

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO. 2011-0538

Appellee, :

vs. :

VON CLARK DAVIS, : {Capital Case}

Appellant. :

On Appeal from the Court of Appeals for the Twelfth District
Case No. CA2009-10-263

MERIT BRIEF OF APPELLEE STATE OF OHIO

Attorneys for Appellant:

LAURENCE E. KOMP (0060142)
P.O. Box 1785
Manchester, Missouri 63011
Telephone: (636) 207-0330
(Counsel of Record)
Lekomp@swbell.net

JOHN P. PARKER (0041243)
988 East 185th Street
Cleveland, Ohio 44119
Telephone: (216) 881-0900

ALAN M. FREEDMAN (*pro hac vice*)
(Illinois Bar #0869570)
Midwest Center for Justice, Ltd.
P.O. Box 6528
Evanston, Illinois 60201
Telephone: (847) 492-1563

Attorneys for Appellee:

MICHAEL T. GMOSE (002132)
Butler County Prosecuting Attorney

MICHAEL A. OSTER, JR. (0076491)
(Counsel of Record)
Assistant Prosecuting Attorney
and Chief, Appellate Division
Government Services Center
315 High Street, 11th Floor
Hamilton, Ohio 45012-0515
Telephone: (513) 887-3474
Fax: (513) 785-5206
Osterm@butlercountyohio.org

OFFICE OF
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

GOVERNMENT SERVICES CENTER
316 HIGH ST. - 11TH FLOOR
P.O. BOX 516
HAMILTON, OHIO 45012

RECEIVED

AUG 05 2011

CLERK OF COURT
SUPREME COURT OF OHIO

FILED

AUG 05 2011

CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS AND AUTHORITIES

Page

STATEMENT OF THE CASE

Procedural Posture

1

Statement of Facts

1

ARGUMENT

Proposition of Law I:

Where one convicted of capital murder had constitutionally waived a jury trial and his conviction at trial was affirmed on direct appeal, but his sentence was vacated thus requiring a new sentencing hearing, the jury trial waiver may not be withdrawn

5

Proposition of Law II:

A trial court, when weighing mitigating evidence, is not required to assign weight to certain evidence if the court finds the evidence to be non-mitigating

19

Proposition of Law III:

Where the Appellant's death sentence was vacated by a federal court on January 29, 2007, because of error that occurred in the sentencing phase of trial [see, *Davis v. Coyle* (C.A.6, 2007), 475 F.3d 761], the trial court properly conducted the re-sentencing hearing in accordance with the modern provisions of R.C. 2929.06(B)

26

Proposition of Law IV:

The trial court properly found each mitigating factor introduced by Appellant, when combined, did not outweigh the aggravating factor, the repeat murder specification, and as such, Appellant's sentence of death is both appropriate and proportionate

40

Proposition of Law V:

**Davis' Twenty-six year length of stay on Ohio's death row
does not constitute cruel and unusual punishment under
either the United States Constitution or the State Constitution
and does not violate binding international law 46**

CONCLUSION 53

PROOF OF SERVICE 54

APPENDIX:

- 1. Criminal Rule 25 A-1
- 2. ORC 2903.01(A) A-2
- 3. ORC 2929.04 A-3

TABLE OF AUTHORITIES

CASES:

<i>Apprendi v. New Jersey</i> (2000), 530 U.S. 466.....	13
<i>Barbour v. Alabama</i> , 673 So.3d 461 (Ala.Crim.App.1994).....	44
<i>Beazell v. Ohio</i> (1925), 269 U.S. 167.....	34
<i>Bielat v. Bielat</i> (2000), 87 Ohio St.3d 350.....	30,32,33
<i>Blakely v. Washington</i> (2004), 542 U.S. 296.....	13
<i>Bifulco v. United States</i> (1980), 447 U.S. 381.....	17
<i>Booker v. State</i> (Fla. 2007), 969 So.2d 186.....	48
<i>Buell v. Mitchell</i> (C.A.6 2001), 274 F.3d 337.....	51,52
<i>Bullington v. Missouri</i> (1981), 451 U.S. 430.....	16
<i>Burgett v. Norris</i> (1874), 25 Ohio St. 308.....	33
<i>Calder v. Bull</i> (1798), 3 U.S. 386.....	34,35
<i>Callanan v. United States</i> (1961), 364 U.S. 587.....	18
<i>Carmell v. Texas</i> (2000), 529 U.S. 513.....	34
<i>Chambers v. Bowersox</i> (C.A.8 1998), 157 F.3d 560.....	48
<i>Collins v. Youngblood</i> (1990), 497 U.S. 37.....	34
<i>Commonwealth of Pennsylvania v. Judge</i> (Penn. 2007), 916 A.2d 511.	49,50,51
<i>Cone v. State</i> , 747 S.W.2d 353 (Tenn.Crim.App.1987).....	43
<i>Davis v. Coyle</i> (C.A.6, 2007), 475 F.3d 761.....	8
<i>Dobbert v. Florida</i> (1977), 432 U.S. 282.....	33,35
<i>Eddings v. Oklahoma</i> (1982), 455 U.S. 104.....	20,21,26
<i>Ex Parte Bush</i> (Ala. 1997), 965 So.2d 138.....	47

<i>Federated Dept. Stores, Inc. v. Moitie</i> (1981), 452 U.S. 394.....	9
<i>Floyd v. State</i> , 497 So.2d 1211 (Fla.1986).....	44
<i>Furman v. Georgia</i> (1972), 408 U.S. 238.....	33
<i>Gozlon-Peretz v. United States</i> (1991), 498 U.S. 395.....	18
<i>Grava v. Parkman Twp.</i> (1995), 73 Ohio St.3d 379.....	9
<i>Greene v. Arkansas</i> , 343 Ark. 526 (2001).....	43
<i>Gregg v. Georgia</i> (1976), 428 U.S. 153.....	46
<i>Gregory v. Flowers</i> (1972), 32 Ohio St.2d 48.....	31
<i>Hawley v. Ritley</i> (1988), 35 Ohio St.3d 157.....	11
<i>Hill v. State</i> (Ark.1998), 331 Ark. 312.....	49
<i>Hitchcock v. Dugger</i> (1987), 481 U.S. 393.....	20
<i>Hubbard ex rel. Creed v. Sauline</i> (1996), 74 Ohio St.3d 402.....	11
<i>Johnson v. Bredesen</i> (2009), 130 S.Ct. 541.....	48
<i>Lackey v. Texas</i> (1995), 514 U.S. 1045.....	46-47
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244, 114 S.Ct. 1483,(1994)..	36,37
<i>Lee v. State</i> , 327 Ark. 692 (1997).....	43
<i>Lewis v. United States</i> (1980), 445 U.S. 55.....	17
<i>Lockett v. Ohio</i> (1978) 438 U.S. 586.....	20
<i>McCray v. New York</i> (1983), 461 U.S. 961.....	47
<i>McKenzie v. Day</i> (C.A. 1995), 57 F.3d 1461.....	47-48
<i>Moskal v. United States</i> (1990), 498 U.S. 103.....	17
<i>Nolan v. Nolan</i> (1984), 11 Ohio St.3d 1.....	11
<i>Padilla v. Kentucky</i> (2010), 130 S.Ct. 4235.....	6
<i>Penry v. Lynaugh</i> (1989), 492 U.S. 302.....	20

<i>Poland v. Arizona</i> (1986), 476 U.S. 147.....	37
<i>Robison v. Maynard</i> , 829 F.2d 1501 (10th Cir. 1987).....	43-44
<i>Sattazahn v. Pennsylvania</i> (2003), 537 U.S. 101.....	16
<i>Skipper v. South Carolina</i> (1986), 476 U.S. 1.....	37
<i>Sosa v. Alvarez-Machian</i> (2004), 542 U.S. 692.....	51
<i>Sowell v. Bradshaw</i> (C.A.6, 2004), 372 F.3d 821.....	7
<i>State ex rel. Corrigan v. McAllister</i> (1985), 18 Ohio St.3d 239.....	34
<i>State ex rel. Kilbane v. Indus. Comm.</i> (2001), 91 Ohio St.3d 258.....	31
<i>State ex rel. Mason v. Griffin</i> , 104 Ohio St.3d 279, 2004-Ohio-6384.	13
<i>State ex rel. Matz v. Brown</i> (1988), 37 Ohio St.3d 279.....	31
<i>State ex rel. Slaughter v. Indus. Comm.</i> (1937), 132 Ohio St. 537.....	31
<i>State ex rel. Special Prosecutors v. Judges, Court of Common Pleas</i> (1978), 55 Ohio St.2d 94.....	11
<i>State v. Adams</i> (2003), 103 Ohio St.3d 508.....	42,45
<i>State v. Allen</i> , Warren App. No. CA2006-01-001, 2006-Ohio-5990...	11
<i>State v. Arnold</i> (1991), 61 Ohio St.3d 175.....	17
<i>State v. Awkal</i> (1996), 76 Ohio St.3d 324.....	42,45
<i>State v. Bays</i> (1999), 87 Ohio St.3d 15.....	7,8
<i>State v. Bey</i> (1999), 85 Ohio St.3d 487.....	46,51
<i>State v. Bradley</i> (1989), 42 Ohio St.3d 136.....	45
<i>State v. Brewer</i> (1989), 48 Ohio St.3d 50.....	21
<i>State v. Brock</i> (1996), 110 Ohio App.3d 656.....	14
<i>State v. Buell</i> (1986), 22 Ohio St.3d 124.....	46
<i>State v. Carter</i> (1992), 64 Ohio St.3d 218.....	45

<i>State v. Casalicchio</i> , Cuyahoga App. No. 89555, 2008-Ohio-2362.....	39
<i>State v. Cassano</i> (2002), 96 Ohio St.3d 94.....	45
<i>State v. Chinn</i> , Montgomery App. No. 11835, 1991 WL 289178.....	20
<i>State v. Chinn</i> , Montgomery App. No. 16206, 1997 WL 464736.....	47
<i>State v. Cook</i> (1998), 83 Ohio St.3d 404.....	29,29,30
<i>State v. Cowans</i> (1999), 87 Ohio St.3d 68.....	45
<i>State v. Craig</i> (2006), 110 Ohio St.3d 306.....	46
<i>State v. D'Ambrosio</i> (1993), 67 Ohio St.3d 185.....	5
<i>State v. D'Ambrosio</i> (1995), 73 Ohio St.3d 141.....	10
<i>State v. Davis</i> (1988), 38 Ohio St.3d 361.....	8-9,32,37
<i>State v. Davis</i> (1992), 63 Ohio St.3d 44.....	5,6,9
<i>State v. Davis</i> , Butler App. No. CA95-07-124, 1996 WL 551432	39
<i>State v. Davis</i> , Butler App. No. CA2009-10-263, 2011-Ohio-787.....	24-25,36,44,52
<i>State v. Elmore</i> , 122 Ohio St.3d 472, 2009-Ohio-3478.....	17
<i>State v. Ferguson</i> (2006), 108 Ohio St.3d 451.....	51
<i>State v. Filiaggi</i> (1999), 86 Ohio St.3d 230, 714 N.E.2d 867.....	21
<i>State v. Fitzpatrick</i> , 102 Ohio St.3d 321, 2004-Ohio-3167.....	7
<i>State v. Foster</i> , 109 Ohio St.3d 1.....	12
<i>State v. Foust</i> , 105 Ohio St.3d 137, 2004-Ohio-7006.....	6
<i>State v. Fox</i> (1994), 69 Ohio St.3d 183.....	21
<i>State v. Green</i> (1997), 122 Ohio App.3d 566.....	29
<i>State v. Green</i> , 11th Dist. Nos. 2005-A-0069 and 2005-A-0070, 2006-Ohio-6695.....	18
<i>State v. Gross</i> , Muskingum App. No. CT2006-0006	

2006-Ohio-6941.....	39
<i>State v. Haschenburger</i> , Mahoning App. No. 08-MA-223,	
2009-Ohio-6527.....	39
<i>State v. Issa</i> (2001), 93 Ohio St.3d 49.....	51
<i>State v. Jenkins</i> (1984), 15 Ohio St.3d 164.....	46
<i>State v. Johnson</i> , 88 Ohio St.3d 95, 2000-Ohio-276.....	41
<i>State v. Keene</i> (1998), 81 Ohio St.3d 646.....	43
<i>State v. Ketterer</i> , 111 Ohio St.3d 70, 2006-Ohio-5283.....	7,13
<i>State v. Letts</i> , Montgomery App. No. 17084, 1999 WL 42011.....	12
<i>State v. Lott</i> (1990), 51 Ohio St.3d 160.....	21
<i>State v. Mapes</i> (1985), 19 Ohio St.3d 108.....	41
<i>State v. Martin</i> , Brown App. No CA2003-09-11, 2004-Ohio-4309.....	15
<i>State v. Maurer</i> (1984), 15 Ohio St.3d 239.....	46
<i>State v. McGee</i> (1998), 128 Ohio App.3d 541.....	14-16
<i>State v. McMahon</i> , Fayette App. No. CA2009-06-008,	
2010-Ohio-2055.....	8
<i>State v. Mink</i> (2004), 101 Ohio St.3d 350.....	19
<i>State v. Moore</i> (Neb. 1999), 256 Neb. 553.....	48
<i>State v. Mundt</i> , 115 Ohio St.3d 22, 2007-Ohio-4836.....	41
<i>State v. Newton</i> (2006), 108 Ohio St.3d 13.....	21,23,25,26,41
<hr/>	
<i>State v. O'Neal</i> , Medina App. No. 08CA0028-M, 2008-Ohio-6572....	39
<i>State v. Piesciuk</i> , Butler App. No. CA2009-10-251, 2010-Ohio-3136..	39
<i>State v. Penix</i> (1987), 32 Ohio St.3d 369.....	14, 32
<i>State v. Perry</i> (1967), 10 Ohio St.2d 175.....	9

<i>State v. Phillips</i> (1995), 74 Ohio St.3d 72.....	51
<i>State v. Roper</i> , Summit App. No. 22988, 2006-Ohio-3661.....	12
<i>State v. Seals</i> , Cuyahoga App. No. 93198, 2010-Ohio-1980.....	39
<i>State v. Short</i> , Slip Opinion No. 2011-Ohio-3641.....	41,52
<i>State v. Sowell</i> (1988), 39 Ohio St.3d 322.....	42
<i>State v. Smith</i> (Mont. 1996), 280 Mont. 158.....	47,49
<i>State v. Stumpf</i> (1987), 32 Ohio St.3d 95.....	43
<i>State v. Steffen</i> (1987), 31 Ohio St.3d 111.....	19,20,21,24
<i>State v. Szefcyk</i> (1996), 77 Ohio St.3d 93.....	9
<i>State v. Taylor</i> (1997), 78 Ohio St.3d 15.....	21,45
<i>State v. Thomas</i> , 97 Ohio St.3d 309, 2002-Ohio-6624.....	42
<i>State v. Turner</i> , 105 Ohio St.3d 331, 2005-Ohio-1938	7
<i>State v. Walls</i> , 96 Ohio St.3d 437, 2002-Ohio-5059.....	28,30,31,32,34,35
<i>State v. Warren</i> , 118 Ohio St.3d 200, 2008 -Ohio-2011.....	29,37
<i>State v. Were</i> , Hamilton App. No. C-030485, 2006-Ohio-3511.....	40
<i>State v. Williams</i> , Butler App. Nos. CA91-04-060, CA92-06-110, 1992 WL 317025.....	46
<i>State v. Wilson</i> (1996), 74 Ohio St.3d 381.....	41
<i>State v. Wilson</i> , - - - Ohio St.3d. - - -, 2011-Ohio-2669	10
<i>Thompson v. McNeil</i> (2009), 129 S.Ct. 1299.....	47,48
<i>Thompson v. State</i> (Fla. 2009), 3 So.3d 1237.....	47
<i>United States v. Johnson</i> (2000), 529 U.S. 53.....	18
<i>United States v. Lanier</i> (1997), 520 U.S. 259.....	17
<i>United States v. Martin</i> (C.A.6, 1983), 704 F.2d 267	8

<i>United States v. Ruiz</i> (2002), 536 U.S. 622, 122 S.Ct. 2450.....	7
<i>United States v. Sammons</i> (C.A.6, 1990), 918 F.2d 592.....	8
<i>Wiles v. Bagley</i> (C.A. 9 2009), 561 F.3d 636	24
<i>White v. Johnson</i> (C.A.5 1996), 79 F.3d 432.....	47,48

CONSTITUTIONAL PROVISIONS: STATUTES:

Crim.R. 25(B).....	27,29
Ohio Constitution, Section 28, Article II.....	30,31,32,33
United States Constitution, Ex Post Facto Clause, Section 10, Article I.	30
R.C. 2903.01(A).....	35
R.C. 2929.03(D).....	19,27,32,35
R.C. 2929.03(D)(1).....	41
R.C. 2929.03(D)(2).....	19,41
R.C. 2929.04(B).....	19,22,41
R.C. 2929.04(B)(7).....	20
R.C. 2929.05.....	40
R.C. 2929.06.....	27,31
R.C. 2929.06(A).....	33
R.C. 2929.06(B).....	13,30,32,33,35,36
R.C. 2929.06(E).....	13,28,30
R.C. 2945.05.....	12

OTHER AUTHORITIES:

138 Cong. Rec. 8068, 8070-71 (Apr. 2, 1992).....	50
138 Cong. Rec. S4781-01, S4783 (Apr. 12, 1992).....	51
International Covenant on Civil and Political Rights Art. VI.....	49-50
International Covenant on Civil and Political Rights Art. VII.....	50
Restatement (Third) of the Foreign Relations Law of the United States Sec. 111 (1987).....	51

STATEMENT OF THE CASE

Procedural Posture:

This appeal is from the judgment of the Court of Appeals, Twelfth Appellate District of Ohio, Butler County, wherein Defendant-Appellant Von Clark Davis, who had been convicted of aggravated murder with a death specification in a 1984 trial, had his death sentence affirmed after receiving a de novo sentencing hearing. *State v. Davis*, Butler App. No. CA2009-10-263, 2011-Ohio-787.

Statement of Facts:

On December 12, 1983, at approximately 7:40 pm, Appellant Von Clark Davis shot and killed his estranged girlfriend, Suzette Butler, on the sidewalk outside the front door of American Legion Post 520 on Central Avenue in Hamilton, Ohio. This shooting was witnessed by several people on the street who indicated that Davis fired multiple shots at Butler's head, the final shot a "*coup de gras*" as he bent down and fired his pistol within inches of her head; autopsy findings were consistent with that testimony. Additional witnesses testified that earlier that day, within a few hours before the shooting, Davis had sought and received their help in acquiring a .25-caliber semi-automatic pistol and ammunition for it. Since Davis had been convicted in 1971 of second-degree murder for having killed Ernestine Davis (his estranged wife), he was under disability and could not legally obtain a firearm. Spent .25 caliber shell cases found at the scene, ejected from the murder weapon, were of the same caliber and brand as the ammunition purchased that day by Davis; the fatal bullets recovered from the victim's head during the autopsy were likewise

consistent with the gun and ammunition that Davis acquired, which was never recovered.¹

Following the murder, Davis was indicted for the aggravated murder² of Butler with a death-penalty specification³ and having weapons while under a disability.⁴ (*Indictment*, T.d. 8) Davis waived a jury trial (T.d. 83, 84) and was tried in May 1984 by a three-judge panel (Hons. Henry J. Bruewer, Judge presiding, John R. Moser and William R. Stitsinger, JJ.); the trial court found Davis guilty as charged (*Entry of Findings of Guilty*, T.d. 101)⁵, and following a mitigation hearing, Davis was sentenced to death. (T.d. 105, 108) On direct appeal, the Twelfth District affirmed the conviction and sentence.⁶ Thereafter, this Court also affirmed Davis' conviction, but a majority of that court reversed Davis' death sentence on the ground that the three-judge panel had improperly considered non-statutory aggravating circumstances during the penalty phase of the trial.⁷ On remand, the same

1. Facts derived from trial record and decision of the Ohio Supreme Court in *State v. Davis* (1988), 38 Ohio St.3d 361, at 361-363, *certiorari denied* (1989), 488 U.S. 1034, 109 S.Ct. 849.

2. R.C. 2903.01(A) (purposely, and with prior calculation and design, causing the death of another).

3. R.C. 2929.04(A)(5) (that prior to the offense at bar he was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, to-wit, murder in the second degree contrary to former R.C. 2901.02, circa 1970).

4. R.C. 2923.13(A)(2) (that he did knowingly acquire, have, carry or use a firearm having previously been convicted of felonies of violence, to-wit: convictions for shooting with intent to wound in 1970, and murder in the second degree in 1971).

5. Davis testified on his own behalf in the 1984 trial's guilt phase, maintaining that he had purchased the murder weapon as part of an exchange with "Silky Carr," a man from Kentucky whom Davis asserted had been Butler's drug dealer; Davis also claimed that Butler owed Carr money, and that on the night of the murder he left Carr and Butler talking in front of the American Legion Hall. See *Davis*, 38 Ohio St.3d, at 363 n.5.

6. *State v. Davis* (May 27, 1986), Butler App. No. CA84-06-071, 1986 WL 5989.

7. *Davis*, 38 Ohio St.3d, at 372-373 (specifically remanding the case to the trial court (the three-judge panel) for a re-sentencing hearing "**** at which the state may seek whatever punishment is lawful, including, but not limited to, the death sentence.")

three-judge panel which had originally tried Davis conducted a re-sentencing hearing in August 1989 and again sentenced him to death. (T.d. 168, 169) The Twelfth District,⁸ as well as this Court,⁹ affirmed Davis' second death sentence on direct appeal.

Following his unsuccessful exhaustion of postconviction remedies in the Ohio courts,¹⁰ in April 1997, Davis filed a petition for a writ of habeas corpus in federal court contending, *inter alia*, that his federal constitutional rights had been violated when he was denied the opportunity to present additional evidence in mitigation at the second sentencing hearing (his postconviction good behavior in prison from 1984 to 1989, as well as a "psychological update" by a psychologist who had previously testified in the sentencing phase in 1984). Ultimately the United States District Court for the Southern District of Ohio denied habeas relief.¹¹ However, on appeal from that decision, the United States Court of Appeals for the Sixth Circuit reversed the District Court's denial of relief, holding that the trial court's refusal to consider the presentation of additional mitigating evidence at the second sentencing hearing was error under *Skipper v. South Carolina* (1986), 476 U.S. 1, 106 S.Ct. 1669; accordingly, the Sixth Circuit ordered the District Court to grant Davis a

8. *State v. Davis* (Oct. 29, 1990), Butler App. No. CA89-09-123, 1990 WL 165137.

9. *State v. Davis* (1992), 63 Ohio St.3d 44, *rehearing denied*, 63 Ohio St.3d 1433, *certiorari denied* (1992), 506 U.S. 858, 113 S.Ct. 172, *second rehearing denied* (1993), 66 Ohio St.3d 1489.

10. Davis filed a petition for post-conviction relief in 1993 (T.d. 188) which was denied on June 30, 1995 (T.d. 226), affirmed in *State v. Davis* (Sept. 30, 1996), Butler App. No. CA95-07-124, 1995 WL 551432, *discretionary appeal not allowed*, *State v. Davis* (1997), 77 Ohio St.3d 1520. Similarly, Davis' attempts in 1998 to obtain relief pursuant to applications to reopen his direct appeal, under App.R. 26(B), were unsuccessful. See *State v. Davis*, 86 Ohio St.3d 212, 1999-Ohio-160 (affirming the Twelfth District's judgment filed January 13, 1999 in *State v. Davis*, Butler App. No. CA84-06-071, unreported.)

11. See *Davis v. Bagley* (S.D. Ohio Jan. 17, 2002), No. C-1-97-402, 2002 WL 193579 (not reported in F.Supp.2d).

conditional writ of habeas corpus, indicating that *Skipper* required that the case be remanded for a new sentencing hearing.¹² Upon issuance of said writ, the trial court assumed jurisdiction and issued an order granting Davis a “new sentencing hearing” on December 19, 2007. (T.d. 241) The original three judges being unavailable, a three judge panel consisting of the presiding judge (Hon. Andrew Nastoff) and judges drawn by lot (Hon. Keith M. Spaeth and Hon. Charles L. Pater), chosen by random lot on the record and in open court with the parties participating, was assigned to hear the matter. (T.d. 250)

Davis thereafter waived any time requirements (T.d. 237,238), and after agreed continuances (T.d. 331, 393), additional discovery, and a spate of pre-sentence motions were heard and determined (T.d. 337), the re-sentencing hearing was conducted on September 8-10, 2009. Witnesses were called on Davis’ behalf, whereas the trial court did not permit any additional evidence to be presented by the State. (T.p. 22-24, resentencing 9/8/09) After deliberation, on September 10, 2009, the trial court once again imposed a death sentence. (T.d. 432— *Judgment of Conviction Entry* and T.d. 435 — *Sentencing Opinion* filed Sept. 21, 2009.) The Twelfth District unanimously affirmed, and this appeal as of right now follow.

12. See, *Davis v. Coyle* (C.A.6, 2007), 475 F.3d 761, 774-775 (citing *Skipper*, 476 U.S. at 8); *Id.* at 781.

ARGUMENT

Proposition of Law I:

Where one convicted of capital murder had constitutionally waived a jury trial and his conviction at trial was affirmed on direct appeal, but his sentence was vacated thus requiring a new sentencing hearing, the jury trial waiver may not be withdrawn.

In his first assignment of error, Davis asserts that both the trial court and the Twelfth District erred by denying his June 27, 2008 motion to withdraw his jury waiver (“Pleading L,” T.d. 283). The State disagrees.

A. Davis’ Jury Waiver Was Valid

In addressing this issue, it should first be noted that the doctrines of res judicata and the law of the case¹³ would preclude a direct review of the jury waiver issue, as will be argued subsequently; however even if Davis’ 1984 jury waiver is reconsidered, there is nothing about the record that suggests that Judge Bruewer’s colloquy with Davis upon acceptance of his jury waiver was fatally deficient. Rather, contrary to Davis’ contentions, the record demonstrates that he knew that his waiver applied to both phases of trial. This is illustrated by Judge Nastoff’s decision in which he reviewed the actual transcripts from 1984 and found that “[a]s the record shows, all were aware, including Defendant, that a jury waiver applied to both phases of trial, and that a three judge panel would determine Defendant’s sentence should the need arise.” (T.d. 337, p.15) As such, Davis did validly

¹³ Argument is made notwithstanding the law-of-the-case, see *Davis* (1992), 63 Ohio St.3d 44, at 48-49, and *State v. D’Ambrosio* (1993), 67 Ohio St.3d 185, 189 (citing *Davis* and rejecting capital defendant’s argument which “assumes that a knowing, intelligent waiver of a jury trial can retroactively be rendered unknowing and unintelligent by postwaiver events”).

waive his right to a trial by jury.

A similar conclusion was reached in the *Foust* decision, where this Court rejected the Appellant's claims:

We also reject Foust's claim that his jury waiver was invalid because the trial court failed to advise him that the waiver applied to both the guilt and the penalty phases of trial. The waiver of the right to trial by jury in a capital case applies to both the guilt phase and the penalty phase of the trial. Contrary to Foust's contentions, the record demonstrates that he knew that his waiver applied to both phases of trial: during a colloquy with counsel after accepting Foust's waiver, the court stated, '[W]e will leave the date for December 12th before a panel of three judges. You should all be aware, in the event any discussions about a plea to reduced charges should be done, that *we still have to convene the three judge court in order to take that plea and impose a sentence.*' (Emphasis added.) Thus, the record reflects that all were aware – including Foust – that his waiver of a jury trial meant that the three-judge panel would impose sentence during the penalty phase.

Further, nothing in the record suggests that Foust's jury waiver was not knowingly, intelligently, and voluntarily made. When the trial court accepted Foust's written waiver, Foust affirmed that his decision was voluntary. Moreover, his trial counsel did not request that the trial court ask any further questions or clarify any of the other rights associated with Foust's waiver.

State v. Foust, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶¶54-55.

Additionally, under Davis' first assignment of error, he asks this Court to reconsider its 1992 opinion as it relates to the issues surrounding the withdrawal of his jury waiver. See, *State v. Davis* (1992), 63 Ohio St.3d 44. The reason given is the United States Supreme Court's decision in the case of *Padilla v. Kentucky* (2010), 130 S.Ct. 4235, that requires a defendant to be advised of the known collateral consequences of entering a guilty plea. The State disagrees that *Padilla* has brought about a change that should affect Davis' case, and urges this Court to reaffirm its 1992 ruling that the jury waiver cannot be withdrawn.

In order for Davis' argument to be plausible, this Court would have to accept the premise that when the United States Supreme Court decides a case, in the context of guilty pleas, that holds that when there exists known collateral consequences of the guilty plea, but the defendant is not advised of those pleas, thus, rendering the plea invalid; that case

provides precedential value in a jury waiver case when there might be unknown and unforeseen consequences that could possibly arise in the future. This tenuous argument and the mental gymnastics that it requires, is unavailing and cuts against clear precedent that relates directly to jury waivers.

This Court has time and again held in regard to jury waivers that a trial court is not “required to inform the defendant of all the possible implications of waiver.” See, *State v. Ketterer*, 111 Ohio St.3d 70, 855 N.E.2d 48, 2006-Ohio-5283, ¶ 68, citing *State v. Bays* (1999), 87 Ohio St.3d 15, 20, 716 N.E.2d 1126, *Sowell v. Bradshaw* (C.A.6, 2004), 372 F.3d 821, 833-836; *State v. Turner*, 105 Ohio St.3d 331, 2005-Ohio-1938, 826 N.E.2d 266, ¶¶ 24-25; *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶¶ 44-46. “Thus, the trial court need not explain a wide variety of legal concepts, such as reasonable doubt, to secure a valid jury waiver. As the United States Supreme Court has noted, ‘the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances-even though the defendant may not know the specific detailed consequences of invoking it.’ *United States v. Ruiz* (2002), 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586.” *Ketterer*, at ¶ 69. (Emphasis added).

Further, in evaluating what a defendant must know to properly execute a jury waiver, this Court has noted that “the United States Court of Appeals for the Sixth Circuit has said: ‘A defendant is sufficiently informed to make an intelligent waiver if he was aware that a jury is composed of 12 members of the community, he may participate in the selection of the jurors, the verdict of the jury must be unanimous, and * * * a judge alone will decide guilt or innocence should he waive his jury trial right.’ Indeed, that may be more than the Constitution requires to render a waiver knowing and intelligent. At any rate, a defendant

need not be specifically told that he has a right to an impartial jury before his jury waiver can be deemed knowing and intelligent.” *Bays*, 87 Ohio St.3d 15, 20, citing *United States v. Martin* (C.A.6, 1983), 704 F.2d 267, 273, *United States v. Sammons* (C.A.6, 1990), 918 F.2d 592. (Emphasis added)

With this well-settled jury waiver precedent in place, it is hard to fathom how *Padilla*, a guilty plea case, would alter the legal landscape of jury waivers. Indeed, *Padilla* did not overrule, alter, or even mention the *Ruiz* case, or any of the law surrounding jury waivers. As such, Davis’ attempt to grossly expand the law surrounding jury waivers to include mandating that a defendant be advised of all consequences, even future unforeseen changes in the law, or else their jury waiver is not valid, must fail.

Davis’ request to withdraw his jury waiver years after it occurred, and years after the conviction was affirmed, can only be reasonably explained as a change of heart, and not based upon any type of misinformation, *et cetera*, that would render it involuntary. *State v. McMahon*, Fayette App. No. CA2009-06-008, 2010-Ohio-2055, ¶26. Accordingly, Davis has failed to show any legal authority that would entitle him to withdraw his jury waiver. Thus, there was no abuse of discretion by the trial court in this regard.

B. Res Judicata

The doctrine of res judicata precludes consideration of Davis’ suggestion that he can withdraw his jury waiver. Davis was before the trial court solely for re-sentencing. See, *Davis v. Coyle* (C.A.6, 2007), 475 F.3d 761, 781 (“the resentencing hearing that we order today will not constitute a ‘trial’ in the sense that [Davis]’s guilt or innocence is again at issue”). As such, to begin consideration of this issue it must first be noted that this issue was not raised in his first appeal, where his 1984 conviction was affirmed. *State v. Davis* (1988), 38 Ohio St.3d 361, 363 (“we affirm the judgment of the court of appeals with regard

to [Davis'] conviction, but reverse the judgment of the court of appeals as to [Davis'] death sentence"). Thereafter, a suggestion that the jury waiver was not knowingly, intelligently and voluntarily made was indeed considered, **and rejected**, in Davis' subsequent appeal. See, *State v. Davis* (1992), 63 Ohio St.3d 44, 48-49 (specifically, in his "fifth proposition of law" wherein it was suggested that Davis was misinformed regarding the distinctions between trial by panel or trial by jury at the time he signed his 1984 jury waiver).

"Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Szefcyk* (1996), 77 Ohio St.3d 93, syllabus, reaffirming *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

*** '[P]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.' [Citation omitted.] We have stressed that '[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the courts. ***' [Citation omitted.]

Szefcyk, 77 Ohio St.3d at 95, quoting *Federated Dept. Stores, Inc. v. Moitie* (1981), 452 U.S. 394, 401, 101 S.Ct. 2424.

There is no injustice in requiring a litigant "to avail himself of all available grounds for relief" through the first available instance, i.e., his direct appeal from a conviction. See, *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 383. Such recognition "establishes certainty in legal relations and individual rights, accords stability to judgments and promotes the efficient use of limited judicial or quasi judicial time and resources." *Id.*, at

383-384; See, also, *State v. D'Ambrosio* (1995), 73 Ohio St.3d 141, 143 (before the Supreme Court a second time after remand to court of appeals for reconsideration of death sentence and the latter court affirmed that sentence, Supreme Court applied the doctrine of res judicata to issues previously decided in its first decision; “[t]he fact that the case was remanded to the court of appeals for re-evaluation of the death sentence in no way implicated the finality of those convictions”).

Thus, the decision of the Twelfth District that echoed the trial court rings true that Davis’ “attempt to re-litigate the propriety of his jury waiver in this case is untimely and barred by the doctrine of res judicata.” (T.d. 337, p.17)

However, in light of the following, Davis also points to this Court’s recent decision in *State v. Wilson*, - - - Ohio St.3d. - - -, 2011-Ohio-2669, for the proposition that res judicata and law of the case cannot be applied to bar the withdrawal of his jury waiver. However, Davis in making this argument has stretched *Wilson* beyond its breaking point.

Simply stated, *Wilson* is not as broadly sweeping as the defense would like it to be. The *Wilson* case is clear that trial issues and all issues that were prior to, and not successfully challenged in the direct appeal are still governed by the doctrine of res judicata. *Id.*, at ¶ 33. Thus, as Davis has both failed to raise the issue of his jury waiver, and unsuccessfully raised the issue, the *Wilson* case, by its own holding, does not control this situation. This Court in *Wilson* squarely penned that “any prior issues not successfully challenged in Wilson’s appeal are outside the scope of his resentencing remand and will be precluded from further review under the principles of res judicata.” *Id.* Therefore, *Wilson* actually affirms the application of res judicata and law of the case by both the trial court and the Twelfth District Court of Appeals in this case.

C. The Law-of-the-Case Doctrine

Moreover, Davis' argument is also defeated under the law-of-the-case doctrine, which "provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, *See, also State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97. "Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Nolan*, 11 Ohio St.3d 1, syllabus. This doctrine precludes a litigant from attempting to rely on arguments at retrial which were fully litigated, or could have been fully litigated, in a first appeal. *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404-405. "[T]he rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Nolan*, 11 Ohio St.3d at 3. A trial court may not exceed the scope of its remand from the superior appellate courts. *See, Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 161. Thus, a trial court has no power to hear and determine a motion to withdraw a guilty plea which would thereby vacate or modify a judgment that has been affirmed by a superior appellate court, "for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do." *State ex rel. Special Prosecutors*, 55 Ohio St.2d at 98. *See, also, State v. Allen*, Warren App. No. CA2006-01-001, 2006-Ohio-5990, ¶ 13 (citing *Special Prosecutors* and holding that trial court does not have jurisdiction to maintain and determine a motion to withdraw a guilty plea subsequent to an appeal and an affirmance by the appellate court).

Specifically, Davis' case was remanded solely for resentencing, and the trial court

lacked authority to consider a motion to withdraw a jury waiver. See, *State v. Roper*, Summit App. No. 22988, 2006-Ohio-3661, ¶¶10-11 (trial court exceeded scope of remand for the limited purpose of resentencing only under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, when it considered motions by defendant to withdraw guilty plea and by state to reconsider withdrawal of guilty plea); *State v. Letts*, Montgomery App. No. 17084, 1999 WL 42011 (on remand for resentencing on affirmed convictions for aggravated robbery where aggravated murder conviction reversed due to insufficient evidence, remand had a “very limited purpose” to resentence defendant absent the aggravated murder, thus under law-of-the-case doctrine, “trial court was to do no more than resentence,” and had the trial court elected on remand to consider motion for a new trial on the aggravated robbery charges, that action would have been wholly inconsistent with the appellate decision affirming robbery convictions, and would have exceeded the permissible scope of the trial court's authority on remand).

As such, the law-of-the-case doctrine also bars re-litigation of this issue.

D. Ohio's Statutory Scheme

Davis' “attempt to withdraw his jury waiver is untimely and runs contrary to Ohio's statutory capital resentencing procedure.” (T.d. 337, p. 17) First, as to his jury waiver, R.C. 2945.05 makes it clear that Davis was free to withdraw his jury waiver “at any time before the commencement of the trial.” Davis' trial commenced in 1984, and has been subsequently affirmed. As such, because Davis failed to withdraw his jury waiver prior to the guilt phase in this case, he has naturally and statutorily abandoned any right to withdraw his jury waiver. Davis' attempts to withdraw are inasmuch untimely.

What is more, because he was originally convicted by a three judge panel, Ohio law

dictates a three judge panel to resentence Davis. R.C. 2929.06(B)¹⁴ is directly on point:

Whenever *** any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. *** If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. (Emphasis added)

The express and unambiguous language of R.C. 2929.06(B) vests the exclusive responsibility to determine Davis' sentence to a three judge panel, and not a jury. As this is what occurred in this case, no error can be found.

Further, while Davis attempts to argue for some form of a hybrid or bifurcated proceeding, none exists in Ohio law. In matters of criminal sentencing, the trial court does not have inherent power to act, but has only such power as is conferred by statute or rule. See, *State ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, ¶¶15-17 (Ohio trial judge patently and unambiguously lacked jurisdiction to convene a jury sentencing hearing in supposed compliance with *Blakely v. Washington* [2004], 542 U.S. 296, 124 S.Ct. 2531, and *Apprendi v. New Jersey* [2000], 530 U.S. 466, 120 S.Ct. 2348, where no statute authorizes a jury to make findings concerning sentencing in criminal cases).

More to the point, in a capital case, *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶¶123-124, this Honorable Court cited *Griffin* and expressly rejected the suggestion that a capital case could be tried pursuant to a "hybrid" or "bifurcated"

¹⁴ Division (E) of R.C. 2929.06 (effective 3-23-05, amended without material change effective 1-1-08) makes the statute applicable "to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981" who were "sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by *** any federal court but who, as of March 23, 2005, have not yet been resentenced."

procedure, not permitted by any statute or rule, whereby an accused charged with aggravated murder could waive a jury, request that three judges determine his guilt, and then have a jury decide the penalty. This is consistent with this Court's longstanding view that the trial procedure in a capital case is strictly governed by statute, and when it is suggested that nonstatutory deviation may be made, "we may not create such a procedure out of whole cloth." See, *State v. Penix* (1987), 32 Ohio St.3d 369, 373. See, also, *State v. Brock* (1996), 110 Ohio App.3d 656, 665-667, *leave to appeal not allowed* (1996), 77 Ohio St.3d 1444 (holding that since there is no provision for a single trial judge to make the determination of guilt in a capital case with the subsequent sentencing decision to be made by a jury, empaneled for sentencing only, conviction and death sentence issued under such procedure was void ab initio for want of jurisdiction). As such, the trial court properly read and followed Ohio's statutory scheme in properly denying Davis' motion to withdraw his jury waiver.

E. *State v. McGee*

Davis, and the Sixth Circuit to some degree, attempt to counter these legally sound arguments by relying on *State v. McGee* to argue that *McGee* indicates "a jury waiver could not stand when new evidence would be presented at the re-trial, due to an amendment indictment." (Appellant's Brief. 4) This is an improper reading of *McGee*.

In *McGee*, the appellate court reversed the defendant's conviction for child endangering on the basis that she was not properly charged with, or found guilty of, an essential element of the offense, namely the element of recklessness. *State v. McGee* (1998), 128 Ohio App.3d 541. The case was remanded for a new trial under an amended indictment. *Id.* at 543. The trial court denied both McGee's motion for a new trial and her request to withdraw her jury waiver. *Id.* At trial, McGee was permitted to recall state witnesses as if

on cross-examination, call her own witnesses, and present final arguments on the issue of recklessness. *Id.* at 545. The trial court convicted McGee as charged under the amended indictment. *Id.* at 543. McGee again appealed her conviction, arguing she was entitled to a new trial and to withdraw her jury waiver on remand. *Id.* at 545. The Third District agreed:

the only appropriate action for the trial court to take is to proceed anew from arraignment on the amended indictment to a new trial. We further conclude that McGee's previous waiver of jury trial [was] inherently revoked by the reversal of the conviction and trial court erred in refusing to allow withdrawal of prior jury trial waiver.
Id. (Emphasis added).

Under *McGee*, a reversed conviction grants the defendant a new trial and subsequently revokes any prior jury trial waiver. *Id.* at 545. However, Davis' conviction remains intact and it is only his sentence that was reversed and remanded to the trial court. Contrary to Davis' argument, *McGee* does not apply and Davis cannot withdraw his jury waiver. See, also, *State v. Martin*, Brown App. No CA2003-09-11, 2004-Ohio-4309 (court allowed the State to amend indictment, after the State and defense rested their cases, without reopening case or obtaining a new jury waiver; "It was also not necessary that a new jury waiver be executed. *** Unlike appellant's cited authority of *State v. McGee*, the instant case did not involve a new trial on remand from an appellate reversal." [Citations omitted]).

This position was followed by the trial court when it decided that "[s]imply put, *McGee* lends no support to the instant motion. Not only is *McGee* not directly on point, but the factual and procedural differences between it and Defendant's case render it nothing more than vaguely analogous." (T.d. 337, p. 21) The trial court continued by holding that the differences between the present case and *McGee* were "material" and that to "say that Defendant should be permitted to withdraw his jury waiver simply because his resentencing

hearing may be considered the functional equivalent of trial glosses over and gives short shrift to the significant procedural differences between *McGee* and the instant case.” *Id.* As such, *McGee* should not be followed.¹⁵

F. The Sentencing Phase is Not a Trial.

Similar to the aforementioned statements from the trial court about *McGee* and this case having significant procedural differences due to the comparisons of the trial phase and sentencing phase, Davis continuously attempts to spin his resentencing into being labeled as a new trial. However this is simply not true.

Davis argues in his brief that “the United States Supreme Court has recognized that mitigation phases are trial like and subject to constitutional protections.” (Appellant’s Brief’s brief, p. 3) Thus, in Davis’ own words, the sentencing phase is “trial like” but not the trial itself. If it was the trial, the word “like” would be unnecessary surplusage. This point further exemplifies why the jury waiver was properly found to be in full force, the trial was completed, and Davis was found guilty. As such, no new trial was had in the present case which would have allowed for the jury waiver to be withdrawn.

This point is further exemplified by the words of Justice Scalia in *Sattazahn v. Pennsylvania* (2003), 537 U.S. 101, 111, 123 S.Ct. 732, “[w]hen *Bullington*, *Rumsey*, and *Poland* were decided, capital-sentencing proceedings were understood to be just that: sentencing proceedings. Whatever “hallmarks of [a] trial” they might have borne, *Bullington*, 451 U.S., at 439, 101 S.Ct. 1852, they differed from trials in a respect crucial for purposes of the Double Jeopardy Clause: They dealt only with the sentence to be imposed

¹⁵ Although not specifically referenced, any attempted reliance on *Ring v. Arizona* (2002), 536 U.S. 534, would also be misplaced due to the fact that Davis knowingly, intelligently and voluntarily waived his right to a jury trial. See, *Davis v. Coyle* (6th Cir. 2007), 475 F.3d 761, 780 fn 8 (“obviously, Ring’s mandates would only apply in situations in which the criminal defendant did not exercise the prerogative to waive the constitutional right to a jury trial.”)

for the “offence” of capital murder. Thus, in its search for a rationale to support *Bullington* and its “progeny,” the Court continually tripped over the text of the Double Jeopardy Clause.” (Emphasis added)

Thus, what the Justice’s word make clear is that a sentencing phase is just that, the sentencing. It is different from the trial and in order to get to that phase, the offense (capital murder) has already been proven. This whole argument about being “trial like” and the hallmarks of a trial, leads to one unassailable point: the sentencing phase is not a trial. As such, the trial was concluded, and the jury waiver could not be withdrawn.

G. The Rule of Lenity

Davis erroneously argues that holding him to his constitutionally valid jury waiver upon remand of this case violates “the rule of leniency.” (Appellant’s Brief p. 17) Davis’ argument is flawed since the rule of lenity is a rule of construction for statutes and rules of procedure, and is only implemented as a last resort of constructing a statute when two statutes are in conflict. In this case, there is no conflict between statutes or any ambiguity.

“The rule of lenity is a principle of statutory construction that provides that a court will not interpret a criminal statute so as to increase the penalty it imposes on a defendant if the intended scope of the statute is ambiguous. See *Moskal v. United States* (1990), 498 U.S. 103, 107-108, 111 S.Ct. 461, quoting *Bifulco v. United States* (1980), 447 U.S. 381, 387, 100 S.Ct. 2247, quoting *Lewis v. United States* (1980), 445 U.S. 55, 65, 100 S.Ct. 915, (“the “touchstone” of the rule of lenity “is statutory ambiguity” ’ ”); *State v. Arnold* (1991), 61 Ohio St.3d 175, 178, 573 N.E.2d 1079.” *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 38. Thus, pursuant to this rule, any ambiguity in a “criminal statute is construed strictly so as to apply the statute only to conduct that is clearly proscribed.” *Id.*, citing *United States v. Lanier* (1997), 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432.

Davis' argument misconstrues the rule of lenity. Davis seeks to apply the rule by arguing, in essence, that each fact and every legal argument should be construed in his favor. He identifies no inconsistent or ambiguous statute that adversely affected him; rather, his argument seems to be that only the most lenient version of an amended statute should be applied against a defendant. That has never been the rule. "[T]he rule of lenity applies to the construction of ambiguous statutes and not to determinations of a remedy for a statute's unconstitutionality or to the law regarding the retroactive application" of a court's decisions or to the remedy for a remand that Davis is unhappy with. *Id.* at ¶ 40, citing *United States v. Johnson* (2000), 529 U.S. 53, 59, 120 S.Ct. 1114, 146 L.Ed.2d 39 ("Absent ambiguity, the rule of lenity is not applicable to guide statutory interpretation"); *Gozlon-Peretz v. United States* (1991), 498 U.S. 395, 410, 111 S.Ct. 840, 112 L.Ed.2d 919, quoting *Callanan v. United States* (1961), 364 U.S. 587, 596, 81 S.Ct. 321, 5 L.Ed.2d 312 ("The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers' "). See, also, *State v. Green*, 11th Dist. Nos. 2005-A-0069 and 2005-A-0070, 2006-Ohio-6695, ¶ 24.

Therefore, since the rule of lenity is a rule of statutory construction, and is only implemented as a last resort when two statutes are in conflict, it is inapplicable to Davis' arguments since there is no conflict or ambiguity in the statutes in question. Rather, Davis simply does not agree with what the statutes clearly dictate. As such, this is not a rule of lenity issue.

Proposition of Law II:

A trial court, when weighing mitigating evidence, is not required to assign weight to certain evidence if the court finds the evidence to be non-mitigating.

In his second assignment of error, Davis asserts that the trial court erred in failing to give weight to certain mitigating factors. (Appellant's Brief, p. 21-23) Davis' argument is without merit. Although the three judge panel did not assign weight to some of the mitigating evidence Davis presented, the panel did consider all of the evidence. Contrary to Davis' interpretation of the law, the law has never required a panel to assign a minimal amount of weight to each piece of mitigating evidence that a defendant may offer.

Mitigating factors are factors that, while not justifying or excusing the crime, may be considered as extenuating or reducing the degree of moral culpability. *State v. Steffen* (1987), 31 Ohio St.3d 111. Mitigating factors may call for a penalty less than death, or lessen the appropriateness of a sentence of death. *State v. Mink* (2004), 101 Ohio St.3d 350. After a finding of proof beyond a reasonable doubt of the aggravating circumstances, a jury or a three judge panel must weigh, pursuant to R.C. 2929.03, the aggravating circumstances against the mitigating factors listed in R.C. 2929.04(B). While "a defendant in a capital case [should] be given wide latitude to introduce any evidence [he] considers to be mitigating, this does not mean that the court is necessarily required to accept as mitigating everything offered by the defendant * * *." *Steffen*, 31 Ohio St.3d at 129. The death penalty cannot be imposed unless the aggravating circumstances are proven beyond a reasonable doubt to outweigh any mitigating factors. R.C. 2929.03(D)(2). The assessment of and weight to be given to mitigating evidence are matters for the trial court's determination.

A court may not refuse to consider a mitigating factor that a capital defendant has

introduced into evidence. *Eddings v. Oklahoma* (1982), 455 U.S. 104. “[T]he Eighth and Fourteenth Amendments require that the sentencer *** not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Id.* at 110, citing *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (Emphasis in original). Since “the imposition of death by public authority is *** profoundly different from all other penalties,” the sentencer must give “independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation ***.” *Eddings*, 455 U.S. at 110; *Lockett*, 438 U.S. at 605. As such, it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. “Ignoring mitigating evidence is tantamount to refusing to consider it.” *State v. Chinn*, Montgomery App. No. 11835, 1991 WL 289178, *18.

Even though a court must consider the mitigating evidence, a court need not give any particular weight to evidence that a defendant has introduced in mitigation. The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight. “[T]he court in its own independent weighing process, may properly choose to assign absolutely no weight to this evidence if it considers it to be non-mitigating. Only that evidence which lessens the moral culpability of the offender or diminishes the appropriateness of death as the penalty can truly be considered mitigating.

Evidence which is not mitigating is not entitled to any weight as a mitigating factor in determining whether such factors outweigh the aggravating circumstances.” *Steffen*, 31 Ohio St.3d at 129. (Emphasis added.) See *Penry v. Lynaugh* (1989), 492 U.S. 302 (overruled on other grounds); See, also, *Hitchcock v. Dugger* (1987), 481 U.S. 393.

The assessment and weight to be given mitigating evidence are matters for the trial court's determination. *State v. Newton* (2006), 108 Ohio St.3d 13, citing *State v. Lott* (1990), 51 Ohio St.3d 160; See, *Eddings*, 455 U.S. 104, 104-105 (“[T]he sentencer *** may determine the weight to be given relevant mitigating evidence.”); Accord *State v. Taylor* (1997), 78 Ohio St.3d 15; *State v. Fox* (1994), 69 Ohio St.3d 183. As such, during the weighing process, a court may properly assign absolutely no weight to Davis’ evidence if it considers it to be non-mitigating. *Steffen*, 31 Ohio St.3d 111. “Nothing in the Ohio statutes or the decisional law mandates that a court give weight to a mitigating factor which it finds is not present.” *State v. Brewer* (1989), 48 Ohio St.3d 50, 56 (court assigned no weight to a doctor’s diagnosis after concluding that the testimony failed to establish the existence of a mental defect which impaired Appellant’s ability to conform his conduct to law). Additionally, there is “no requirement” that the trial court explain “how it decides how much weight to give to any one factor. The weight, if any, given to a mitigating factor is a matter for the discretion of the individual decisionmaker.” *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 245, 714 N.E.2d 867, 880. (Emphasis added)

Davis’ claim that the trial court did not give appropriate weight to mitigating evidence confuses admissibility of evidence with mitigating weight. *Newton*, 108 Ohio St.3d 13. The trial court as sentencer is required to **weigh** the mitigating evidence presented by a defendant. The trial court is *not* required to give the mitigating evidence **weight**. Davis argues an *Eddings* violation occurred when the sentencer gave “no weight” to certain evidence. This evidence includes that: Davis may never be released from prison if given a life sentence, and the avoided costs to taxpayers by not executing Davis. (Appellant’s Brief, p. 12) However, *Eddings* states that a sentencer “may not give [relevant mitigating evidence] no weight *by excluding such evidence from their consideration.*” *Eddings*, 455

U.S. at 114-115 (Emphasis added.) *Eddings* only requires that the sentencer not exclude potentially mitigating evidence from their consideration; it does not comment on the weight to be given to such evidence. Contrary to Davis' overgeneralized argument, there is a large difference between excluding mitigating evidence from consideration and assigning little or no weight to mitigating evidence after consideration.

In accordance with R.C. 2929.04(B), the trial court weighed against the aggravating circumstances the following mitigating factors: Davis' borderline personality disorder; Davis' alcohol abuse; love and support of family members and friends; testimony of Davis' daughter regarding her forgiveness of him for purposefully killing her mother; good behavior while in prison; childhood and family experience; remorse and apology; advanced age (62 years); probability of no release from prison; whether life in prison would bring closure to the victim's family; and the savings to taxpayers by imposing a life sentence. (T.d. 435 p.5)

The three judge panel found proof beyond a reasonable doubt of the aggravating circumstance—specifically, the prior conviction for the murder of Davis' wife—and assigned it “great weight.” (T.p. 9) The panel then, as statutorily required, weighed the aggravating circumstances against the aforementioned mitigating factors. If a court is of the opinion that certain mitigating evidence deserves little or no weight, it is statutorily required to specifically state this in its findings.

The three judge panel properly assigned little or no weight to each mitigating factor. (T.p. 9) Specifically, in detailing the weight assigned, the panel found that Davis is loved and supported by family and friends, which was afforded little weight. (Id.) The panel also found that Davis' family experiences upon which his personality development and mental health issues were directly related, per Dr. Robert Smith' testimony, did not correspond

with separate testimony from family and friends. Likewise, even if Davis' borderline personality disorder and alcohol dependence were a result of his background, these factors were entitled to little weight in mitigation. (T.p. 10); See, *Newton*, 108 Ohio St. 3d 13 (court found defendant's introduction of evidence about his family history as a mitigating factor not particularly weighty).

Similarly, Cynthia Mausser's "highly speculative" and "unconvincing" testimony regarding Davis' unlikely release from prison if given a sentence less than death was afforded no weight. (Id.) Davis' good behavior in prison, advanced age, remorse and apology each attributed little weight. (Id.) Lastly, the economic benefit taxpayers would receive from an alternative life sentence and the possibility of closure to the victim's family were entitled to no weight. (Id. at 10-11)

Of these factors, Davis appears to take the most offense to the weight given to Cynthia Mausser's testimony. Specifically, Davis argues that the sentencer gave no weight to the evidence that he would never be released from prison. The main problem with this argument is that Ms. Mausser never testified that Davis would never be let out of prison. In response to a hypothetical question, Ms. Mausser stated that a person in a similar position to Davis "would likely spend a large portion of the remainder of their life in prison." (T.p. 175) A large portion is not the same as never.

What is more, Ms. Mausser on cross examination admitted to not having the necessary information that she would need to make a decision about Davis, admitted not knowing how the board would vote, admitted that she could not form an opinion on how the board would vote without the missing information, admitted not knowing how many or whom the board members would even be that would make the vote, and stated that it would be improper for her to give an opinion without all of the missing information and

before someone had officially come before the board. (T.p. 181-187) Thus, Ms. Mausser could not say how she or the board would vote as to Davis. (T.p. 188-189) The panel's decision finding this testimony to be speculative and unconvincing was the only possible finding based upon her testimony. Additionally, as the Twelfth District noted "Mauser was unable to definitively state that Davis would never be paroled and instead, indicated that should he become parole-eligible, he would be considered for parole on multiple occasions." *Davis*, 2011-Ohio-787, ¶ 96.

Davis also takes issue with the weight given to the "cost" factor. (Appellant's Brief, p. 22) However, it is hard to fathom how the cost associated with capital punishment as opposed to life imprisonment is "evidence which lessens the moral culpability of the offender or diminishes the appropriateness of death as the penalty can truly be considered mitigating." *Steffen*, 31 Ohio St.3d at 129. In that light the Twelfth District correctly "considered Davis' contention that housing a prisoner in general population of a prison is less expensive than housing a death row inmate. However, Ohio's capital sentencing scheme does not place importance on the financial burden either execution or life imprisonment has on the citizens of Ohio. We find Davis' concern for the state's budget incongruous with his request to remain supported the rest of his life, or however long he would be imprisoned, by the taxpayers of Ohio." *Davis*, 2011-Ohio-787, ¶ 97. The reason capital punishment may be more expensive "is simple: 'lawyers are more expensive than prison guards.'" *Wiles v. Bagley*, 561 F.3d 636, Fn 4, (6th Cir. 2009). But, this in no way lessens the moral culpability of Davis or diminishes the appropriateness of death as the penalty. See, *Steffen*, 31 Ohio St.3d at 129. Thus, this factor was properly accorded no weight.

Davis also continuously attempts to compare and contrast the findings from his earlier mitigation hearing as independently weighed by the Ohio Supreme Court with the

new panel's decision. All arguments in this vein are fruitless because the new panel conducted a completely new hearing with new and different evidence. With different evidence before the new panel than what was before this Court in its earlier review, it is impossible to directly compare the weight given to any one genre or category of items. This is truly an example of trying to compare apples and oranges, and should be disregarded by this Court as it was by the Twelfth District. Specifically, the Twelfth District citing cases from this Court found: "that while the New Panel found that Mausser's testimony was entitled to no weight, the Davis IV court 'considered the probability that [Davis] would never be released from prison if he were to be sentenced to life imprisonment' and gave that factor 'some weight' 63 Ohio St.3d 51." *Davis*, 2011-Ohio-787, ¶ 85.

However, and for this very reason, this Court has specifically stated that 'a decisionmaker need not weigh mitigating factors in a particular manner. The process of weighing mitigating factors, as well as the weight, if any, to assign a given factor is a matter for the discretion of the individual decision maker.' *Newton*, 2006-Ohio-81 at ¶ 60, 108 Ohio St.3d 13, 840 N.E.2d 593. The fact that the New Panel assigned no weight to testimony it found highly speculative and unconvincing was within its discretion, just as the Ohio Supreme Court may assign a different amount of weight to Mausser's testimony during its own independent review of the factors." *Davis*, 2011-Ohio-787, ¶¶ 85-86.

Finally, the remainder of Davis' argument truly boils down to semantics and synonyms. The decision to give "little" v. "some"; or "not deserving of significant" v. "some", merely reflects a choice or preference in adjectives that are synonyms. This semantical argument is entitled to zero weight.

After properly assigning only little or no weight to most of the items in mitigation, the panel found the sole aggravating circumstance to outweigh the collective mitigating

factors beyond a reasonable doubt. (T.d. 435 at p.11) The fact that the panel did not find those factors to outweigh the aggravating circumstance does not mean the court did not consider the evidence. Rather, the court properly and legally gave that evidence little weight, as it is well within its discretion to do. *Newton*, 108 Ohio St.3d 13; See, *Eddings*, 455 U.S. 104. Finally, the idea that the “sentencer was simply going through the motions and that death was a foregone conclusion for this panel”(Appellant’s Brief, p. 26), is simply offensive. The trial court and the court of appeal each conducted their statutorily mandated weighing process. The fact that Davis is unhappy with their decision is not a legal ground to haphazardly soil six judges’ reputations and question their morals and ethics. This casting of aspersions should gain no traction as it is without legal or factual support.

Having weighed each mitigating factor, the trial court properly found each factor contributed only little or no weight, and as such, the mitigating factors did not preclude Davis’ sentence of death.

Proposition of Law III:

Where the Appellant’s death sentence was vacated by a federal court on January 29, 2007, because of error that occurred in the sentencing phase of trial [see, *Davis v. Coyle* (C.A.6, 2007), 475 F.3d 761], the trial court properly conducted the re-sentencing hearing in accordance with the modern provisions of R.C. 2929.06(B).

Davis’ third assignment of error contends that the trial court erred in re-sentencing Davis to death after following the provisions of the amended R.C. 2929.06(B) rather than enforcing provisions of the code when Davis was originally sentenced to death. (Appellant’s Brief, p. 27) The State disagrees.

Contrary to Davis' argument, R.C. 2929.06¹⁶ and Crim.R. 25(B)¹⁷ provide controlling authority for a new three-judge panel, upon remand after a death sentence is vacated by any state or federal court, to conduct a resentencing hearing which shall follow the procedure set forth in R.C. 2929.03(D), at which the state may seek whatever punishment is lawful including, but not limited to, the death sentence and any life sentence available at the time the offense was committed. Moreover, there is no constitutional impediment to the application of R.C. 2929.06(B)'s remedial/procedural provisions in the case at bar.

16. R.C. 2929.06 provides, in relevant part:

(B) Whenever *** any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. At the hearing, the court or panel shall follow the procedure set forth in division (D) of section 2929.03 of the Revised Code in determining whether to impose upon the offender a sentence of death, [or] a sentence of life imprisonment ***. If, pursuant to that procedure, the court or panel determines that it will impose a sentence other than a sentence of death, the court or panel shall impose upon the offender one of the sentences of life imprisonment that could have been imposed at the time the offender committed the offense for which the sentence of death was imposed, determined as specified in this division[.] *** [T]he sentences of life imprisonment that are available at the hearing, and from which the court or panel shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 *** of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed.

* * *

(E) *This section, as amended by H.B. 184 of the 125th general assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981 ***. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced.*" (Emphasis added.)

17. Crim. R. 25(B) (effective July 1, 1973) provides:

Rule 25. Disability of a Judge

(B) **After verdict or finding of guilt.** If for any reason the judge before whom the defendant has been tried is unable to perform the duties of the court after a verdict or finding of guilt, another judge designated by the administrative judge, or, in the case of a single-judge division, by the Chief Justice of the Supreme Court of Ohio, may perform those duties. ***

A. R.C. 2929.06(B) and Crim.R. 25(B).

As applicable here, R.C. 2929.06(B) specifically details the procedure for a new sentencing hearing in an Ohio capital case after any state or federal court has vacated a death sentence because of error that occurred in the sentencing phase of the trial and where none of the three circumstances set forth in division (A) of R.C. 2929.06 apply. And division (E) of R.C. 2929.06 expressly states the General Assembly's intent that the provisions of this statute apply retroactively to a case where the offense at bar was committed after October 19, 1981, the offender's death sentence was reversed by a state or federal court, and as of March 23, 2005 (or thereafter), the offender has not yet been resentenced. Davis' case falls precisely within all the terms of this statute.¹⁸ By the language of R.C. 2929.06(E), the General Assembly has expressed its intent that this statute shall apply retrospectively to Davis' case. See, *State v. Cook* (1998), 83 Ohio St.3d 404, 410 (finding a "clearly expressed legislative intent" that sexual-predator statutes apply retrospectively because the statutes imposed requirements on offenders based on offenses committed before the statutes' effective date); See, also, *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶14 (amendment to statute which made the age of the offender upon apprehension the "touchstone" of determining juvenile-court jurisdiction, without regard to date of offense, indicated intent to apply amended statute retroactively).

18. Davis was "sentenced to death for an aggravated murder that was committed on or after October 19, 1981" [specifically, on December 12, 1983], he was "sentenced to death prior to *** March 23, 2005" [specifically, on August 4, 1989], and since the federal court's decision on January 29, 2007, he is an "offender[] whose sentence of death has been set aside, nullified, or vacated by [a] federal court but who, as of March 23, 2005, ha[s] not yet been resentenced." R.C. 2929.06(E). And Davis' death sentence was vacated "because of error that occurred in the sentencing phase of the trial", thus, R.C. 2929.06(B) requires that "the trial court that sentenced [Davis] shall conduct a new hearing to resentence [him]," and whereas he "was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing," R.C. 2929.06(B).

And because Davis “was tried by a panel of three judges,” R.C. 2929.06(B) provides: “that panel or, if necessary, a new panel of three judges shall conduct the hearing.” Given that none of the three judges on the panel that tried the case in 1984 are now available (all three having retired, and in addition, the late Judge Stitsinger having passed away on May 2, 2007), it becomes “necessary” to apply Crim.R. 25(B)’s longstanding rule (effective July 1, 1973, with the earliest promulgation of the Criminal Rules) that if, for any reason, a judge before whom a criminal defendant was tried is thereafter unable to perform the duties of the court after a verdict or finding of guilt, another judge may be assigned to perform those duties, including sentencing. See, *State v. Green* (1997), 122 Ohio App.3d 566, 571 (where Judge Elliott retired following trial and guilty verdict, and Judge Bressler assumed Judge Elliott’s docket prior to sentencing hearing, Butler County Court of Appeals found it “entirely proper, pursuant to Crim.R. 25(B), for Judge Bressler to have imposed sentence upon appellant after Judge Elliott’s verdict of guilty had been entered”).

B. The application of R.C. 2929.06(B) is constitutional.

Beyond Davis’ flawed statutory analysis, his constitutional challenge to the application of R.C. 2929.06(B)—asserting that for the State to again seek the imposition of the death penalty violates the *ex post facto*, due process and double jeopardy clauses of the United States and Ohio Constitutions (Appellant’s Brief, p. 28-29)—is without merit. The three issues posed by Davis should be separately discussed; analysis must begin with the “strong presumption” that R.C. 2929.06 is constitutional. See, e.g., *State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011, See, also, *Cook*, 83 Ohio St.3d at 409 (as applicable to retroactivity and ex post facto analysis).

C. Retroactivity Clause/Ex Post Facto Clause issues.

The “ex post facto” branch of Davis’ argument involves two related issues: (1) whether application of R.C. 2929.06(B) retroactively to the offense at bar violates Ohio’s Retroactivity Clause, Section 28, Article II of the Ohio Constitution (which provides that “[t]he general assembly shall have no power to pass retroactive laws”), see, *Walls*, 96 Ohio St.3d 437 at ¶¶15-19, and (2) the distinct legal question whether it offends the federal Ex Post Facto Clause, Section 10, Article I of the United States Constitution (“no state shall *** pass any *** ex post facto law”), *Id.* at ¶¶20-49.

1. *The Ohio retroactivity question: R.C. 2929.06 is remedial.*

This Court has articulated a two-part framework, involving both statutory and constitutional analyses, to determine when a law is *unconstitutionally* retroactive under Section 28, Article II of the Ohio Constitution. See, *Walls*, 96 Ohio St.3d 437 at ¶10; See, also, *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 353 (emphasis *sic*) (“[w]e emphasize the phrase ‘*unconstitutionally* retroactive’ to confirm that retroactivity itself is not always forbidden by Ohio law”). Once a court finds a “clearly expressed legislative intent” that a statute is to apply retroactively under statutory analysis (as the language of R.C. 2929.06(E) clearly establishes), the determination whether retroactive application is constitutionally permissible will then proceed to the second step, which analyzes whether the challenged statute is remedial or substantive. See, *Walls*, 96 Ohio St.3d 437 at ¶10, citing *Cook*, 83 Ohio St.3d, at 410. In *Walls*, the court detailed the essential test:

[A] statute is *unconstitutionally* retroactive under Section 28, Article II “if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.” *Bielat*, 87 Ohio St.3d 350, 354; See, also, *Van Fossen*, 36 Ohio St.3d at

106-107.¹⁹ On the other hand, a statute that is ‘purely remedial’ ‘does not violate Section 28, Article II. *Van Fossen*, 36 Ohio St.3d at 107, quoting *Rairden v. Holden* (1864), 15 Ohio St. 207, paragraph two of the syllabus. We have defined as ‘remedial’ those laws affecting merely ‘the methods and procedure[s] by which *rights are recognized, protected and enforced, not *** the rights themselves.*’ (Emphasis added.) *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28, quoting *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 205.

Walls, 96 Ohio St.3d 437 at ¶15.

“Remedial laws *** generally come in the form of ‘rules of practice, courses of procedure, or methods of review.’” *State ex rel. Kilbane v. Indus. Comm.* (2001), 91 Ohio St.3d 258, 260, citing *State ex rel. Slaughter v. Indus. Comm.* (1937), 132 Ohio St. 537, paragraph three of the syllabus. Thus, “it is generally true that laws that relate to procedures are ordinarily remedial in nature.” *Walls*, 96 Ohio St.3d 437 at ¶17, quoting *Cook*, 83 Ohio St.3d at 411.

As such, the provision in R.C. 2929.06(B) for resentencing by a three-judge panel other than the original panel, if necessary—retroactive per R.C. 2929.06(E) to Davis’ case, where his offense was committed after October 19, 1981, his death sentence was vacated by a federal court after March 23, 2005, and he is yet to be resentenced—is fundamentally procedural and remedial, not substantive. The changes to resentencing procedures under R.C. 2929.06 did not impair any of Davis’ “vested substantive rights” within the meaning of Ohio’s retroactivity jurisprudence. Clearly, the essential elements of the crime are unchanged (it being unnecessary to re-try the guilt phase of trial), the range of available punishments remain the same, and the quantum and manner of proof at the sentencing

19. This Court has also made it clear that “not just any asserted ‘right’ will suffice,” *Bielat*, 87 Ohio St.3d, at 357, but rather, it must be an “accrued substantive right” that is impaired by the retrospective act. See, *Gregory v. Flowers* (1972), 32 Ohio St.2d 48, paragraph three of the syllabus. Or, as stated in *Van Fossen*, the retroactivity test is stated in terms of “substantive rights.” *Id.*, at paragraph four of the syllabus. Or, as stated in *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281 (an unconstitutionally retroactive law impairs a “vested substantive right.”).

hearing [as set forth in R.C. 2929.03(D)] is unchanged. Indeed, both now and then, Davis similarly faced resentencing inclusive of the death penalty after his original 1984 death sentence was overturned in 1988. See, *State v. Davis* (1988), 38 Ohio St.3d 361, syllabus (distinguishing *State v. Penix* [1987], 32 Ohio St.3d 369, and holding that there is “nothing unconstitutional in permitting the state to seek whatever punishment is lawful on remand,” and that it was permissible to “remand the action to that trial court for a resentencing hearing at which the state may seek whatever punishment is lawful, including, but not limited to, the death sentence. We have **not** found the evidence in the instant action to be legally insufficient to justify imposition of the death penalty.” *Davis*, 38 Ohio St.3d at 374, emphasis *sic*).

Thus, under either the law in effect circa 1983, or under the law presently in effect (subsequent to its effective date, March 23, 2005), Davis was on notice that the offense he committed could subject him to a death sentence when his case was reversed on appellate review and remanded for error in the sentencing phase of the trial. See, *Walls*, 96 Ohio St.3d 437 at ¶17 (“we cannot characterize this change as anything other than remedial. *** [U]nder either the 1985 law or the 1997 law, Walls was on notice that the offense he allegedly committed could subject him to criminal prosecution as an adult in the general division of the court of common pleas”). In the case at bar, the 2005 law merely removed any procedural issue as to whether he was required to be resentenced by the same three-judge panel that originally found him guilty.

And the conclusion that R.C. 2929.06(B) is remedial is “strengthened by our state’s recognition of the validity of retrospective **curative** laws.” See, *Bielat*, 87 Ohio St.3d at 355-356 (Emphasis *sic*):

As this court noted long ago, the language that immediately follows the prohibition of retroactive laws contained in Section 28, Article II of our

Constitution expressly permits the legislature to pass statutes that “authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties and officers, by *curing omissions, defects, and errors in instruments and proceedings, arising out of their want of conformity with the laws of this state.*” (Emphasis added in *Bielat*.) *Burgett v. Norris* (1874), 25 Ohio St. 308, 316, quoting Section 28. *Burgett* recognized that curative acts are a valid form of retrospective, remedial legislation when it held that “[i]n the exercise of its plenary powers, the legislature *** could cure and render valid, by remedial retrospective statutes, that which it could have authorized in the first instance.”

Id. at 317.

Thus, under the logic of *Bielat*, in the case at bar, R.C. 2929.06(B) is a purely remedial statute designed to provide a procedure for resentencing in a case not otherwise controlled by the former version of R.C. 2929.06 [now R.C. 2929.06(A)] where none existed before. By enacting R.C. 2929.06(B) and (E), the General Assembly saw fit to retrospectively resolve the exact procedural issue presented. As our Constitution expressly permits. R.C. 2929.06(B) cures an omission in Ohio’s death-penalty statutory framework.

2. *The federal ex post facto question.*

Davis’ argument under the federal Ex Post Facto Clause is completely defeated by the decision in *Dobbert v. Florida* (1977), 432 U.S. 282, 97 S.Ct. 2290 (holding that the application of remedial statutes amending Florida’s capital sentencing procedure in the wake of *Furman v. Georgia* [1972], 408 U.S. 238, to a defendant who was sentenced to death for crimes occurring before the law’s effective date, but whose arrest and trial took place thereafter, did not violate the Ex Post Facto Clause).

The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. (Citation omitted.)

[t]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation and not to limit the legislative

control of remedies and modes of procedure which do not affect matters of substance. (Citations omitted)
Dobbert, 432 U.S., at 293.²⁰

The Ex Post Facto Clause is generally said to bar the retrospective application of any penal statutes which disadvantage the offender affected by them. See, *Walls*, 96 Ohio St.3d 437 at ¶21, citing *Collins v. Youngblood* (1990), 497 U.S. 37, 41. But “[n]ot just any ‘disadvantage’ to an offender, however, will run afoul of the Ex Post Facto Clause.” *Walls*, *id.*, citing *Collins*, 297 U.S. at 42, and *Calder v. Bull* (1798), 3 U.S. 386, 390-92. The United States Supreme Court has used the following four-part framework to evaluate whether a law runs afoul of the Ex Post Facto Clause:

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

Id., at 390 (emphasis in original); *Calder*, 297 U.S. at 390; See, also, *Carmell v. Texas* (2000), 529 U.S. 513, 522.²¹

The Supreme Court has held that these four categories provide “an exclusive definition of ex post facto laws,” see, e.g., *Collins*, 297 U.S. at 42, and has also noted that it is “a mistake to stray beyond *Calder*’s four categories.” *Carmell*, 529 U.S. at 539 (describing

20. See, *State ex rel. Corrigan v. McAllister* (1985), 18 Ohio St.3d 239 (application of amended statute which redefined capital offense to include only those offenses for which the death penalty may be imposed, R.C. 2901.02(B), to trial for aggravated murder committed prior to effective date of the amendment, didn’t violate Ex Post Facto Clause).

21. The four categories described above are read to include a prohibition of any statute which “deprives one charged with crime of any defense available according to law at the time when the act was committed.” See, *Collins*, 497 U.S. at 42, citing *Beazell v. Ohio* (1925), 269 U.S. 167, 169-170.

the import of the *Collins* decision). Thus, if Davis' claim is to be successful, it must fall within one of *Calder's* four categories.

Under the first category, there is absolutely no change made in the definition of the crime of aggravated murder "that makes an action done before the passing of the law, and which was innocent when done, criminal." *Calder*, 297 U.S. at 390; See, *Dobbert*, 432 U.S. 282 at 293. The substantive statute under which Davis was convicted, R.C. 2903.01(A), was the same in all material respects at the time of Davis' offense in 1983 as it is now. Indeed, Davis is not to be tried again: his 1984 conviction was affirmed in 1988.²²

At the heart of his argument, Davis invokes the third *Calder* factor, which prohibits as *ex post facto* any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder* 297 U.S. at 390; See, *Walls*, 96 Ohio St.3d 437 at ¶¶28-29. But Davis' argument is foreclosed by the decision in *Dobbert*. Under R.C. 2929.06(B) the potential punishment for Davis' aggravated murder charge **was, and remains**, a sentence of either death, or life imprisonment with 30 full years to parole eligibility, or life imprisonment with 20 full years to parole eligibility, to be determined under the weighing process prescribed by R.C. 2929.03(D). Cf. Senate Bill 1, 114th General Assembly, eff. 10-19-81, with 2007 Ohio SB 10, eff. 1-1-08.

Finally, Davis argued to the trial court for inclusion of this case within the fourth *Calder* category. But Davis points to no particular Rule of Evidence that has changed to his detriment and "changed the quantum of evidence necessary to sustain a conviction." In the case at bar, nothing in R.C. 2929.06(B) changed the substantive law as to what evidence can

22. Davis makes no claim, under the second category of *ex post facto* analysis, that there is anything about the application of R.C. 2929.06(B) "that aggravates a crime, or makes it greater than it was, when committed." *Calder*, 297 U.S. at 390. It thus becomes unnecessary to discuss that category.

or cannot be weighed by a three-judge panel. Indeed, R.C. 2929.06(B) specifically directs that “[a]t the [resentencing] hearing, the court or panel shall follow the procedure set forth in division (D) of section 2929.03 of the Revised Code in determining whether to impose upon the offender a sentence of death, [or] a sentence of life imprisonment.” By this, a substantive change is neither intended nor effected.

D. The Due Process Issue.

The next branch of Davis’ constitutional challenge alleges that the retroactive application of R.C. 2929.06(B) would violate the Due Process Clause of the United States Constitution and the Ohio Constitution’s analogous provision. However, the case of *Landgraf* recognized that a jurisdictional statute as to the particular forum in which an action is to be tried may govern retroactively “because jurisdictional statutes ‘speak to the power of the court rather than to the rights or obligations of the parties,’” *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994)(citations omitted). Or to put it another way, “[s]tatutes merely addressing **which** court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties.” *Id.* at 275 (emphasis *sic* per Scalia, J., concurring).

As the Twelfth District found “we do note that the *Walls* court addressed the effect a jurisdictional rule has on retroactivity, and stated ‘an application of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case.’ 2002-Ohio-5059 at ¶ 18, 96 Ohio St.3d 437, 775 N.E.2d 829. (Emphasis added.) While the court was referencing whether the juvenile court or general criminal division had jurisdiction to try *Walls*, we cannot disregard the court’s finding that changing the tribunal that hears a case takes away no substantive right.” *Davis*, 2011-Ohio-787, ¶ 56

Thus, R.C. 2929.06(B) is a remedial law which relates not to any substantive right, but rather, merely addresses which **judges** shall have jurisdiction to entertain a resentencing hearing, i.e., it exemplifies the “[a]pplication of a new jurisdictional rule [which] ‘takes away no substantive right but simply changes the tribunal that is to hear the case.’” *Walls*, 96 Ohio St.3d at ¶17, quoting *Landgraf*, 511 U.S. at 274. Thus, the essential principles that emerge from *Walls* and *Landgraf* make it impossible for Davis to prevail on his due process argument. See, *State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011.

E. The Double Jeopardy issue.

The final branch of Davis’ argument appears to seek a double-jeopardy bar to resentencing, founded on the Ohio and Federal Double Jeopardy Clauses. However, the Double Jeopardy Clause does not bar further capital sentencing proceedings on remand when, on appeal, the reviewing court has vacated the death sentence due to error occurring at the penalty phase, but does not find the evidence legally insufficient to justify imposition of death penalty and hence, there was no death penalty “acquittal.” See, *Poland v. Arizona* (1986), 476 U.S. 147, 157; Accord *Skipper v. South Carolina* (1986), 476 U.S. 1, 8 (where the state trial court erred by its exclusion of relevant mitigating evidence of defendant’s good behavior in custody, “[t]he resulting death sentence cannot stand, although the State is of course not precluded from again seeking to impose the death sentence, provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available”).

~~And Davis’ current double jeopardy claim is also contrary to the holding in his own case, *State v. Davis* (1988), 38 Ohio St.3d 361, 374 (citing *Skipper* and *Poland* and holding that there is “nothing unconstitutional in permitting the state to seek whatever punishment is lawful on remand *** when a reviewing court vacates the death sentence of a defendant~~

imposed by a three-judge panel due to error occurring at the penalty phase, not otherwise covered by [the then-existing version of] R.C. 2929.06 [i.e., where the Ohio death-penalty statutes are determined to be unconstitutional, or where, upon its independent review, a reviewing court has found the death sentence inappropriate or disproportionate], and the reviewing court does not find the evidence to be legally insufficient to justify imposition of the death sentence”).

F. Ishmail Claim

The final argument in Davis’ third assignment of error is that the appellate court committed error when it cited to matters outside the record. (Appellant’s Brief, p. 30) However, this argument fails both factually and legally. Factually, the affidavit in question was filed in CR1983-12-0614. (See, Petition dated 10/8/83) The Court of Appeals was reviewing CR1983-12-0614. Simply stated, the court of appeals was permitted to view all of the underlying record in the criminal case before it. As such, no error occurred.

Additionally, Davis squarely put the affidavit and other affidavits from the same filing before the trial court. At the August 28, 2008 hearing, Davis was called to testify about the jury waiver and his counsel stated “Mr. Davis will not be testifying as to the facts of the case, so he would be reserving his Fifth Amendment right. He will be testifying regarding conversations he had with his attorney regarding his jury waiver. We understand to the extent that he testifies to those conversations, it is a waiver of the privilege, but only to that extent. Call Mr. Davis.” (T.p. 10, 8/28/08 Motion hearing) The defense then called Davis’ original trial counsel, Mike Shanks, and specifically referenced the postconviction affidavit with counsel. (T.p. 25, 8/28/08) Thereafter, the State of Ohio followed this line of questioning, and utilized Shanks’s affidavit in cross examination. (T.p. 27, 8/28/08) What is more, on the third and final day of the resentencing hearing, Davis, through Dr.

Smith, again utilized one of the affidavits from the postconviction filing. (T.p. 245 , 9/10/09 Resentencing hearing) As such, Davis clearly made the affidavits from the postconviction petition filed in the underlying case part of the record that the trial court was permitted to consider.

Additionally, "Ohio case law indicates that the time limit for a postconviction relief petition runs from the original appeal of the conviction, and that a resentencing hearing does not restart the clock for postconviction relief purpose as to any claims attacking the underlying conviction." *State v. Piesciuk*, Butler App. No. CA2009-10-251, 2010-Ohio-3136, ¶ 12, citing, *State v. Seals*, Cuyahoga App. No. 93198, 2010-Ohio-1980, ¶ 7; see, also, *State v. Haschenburger*, Mahoning App. No. 08-MA-223, 2009-Ohio-6527, ¶ 27; *State v. Casalicchio*, Cuyahoga App. No. 89555, 2008-Ohio-2362, ¶ 22; *State v. O'Neal*, Medina App. No. 08CA0028-M, 2008-Ohio-6572, ¶ 13; *State v. Gross*, Muskingum App. No. CT2006-0006, 2006-Ohio-6941, ¶ 34. Thus, the postconviction documents in Davis' case were the law of the case at the time the appellate court was reviewing the case. As such, much like the court did not error in considering what other court's had stated in terms of prior arguments and issues such as res judicata, the appellate court did not err in considering the affidavits from already decided issues.

The fact that this issue was decided long ago is supported by none other than the Twelfth District's opinion as to the postconviction petition. See, *State v. Davis*, Butler App. No. CA95-07-124, 1996 WL 551432, *7 ("appellant argues that the trial court's refusal to sever the two charges in the indictment would have put the element of appellant's prior murder conviction before a jury, so that appellant effectively had no choice but to waive his right to a jury trial.")

Therefore, the fact that this document was filed in the underlying criminal case, that

the defense utilized affidavits from this document, and that these documents were part of the law of the case, all indicate that the trial court acted properly. However, in the unlikely event that this Court finds error, the State would assert that the error is either harmless or invited.

As such, all of Davis' claims under his third argument are without merit and should be denied.

Proposition of Law and Argument IV:

The trial court properly found each mitigating factor introduced by Appellant, when combined, did not outweigh the aggravating factor, the repeat murder specification, and as such, Appellant's sentence of death is both appropriate and proportionate.

In his fourth assignment of error, Davis asserts that the trial court erred in imposing the death penalty, arguing it is a disproportionate and inappropriate sentence. (Appellant's Brief, p. 31) Davis argues that his sentence must be vacated because the aggravating circumstance did not outweigh the mitigating factors. However, a review of the present case will clearly prove the contrary.

Davis' challenge involves this Court's independent review pursuant to R.C. 2929.05. To determine whether Davis' sentence of death was appropriate, a reviewing court must conduct an independent review. *State v. Were*, Hamilton App. No. C-030485, 2006-Ohio-3511.

In determining whether the sentence of death was appropriate, we must consider whether the sentence was excessive or disproportionate to the penalty imposed in similar cases. We must also review all the facts and evidence and determine whether the evidence supports the aggravating circumstances the jury found the offender guilty of committing, and also whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating

factors. Finally, we should affirm a sentence of death only if the record persuades us that the aggravating circumstances outweigh the mitigating factors and that the death sentence was the appropriate sentence.

Id. at ¶ 23, see, also *State v. Short*, Slip Opinion No. 2011-Ohio-3641, ¶ 141.

The evidence in the case at bar established that defendant was properly convicted of aggravated murder with a death-penalty specification and having weapons while under a disability. After hearing all of the relevant evidence, the three judge panel correctly determined that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt and sentenced Davis to death. See, R.C. 2929.03(D)(1) and (2).

R.C. 2929.04(B) provides the categories into which all mitigating evidence must fall. Davis asserts that mitigation sufficient to reverse his sentence is found in the nature and circumstances of the offense, his character, his history and background, his mental disease or defect and factors of the catch-all provision of R.C. 2929.04(B)(7). The State disagrees.

A. Mental Disease or Defect

Davis' borderline personality disorder should not be given sizeable weight in mitigation. "Personality disorders are often accorded little weight because they are so common in murder cases." *State v. Wilson* (1996), 74 Ohio St.3d 381. In *State v. Newton*, 108 Ohio St.3d 13, this Court found Newton's borderline personality disorder to be a relevant mitigating factor but concluded beyond a reasonable doubt that the aggravating circumstance of killing another outweighed the mitigation. *Id.*; See, *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276 (defendant's personality disorder and drug dependence entitled to very little weight in mitigation); *State v. Mundt*, 115 Ohio St.3d 22, ¶ 205 (where personality disorders included, but not limited to borderline personality disorder, Court accorded "little weight to Mundt's personality disorders as a mitigating 'other factor'"). As such, this Court should attribute little weight to Davis' borderline personality disorder.

B. Substance Abuse

Davis next contends that his history of substance abuse, specifically his alcohol dependence, should be given additional weight in mitigation. The State again disagrees. This Court has repeatedly held that substance abuse is to be given little weight in mitigation and has upheld the imposition of death when substance abuse and intoxication are claimed as mitigation. See, *State v. Sowell* (1988), 39 Ohio St.3d 322, 336-337 (the defendant killed one person and attempted to kill a second; Sowell presented mitigating evidence that he was intoxicated when it occurred, but the Court accorded this factor “little or no weight” and affirmed the death sentence). See, also, *State v. Thomas*, 97 Ohio St.3d 309, ¶ 113, and *State v. Adams*, 103 Ohio St.3d 508, ¶ 135. Therefore, the State would urge this Court to accord little weight to Davis’ substance abuse.

C. Davis’ History and Background

Davis claims that his dysfunctional childhood should also be given significant weight as a mitigating factor. The State disagrees. In *State v. Adams*, 103 Ohio St.3d 508 at ¶142, the defendant established that he had a horrific upbringing, an abusive father, psychological problems, and substance abuse problems. However, the death penalty was found to be appropriate. *Id.* Additionally, in *State v. Awkal* (1996), 76 Ohio St.3d 324, the defendant asserted as mitigating evidence that he was raised in a poor background, did not finish school, had a father who was physically abusive and suffered from psychological disorder. However, his death sentence was affirmed as these mitigating factors were not enough to outweigh the aggravating circumstances. *Id.* As such, this Court should attribute little weight to Davis’ history and background.

D. Additional Mitigating Factors

Additionally, Davis claims that his apology and remorse should be a mitigating factor. However, “retrospective remorse” is entitled to little weight in mitigation. *State v. Keene* (1998), 81 Ohio St.3d 646, 671; *State v. Stumpf* (1987), 32 Ohio St.3d 95, 106. Therefore, this Court should find that the mitigating evidence is easily outweighed by the serious aggravating factor in the case at bar.

E. Forgiveness

Davis maintains that his daughter’s forgiveness for purposefully killing her mother is mitigating evidence that deserves greater weight than the trial court granted. (Appellant’s Brief, p. 9) Contrary to Davis’ argument, forgiveness in itself does not mitigate his guilt. See, *Cone v. State*, 747 S.W.2d 353, 357 (Tenn.Crim.App.1987) (“We fail to see how a forgiving letter written by someone else would mitigate the appellant’s guilt.”). A similar argument was made, and rejected, in *Greene v. Arkansas*, 343 Ark. 526, 532 (2001), where the victim’s wife had forgiven the defendant. *Id.* In finding that the family of the victim’s forgiveness was irrelevant as a mitigating factor, the court reasoned:

We are not persuaded that Edna Burnett’s forgiveness and her opinion that life imprisonment is the appropriate penalty constitute relevant mitigating evidence. *Lee v. State*, supra. *** More on point, the Tenth Circuit Court of Appeals has spoken precisely on the issue of personal opinions of the appropriate sentence. See, *Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1987). In *Robison*, the court stated:

“An individual’s personal opinion of how the sentencing jury should acquit its responsibility, even though supported by reasons, relates to neither the character or record of the defendant nor to the circumstances of the offense. Such testimony, at best, would be a gossamer veil which would blur the jury’s focus on the issue it must decide. Moreover, allowing any person to opine whether the death penalty should be invoked would interfere with the jury’s performance of its duty to exercise the conscience of the community.***.” (Citations omitted).

Id. at *533.

Similarly, in *Barbour v. Alabama*, 673 So.3d 461 (Ala.Crim.App.1994), the victim's brother wrote a letter to the trial court requesting that the defendant be sentenced to life in prison rather than death. The trial court followed *Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1987), which held that evidence of a victim's family member's opinion of an appropriate or desired sentence is not relevant mitigating evidence. *Id.* See, also, *Floyd v. State*, 497 So.2d 1211 (Fla.1986) (court refused to allow testimony of murder victim's daughter that she and the victim opposed capital punishment as mitigating evidence).

What is more, in the present case, Davis' daughter's words of forgiveness reflected that such forgiveness was *for her benefit*: "Over the years, growing up, I have held -- it was almost like a grudge, you know, I want to say it was a little hatred, you know, a lot of grievance there, but I have forgiven him even though this was my mother. I have forgiven him, that is just something I don't want to carry that anymore." (T.p. 100-101)

In regard to this argument, the Twelfth District correctly afforded "this factor little weight. While this forgiveness was undoubtedly cherished by Davis, we fail to see how a third-party's state of mind or willingness to forgive lessens the moral culpability of the offender or diminishes the appropriateness of death as the penalty. Moreover, Davis' daughter testified that she forgave her father so that she could displace the burden of hate she had carried for many years. This forgiveness, born of a daughter's desire to move on with her life, does not otherwise mitigate Davis' action." *Davis*, 2011-Ohio-787, ¶ 91.

Such evidence fails to serve as a mitigating factor that outweighs the aggravating circumstance. As such, a victim's family's forgiveness or their opinions on an appropriate sentence is not considered relevant mitigating evidence and thus entitled to little or no weight. The trial court and appellate court properly assigned this mitigating factor little

weight and we ask this Court to similarly assign little weight to this factor.

F. Comparative Application

The death penalty imposed upon Davis for the aggravated murder of his estranged girlfriend is appropriate when compared with cases involving persons who were previously convicted of purposefully killing. See, e.g., *State v. Cassano* (2002), 96 Ohio St.3d 94; *State v. Cowans* (1999), 87 Ohio St.3d 68; *State v. Taylor* (1997), 78 Ohio St.3d 15; *State v. Carter* (1992), 64 Ohio St.3d 218; *State v. Bradley* (1989), 42 Ohio St.3d 136; *State v. Mapes* (1985), 19 Ohio St.3d 108.

In both *State v. Adams* (2004), 103 Ohio St.3d 508, and *State v. Awkal* (1996), 76 Ohio St.3d 324, even after the defendants each established a history of abusive family members, psychological disorders, and substance abuse problems, these mitigating factors were not considered enough to outweigh the aggravating circumstances. Comparative analysis of other persons previously convicted of purposefully killing another reveals these factors do not outweigh Davis' repeat murder specification.

The trial court correctly found the mitigating evidence offered by Davis was insufficient to outweigh the sole aggravating factor of his previous murder conviction. As such, Davis' death sentence is appropriate and proportional to his crime and we respectfully ask this Honorable Court to uphold his death sentence.

Proposition of Law V:

Davis' Twenty-six year length of stay on Ohio's death row does not constitute cruel and unusual punishment under either the United States Constitution or the State Constitution and does not violate binding international law.

A. *The United States Constitution and Ohio Constitution.*

In Davis' fifth assignment of error, he erroneously argues that twenty-six years on Ohio's death row constitutes cruel and unusual punishment, as prohibited under both the United States Constitution and Ohio Constitution.

The United States Supreme Court has held that the Eighth Amendment does not prohibit capital punishment. *Gregg v. Georgia* (1976), 428 U.S. 153. The Ohio Supreme Court has also repeatedly held that Ohio's current death penalty statute is constitutional and has never wavered from that view. *State v. Williams*, Butler App. Nos. CA91-04-060, CA92-06-110, 1992 WL 317025, *9, citing generally *State v. Jenkins* (1984), 15 Ohio St.3d 164; *State v. Maurer* (1984), 15 Ohio St.3d 239, ¶ 2 of syllabus. See, also, *State v. Buell* (1986), 22 Ohio St.3d 124; *State v. Bey* (1999), 85 Ohio St.3d 487; *State v. Craig* (2006), 110 Ohio St.3d 306.

Davis argues that the length of his stay on death row is unconstitutional because such length constitutes cruel and unusual punishment. To support this argument, Davis relies upon a memorandum decision denying certiorari, issued by Justice Stevens in *Lackey v. Texas* (1995), 514 U.S. 1045. In *Lackey*, the United States Supreme Court denied certiorari to review whether the petitioner's claim that execution after seventeen years on death row

constituted cruel and unusual punishment.²³ *Id.* at 1045. While Davis cites to Justice Stevens' memorandum decision denying certiorari, it is important to note that this memorandum does not establish that an inmate's lengthy stay on death row violates the constitutional prohibition against cruel and unusual punishment. Rather, Justice Stevens simply noted that "a denial of certiorari on a novel issue * * * permit[s] the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.'" *Lackey*, 514 U.S. at 1046, quoting *McCray v. New York* (1983), 461 U.S. 961, 963.

To date, there is no Ohio precedent that supports the proposition that an inmate's lengthy stay on death row constitutes cruel and unusual punishment. In fact, the Second District Court of Appeals of Ohio has previously ruled that the inmate's length of stay on death row in that case did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. See *State v. Chinn*, Montgomery App. No. 16206, 1997 WL 464736.

Furthermore, courts from other state and federal jurisdictions have held that lengthy stays on death row do not constitute cruel and unusual punishment under the Eighth Amendment. See e.g. *Thompson v. State* (Fla. 2009), 3 So.3d 1237 (thirty-one years on death row); *Ex Parte Bush* (Ala. 1997), 695 So.2d 138 (sixteen years on death row); *State v. Smith* (Mont.1996), 280 Mont. 158 (thirteen years on death row); *McKenzie v. Day* (C.A.9 1995), 57 F.3d 1461 (twenty years on death row); *White v. Johnson* (C.A.5 1996), 79 F.3d 432 (seventeen years on death row).

Additionally, Davis argues, without merit, that the delay in his execution is unconstitutional because, as he claims, it is the trial court's errors that are responsible for

23. Most recently, the Supreme Court in *Thompson v. McNeil* (2009), 129 S.Ct. 1299, was presented with a petition for a writ of certiorari to consider whether a thirty-two year stay on death row was unconstitutional, but the Supreme Court again denied certiorari on the issue.

such delay. Many state and federal courts have noted that delays in executions often serve as constitutional and procedural safeguards “to ensure that executions are carried out only in appropriate circumstances.” *Day*, 57 F.3d at 1466-67; See, also, *State v. Moore* (Neb.1999), 256 Neb. 553. Delays in executions are “a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences.” *Day*, 57 F.3d at 1467. “There are compelling justifications for the delay between conviction and the execution of a death sentence. The state’s interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners * * * to challenge their convictions for years.” *White*, 79 F.3d 432 at 439. Furthermore, the delays in executions due to death penalty postconviction proceedings is “a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone’s life.” *Chambers v. Bowersox* (C.A.8 1998), 157 F.3d 560, 570.

Most recently, upon the Supreme Court’s denial of certiorari in *Johnson v. Bredesen* (2009), 130 S.Ct. 541, 544-45, Justice Thomas, in a concurring opinion, stated that “[t]here is simply no authority ‘in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.’” *Id.* quoting *McNeil*, 129 S.Ct at 1301.

What is more, courts have even upheld death row sentences despite state errors being partially responsible for the lengthy stays on death row. See, e.g. *Booker v. State* (Fla. 2007), 969 So.2d 186, 200 (finding that “no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment,

especially where both parties bear responsibility for the long delay”). In fact, the Montana Supreme Court in *State v. Smith* (Mont. 1996), 280 Mont. 158, 185, determined that no cruel and unusual punishment violation occurred, despite four separate sentencing hearings which contributed to the inmate’s approximate thirteen year stay on death row. That court found that the “defendant has benefitted from the appellate and federal review process of which he has availed himself and which has resulted in the delay and multiple sentencing hearings in this case.” *Id.* at 185; See, also, *Hill v. State* (Ark.1998), 331 Ark. 312, 323 (holding that no constitutional violation occurred when defendant was resentenced to death even though he had been on death row for more than fifteen years).

In Davis’ case, he has made several attempts throughout his twenty-six years on death row for postconviction remedies in Ohio and in federal court. After various appeals by Davis, remands, and resentencing hearings, Davis was still ultimately sentenced to death. Any delay in Davis’ execution is part of our present law’s procedural safeguard in carrying out a death sentence. Based on the foregoing, there is no merit to Davis’ argument that his length of stay on death row is a constitutional violation and should therefore be overruled.

B. International law.

Davis argues that his twenty-six year stay on death row constitutes cruel, inhuman or degrading treatment or punishment, in violation of Article VII of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”). “The ICCPR is an international agreement that sets forth substantive and procedural rights to which all persons are entitled and establishes the Committee to monitor States-Parties’ compliance with the treaty’s provisions.” *Commonwealth of Pennsylvania v. Judge* (Penn. 2007), 916 A.2d 511, 514-15. Article VI of the ICCPR specifically addresses capital punishment.

Relevant portions of Article VI provide that:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

International Covenant for Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6.I.L.M. 368 (entered into force Mar. 23, 1976), Art.6(1)(2).

When the United States ratified the ICCPR in 1992, it made a reservation with regards to Article VI, stating that “the United States reserved the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.” *Judge*, 916 A.2d at 515; See, also, 138 Cong. Rec. 8068, 8070-71 (Apr. 2, 1992). The ICCPR therefore does not prohibit the U.S. from imposing capital punishment on a convicted person.

Article VII of the ICCPR provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” ICCPR, Art.7. While Davis argues that the ICCPR’s “cruel, inhuman or degrading treatment or punishment” provision is defined by international norms,²⁴ and that the United States is bound by those norms, the United States made a reservation to Article VII that clearly establishes that it is bound only by the confines of domestic law and not by international norms. Specifically, the reservation states that the U.S. is bound to the extent that “cruel, inhuman or degrading

24. Davis cited cases from the British Privy Council, the European Court of Human Rights, and the Supreme Courts of India, Zimbabwe, and Canada to show there is an international norm that declares that lengthy delays between convictions and executions constitute inhumane punishments.

treatment or punishment” means cruel and unusual treatment or punishment as prohibited by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States. See 138 Cong. Rec. S4781-01, S4783 (Apr. 12, 1992). Thus, whatever international norms exist in regards to “cruel, inhuman or degrading treatment or punishment,” as defined under Article VII of the ICCPR, these norms are outside the realm of Davis’ case.

Moreover, while the United States is a party to the ICCPR, the U.S. government and its constituent states are not necessarily required to enforce the provisions of the treaty as binding federal law. During the United States’ ratification process of the ICCPR, the U.S. specifically stated that the treaty would not be self-executing and that its provisions cannot be enforced in U.S. courts absent enabling legislation. *Judge*, 916 A.2d at 523, citing generally 138 Cong. Rec. S4781, S4783; See, also, Restatement (Third) of the Foreign Relations Law of the United States Sec. 111 (1987). To date, Congress has not enacted any such law with regard to the ICCPR. See *Sosa v. Alvarez-Machian* (2004), 542 U.S. 692.

Davis also refers to the prohibition against cruel, inhuman or degrading treatment as binding international law. However, state and federal courts have consistently rejected claims where customary international law is used as a defense against an otherwise constitutional action. See, e.g., *State v. Ferguson* (2006), 108 Ohio St.3d 451; *Buell v. Mitchell* (C.A.6 2001), 274 F.3d 337. For example, this Honorable Court has previously rejected the claim that an execution will violate international law and treaties to which the United States is a party. *Ferguson*, 108 Ohio St.3d 451, ¶ 85; See, also, *State v. Issa* (2001), 93 Ohio St.3d 49; *State v. Bey* (1999), 85 Ohio St.3d 487; *State v. Phillips* (1995), 74 Ohio St.3d 72. As recently as July 28, 2011, this Court has reaffirmed this position, finding “Short’s other international-law claims have all been rejected by this court and/or other courts. See *State v. Phillips* (1995), 74 Ohio St.3d 72, 101, 103-104, 656 N.E.2d 643; *Buell*

v. Mitchell (C.A.6, 2001), 274 F.3d 337, 370-372 (death penalty does not violate International Covenant on Civil and Political Rights (“ICCPR”) or the “customary international law norm”); *People v. Perry* (2006), 38 Cal.4th 302, 322, 42 Cal.Rptr.3d 30, 132 P.3d 235 (death penalty does not violate ICCPR); *Sorto v. State* (Tex.Crim.App.2005), 173 S.W.3d 469, 490 (death penalty does not violate United Nations Convention against Torture).” *State v. Short*, Slip Opinion No. 2011-Ohio-3641, ¶ 138.

As such, the Twelfth District was correct in finding “that ‘[h]ow these issues are to be determined is settled under American Constitutional law. Not a single argument is advanced directed to proving that the United States in these international agreements agreed to provide additional factors for decision or to modify the decisional factors required by the United States Constitution as interpreted by the Supreme Court.’” *Davis*, 2011-Ohio-787, ¶ 125 (Internal citation omitted).

In addition, a federal appeals court has already rejected the claim that Ohio’s death penalty statute violated the Supremacy Clause by not complying with various international treaties, including the ICCPR, and that the prohibition of executions is a customary norm of international law that is binding on the states. *Mitchell*, 274 F.3d at 370. The court stated, “[t]hat the determination of whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it their [sic] constitutional role to determine the extent of this country’s international obligations and how best to carry them out.” *Id.* at 375-76.

For the forgoing reasons, *Davis*’ length of stay on Ohio’s death row is not a violation of binding international law and, therefore, has no merit.

CONCLUSION

For the foregoing reasons, the death penalty should be affirmed.

Respectfully submitted,

MICHAEL T. GMOSE (002132)

Butler County Prosecuting Attorney



MICHAEL A. OSTER, JR. (0076491)

Assistant Prosecuting Attorney

Chief, Appellate Division

[Counsel of Record]

Government Services Center

315 High Street, 11th Floor

Hamilton, Ohio 45012-0515

Telephone: (513) 785-5204

PROOF OF SERVICE

This is to certify that copies of the foregoing Brief of Appellee was served upon:

LAURENCE E. KOMP (0060142)

P.O. Box 1785

Manchester, Missouri 63011

ALAN M. FRIEDMAN

Midwest Center for Justice, Ltd.

P.O. Box 6528

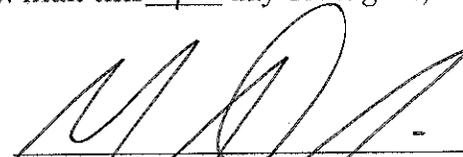
Evanston, Illinois 60201

JOHN P. PARKER (0041243)

988 East 185th Street

Cleveland, Ohio 44119

Attorneys for Appellant, by ordinary U.S. mail this 4th day of August, 2011.



MICHAEL A. OSTER, JR. (0076491)
Assistant Prosecuting Attorney

Crim R 25 Disability of a judge

(A) During trial

If for any reason the judge before whom a jury trial has commenced is unable to proceed with the trial, another judge designated by the administrative judge, or, in the case of a single-judge division, by the Chief Justice of the Supreme Court of Ohio, may proceed with and finish the trial, upon certifying in the record that he has familiarized himself with the record of the trial. If such other judge is satisfied that he cannot adequately familiarize himself with the record, he may in his discretion grant a new trial.

(B) After verdict or finding of guilt

If for any reason the judge before whom the defendant has been tried is unable to perform the duties of the court after a verdict or finding of guilt, another judge designated by the administrative judge, or, in the case of a single-judge division, by the Chief Justice of the Supreme Court of Ohio, may perform those duties. If such other judge is satisfied that he cannot perform those duties because he did not preside at the trial, he may in his discretion grant a new trial.

2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(G) As used in this section:

(1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or 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.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.