ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**Case No. 2011-0538**
Appellee,	:	**ON APPEAL FROM THE BUTLER COUNTY COURT OF APPEALS, TWEFLTH APPELLATE DISTRICT. CASE NO. CA2009-10-263**
vs.	:	
VON CLARK DAVIS,	:	
Appellant.	:	**CAPITAL CASE**

REPLY BRIEF OF APPELLANT VON CLARK DAVIS

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INTRODUCTORY STATEMENT

Davis stands on his original brief as it relates to his Fourth and Fifth Propositions of Law. Appellant notes that the Third Proposition of Law is dramatically impacted by this Court's consideration of the retroactive application of O.R.C. 2929.06 that is currently pending in *State v. Maxwell White*, Case No. 09-1661.

ARGUMENT

PROPOSITION OF LAW NO. I

THE TRIAL COURT ERRED IN VIOLATION OF THE EIGHTH AND SIXTH AMENDMENT AND DUE PROCESS TO ALLOW A 25-YEAR OLD, STALE JURY WAIVER TO STAND WHEN THERE WAS A NEW PENALTY HEARING.

In his opening brief, Davis argued that this Court should reconsider *State v. Davis* (1992), 63 Ohio St. 3d 44, where this Court held that Davis herein could not withdraw his earlier jury waiver. Davis cited to the recent United States Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 4235 (2010), which requires a defendant to be advised of the collateral consequences of his plea. Such collateral consequences would include that Davis would be subject to unfavorable changes in the law that benefit the state, and that he could not take advantage of favorable changes of the law.

The State accuses Davis of engaging in mental gymnastics because "there might be unknown and unforeseen consequences in the future." State's Brief p. 7. However, Davis is not requesting such an extreme rule, i.e. that a defendant be advised in detail of all possible changes in the law. Rather, *Padilla* simply requires that a defendant be advised of known collateral consequences, i.e. that future changes in the law that benefit the state will be applied and changes in the law that benefit the defendant will not be applied.

In that regard, Davis' argument is wholly consistent with *United States v. Ruiz* (2002), 536 U.S. 622, 629, which this Court relied on in *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283 par. 69, for the proposition that a defendant must be apprised of "how it would likely apply in general in the circumstances-even though the defendant may not know the specific detailed consequences of invoking it." Davis simply contends that he should have been advised generally that that future changes in the law that benefit the state will be applied against him and changes in the law that benefit him will not be applied at all. Davis does not contend that he had to have been advised of substance of the **multiple** changes to the statute that did in fact occur and how they specifically impacted the death penalty process in Ohio.

The State of Ohio incorrectly asserts that law of the case and res judicata should influence this Court's consideration of the claim. However, the factual and legal circumstances have changed. In no fashion did or could Davis have presented this issue before because there had been no **second** reversal leading to a **third** sentencing hearing, **there was not a different panel**, and **there is a different mitigation presentation**. *See* State's Brief p. 25 (Conceding that "...the new panel conducted a completely new hearing with new and different evidence."). This passage of time and change in circumstances undercuts any argument that these procedural impediments exist in the instant case. In fact, Davis could not have raised these issues earlier because they were not ripe and the factual basis did not exist.

The passage of time, the change in circumstances, and the new sentencing hearing, with as the State's concedes "new and different evidence," mandate application of this Court's recent decision in *State v. Wilson*, __ Ohio St.3d __, 2011-Ohio-2669. In *Wilson*, this Court specifically held, in the second syllabus, that "a defendant is not barred by res judicata from raising objections to issues that arise in a resentencing hearing, even if similar issues arose and

were not objected to at the original sentencing." *See also id.* par. 30 ("The doctrine of res judicata does not bar a defendant from objecting to issues that arise at the resentencing hearing or from the resulting sentence.")

The State of Ohio attempts to distinguish are unavailing. Davis is not attempting to push *Wilson* "beyond its breaking point." Rather, he seeks a straightforward application of *Wilson* to a *de novo* sentencing and the issues that arose therefrom.

For similar reasons, the State misreads *State ex rel. Special Prosecutors v. Judges of Belmont Cty. Court of Common Pleas* (1978), 55 Ohio St.2d 94. The law-of-the-case doctrine of *Special Prosecutors* does not apply to Davis' claim because his motion to withdraw his jury waiver was based on "grounds not resolved in the previous appeal." Indeed, even the State conceded in its brief at p. 24 that a "...**new** panel conducted a **completely new** hearing with **new and different** evidence." (emphasis added). Because, as even the State concedes, everything is "new", "completely new" and/or "new and different," the trial court was considering a new argument or ground not resolved in the previous appeal. Because Davis presented an argument that could not have been resolved in the previous appeal, law of the case doctrine simply does not apply.

Additionally, the State utterly ignores and fails to address in its brief the actual jury waiver signed by Davis, accepted by the trial court and journalized. When Davis waived his right to a jury for the first proceeding he specifically waived his jury for a specific panel. The waiver signed by the trial court states:

> "I, Von Clark Davis, defendant in the above cause, appearing in open court this 8th day of May, 1984, with my attorneys, Michael D. Shanks and John A. Garretson, do hereby voluntarily waive my right to trial by jury and elect to be tried by a court **to be composed of three judges, consisting of Judges Henry J. Bruewer, William R. Stitsinger, and John R. Moser**..."

Jury Waiver, T.d. 84 (emphasis added). The jury waiver colloquy reaffirms and incorporates that understanding:

> By the Court: And it goes to all phases except as to the rulings on the evidence and findings of fact. Well, if nobody has anything further to say we'll have three judges will be here tomorrow, you know who they are, and they're in this form here. It'll be myself and Judge Moser and Judge Stitsinger.
>
> Mr. Davis: Yes....

Transcript of Motions p. 61.

The jury waiver signed by Davis, accepted and journalized by the trial court, and reviewed at the jury waiver colloquy specifically tied the waiver to three particular judges. Initially, at the first two sentencings, the composition of the three judge had not changed. Thus, the State of Ohio fails to explain how Davis could have raised this unripe issue in his first two ultimately successful appeals.

Further, and unaddressed by the State, the State accepted a waiver tied to three specific judges. Davis simply desires that the State meet its end of the agreement, and if it cannot, the jury waiver cannot stand.

Notwithstanding these issues, to accept a waiver from 1984 in a 2009 sentencing hearing simply violates the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment. The Sixth Circuit anticipated this issue specifically noting:

> Granted, the resentencing hearing that we order today will not constitute a "trial" in the sense that the petitioner's guilt or innocence is again at issue. However, in this case, the proceeding can indeed be considered the functional equivalent of "trial" because, unlike sentencing in a non-capital case, it will take the form of an evidentiary proceeding on the question of whether Davis should receive the death penalty or some form of a life sentence.
>
> Moreover, we think there is a legitimate question as to whether a criminal defendant should be held to a jury waiver entered almost 25 years before his newly-mandated sentencing hearing. In the Sixth Circuit, at least, we have recognized that a defendant's jury waiver entered prior to the first trial of his case

> does not bar his right to a jury trial on the same case after remand from a reviewing court.

Davis v. Coyle (6th Cir. 2007), 475 F.3d 761, 780-781.[1] According to the United States Supreme Court, *de novo* mitigation hearings are trial like. *Bullington v. Missouri* (1981), 451 U.S. 430, 438. Indeed, mitigation hearings are so much like trials that double jeopardy attached. *Id.* at 444-446 ("By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence... The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial...Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial.")

To counter Appellant's arguments, the State creates a misimpression regarding United States Supreme Court authority with its citation to a section from Justice Scalia's opinion in *Sattazahn v. Pennsylvania* (2003), 537 U.S. 101, **which was only joined by two other justices**. This portion of the opinion was not the opinion of the Court and it is inappropriate to suggest otherwise, and entirely inappropriate to make the same error before this Court as it did in briefing before the court of appeals. The controlling authority from the Supreme Court is that mitigation phases are trial like and subject to constitutional protections, *Bullington*, notwithstanding Justice Scalia's protestations to the contrary.

Also unaddressed by the State, is that under Ohio law Davis was not convicted. *State v. Baker* (2008), 119 Ohio St.3d 197, syll., 2008-Ohio-3330. Indeed, the State did not even defend

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[1] This was also foreshadowed by a former member of this Court. *State v. Davis* (1992), 63 Ohio St. 3d 44, 52-53 ("Implicit within the court of appeals' opinion in its review of the sentence was a belief that its prior determination was entitled to a presumption of validity that needed to be overcome by appellant's argument.")

the Court of Appeal's discussion of *Baker*. Therefore, legally it is simply inaccurate to deny a jury waiver withdrawal request due to a conviction, when under *Baker* there was no conviction.

In conclusion, the harshness of the procedure herein required a defendant to be subject to a jury waiver that is approximately twenty-five years old. This violates Due Process principles of the Fourteenth Amendment and the Eighth Amendment because Appellant is subject to a stale jury waiver from 1984, the terms of which the State cannot comply with, when there are currently different facts and equities involved in 2009. In short, due to the new facts developed as mitigation, new judges determining Davis's fate, new attorneys, the operation of new statutory provisions, and two previous reversals the source of which was errors committed by the previous three judge panels, and the newly constituted three judge panel that he no longer wanted, the waiver in 1984 cannot be constitutionally construed to establish that Davis had sufficient awareness of the relevant circumstances and likely consequences of his waiver. Rather, Appellant did not knowingly and intelligently waive his right to a jury trial.

PROPOSITION OF LAW NO. II

THE THREE JUDGE PANEL ERRED IN NOT CONSIDERING AND GIVING EFFECT TO CERTAIN MITIGATING EVIDENCE.

The State asks this Court to ignore United States Supreme Court authority. In *Eddings v. Oklahoma* (1982), 455 U.S. 104,114-115, the Supreme Court specifically stated that a state court "may not give it no weight" if it is mitigation but "such evidence properly may be given little weight." The bottom line is that once evidence is accepted as mitigating it cannot be given no weight by a trial court. *Eddings.*

While the State cites numerous cases for a contrary view point, that authority does not withstand scrutiny and actually supports Davis' arguments. Each of the cases cited by the State involve scenarios where the trial courts found the evidence not to be mitigating. *See State v. Steffen* (1987), 31 Ohio St.3d 111, 129 (a court "...may properly choose to assign no weight to this evidence **if** it considers it to be non-mitigating...")(emphasis added).

However, Davis' trial court noted that the evidence presented by Davis was properly presented mitigating evidence. Thus, *Steffen* and the other authority cited by the State are not applicable and the *Eddings* admonition that a state court "may not give it no weight" if it is mitigation must be followed.

Indeed, the trial court specifically noted that it was engaging in a weighing process:

> The weighing process is just that. The panel must place the aggravating circumstance on one side and place all of the mitigating factors on the other side, and then determine beyond a reasonable doubt whether the aggravating circumstance outweighs the mitigating factors.

T.d. 435 p. 8. In utilizing the scales weighing metaphor, the trial court recognized that in order to place something on the scale it has to have some weight.

The State's position that a court can consider something that it "did not assign weight" is the height of illogic. Utilizing the trial court's metaphor of the scales, even a kindergartener knows that adding nothing to a scale means that the scale does not and cannot change. In short, 2+0 will always be 2. A "zero" cannot, by its terms, be weighed because it has no weight. This suggested policy of weighing something that has no weight is precisely what the United States Supreme Court recently found ineffectual in *Porter v. McCollum* (2009), __ U.S. __, 130 S.Ct. 447, 455 (a state court's treatment of mitigation problematic when it was "unreasonable to discount" mitigation by "reduc[ing it] to inconsequential proportions.).

The State of Ohio accuses Davis of playing a game of semantics. He is not. Rather, it is the State of Ohio that wants to play a game of semantics when it says something valued at zero actually has weight.

While in the first proposition of law the State argues that this Court is bound by previous appeals, the State argues this Court's treatment of categories of mitigation is irrelevant to current proceedings.[2] Contrary to the State of Ohio, this Court's treatment of mitigation and assessment of weight is absolutely relevant in addressing the trial court's dissimilar treatment of identical categories of mitigation.

Improperly, the sentencer gave "no weight" to evidence that Davis would never be released from prison if given a life sentence. T.d. 435 at p. 10. However, this Court disagreed and held in *State v. Davis* (1992), 63 Ohio St. 3d 44, 51, that this exact mitigating factor is entitled to "some weight."

The State asserts that there was no error because "costs" simply are not mitigation. State's Brief p. 24. Having not filed a cross appeal of the trial court's finding that it was

[2] This is yet another example of the State of Ohio's position in this case, and enforced by the courts below, that any benefit in the law or previous case-law cannot assist Davis. However, any perceived change that opens additional options to the State and restricts Davis will be applied.

mitigation, the State has waived such an argument. Setting this aside, under R.C. 2929.04(C), the defendant "shall be given great latitude" in the presentation of mitigation evidence. The "cost of incarceration" is an "individualized consideration" required by the Eighth and Fourteenth Amendments of the federal Constitution. *See Lockett v. Ohio* (1978), 438 U.S. 586, 605.

A State can not bar the consideration of evidence if the sentencer could reasonably find that it warrants a sentence of less than death. The standard for relevant evidence in the mitigation phase of a capital case is expansive, i.e. "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Tennard v. Dretke* (2004), 542 U.S. 274, 284-85.

The Eighth Amendment requires that a sentencer be able to consider and give effect to a capital defendant's mitigating evidence. *See Tennard*, at 285; *Boyde v. California* (1990), 494 U.S. 370; *Lockett*. There are "virtually no limits" placed on "relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard*, at 285; *Eddings*, 455 U.S. at 114.

Again, a trial court can neither give properly presented mitigation no weight nor unconstitutionally minimize properly presented mitigation. *Porter*, at 454-455 (Florida Supreme Court "either did not consider or unreasonably discounted the mitigation evidence.") The three judge panel herein similarly "unreasonably discounted" mitigation and "reduced them to inconsequential proportions."

Appellant will not revisit each of the trial court's shortcomings as argued in his opening brief, however, the trial court's treatment of two particular factors bears repeating. Specifically,

the trial court improperly diminished mitigating evidence related to good conduct in prison and the victim's forgiveness from the sole aggravating factor.

The trial court gave "little weight" to the mitigation that Sherry Davis has forgiven Appellant for the purposeful killing of her mother. T.d. 435 p. 9. This is substantial mitigation and should not have been minimized, particularly because it relates to the sole aggravating circumstance. Indeed, courts reverse when trial counsel fail to present such evidence. *See United States v. Kretutzer* (Army Ct. Crim. App. 2004), 59 M.J. 773, 783; *Scott v. Schriro* (9th Cir. 2009), 567 F.3d 573.

The sentencer gave "little weight" to Davis' good behavior in prison even though it is a recognized and important mitigation factor. *Skipper v. South Carolina* (1986), 487 U.S. 1, 106 S.Ct. 1669; *State v. Simko* (1994), 71 Ohio St.3d 483. Further, Davis' good behavior in prison deserved "some weight" according to the previous ruling of this Court. *Davis*, 63 Ohio St. 3d, at 51. As noted in his opening brief p. 25, courts routinely reverse for failing to consider and present *Skipper* evidence. The trial court also seemingly avoids the Sixth Circuit's recognition in this case that the evidence is "highly relevant." *Davis*, 475 F.3d at 773. It makes no sense that something can be "highly relevant" but it has little weight.

The State's contention that a reviewing court need not assign particular weight to mitigation and has the discretion to assign whatever weight it desires goes only so far. Again, the United States Supreme Court has held that courts may not preclude the sentencer from considering any mitigating factor and the sentencer may not, as a matter of law, refuse to consider relevant mitigating evidence. One may not give no weight to mitigating evidence by excluding it from consideration. *Eddings*, 455 U.S. at 113-114. Otherwise the rule in *Lockett* is

violated. As the Supreme Court stated in footnote 10 of *Eddings*, "*Lockett* requires the sentencer to listen."

The recent Supreme Court decision in *Porter*, 130 S.Ct. 447, reaffirms and strengthens this principle. Therein, the Supreme Court held that the Florida Supreme Court "either did not consider or unreasonably discounted the mitigation evidence" adduced in a post conviction hearing. Citing to *Eddings*, the Court held that the sentencer must be permitted to consider relevant mitigating factors. *Porter*, at 454-55.

In this case, the sentencer refused to "listen" as required by *Eddings*. Again, this is best demonstrated by the sentencing opinion, pages 9-11, where the sentencer gave "no weight" to evidence that appellant would never be released from prison if given a life sentence. (See page 10 of opinion) However, this Court held in one of its earlier decisions in this case that life in prison deserves "some weight." *State v. Davis*, 63 Ohio St.3d 44, 51. Thus, the trial court violated *Eddings* as supported by *Porter* case where the Supreme Court held that Florida "did not consider or unreasonably discounted" mitigation evidence.

In conclusion, the trial court improperly pursuant to *Eddings* provided no weight to recognized mitigation, and improperly diminished other mitigation pursuant to *Porter*. As a result, this Court should reverse and remand for a new sentencing hearing.

PROPOSITION OF LAW NO. III

THE TRIAL COURT ERRED IN NOT PRECLUDING THE DEATH PENALTY AND ENFORCING THE THEN EXISTING PROVISIONS OF O.R.C. 2929.03(C)(2)(a).

Davis maintains the arguments set forth in merit brief. However, the State's argument that the changes made to ORC 2929.03 are remedial rather than substantive does not hold water. Davis had a vested right and a substantive right to have the statutes enforced that were in effect at the time of his trial. Davis had a "vested right" to have three particular judges decide his fate. Through no fault of his own, the State can not live up to its end of the contract and therefore the contract is void.

The changes made to ORC 2929.03 are substantive and not remedial. The changes in the statute for Davis are the difference between life and death. This is substantive and not remedial. The punishment now for Davis has been increased because the statute has been changed years after his trial was completed. This is a classic example of an ex post facto change in the law and also a violation of due process under the federal constitution.

The affidavits filed in the original post conviction action in this case were never filed and made a part of the record in the re-sentencing hearing subject to this appeal. It was improper for the Court of Appeals to reach into the post conviction record (which is actually a separate civil proceeding) to examine affidavits not introduced into the penalty phase retrial of this criminal and capital case. The passing references to affidavits mentioned at pages 38-39 of the State's brief are not put into the proper context. The affidavits were never made part of the re-sentencing hearing which is subject to this appeal. T.p. 19, 22.

The "law of the case" doctrine is not applicable here as the State argues in pages 38-40. First, the sentence of death was vacated in federal court and a new sentencing hearing was

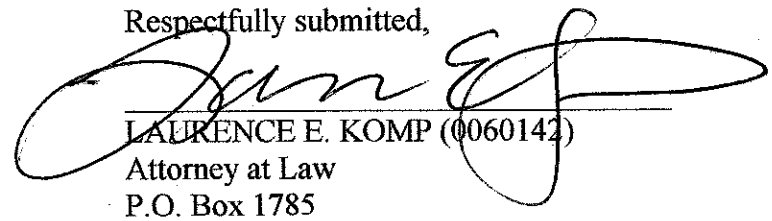
ordered. Second, the law-of-the-case doctrine, provides that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St. 3d 1, 3.

Here, the State is arguing that it is proper to apply documents filed in an old civil trial level post conviction proceeding as the "law of the case" on a Court of Appeals reviewing a new criminal appeal. *Nolan* holds otherwise. It is the decision of the "reviewing court" that is the law of the case for subsequent proceedings. The old post conviction affidavits were not introduced into evidence in the sentencing hearing subject of this appeal; the affidavits are not the "law of the case" (see *Nolan* supra) and it was improper for the Court of Appeals to reach into items not part of the record in this sentencing hearing to justify its decision.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court vacate his sentence of death, impose a life sentence, or remand for a new sentencing hearing with a jury.

Respectfully submitted,



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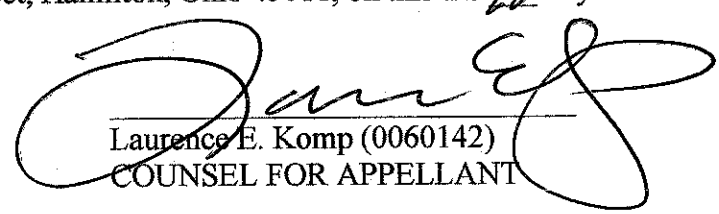
CERTIFICATE OF SERVICE

I certify a copy of the foregoing **APPELLANT'S REPLY BRIEF** was mailed regular U.S. Mail to Michael A. Oster, Jr. Assistant Butler County Prosecuting Attorneys at the Government Services Center, 315 High Street, Hamilton, Ohio 45011, on this the 22nd day of August, 2011.



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