographs of the scene, and identified various pieces of physical evidence that had been recovered from the scene. (Hrg. 05.18.20 Tr. 46-55). Trooper Stanfield then testified to his interview with Drain. (*Id.* at 55). Finally, Trooper Stanfield testified to the medical examiner's report and stated that cause of death was multiple blunt force and sharp force injuries to the head and neck. (*Id.* at 64).

After conclusion of the evidence, both sides waived closing argument. (*Id.* at 80-81). The panel deliberated over lunch for one hour and fifteen minutes and found Drain guilty of all charges and specifications. (*Id.* at 82-84).

E. Sentencing

The hearing then immediately moved to the mitigation phase. The State moved all prior evidence and testimony from the plea hearing into evidence and then rested, waiving opening statements. (*Id.* at 90). Defense counsel likewise waived the opportunity to present an opening statement. (*Id.*). Before proceeding to defense witnesses, the court found the autopsy photos not relevant for sentencing and excluded them from this phase of the hearing. The Court admitted all other evidence from the trial. (*Id.* at 90-91).

Defense counsel presented two witnesses on Drain's behalf: her cousin Miranda Shoemaker and a life-long friend, Andrea Stanfield. (*Id.* at 92-105). Both expressed their love for Drain and their desire not to see her executed. (*See id.*). Drain then made an unsworn statement. (*Id.* at 106-110). After this limited presentation, defense counsel asked the court to admit Defense Exhibit A to the record under seal, not to be considered by the court, but to be part of the record for appeal. (*Id.* at 110-114). Then the defense rested and both sides made closing arguments. (*Id.* at 114-132). After deliberating for only one hour and twelve minutes, the panel returned and sentenced Drain to death. (*Id.* at 133).

LEGAL ARGUMENT

Proposition of Law No. 1: The death sentence imposed on Drain was unreliable and inappropriate in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution, Article I, Sections 1, 2, 9 and 16 of the Ohio Constitution and R.C. 2929.05.

This Court is required to independently review Drain's sentence for appropriateness. R.C. 2929.05(A). "[A]ll of the facts *and other evidence* disclosed in the record in the case" must be considered, along with "the offense and the offender * * *" (Emphasis added.) R.C. 2929.05(A). In reviewing Drain's sentence, this Court must determine whether the evidence supports the three-judge panel's finding of the aggravating circumstances, whether those aggravating circumstances outweigh the mitigating factors, and whether death is the appropriate sentence. R.C. 2929.05(A); *State v. Graham*, 2020-Ohio-6700, __ N.E.3d __ ¶ 190. No deference should be given to the trial court's determination. *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984); *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984).

I. Aggravating Circumstances

Drain was convicted of two capital specifications in this case. First, the offense was committed while Drain was under detention at Warren. R.C. 2929.04(A)(4). Second, at the time of the instant offense, Drain was serving a sentence for a prior aggravated murder conviction. R.C. 2929.04(A)(5).

II. Mitigating Factors

Weighted against those two aggravating circumstances are the statutory mitigating factors outlined in R.C. 2929.04(B). Much of Drain's mitigation story falls under the catchall provision of (B)(7).

A. This Court should consider the entire Defendant's Exhibit A when conducting its independent review of Drain's sentence and find that the mitigating factors outweigh the aggravating circumstances.

This Court must consider "all of the facts *and other evidence disclosed in the record* in this case," which includes Defendant's Exhibit A. (Emphasis added.) R.C. 2929.05(A). At the mitigation hearing, Drain presented two witnesses and made an unsworn statement. (Hrg. 05.18.20 Tr. 92-110). After Drain's unsworn statement, defense counsel marked Defendant's Exhibit A, which was "other information that we believe would be mitigation on [Drain's] behalf" and asked for it to be admitted to the record under seal. (*Id.* at 110-111). The exhibit contained Dr. O'Donnell's mitigation report plus approximately 2000 pages of corresponding documentation that was referenced in her report. (*Id.* at 112); (Def. Ex. A). The trial court "generally agree[d] that it should be made part of the record, because I think in a capital case, everything should be made part of the record * * *" (Hrg. 05.18.20 Tr. 113). The panel took it under advisement, but delayed ruling until after the conclusion of trial. (*Id.* at 113-114). The exhibit was not considered by the panel in determining its sentence. (*Id.*).

Ultimately, the trial court filed Defendant's Exhibit A under seal, noting that "this evidence is solely for the purpose of appeal * * *" (*Id.* at 151). The trial court indicated its belief that the exhibit would be considered by this Court: "I am going to order that Exhibit A be made part of the record under seal, and that will be subject to the review in this case by the Supreme Court because * * * they are the ones that we are making a part of the record for their benefit." (*Id.*).

Though this Court has previously declined to consider information that defense counsel submitted under seal, Drain's case is distinguishable. *State v. Clinton,* 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 250. In *Clinton*, no mitigation evidence was presented except Clinton's unsworn statement. *Id.* at ¶ 254. Additional information was submitted under seal, including

summaries of family interviews, children services records, and mental health records. *Id.* at ¶ 250. This Court took issue with the family interviews because they were not signed by the family members and were "submitted simply to show that the defense had thoroughly investigated Clinton's mitigation." *Id.* at ¶ 254. Defense counsel's stated purpose in *Clinton* was to "'make the record clear' that Clinton was voluntarily waiving mitigation and that if Clinton changed his mind, his defense team was ready to present mitigating evidence." *Id.* at ¶ 253.

The difference in this case is, unlike in *Clinton*, Drain did not waive mitigation. She presented two witnesses in addition to her unsworn statement. Drain's counsel then failed to present the rest of the mitigation evidence, instead submitting Defendant's Exhibit A under seal. *See* Prop. of Law No. 2. Drain's counsel stated their purpose for the exhibit was to demonstrate that there was additional mitigation to present. (Hrg. 05.18.20 Tr. 110). As further outlined in Proposition of Law No. 2, counsel was ineffective for filing Defendant's Exhibit A under seal, rather than presenting the mitigation to the panel for their consideration. Drain should not be penalized for her trial counsel's errors.

Additionally, this Court has demonstrated divergence from *Clinton* in *State v. Madison*, 160 Ohio St.3d 232, 2020-Ohio-3735, 155 N.E.3d 867, ¶¶ 149, 214-243. Trial defense counsel in *Madison* proffered information relevant to mitigation, yet this Court did not distinguish that mitigating evidence when conducting its sentencing evaluation. *Id.* Drain's situation is different from *Clinton*, and under R.C. 2929.05(A) this Court should consider all the mitigation evidence available, including the full Defendant's Exhibit A, in its independent review of Drain's sentence.

Even if this Court does not consider Defendant's Exhibit A in its entirety, the record contains sufficient mitigating factors to outweigh the aggravating circumstances in this case. First, the competency evaluation and report by Dr. Jennifer O'Donnell must be considered. *Clinton* at ¶

225, citing *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064; *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93. At the final pretrial hearing, the trial court relied on Dr. O'Donnell's report in addressing Drain's "general competency," whether Drain wanted to waive jury, and whether she potentially wanted to waive mitigation. (PT 04.16.20 Tr. 3-5). During that hearing, the court admitted Dr. O'Donnell's Competency Report as a Court's exhibit, identified as "Exhibit 4.16.20 I" without objection. (PT 04.16.20 Tr. 3). The court re-admitted Dr. O'Donnell's competency report at the plea hearing. (Hrg. 05.18.20 Tr. 19-20). Dr. O'Donnell's report contains significant mitigating factors. (*See* Ex. 04.16.20 I).

Further, Drain presented two witnesses in mitigation: Miranda Shoemaker, a cousin who grew up more as a sibling, and Andrea Stanfield, a family friend who also grew up close to Drain. (Hrg. 05.18.20 Tr. 92-105). Drain made an unsworn statement in mitigation. (*Id.* 106-110). Additionally, evidence presented at trial may also be considered by this Court to the extent that it is mitigating. For example, State's Exhibit 40 contains witness interviews that provide mitigating evidence regarding Drain and her life, such as her mental health status, Gender Dysphoria diagnosis, and HIV positive status. (*See* State's Ex. 40) (Inmate Kyle Taylor Interview, Inmate Michael Cothern Interview, and RN Nicole Schimweg Interview). Because defense counsel stipulated to the admission of State's Exhibit 40, they should have then used the mitigating portions of those witness interviews.

B. Background and Childhood

The United States Supreme Court has made it clear that a defendant's troubled history is "relevant to assessing a defendant's moral culpability." *See Wiggins v. Smith*, 539 U.S. 510, 535, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (noting that consideration of the offender's character and background is

mandated by the Eighth Amendment when imposing a capital sentence). This Court historically has not given "decisive weight" to a defendant's background, but it has given a troubled upbringing some weight. *Graham,* 2020-Ohio-6700 at ¶ 208 ("the mitigating evidence presented in this case demonstrates that Graham's history and background are entitled to some weight."); *State v. Grate*, 2020-Ohio-5584, __ N.E.3d __, ¶ 246 ("We give weight to Grate's chaotic background and upbringing."); *Madison,* 2020-Ohio-3735 at ¶ 241 ("Madison's most significant mitigating factor is his abused, and unstable childhood."); *State v. Jackson,* 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.3d 414, ¶ 164 ("We also give some weight to the testimony that Jackson had a troubled childhood.").

In *Clinton*, this Court gave "significant weight" to Clinton's background. 2017-Ohio-9423 at ¶ 294. Both Drain and Clinton suffered from being raised in a dysfunctional household, and both were forced to engage in sexual activity with family members. *Id.*, *see also* (Def. Ex. A at 33, 1225, 1238, 1241, 1245-1246, 1347). As outlined below, Drain's traumatic life history is similarly entitled to significant weight in mitigation.

i. Drain had a traumatic and dysfunctional upbringing that followed her into adulthood.

Within Dr. O'Donnell's competency report, and throughout the record, there is a host of mitigation describing Drain's troubled childhood. At the time of trial, Drain was 38 years old. (Ex. 04.16.20 I, p. 6). Drain was raised by family members with substance abuse issues. (*Id.* at 7). Drain herself admitted that she had a dysfunctional childhood and upbringing. (Hrg. 05.18.20 Tr. 108). Though she did not want to "rehash" it, she acknowledged that there were "traumas [she] went through as a child." (*Id.*).

Her troubles began before middle school. At the tender age of 9, she first drank alcohol, which then escalated in frequency, and eventually resulted in her turning to other substances. (Ex.

04.16.20 I, p. 7). That same year, Drain began mental health services and counseling through an outpatient community health center for the first time. (*Id.* at 6). Around fourth grade, at the age of 10, she was placed in supervised classes due to disruptive behavior. (*Id.*). She completed only about eight grades of formal education before being incarcerated in DYS. (*Id.*). When discussing her involvement with the system, Drain reported being incarcerated at the infamous juvenile detention center in Columbus, known as "TICO" in 1996. (State's Ex. 19).

Drain's experience in DYS had a profound effect on her mental health: "I was sitting in a prison cell, locked down, by myself twenty hours a day before I made it to middle school. I was too young back then to have anything close to the capacity to understand what the consequences of solitary confinement at that age could be." (Hrg. 05.18.20 Tr. 109). Drain expressed her feelings of abandonment and rejection from the system that was supposed to help her: "My death sentence was handed down long ago when Juvenile Judge Alan H. Davis decided the best way to deal with me, was to throw me in a cell and left me to figure everything out for myself." (*Id.* at 109).

At the age of 9,[8] Drain began a now long documented history of the self-injurious behavior of cutting—even to the point of cutting arteries. (Ex. 04.16.20 I, p. 6). That same year, Drain first met the criteria for addiction, according to a 1997 assessment by DYS. (*Id.* at 7). While at DYS in 1995, Drain was assaulted and knocked unconscious for approximately an hour. (*Id.* at 7).

Dr. O'Donnell reported that her review of the records suggested that Drain was retained at DYS "at least a couple of times during [her] academic career." (*Id.* at 6). Drain returned to the

[8] Dr. O'Donnell's competency report states that Drain began cutting at age 13, however, Dr. O'Donnell's mitigation report indicates that Drain's self-injurious behavior started at age 9-13, and also lists hospital treatment for cutting at age 9. Def. Ex. A at 36. Therefore, for consistency, we will refer to Drain's self-injurious behavior beginning at age 9 throughout.

public education system after DYS and "briefly continued in school until age 18, but there are no records of graduation." (*Id.*). Drain recounted receiving her GED from DYS. (*Id.*).

Dr. O'Donnell reported that there are no records of post-secondary education or vocational certificates, nor records of productive employment other than a porter job in prison in 2016. (*Id.*). Drain qualified for Social Security Supplemental Income due to her severe mental illness; however, Drain alleged to Dr. O'Donnell that it was "purely for the financial benefit conceived of and put forth when [s]he was homeless and without a job." (*Id.*). An appropriate evaluation of Drain's mental health status—and Drain's attempt to explain away her mental illness in that way—should have been properly presented to the three-judge panel. *See* Prop. of Law No. 2.

Drain married the mother of her two children and maintains a positive relationship with both her and their children. (Ex. 04.16.20 I, p. 6). Drain described these relationships as important to her, and the records revealed she talked to others in a positive manner about these relationships too. (*Id.*). Drain's son was 12 years old at the time of trial. (*Id.*). Her daughter, age 14 at the time of trial, is closest to Drain. (*Id.*). Drain described her daughter as "the only part of me that's truly innocent and good." (Hrg. 05.18.20 Tr. 107). Though misinformed at the time, Drain's decision to not allow her daughter to testify in mitigation was purely a selfless act, made in desire to protect her child: "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." (*Id.*). The parental desire to protect her child in a way that Drain was never protected as a child deserves consideration.

At the mitigation hearing, two pseudo-siblings testified on Drain's behalf: Miranda Shoemaker and Andrea Stanfield. (*Id.* at 92-105). Drain has been close with her cousin Miranda since Miranda was 11 or 12. (*Id.* at 93). Drain was like a sibling to her. (*Id.* at 97). They continue

to speak almost daily. (*Id.* at 93). Drain is particularly close with Miranda's 12-year-old daughter, Nevaeh. (*Id.*). Miranda explained that Drain is a positive influence on her life and her daughter's life. (*Id.* at 97-98).

Andrea Stanfield testified that she grew up with Drain and that they also have a sibling type relationship. (*Id.* at 102). Andrea described Drain as "an amazing person, if you get to know" her, "fun," having "an amazing personality," and willing to "help anybody out." (*Id.* at 102-103). They still speak about once a week, discussing everyday life, particularly the things that Andrea is doing. (*Id.* at 104). The testimony of both these surrogate-sisters is entitled to weight in mitigation. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶104, citing *State v. Bays*, 87 Ohio St.3d 15, 34, 716 N.E.2d 1126 (1999).

ii. Defendant's Exhibit A provides a fuller picture of the depths of trauma Drain experienced during her upbringing and into adulthood.

Dr. O'Donnell's mitigation report, the family witness interviews, and the voluminous records in Defendant's Exhibit A provide further insight into and understanding of the trauma Drain has endured throughout her life.

Drain's parents, Susan and Edwin Drain, divorced when Drain was three years old after Edwin had an affair. (Def. Ex. A at 31). Susan moved her two children, Drain and Brandon, in with her mother Carolyn Gusler. (*Id.* at 31-32). Edwin was mostly out of Drain's life until age 9 or 10 when they reconnected. (*Id.* at 32). After they reconnected, Drain favored her father's lifestyle as opposed to the structured routine that her grandmother provided, which included curfews, chores, and homework expectations. (*Id.*). Eventually, Susan and her children left Carolyn's home because the kids—ages 11 and 13—were abusing substances and getting in trouble. (*Id.*).

Leaving their grandmother's home led to a defining—and devastating—period of Drain's childhood. Drain and Brandon encouraged their mother to take their father back. (*Id.*). Despite having a prior restraining order against Edwin, Susan allowed him to recuperate from knee surgery in her home with the children, solely as a platonic relationship. (*Id.*). While staying at her home, Edwin abused Susan, putting acid in Susan's sanitary pads, and cutting her dresses when she went out at night—though Susan seemed to ignore these behaviors. (*Id.* at 32, 46). One night the abuse escalated to a serious physical beating that caused Susan to be hospitalized for a couple weeks due to a brain bleed. (*Id.* at 32).

Edwin lied to the children about where Susan was when they awoke the next morning looking for their mom. (*Id.*). After the kids went to school, a neighbor found Susan unconscious. (*Id.*). Susan has no memory of the beating due to the brain damage she suffered, and she still has great difficulty communicating. (*Id.*). After the assault, she lost control of her children and never lived with Drain again for any appreciable period. (*Id.*). Susan observed that Drain became more violent towards inanimate objects and made threats of violence against her after this incident. (*Id.* at 34).

In 1996, Edwin became Drain's primary custodian. (*Id.* at 33, 1293-1296). Susan discovered a year later that Drain's desire to live with her father and stepmother, Betty Phillips, was due to Edwin and Betty providing alcohol and drugs to Drain and allowing her to live without any restrictions. (*Id.* at 33).

Edwin and Betty caused irreparable damage to Drain. They both sexually abused her.[9] (*Id.* at 33, 1225, 1238, 1241, 1245-1246, 1347). Brandon reported that Drain stole Edwin and Betty's

[9] At this time, Drain was still viewed by Edwin, Betty, and much of the outside world, as a young boy.

car, so they forced Drain to have sex with Betty, while Edwin watched, in exchange for not pressing charges. (*Id.* at 33, 47). The sexual abuse perpetrated against Drain by her father is well documented. (*Id.* at 33, 1225, 1238, 1241, 1245-1246, 1347). Drain's DYS records are filled with references that Drain was sexually abused by her father. (*Id.* at 1225, 1238, 1241, 1245-1246). The records also have notes that Drain had homicidal ideations about her father. (*Id.* at 1225, 1238, 1241, 1245-1246).

Edwin and Betty also perpetrated incestuous sexual abuse on Drain's half-sister. (Def. Ex. A at 33). They videotaped their teenage daughter "doing a striptease act and performing sex acts while the adults looked on." (*Id.*). Family members described Edwin as a "pervert" who "blackmailed" a young woman in the apartment complex in exchange for sex. (*Id.*). Edwin was convicted of Illegal Use of a Minor in Pornography in 2000 and was charged with Felonious Assault, Kidnapping, and Rape in 2001, ultimately being convicted of the felonious assault, where Betty was the victim. (*Id.* at 33, 1519-1526).

Yet, there is no evidence that Drain ever received counseling, support, or trauma-informed care regarding the incestuous abuse she endured. In fact, the records indicate the exact opposite; her trauma was ignored. Despite reporting the sexual abuse to officials at DYS, Drain was eventually discharged with a note in her file that, "There were no mental health issues dealt with this youth. [She] is receiving medication for sleeping problems, [her] chief complaint." (*Id.* at 1239). Despite doing the only thing a child in such circumstances can be expected to do—tell an adult—Drain was failed by the entire institution of adults that were required to not only report this abuse to authorities, but also provide her with care and rehabilitation.

Shortly after the traumatic experiences she endured while living with her father, at age 15, Drain was adjudicated and sent to DYS for three years, then released to a halfway house. (*Id.* at

33). As a teenager, Drain was affiliated with a gang and was exposed to rampant community violence. (*Id.* at 34). The gang kicked her out after they discovered she was gay.[10] (*Id.*) Drain's brother, Brandon, was also known to be violent against Drain and forced her to participate in his criminal activities. (*Id.*). Both kids were in frequent trouble for vandalism and street fighting. (*Id.*).

Drain described "being the target of serious physical violence and bullying starting in [her] early teens and continuing through the rest of [her] adult life." (*Id.* at 35). Her DYS records discussed her need to prove herself with violence due to her small stature. (*Id.* at 1226). Drain further described being the target of older men who, viewing Drain as a young and malleable boy, would groom or intimidate her into having sex with them. (*Id.* at 35). Drain talked to Dr. O'Donnell about how she had to adapt to survive because without some of the men in her life she would have been homeless or preyed on by other people. (*Id.*).

Drain's ex-wife, Gina Stokes, described a long-term sexual partner of Drain's named Randy Grose, who met Drain when Drain was 16 and Grose was in his thirties. (*Id.*). The relationship was abusive, and Grose paid Drain for sex and paid other men to have sex with Drain. (*Id.*). Grose ultimately became the victim in Drain's prior aggravated murder conviction. (State's Ex. 33). Drain reportedly murdered Grose for turning her in for stabbing her father, but also because he was an abuser. (Def. Ex. A at 35). Drain confessed that she stabbed her father in retaliation for the abuse he inflicted on her and her stepsister as children. (*Id.*). Drain's violent reactions towards men and child molesters is a trauma reaction to the abuse she suffered as a child. (*Id.* at 35, 146, 280, 297-298, 334-335, 1347, 1821).

Gina also described her relationship with Drain, and the downward spiral that Drain's life seemed to take as Drain entered adulthood. Gina noted the abrupt change in Drain after their return

[10] At this time, Drain was still viewed as a boy by the outside world.

from Drain's grandmother's funeral. (Def. Ex. A at 57). Gina detailed her recognition of Drain's mental health symptoms and how that impacted their lives, including Drain leaving their infant daughter in the care of Gina's teenage son and suddenly leaving the relationship without warning. (*Id.* at 57-58). Eventually Drain returned and Drain and Gina picked up where they left off but Drain and Gina's relationship was further strained by Drain's continued interest in relationships with men. (*Id.* at 58). On multiple occasions, Drain left Gina for periods of time to pursue male relationships and use drugs. (*Id.*). This ultimately ended their marriage. (*Id.*).

Even after their marriage ended, Gina stayed in contact with Drain and those close to Drain. Gina described receiving reports from Drain's friends that Drain was suicidal, and Gina called Ohio police on multiple occasions to ask for their assistance in helping Drain. (*Id.* at 58-59). Gina recounted an instance of picking Drain up after her release from prison and taking her to an in-patient substance abuse treatment program, though Drain ultimately abandoned the program. (*Id.* at 59).

Drain's upbringing was tumultuous and marred by sexual abuse, drugs, alcohol, and violence. This upbringing caused Drain to self-soothe by cutting herself and using substances. This early substance abuse and self-injurious behavior were indicative of how extensively Drain's formative years affected her. Her years in DYS did nothing but exacerbate her problems. As she moved into adulthood, her long-term partner and eventual wife and mother of her children, Gina, described the downward spiral that Drain experienced. But Gina also described their loving—although strained—relationship and Drain's love for both her, and their children. (*Id.* at 57-61). Drain's mitigation story is rich with trauma similar to that detailed in *Clinton,* 2017-Ohio-9423 at ¶ 294. This Court should give "significant weight" to Drain's history and background.

C. History of mental illness

The United States Supreme Court, and this Court, have recognized that a defendant's mental illness makes her morally less culpable. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 390-393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *State v. Johnson*, 144 Ohio St.3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶¶ 138, 140. Previous members of this Court have questioned the appropriateness of sentencing a seriously mentally ill offender to death. *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.2d 1112, ¶¶ 308–313 (O'Neill, J., dissenting) ("[E]xecuting the mentally ill is unconscionable."). The Ohio Legislature recently passed a bill making those with serious mental illnesses ineligible for the death penalty. *See* S.B. No. 54, 133rd General Assembly (2019-2020).

Drain's history of mental illness deserves considerable weight. *Grate*, 2020-Ohio-5584 at ¶ 245 (giving "considerable weight" to long-term mild depressive condition, bipolar and related disorders, ADHD, a language-based learning disorder, a neuro cognizance disorder and a personality disorder); *Clinton* at ¶ 296 ("We give weight to Clinton's personality disorders and other mental-health problems"); *Jackson*, 2016-Ohio-5488 at ¶ 164 ("We give some weight in mitigation to Jackson's ADHD and antisocial personality disorder."); *Graham*, 2020-Ohio-6700 at ¶ 209 ("[W]e give some weight to Graham's mental health problems.").

i. Drain has a history of mental illness, including diagnoses of Post-Traumatic Stress Disorder, Gender Dysphoria, and Borderline Personality Disorder, in addition to her chronic depression and self-injurious behavior.

Within Dr. O'Donnell's competency report, and throughout the record, there are dozens of references to Drain's history of mental illness. This offense occurred at Warren Correctional Institution in the Residential Treatment Unit. Hrg. (05.18.20 Tr. 75-76). A few weeks before this offense, Drain had been transferred from Lucasville to Warren's RTU for treatment after

attempting to self-castrate. (State's Exs. 19, 40). RTUs provide "intensive psychiatric services to some of the most troubled of Ohio's prison inmates." *Scarnati v. Ohio Unemp. Comp. Bd. Of Review*, 86 Ohio App.3d 589, 590, 621 N.E.2d 723 (10th Dist.1993). Inmates in RTUs "commonly suffer[] from a variety of mental and emotional problems." *Id.* Unit C1, where Drain was housed, was specifically for treatment purposes. (State's Ex. 40, Interview of Kyle Taylor). Registered Nurse Nicole Schimweg explained that as psychiatric nurses, they are stationed next to the RTU, and their primary job is the psychiatric aspect of nursing—talking to the inmates and administering medications. (State's Ex. 40).

Drain's history of mental illness is well documented. She first received mental health services at the age of 9 and continued with counseling throughout her childhood and up until the instant offense, depending on life circumstances. (Ex. 04.16.20 I, p. 6). Dr. O'Donnell noted a family member reported there was a family history of mental illness and that they had seen Drain "stare off into space," causing that family member to believe Drain is psychotic. (*Id.*).

During her previous incarceration in DRC, prison staff diagnosed Drain with Gender Dysphoria, Post-Traumatic Stress Disorder ("PTSD"), and Borderline and Antisocial Personality Disorders. (*Id.* at 7). Drain was also identified as having the psychiatric disorder Schizophrenia and was hospitalized after leaving DYS as a teenager. (*Id.*). Dr. Cheng, the doctor at the prison where Drain was housed, described Drain as "primarily struggling with issues related to the gender dysphoria and responding to that with self-harm (cutting [her]self) and anger." (*Id.*). The self-injurious behavior dates back to age 9, and Drain has severely endangered herself by cutting arteries intentionally. (*Id.* at 6). Drain reported that these incidents were not suicide attempts, but rather done as a self-soothing behavior. (*Id.* at 7).

Dr. O'Donnell noted that Drain filed a lawsuit against DRC regarding her being a transwoman. (*Id.*). Drain won that civil suit against the prison system using the Americans with Disability Act (ADA). (*Id.* at 8). Despite this and myriad other evidence supporting Drain's gender identity, Dr. O'Donnell, as further described in Proposition of Law No. 2, wrongly dismissed Drain's gender identity by being persuaded by Drain's passing remarks that she "was never seriously considering gender changing." (*Id.* at 7).

The record is clear, however, that Drain is a transwoman, and that fact was well-known. During his interview, fellow inmate, Kyle Taylor, told the investigator that he has known Drain as Victoria, Tori for short, as long as he has known Drain. (State's Ex. 40, Interview of Kyle Taylor). Taylor described Drain's transgender history and how she has been victimized for being a transwoman in the past. (*Id.*). Taylor reported Drain's attempt to self-castrate, which brought Drain to Warren so the prison could "treat" her Gender Dysphoria. (*Id.*). Even inmate Michael Cothern, who was less sensitive in his description of Drain, knew that Drain was transgender. (State's Ex. 40, Interview of Michael Cothern). Cothern met Drain in 2012 or 2013 when they were both incarcerated in an RTU at Lucasville, —more evidence that Drain's need for mental health treatment has been longstanding. (*Id.*).

In addition to her documented diagnoses, Drain has reported the chronic feeling of depression and the inability to feel joy. (Ex. 04.16.20 I, p. 6). She has been prescribed a host of psychiatric medications, such as Haldol, Effexor, Artane, and Lamictal. (*Id.*). At the time of the offense, Drain was taking Effexor for anxiety twice a day. (State's Exs. 19, 40). The records are clear that Drain has not been consistent in complying with her prescriptions. (Ex. 04.16.20 I, p. 7). Yet, Dr. O'Donnell reported that Drain was engaged in individual therapy since arriving at the prison after the offense and began to find some benefit in talking to someone she trusts. (*Id.* at 8).

ii. Dr. O'Donnell's mitigation report and the corresponding records in Defendant's Exhibit A provide further evidence of Drain's history of mental illness.

In her evaluation for mitigation purposes, Dr. O'Donnell adds further insight into Drain's diagnoses and adds an additional diagnosis of Obsessive-Compulsive Disorder ("OCD"). (Def. Ex. A at 40-42). Dr. O'Donnell determined that Drain meets the diagnostic criteria for OCD, "namely recurrent and persistent thoughts and urges causing marked anxiety and distress and engaging in behaviors aimed at preventing or reducing that anxiety." (*Id.* at 42). OCD, described as "the manifestation of behaviors that fall on a continuum of extreme to minor and is expressed typically through thoughts and urges, called obsessions * * *" (*Id.*). These obsessions are seen in Drain's self-harm events. (*Id.*). Drain has been self-injuring herself by cutting since she was 9 years old. (*Id.* at 36).

Dr. O'Donnell's insight on Borderline Personality Disorder ("BPD"), and why Drain does not meet the criteria for Antisocial Personality Disorder ("APD"), is particularly helpful in explaining Drain's mental health. (*Id.* at 41-42). Because of Drain's "craving for positive, nurturing relationships," Dr. O'Donnell determined Drain "does not fully meet the criteria for APD but does meet the criteria for BPD." (*Id.* at 41).

The research indicates that BPD manifests due to a combination of genetic and environmental factors: biological vulnerabilities plus exposure to traumatic experiences as a child. (*Id.*). Since the age of 12 or 13—which the records indicate is around the time of the sexual abuse Drain suffered at the hands of her father and stepmother—Drain's "experience of others devolved from a once reasonably healthy child with no signs of emotional disabilities to one of a predator who perceives every encounter as fraught with either imminent danger or at a minimum the

potential of abandonment and rejection, causing [her] to experience emotions that [she] cannot manage healthily." (*Id.* at 40).

Self-injurious behavior is a hallmark of BPD. (*Id.* at 41). Drain's medical and mental health records are filled with incidents of self-injurious behavior, including Drain saying "I cut myself because I don't like who I am. I'm transgender so I don't like certain parts of myself." (*Id.* at 118). The DRC records memorialize recent and severe incidents of cutting: in December 2016, Drain swallowed a razor blade; in both October and November 2018, Drain inflicted very serious injuries to her penis; and in May 2019, there are records of cutting her lower arms. (*Id.* at 37).

Drain's relationships are emmeshed in her trauma response to her experiences. Drain struggles with those who failed her expectations: "[her] mother's inability to protect [her] from [her] father, [her] father's exploitation of his children, violence against [her] mother, [her] ex-lover's betrayal of [her] in implicating [her] in [her] father's stabbing." (*Id.* at 41). This hallmark thinking of BPD explains Drain's complete rejection of others when they cannot be there for her one hundred percent of the time. (*Id.*).

Drain's trauma is incredibly deep-rooted, and Dr. O'Donnell's mitigation report adds details regarding her diagnosis of PTSD. (*Id.* at 42). Drain meets all the criterion for PTSD, and these have been met for at least twenty years. (*Id.*).

Dr. O'Donnell's mitigation evaluation glosses over Drain being transwoman, yet also admits her long history of being transgender. (*Id.* at 31, 37-40, 43-44). Her report indicates Drain requested the defense team use male pronouns and emphasizes one piece of Drain's long history where Drain alleged that she is not transgender. (*Id.* at 31, 256-257, 269).

Dr. O'Donnell's representation of Drain malingering is a bit misleading. After the instant offense, there is a single report that on July 19, 2019, Drain indicated in therapy that she was trying

to manipulate the system to be moved to the women's prison, the Ohio Reformatory for Women. (*Id.* at 256-257, 269). But there are voluminous records, including her lawsuits against DRC in 2017 and 2019, that discuss Drain being a transwoman and her desire for hormone therapy. (*Id.* at 159-160, 187-189, 190-192, 196-197, 219-221, 488, 739-741, 743-744, 1360-1514). In the DRC records leading up to Drain's trial, Drain said her lawsuit and desire for hormone therapy was temporarily on hold because she wanted to focus on her aggravated murder case, the instant offense. (*Id.* at 165-166, 187-192, 251-252, 226-228, 238). And in July 2019, Drain indicated her plan to go through with the lawsuit after being sentenced for the instant offense. (*Id.* at 251-252). Yet Dr. O'Donnell ignored all this evidence in favor of a single comment and report to the contrary.

Since age 21, Drain has recognized she is transgender and made that known to family and friends. (*Id.* at 37). While living in Florida, Drain took hormones without medical supervision, and while in the Florida prison system, she was permitted to wear female clothing and make up and present herself as a female. (*Id.* at 38). Staff at DRC first made the diagnosis of Gender Dysphoria on April 7, 2017, and Dr. Cheng, also at DRC, confirmed the diagnosis in 2019. (*Id.*).

Accordingly, this Court should give considerable weight to Drain's history of mental illness. *Grate*, 2020-Ohio-5584 at ¶ 245; *Clinton*, 2017-Ohio-9423 at ¶ 296; *Jackson*, 2016-Ohio-5488 at ¶ 164; *Graham*, 2020-Ohio-6700 at ¶ 209.

D. History of substance abuse

Drain's history of substance abuse and dependence is entitled to some weight. *State v. Graham* at ¶ 210; *State v. Kirkland*, 160 Ohio St.3d 389, 2020-Ohio-4079, 157 N.E.3d 716, ¶ 176; *State v. Cepec*, 149 Ohio St.3d 438, 2016-Ohio-8076, 75 N.E.3d 1185, ¶ 170; *Jackson*, 2016-Ohio-5488 at ¶ 164. At the time of the offense, Drain had suffered from substance dependence for 28 years. (Ex. 04.16.20 I, p. 6). Similar to *Cepec*, whose 25-year history of alcohol and polysubstance

dependence was accorded some weight, Drain's similarly long history of the same also deserves weight. *Cepec* at ¶ 170.

i. Drain has suffered from substance dependence since early childhood.

Drain first started drinking at the tender age of 9, which ultimately led to abusing other substances. (Ex. 04.16.20 I, p. 6). Her history of substance dependence started at age 13 or 14 with alcohol and marijuana use, which continued heavily until 2013 when Drain was 32. (*Id.*). An assessment at DYS in 1997, indicates that Drain has met the criteria for addiction since age 13. (*Id.* at 7). At age 16, Drain did not identify herself as having an addiction, despite the negative consequences she was having from drug and alcohol abuse. (*Id.*). Given her age at the time, it is not surprising that she did not self-identify a problem despite her two episodes of treatment prior to age 16. (*Id.*).

Dr. O'Donnell's review of the treatment records indicated that Drain would still use if given the opportunity. (*Id.* at 6). When describing the night of the offense, Drain admits to having "K2" and the intent to smoke a joint. (State's Ex. 19). A joint was also found in her cell. (*Id.*). These facts indicate that Drain is still struggling with her drug addiction, however, she has not had any recent positive drug tests while incarcerated. (Ex. 04.16.20 I, p. 6).

ii. The additional records in Defendant's Exhibit A provide supplemental documentation of Drain's life-long battle with substance abuse.

On July 24, 1997, Drain was identified as polysubstance dependent. (Def. Ex. A at 34). According to a DYS investigation report after teenage Drain went AWOL while on home monitoring, Drain received drug and alcohol counseling at two different centers, including inpatient counseling at St. Anthony's Villa. (*Id.* at 1224). Those records report Drain first used alcohol at age 9 and was using daily until her arrest on October 5, 1998, at age 17. (*Id.* at 1218, 1225). She started using marijuana at age 11 but had not used in two years at the time of the

assessment at age 17. (*Id.*). The probation officer conducting the assessment on October 23, 1998, determined Drain had "a major alcohol problem," and needed "cont[inued] drug and alcohol treatment as well [as] independent living skills." (*Id.* at 1226).

In another assessment done by DYS on August 6, 1997, Drain reported having used: marijuana, cleaning products, alcohol, Ritalin, cocaine, LSD, mushrooms, and muscle relaxers. (*Id.* at 1251). She did not believe she had a problem, however, and claimed she was able to stop "any time I want." (*Id.*). At that point, Drain had been treated for substance abuse at two facilities: The Family Resource Center from age 13-14, at which she participated in group counseling twice a week and "attended high;" and at Lincoln Center, age 14, at which she did daily counseling, was drug tested, and continued using. (*Id.*).

The additional records also indicate that she had numerous drug treatment episodes in Florida and Ohio as an adult, however, those interventions were only for detoxification and not actual treatment of her addiction. (*Id.* at 37). Gina, who married Drain in 2005, described Drain as having a substance abuse problem. (*Id.* at 58). Gina attended AA meetings with Drain because Drain was "in and out of recovery with alcohol issues." (*Id.*). Gina described Drain as needing a six pack of beer a day "just to maintain." (*Id.*). On another occasion, Gina took Drain to a detox unit in Florida after Drain had disappeared for a week doing meth and other drugs. (*Id.*).

In Drain's 2016 court competency assessment, Drain described being a regular user of opiates until she robbed a pharmacy in Florida. (*Id.* at 1348). Gina recounted receiving a call from a county sheriff in 2011 stating they had Drain in custody. (*Id.* at 59). Gina reported that Drain stole pills from a Walgreen's by writing a note to the clerk that she had a gun, which she did not actually have. (*Id.*). Drain was sentenced to six years for that crime. (State's Ex. 35). This Court

should give some weigh to Drain's history of substance abuse. *Graham* at ¶ 210; *Kirkland* at ¶ 176; *Cepec* at ¶ 170; *Jackson* at ¶ 164.

E. Medical health

Drain's medical health problems are entitled to weight under the catchall provision of R.C. 2929.04(B)(7). Similar to an intellectual disability, medical health problems are conditions Drain suffers from outside of her control that are a part of her life story. Consideration of a mitigating factor under (B)(7), "does not lessen the importance attributed to the evidence during the weighing process." *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, 779 N.E.2d 1017, ¶ 115 (explaining limited intellect being considered under (B)(7), rather than (B)(3), does not diminish its importance.).

i. Drain's medical health problems are entitled to weight.

Drain has endured significant medical health problems that deserve consideration. In 2004, Drain was diagnosed with a benign pituitary tumor that was detected by an MRI. (Ex. 04.16.20 I, p. 7). Drain was diagnosed with testicular cancer in 2011 and was treated throughout the next year with four cycles of chemotherapy. (*Id.*). Drain is also HIV positive. (*Id.*). She was diagnosed with the disease in 2016, but believes she contracted it in February 2015. (*Id.*). Her condition is known by the other inmates as well. (State's Ex. 40). Because Drain has been incarcerated since her diagnosis, she has never received the counseling or support for that life-changing diagnosis that would be available outside of prison. At the time of drafting the competency report, Dr. O'Donnell did not conduct a thorough review of the 797 pages of records in Drain's DRC medical health file from 2016 to late 2019. (Ex. 04.16.20 I, p. 7). Her cursory review did reveal, however, that Drain was only sporadically compliant with her HIV medications. (*Id.*). Drain's non-compliance indicates that she has not received the tools or support necessary to process her diagnosis.

ii. DRC's medical file provides further details about Drain's medical health problems.

There are 797 pages from DRC's medical unit from 2016 to late 2019, which Dr. O'Donnell reviewed for the mitigation evaluation. (Def. Ex. A at 37). The medical records describe Drain's monthly HIV medical appointments that she must comply with. The records also describe in detail the self-harm that Drain has engaged in and has been unable to stop. Drain also has a history of anemia, malnutrition, and being underweight. (*Id.*). Drain has explained her medical non-compliance as being due to the medications causing her to be nauseous and have diarrhea. (*Id.*). This Court should give weight to Drain's medical health problems. R.C. 2929.04(B)(7); *Thomas* at ¶ 115.

F. Cooperation and acceptance of responsibility

Drain's cooperation and full acceptance of responsibility deserves significant weight. From the moment the correction officers discovered the victim, Drain accepted full responsibility. (*See* State's Ex. 2). Drain was already on the bottom range on her knees with her hands in the air when officers opened the door to Drain's cell and found the victim. (State's Exs. 2, 40). In their respective interviews, each officer reported the same facts: Drain was on her knees surrendering next to the desk, she had her hands in the air, and she voluntarily allowed herself to be cuffed and escorted away. (State's Ex. 40).

In her interview with Trooper Nathan Stanfield and Trooper Joe Griffith, Drain admitted what she did. (State's Ex. 19). She confessed to the officers what happened and made no attempts to hide her actions. (*Id.*). She also consented to a DNA sample. State's Ex. 39. A couple months after the incident, Drain made a handwritten statement providing more details of the offense. (State's Ex. 38).

Additionally, rather than convene a jury and put citizens of Warren County through the traumatic experience of a capital trial, Drain elected to proceed with a three-judge panel. (R. 204). Drain went even further in accepting responsibility by pleading no contest. (R. 214, 215). In her unsworn statement, she said, "First and foremost, I stand before you today accepting full responsibility. Not only for the murder of Christopher Richardson, but for everything I've done in the past or will do in the future, good or bad." (Hrg. 05.18.20 Tr. 107). This is not a case where a defendant hedges their confession and only reluctantly accepts responsibility once backed into a corner—this is a case where Drain accepted full responsibility and cooperated with law enforcement every step of the way, from the incident through conviction.

Drain's confession is entitled to some weight. *Kirkland,* 2020-Ohio-4079at ¶ 177 ("a confession is entitled to some weight in mitigation * * *"). And unlike Kirkland, Drain did not tell multiple versions of events that denied or diminished culpability—Drain was immediately and consistently forthcoming. *Id.* Drain's plea also deserves substantial weight "'since guilty pleas are traditionally accorded substantial weight in imposing a sentence.'" *Obermiller,* 2016-Ohio-1594 at ¶ 158, quoting *State v. Ashworth*, 85 Ohio St.3d 56, 72, 706 N.E.2d 1231 (1999). Similar to Obermiller, Drain's "willingness to step forward and take responsibility for [her] actions, without any offer of leniency by the state, indicates a person who is remorseful for the crimes [s]he has committed." *Id.*

G. Proportionality

A death sentence for Drain would be disproportionate to the penalty imposed in similar cases. R.C. 2929.05(A). Though this Court's practice traditionally "dispose[s] of the proportionality issue with a single sentence, indicating that the death penalty has been imposed at some point in history in a capital case involving the same aggravating factor or factors," this Court

should seriously consider the cases below in determining whether a death sentence is appropriate for Drain. *Graham*, 2020-Ohio-6700 at ¶ 222, (Donnelly, J., concurring) (agreeing with the majority that a sentence of death was not appropriate for Graham and adding that the sentence was also disproportionate and excessive).

Another capital trial, not only in the same county, but with the same judge, lead defense counsel, defense psychologist, and mitigation specialist, concluded just two months before Drain's case. *State of Ohio v. Jack Welninski*, Warren County Case No. 18CR034808. There, Welninski was an inmate at Lebanon Correctional, another prison in Warren County, and murdered his cellmate. *Id.* Both Welninski and Drain had the same two capital specifications of under detention and a prior conviction where an essential element of the offense was the purposeful killing or attempt to kill another. R.C. 2929.04(A)(4)&(5). The jury recommended a death sentence for Welninski; however, the trial court overrode the jury recommendation and sentenced Welninski to life without the possibility of parole. *See Welninski*.

Additionally, Timothy Hancock was convicted and sentenced to death pursuant to the same specifications of under detention and a prior murder conviction, also in Warren County. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 1. In *Hancock*, this Court upheld his conviction but remanded for a new sentencing phase. *Id.* at ¶ 161. After a new sentencing hearing, the jury sentenced Hancock to life in prison without parole. *State v. Hancock*, 12th Dist. Warren, No. CA2007-03-042, 2008-Ohio-5419. Drain's death sentence is disproportionate to those similarly situated cases.

H. Cumulative weight

This Court has previously found that even if no single mitigating factor was enough to outweigh the aggravating circumstances, a death sentence must be vacated when the cumulative

weight of the mitigating factors outweighs the aggravating circumstances. *Graham*, 2020-Ohio-6700 at ¶ 215; *Johnson*, 2015-Ohio-4903 at ¶ 137; *Tenace*, 2006-Ohio-2417 at ¶ 139.

First, Drain's traumatic background and childhood deserves significant weight. *Graham* at ¶ 208; *Johnson* at ¶ 132 (offered significant evidence of troubling family history and background that was entitled to significant weight in mitigation). Similar to *Tenace* and *Johnson*, Drain was "doomed from the start" because of her upbringing. *Johnson* at ¶ 137; *Tenace* at ¶ 101. Drain suffered sexual abuse at the hands of her father and stepmother. *Tenace* at ¶ 70-71, 76. Drain's father was similarly plagued by addiction and provided substances to Drain as a child. *Tenace* at ¶ 73.

Loved ones testified on Drain's behalf, and "the love and support of the family members who testified on [the defendant's] behalf also deserve some mitigation weight." *Tenace* at ¶ 104, citing *Bays*, 87 Ohio St.3d at 34. Here, Drain's cousin Miranda testified that she and her daughter would be particularly devastated by a death sentence for Drain. (Hrg. 05.18.20 Tr. 98). Similarly, Drain's close friend Andrea asked the court to spare Drain's life. (*Id.* at 102). Like in *Tenace* and *Bays*, the testimonies of both Miranda and Andrea deserve some mitigating weight. *Tenace* at ¶ 104; *Bays* at 34.

Drain's history of mental illness is entitled to significant weight. *Clinton*, 2017-Ohio-9423 at ¶ 296. Similar to *Clinton* and *Tenace*, Drain suffers from PTSD, depressive disorders, and personality disorders. *Id.*; *Tenace* at ¶¶ 93-94. A history of mental health problems has been a significant factor in this Court overturning a death sentence on independent review. *Graham* at ¶ 209; *Tenace* at ¶¶ 93-94. Like Graham, Drain has not received adequate treatment for her mental health disorders. *Graham* at ¶ 209. A history of substance abuse is also entitled to some weight. *Graham* at ¶ 210; *Tenace* at ¶ 73; *State v. Tibbets*, 92 Ohio St.3d 146, 174, 749 N.E.2d 226 (2001).

Further, Drain's acceptance of responsibility and cooperation are also entitled to weight. *Tenace* at ¶ 104; *State v. Dunlap*, 73 Ohio St.3d 308, 319, 652 N.E.2d 988 (1995); *Kirkland*, 2020-Ohio-4079 at ¶ 177. Drain's waiver of jury and no contest plea is entitled to substantial weight. *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 192.

The nature and circumstances of Drain's offense were horrific; however, the fact that the offense occurred in an RTU is mitigating. Inmates in the RTU are there for treatment of severe mental illness, and Drain's housing in the mental health ward of the prison is, similarly, mitigating.

Though nothing condones Drain's murder of a fellow inmate, the mitigating evidence, viewed cumulatively, mitigates against imposing a death sentence. *Johnson*, 2015-Ohio-4903 at ¶ 139, *Tenace* at ¶ 105. Accordingly, the cumulative weight of Drain's mitigating factors outweighs the aggravating circumstances in this case, and a death sentence is not appropriate. This Court should vacate Drain's death sentence and remand for a new sentencing hearing consistent with R.C. 2929.06.

Proposition of Law No. 2: The right to effective assistance of counsel during the mitigation phase is violated when counsel's deficient performance results in prejudice to the defendant in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.

Drain's history and background demonstrate that she "was doomed from the start," and she never got the lifeline she needed. *Tenace*, 2006-Ohio-2417 at ¶ 101. Trial counsel had all the evidence they needed to demonstrate that, but they failed to do so.

I. Summary of the Issue

The underlying theme throughout Drain's life has been trauma—trauma from the sexual abuse that plagued her childhood, trauma from the self-inflicted pain she used as a maladaptive coping mechanism to deal with the distress of not being able to fully be herself in her own body, and trauma from the failures of the institutions that were supposed to be in place to protect her.

Drain is a transwoman, diagnosed with Gender Dysphoria, and her records contain voluminous documentation of self-harm as a coping mechanism for the distress associated with Gender Dysphoria. (Ex. 04.16.20 I, p. 7); (*see also* Def. Ex. A at 76, 118, 176-177, 426-471, 518-564, 773-776, 947).

As a child, Drain was sexually abused by her father and stepmother, and that sexual abuse was detailed in Drain's DYS evaluation, including that teenage Drain had homicidal thoughts about her father because of the abuse. (*See* Def. Ex. A at 1218-1258). Drain had a significant history of substance abuse, meeting the criteria for addiction since age 13 and participating in treatments for substance abuse twice before the age of 16. (Ex. 04.16.20 I, p. 6). Her history of cutting began at age 13. (*Id.* at 6). Her formative years were further scarred by the trauma of her time spent in DYS. *See S.H. v. Stickrath*, 251 F.R.D. 293, 295-296 (S.D.Ohio 2008) (A "damning" report conducted by an independent fact-finding team found that "'excessive force and the

excessive use of isolation, some [sic] it extraordinarily prolonged, [was] *endemic to the ODYS system*.'" (Emphasis sic.) (quoting the Cohen Report)).

Drain has a significant medical history—she was diagnosed with a benign pituitary tumor in 2004, diagnosed and treated for testicular cancer in 2011 and 2012, and diagnosed with HIV in 2016. (Ex. 04.16.20 I, p. 7). She also has a history of mental illness, including diagnoses of PTSD and Borderline and Antisocial Personality Disorders, and her records show a prior diagnosis of Schizophrenia. (*Id.* at 6).

All this evidence was contained in Dr. O'Donnell's competency report and the records she relied upon. Trial counsel not only failed to use this evidence to demonstrate why Drain was unworthy of a death sentence, but they also failed to recognize the effect this had on Drain—in the present time and on her decision-making. (*See, e.g.*, Ex. 04.16.20 I, p. 11) (Dr. O'Donnell identified that Drain's current conditions of confinement were "intolerable" and were what motivated her to push her attorneys to expedite her legal process).

The Sixth Amendment guarantees a capital defendant the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When ineffective performance implicates the fairness of the sentencing proceeding in a capital case, the defendant's rights under the Eighth Amendment are also involved. While Drain believes that counsel's ineffective assistance is present in the record of this case, if this Court were to determine that this issue or a sub-part of this issue cannot be decided without information outside the record, the Court should defer any ruling on the issue or sub-issue and allow it to be addressed in post-conviction proceedings. *State v. Madrigal*, 87 Ohio St.3d 378, 390-391, 721 N.E.2d 52 (2000).

The inquiry in determining whether defense counsel was deficient is whether defense counsel's performance undermined the integrity of the adversarial process by undermining

confidence in the outcome. *Strickland* at 669. Defense counsel's performance must be so deficient that had counsel performed effectively, the outcome would have been different. *Id.* at 694; *Williams v. Taylor*, 529 U.S. 362, 393-399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

Here, Drain's defense counsel failed to investigate mitigating factors that were readily apparent and failed to present the available mitigating evidence that they did uncover. As outlined in Proposition of Law No. 1, there was significant mitigation identified in the record leading up to trial and additional mitigation in Defendant's Exhibit A that defense counsel failed to present. The only evidence presented in mitigation was the testimony of two of Drain's loved ones asking the court to spare Drain's life and Drain's unsworn statement. Had defense counsel presented Drain's meaningful mitigation story, she would not have received a death sentence.

II. Trial counsel's performance fell below an objective standard of reasonableness when they failed to investigate and present meaningful mitigation evidence.

Prevailing professional norms are used to determine whether trial counsel's performance was reasonable. *Strickland* at 688; *State v. Herring*, 142 Ohio St.3d 165, 2014-Ohio-5228, 28 N.E.3d 1217, ¶ 68; *Bobby v. Van Hook*, 558 U.S. 4, 8-9, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009). The ABA Guidelines provide those standards when evaluating counsel's effectiveness in a capital case. *Wiggins* at 524, citing the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 11.4.1(C), p. 93 (1989). The "standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases * * *" *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir.2003). Ohio adopted the Rules for Appointment of Counsel in Capital cases in 2015 and implemented much of the same language as the ABA Guidelines. Appt.Coun.R. 3.01. "In

determining high quality representation, the court may consider the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases." Appt.Coun.R. 6.01. This Court has recognized that in a capital case, counsel is obligated to "conduct a thorough investigation of the defendant's background" to discover all available mitigating evidence. *Herring* at ¶ 69, quoting *Williams* at 396; *see also Johnson* at 89-91; *Wiggins* at 524.

A. Counsel's mitigation investigation was unreasonable and failed to comply with prevailing professional norms.

Defense counsel failed to adequately investigate all the mitigating evidence that was available at the time of trial and failed to investigate any mitigation before advising Drain about the possibility of waiving mitigation. As an initial matter, Drain did not ultimately waive the presentation of mitigation. She expressed early on that she wanted to waive the presentation of all mitigation, but ultimately, at most, she only instructed counsel not to present evidence of her "dysfunctional" childhood or have her daughter testify. (Hrg. 05.18.20 Tr. 107-108). Regardless of that limited prohibition on the presentation of evidence, counsel was still required to investigate that specific evidence in order to inform her of just what she could be waiving.

Counsel is required to investigate mitigating evidence regardless of the client's expressed desires. *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 10.11, Commentary, p. 1021 (2003) (hereinafter *ABA Guidelines*). "Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has *first* conducted a thorough investigation with respect to both phases of the case." (Emphasis added.) *Id.*; *see also Wiggins* at 524.

i. Failure to begin mitigation investigation in a reasonable time.

First, trial counsel was deficient for failing to begin the mitigation investigation as quickly as possible. *ABA Guidelines*, Guideline 10.7, Commentary p. 1023; *see also Herring* at ¶¶ 81-82. On September 27, 2019, the trial court granted funding for mitigation specialist Linda Richter and psychologist Dr. Jennifer O'Donnell. (R. 29). Dr. O'Donnell met with Drain on October 30, 2019. (Ex. 04.16.10 I, pp. 11-12). The court held a pretrial conference on January 2, 2020, with Drain appearing by video. (PT 1.2.20 Tr. 3). That same day, after the pretrial, Drain wrote a letter to the trial court saying she wanted to plead no contest and waive mitigation. (R. 186). On January 10, 2020, the court set a hearing to discuss the letter received from Drain. (R. 186). Five days later, on January 15, Drain told her counsel that it was her intention to plead and waive mitigation. (PT 02.19.20 Tr. 7).

It was only then, *after* Drain told the trial court and her counsel that she wanted to waive mitigation, that the mitigation specialist began interviewing Drain's family members. (Def. Ex. A at 45-48). Richter's first interview was not conducted until January 18, 2020, about four months after she was appointed to the case. (*Id.*). And it was not until April 18, 2020—two days after the final pretrial hearing and more than three months *after* Drain indicated a desire to plead no contest—that Richter first spoke to Gina Stokes, Drain's ex-wife, the mother of Drain's children, and one of the most significant relationships of Drain's life. (*Id.* at 57-60). Drain pleaded no contest just one month later. (Hrg. 05.18.20 Tr.). The ABA Guidelines require the mitigation investigation to "be conducted regardless of any statement by the client that evidence bearing upon the penalty is not to be collected or presented." *ABA Guidelines*, Guideline 10.7(A)(2). The guidelines specifically require interviewing witnesses familiar with the defendant's life history. *ABA*

Guidelines, Commentary p. 1019. The delay in counsel's investigation is unexplained in the record and falls below the standard professional norms.

What is evident from the record is that by January 2, 2020, Drain had already given up. (R. 186). To reasonable defense counsel, it should be easy to understand the initial difficulty that someone like Drain would have with airing her darkest days to people who were ultimately sitting in judgment of her. But it was incumbent on defense counsel to guide her through that process with as much information as possible. As late as January 15, 2020, counsel had failed to have the mitigation specialist begin collecting pertinent records or begin to interview family members. Had counsel begun the mitigation investigation immediately, as required, they would have been able to advise her on presenting a full mitigation investigation before she had resigned herself to potentially waiving that presentation. *ABA Guidelines*, Guideline 10.7, Commentary p. 1023 ("The mitigation investigation should begin as quickly as possible * * *).

Moreover, it must be emphasized that even though Drain indicated on January 15, 2020 that it was her desire to waive mitigation, she did not ultimately do so. This circumstance—a defendant changing their mind about presenting mitigation evidence—is exactly the reason why counsel has a duty to continue the mitigation investigation regardless of the defendant's initial statements about whether or not they want to present such evidence. *ABA Guidelines*, Guideline 10.7(A)(2). The trial court went to great lengths to discuss that by presenting an unsworn statement and witnesses, Drain was not waiving mitigation. (Hrg. 05.18.20 Tr. 114-115); (*see also* PT 04.16.20 Tr. 4-6, 39-40). Drain indicated in her unsworn that she was not allowing defense counsel to present evidence of her dysfunctional childhood or have her daughter testify (Hrg. 05.18.20 Tr. 107-108), but there was no other barrier to defense counsel's presentation of other mitigating evidence once they began the mitigation phase.

ii. Failure to investigate and present mitigating evidence that was identified.

Trial counsel were deficient in failing to investigate and present mitigating evidence that was identified in Dr. O'Donnell's competency report and the records counsel obtained prior to the plea hearing. *See Herring*, 2014-Ohio-5228 at ¶ 69, quoting *Williams*, 529 U.S. at 396; *see also Johnson*, 24 Ohio St. 3d at 89-91; *Wiggins*, 539 U.S. at 524. Dr. O'Donnell's competency report was submitted on April 10, 2020. (Ex. 04.16.20 I, p. 1). As part of that evaluation, she had access to three interviews by Richter of Drain's mother, brother, and cousin; Drain's DRC records; a DYS Disposition Investigation Report from 1998; education records from three schools; and Drain's prior court evaluation from 2016. (*Id.* at 2-3). If Dr. O'Donnell had access to this evidence, then trial counsel, likewise, had access to it before the date that Dr. O'Donnell submitted her report.

Identified in those documents was a plethora of mitigating evidence that defense counsel failed to investigate. First, there was evidence in those initial records that Drain was sexually abused by her father and her stepmother. (*See* Def. Ex. A at 1218-1258, 1346-1351). Yet, the record is devoid of trial counsel investigating that abuse or procuring an expert to discuss the effects of that abuse on Drain's development. Later, Dr. O'Donnell's mitigation report mentions the abuse but fails to connect the dots between Drain's abuse and her perpetration of violence against others who inflict similar abuse on children. The sexual abuse is detailed in Drain's DYS evaluation, including that teenage Drain was having homicidal thoughts about her father because of the abuse. (*Id*. at 1225, 1238, 1240-1241, 1245-1246, 1258). There is no evidence in the record that Drain received trauma-informed care for the violence perpetrated against her, or that counsel investigated whether records of any care were available.

"The investigation should [] explore the adequacy of institutional responses to childhood trauma, mental illness, or disability to determine whether the client's problems were ever

accurately identified or properly addressed." *ABA Guidelines*, Commentary p. 1026. Defense counsel similarly failed to investigate the systemic failures prevalent in Drain's life. After reporting the sex abuse to officials at DYS, when it is time for her discharge years later, DYS noted, "There were no mental health issues dealt with this youth. [She] is receiving medication for sleeping problems, [her] chief complaint." (Def. Ex. A at 1239).

Next, trial counsel failed to investigate Drain's diagnosis of Gender Dysphoria and its connection to her mental health. They failed to investigate her gender identity's effect on her decision-making in the instant case even after Dr. O'Donnell identified that Drain's current conditions of confinement were "intolerable" and were what motivated her to push her attorneys to expedite her legal process. (Ex. 04.16.20 I, p. 11). Dr. O'Donnell was not an expert on the unique challenges faced by transgender individuals and her reports reflect her inexperience with transgender clients. Nevertheless, Drain's attorneys were aware of Drain's lawsuits against DRC for hormone treatment, and her records contained voluminous documentation of self-harm as a coping mechanism for the distress associated with Gender Dysphoria. (Def. Ex. A at 76, 118, 176-177, 426-471, 518-564, 773-776, 947 (reports of self-harm), and 1360-1397, 1398-1514 (Drain's lawsuits against DRC for hormone treatment)). Despite all of these records, there was no investigation into issues transgender people face in society or in prison, how that might have affected Drain in the past, or in her current decision-making. Counsel also failed to retain an expert with experience in Gender Dysphoria and issues faced by transgender individuals.

Dr. O'Donnell's competency report and the records identified therein also mentioned Drain's history of mental illness, including PTSD and Borderline and Antisocial Personality Disorders. (Ex. 04.16.20 I, pp. 6-7). Additionally, Drain has a prior diagnosis of Schizophrenia. (*Id.* at 6). Yet, trial counsel failed to investigate any of these diagnoses further, even though a

diagnosis of Schizophrenia could have ultimately precluded the death penalty. S.B. No. 54, 133rd General Assembly (2019-2020).[11] Though the SMI Bill had not yet been enacted, the bill was highly publicized in the media and was well-known in the criminal justice community by both prosecutors and defense attorneys. Any competent capital defender would have had knowledge regarding this impending major shift in the law. *ABA Guidelines*, Commentary p. 990-911 (requiring competent counsel be aware of the specialized and frequently changing laws governing capital cases); *Hinton v. Alabama*, 571 U.S. 263, 274, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.").

Investigation into Drain's mental illnesses would have also included seeking out additional expert assistance. Even though Dr. O'Donnell was a psychologist, seeking out and retaining a forensic psychologist with a specialty in Gender Dysphoria, and trauma would have informed both counsel and Drain as to additional avenues of available mitigation.

Further, Drain's history of substance abuse was readily apparent in Dr. O'Donnell's competency report and the records she reviewed for her evaluation. (Ex. 04.16.20 I, p. 6). She reported that Drain began drinking at age 9, met the criteria of addiction at age 13, and had two treatments for substance abuse before the age of 16. (*Id.*). Substance abuse and addiction is a well-known mitigating factor. *Graham*, 2020-Ohio-6700 at ¶ 210; *Kirkland*, 2020-Ohio-4079 at ¶ 176; *Cepec*, 2016-Ohio-8076 at ¶ 170; *Jackson*, 2016-Ohio-5488 at ¶ 164; *see also* Prop. of Law No. 1, Section II(D). Defense counsel were obligated to investigate Drain's addictions and seek out

[11] Since Drain's underlying trial court proceedings, the SMI Bill was signed into law by Governor DeWine on January 9, 2021. The law goes into effect on April 9, 2021.

expert assistance in the area of substance abuse. *ABA Guidelines*, Commentary p. 1022 (listing substance abuse as an area of the client's life that counsel must explore).

Dr. O'Donnell's competency evaluation also listed Drain's significant medical history. (Ex. 04.16.20 I, p. 7). Drain was diagnosed with a benign pituitary tumor in 2004. *Id.* In 2011, Drain was diagnosed with testicular cancer. (*Id.*). She went through four cycles of chemotherapy over two years before being "cleared" of cancer. (*Id.*). Drain was diagnosed with HIV in 2016, a life-long and life-threatening illness. The records indicate Drain's continued struggle to manage this disease and a consistency in refusing her treatment medications. (*Id.*); (*see also* Def. Ex. A at 159-160, 219-221, 361, 582-584, 841-843).

These are serious medical conditions that were flagged for counsel, yet they failed to conduct investigation as to the effects of these medical conditions on Drain's life and mental health. *ABA Guidelines*, Commentary p. 1022 (mandating counsel explore medical history, including physical illness or injury.). Seeking out a medical expert who could have highlighted for counsel the struggles associated with these diagnoses (especially in succession), was necessary; yet, again, counsel did not seek out this assistance.

There was also a report of Drain being unconscious for an hour after an assault in DYS in 1995. (Ex. 04.16.20 I, p. 7). The research on head trauma and its effect on the brain is a well-known red flag to any competent counsel. *ABA Guidelines*, Commentary p. 1022. Yet, again, defense counsel failed to investigate any potential brain trauma, or seek the assistance of a qualified neurologist or neuropsychologist who could have testified to any affect this head injury may have had on Drain.

Finally, Dr. O'Donnell's competency report identified hallmark indications of a troubled childhood that defense counsel should have investigated further. The competency report flagged

that Drain had a history of disruptive behavior in school, which is a good indicator that something was going on either at home or with learning. (Ex. 04.16.20 I, p. 6). Receiving mental health services at the age of 9 is also not typical of a normal, happy childhood. (*Id.*). Even more troubling was Drain's history of cutting beginning at age 9. (*Id.*). There is no indication in the record that defense counsel delved into investigating what was happening in Drain's life during these formative years that had clearly caused Drain significant distress.

Perhaps the most significant indicator that Drain's childhood was plagued by trauma was her time spent in DYS. (*Id.* at 6-7). A few years after Drain's incarceration in DYS, "litigation arose amid a maelstrom of national media attention surrounding allegations of violence and sexual abuse at Scioto Juvenile Correctional Facility []. Beginning in 2003, prosecutors indicted fourteen [] Corrections Officers [] for abusing incarcerated minors." *See Stickrath*, 251 F.R.D. at 295. In 2007, that litigation expanded to include all DYS facilities. *Id.* at 296. A "damning" report conducted by an independent fact-finding team found that there was "'excessive force and the excessive use of isolation, some [sic] it extraordinarily prolonged, is *endemic to the ODYS system.*'" (Emphasis sic.) *Id.* at 296, quoting the Cohen Report. Armed with this knowledge, as capital defense counsel, Drain's team should have investigated Drain's time at DYS and what trauma she experienced while there. This is of particular concern when the defendant is transgender and there had been a report of her being kicked out of a gang around that age because she was gay. (Def. Ex. A at 34). Because trial counsel failed to investigate this important aspect of her life, or retain an expert to evaluate the same, the extent of the trauma inflicted on Drain while at DYS is unknown.

Despite the drastic difference in purpose and completeness of a competency report versus a mitigation presentation, competent counsel would still have recognized the red flags that were

identified in the competency report and limited records that were collected. They would have then conducted a thorough investigation into the mitigating evidence. One additional interview with Drain, conducted only by Dr. O'Donnell, was not enough to produce a thorough investigation into Drain's life. A qualified forensic psychologist would have tied together and explained Drain's mitigation story instead of dismissing significant aspects of Drain's personhood. And additional experts, as noted, would have helped complete that story. *ABA Guidelines*, Guideline 10.4, Commentary, p. 1004 (adding that "additional expert assistance specific to the case will almost always be necessary for an effective defense.").

Similar to *Herring*, trial counsel here did not make a full investigation into Drain's background. 2014-Ohio-5228 at ¶ 113. Drain's counsel did not investigate the red flags that were apparent in the record, did not obtain experts to explore the trauma Drain experienced, did not obtain experts with specific expertise in the unique circumstances of Drain's life, and then proceeded to only put on two witnesses to ask the court to spare Drain's life. Only putting on those two witnesses without the benefit of a full investigation and a full and qualified defense team was deficient performance. *Id.*

iii. Drain's limited participation was not an excuse for investigation failures.

Defense counsel was not excused from conducting a mitigation investigation based on Drain's comments regarding the mitigation presentation. Though Drain initially refused to sign waivers for the psychologist and mitigation specialist, there was no other indication that Drain refused to participate in the investigation.[12] (PT 11.14.19 Tr. 6). After that second pretrial hearing, Drain actively participated in three interviews by defense psychologist Dr. O'Donnell (Ex.

[12] Ultimately, Drain did cooperate and did sign the waivers counsel requested. (PT. 02.19.20 Tr. 13).

04.16.20 I, p. 10), defense counsel was able to obtain records that required Drain's authorization (*Id.* at 2-3), and the defense team was able to conduct interviews with family members (Def. Ex. A at 45-62). Drain ultimately presented mitigation through two witnesses and her unsworn statement. (Hrg. 05.18.20 Tr. 92-110).

Courts have previously determined that a defendant's lack of cooperation, "*in some extreme cases*," made trial counsel's limited investigation reasonable. *Herring* at ¶ 108. For example, in *Schriro v. Landrigan*, the defendant actively obstructed counsel's investigation by instructing his mother and ex-wife not to testify. 550 U.S. 465, 469-470, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). There, the defendant prevented his counsel from even proffering the mitigating evidence by repeatedly interrupting their presentation, stating he did not want *any* mitigating evidence presented. *Id.* Additionally, in *Owens v. Guida*, the defendant refused to cooperate with mental health examiners, prevented counsel from interviewing her family, and refused to testify on her own behalf. 549 F.3d 399, 406-407, 412 (6th Cir.2008). The courts in both those cases found defense counsel's failure to develop mitigating evidence was the result of the defendant's actions. *Landrigan* at 475-477; *Guida* at 412. Drain's conduct did not rise to either of those levels of interference.

The mere fact of a "defendant's lack of cooperation does not eliminate counsel's duty to investigate." *Neyland*, 2014-Ohio-1914 at ¶ 248, citing *Hamilton v. Ayers*, 583 F.3d 1100, 1118 (9th Cir.2009). Specifically, in *Neyland*, the defendant refused to cooperate with the mitigation specialist and defense psychologist. *Neyland* at ¶ 249. But the defendant never told the trial court that he did not want defense counsel to present mitigation, and this Court determined that his two unsworn statements in mitigation, "indicate[d] that he did want to present some mitigation." *Id.* Accordingly, Neyland's lack of cooperation "did not excuse counsel from conducting a mitigation

investigation." *Id.* Likewise in *Herring*, trial counsel was not excused from investigating mitigation because Herring refused to divulge negative information about his life and family. *Herring* at ¶¶ 105-110.

Drain's level of participation in the mitigation investigation was ultimately more involved than all four of those defendants. Unlike in *Herring*, Drain divulged negative information about herself and her family to Dr. O'Donnell. (*See* Ex. 04.16.20 I); (Def. Ex. A at 25-44). Unlike in *Neyland* and *Guida*, Drain engaged with the psychologist. (*See id.*). And like *Neyland*, Drain made an unsworn statement, which this Court determined indicates a desire to present mitigation. (Hrg. 05.18.20 Tr. 106-110). Moreover, Drain did not prevent trial counsel from presenting any mitigating evidence like in *Landrigan*. Accordingly, Drain's statements regarding mitigation, including her initial reluctance, did not excuse defense counsel from conducting a thorough and complete mitigation investigation.

B. Defense counsel failed to present the available mitigating evidence at the mitigation phase.

Though Drain's defense counsel failed to perform an adequate investigation, Drain's mitigation is so significant that even their minimal investigation yielded profound evidence weighing against a death sentence. Yet defense counsel failed to present it. Proffering the mitigation that defense counsel identified as a sealed exhibit, instead of presenting it to the panel in mitigation, was deficient performance.

Though this Court should consider Defendant's Exhibit A in its analysis for the independent weighing, *see* Prop. of Law No. 1, this Court has at least once declined to do so. *Clinton*, 2017-Ohio-9423 at ¶¶ 249-256. In *Clinton*, defense counsel submitted information under seal for the purpose of showing that they conducted a thorough investigation into Clinton's background. *Id.* at ¶ 250. This Court declined to consider the mitigating evidence that was

presented by Clinton's counsel under seal when conducting its independent review of Clinton's sentence. *Id.* at ¶¶ 254-255. Capital defense counsel must know the relevant law controlling capital cases. *ABA Guidelines*, Guideline 5.1(B)(2)(a) (requiring attorneys to have demonstrated a substantial knowledge and understanding of the laws governing capital cases); *see also Hinton*, 571 U.S. at 274. Because of this Court's decision in *Clinton,* trial counsel should have known that merely proffering the significant mitigation in this case may not mean it would be considered by a reviewing court. Accordingly, defense counsel's decision to proffer the mitigation rather than present it was unreasonable.

Additionally, Drain did not waive mitigation, therefore, her counsel was obligated to present the mitigating evidence that was available. Counsel "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.'" *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270, ¶ 24, quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Examples of decisions within defense counsel's control are "'what arguments to pursue, * * * and what agreements to conclude regarding the admission of evidence * * *'" *Id.*, quoting *New York v. Hill*, 528 U.S. 110, 115, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000).

This Court has recognized that those professional duties must also align with the rules of professional conduct. *Obermiller*, 2016-Ohio-1594 at ¶ 86. But Drain's case is significantly different than *Obermiller*. Defense counsel may not be deficient when they heed a defendant's wishes regarding the objectives of litigation. *Id.*, citing *State v. Griffith*, 8th Dist. Cuyahoga No. 97366, 2012-Ohio-2628, ¶ 24.

Drain's wishes concerning the "objectives of litigation" were not ultimately at odds with presenting mitigation. The record is abundantly clear that Drain did not waive mitigation. (Hrg.

05.18.20 Tr. 114-115). The trial court went to great lengths to emphasize that by presenting an unsworn statement and witnesses, Drain was not waiving mitigation. (*Id.*); (*see also* PT 04.16.20 Tr. 4-6, 39-40). Drain indicated in her unsworn that she was not allowing defense counsel to present evidence of her dysfunctional childhood or have her daughter testify (Hrg. 05.18.20 Tr. 107-108), but there was no other barrier to defense counsel's presentation of mitigating evidence once they were at the plea hearing and mitigation phase.

Drain's conduct makes these circumstances distinguishable from *Obermiller* because Obermiller significantly restrained his counsel from defending him at trial and in presenting mitigation. *See Obermiller* at ¶¶ 88-92. In *Obermiller*, the defendant expressly forbade his defense counsel from objecting to evidence, cross-examining witnesses, and giving a closing argument. *Id.* at ¶¶ 88-89. After being found guilty, Obermiller demanded the panel proceed immediately to sentencing, refused to allow his counsel to present mitigation, including giving a closing argument, and completely waived mitigation. *Id.* at ¶ 90.

Here, Drain's restrictions were not nearly as severe. At the plea hearing, Drain—at most—expressed her desire to not allow her daughter to testify and not allow her attorneys "to present testimony or evidence of [her] dysfunctional childhood or upbringing." (Hrg. 05.18.20 Tr. 107-108). Even if Drain's comment in her unsworn statement was sufficient to limit trial counsel's mitigation presentation (which appellate counsel argue it was not), then counsel would have only been prevented only from presenting testimony by Drain's daughter and evidence of Drain's childhood. Defense counsel still had significant other evidence available and should have presented that evidence including Drain's Gender Dysphoria; mental health issues and diagnosed disorders; her history of substance abuse; her medical history and the effect that has had on her mental health and decision-making; any mitigating evidence concerning her time spent in juvenile

facilities and other facilities; and the cumulative impact of those mitigating factors. *See* Prop. of Law No. 1. Further, defense counsel should have presented expert testimony by Dr. O'Donnell and submitted her reports in evidence. *ABA Guidelines*, Guidelines 10.4, Commentary p. 1003-1004 (describing the importance of a psychologist and expert assistance specific to the case).

Capital defense counsel have an obligation to argue why death is not the appropriate punishment for their client. *ABA Guidelines*, Guideline 10.11(L). By failing to present the significant mitigating evidence in this case, counsel's conduct fell below the prevailing professional norms of capital representation.

III. Had trial counsel investigated and presented the meaningful mitigation evidence available at trial, Drain would have received a life sentence.

The prejudice to Drain because of counsel's deficient performance at mitigation is notably apparent in this case on direct review. To determine prejudice in overturning a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Accordingly, in determining prejudice, this Court must "consider 'the totality of the available mitigating evidence' and reweigh it 'against the evidence in aggravation.'" *Herring*, 2014-Ohio-5228 at ¶ 116, quoting *Williams*, 529 U.S. at 397-398.

As outlined in Proposition of Law No. 1, the record in this case is uniquely filled with mitigating evidence, yet defense counsel failed to present it. Had defense counsel presented all the mitigating evidence in the record, there is a reasonable probability that Drain would not have received a death sentence.

During the mitigation phase, trial counsel presented just two witnesses: Miranda Shoemaker, Drain's cousin, and Andrea Stanfield, Drain's close friend. (Hrg. 05.18.20 Tr. 92-

105). Both witnesses only testified to the fact that they did not want Drain to die. (*Id.*). Drain made a short-unsworn statement, protecting the innocence of her daughter, indicating she spent time in juvenile prison in isolation, and expressing her inability to understand the impact of her upbringing on her current situation. (Hrg. 05.18.20 Tr. 106-110).

Had defense counsel performed effectively, they would have presented all the mitigating evidence in Dr. O'Donnell's competency report, Drain's records, and Dr. O'Donnell's mitigation report, presented live testimony from Dr. O'Donnell, and presented live testimony from Drain's family members who were interviewed by mitigation specialist Richter. *See* Prop. of Law No. 1. Drain's mitigation story contains evidence of Gender Dysphoria; a traumatic upbringing, including sexual abuse, dysfunctional parents, traumatic experiences in DYS, and no support from adults or the systems in place meant to support her; a history of substance abuse; a history of mental illness, including PTSD, Borderline Personality Disorder, chronic depression, and self-injurious behavior; a history of medical health problems; and Drain's cooperation and acceptance of responsibility in this case.

None of that compelling evidence—statutorily entitled to weight in mitigation—was presented to the three-judge panel. Nothing in that evidence could be considered cumulative to what was presented. All defense counsel presented to save Drain's life was that there were two people who did not want her to die. (Hrg. 05.18.20 Tr. 92-105).

Drain's case is atypical on direct appeal in proving prejudice because here it is possible to know at least the crux of what the witnesses would have presented in mitigation through the records and both of Dr. O'Donnell's reports. (*See* Ex. 04.16.20 I and Def. Ex. A). Because defense counsel failed to argue the compelling mitigating evidence in the record, all the mitigation outlined in Proposition of Law No. 1 should be considered when evaluating prejudice for this claim.

Strickland, 466 U.S. at 695; *Herring*, 2014-Ohio-5228 at ¶ 117. Had defense counsel presented all the mitigating evidence in the record, there is a reasonable probability that Drain would not have received a death sentence.

IV. The cumulative effect of defense counsel's ineffectiveness deprived Drain of a fair mitigation phase.

Assuming, *arguendo*, that none of the failures outlined above individually constitute ineffective assistance of counsel, the accumulation of errors over the course of the plea hearing and mitigation phase deprived Drain of her right to counsel, freedom from cruel and unusual punishment, a fair trial, and due process. The "cumulative effect" of counsel's errors and omissions violated Drain's Sixth Amendment right to effective counsel. *See State v. Gondor*, 112 Ohio St.3d 377, 392, 2006-Ohio-6679, 860 N.E.2d 77, citing *State v. DeMarco*, 31 Ohio St.3d 191, 196, 509 N.E.2d 1256 (1987); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-1164 (10th Cir.1999).

The above claims of ineffective assistance of counsel throughout the trial, considered cumulatively, establish that Drain's constitutional rights were violated under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Court should order that Drain is entitled to a new mitigation phase.

Proposition of Law No. 3: The right to effective assistance of counsel during pretrial proceedings, the plea hearing, and sentencing is violated when counsel's deficient performance results in prejudice to the defendant in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I of the Ohio Constitution.

The Sixth and Fourteenth Amendments to the U.S. Constitution, and corresponding rights under the Ohio Constitution, guarantee a criminal defendant the effective assistance of counsel. *Strickland*, 466 U.S. 688 (1984). A defendant whose counsel fails to provide effective representation is in no better position than one who has no counsel at all. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). To prevail on a claim of ineffective assistance of counsel under *Strickland*, a defendant must show both (1) deficient performance and (2) prejudice.

The deficient performance prong requires that a defendant show his lawyer's performance "fell below an objective standard of reasonableness." *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), citing *Strickland*, 466 U.S. at 694. Reasonableness is determined by prevailing professional norms. *Id*. The prejudice prong requires that a defendant show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Padilla* at 366, citing *Strickland* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Hinton*, 571 U.S. at 275, citing *Strickland* at 694.

Counsel in capital cases have specific guidelines to follow. *See ABA Guidelines*. "Death is a different kind of punishment." *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). In a capital case, avoiding a sentence of death is often "the best and only realistic result possible." *ABA Guidelines*, Guideline 10.9.1, Commentary p. 1040. Thus, counsel has a continuing obligation to seek an agreed-upon disposition. *ABA Guidelines*, Guideline 10.9.1, Commentary p. 1040. This obligation presumes that the disposition secured by counsel will be a sentence less than death. Yet in this case, trial counsel allowed their client to plead no contest to the indictment as

charged, including the death specifications, without any true attempt to secure a sentence less than death.

I. Summary of the Issue.

At every turn, counsel egregiously mishandled this case and failed to protect Drain's constitutional rights, including:

- Failing to build a sufficient rapport with their traumatized client;
- Waiving Drain's presence at pretrial hearings, despite her right to be present;
- Waiving the applicability of the rules of evidence to the no contest plea hearing;
- Stipulating to entire categories of evidence, including irrelevant and prejudicial information, and failing to object to the admission of such evidence at the plea hearing;
- Failing to request a stay of the proceedings due to the global COVID-19 pandemic that drastically impacted the proceedings and potential investigation;
- Failing to object to Drain's 10-year sentence under an invalid specification; and
- Failing to object to the "under detention" specification as being unconstitutional per se and as applied to Drain.

Overarching all of these failures, counsel allowed Drain to plead no contest to a panel without first completing a sufficient investigation and without a promise from the State to remove the death specifications. When evaluating whether a capital defendant should plead, "If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights." *ABA Guidelines*, Guideline 10.9.2, Commentary p. 1045.

Trial counsel performed deficiently, to Drain's prejudice, throughout the pretrial proceedings, at the plea hearing, and at sentencing. Any one of the following errors warrants reversal and remand. This Court should also consider these claims in the cumulative. *See Gondor*

at 392, citing *DeMarco*, 31 Ohio St.3d at 196; *Stouffer*, 168 F.3d at 1163-1164. Defense counsel's ineffective assistance is present in the record of this case, however, if this Court were to determine that this issue or a sub-part of this issue cannot be decided without information outside the record, the Court should defer any ruling on the issue or sub-part and allow it to be addressed in post-conviction proceedings. *Madrigal*, 87 Ohio St.3d at 390-391.

II. Defense counsel were ineffective for failing to build a rapport with Drain.

Defense counsel failed to build a sufficient rapport with their client. First, and probably most important, Drain had previously been diagnosed with Gender Dysphoria and serious mental illnesses, such as PTSD, Borderline Personality Disorder, and Schizophrenia. (Ex. 04.16.20 I, pp. 6-7); *see also* Prop. of Law Nos. 1 and 2. Even though trial counsel were aware of Drain being a transwoman, they continued to use male pronouns throughout their representation. Disregarding someone's identity is not a way to develop—or even begin—a trusting attorney-client relationship. This disrespect at such a basic human level continued during courtroom proceedings, where trial counsel repeatedly allowed the State and the trial court to misgender Drain by using the wrong pronoun and honorific, further demeaning Drain. *See* Chan Tov McNamarah, *Misgendering As Misconduct*, 68 UCLA L. Rev. Discourse 40 (2020) (detailing the courtroom practice of intentionally misgendering a person in order to intimidate and harass).

Further, trial counsel failed to investigate the effect of Drain's gender identity on her decision-making in the instant case. Dr. O'Donnell identified that Drain's current conditions of confinement were "intolerable" and were what motivated her to push her attorneys to expedite her legal process (i.e. to plead no contest, waive jury, and waive mitigation), yet trial counsel did nothing to investigate or ameliorate these conditions. (Ex. 04.16.20 I, p. 11). Trial counsel could have made some effort to ensure that Drain was made more comfortable in transportation to and

from the prison to the court. Trial counsel could have requested that a female guard be, at least, present during searches of Drain's person. Trial counsel could have asked Drain what could be done to make her conditions more "tolerable." In general, trial counsel could have just taken the time to talk to their client about her concerns and brainstormed various solutions. Yet, it appears all they did was agree to Drain's desperate solution to waive her right to be present. (*See* Section II, *infra*).

Drain was previously diagnosed with PTSD, Schizophrenia, and Borderline and Antisocial Personality Disorders. (Ex. 04.16.20 I, p. 6-7). Drain also had an extensive history of self-injurious behaviors. (*Id.* at 6). Despite counsel's knowledge of these serious mental illnesses and her history of injuring herself as a method of self-soothing, trial counsel made no attempt to assist Drain with controlling her anxiety, depression, and/or psychotic thoughts. For instance, Drain indicated to Dr. O'Donnell that she had gotten some relief by taking anxiety medications and would consider taking it if it did not cause her to feel vulnerable to others. (*Id.* at 6). Trial counsel could have attempted to secure those anti-anxiety medications for their client from DRC. But, once again, trial counsel left Drain to flounder into a downward spiral of hopelessness.

The ABA guidelines specifically state that "overcoming barriers to communication and establishing a rapport with the client are critical to effective representation." Guideline 10.5, Commentary at p. 1009. *See also ABA Guidelines*, Guideline 4.1, Commentary at p. 960 ("The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death."). Given the stakes of a capital trial, it was impossible for counsel to adequately advise Drain about the choices she was facing, her unique concerns, repair an already strained relationship, conduct investigation, or even begin to alleviate their client's concerns without

uninhibited in-person, privileged meetings. Such communication could not be more critical than in a capital case.

Counsel was tasked with building rapport with their client and developing a level of trust with their client that would lead her to confide in her counsel. Counsel's complete failure to do so is evident by Drain's continued letters to the court in an effort to communicate her desires, which occurred so often that the court had to advise Drain on the record to write to her attorneys and not the court. (PT. 02.19.20 Tr. 47). Trial counsel failed Drain, to Drain's prejudice, when they failed to build a sufficient rapport with their client.

III. Defense counsel were ineffective for allowing Drain to waive her in-person presence at pretrials.

Trial counsel were ineffective to Drain's prejudice when they allowed Drain to waive her live presence at pretrial proceedings. Instead of attempting to resolve the problems that Drain was experiencing that caused her desire to waive her appearance, counsel instead requested that she appear via closed circuit video. Counsel failed Drain when they made no effort to investigate the circumstances that led Drain to prefer to waive her presence at critical proceedings where her life was literally at stake. As a result, Drain was prejudiced.

The accused has a right of presence at every critical stage of the trial as guaranteed by the Confrontation and Due Process Clauses of the U.S. Constitution. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *Kentucky v. Stincer*, 482 U.S. 730, 739-740, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); *Lewis v. United States*, 146 U.S. 370, 372, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). The right of presence may be waived; however, the right is personal to the accused. The accused must make any waiver of this fundamental constitutional right

knowingly, intelligently, and voluntarily.[13] *See Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Decisions (and waivers) can only be knowing and intelligent when the defendant has all of the facts before her, and that can only happen after a full and complete investigation is done. *Wiggins* at 521, citing *Strickland* at 690-691 ("strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *see* Prop. of Law No. 2. Further, "[e]very reasonable presumption should be made against waiver, especially when it relates to a right or privilege deemed so valuable as to be secured by the constitution." *Simmons v. Stat*e, 75 Ohio St. 346, 352, 79 N.E. 555 (1906). Counsel is constitutionally ineffective when their representation falls "below an objective standard of reasonableness" and the defendant is prejudiced as a result. *Strickland* at 688.

Drain's request to not be brought to court for her pretrial hearings was not an effort to refuse participation in her case, but a cry for help given the humiliation and discomfort that the strip searches, solitary confinement, quarantine, and other dehumanizing treatment caused her each time she was processed out from the prison and transported to the courthouse. (PT. 09.17.19 Tr. 4-9); (Exhibit 04.16.20 I, p.11). As Drain is a transwoman, who had previously attempted to self-castrate as a result of the shame and loathing of her male body, being housed in a male prison, escorted and presumably searched by male guards, put in a "pickle suit" where the Velcro on the back did not work, "deprived of [her] clothing," and losing her assigned cell and possessions just

[13] The fact that any waiver made by Drain in this case could not be knowing nor voluntary is raised in Proposition of Law No. 9.

to be transported for a short pretrial hearing—became too much for Drain's psychological state to endure month after month. (State's Ex. 40); (Exhibit 04.16.20 I, p.11); (R.186); (R.198); (PT. 09.17.19 Tr. 4-9).

Instead of attempting to resolve the issues that Drain was facing regarding her housing and transportation by seeking an order from the court that she be held locally, or that she be provided some sort of accommodation in strip searches due to her status as a transwoman, counsel simply advised that she waive her physical presence at these proceedings. (PT. 09.17.19 Tr. 4-9). This failure prejudiced Drain by not only depriving her of her right to be present for the proceedings, but it also limited her access and opportunity to consult with her attorneys.

Counsel's complete failure to learn about or make a record of Drain's gender identity and their failure to investigate the case to learn about the circumstances that caused Drain to react in ways unlike a typical defendant, was ineffective assistance of counsel. Even though Drain had reasonable hesitations for not wanting to be transported to court, trial counsel had a duty to represent Drain effectively and preserve her constitutional rights. *See Strickland*, 466 U.S. 668.

IV. Defense counsel were ineffective for allowing Drain to waive a jury and plead no contest.

Trial counsel were similarly ineffective, to Drain's prejudice, when they allowed Drain to plead no contest to a three-judge panel, absent first completing a robust investigation into Drain's available mitigation, and at least trying to secure a deal from the State for less than death. Counsel neither investigated the offense at issue nor any underlying psychological issues that led Drain to commit the offense when they were advising her on whether to waive jury or plead no contest. As a result, Drain was prejudiced.

A defendant is entitled to "the effective assistance of counsel at 'critical stages of a criminal proceeding,' including when [s]he enters a guilty plea." *Lee v. United States*, 137 S.Ct. 1958, 1966,

198 L.Ed.2d 476 (2017); *Lafler v. Cooper*, 566 U.S. 156, 165, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012); *Padilla* at 364. Counsel is constitutionally ineffective when their representation falls "below an objective standard of reasonableness" and the defendant is prejudiced as a result. *Strickland* at 688.

A defendant must usually demonstrate prejudice by showing a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. But because a defendant's guilty plea means that the proceeding–i.e., the trial–never occurred, "we do not ask whether, had [s]he gone to trial, the result of that trial 'would have been different' than the result of the plea." *Lee* at 1965. Instead, the prejudice inquiry involves assessing whether "the defendant, properly advised, would have opted to go to trial" rather than pleading guilty. *Id*. Such a decision to plead guilty does not just turn on the defendant's calculation of her chance of acquittal, but "involves assessing the respective consequences of a conviction after trial and by plea." *Lee* at 1966.

A. Defense counsel allowed Drain to waive jury and plead no contest without fully investigating the case.

Decisions (and waivers) can only be knowing and intelligent when the defendant has all of the facts before her, and that can only happen after a full and complete investigation is done. *Wiggins* at 521, citing *Strickland* at 690-691. Trial counsel's failure to adequately investigate both the offense at issue and all available mitigation, before the plea hearing, was deficient performance that prejudiced Drain. *ABA Guidelines*, Commentary p. 925 ("Investigation and planning for both phases must begin immediately upon counsel's entry into the case."). As previously detailed, Drain's counsel got a late start, or failed completely, to conduct a sufficient investigation into the circumstances of the offense and the mitigating evidence. *See* Prop. of Law No. 2.

It is evident from the record that Drain was giving up and giving in. On January 2, 2020, she wrote a letter to the trial court saying she wanted to plead no contest and waive mitigation. (R. 186). On January 15, Drain also told her counsel that it was her intention to plead and waive mitigation. (PT 02.19.20 Tr. 7). It was only then, *after* Drain told the court and her counsel that she wanted to plead no contest and waive mitigation, that the mitigation specialist began interviewing Drain's family members. (Def. Ex. A at 45-48). Drain's ex-wife Gina, who arguably knows Drain the best, was not interviewed until April 18, more than three months after Drain decided to plead no contest, two days after the final pretrial hearing, and just one month before Drain's plea. This delay was unacceptable. *ABA Guidelines*, Guideline 10.7, Commentary p. 1023 ("The mitigation investigation should begin as quickly as possible because it may affect * * * plea negotiations."). *See also Herring* at ¶¶ 81-82.

The delay in investigation, and the resultant harm to the attorney-client relationship, prejudiced Drain's ability to make an informed decision regarding her desire to plead, waive jury, and, as argued in Proposition of Law No. 2, present a complete mitigation case. Drain's behavior and decision-making before, during, and after the offense were affected by the abuse Drain suffered as a child, her juvenile incarceration, her rampant substance abuse, her psychological pathology, and her status as a transwoman. (R.198); (Ex. 04.16.20 I); (State's Ex. 40). *See also*, Prop. of Law No. 2. Yet, when Drain was deciding to waive jury and plead no contest on January 15, 2020, defense counsel had not investigated those mitigating factors.

Although trial counsel ultimately advised Drain against pleading no contest and waiving jury, trial counsel never had the full picture in front of them in order to competently advise her. (PT 02.19.20 Tr. 7-8) (trial counsel indicated they had "extensive conversations" with Drain when discussing her desire to plea); (PT. 04.16.20 Tr. 10-17 (trial counsel stated that Drain's "decision

to waive a jury trial and enter a plea of no contest, is against the advice of counsel.")). Had counsel begun their investigation, including the mitigation investigation, immediately, as required they would have been able to competently and effectively advise Drain on why she should not plead no contest, and further why she should allow a full presentation of mitigation to a jury, instead of a three-judge panel. *ABA Guidelines*, Guideline 10.7, Commentary p. 1023; *see also ABA Guidelines*, Comment 10.10.2 (The ABA Guidelines instruct defense counsel in a capital case to "devote substantial time to determining the makeup of the venire, preparing a case-specific set of voir dire questions, planning a strategy for voir dire, and choosing a jury most favorable to the theories of mitigation that will be presented.").

Drain was prejudiced by this failure. There is a reasonable probability that Drain would not have decided to plead no contest and waive jury, and instead, would have gone to trial, had trial counsel conducted a sufficient investigation *before* Drain made her ill-formed "decision." *Lee* at 1965.

B. Defense counsel allowed Drain to plead without securing a deal for a sentence less than death.

Additionally, when evaluating whether a capital defendant should plead, "If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights." *ABA Guidelines*, Commentary p. 1045. Here, before allowing Drain to plead no contest to all charges, including death specifications, Drain's counsel should have attempted to secure an agreement with the State as to the punishment to be imposed. To not even attempt these discussions with the State was ineffective assistance that prejudiced Drain.

For example, a capital defendant waived jury and was found guilty by a three-judge panel in *State v. Haight*, 98 Ohio App.3d 639, 655, 649 N.E.2d 294 (10th Dist.1994), discretionary

appeal not allowed at 71 Ohio St.3d 1500, 646 N.E.2d 1125 (1995). Following the conclusion of the mitigation phase, the prosecutor told the court that before trial an arrangement had been entered into between the defense and the prosecution. *Id.* at 657. This arrangement entailed trial counsel approaching the prosecutor and suggesting that if there was a conviction to the charges, if the prosecutor would agree to ask the court not to consider sentencing the defendant to death, the defendant would waive his right to a jury trial. *Id.* The arrangement was agreed to by the prosecutor and the victim's family. *Id.* Despite this agreement, the three-judge panel sentenced the defendant to death. *Id.* at 658.

On appeal, the court of appeals reversed the defendant's convictions and sentences. *Id.* at 661. In ruling on trial counsel's ineffectiveness, the court of appeals stated that trial counsel erred by failing to reveal the arrangement with the prosecutor until all of the evidence had been presented at the mitigation phase and they had rested. *Id.* at 662. The court stated that the arrangement with the victim's widow was never actually in evidence to be weighed by the three-judge panel and the statement by the prosecutor requesting the panel "not to consider the penalty of death" was not evidence. *Id.* at 658, 662. The court faulted trial counsel for failing to put the victim's family's agreement to a sentence less than death into evidence. *Id.* The court also faulted trial counsel for "concealing [] the agreement with the prosecutor from the trial court at the time that a waiver of jury was being discussed in open court * * *." *Id.* The holding of this case demonstrates that trial counsel and the prosecution can, and do, enter into such agreements and the validity of the agreement is recognized by the courts.

Similarly, in *State v. Spivey*, 81 Ohio St.3d 405, 692 N.E.2d 151 (1998), a capital defendant waived jury and pleaded no contest to the indictment. *Id.* at 408, 414. This Court found that the defendant received what he bargained for with respect to the plea, namely:

> The state agreed not to make any recommendation concerning appellant's sentence and agreed not to vigorously challenge defense witnesses during the penalty phase unless the witnesses perjured themselves. *** Additionally, defense counsel knew that if the panel accepted the pleas of no contest, the panel could dismiss the R.C. § 2929.04(A)(7) death penalty specification pursuant to Crim. R. 11(C)(3). Therefore, the no contest pleas provided appellant with a chance to avoid the death sentence* * *.

Spivey at 418-19.

These cases lie in stark contrast to Drain's, where there is no indication in the record that there were any plea negotiations at all. "'Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible; as a result, plea bargains in capital cases are not usually 'offered' but instead must be 'pursued and won.'" *ABA Guidelines*, Comment 10.9.1, quoting Kevin McNally, *Death Is Different: Your Approach to a Capital Case Must be Different, Too*, The Champion, Mar. 1984, at 8, 15. It is common in cases like Drain's, where evidence of guilt is compelling and difficult to overcome, that defense counsel, in effect, concedes guilt to the jury during the trial phase and focuses on developing a viable mitigation case. *See, e.g., State v. Hessler*, 90 Ohio St.3d 108, 734 N.E.2d 1237 (2000). That could have been done here since trial counsel had a host of available mitigation on which to turn their focus. *See* Prop. of Law Nos. 1 and 2. Failure to attempt to secure a plea deal for less than death prejudiced Drain.

C. Conclusion

Regardless of Drain's hesitations or stated desires to plead no contest and waive jury, trial counsel had a duty to represent Drain effectively. *ABA Guidelines*, Guideline 10.11, Commentary, p. 1021; *Lee*, 137 S.Ct. 1958. That representation required fully investigating evidence relevant to both culpability and mitigation. Defense counsel failed to conduct a complete investigation, and that caused Drain to make an uninformed decision regarding a plea of no contest and a waiver of jury. Effective representation also required at least attempting to secure from the State an

agreement on a sentence less than death before allowing their client to plead to all charges and waive her right to a jury. Counsel's errors in allowing Drain to waive jury and plead no contest, particularly considered together, constitute deficient performance to Drain's prejudice, as there is a reasonable probability that Drain would have gone to trial had trial counsel not been ineffective.

V. Defense counsel were ineffective for failing to request a stay due to COVID-19.

Both the Ohio and United States Constitution's guarantee a defendant's right to a trial before an impartial, unprejudiced, and unbiased jury. U.S. Const. Amends V, VI, IX; Ohio Const., Art. I, Section 5. And, "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences." *State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034, ¶ 31, citing *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

On March 9, 2020, Governor Mike DeWine issued Executive Order 2020-01D which declared a State of Emergency in Ohio due to the novel COVID-19 pandemic[14]. On March 10, DRC issued guidelines indefinitely suspending visitations, but providing that legal visits would potentially still be permitted subject to health screenings prior to entering any DRC facility. See Attachment A. On March 22, under the direction of the Governor, the Ohio Department of Health Director, Dr. Amy Acton, M.D., MPH, issued a director's order to require all Ohioans to stay in their home to prevent the further spread of COVID-19 effective March 23 until April 6.[15] Dr. Acton subsequently extended that Order until May 1.[16] The Stay-at-Home Order mandates "all individuals currently living within the State of Ohio are ordered to stay at home or at their place

[14] Accessible at https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d (last accessed March 5, 2021).
[15] Accessible at https://coronavirus.ohio.gov/static/publicorders/DirectorsOrderStayAtHome.pdf (last accessed March 7, 2021).
[16] Accessible at https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-At-Home-Order-Amended-04-02-20.pdf (last accessed March 7, 2021).

of residence * * *" unless engaged in "Essential Work or Activity."[17] Further, on March 27, Governor Mike DeWine signed Am.Sub.H.B. No. 197 ("H.B.197") into law which immediately tolled, retroactive to March 9, all statutes of limitations, time limitations, and deadlines in the Ohio Revised Code and the Ohio Administrative Code set to expire between March 9, 2020, and July 30, 2020 until the expiration of Executive Order 2020-01D or July 30, 2020, whichever is sooner.[18] On that same date, the Ohio Supreme Court issued an administrative order which mirrored the tolling requirements of H.B. 197.[19]

At the time leading up to Drain's plea hearing, the COVID-19 pandemic was gaining notoriety and governments were becoming increasingly concerned. Drain was already frustrated by having to be brought back and forth from the prison and subject to the inhumane conditions that each transport would cause. (PT 09.17.19 Tr. 4-9). Given that Drain is a transwoman, these conditions were further dehumanizing and mentally taxing for Drain in particular. (*Id.*). Drain also has a host of co-morbidities making transport and exposure to new people a constant threat to her health and safety. (Ex. 04.16.20 I, p. 7).

With the pandemic raging worldwide, trial counsel was ineffective for failing to request either a continuance of the trial date or an indefinite stay due to the ongoing COVID-19 pandemic. The social disruptions caused by the COVID-19 outbreak in Ohio made it impossible for counsel to adequately prepare Drain for a trial in a constitutionally effective manner in that they could not advise Drain how investigation would take place, when a trial could or would take place, when or

[17] Accessible at https://coronavirus.ohio.gov/static/publicorders/DirectorsOrderStayAtHome.pdf (last accessed March 7, 2021).
[18] Accessible at https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-197 (last accessed March 5, 2021).
[19] Accessible at https://www.ohiobar.org/globalassets/misc/court-covid-19-guidelines/supreme-court-of-ohio-covid-19-tolling-order.pdf (last accessed March 5, 2021).

if they would be able to see her, or how many times she would have to be brought back and forth for hearings or status conferences in this environment. Not to mention the procedural questions that no one could answer, such as how jurors would be selected, witnesses called, how many people would be allowed in a court room at once, or even how attorneys could communicate with their clients in a privileged manner during a trial given the need for social distancing. The trial court took judicial notice of the COVID-19 pandemic and made multiple references of the need for social distancing and the pandemic throughout later court proceedings. (R. 201); (Ex. 04.16.20 II); (PT 04.16.20 Tr. 45); (Hrg. 05.18.20 Tr. 6-7, 10, 12, 17).

Given that the Ohio Supreme Court Chief Justice Maureen O'Connor urged Ohio courts to "[p]rioritize cases and use continuances to reduce the need for jury pools when possible,"[20] and due to the state of emergency and the guidance from the Ohio Supreme Court in effect while Drain's case was pending, and to protect her constitutional rights, it was incumbent upon trial counsel to seek a stay of proceedings in the case until a death penalty trial could be safely conducted without restrictions, and without violating Drain's constitutional rights. Drain had previously waived her right to speedy trial and was already serving a life sentence. Thus, there would have been no prejudice to the State in indefinitely suspending the trial in this case. There were no live witnesses to the crime, and Drain had confessed.

This failure of counsel was ineffective to Drain's prejudice, as Drain may have changed her mind as to pleading no contest and waiving jury had trial counsel requested this continuance and were able to operate under more "normal" conditions. In the end, there is a reasonable

[20] March 13, 2020, Letter to Ohio Judges, Chief Justice Maureen O'Connor, http://www.supremecourt.ohio.gov/coronavirus/resources/letterOhioJudges.pdf.

probability that had "the defendant, [been] properly advised, [she] would have opted to go to trial" rather than pleading guilty. *Lee*, 137 S.Ct. at 1965.

VI. Defense counsel were ineffective at the plea hearing.

Defense counsel were additionally ineffective at the plea hearing when they stipulated to irrelevant and prejudicial information and failed to make an accurate record of what exactly they were stipulating to. Defense counsel also failed to test the State's case in any meaningful way. These errors—alone and cumulatively—prejudiced Drain.

A. Defense counsel stipulated to irrelevant and prejudicial information and failed to make a clear and adequate record of what they were stipulating to.

While it appears that defense counsel stipulated to the admissibility of certain categories of evidence, the record is not clear as to what that universe of evidence contained. In this extremely truncated trial process, the discussion of stipulations arose seemingly out of thin air during the fifth and final pretrial hearing on April 16, 2020. (PT 04.16.20 Tr. 21-32).

At that hearing, the trial court explained the plea hearing process to Drain. After discussing that the State still had the burden to put on evidence to prove the charge and specification even though there would be a plea of no contest, the court initiated a conversation regarding stipulations. (*Id.* at 21). The court proposed the parties stipulate to certain evidence as a way for Drain to not contest the State's evidence. (*Id.*). The court explained that while usually it would not allow a trial to be conducted based on stipulations because that violates various rights, including the right to confrontation and the rules of evidence against hearsay, "sometimes that's how it works." (*Id.* at 21-22).

The court then stated, it "[p]robably makes sense for us to go ahead and talk about stipulations, while we're all here * * *." (*Id.* at 22). After the State agreed, the court listed various items of potential evidence, such as police reports and witness statements, and asked if the defense

would stipulate to such evidence. (*Id.* at 22-23). Defense counsel agreed. (*Id.* at 23). After going through a few categories of potential evidence, however, defense counsel indicated that there had been no prior discussion of stipulations between the parties. (*Id.* at 23). Defense counsel suggested the State "marshall [sic] a list of stipulations" for the defense to review, to allow the defense to "test each one of the pieces of evidence or to see if we're agreeable to stipulate to those." (*Id.* at 23-24).

The court responded that it needed to know if the stipulations were going to cause issues and that there was a dispute in the law as to whether the rules of evidence even applied at a capital no contest plea hearing. (*Id.* at 24-25); *see* Prop. of Law No. 5, Section B. Defense counsel responded that if the court wanted to proceed with the stipulations, Drain had indicated she would stipulate to the witness statements. (PT 04.16.20 Tr. 25). That comment prompted the discussion of stipulations to resume, and defense counsel ultimately stipulated to all categories of evidence suggested by the court. (*Id.* at 25-32). The hearing then concluded.

The following day, the court set the case for trial before a three-judge panel. (R. 207). The entry stated, "[t]he parties agreed to the admissibility, subject to objections for relevance, of the following evidence without further foundation," and listed 16 stipulations. (*Id.*). There is nothing additional in the record regarding stipulations between the final pretrial on April 16, 2020, and when the plea hearing began on May 18.

At the start of the plea hearing, the court asked if anything had changed regarding the stipulations. (Hrg. 05.18.20 Tr. 6, 17). Defense counsel responded that there were no changes and that there would not be any objections to the State's exhibits. (*Id.*). The court restated that "Drain is stipulating to the sixteen stipulations." (*Id.* at 26). The panel then accepted Drain's plea of no contest, and the State moved Exhibits 1A-C, 2-40, and 42-43 into evidence. (*Id.* at 28-29).

"One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review." *ABA Guidelines*, Guideline 10.8, Commentary p. 1030. Counsel must ensure not only that there is a complete record but also that the record is clear. *ABA Guidelines*, Guideline 10.8, Commentary p. 1033. This Court "has recognized the importance of a complete record in a capital case." *State v. Watson*, 61 Ohio St.3d 1, 14, 572 N.E.2d 97 (1991), abrogated on other grounds by *State v. McGuire*, 80 Ohio St.3d 390, 686 N.E.2d 1112 (1997). A complete record is especially important because this Court has a solemn duty to reevaluate all the evidence in the case to determine whether a death sentence is truly appropriate. *See State ex rel. Spirko v. Judges of Court of Appeals, Third Appellate Dist.*, 27 Ohio St.3d 13, 16, 501 N.E.2d 625 (1986). "It is clear that a court cannot review all the facts and circumstances of a case if it does not have a complete record from which to conduct such a review." *Id.*

There is nothing in the record to indicate there was any other documentation or discussion of what exactly the parties stipulated to. A logical inference is that the defense stipulated to anything and everything that would fall into one of the general categories that were discussed in the final pretrial hearing.

Looking at the actual items entered into evidence at the plea hearing does not assist in this determination. For example, defense counsel stipulated to "the police report and investigatory reports from the Ohio State Patrol." (R. 207). Yet not a single police or investigatory report from the Ohio State Patrol was entered into evidence. A single incident report from the Ohio State Penitentiary ("OSP"), State's Exhibit 38, was entered in evidence with no objection by defense counsel. (Hrg. 05.18.20 Tr. 69-71). This exhibit exemplifies the problem because it is unclear whether this incident report from OSP was one of the "police" and "investigatory reports" from

the Ohio State Patrol, or if it fell under a different broad category of the stipulations, such as "Investigative documents from the Ohio Department of Rehabilitation and Corrections." (R. 207).

Defense counsel also stipulated to "witness statements." (R. 207). Did this mean written statements signed by the witnesses, investigative write-ups of witness interviews with police, audio-or-videotaped oral statements of witnesses, or perhaps some combination thereof? Because defense counsel did not clarify in any way what was meant by "witness statements," the record is now exceedingly unclear. Ultimately, a DVD of audiotaped witness interviews was entered into evidence as State's Exhibit 40. (Hrg. 05.18.20 Tr. 71-72). As discussed below, defense counsel should have objected to the admission of these statements, but the full extent of their errors cannot be known. Defense counsel's failure to put on the record, orally or via written stipulations entered into the record, what exactly the stipulations entailed beyond mere broad categories, was deficient and deprived Drain of effective representation. *Strickland*, 466 U.S. 668.

B. Defense counsel were ineffective for failing to challenge the State's case, specifically when they waived the applicability of the Rules of Evidence at the plea hearing.

A valid ineffective assistance claim exists where Drain can show a "substantial violation" of counsels' "essential duties." *State v. Holloway*, 38 Ohio St.3d 239, 527 N.E.2d 831 (1988). Trial counsel violated their essential duties to Drain in four ways. First, they failed to fill a vital role of defense counsel: defense counsel has "*a duty to question and challenge the state's evidence*." *State v. Petway*, 11th Dist. Lake, No. 2016-L-084, 2017-Ohio-7954, ¶ 21 (O'Toole, J., dissenting), quoting Huey, Adams & Nesci, *Ohio OVI Defense The Law and Practice* at 160 (2016). This requirement does not disappear when a defendant enters a guilty or no contest plea to a capital charge. Second, counsel not only failed to object to the State's evidence in the moment, but they agreed in advance that they would not object to the admissibility of evidence, foreclosing their

own ability to represent Drain's interests at the plea hearing. This is important because, while counsel formally had an *opportunity* to object to the State's evidence and cross-examine witnesses, they constricted their ability to do so from the start. Third, they failed to preserve any evidentiary objections for this Court's review, which could have been used to challenge the sufficiency of the State's evidence on appeal. *See Belton* at ¶ 127, citing *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 93. And finally, they failed to protect Drain's constitutional right to confront the witnesses against her—a right that, in a *capital* plea hearing, Drain still had the right to exercise.

In a capital case, the fact that Drain entered a no contest plea does not mean that defense counsel had no obligations to test the State's evidence. In *Belton,* when an appellant raised two ineffective assistance claims based on counsel's failure to raise objections during a capital plea hearing, this Court suggested that, had the appellant identified examples of issues, including objections to testimony, that counsel failed to preserve during the plea hearing, the appellant could satisfy the *Strickland* test. *Belton* at ¶¶ 136-137. Drain can meet the *Strickland* standard.

Here, the State openly relied on hearsay evidence to establish critical facts in the case. Trooper Stanfield was the State's only witness. He relied on two layers of hearsay testimony to describe how correctional staff discovered the victim, what they and Drain did following the incident, and what Drain said to them. (Hrg. 05.18.20 Tr. 34-35). He relied on hearsay to describe what correctional staff saw, thought, and said. (*Id.* at 41-44). He relied on hearsay to describe what EMTs saw at the scene. (*Id.* at 49). The trial court asked him questions about whether the victim was responsive when he was discovered, which he answered based on hearsay. (*Id.* at 46). And he relied on hearsay to describe the victim's condition at the hospital and the actions of hospital staff.

(*Id.* at 32-33). Had trial counsel not waived the rules of evidence for this hearing, none of this evidence would have been admissible through Trooper Stanfield's testimony.

Trooper Stanfield also testified to several matters that normally require expert testimony or that he lacked foundation for. *See Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct 2527, 174 L.Ed.2d 314 (2009). He speculated, and reported others' speculation, as to the presence of blood on clothing and stairs. (Hrg. 05.18.20 Tr. 34, 47-48, 50, 52, 54). He testified later to the results of DNA testing of some items. (*Id.* at 67-68). He also testified that the victim died based on hearsay and described the results of the autopsy. (*Id.* at 62-63). And he testified without foundation as to how the locks on specific prison doors function and whether a cell door was locked at the time of the offense. (*Id.* at 43-44). Again, this evidence would have been inadmissible through Trooper Stanfield's testimony had defense counsel not waived the rules of evidence.

Following this testimony, the only cross-examination of Trooper Stanfield by defense counsel was a series of questions about prison security levels and a question about whether Drain's room had a bunk bed (it did, but the top bunk was unoccupied). (*Id.* at 74-77). Defense counsel did not test the State's evidence in any meaningful way and made no effort to ensure that Drain was convicted based on reliable, admissible evidence—or even, as discussed in the section above, evidence that was clearly on the record. Counsel even stipulated that they would make no objections to Trooper Stanfield's testimony. (Hrg. 05.18.20 Tr. 63). Because Trooper Stanfield was allowed to freely testify to essential facts and expert conclusions based on what he was told by others, his testimony is little more reliable than a prosecutor's proffered statement of facts. *See State v. Green*, 81 Ohio St.3d 100, 104, 689 N.E.2d 556 (1998).

To the extent defense counsel waived the entirety of the rules of evidence for Drain's plea hearing, doing so constituted ineffective assistance of counsel. Drain pleaded no contest to aggravated murder––she did not waive her right to counsel. And pleading no contest to a capital charge in Ohio does not excuse the State from its burden of proving that the defendant is guilty beyond a reasonable doubt. In this case, where the State rested its case largely on hearsay evidence, defense counsel rendered ineffective assistance by failing to challenge, or even leave open the *possibility* of challenging, that evidence.

C. Defense counsel were ineffective for failing to challenge the State's case, specifically when they failed to object to multi-level hearsay statements, failed to preserve Drain's right to confrontation, and failed to object to unqualified expert testimony during the plea hearing.

As discussed above, in its entry setting the case for trial to a three-judge panel, the trial court noted the expectation that evidence related to the stipulations would not be challenged by the defense and the "rules of evidence will not bar the admission of testimony and/or documentary evidence." (R. 207). Further, during the testimony of the State's sole witness at the plea hearing, the court reiterated that there was an agreement that it was receiving evidence that might otherwise be barred by hearsay or other rules of evidence. (Hrg. 05.18.20 Tr. 63). Defense counsel not only failed to object but confirmed their agreement. (*Id.*).

"Hearsay is inadmissible because it violates the right of confrontation [and] because it is unreliable." *State v. Young*, 5 Ohio St.3d 221, 223, 450 N.E.2d 1143 (1983). In reviewing the Supreme Court's jurisprudence in *Young*, this Court stated,

> The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial * * * [and] the Clause envisions a personal examination and cross-examination of the witness in which the accused has an opportunity, [] of testing the recollection and sifting the conscience of the witness * * *. These means of testing accuracy are so important that the absence of proper confrontation at trial calls into question the ultimate integrity of the fact-finding process.

Young at 223-224 (internal quotation marks omitted). The integrity of that process was severely undermined in this case.

Defense counsel were not required to permit the State to rely on inadmissible evidence to make its case. This Court's case law establishes that defense counsel can and do make evidentiary objections at plea hearings. *Belton* at ¶¶ 105, 114; *Ketterer* at ¶¶ 128-30; *Green* at 101. During Trooper Stanfield's testimony, significant issues arose related to hearsay and the right to confrontation, yet defense counsel sat silent.

The Trooper Stanfield testified to multiple layers of hearsay when describing the crime. (Hrg. 05.18.20 Tr. 34-35). At times it is unclear who this information is even supposed to have come from. (*Id.*). Trooper Stanfield described a conversation with Investigator Baker, who relayed information from Officer Crowder about actions that Crowder and another officer, Officer Ballard, took that day. (*Id.*). Trooper Stanfield also described a conversation that was apparently between Drain and Officer Ballard, though it is unclear whether Trooper Stanfield gained this information from Ballard himself, from Ballard through Crowder, or by some other means. (*Id.* at 35). Trooper Stanfield also testified that "they" called a medical emergency and "they" observed Drain get down on her knees and surrender, but it is unclear who exactly is being referred to here. (*Id.*). Defense counsel should have objected this this unreliable hearsay testimony. "[T]here is no hearsay exception to multiple levels of hearsay." *State v. Holloway*, 10th Dist. Franklin No. 02AP-984, 2003-Ohio-3298, ¶ 27.

Regarding discovery of the body, Trooper Stanfield testified to detailed observations of the first responders based on a review of EMT records, including the location and state of items of evidence and whether or not certain items were brought in by the first responders. (Hrg. 05.18.20 Tr. 49-50). Trooper Stanfield also testified to items of physical evidence and opined that there was

blood on them—an opinion typically reserved for an expert, yet none was called to testify. (*Id.* at 52-54). Evidence Rule 701 limits a lay witness' testimony to "those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Evid. R. 701. Trooper Stanfield did not testify that there "appeared" to be blood, or there was "apparent" blood, but that there was blood, yet he did not do any testing to make that determination and there is nothing in the record to indicate he is qualified to provide such an opinion. *See State v. Hartman*, 93 Ohio St.3d 274, 286, 754 N.E.2d 1150 (2001) (while not formally tendered as an expert, witness' "experience as a forensic scientist qualified him to testify about the presence of blood on various items").

Trooper Stanfield also testified to the medical examiner's report and determination of cause of death, another area in which expert testimony is required. (Hrg. 05.18.20 Tr. 64-67). *See City of Lorain v. Averette*, 9th Dist. Lorain No. 91CA005022, 1991 WL 231334, at *2 (Nov. 6, 1991) (officer was not qualified as medical expert and therefore could not offer opinion as to cause of death). *See also McMunn v. Mount Carmel Health*, 10th Dist. Franklin No. 97APE05-643, 1998 WL 212853, at *11 (April 30, 1998) ("an opinion regarding cause of death * * * [i]s a 'medical question' for a physician."). Defense counsel should have objected to this unqualified hearsay testimony.

These are just a few examples of a myriad of instances in which testimony of multi-level hearsay, hearsay in which the declarant is unclear, and unqualified expert testimony was admitted in front of the panel. (*See also* Hrg. 05.18.20 Tr. 41-46, 49, 59, 67-68). During the trooper's testimony, the trial court even clarified for the record that it was receiving evidence that might otherwise be barred by hearsay or other rules of evidence without objection, and defense counsel agreed. (*Id.* at 63). This was deficient performance. Trial counsel still had a duty to protect Drain's

constitutional rights even though this was a plea hearing, instead of a full trial. Trial counsel failed in that regard.

D. Drain was prejudiced by counsel's failures.

Prejudice amounts to a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a *probability sufficient to undermine confidence in the outcome*." (Emphasis added.) *Herring* at ¶¶ 116-17. Drain was prejudiced by defense counsel's failure to test the State's evidence. Counsel stipulated to irrelevant and prejudicial information and failed to make a clear record of what was being stipulated to and in what way. Counsel then waived the applicability of the rules of evidence at the plea hearing. Finally, counsel failed to object to multi-level hearsay statements, failed to preserve Drain's right to confrontation, and failed to object to unqualified expert testimony during the plea hearing. These errors by defense counsel are sufficient to undermine confidence in the outcome. *Strickland* at 669.

First, Drain was prejudiced by her counsel's blanket agreement to stipulate all the evidence. Much of the information defense counsel stipulated to was irrelevant to the crime and was unduly prejudicial. By stipulating wholesale to the admissibility of entire categories of evidence, and then by failing to object to certain exhibits offered by the State, counsel allowed irrelevant and prejudicial information before the panel.

Counsel's ineffectiveness is particularly apparent in the stipulation to "witness statements." At the plea hearing, the State entered Exhibit 40––a DVD of witness interviews—as evidence before the trial court. This exhibit contained interviews of the EMTs and prison staff who responded to the incident and four interviews of Drain's fellow inmates. None of these inmates were eyewitnesses to the crime, and none had information about the crime itself. All four inmates

made statements to the effect that they had absolutely no knowledge of the crime. (State's Ex. 40). What little information they had regarding what happened shortly before or after the crime was cumulative of the videotape covering the entire unit that was already in evidence. (State's Ex. 2).

The vast majority of what these inmates did have, however, was irrelevant information and anecdotes about Drain's character, both from well before Drain even arrived at Warren and during her time there. The irrelevant and prejudicial information included prior violent behavior (stabbing inmates in other prisons and stabbing police), a penchant to prey on the weak, and the subjective belief that Drain was "animalistic," dangerous, and calculated, among other things. (State's Ex. 40). All of this information was irrelevant to the crime, unduly prejudicial, and would have been excluded under Evidence Rule 404(b), had counsel objected.

Further, counsel prejudiced Drain by stipulating to "letters and correspondence from the Defendant." (R. 207). At trial, the State entered Exhibits 37 and 38 into evidence, which contained a letter and voluntary statement from Drain.[21] These writings contain extremely prejudicial information unrelated to the crime, including information about prior crimes and bad acts, and what information is related to the crime is cumulative and unduly prejudicial. Had counsel objected, these too would have been excluded under Evidence Rule 404(b).

There was no doubt about culpability in this case that would have overcome the unfair prejudice of these statements. There was video footage of Drain and Richardson entering Drain's cell. (State's Ex. 2). No one else entered the cell before prison officials found Richardson unconscious. (State's Ex. 2). Drain immediately surrendered and confessed on video, describing

[21] Arguably, since the statement contained in Exhibit 38 is memorialized in a prison incident report, it may fall under stipulation 5: "Investigative documents from the Ohio department of Rehabilitation and Corrections," but again, the record is unclear and because it contains a statement from Drain it will be discussed here.

the crime in detail. (State's Ex. 19). That evidence was more than sufficient to meet the State's burden to prove guilt. Whatever tangential information the inmates had that would support Drain's guilt was cumulative of that evidence and was unduly prejudicial. And the only purpose served by Drain's written statements was to pile onto that evidence and further stain Drain's character. Trial counsel, therefore, should not have stipulated to these statements and should have objected to their admission. Their failure to do so tainted the panel's opinion of Drain for purposes of guilt and sentencing, since defense counsel did not object to the State's readmission of all evidence and testimony that was presented in the trial phase, with respect to the mitigation phase. (Hrg. 05.18.20 Tr. 90). Drain was prejudiced as a result. *See* Prop. of Law Nos. 6 and 12 (listing errors by the trial court in sentencing that were caused, at least in part, by trial counsel's failure to object to the admission of this evidence in mitigation).

Next, defense counsel's agreement to waive the rules of evidence prejudiced Drain. This Court should have little confidence in the outcome of this case because hearsay evidence is unreliable, and the second-hand statements introduced through Trooper Stanfield were not subject to cross-examination. As this Court has summarized, hearsay is inadmissible for a reason. *Young* at 223. For that reason, the right to confrontation is enshrined as a constitutional right. "[T]he absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact-finding process." *Id.* at 224. Because the foundation of the State's case was hearsay, defense counsel's failure to object to or test that hearsay undermines confidence in the outcome of the trial. Just as there are "inherent dangers" in relying on a prosecutor's statement of facts (*Green* at 104), there are inherent dangers in relying on hearsay.

This Court does not know what the State's case would have looked like had Drain's counsel objected to the State's pervasive use of hearsay testimony. It is possible that the State's case would

have looked very much the same. But it is equally possible that Trooper Stanfield was inaccurate in his descriptions about what other people saw, thought, and heard. The possible testimony of those other individuals—hospital staff, correctional officers, and other police officers—is not on the record for this Court to consider, because defense counsel allowed Trooper Stanfield to testify on their behalf.

A conclusion that Drain was prejudiced in this case would be consistent with this Court's decision in *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858. In that case, defense counsel failed to raise the issue of spousal competency with regard to the testimony of the only eyewitness to the event. This Court concluded that the failure to challenge that testimony constituted ineffective assistance of counsel warranting reversal, even though "physical evidence, as well as the testimony of [two witnesses,]" linked the defendant to the killings, and even though the eyewitness "may have chosen to testify voluntarily at trial, even after being informed of her right not to do so." *Id.* ¶¶ 60, 64. *Brown* makes clear that prejudice exists not only when the Court is *certain* that the outcome of the trial would have changed, but whenever it is "questionable" whether the outcome of the trial would have changed. *Id.* ¶ 64. In this case, had the State's evidence been properly tested and presented in admissible form, it is questionable whether the outcome of Drain's case would remain the same.

Finally, Drain was prejudiced by counsel's failure to object to multiple levels of hearsay, to preserve Drain's right to confrontation, and failure to object to unqualified expert testimony during Trooper Stanfield's testimony. As described above, the bulk of Trooper Stanfield's testimony was based on second- (or third-) hand accounts of what happened that day. The trooper testified based on interviews he (and others) conducted, as well as reports written by others. He

also testified to scientific conclusions−−such as cause of death and the existence of blood−−that he was not qualified to testify to.

Instead of permitting the trooper to testify to hearsay, denying Drain her right to confrontation and allowing unqualified testimony before the panel, defense counsel should have objected. All of this evidence could have been put in the record as exhibits. Indeed, some of it, such as the DVD of witness statements and the medical examiner's report, was already in evidence as an exhibit. (*See* State's Exs. 30, 40). Additional documents, such as police and investigatory reports, were stipulated to but not entered into evidence. (R. 207). By following the rules of evidence instead of waiving them at every turn, not only would trial counsel have preserved Drain's rights, but the record would be more accurate and reliable. The medical documents, police reports, and witness interviews can speak for themselves, and the record would be clear as to where all of that evidence was coming from instead of leaving us with confusion regarding things like who Trooper Stanfield was referring to when he said "they" called a medical emergency and "they" observed Drain get down on her knees and surrender. (Hrg. 05.18.20 Tr. 35). Drain was prejudiced by trial counsel's failures.

VII. Defense counsel were ineffective for failing to object to an improper sentence.

As discussed in Proposition of Law No. 10, the trial court erroneously sentenced Drain to a maximum sentence of 10 years on the Repeat Violent Offender ("RVO") specification that attached to the aggravated murder charges in this case. An RVO specification may not attach to an aggravated murder conviction if the defendant is sentenced to death. *See* Prop. of Law No. 10; *see also* R.C. 2929.14(B). Despite the fact that the trial court could not sentence a defendant to an RVO specification when also sentencing that same defendant to death for the count of conviction to which the RVO specification attached, trial counsel failed to object to the trial

court's imposition of this invalid and improper 10-year sentence. This failure obviously prejudiced Drain, as the trial court then went on to sentence Drain to a 10-year sentence, consecutive to her death sentence, that was not statutorily allowed. R.C. 2929.14(B). Trial counsel were ineffective for failing to object to this 10-year consecutive sentence, since it was invalid and improper according to statute. This Court should grant relief and invalidate the 10-year sentence that Drain received on the RVO specification.

VIII. Defense counsel were ineffective for failing to object to the "under detention" death specification.

As argued in Proposition of Law No. 11, the "under detention" specification is unconstitutional on its face and as applied to Drain. Trial counsel failed their client when they failed to object to this specification in Drain's indictment. Trial counsel further prejudiced Drain when they failed to object to Drain's death sentence, which was founded—at least in part—on this unconstitutional specification.

IX. Defense counsel were ineffective by failing to object to Ohio law that forbid Drain from having a jury for the mitigation phase after her no contest plea.

Lastly, as argued in Proposition of Law No. 13, R.C. 2929.03(D) provides that a death sentence may only be imposed upon a finding by proof beyond a reasonable doubt that the aggravating circumstance(s) of which the defendant has been found guilty outweighs any mitigating factors proven by a preponderance of the evidence. By extension, a capital defendant who enters a guilty or no contest plea to a charge of aggravated murder and the accompanying death specifications, has a constitutional right to a jury determination of the existence of any mitigating factors. *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 158 L.Ed.2d 556 (2002). A jury should further determine whether the aggravating circumstances outweigh those mitigating factors by proof beyond a reasonable doubt. However, Ohio law denies the capital

defendant that right. *See* R.C. 2929.03(D)(2); R.C. 2945.06; Crim. R. 11(C)(3). If a capitally charged defendant enters a guilty or no contest plea to the indictment, she must waive her right to a jury trial not only for the culpability phase of the trial but also for the mitigation phase. This is unfair and unconstitutional.

Thus, trial counsel should have objected to the application of these statutes to Drain. Yet, they failed to do so to Drain's prejudice. This Court should grant relief and remand this case for a mitigation hearing before a jury of Drain's peers.

X. Cumulative effect of defense counsel's ineffectiveness.

The cumulative effect of defense counsel's ineffectiveness during pretrial proceedings and the plea hearing in this case, in light of the evidence adduced against Drain, and when combined with other errors, demonstrates that Drain was denied due process and a fair trial, in violation of her Sixth and Fourteenth Amendment rights under the United States Constitution, and Sections 10 and 16 of Article I of the Ohio Constitution.

While Drain submits that defense counsel's ineffective assistance is present in the record of this case, if this Court were to determine that this issue or a sub-part of this issue cannot be decided without information outside the record, the Court should defer any ruling on the issue or sub-part and allow it to be addressed in post-conviction proceedings. *Madrigal* at 390-391.

As such, this Court should grant relief on this claim or any individual sub-claim and remand this case to the trial court for a new trial, or at least a new mitigation phase. In addition, this Court should invalidate the 10-year sentence that Drain received on the RVO specification.

Proposition of Law No. 4: The right to effective assistance of counsel during pretrial proceedings, the plea hearing, mitigation phase, and sentencing is violated when counsel entirely fails to subject the State's case to meaningful adversarial testing in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.

The Sixth Amendment guarantees a capital defendant the effective assistance of counsel. *Strickland*. "If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984). In such a case, "when surrounding circumstances justify a presumption of ineffectiveness * * * a Sixth Amendment claim [can] be sufficient without inquiry into counsel's actual performance at trial." *Id*. at 662.

Such a situation occurred here—trial counsel failed Drain at every stage of this case, and therefore, prejudice should be presumed. *See id.* From the start, counsel failed to develop a sufficient rapport with their client; allowed their client to plead no contest to a capital indictment as charged, including the death specifications, without any true attempt to secure a sentence less than death; failed to conduct a full and complete investigation into available mitigation; failed to preserve their client's constitutional rights by waiving applicability of the rules of evidence, stipulating to irrelevant and prejudicial information, failed to object to inadmissible evidence; and failed to present any of the meaningful mitigation evidence they did have. *See* Prop. of Law Nos. 1, 2, 3. Throughout these proceedings, it was as if Drain had no counsel at all. If this Court does not agree that Drain meets the standard announced in *Cronic*, Drain alternatively raised defense counsel's ineffectiveness pursuant to *Strickland*. *See* Prop. of Law Nos. 2 and 3.

I. Counsel delayed their investigation into available mitigation.

Trial counsel failed to immediately begin their mitigation investigation as soon as they were appointed to the case as required. *ABA Guidelines*, Guideline 10.7, Commentary p. 1023. As detailed in Proposition of Law No. 2, defense counsel failed to conduct a timely mitigation investigation to the detriment of Drain. The sum of any "mitigation investigation" that occurred before this case derailed and Drain gave up on her counsel's assistance totaled: (1) the trial court granted funding for mitigation specialist Linda Richter and psychologist Dr. Jennifer O'Donnell, and (2) Dr. O'Donnell met with Drain once. (R. 29, 186); (Ex. 04.14.20 I, p. 11-12). The mitigation specialist, Linda Richter, did not begin her interviews until *after* Drain told the court and her counsel that she wanted to waive mitigation, and four months after Richter was appointed to the case. (Def. Ex. A at 45-48).

The ABA Guidelines require the mitigation investigation to "be conducted regardless of any statement by the client that evidence bearing upon the penalty is not to be collected or presented." *ABA Guidelines*, Guideline 10.7(A)(2). The guidelines specifically require interviewing witnesses familiar with the defendant's life history. *ABA Guidelines*, Commentary p. 1019. The delay in counsel's investigation is inexplicable and falls below the standard professional norms. *Herring* at ¶¶ 81-82.

That delay also caused irreparable harm to the attorney-client relationship and to Drain's ability to make an informed decision regarding her desire to plead, waive jury, and present mitigation. *See* Prop. of Law Nos. 2 and 3. Had counsel begun the mitigation investigation immediately, as required, defense counsel would have been able to advise Drain on why she should not plead to the indictment and why she should present a full mitigation case to a jury, instead of a three-judge panel. *ABA Guidelines*, Guideline 10.7, Commentary p. 1023 ("The mitigation

investigation should begin as quickly as possible because it may affect * * * plea negotiations.).

II. Counsel failed to develop any sort of rapport with their client.

In addition to the late start to the mitigation investigation, counsel failed in myriad other ways, including a failure to build a sufficient rapport with their client. Building a rapport with a client is particularly important in a capital case because, if the case proceeds to mitigation, which was guaranteed in this case because of Drain's plea, counsel must ask their client to divulge deeply personal, often difficult, embarrassing, and traumatic information about themselves for counsel to then present in mitigation. Capital clients must reveal their entire lives to their attorneys, people who the clients have never met before and who often come from very different backgrounds and social circumstances. This is not an easy task, and it is nearly impossible without a solid relationship built on mutual respect.

Drain's case is no exception. As detailed in Proposition of Law Nos. 1 and 2, Drain has significant mitigating factors from all aspects of her life. First, and probably most important, Drain is a transwoman and had previously been diagnosed with Gender Dysphoria. (State's Ex. 40); (Ex. 04.16.20 I, p. 6). Information in the records regarding Drain being known for years as "Tori" and her documented diagnosis should have immediately signaled to counsel that this was not a typical case. As such, more sensitivity—and training—was needed in order to develop a trusting relationship with the client. Yet, instead of showing Drain that sensitivity and educating themselves on the challenges faced by transgender individuals, defense counsel chose to ignore Drain's identity as a transwoman, continually damaging their relationship by referring to her by a male name and male pronouns during each encounter. Such fundamental disrespect and disregard for what makes a person who they are can only lead to discord. *See* Chan Tov McNamarah,

Misgendering As Misconduct, 68 UCLA L. Rev. Discourse 40, 43 n.6 (2020) (collecting cases describing how degrading and mentally devastating it is for a transgender person to be misgendered).

For example, Drain indicated to Dr. O'Donnell that Drain's current conditions of confinement were "intolerable" and were what motivated her to push her attorneys to expedite her legal process (i.e., to plead no contest, waive jury, and waive mitigation). (Ex. 04.16.20 I, p. 11). Instead of recognizing how distressing it may have been for Drain, a transwoman incarcerated in a male prison, to be transported to and from prison to court and identifying that as an issue they may be able to assist with, counsel simply agreed to Drain's suggestion to waive her presence at pretrial hearings.

Additionally, Drain had significant mental health diagnoses that could have affected her relationship with her attorneys and her everyday decision-making, including PTSD, Borderline Personality Disorder, and Schizophrenia. (Ex. 04.16.20 I, pp. 6-7). Drain also had an extensive history of self-injurious behaviors. (*Id.* at 6). Instead of recognizing the potential for barriers to building a strong relationship, counsel again failed to even investigate these issues. Some of these issues were relatively small and could have been easily remedied. For instance, Drain suffers from anxiety. (*Id.* at 6). Drain indicated to Dr. O'Donnell that she had gotten some relief by taking anxiety medications and would consider taking it if it did not cause her to feel vulnerable to others. (*Id.* at 6). Yet, trial counsel never attempted to secure those anti-anxiety medications for their client from DRC. These are just a few examples of the ways in which counsel completely failed to recognize their client as a whole person, failed to ensure their client felt comfortable sharing details of her life with them, and failed to ensure their client felt like she could rely on them to advocate for her needs–all things any competent counsel should do beginning on day one.

III. Counsel failed Drain during pretrial proceedings and the plea hearing, including failing to investigate the facts of the crime, waiving the applicability of the Rules of Evidence, stipulating to entire categories of evidence, failing to object to the admission of evidence, failing to object to the constitutionality of the "under detention" specification, and failing to competently advise Drain as to the plea and jury waiver.

Trial counsel failed Drain throughout the pretrial hearings and at the final plea hearing. As detailed in Proposition of Law No. 3, despite not having completed a full investigation into all available mitigating factors, Drain's trial counsel allowed their client to plead no contest to the indictment as charged, including the death specifications. At every turn, counsel egregiously mishandled this case and failed to protect Drain's constitutional rights.

Counsel waived Drain's physical presence in the courtroom and allowed Drain to appear, instead, via closed circuit video. Despite the fact that the trial court stated that there was a dispute in the law as to whether the rules of evidence would apply at the no contest plea hearing, counsel waived applicability of the rules of evidence. *See* Prop. of Law No. 3. Without conducting any investigation into the actual facts of the crime, counsel stipulated to entire categories of evidence and failed to object to the admission of such testimony and/or evidence at the plea hearing, despite much of the discovery containing wholly irrelevant and prejudicial information. *Id.*

Counsel also failed to challenge the constitutionality of two of the death specifications attached to this case: the "under detention" specification and the applicability of the Repeat Violent Offender specification. *Id.* And finally, counsel allowed Drain to plead no contest to a panel without a promise from the State to remove the death specification. *Id.* These were blatant failures by Drain's counsel. Prejudice should be presumed.

IV. Counsel failed their client during the mitigation hearing.

Despite allowing their client to plead no contest to the indictment and death specifications, trial counsel still had a chance—and an obligation—to make an effective argument at mitigation

to spare Drain's life. *See* Prop. of Law Nos. 1 and 2. Counsel, however, once again, merely stood by and failed to present any case for life. As detailed in Proposition of Law No. 2, there was a plethora of mitigating evidence that defense counsel failed to investigate. First, there was evidence in the records that Drain was sexually abused by her stepmother and her father. (Def. Ex. A at 33, 1225, 1238, 1241, 1245-1246, 1347). Yet, the record is devoid of trial counsel investigating that abuse or procuring an expert to discuss the effects of that abuse on Drain's development.

Next, trial counsel failed to investigate Drain's diagnosis of Gender Dysphoria and its connection to her mental health. Drain also had other diagnoses, including PTSD, Schizophrenia, and Borderline and Antisocial Personality Disorders. (Ex. 04.16.20 I, pp. 6-7). Trial counsel failed to fully investigate how these mental illnesses would have affected Drain's decision-making at the time of the crime, and also leading up to, and including at the plea hearing. They further failed to hire a qualified psychologist with expertise in the significant areas of Drain's life, such as gender identity and trauma. A qualified forensic psychologist would have tied Drain's life story together for the trier of fact.

Trial counsel also could have, but did not, retain additional qualified experts. First, trial counsel should have sought out the services of a separate expert in substance abuse. Drain had a history of addiction dating back to 13 years of age. (Ex. 04.16.20 I, pp. 6-7). Trial counsel should have also sought out the services of an expert trained in dealing with sexual abuse survivors, since the records are replete with indications that Drain was sexually abused by multiple sources. (Def. Ex. A. at 33, 1225, 1238, 1241, 1245-1246, 1347). Trial counsel were, likewise, aware that Drain was housed in DYS beginning at a young age. (Ex. 04.16.20 I, pp. 6-7); (Def. Ex. A at 33-34, 1218-1258). Drain even remarked on her time in DYS in her unsworn statement: "I was sitting in a prison cell, locked down, by myself twenty hours a day before I made it to middle school. I was

too young back then to have anything close to the capacity to understand what the consequences of solitary confinement at that age could be." (Hrg. 05.18.20 Tr. 107). Thus, consulting an expert in juvenile facilities in Ohio during the 90s, solitary confinement or even just prison culture would have been imperative. In addition, consulting with additional experts with expertise in trauma and psychosis would have assisted counsel in developing a full mitigation case.

Even if this Court ultimately determines that Drain constrained, in part, what trial counsel could have presented during mitigation, Drain did not completely cut off trial counsel's options. At most, she only instructed counsel not to present evidence of her "dysfunctional" childhood or present testimony from her daughter. (Hrg. 05.18.20 Tr. 107-108). Drain's statement regarding mitigation, including her initial reluctance, did not excuse defense counsel from failing to conduct a thorough and complete mitigation investigation. In addition, the record is clear that Drain did not waive mitigation. (Hrg. 05.18.20 Tr. 114-115); (PT 04.16.20 Tr. 4-6, 39-40); *see also* Prop. of Law No. 2. Thus, trial counsel had a duty to present what mitigation evidence that they had collected. Trial counsel had a chance to save Drain's life, yet they squandered it. These failures were ineffective assistance of the highest order; prejudice must be presumed.

V. Trial counsel failed their client at sentencing.

The trial court erroneously sentenced Drain to the maximum sentence of 10 years on the RVO specification that attached to the aggravated murder charges in this case. *See* Prop. of Law No. 10; *see also* R.C. 2929.14(B). Despite the fact that the trial court could not sentence Drain to an RVO specification when also sentencing Drain to death, trial counsel failed to object to the trial court's imposition of this invalid and improper 10-year sentence. R.C. 2929.14(B). This error is plain; prejudice must be presumed.

VI. Conclusion.

From beginning to end, counsel stood by and allowed their client to make uninformed and harmful decisions because counsel failed to build a sufficient rapport with their client and failed to complete an investigation into available mitigating factors. Counsel stood by and allowed the prosecution to proceed in their case untested. This is not acting in the role of counsel in a capital case. *See Cronic*, 466. U.S. at 659. Death is a different kind of punishment. *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). This is a capital case; therefore, more process is due, not less. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion). Had counsel in this case performed even their basic duties, they would have secured a sentence less than death for Drain. *See* Prop. of Law Nos. 1 and 2. This Court should grant relief and remand this case for a new trial or mitigation phase.

Proposition of Law No. 5: The trial court violated the right to a fair trial and Due Process as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 10, and 16 of the Ohio Constitution, when it allowed a conviction based on inadmissible evidence.

Drain was convicted of aggravated murder and sentenced to death based on inadmissible evidence. That fact is unquestionable: the trial court stated explicitly on the record that it was admitting inadmissible evidence for the purpose of Drain's no contest plea hearing. (Hrg. 05.18.20 Tr. 63). While the trial court believed that "there is some dispute in the law * * * as to whether or not the rules of evidence apply" at such a hearing, (PT 04.16.20 Tr. 24), that is not the case. This Court has stated that "we apply the *same evidentiary rules*" at capital plea hearings that we do at the trial phase of other capital trials. (Emphasis added.) *Belton*, 2016-Ohio-1581 at ¶ 128. And when a conviction is based on inadmissible evidence—even where a defendant has pleaded guilty or no contest—the conviction cannot stand. *Green*, 81 Ohio St.3d at 104.

The trial court stated at a pre-trial hearing that it was unsure whether the rules of evidence applied at a capital plea hearing. It recognized that at some plea hearings, "we have one person, an investigator or the lead law enforcement officer on the case, testif[y] about what happened. Normally, I don't allow that. Normally, I don't allow one person to testify about what other people see, hear, or say because it violates both the evidence rules about hearsay and it also violates your right to confront the witnesses against you. But sometimes that's how it works." (PT 04.16.20 Tr. 21-22). However, the trial court suggested that it was unclear whether this procedure was valid under the Ohio Rules of Evidence. It stated, "there is some dispute in the law * * * as to whether or not the rules of evidence apply * * *. No contest means that you accept the facts, but you don't necessarily agree that those facts constitute a criminal offense, or this particular criminal offense. And they have to prove all of the specifications. So, *there is some question as to whether or not they have to abide by the rules of evidence at that hearing*." (Emphasis added.) (*Id.* at 24).

The trial court ultimately determined that it would allow inadmissible evidence at the hearing. The court issued an order in which it described the parties' stipulations and stated, "For planning purposes only, the State of Ohio shall be prepared to go forward with the presentation of evidence at the trial phase with the expectation that this evidence will not be challenged and the rules of evidence will not bar the admission of testimony and/or documentary evidence." (R. 207 at 2). Later, during the plea hearing, the court stated that "one of the stipulations was that the Court would receive evidence perhaps that might otherwise be barred by hearsay or other rules of evidence and that that would be received without objection."[22] (Hrg. 05.18.20 Tr. 63). Defense counsel agreed, and never objected to the admissibility of the State's evidence.

To convict a defendant following a plea of no contest, a three-judge panel is required to "hear evidence in deciding whether the accused is *guilty* of aggravated murder beyond a reasonable doubt." *State v. Post*, 32 Ohio St.3d 380, 392, 513 N.E.2d 754 (1987) (interpreting Crim. R. 11 alongside R.C. 2945.06). Ordinarily, in making such a decision, the panel is "presumed to consider only relevant, competent and admissible evidence in its deliberations." *Ketterer*, 2006-Ohio-5283 at ¶ 136. But in this case, the panel, by its own admission, found Drain guilty based on inadmissible evidence, rendering the evidentiary hearing virtually meaningless. The trial court's adoption of this procedure constitutes reversible error.

A. The Ohio Rules of Evidence apply at no contest plea hearings.

In a capital case, a no contest plea does not amount to a full waiver of trial. *Belton*, 2016-Ohio-1581 at ¶ 51. Although "[i]n most cases, a defendant's plea of no contest or guilty to a felony amounts to a waiver of trial, meaning that the state need not present evidence of guilt * * * more

[22] This understanding was never formally entered as a stipulation and was announced in the trial court's order for "planning purposes only," but defense counsel nevertheless acquiesced to the procedure. (R. 207).

stringent procedures apply when a trial court accepts a plea to capital charges." *Id.* (quotation omitted). Pursuant to Criminal Rule 11(C)(3)(c) and R.C. 2945.06, "upon acceptance of a guilty plea for aggravated murder, a three-judge panel must still hear testimony in order to determine if the accused is guilty of aggravated murder beyond a reasonable doubt." *Green,* 81 Ohio St.3d at 103. Specifically, the three-judge panel must "examine witnesses, hear any other evidence properly presented by the prosecution, and unanimously determine whether the defendant is guilty beyond a reasonable doubt." *Belton* at ¶ 51 (quotation omitted).

The prosecution's burden is the same in a plea hearing as it is in the trial phase of a capital trial. It is the prosecution's burden to present sufficient evidence at a plea hearing to prove both aggravated murder and the capital specifications. *Belton* at ¶ 127. Moreover, prosecutors have full discretion in what to present at a plea hearing and can introduce the same evidence that it would at the trial phase of any other capital trial. This Court has stated, "the prosecutor is not * * * limited to offering only that quantum of evidence necessary to establish a factual basis for the plea so as to allow the fact-finder to make a determination of guilt. Instead, the prosecutor may offer any evidence that is relevant to an element of the charged offense and otherwise admissible." *Id.* ¶ 128.

This Court has also made clear that the rules of evidence apply in full at plea hearings. It stated, "we apply the same evidentiary rules" in both plea hearings and the trial phase of other capital trials. *Id.* And defense counsel routinely challenges the admissibility of the prosecution's evidence both at the time of the trial and on appeal. *See id.* ¶¶ 105, 114 (reviewing evidentiary objections); *Ketterer* at ¶¶ 128-30 (same); *Green* at 101 (describing defense counsel's objection to prosecutor's recital of facts). Defendants may also present exculpatory evidence at capital plea hearings. *See, e.g.*, *Belton* at ¶¶ 32-34 (reviewing expert evidence submitted by defendant after

defendant entered no contest plea). Capital plea hearings do not require defendants to forego challenges to the State's evidence.[23]

Plea hearings in capital cases are not like plea hearings in non-capital cases: they are adversarial proceedings at which the prosecution must prove beyond a reasonable doubt that a defendant is guilty of aggravated murder, and the defense may challenge and rebut the prosecution's evidence. This Court's caselaw establishes that some procedural rights are unwaivable for capital defendants, and the right to be proven guilty beyond a reasonable doubt is one of them. *See Belton* at ¶ 51 ("[i]n a capital case, a three-judge panel *must* * * * unanimously determine whether the defendant is guilty beyond a reasonable doubt of aggravated murder or of a lesser offense.") (internal quotation marks omitted). As discussed in the next section, the procedure in this case was inconsistent with this requirement.

B. The trial court erred in disregarding the rules of evidence.

The trial court erred in determining that the rules of evidence were not required at Drain's plea hearing. The court then compounded its mistake by adopting a procedure in which the rules of evidence did not apply at all. As a result, Drain's plea hearing did not resemble the adversarial

[23] There have been exceptions to this general rule—in the past, this Court has held that a defendant was bound by an "agreed-upon procedure wherein the state would proffer a statement of facts in lieu of witnesses or other evidence." *Post* at 393. The Court applied this exception in *Post*, when it held for the first time that prosecutors must present evidence at capital plea hearings. *Id.* But this Court has moved away from that holding. In *Green*, this Court distinguished *Post*, declining to allow a similar procedure in a situation where the defense objected, stating that "such a statement does not satisfy the evidentiary requirements under Crim.R. 11 and R.C. 2945.06," because the "inherent dangers" in relying on such a second-hand statement "are especially heightened in the context of an aggravated murder trial where the death penalty may be imposed." *Green* at 104. Although the *Post* holding has never been explicitly overturned, it now stands in contrast with the Court's more recent case law holding that the prosecution must submit *sufficient admissible* evidence to support a conviction. *See Belton* at ¶¶ 127-128. This Court should now overrule *Post* to the extent it allows a trial court to convict a defendant based on inadmissible evidence.

evidentiary hearing required by statute and by this Court's case law but was little more than the prosecutor's statement of facts in *Green*.

The inadequate procedure in this case was rooted in a legal error. The trial court stated, "there is some question as to whether or not the[] [State] has to abide by the rules of evidence at that hearing." (PT 04.16.20 Tr. at 24). There is no such question in the law. This Court has stated explicitly that the rules of evidence apply to plea hearings just as they do in ordinary trials. *Belton*, 2016-Ohio-1581 at ¶ 128. This Court has also stated that plea hearings are not limited to a summary presentation of facts—a prosecutor can present "any evidence that is relevant to an element of the charged offense and otherwise admissible," *id.*, and must present "sufficient evidence at a plea hearing to prove both aggravated murder and the capital specifications." *Id.* ¶ 127. Thus, the trial court was simply incorrect in saying that there was a "dispute" as to whether the State had to comply with the rules of evidence.

The court ultimately resolved this dispute contrary to current law. The court instituted a procedure by which "the State of Ohio shall be prepared to go forward with the presentation of evidence at the trial phase with the expectation that this evidence will not be challenged and the rules of evidence will not bar the admission of testimony and/or documentary evidence." (R. 207 at 2). While the defense ultimately agreed to this procedure, it was the court who imposed it. But under this Court's case law, Drain was entitled to more than this summary proceeding. She was entitled to an adversarial hearing in which the State was held to its burden of proving her guilt with admissible evidence beyond a reasonable doubt.

The trial court's decision to disregard the rules of evidence in Drain's plea hearing was plain error warranting reversal. The State offered the testimony of Trooper Nathan Stanfield, who testified to many facts that he had no personal knowledge of. Those facts included the victim's

medical condition at the hospital; the prison staff's investigation of the crime; the victim's autopsy and cause of death; and DNA lab results. Although Trooper Stanfield had personal knowledge of the interview of Drain, one interview is not enough to prove all the elements of aggravated murder. The inadmissible evidence was so pervasive that its blanket admission constituted plain error. *See, e.g., State v. Edwards*, 123 Ohio App.3d 43, 47, 702 N.E.2d 1242 (6th Dist.1997) (holding that where improper admission of testimony was pervasive and central to the state's case, admission constituted plain error); *State v. Shaw*, 2d Dist. Montgomery No. 21880, 2008-Ohio-1317, ¶ 2 (pervasive nature of other-bad-acts evidence prejudiced defendant).

Nor was this harmless error. The court explicitly stated that it normally would not allow "one person to testify about what other people see, hear or say because it violates both the evidence rules about hearsay and it also violates your right to confront the witnesses against you." (PT 04.16.20 Tr. 21-22). Thus, were it not for the court's uncertainty about the state of the law, it seems that the court would have excluded much of the inadmissible hearsay evidence that was presented. And there is good reason to exclude this evidence: as described by this Court in *Green*, there are "inherent dangers" in relying on inadmissible evidence, such as inaccuracies and misstatements of the facts. 81 Ohio St.3d at 104. Indeed, courts have stated that some rules of evidence are "so fundamental to the reliability of the fact-finding process" that they are "not subject to waiver by agreement in our state." *State v. Miller*, 2nd Dist. Montgomery No. 15552, 1997 WL 674673, at *6 (Oct. 31, 1997), quoting *U.S. v. Mezzanatto*, 513 U.S. 196, 204, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995). In this case, as discussed in section Proposition of Law No. 3, the record is unclear on the basic question of what evidence was stipulated to, entered into evidence, and/or relied on by the trial court. The dangers of relying on inadmissible or extrajudicial evidence are "especially

heightened in the context of an aggravated murder trial where the death penalty may be imposed." *Green* at 104.

Although evidentiary decisions are ordinarily within the trial court's discretion, this Court should not defer to the trial court's decision, for two reasons. First, the trial court's decision rested on a legal error—the court's belief that the application of the evidentiary rules to plea hearings was unsettled law. "When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 6. Second, the trial court openly admitted that *the court itself* believed Trooper Stanfield's testimony to be inadmissible under the rules of evidence. (PT 04.16.20 Tr. 21-22). This is not a situation where the trial court made a stray error in overruling an evidentiary objection—this is a situation where the trial court, based on a misunderstanding of the law, determined Drain's guilt based on evidence that it believed would normally be inadmissible.

This case falls below the permissible evidentiary bar for capital plea hearings. In *Green*, this Court reversed the appellant's conviction because, even though the defendant pleaded guilty, their conviction was unsupported by admissible evidence. *Green*, 81 Ohio St.3d at 104. The Court should do the same here and grant relief on this Proposition of Law.

Proposition of Law No. 6. The trial court violated the Eighth and Fourteenth Amendments and Article I of the Ohio Constitution when it failed to ensure a full and complete record and considered facts not in evidence at sentencing.

I. The trial court failed to ensure a full and complete record.

As discussed in Proposition of Law No. 3, the record is not clear as to what exactly the parties stipulated to. Indeed, the court, *sua sponte,* introduced the idea of stipulations at the final pretrial hearing before Drain's plea. (PT 04.16.20 Tr. 21). In doing so, the court listed several categories of evidence, such as "witness statements," asking whether the defense would stipulate to each category, and defense counsel agreed. (PT 04.16.20 Tr. 22-32). After this hearing, the court memorialized the stipulations in a docket entry setting the case for trial to a three-judge panel. (R. 207). That entry listed 16 stipulations and indicated that the parties were agreeing to the admissibility of these evidentiary categories. (*Id.*). This is the only memorialization of the stipulations in the record aside from an identical listing in the court's sentencing entry. (R. 227).

This list of broad categories leaves one to guess at what was actually stipulated to. For example, the court listed "the police report and investigatory reports from the Ohio State Patrol" plural, yet not a single police report was entered into evidence and none is in the record. The court also listed "investigative documents from the Ohio Department of Rehabilitation and Corrections" and "letters and correspondence from the Defendant," both in the plural, yet only one exhibit entered at trial could be considered to fall within each category. (*See* State's Exs. 37-38). And arguably, both of these exhibits could fall into the latter category of "letters and correspondence from the Defendant," meaning that, as with "the police report and investigatory reports from the Ohio State Patrol," nothing from the former stipulation, "investigative documents from the Ohio Department of Rehabilitation and Corrections," was actually entered into evidence. These stipulations all suggest that more was available and stipulated to, but there is nothing in the record

to indicate what those other items were. Further, the court listed "witness statements" as a stipulation but gave no indication as to whether these were written statements, signed statements, oral statements later memorialized by investigators, video or audio statements, or any combination of these, and there is no specificity as to the universe of witnesses who might be covered by this stipulation.

"[I]n capital cases, R.C. 2929.03(G) requires that 'the entire record' be transmitted for appellate review." *Watson*, 61 Ohio St.3d at 14. This is particularly important in capital cases because this Court must conduct an independent review of all of the evidence in the case, and "a court cannot review all the facts and circumstances of a case if it does not have a complete record from which to conduct such a review." *Spirko*, 27 Ohio St.3d at 16. What evidence was stipulated to is even more important in this case because the court mentioned *all* of the stipulations, including categories of items not entered into evidence, in its sentencing entry, suggesting that the panel considered such items in sentencing Drain.

II. The trial court considered facts not in evidence.

Despite the fact that the parties only stipulated to admissibility, in its sentencing entry, the court again listed all 16 stipulations entered into by Drain. (R. 227). As noted above, not all categories of evidence stipulated to were actually entered into evidence at trial. After listing the stipulations, the sentencing entry goes on to describe facts from the trial and mitigation phases, and then the court conducts the weighing process to determine whether a sentence of death was appropriate. Without anything to clarify otherwise, one is led to the logical conclusion that the court erroneously considered all 16 stipulations in determining its sentence. If the court, in fact, considered extra-judicial evidence in making its determination on either guilt or sentence, this was prejudicial error.

Even if the court did not consider evidence outside of the record, this is still error because the record is so unclear as to what the trial court actually considered in its weighing process, which is a violation of R.C. 2929.03(F). When imposing a sentence of death, a court must set forth specific findings in its sentencing entry as to the aggravating circumstances and mitigating factors it used to impose such a sentence. R.C. 2929.03(F); *Ketterer*, 126 Ohio St.3d at 450-51. This is required to assist reviewing courts in conducting their solemn duty to review and independently weigh all of the facts and other evidence disclosed in the record." R.C. 2929.05(A); *Spirko* at 16. In addition, as detailed above, the trial court had an obligation to ensure the record was complete. "A clear and accurate record of what evidence or testimony was considered should be preserved, including any exhibits, for purposes of any potential appeal." *State v. Eppinger*, 91 Ohio St.3d 158, 166, 743 N.E.2d 881 (2001).

III. Conclusion.

In this case, at best, the trial court left this Court with an unclear record. At worst, it considered facts not in evidence in sentencing Drain to death. This Court should remand this case to the trial court for a new trial. In the alternative, this Court should remand this case so the trial court can clarify what factors it used to impose death in its sentencing entry.

Proposition of Law No. 7. Prosecutorial misconduct during both phases of a capital trial denies the defendant her rights under Article I, Sections 2, 9, 10, and 16 of the Ohio Constitution and the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the U.S. Constitution.

When assessing a claim of prosecutorial misconduct, it is necessary to begin from the following framework:

> A prosecutor may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). As the government's representative, the prosecutor has a special duty "whose obligation to govern impartially is as compelling as its obligation to govern at all." *Id*. at 88.

The test for prosecutorial misconduct is whether the challenged conduct and/or remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights so as to deny him a fair trial. *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990); *State v. Apanovitch*, 33 Ohio St. 3d 19, 24, 514 N.E.2d 394 (1987). The touchstone of this analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). As this Court has said: "While we realize the importance of an attorney's zealously advocating his or her position, we cannot emphasize enough that prosecutors of this state must take their roles as officers of the court seriously. As such, prosecutors must be diligent in their efforts to stay within the boundaries of acceptable argument and must refrain from the desire to make outlandish remarks, misstate evidence, or confuse legal concepts." *State v. Fears*, 86 Ohio St.3d 329, 332, 715 N.E.2d 136 (1999). *State v. Smith*, 14 Ohio St.3d 13, 13-15, 470 N.E.2d 883 (1984) (conviction reversed because of prosecutorial misconduct).

In this case, at the suggestion of the court and in open court, both the State and Drain agreed to stipulate to certain documents, which included audio/video statements and physical evidence to be admitted. The court stated the purpose of these stipulations was to determine how long of a trial to set, and who would need to be in attendance. (PT 04.16.20 Tr. 21-35); (Hrg. 05.18.20 Tr. 134-135). When Drain waived her right to a jury trial and pleaded no contest to the indictment, the presiding judge stated that the panel would consider the facts contained in the stipulations in accepting the no contest plea. (Hrg. 05.18.20 Tr. 26). The presiding judge did not state on the record if the stipulations were made as to content or simply to admissibility. The court did however in their entry setting the case for trial to the three-judge panel state that the stipulations were to admissibility and subject to objections for relevance. (R. 207).

At no time during the trial were the stipulations read into the record, nor was it clarified how many or what specific documents were contained within those stipulations. *See* Prop. of Law Nos. 3 and 6. At the outset of the State's presentation of evidence, the State moved to introduce its exhibits. (Hrg. 05.18.20 Tr. 29). Judge Oda, the presiding judge, admitted the State's exhibits without objection. (*Id.*). During the direct examination of Trooper Stanfield, the State asked Trooper Stanfield to identify State's Exhibit 38, asking the trooper if it was a statement made by Drain to individuals at the Ohio State Penitentiary. (*Id.* at 70). The trooper agreed that Exhibit 38 is that statement. The State then requested that Trooper Stanfield read the statement made by Drain into the record, but the court intervened and stated that they all have the statement and can read it themselves. (*Id.*). The State went on to ask the trooper to identify State's Exhibit 37, and further to confirm that it was a letter to the Warren County Prosecutor's Office dated May 27, 2019. (*Id.* at 71). The Trooper agreed that Exhibit 37 is in fact the May 27, 2019, letter written by Drain.

(*Id.*). The State asked Trooper Stanfield to confirm that in that letter Drain made statements about what he did to Christopher Richardson, and the Trooper confirmed the same. (*Id.*).

Both of these writings contain extremely prejudicial information unrelated to the crime, including information about prior crimes and bad acts, and what information is related to the crime is cumulative and unduly prejudicial. The State was clearly aware of what was contained in both these writings as they asked the trooper specific questions about their content. (*Id*. at 70-71).

Also, as part of their case in chief, the State introduced State's Exhibit 40. The State asked the trooper whether he conducted interviews of persons, inmates and first responders that were present at Warren at the time of the crime. (*Id*. at 71). Trooper Stanfield acknowledged that he conducted those interviews, and they were contained on the CD marked State's Exhibit 40. (*Id*. at 72). The prosecutor was aware that the exhibit contained interviews with inmates, since he asked Trooper Stanfield directly to confirm that some of the interviews were with inmates. (*Id.* at 71).

The vast majority of what these inmates had to say was irrelevant information and anecdotes about Drain's character, both from well before Drain even arrived at Warren and during Drain's incarceration at Warren and elsewhere. The irrelevant and prejudicial information introduced included allegations of prior violent behavior (stabbing inmates in other prisons and stabbing police), a penchant to prey on the weak, and the subjective belief that Drain was "animalistic," dangerous, and calculated, among other things. (State's Ex. 40). All of this information was irrelevant to the crime and unduly prejudicial under Evidence Rule 404(b). Again, the State was clearly aware of the content on State's Exhibit 40 as the State asked specific questions to the trooper about what content was on the discs. (Hrg. 05.18.20 Tr. 71-72).

The presentation of this testimony and evidence was totally unnecessary and was introduced only to attempt to show that Drain was known as a bad person capable of doing bad

things. There was video footage of Drain and Richardson entering Drain's cell. (State's Ex. 2). No one else entered the cell before prison officials found Richardson unconscious. (*Id.*). Drain immediately surrendered and confessed on video, describing the crime in detail. (State's Ex. 19). That evidence was more than sufficient to meet the State's burden to prove guilt. Yet, the prosecutor put additional irrelevant and prejudicial information into evidence. What made this error even worse is that the State readmitted this same evidence and testimony during the mitigation phase. (Hrg. 05.18.20 Tr. 90).

Prosecutorial misconduct throughout the proceedings deprived Drain of a fair trial and reliable sentencing proceeding as guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments and Ohio's counterparts. The admission of this evidence was merely to make a death sentence more likely. The error is plain error in the circumstances of this case because Drain's substantial rights were denied in a way that affected the outcome of his sentencing proceeding. *See* Ohio Crim. R. 52(B); *State v. Thomas*, 152 Ohio St.3d 15, 2017-Ohio-8011, 92 N.E.3d 821, ¶¶ 32-34. Absent the misconduct, there is a reasonable likelihood Drain would not have been sentenced to death. She is entitled to a new trial or, at least, a new sentencing proceeding.

Proposition of Law No. 8. It is a violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 5 of the Ohio Constitution to be expected to make choices between fundamental rights in the face of an unprecedented global pandemic.

Both the Ohio and United States Constitution guarantee a defendant's right to a trial before an impartial, unprejudiced, and unbiased jury. U.S. Const. Amends. V, VI, IX; Ohio Const., Art. I, Section 5. And "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences." *Sowell*, 2016-Ohio-8025 at ¶ 31, citing *Sheppard*, 384 U.S. 333. The United States Constitution's Sixth Amendment 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." The global pandemic, that still rages throughout this county at the time of this writing, seems to have put courts in the untenable position to force criminal defendants to choose between these two fundamental rights.

On March 9, 2020, Governor Mike DeWine issued Executive Order 2020-01D which declared a State of Emergency in Ohio due to the novel COVID-19 pandemic[24]. On March 10, DRC issued guidelines indefinitely suspending visitations, but providing that legal visits would potentially still be permitted subject to health screenings prior to entering any DRC facility. See Attachment A. On March 22, under the direction of the Governor, the Ohio Department of Health Director, Dr. Amy Acton, M.D., MPH, issued a director's order to require all Ohioans to stay in their home to prevent the further spread of COVID-19 effective March 23 until April 6.[25] Dr. Acton subsequently extended that Order until May 1.[26] The Stay-at-Home Order mandates "all

[24] Accessible at https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d (last accessed March 5, 2021).
[25] Accessible at https://coronavirus.ohio.gov/static/publicorders/DirectorsOrderStayAtHome.pdf (last accessed March 7, 2021).
[26] Accessible at https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-At-Home-Order-Amended-04-02-20.pdf (last accessed March 7, 2021).

individuals currently living within the State of Ohio are ordered to stay at home or at their place of residence * * *" unless engaged in "Essential Work or Activity."[27] Further, on March 27, Governor Mike DeWine signed Am.Sub.H.B. No. 197 ("H.B.197") into law which immediately tolled, retroactive to March 9, all statutes of limitations, time limitations, and deadlines in the Ohio Revised Code and the Ohio Administrative Code set to expire between March 9, 2020, and July 30, 2020 until the expiration of Executive Order 2020-01D or July 30, 2020, whichever is sooner.[28] On that same date, the Ohio Supreme Court issued an administrative order which mirrored the tolling requirements of H.B. 197.[29]

At the time leading up to Drain's plea hearing, the COVID-19 pandemic was gaining notoriety and governments were becoming increasingly concerned. Drain was already frustrated by having to be brought back and forth from the prison and subject to the inhumane conditions that each transport would cause. (PT. 09.17.19 Tr. 4-9); (R. 186). Given that Drain is a transwoman, these conditions were further dehumanizing and mentally taxing for Drain in particular. (State's Ex. 40); (Ex. 04.16.20 I, p.11); (R.186); (R.198); (PT. 09.17.19 Tr. 4-9). Drain also has a host of co-morbidities making constant transport and exposure to new people a constant threat to her health and safety. (Ex. 04.16.20 I). Thus, as argued elsewhere in this brief, Drain's ability to make any sort of informed decision as to a plea of no contest, a jury waiver, or a waiver of any mitigation, was hampered by not only trial counsel's ineffectiveness (*see* Prop. of Law No.

[27] Accessible at https://coronavirus.ohio.gov/static/publicorders/DirectorsOrderStayAtHome.pdf (last accessed March 7, 2021).
[28] Accessible at https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-197 (last accessed March 5, 2021).
[29] Accessible at https://www.ohiobar.org/globalassets/misc/court-covid-19-guidelines/supreme-court-of-ohio-covid-19-tolling-order.pdf (last accessed March 5, 2021).

3), but also the by this global pandemic and the limitations it placed on courts, investigation, and life, in general.

Practically, during a global pandemic there is no way to deliver a speedy trial while also delivering an impartial, unprejudiced, and unbiased jury. Given the guidance in place by the federal and state governments regarding social distancing, group gatherings, and high-risk individuals, it would have been impossible to select and maintain the health of a 12-person jury. These guidelines would also have greatly reduced the jury pool since many individual jurors would be excused due to their risk of complications and the risk of family members. Further, all aspects of trial would be affected by the need to maintain appropriate hygiene and distance between parties, jurors, and court staff. And, as the COVID-19 pandemic was continuing to grow, potential jurors were reasonably likely to be concerned about their risk of exposure to the virus. This heightened fear would constitute an undue outside influence that may impair the jury's ability to remain fair and impartial and impede the jury's desire and ability to properly consider and deliberate on the evidence in order to limit the length of deliberation and their exposure to harm.

Thus, Drain's constitutional rights were violated because the trial court allowed this plea hearing to move forward despite the raging pandemic throughout the world. This was a violation of Drain's right to speedy trial, due process, and equal protection. Drain should never have been placed in the untenable place of having to make choices between fundamental rights in the face of an unprecedented global pandemic. The Court should grant relief and remand this case to the trial court for a new, fair trial.

Proposition of Law No. 9. A trial court violates a defendant's rights to Due Process and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 10 and 16 of the Ohio Constitution when it allows her to waive jury and enter pleas of no contest despite her inability to do so knowingly, intelligently and voluntarily due to the lack of a complete investigation into the facts of the case and available mitigation evidence.

Drain did not knowingly, voluntarily, and intelligently waive jury and enter her no contest plea, resulting in a violation of due process and the prohibition against cruel and unusual punishment. (R.204); (R. 214); (R. 215). Drain could not have knowingly, intelligently, and voluntarily executed the waiver or plea because she did not have all the relevant information concerning the available mitigation in her case and how it could be cohesively presented to a jury.

A defendant has a state and federal constitutional right to a jury trial. U.S. Const. Amend. VI; Ohio Const., Art. I, Section 5. The right to a jury trial in a criminal case may be waived, but because it is a fundamental right, there must be no doubt that the waiver was knowingly, intelligently, and voluntarily entered. *Patton v. United*, 281 U.S. 276, 312-313, 50 S.Ct. 253, 74 L.Ed. 854 (1930), abrogated on other grounds by *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). In Ohio, "[e]very reasonable presumption should be made against the waiver, especially when it relates to a right or privilege so valuable as to be secured by the Constitution." *Simmons v. Stat*e, 75 Ohio St. 346, 352, 79 N.E. 555 (1906). Since that time, the Court has been unyielding in its insistence that "a defendant's waiver of [her] trial rights cannot be given effect unless it is 'knowing' and intelligent.'" *Illinois v. Rodriguez*, 497 U.S. 177, 183, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), citing *Zerbst*, 304 U.S. 458.

Being able to execute a valid waiver of the right to a jury trial does not require merely being competent to stand trial and not being intellectually disabled. Trial counsel acknowledged this fact when they inexplicably went into detail about privileged conversations concerning Drain's waiver on the record. (PT 04.16.20 Tr.11-18). Counsel informed the court again and again that

Drain was competent, and that this decision was against their advice. (*Id*.). However, it was also painfully clear from the record that Drain did not trust the advice of her counsel. (PT 02.19.20 Tr. 6-12); (R. 186); (R. 198).

Drain was entitled to have all the relevant facts, as well as how they could apply to the issues in her case, presented to her before she should have been expected to make a knowing and intelligent waiver as to her rights. Counsel did not possess adequate knowledge of the relevant facts concerning the crime, nor did counsel understand the underlying psychological issues that led to the offense. Therefore, counsel could not have reasonably advised Drain concerning her no contest pleas. *See* Prop. of Law No. 3.

Drain was in an RTU at the time that this offense took place. (Hrg. 05.18.20 Tr. 75-76). Drain was placed in the RTU due to her attempt to self-castrate because she is transgender. (State's Exs. 19, 40). Not once in the record does counsel acknowledge her mental health, that she is a transwoman, or how any of these things may have impacted her at the time of the crime. There is also no record evidence that Drain was ever advised as to how all of these issues could impact her culpability. Thus, on the day she entered her plea of no contest and waived her right to a jury trial, Drain had received no advice from her counsel about these issues, nor did she possess the requisite knowledge of her case to waive her rights knowingly, intelligently, or voluntarily.

In addition, defense counsel failed to investigate how Drain's psychological makeup, background, and family history related to her behaviors or demeanor, before or after the offenses. *See* Prop. of Law No. 2. The abuse Drain suffered as a child, her juvenile incarceration, her rampant substance abuse, her psychological pathology, and being a transwoman all contributed to her behaviors before, during, and after the offense. (State's Ex. 40); (Ex. 04.16.20 I); (Def. Ex. A). Drain has at least four diagnoses: Gender Dysphoria, Post-Traumatic Stress Disorder, Borderline

Personality Disorder, and polysubstance abuse and dependence. (Ex. 04.16.20 I). These conditions began manifesting at a young age, and have affected her insight, judgment, and behavior throughout her life. (*Id*.). Drain was on no medications at the time of her plea, and while there is no argument that she was legally incompetent to understand the proceedings, the untreated symptoms of these disorders would have negatively impacted her ability to make intelligent decisions and validly waive her constitutional rights.

Drain's ability to waive her right to a jury trial and plead no contest needed to be assessed in light of her significant history of mental illness, as well as the effects of her state of mind as she awaited trial. While these were superficially addressed during the plea hearing, the serious, untreated nature of her multiple mental illnesses and the lack of any medication regimen were not adequately considered to ensure that Drain's constitutional rights were protected. Her lack of treatment had devastating consequences, as her mental status and depression prompted her to engage in self-defeating legal decisions that were both against her interest and the advice of her counsel.

Thus, for all of the foregoing reasons, Drain was unable to knowingly, voluntarily, and intelligently waive her right to a jury trial and enter a no contest plea as indicted. *Illinois v. Rodriguez* at 183, citing *Zerbst* at 458. This Court should grant relief and remand this case back to the trial court for a new, fair trial.

Proposition of Law No. 10. It is a violation of the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 9 and 16 of the Ohio Constitution for a trial court to impose a repeat violent offender specification on a person who has been sentenced to death.

At the sentencing hearing in this case, the court imposed a single death sentence on Drain. (Hrg. 05.18.20 Tr. 148). The court added a maximum sentence of 10 years as to the Repeat Violent Offender Specification ("RVO") associated with the aggravated murder count for which the court imposed a death sentence. The court also imposed the maximum sentence of 11 years on a single count of possession of a deadly weapon under detention. (Hrg. 05.18.20 Tr. 148). The trial court's sentencing opinion indicates that the RVO specification of 10 years on the aggravated murder charge was to run consecutively to the death sentence already imposed under the same case number. (R. 228).[30] Counsel for Drain did not object to the court sentencing Drain to 10 consecutive years on the RVO specification. (Hrg. 05.18.20 Tr. 150).

R.C. 2941.149 governs the RVO specification and sets out what the indictment must contain to sentence a defendant to a repeat violent offender specification: (1) the specification must be included in the indictment, (2) the court must determine whether an offender is in fact a repeat violent offender, and (3) the State must give notice to the offender that it intends to use a prior conviction(s) as proof of the specification.

A repeat violent offender is defined by R.C. 2929.01(CC) as a person who is facing a sentence for committing aggravated murder or another violent offense of the first or second degree; having previously been convicted of a qualifying offense or offenses, including prior aggravated murder, murder, or a felony of the first or second degree that is an offense of violence.

[30] The trial court ordered the 11-year sentence for possession of a deadly weapon under detention to run concurrent to the death sentence and its attendant RVO specification term of years.

Here, Drain was properly indicted with the specification, and was charged and convicted of aggravated murder in violation of R.C. 2903.01(A) & (F). Drain had prior qualifying convictions for offenses of violence in Hancock County Common Pleas Court Case numbers 2016-CR-132 and 2016-CR-97 and Sumter County, Florida Case number 2011CF16. Drain was provided notice that the State intended to use those prior convictions to prove the specification.

Up to this point, Drain appeared eligible and properly charged with an RVO specification. The problem, however, was in applying R.C. 2929.14, which controls what sentence may be imposed upon offenders for felony convictions.

> Except as provided in division (B)(1), (B)(2), (B)(3), (B)(4), (B)(5), (B)(6), (B)(7), (B)(8), (B)(9), (B)(10), (B)(11), (E), (G), (H), (J), or (K) of this section or in division (D)(6) of section 2919.25 of the Revised Code and *except in relation to an offense for which a sentence of death or life imprisonment is to be imposed*, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a prison term that shall be one of the following***.

(Emphasis added.) R.C. 2929.14(A).

As the indictment in Drain's case shows, the RVO specification is attached only to the aggravated murder charges. Any sentence for the RVO specification must be imposed based on the underlying aggravated murder−which means it must be governed by R.C. 2929.14(B)(2), and all of the following criteria must be met:

> If division (B)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense or, for offenses for which division (A)(1)(a) or (2)(a) of this section applies, in addition to the longest minimum prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if *all of the following criteria are met:*
>
> > (i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

> (ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder *and the court does not impose a sentence of death* or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(Emphasis added.) R.C. 2929.14(B)(2)(a).

Since Drain pleaded no contest *and* was sentenced to death, (ii) does not apply. And, since all the subsections must apply before the court may add a term of years sentence for an RVO specification to the sentence imposed on the underlying aggravated murder count, R.C. 2929.04(B)(2)(a) did not authorize the court to add an RVO specification term of years sentence to a death sentence.

Having shown that R.C. 2929.14(B)(2)(a) does not authorize adding an RVO term of years sentence to a death sentence, we next examine R.C. 2929.14(B)(2)(b) to see if it authorizes such a sentence. It does not. That section provides:

> b) The court shall impose on an offender the longest prison term authorized or required for the offense or, for offenses for which division (A)(1)(a) or (2)(a) of this section applies, the longest minimum prison term authorized or required for the offense, and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years *if all of the following criteria are met:*
>
> > i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.
> >
> > (ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of section 2929.01 of the Revised Code, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the

> offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.
>
> (iii) *The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death* or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(Emphasis added.) R.C. 2929.14(B)(2)(b).

Again, because Drain was in fact sentenced to death, and thus is expressly exempt from the application of an RVO specification sentence by operation of R.C. 2929.14(B)(2)(b)(iii), the court did not have the statutory authority to add an RVO specification term of years to a death sentence.

Because the statutes do not authorize a trial court to add an RVO specification term of years to a death sentence, the trial court erred in sentencing Drain on that specification. That error is plain from reading the applicable statutes, and harm affecting Drain's substantial rights has occurred in Drain being sentenced to 10 consecutive years in prison in addition to her death sentence. Since counsel made no objection to the wrongful imposition of this additional term of incarceration, this constitutes plain error:

> Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "By its very terms, the rule places three limitations on a reviewing court's decision to correct an error" that was not preserved at trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). First, an error, "*i.e.* a deviation from a legal rule," must have occurred. *Id.*, citing *State v. Hill*, 92 Ohio St.3d 191, 200, 749 N.E.2d 274 (2001), citing *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Second, the error complained of must be plain, that is, it must

> be "an 'obvious' defect in the trial proceedings." *Id.*, citing *State v. Sanders*, 92 Ohio St.3d 245, 257, 750 N.E.2d 90 (2001), citing *State v. Keith*, 79 Ohio St.3d 514, 518, 684 N.E.2d 47 (1997). "Third, the error must have affected 'substantial rights.' We have interpreted this * * * to mean that the trial court's error must have affected the outcome of the trial." *Id.*

State v. Morgan, 153 Ohio St.3d 196, 2017-Ohio-7565, 103 N.E.3d 784, ¶ 36.

The trial court lacked statutory authorization to add an RVO specification term of years sentence to a death sentence but did exactly that in this case. The first prong of plain error is met. The error is obvious on the record; one need only review the statutes and the sentencing entry to discovery the error. The second prong of plain error is met. The trial court's attempt to add an RVO specification term of years sentence to Drain's death sentence affects a substantial right–Drain's liberty interest protected by the Fifth and Fourteenth Amendments of the United States Constitution and the Due Process Clause of Article I, Section 16 of the Ohio Constitution. The third and final prong of plain error is met.

Even though trial counsel did not object at the time of sentencing, the trial court's attempt to add an RVO term of years sentence to a death sentence is contrary to law and plain error. As such, the court violated Drain's rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, and 16 of the Ohio Constitution. This Court must grant relief and vacate the RVO term of years sentence.

Proposition of Law No. 11. The "under detention" capital specification is unconstitutional on its face, in its application in general, and as applied to Drain specifically, in violation of the First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments to the United States Constitution and Article I, Sections 1, 2, 5, 9, 10 and 16 and the Ohio Constitution.

Drain's death sentence is unconstitutional because Ohio's "under detention" death penalty specification, codified in R.C. 2929.04(A)(4) is unconstitutional on its face, in its application in general, and as applied to Drain specifically. U.S. Const. Amends. I, IV, V, VI, VIII, and XIV; Ohio Const., Art. I, Sections 1, 2, 5, 9, 10 and 16. The capital specification is unconstitutional because it fails to provide adequate safeguards to narrow the class of offenders to whom the death penalty can be applied reliably and not arbitrarily. This capital specification also arbitrarily assigns a higher value to human life in this class of victims over others.

A bedrock principle of capital jurisprudence in the United States is the need for procedural protections against "random or arbitrary imposition of the death penalty." *Gregg v. Georgia*, 428 U.S. 153, 206, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *see also Mills v. Maryland*, 486 U.S. 367, 383-384, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), quoting *Atkins v. Virginia*, 536 U.S. 304, 319, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

The "under detention" specification allows for the imposition of the death penalty if the State proves beyond a reasonable doubt that "the offense was committed while the offender was under detention or while the offender was at large after having broken detention." R.C. 2929.04(A)(4). Detention is defined in R.C. 2921.01, but essentially includes any person under arrest or confined in connection with an arrest or conviction. The specification excludes "hospitalization, institutionalization, or confinement in a mental health facility or intellectual

disabilities facility" unless the offender was in those facilities as the result of being charged with or convicted of a violation of the Revised Code. R.C. 2929.04(A)(4).

The death penalty is supposed to be reserved for the worst of the worst. As such, states are required to "give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper* at 568, citing *Godfrey v. Georgia*, 446 U.S. 420, 428-429, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). As such, Ohio's death penalty statute categorizes classes of victims that the law recognizes as being worthy of special protection compared to a different victim. R.C. 2929.04(A)(1) (the president, vice-president, state governor, or state lieutenant governor); R.C. 2929.04(A) (law enforcement officers); R.C. 2929.04(A)(9) (children under the age of 13).

Yet, the "under detention" specification misses the mark, as there is no legitimate reason to classify these murders committed while "under detention" as categories worthy of special protection. This specification makes the purposeful killing of an inmate in prison more heinous than the purposeful killing of the exact same person outside prison simply because the killing occurred in prison. The specification is arbitrary and capricious, and therefore unconstitutional on its face.

As applied in general, this specification is unconstitutional. In any case where one inmate kills another, this specification is potentially available to elevate the crime to a death penalty offense. In that scenario (assuming no other specifications apply), the sole difference between life and death is that the inmate was detained in prison when she committed the homicide. Inmates are not above or beneath the law. Because someone broke the law and is now incarcerated does not make their life weigh any more or less than if they were living in society. When an offender is

already incarcerated and commits murder, that offender should be charged with the purposeful killing of another, just as they would if living in society at the time of the crime.

Finally, the "under detention" specification is unconstitutional as applied specifically to Drain. Had Drain killed the victim in the exact same way—but outside the walls of Warren Correctional—Drain could have been charged with the purposeful killing on another, i.e., aggravated murder, but there would have only been one death specification attached to this aggravated murder, not two. The State charged two specifications in this case: the "under detention" specification and that Drain had a prior conviction of aggravated murder. R.C. 2929.04(A)(4)&(5). No other specifications were applicable, as the victim did not have a special status as a police officer, nor was he a child under 13; in addition, Drain did not commit this crime in the course of committing another aggravated murder or any other delineated felony offense.

In this case, specifically, one less specification would have stood between the State and a death sentence for Drain if this specification were declared invalid and unconstitutional. That is, again, arbitrary and capricious, and unconstitutional as applied to Drain.

This Court should declare the "under detention" specification unconstitutional on its face and as applied in this case. In addition, this Court should remand this case for a new trial, or at least a new mitigation phase.

Proposition of Law No. 12. The trial court violates the Eighth And Fourteenth Amendments of the United States Constitution, and Article 1, Sections 1, 2, and 16 of the Ohio Constitution, when, in its required sentencing opinion, it ignores mitigating factors, unreasonably discounts accepted mitigation evidence, and misapplies the weighing process.

The trial court's sentencing opinion plays a crucial role "in evaluating all of the evidence, including mitigation evidence, and in carefully weighing the specified aggravating circumstances against the mitigating evidence in determining the appropriateness of the death penalty." *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 157. In order to avoid an arbitrary and capricious (and thereby unconstitutional) death sentence, Ohio law requires the trial court to follow a specific framework and include an "'examination of *specific factors* that argue in favor of or against imposition of the death penalty.'" (Emphasis sic.) *State v. Davis*, 38 Ohio St.3d 361, 372-73, 528 N.E.2d 925 (1988), quoting *Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913; *see also Gregg*, 428 U.S. at 193-195 ("Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."). The court must state, in a separate opinion, its specific findings as to the existence of any mitigating factors set forth in R.C. 2929.04(B), the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. R.C. 2929.03(F); *State v. Maurer*, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984).

Here, the trial court's sentencing opinion contained significant errors that undermined any confidence in the resulting death verdict. Both statutory and otherwise significant mitigating factors were either unreasonably discounted or ignored entirely, and the trial court engaged in a

weighing process that did not meet the requirements of established Ohio law. Collectively, these errors violated Drain's right to an individualized, clear, fair, and reliable sentencing proceeding.

I. The trial court failed to properly consider and weigh the mitigating factors.

When a defendant's life is at stake, a sentencer may not, as a matter of law, refuse to consider relevant mitigating evidence. *Eddings*, 455 U.S. at 113-114. In *Eddings*, the United States Supreme Court found it impermissible for a court to "consider[] only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." *Id.* at 113. A sentencer must be able to consider "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*, 438 U.S. at 604.

This Court recently affirmed this broad understanding of evidence relevant to mitigation. *State v. Ford*, 158 Ohio St.3d 129, 2019-Ohio-4539, 140 N.E.2d 616, ¶ 436. The trial court in *Ford* failed to assign any mitigating value to the defendant's alcohol use disorder, as "there was no evidence that Defendant Ford was under the influence of alcohol at the time of the murder." *Id.* This Court held that it was improper for the trial court to discount the evidence entirely simply because it did not have a direct influence on the commission of the offense. *Id.* The trial court erred by applying "an incorrect definition of mitigation, one that relates to culpability, as opposed to those factors that are relevant to whether the offender should be sentenced to death." *Id.*

The trial court in this case applied the same incorrect standard when evaluating the evidence in mitigation. These errors were further compounded when it failed to consider certain evidence entirely and failed to assess the cumulative weight of the mitigation.

A. The trial court erroneously failed to consider Drain's mental health under R.C. 2929.04(B)(3).

The trial court was required to consider any evidence of mental illness pursuant to the R.C. 2929.04(B)(3), as well as the R.C. 2929.04(B)(7) catchall provision. *See State v. Bays*, 87 Ohio St.3d 15, 30, 716 N.E.2d 1126 (1999) (finding error when the court considered evidence of brain damage only under the diminished capacity factor, rather than the catchall). Defense counsel did not present any expert testimony during the mitigation phase, including failing to call Dr. Jennifer O'Donnell, the psychologist who had examined Drain prior to her plea hearing. While this failure by counsel is inexcusable given Drain's lengthy mental health history, (*see* Prop. of Law No. 2) the fact that this crime was committed while Drain was housed in the RTU at Warren should have been considered by the court. (State's Exs. 19, 40).

In addition, Drain is a transwoman, and that fact was well-known. During his interview, fellow inmate, Kyle Taylor, told the investigator that he has known Drain as Victoria, Tori for short, as long as he has known Drain. (State's Ex. 40), Interview of Kyle Taylor. Taylor described Drain's transgender history and how she has been victimized for being a transwoman in the past. (*Id.*). Taylor reported Drain's attempt to self-castrate, which brought Drain to Warren, so the prison could "treat" her Gender Dysphoria. (*Id.*). Even inmate Michael Cothern, who was less sensitive in his description of Drain, knew that Drain was transgender. (State's Ex. 40, Interview of Michael Cothern). Cothern met Drain in 2012 or 2013 when they were both previously incarcerated in an RTU at Lucasville, demonstrating that Drain's need for mental health treatment has been longstanding. (*Id.*).

Finally, evidence of Drain's mental health was admitted as a pretrial exhibit through Dr. O'Donnell's competency report. (Ex. 04.16.20 I). The trial court re-admitted the competency report for purposes of the plea hearing. (Hrg. 05.18.20 Tr. 19-20). Yet, the only mention that the

trial court made of Drain's mental health was to state it was a required factor to consider under 2929.04. (R. 227).

Despite the trial court's acknowledgment that it must consider mental health evidence, at no point does the court assess the evidence of Drain's mental illness whether inside the parameters of R.C. 2929.04(B)(3), or under the "catchall" B(7) factor. When a court considers "only that evidence to be mitigating which would tend to support a legal excuse from criminal liability," it violates the requirement of individualized sentencing. *Lockett*, 438 U.S. at 605 ("[A]n individualized decision is essential in capital cases.").

B. The trial court failed to consider or assign weight to several additional factors as mandated by 2929.04(B) and 2929.03 (F).

In its sentencing opinion, a court is required to consider specific factors as enumerated under R.C 2929.04(B). The statute provides:

> [The] panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:
> (1) Whether the victim of the offense induced or facilitated it;
> (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
> (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;
> (4) The youth of the offender;
> (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
> (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;
> (7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

R.C 2929.04(B).

Here, the trial court began its weighing process by carefully detailing the aggravating circumstances and providing a detailed explanation of why each aggravating circumstance was entitled to considerable weight. (R. 227 at 4-5). The sentencing opinion is clear about what the court considered to establish the weight given to the aggravating circumstances and what weight they were assigned. (*Id.*).

The trial court then moved on to the mitigating factors. Again, the court began by first carefully detailing what the statute required to be considered in mitigation, but then failed to engage in the same detailed explanation of how it determined the weight of each factor it considered. (*Id.* at 5-8). For some factors, it did not even specify what weight was assigned despite acknowledging that a factor deserved weight. (*Id.* at 5-8).

Beginning on page 6 of its opinion, the court stated that the defendant offered no evidence of the statutory factors. (*Id.* at 6). The court then listed the (B)(7) mitigating factors it found to have been identified and presented by Drain. (*Id.*). Drain's confession and cooperation with law enforcement was determined to be a factor of "high value," but the court failed to address what specific weight it assigned this "high value" factor. The court next detailed Drain's acceptance of responsibility and her plea of no contest, adding that by pleading instead of going to trial, Drain saved the citizens of Warren County time, money, and a difficult experience. (*Id*.). Both a "high value" and "substantial weight" were assigned to that factor. (*Id.*).

The court acknowledged that Drain expressed love and a desire to protect her child as a mitigating factor; but assigned it "minimal weight" without any analysis as to why that factor was less deserving. (*Id.*). When considering youth, because Drain was in her late 30s at the time of the offense, it was not given "much weight." (*Id.*). Later, when the court again addressed the factor of youth, it found "no mitigation." (*Id*. at 7).

The court next considered the expression of love from Drain's family for Drain, and from Drain for her family. (*Id*. at 6). The court explained that it was clear from the testimony, and the emotion shown by both the family members and Drain, that a bond existed, and the court considered this love and support. (*Id.*). But once again, the court failed to specify what weight it gave to this mitigating factor. (*Id*.).

The court also considered Drain's unsworn statement and that Drain "claim[ed] to accept responsibility for [her] actions. (*Id.*). Her statement was described as "problematic" as a mitigating factor because the court interpreted it as casting blame on others for her behavior. (*Id.*). Yet, again, the court failed to say what, if any, weight was assigned to this factor. (*Id.*). No weight was given to whether the use of the death penalty deterred crime, or to the cost of the death penalty on society. (*Id.* at 7). The absence of other possible aggravating factors was entitled to some mitigation, and the court detailed its analysis as to why this factor was deserving of weight, but again, failed to assign what weight it gave to this acknowledged mitigating factor. (*Id.*).

Finally, the court listed "other mitigating factors" and stated, "except as set forth above," the Panel gave no weight to youth as a mitigating factor (2929.04 (B)), or to a lack of significant prior criminal history 2929.04(B)(5). *Id.* In this same sub-section of "other mitigating factors" the court considered the nature and circumstances of the offense, found no mitigating value, and explained why no weight was given. (*Id.*). No weight was given to remorse because the panel determined that Drain "showed no regret for what happened." (*Id.*). For that reason, the court gave this factor no weight. (*Id.*). The court then concluded that having balanced the aggravating circumstances and mitigating factors that the aggravating factors outweighed the mitigation beyond a reasonable doubt. (*Id.* at 8).

Nowhere in the court's sentencing opinion, nor during the sentencing hearing, did the trial court ever address the history, character, and background of the offender, and whether mental disease or defect was present, as detailed in section (B). This was error, as there was significant evidence presented throughout the record that was mitigating, such as inmate witness statements and Drain's unsworn statement, which mentioned her time spent in DYS facilities, her mental health struggles, her difficult upbringing, and her medical struggles. (Ex. 04.16.20 I); (State's Ex. 19, 40); (Hrg. 05.18.20 Tr. 106-110, 128). Thus, they should have been assigned weight.

The sentencing opinion is extremely confusing, as the court seemed to assign some weight to certain factors and then take away that weight again later; assigned weight to some mitigating factors but failed to assign weight on others. (R. 227 at 4-8). It is impossible for reviewing courts to know the weight on one of the sides of the scale when the court neglects to give that information.

C. The trial court failed to consider the cumulative weight of the mitigating evidence.

Mitigating factors are not to be considered discreetly, each factor weighed in turn against the aggravating circumstances. Instead, the trial court must assess the cumulative impact of the mitigating factors. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, at ¶ 105 ("A single one of these facts, standing alone, would not establish that appellant's history, character, and background were so impaired as to outweigh [aggravating circumstances], the foregoing evidence, viewed cumulatively, establishes the presence of R.C. 2929.04(B)(7) 'other factors' that strongly militate against imposing the death sentence."); *Bays*, 87 Ohio St.3d at 30 (finding error when "instead of weighing the mitigating factors collectively against the aggravating circumstance, the panel weighed each proffered factor individually against the aggravating circumstance"). This Court has previously found that even if no single mitigating factor was enough to outweigh the aggravating circumstances, a death sentence must be vacated when the

cumulative weight of the mitigating factors outweighs the aggravating circumstances. *Graham*, 2020-Ohio-6700, at ¶ 215; *Johnson*, 2015-Ohio-4903 at ¶ 137; *Tenace* at ¶ 139.

The trial court did not assess the cumulative impact of the aggravating circumstances and put forth no discussion whatsoever about whether the court considered the circumstances cumulatively with either the aggravating or mitigating evidence. Drain cannot assess whether the court properly considered the cumulative weight of the evidence when the court is silent as to this necessary piece of its weighing process.

D. The trial court unreasonably discounted the mitigating evidence presented.

Like the trial court in *Ford*, the trial court here did not have a sufficient appreciation of the purpose and role of mitigating evidence in a capital case. The United States Supreme Court has made it clear that a defendant's troubled history is "relevant to assessing a defendant's moral culpability." *See Wiggins v. Smith*, 539 U.S. 510, 535, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). The trial court made no finding about Drain's "history, or character and background" as is required pursuant to R.C. 2929.03(F).

However, Drain's history, character and background deserved individualized consideration. R.C. 2929.04(B)(7); *Lockett*, 438 U.S. at 605 ("[A]n individualized decision is essential in capital cases."). Despite this duty, the court failed to discuss Drain's history, character, and background at all. For instance, the court should have considered that the crime took place on the residential treatment unit of Warren Correctional Institution. (State's Ex. 19). The fact that Drain was undergoing substantial enough mental health problems to be placed in a specialized unit for serious mental health issues was certainly worthy of consideration when considering how this crime took place. In addition, inmate witness statements, which were admitted by the State as State's Ex. 40, held specific mitigating evidence about Drain and her struggle with her gender

identity. Drain also made an unsworn statement where she negatively referenced her time that she spent in DYS facilities. (Hrg. 05.18.20 Tr. 106-110). This mitigating evidence should have been considered as such as part of Drain's history, character, and background.

The trial court denied Drain the individualized assessment of her moral culpability by unreasonably ignoring or discounting evidence that has been firmly established as mitigating.

E. The trial court improperly considered the nature and circumstances of the offenses in aggravation.

The trial court was well-aware that it was improper to consider the nature and circumstances of the offense as an aggravating circumstance. The court stated that "the crime itself was violent, intensely personal and carried out in a brutal fashion. Therefore, the Court finds no mitigating value in the nature and circumstances of the offense and therefore gives this potential mitigating factor no weight in the decision." (R. 227 at 7). Although the trial court added the obligatory caveat that, "the panel has not considered * * * the nature and circumstances or the aggravated murder itself as an aggravating circumstance" there was no other reason to highlight the "intensely personal" and "brutal fashion" of the murder." (*Id.*).

The court also stated that it did not consider the absence of remorse as an aggravating circumstance but found that Drain was not remorseful and showed "no regret for what happened." (*Id*.).

These general disclaimers that the trial court did not consider these factors is unpersuasive. The fact that the trial court mentioned these factors implies that it improperly considered both the nature and circumstances of the offense and Drain's lack of remorse as non-statutory aggravating factors.

II. These serious errors require a new mitigation and/or sentencing hearing.

A state that allows the death penalty "has a constitutional obligation to tailor and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." (Emphasis added.) *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *see also Barclay v. Florida*, 463 U.S. 939, 958-959, 103 S.Ct 939, 77 L.Ed.2d 1134 (1983), (Stevens, J., concurring) ("Since *Furman v. Georgia*, 408 U.S. 238 (1972), this Court's decisions have made clear that States may impose this ultimate sentence *only if they follow procedures that are designed to assure reliability in sentencing determinations*.").

The collective deficiencies of the trial court's opinion are too great to allow the death sentence to stand. *See Green*, 90 Ohio St. 3d at 363-364 ("We deem the deficiencies in this case too severe to correct by simply reevaluating the evidence."). These errors can only be corrected by a remand for a new mitigation phase trial, or at least a new hearing before the trial court to properly weigh the aggravating circumstances and mitigation factors.

Proposition of Law No. 13. Ohio's death penalty statute and rules violate the right to a jury trial when they fail to allow a capital defendant who chooses to accept responsibility for her crime to have a sentencing determination made by a jury and because they penalize the assertion of a constitutional right in violation of the Fifth, Sixth, Eighth And Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 5, 9, 10 and 16 of the Ohio Constitution.

A capital defendant has a right to a jury determination of every fact "necessary to put him to death." *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 158 L.Ed.2d 556 (2002). R.C. 2929.03(D) provides that a death sentence may only be imposed upon a finding by proof beyond a reasonable doubt that the aggravating circumstance(s) of which the defendant has been found guilty outweighs any mitigating factors proven by a preponderance of the evidence. By extension, a capital defendant who enters a guilty or no contest plea to a charge of aggravated murder and the accompanying death specifications, has a constitutional right to a jury determination of the existence of any mitigating factors. A jury should further determine whether the aggravating circumstances outweigh those mitigating factors by proof beyond a reasonable doubt.[31]

Ohio law denies the capital defendant that right. R.C. 2929.03(D)(2) implicitly and R.C. 2945.06 and Crim. R. 11(C)(3) specifically provide that if a capitally charged defendant enters a guilty plea to the indictment, she must waive her right to a jury trial not only for the culpability phase of the trial but also for the mitigation phase. The mitigation phase of an Ohio capital proceeding constitutes a trial. *See Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

Moreover, the denial of a right to jury sentencing after entering a plea violates a capitally charged defendant's right to present a defense as guaranteed by the Sixth and Fourteenth

[31] In *McKinney v. Arizona*, 140 S.Ct. 702, 707, 206 L.Ed.2d 69 (2020), the Court said that a jury is not required to weigh aggravating circumstances against mitigating factors. But *McKinney* has no bearing on the need to have a jury determine *the existence* of mitigating factors.

Amendments and to the protection of the Cruel and Unusual Punishment Clause of the Eighth Amendment though the Fourteenth Amendment. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Lockett* established that at a capital sentencing hearing a jury must be permitted to consider all mitigating evidence. However, under Ohio's law when a defendant chooses to accept responsibility and enter a plea, a mitigation phase jury is denied the opportunity to consider the substantial mitigating evidence of taking responsibility for the crime through a plea of guilty. That mitigating evidence may only be considered by a three-judge panel. *See Ketterer* at ¶ 186.

A plea of guilty or no contest to a three-judge panel also permits the panel, without hearing mitigation evidence, to "dismiss the specifications and impose sentence accordingly, in the interests of justice." Crim. R. 11(C). A case that goes to a jury must be determined exclusively by the law which does not include the standard of "in the interests of justice" as Crim. R. 11 (C)(3) does. A procedure which offers an individual a reward for waiving a fundamental constitutional right, or imposes a harsher penalty for asserting it, must not be upheld. *United States v. Simmons*, 390 U.S. 377, 393-394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). See also *Lockett* at 618.

In *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the Supreme Court examined the Federal Kidnaping Act which permitted a death sentence when a defendant elected to exercise her constitutional right to trial by jury but precluded a death sentence when the defendant either entered a guilty plea or waived her right to a jury and tried her case to the court. The Supreme Court ruled:

> The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right to demand a jury trial* * *. Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.

Id. at 582-583.

In his concurring opinion in *Lockett v. Ohio, supra*, Justice Blackmun addressed this specific issue in the context of Ohio's capital sentencing procedures.

> There is *no* provision similar to Rule 11(C)(4) permitting the trial court to dismiss aggravating specifications "in the interests of justice" where the defendant insists on his right to trial. . . . a defendant can plead not guilty only by enduring a semi mandatory, rather than a purely discretionary, capital-sentencing provision. This disparity between a defendant's prospects under the two sentencing alternatives is, in my view, too great to survive under *Jackson* . . .

Id. at 618-619.

These flaws in Ohio's death penalty scheme are also separately at issue as applied in this case. Because Drain elected to enter no contest pleas, this automatically waived not only the right to have a jury determine guilt, but also the Sixth Amendment right to have a jury determine the facts necessary to impose a death sentence. *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L.ED.2d 504 (2016).

Drain's death sentences are inappropriate because of the requirement to decide between two conflicting rights: to plead guilty or to fully exercise the right to a jury trial in the mitigation phase. This Court should vacate her death sentences and remand the matter to permit her to elect whether she wishes to exercise her constitutional right to a jury in the mitigation phase.

Proposition of Law No. 14. Execution by lethal injection as administered by the State of Ohio violates Drain's rights to Due Process, Equal Protection, and freedom from cruel and unusual punishment under the Eighth And Fourteenth Amendment of the United States Constitutions and Article I, Sections 1, 9 and 16 of the Ohio Constitution.

The death penalty as administered by lethal injection in the State of Ohio violates Drain's constitutional rights to protection from cruel and usual punishment and to due process and equal protection of the law. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 281, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998) (holding that the Due Process Clause protects the "life" interest at issue in capital cases).

I. Introduction.

Ohio law requires that all executions be carried out by lethal injection. R.C. 2949.22. Ohio cannot carry out Drain's execution by lethal injection without violating her constitutional rights, regardless of the execution protocol in place. Ohio's history of botched executions and repeated protocol changes demonstrates that Ohio cannot, and never will, carry out her execution by lethal injection in a constitutional manner.

The most recent protocol issued by the Ohio Department of Rehabilitation and Correction was promulgated on October 7, 2016. *See* Notice of Revised Protocol, *In re: Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, ECF No. 667-1, PageID 19812–32 (S.D. Ohio Oct. 7, 2016). The drugs in that protocol include three options: (1) Pentobarbital (5 grams); (2) Thiopental sodium (5 grams); or (3) A three-drug combination of: (a) Midazolam Hydrochloride (500 mg), (b) a bromide paralytic drug (Vecuronium, Pancuronium, or Rocuronium bromide), and then (c) Potassium Chloride (240 milliequivalents). *Id.* In each of the four executions that Ohio has carried out or attempted to carry out since the adoption of that protocol, Ohio has exclusively used the third method, involving the administration of three drugs, beginning with midazolam (the "three-drug method").

II. Any attempt by Ohio to execute Drain by lethal injection will violate her constitutional rights.

The use of these drugs by Ohio poses an intolerable risk of extreme pain and cruelty. The drugs arbitrarily selected by Ohio for its current lethal injection protocol pose a sure or very likely risk of severe pain and suffering. *See Glossip v. Gross*, 576 U.S. 863, 878, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015); *Baze v. Rees*, 553 U.S. 35, 52, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). Midazolam is not an anesthetic drug and will not suppress the pain of the second and third drugs. Moreover, injectable midazolam is extremely acidic and caustic, and the use of the extreme quantity of midazolam that Ohio employs—500 mg—will overwhelm and damage Drain's lungs, causing acute pulmonary edema and the accompanying sensations of suffocation and drowning. *In re Ohio Execution Protocol*, 946 F.3d 287, 290 (6th Cir.2019). The second and third drugs given in the sequence are known to cause pain. *Fears v. Morgan (In re Ohio Execution Protocol)*, 860 F.3d 881, 886 (6th Cir.2017). Such an execution cannot comport with the Eighth Amendment of the U.S. Constitution or Article I, Sections 9 and 16 of the Ohio Constitution, as well as the "quick and painless" requirement of R.C. 2949.22(A).

Moreover, Ohio has an unfortunate history of botched executions. *See generally Cooey v. Strickland*, 479 F.3d 412, 423–24 (6th Cir.2007). These included the prolonged death of Dennis McGuire in 2014, as well as the aborted execution of Rommel Broom in 2009. *See State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028, 51 N.E.3d 620. They also include, more recently, the botched attempted execution of Alva Campbell in November 2017.

Death by state-sanctioned lethal injection, as contemplated under Ohio's current execution protocol, violates the due process protection of life, and constitutes cruel and unusual punishment in violation of Drain's constitutional rights because it inflicts torturous, gratuitous, and inhumane pain, suffering, and anguish upon the person executed by these means. As "considerations of cruel

and unusual punishment must draw meaning from evolving standards of decency that mark progress of a maturing society," this Court is not bound to statutory regulations or prior rulings by a court that violate the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), citing *Weems v. United States*, 217 U.S. 349, 379, 30 S.Ct. 544, 54 L.Ed. 793 (1910); *see also Dawson v. State of Georgia*, 274 Ga. 327, 329 (Ga. 2001).

The United States Supreme Court has made clear that the death penalty must result in "the mere extinguishment of life" and that "torture or a lingering death" is unconstitutional. *In Re Kemmler*, 136 U.S. 436, 447, 10 S.Ct. 930, 34 L.Ed.3d. 519 (1890). The jurisprudence of the Eighth Amendment has been consistent in its prohibition against all unnecessary cruelty. *Wilkerson v. Utah*, 99 U.S. 130, 135-136, 25 L.Ed. 345 (1878); *Louisiana ex rel. Francis v. Reswebeer*, 329 U.S. 459, 464, 67 S.Ct. 374, 91 L.Ed. 422 (1947).

III. Conclusion.

Ohio cannot constitutionally execute Drain under its only authorized method of execution—lethal injection. Its current protocol poses an intolerable risk—indeed, a sure or very likely risk—of severe pain and suffering, from each of the three drugs. And Ohio's history of botched and failed executions makes clear that Ohio will never be able to execute Drain in compliance with the requirements of the U.S. or Ohio Constitutions. As such, this Court should vacate Drain's death sentence.

Proposition of Law No. 15. Ohio's death penalty law is unconstitutional. R.C. 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Drain in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 10, and 16 of the Ohio Constitution. Further, Ohio's death penalty statute violates the United States' obligations under international law.[32]

The Eighth Amendment to the U.S. Constitution and Article I, Section 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. U.S. Const. Amend. VIII; Ohio Const., Art. I, Section 9. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

Punishment that is "excessive" constitutes cruel and unusual punishment. *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether a death penalty statute is constitutional. *See Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring); *Rhodes v. Chapman*, 452 U.S. 337, 361, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *Trop*.

I. Arbitrary and unequal punishment.

The Fourteenth Amendment's guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment. *Furman* at 249 (Douglas, J., concurring). A death penalty imposed in violation of the Equal Protection guarantee is a cruel and unusual punishment. *See id*. Any arbitrary use of the death penalty also offends the Eighth Amendment. *Id*.

[32] In *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute, and this Court may, therefore, reject this claim on its merits if it disagrees with Appellant's federal constitutional arguments. *State v. Poindexter*, 36 Ohio St.3d 1, 520 N.E.2d 568 (1988).

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of *Furman* and its progeny. Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. *Commonwealth v. O'Neal*, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); *State v. Pierre*, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting). Moreover, where fundamental rights are involved, personal liberties cannot be broadly stifled "when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The United States Supreme Court has recognized that the fundamental right to "life" deserves the highest protection possible under the Fourteenth Amendment's protection of "life, liberty and property." *Woodard* (five Justices recognized a distinct "life" interest protected by the Due Process Clause in all stages of a capital case, above and beyond protected liberty and property interests). Death is different; for that reason, more process is due, not less. *See Lockett*; *Woodson*. To imperil this protected, fundamental life interest, the State must show that it is the "least restrictive means" to a "compelling governmental end." *O'Neal* at 678. The death penalty is neither the least restrictive nor an effective means of deterrence. Both isolation of the offender and retribution can be effectively served by less restrictive means. Society's interests do not justify the death penalty.

II. Unreliable sentencing procedures.

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State's application of capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 188, 193-195, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman* at 255, 274. Ohio's scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

The statutory scheme is unconstitutionally vague, which leads to the arbitrary imposition of the death penalty. The language "that the aggravating circumstances * * * outweigh the mitigating factors" invites arbitrary and capricious decisions. "Outweigh" preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing. Additionally, the mitigating circumstances are vague. The sentencer must be given "specific and detailed guidance" and be provided with "clear and objective standards" for their sentencing discretion to be adequately channeled. *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor are within the individual decision-maker's discretion. *State v. Fox*, 69 Ohio St.3d 183, 193, 631 N.E.2d 124 (1994). So much discretion inevitably leads to arbitrary and capricious judgments.

The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating: youth or childhood abuse (*Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)), mental disease or defect (*Penry v. Lynaugh*,

492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), rev'd on other grounds *Penry v. Johnson*, 532 U.S.782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001)), level of involvement in the crime (*Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982)), or lack of criminal history (*Delo v. Lashley*, 507 U.S. 272 (1993))] will not be factored into the sentencer's decision. While the federal constitution may allow states to shape consideration of mitigation, *see Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993), Ohio's capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman* and its progeny.

III. Defendant's right to a jury is burdened.

The Ohio scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. A defendant who pleads guilty or no contest benefits from a trial judge's discretion to dismiss the specifications "in the interest of justice." Crim.R. 11(C)(3). Accordingly, the capital indictment may be dismissed regardless of mitigating circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury. *See* Prop. of Law No. 13.

Justice Blackmun found this discrepancy to be constitutional error. *Lockett* at 617 (Blackmun, J., concurring). This disparity violated *United States v. Jackson*, 390 U.S. 570 (1968), and needlessly burdened the defendant's exercise of his right to a trial by jury. Since *Lockett*, this infirmity has not been cured and Ohio's statute remains unconstitutional.

IV. Mandatory submission of reports and evaluations.

Ohio's capital statutes are unconstitutional because they require submission of the pre-sentence investigation report and the mental evaluation to the jury or judge once requested by a

capital defendant. R.C. 2929.03(D)(1). This mandatory submission prevents defense counsel from giving effective assistance and prevents the defendant from effectively presenting his case in mitigation.

V. Mandatory death penalty and failure to require appropriateness analysis.

The Ohio death penalty statutory scheme purports to preclude a mercy option, either in the absence of mitigation or when the aggravating circumstances "outweigh" the mitigating factors. The statutes in those situations mandate that death shall be imposed. R.C. 2929.03, 2929.04. The sentencing authority is impermissibly limited in its ability to return a life verdict by this provision.

In *Gregg*, the United States Supreme Court stated, "nothing" in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Gregg* at 199. *Gregg* held only that, "in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Id. Gregg* requires the State to establish, according to constitutionally sufficient criteria of aggravation and constitutionally mandated procedures, that capital punishment is appropriate for the defendant. Nothing requires the State to execute defendants for whom such a finding is made.

Indeed, the Georgia statute, approved in *Gregg* as being consistent with *Furman*, permits the jury to make a binding recommendation of mercy even though the jury did not find any mitigating circumstances in the case. *Fleming v. Georgia*, 240 S.E.2d 37 (Ga.1977); *Hayes v. Georgia*, 158 Ga.App.754 (Ga.App.1981). Subsequent to *Lockett*, the Fifth and Eleventh Circuits repeatedly reviewed and remanded cases for error in the jury instructions when the trial court failed to clearly instruct the jury that they had the option to return a life sentence even if the aggravating

circumstances outweighed mitigation. *Chenault v. Stynchcombe*, 581 F.2d 444 (5th Cir.1978); *Spivey v. Zant*, 661 F.2d 464 (5th Cir.1981); *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir.1981); *Westbrooke v. Zant*, 704 F.2d 1487 (11th Cir.1983); *Tucker v. Zant*, 724 F.2d 882 (11th Cir.1984); *Gray v. Lucas*, 677 F.2d 1086 (5th Cir.1982); *Prejean v. Blackburn*, 570 F. Supp. 985 (D. La.1983).

Capital sentencing that is constitutionally individualized requires a mercy option. *See also* Prop. of Law No. 14. An individualized sentencing decision requires that the sentencer possess the power to choose mercy and to determine that death is not the appropriate penalty for this defendant for this crime. In *Barclay v. Florida*, the Court stated that the jury is free to "determine whether death is the appropriate punishment." *Barclay v. Florida*, 463 U.S. 939, 950, 103 S.Ct. 3418, 77 L.Ed.2d 1134(1983). *See also Kansas v. Carr*, 577 U.S. 108, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016); *Kansas v. Marsh*, 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006).

Absent the mercy option, the defendant faces a death verdict resulting from a *Lockett*-type statute, i.e., a statute that mandated a death verdict in the absence of one of three specific 255 mitigating factors. Under current Ohio law, the sentencer lacks the option of finding a life sentence appropriate in the face of a statute which requires that when aggravating circumstances outweigh mitigating factors "it shall impose a sentence of death on the offender." R.C. 2929.03(D)(3).

A non-mandatory statutory scheme that affords the jury the discretion to recommend mercy in any case "avoids the risk that the death penalty will be imposed in spite of factors 'too intangible to write into a statute' which may call for a less severe penalty, and avoidance of this risk is constitutionally necessary." *Conner v. Georgia*, 303 S.E.2d 266, 274 (Ga.1983). Other state courts have also required a determination of "appropriateness" beyond mere weighing of aggravating

circumstances and mitigating factors. *California v. Brown*, 726 P.2d 516 (Cal.1985), *rev'd on other grounds*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987).

In *Brown*, the Supreme Court repeated "the Eighth Amendment's need for reliability in the determination that death is the appropriate punishment in a specific case." In *Brown*, the Court agreed that jurors may be cautioned against reliance on "extraneous emotional factors," and that it was proper to instruct the jurors to disregard "mere sympathy." *Id*. This instruction referred to the sort of sympathy that would be totally divorced from the evidence adduced during the mitigation phase. The Court's analysis clearly approved and mandated that jurors be permitted to consider mercy, i.e., mercy tethered or engendered by the mitigation phase evidence. *Marsh*; *Carr*.

The Ohio statute does not permit an appropriateness determination; a death sentence is mandated after a mere weighing. Finally, while the Court has said that a "jury is not precluded from extending mercy to a defendant," *State v. Zuern*, 32 Ohio St.3d 56, 64, 512 N.E.2d 585 (1987), Ohio jurors are not in fact informed of this capability. In fact, this Court has even permitted mitigation phase jury instructions in direct contradiction to this extension of mercy capability. The Ohio "no-sympathy" instructions to juries do not in any way distinguish between "mere" sympathy (untethered), and that sympathy tied to the evidence presented in the mitigation phase, and therefore commit the very violation of the Eighth Amendment which the California instruction had narrowly avoided.

While this Court has said extending mercy is permissible in Ohio and acknowledges that "[s]entencing discretion is an absolute requirement of any constitutionally acceptable capital punishment statute," *id*. at 65, there is in fact no such indication on the statute's face, and no state court assurance that jurors are so informed. Bald, unsupported assertions of compliance with the constitution are inadequate.

VI. R.C. 2929.03(D)(1) and 2929.04 are unconstitutionally vague.

Section 2929.03(D)(1) of the Revised Code refers to "the nature and circumstances of the aggravating circumstance," which incorporates the nature and circumstances of the offense into the factors to be weighed in favor of death. The nature and circumstances of an offense are, however, statutory mitigating factors under R.C. 2929.04(B), that may only be weighed on the side of mitigation. *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996). R.C. 2929.03(D)(1) makes Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. *Lewis v. Jeffers*, 497 U.S. 764, 774, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 362, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). A vague aggravating circumstance fails to give that guidance. *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *vacated on other grounds Ring*; *Godfrey* at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor. *Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). The aggravating circumstances in R.C. 2929.04(A)(1)-(8) are both.

VII. Proportionality and appropriateness review.

R.C. 2929.021 and 2929.03 require data about adjudication of death-eligible cases be reported to the courts of appeals and to the Ohio Supreme Court. There are substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. R.C. 2929.021 requires only minimal information on these cases. Additional data is necessary to make an adequate comparison in these cases. This prohibits adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). The standard for review is one of careful scrutiny. *Zant* at 884-85. Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. *Id*.

Ohio's statutes' failure to require the jury or three-judge panel recommending life imprisonment to identify the mitigating factors undercuts adequate appellate review. Without this information, no significant comparison of cases is possible. Absent a significant comparison of cases, there can be no meaningful appellate review. *See State v. Murphy*, 91 Ohio St.3d 516, 562, 747 N.E.2d 765 (2001) (Pfeifer, J., dissenting) ("When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard.").

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by R.C. 2929.05(A). *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987), paragraph one of the syllabus. However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

This Court's appropriateness analysis is also constitutionally infirm. R.C. 2929.05(A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances outweigh the mitigating factors, and that death is the appropriate sentence. *Id*. This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not "rationally distinguish between those individuals for whom death is an appropriate sanction and

those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), overruled on other grounds by *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a state acts with significant discretion, it must act in accordance with the Due Process Clause. *Evitts*. The review currently used violates this constitutional mandate. An insufficient proportionality review violates Drain's due process and liberty interest in R.C. 2929.05.

VIII. Ohio's "beyond a reasonable doubt" standard.

A. The statutes fail to require proof beyond all doubt as to guilt that aggravating circumstances outweigh mitigating factors, and the appropriateness of death as a punishment before the death sentence may be imposed.

The burden of proof required for capital cases should be proof beyond all doubt. The factfinder should be instructed during both phases that the law requires proof beyond all doubt of all the required elements. Most importantly, death cannot be imposed as a penalty except upon proof beyond all doubt of both the crime itself and the fact that the aggravating circumstances outweigh the mitigating factors.

Insistence on reliability in guilt and sentencing determination is a vital issue in the United States Supreme Court's capital decisions. This emphasis on the need for reliability and certainty is a product of the unique decision that must be made in every capital case – the choice of life or death. The Supreme Court has consistently emphasized the "qualitative difference" of death as a punishment, stating that "death profoundly differs from all other penalties" and is "unique in its

severity and irrevocability." *Woodson* at 305; *Lockett* at 605; *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *Gregg*, 428 U.S. at 187.

Proof beyond all doubt, a higher standard than the statutory proof beyond a reasonable doubt, should be required in a capital case because of the absolute need for reliability in both the culpability and mitigation phases. The irrevocability of the death penalty demands absolute reliability. Absent such a safeguard, a defendant may be subject to a sentence of death in violation of her Eighth and Fourteenth Amendment rights.

The proof beyond a reasonable doubt standard is required in criminal cases "to safeguard men from dubious and unjust convictions." *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The petitioner in *Winship* was a juvenile facing a possible six year imprisonment. Crucial to the Court's decision was its assessment of the importance of the defendant's right not to be deprived of his liberty. Proof beyond a reasonable doubt was demanded in recognition that "the accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that [s]he may lose [her] liberty upon conviction and because of the certainty that [s]he would be stigmatized by the convictions." *Id*. Only this standard of proof adequately commanded "the respect and confidence of the community in applications of the criminal law." *Id*. at 364.

In a capital case, far more than liberty and stigmatization are at issue. The defendant's interest in her life must be placed on the scales. Only then can an appropriate balancing of the interests be performed; only then can one know whether the "situation demands" a particular procedural safeguard. Given the magnitude of the interests at stake in a capital case and the necessity that the community "not be left in doubt whether innocent men are being condemned" a high standard is required which reduces the margin of error "as much as humanly possible," *id*.;

Eddings 455 U.S. at 116. This is all the more so when a petitioner's "life" interest (protected 258 by the "life, liberty and property" language in the Due Process Clause) is at stake in the proceeding. *Woodard*, 523 U.S. 272 (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases, above and beyond liberty and property interests). The most stringent standard of proof that is "humanly possible" is proof beyond all doubt.

The American Law Institute's Model Penal Code, cited by the United States Supreme Court as a statute "capable of meeting constitutional concerns," adopts the beyond-all-doubt standard at the mitigation phase. *See Gregg*, 428 U.S. at 191–95. The Model Penal Code mandates a life sentence if the trial judge believes that "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt." Model Penal Code §210.6(1)(f). If the trial judge has any doubt of the defendant's guilt, life imprisonment is automatically imposed without a sentencing hearing. The words used are "all doubt," not merely "doubt" or "reasonable doubt."

B. Ohio's definition of proof "beyond a reasonable doubt" results in a burden of proof insufficiently stringent to meet the higher reliability requirement in capital cases at the trial phase, and this has not been cured by appellate courts in their review of convictions or death sentences.

Ohio law provides standard jury instructions of "reasonable doubt" and "proof beyond a reasonable doubt" as the applicable burden of proof in capital cases. R.C. 2901.05(D). However, Ohio's definition actually articulates the standard for the lower burden of proof by a preponderance of the evidence, thus unconstitutionally diluting defendant's rights to a fair trial. *See Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954); *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed.2d 150 (1954); *Scurry v. United States*, 347 F.2d 468, 470 (D.C. Cir.1965) ("[I]mportant affairs is the traditional test for clear and convincing evidence . . . The jury . . . is prohibited from convicting unless it can say beyond a reasonable doubt that defendant is guilty as

charged. . . . To equate the two in the juror's mind is to deny the defendant the benefit of a reasonable doubt."). *State v. Crenshaw*, 51 Ohio App.2d 63, 65, 366 N.E.2d 84 (2d Dist.1977); *cf. State v. Nabozny*, 54 Ohio St.2d 195, 375 N.E.2d 784 (1978), *vacated on other grounds*, *Nabozny* v. *Ohio*, 439 U.S. 811, 99 S.Ct. 70, 58 L.Ed.2d 103 (1978); *State v. Seneff*, 70 Ohio App.2d 171, 435 N.E.2d 680 (8th Dist.1980).

The Ohio reasonable doubt instructions fail to satisfy the requirement of reliability in a capital case. Even in *Winship*, when considering the reasonable doubt standard, the Court stated that the fact finder must be convinced of guilt "with utmost certainty," and that the court must impress on the trier of fact the necessity of reaching a subjective state of certitude. *Winship*, 397 U.S. at 363–64. Ohio's definition of a reasonable doubt is inadequate to meet even these standards.

C. The Ohio death penalty statutes fail to require that the sentencer consider as a mitigating factor pursuant to R.C. 2929.04(B) that the evidence fails to preclude all doubt as to the defendant's guilt.

The language of R.C. 2929.04(D)(2) contemplates a balancing process focusing upon the mitigating factors present in the case as compared to the offender's "guilt" with respect to the aggravating circumstances. In determining the appropriateness of the death penalty, the fact that the evidence presented failed to foreclose all doubt as to guilt must be considered as a relevant mitigating factor. "The jury should have before it not only the prosecution's unilateral account of the offense but the defense version as well. The jury should be afforded the opportunity to see the whole picture * * *" *California v. Terry*, 61 Cal.2d 137, 141 (Cal.1964). The failure to require the sentencer give consideration to the fact that the evidence does not foreclose all doubt as to guilt violates the constitutional standards established for the imposition of the death penalty.

IX. Ohio's statutory death penalty scheme violates international law.

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Drain's capital conviction and sentence cannot stand.

A. International law binds Ohio.

"International law is a part of our law[.]" *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900). A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where state law conflicts with international law, it is the state law that must yield. *See Zschernig v. Miller*, 389 U.S. 429, 440, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968). In fact, international law creates remediable rights for United States citizens. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal.1987).

B. Ohio's obligations under international charters, treaties, and conventions.

The United States' membership and participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. Art. 1(3). The United States bound itself to promote human rights in cooperation with the U.N. Art. 55-56. The United States again proclaimed the fundamental rights of the individual when it became a member of the OAS. OAS Charter, Art. 3.

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: The International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial

Discrimination (ICERD) ratified in 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land. Ohio is not fulfilling the United States' obligations under these conventions. Rather, Ohio's death penalty scheme violates each convention's requirements and thus must yield to the requirements of international law. (*See* discussion *infra*).

1. Ohio's statutory scheme violates the ICCPR's and ICERD's guarantees of equal protection and due process.

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing (Art. 14(1)), an independent and impartial tribunal (Art. 14(1)), the presumption of innocence (Art. 14(2)), adequate time and facilities for the preparation of a defense (Art. 14(3)(a)), legal assistance (Art. 14(3)(d)), the opportunity to call and question witnesses (Art. 14(3)(e)), the protection against self-incrimination (Art. 14(3)(g)), and the protection against double jeopardy (Art. 14(7)). However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants like Drain as contemplated by the ICCPR and the ICERD.

2. Ohio's statutory scheme violates the ICCPR's protection against arbitrary execution.

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant

women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life as discussed, *supra*.

3. Ohio's statutory scheme violates the ICERD's protections against race discrimination.

The ICERD, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels. Art. 2. It requires specific action and does not allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory manner. (*See infra*). A scheme that sentences Black defendants and those who kill white victims more frequently and which disproportionately places Black defendants on death row is in clear violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

4. Ohio's statutory scheme violates the ICCPR'S and the CAT'S prohibitions against cruel, inhuman, or degrading punishment.

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman, or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed. *See* Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering. Thus, there is a violation of international law and the Supremacy Clause.

5. Ohio's obligations under the ICCPR, the ICERD, and the CAT are not limited by the reservations and conditions placed in these conventions by the Senate.

While conditions, reservations, and understandings accompanied the United States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article II, Section 2 of the United States Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted. However, the Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will and will not follow. Their role is to simply advise and consent.

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role of advice and consent. The Senate picks and chooses which items of a treaty will bind the United States and which will not. This is the equivalent of the line-item veto, which is unconstitutional. *Clinton v. City of New York*, 524 U.S. 417, 438, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998). The Supreme Court specifically spoke to the enumeration of the president's powers in the Constitution in finding that the president did not possess the power to issue line-item vetoes. *Id*. If it is not listed, then the President lacks the power to do it. *See id*. Similarly, the Constitution does not give the power to the Senate to make conditions and reservations, picking and choosing what aspects of a treaty will become law. Thus, the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional. *See id.*

The Vienna Convention on the Law of Treaties further restricts the Senate's imposition of reservations. It allows reservations unless: they are prohibited by the treaty, the treaty provides that only specified reservations, not including the reservation in question, may be made, or the reservation is incompatible with the object and purpose of the treaty. Art. 19(a)-(c). The ICCPR

specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Under the Vienna Convention, the United States' reservations to these articles are invalid under the language of the treaty. *See id*. Further, the ICCPR's purpose is to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

6. Ohio's obligations under the ICCPR are not limited by the Senate's declaration that it is not self-executing.

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir.1985) (Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965)). It is the function of the courts to say what the law is. *See Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803).

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Article 2, Section 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. *See Clinton*, 524 U.S. at 438.

C. Ohio's obligations under customary international law.

International law is not merely discerned in treaties, conventions, and covenants. International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and

enforcing that law." *United States v. Smith*, 18 U.S. 153, 160-61, 5 L.Ed. 57 (1820). Regardless of the source "international law is a part of our law[.]" *The Paquete Habana* at 700.

The judiciary and commentators recognize the Universal Declaration of Human Rights (DHR) as binding international law. The DHR "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." *Filartiga* at 883 (internal citations omitted).

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman, or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are violated by Ohio's statutory scheme. Thus, Ohio's statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. *Smith* directs courts to look to "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law" in ascertaining international law. *United States v. Smith* at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. *See id.*

Ohio's statutory scheme is in violation of customary international law.

X. Conclusion.

Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur. The procedures actually promote the imposition of the death penalty and, thus, are constitutionally intolerable. R.C. 2903.01, 2929.02, 2929.021, 2929.022,

2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution and Article I, Sections 2, 9, 10, and 16 of the Ohio Constitution and international law. Furthermore, subjecting Drain to the prospect of capital punishment violates international law and the Supremacy Clause of the United States Constitution.

Drain's death sentence must be vacated.

Proposition of Law No. 16. The death penalty may not be sustained where the cumulative effect of trial error results in an unfair trial with an arbitrary and unreliable sentence in violation of the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution.

Drain has raised numerous errors any one of which warrant relief from a sentence of death. Even, assuming arguendo that each were not enough to warrant reversal, the combination of errors by the trial court, the prosecution, and the ineffectiveness of defense counsel made the trial fundamentally unfair. *See Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.1983). Under the doctrine of cumulative error, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial, even though each instances of error alone does not individually constitute cause for reversal. *DeMarco*, 31 Ohio St.3d at 196-197; *see also State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶¶ 222-224; *State v. Garner*, 74 Ohio St.3d 49, 1995-Ohio-168, 656 N.E.2d 623 (1995); *Stouffer*, 168 F.3d at 1163-1164. Review must also determine whether the cumulative effect of the errors rendered the trial fundamentally unfair. *Walker* at 963.

As addressed individually in the previous Propositions of Law, and incorporated herein, the cumulative impact of defense counsel's ineffectiveness, in light of the evidence adduced against Drain, and when combined with other errors, resulted in a fundamentally unfair trial with an arbitrary and unreliable sentence, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and Article I, Sections 2, 9, 10 and 16 of the Ohio Constitution. This Court must reverse and remand for a new trial or sentencing hearing in light of these errors.

CONCLUSION

Pursuant to the preceding Propositions of Law, Drain respectfully requests that this Court reverse the convictions and remand for a new trial and/or reverse Drain's death sentence and remand with an order for a new mitigation phase trial.

CERTIFICATE OF SERVICE

This is to certify that a copy of the **MERIT BRIEF OF DEFENDANT-APPELLANT JOEL M. DRAIN** was filed electronically and sent via electronic mail to David Fornshell, Warren County Prosecuting Attorney at *David.Fornshell@warrencountyprosecutor.com* and Kirsten Brandt, Assistant Prosecuting Attorney, at *Kirsten.Brandt@warrencountyprosecutor.com*, on this 8th day of March, 2021.

/s/ Adrienne M. Larimer
Adrienne M. Larimer [0079837]
Assistant State Public Defender