[Cite as *State v. Davis*, 2011-Ohio-787.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-263
	:	O P I N I O N
- vs -		2/22/2011
	:	
VON CLARK DAVIS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR1983-12-0614

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POWELL, P.J.

{¶1} Defendant-appellant, Von Clark Davis, appeals the sentence of death

imposed upon him by a three-judge panel in the Butler County Court of Common Pleas. We affirm.

{¶2} In 1969, Davis was convicted of one count of Shooting with Intent to Wound, for shooting at his estranged wife, Ernestine. In 1970, Davis stabbed Ernestine to death, and later pled guilty to second-degree murder and was sentenced to life imprisonment. However, he was released in 1980, and while on parole in 1983, Davis shot and killed his estranged girlfriend, Suzette Butler, outside an American Legion Post. An autopsy revealed that Butler died as a result of multiple gunshot wounds to her head, and that the gun was located between four and 20 inches from her head when fired.

{¶3} The police investigation into Butler's murder revealed that on the day of the shooting, Davis approached two people for help in obtaining a gun and ammunition because he was unable to procure firearms due to his prior convictions for shooting at Ernestine and her subsequent death. Once in possession of the weapon and ammunition, Davis approached Butler at the Legion and the two went outside to talk. According to an eye-witness, as Butler and Davis spoke, Davis fired two shots at Butler's head, a third after Butler fell to the ground, and "after she was down, [Davis] bent down and shot her in the head." Two eye-witnesses identified Davis as the shooter.

{¶4} Davis was indicted on one count of aggravated murder, with the aggravating circumstance being his prior conviction for killing his wife, and one count of having a weapon under disability. Davis elected to have a three-judge panel hear his case, and waived his right to a jury. During trial, Davis raised inconsistencies in the eye-witness accounts of the shooting, and claimed that he had purchased the

murder weapon as part of an exchange with a third party for dental equipment. Davis denied killing Butler, and instead, testified that he left Butler with the third party talking in front of the Legion moments before she was killed.

{¶5} The three-judge panel (Original Panel) found Davis guilty, and after the penalty-phase hearing, imposed the death penalty. This court affirmed Davis' conviction and sentence in *State v. Davis* (May 27, 1986), Butler App. No. CA84-06-071 (*Davis I*). On appeal, the Ohio Supreme Court affirmed Davis' conviction, but vacated his sentence and remanded for re-sentencing because the Original Panel improperly considered non-statutory aggravating circumstances during the penalty phase. *State v. Davis* (1988), 38 Ohio St.3d 361 (*Davis II*).

{¶6} On remand, the Original Panel again imposed the death penalty, but did so after denying Davis' request to consider new mitigation factors such as his good behavior in prison since the time of Butler's murder. This court affirmed the Original Panel's re-sentence in *State v. Davis* (Oct. 29, 1990), Butler App. No. CA89-09-123 (*Davis III*), as did the Ohio Supreme Court in *State v. Davis* (1992), 63 Ohio St.3d 44 (*Davis IV*). Davis later filed an appeal after his petition for postconviction relief was denied within the common pleas court, and we affirmed the decision in *State v. Davis* (Sept. 30, 1996), Butler App. No. CA95-07-124 (*Davis V*).

{¶7} After exhausting the state appellate process, Davis filed a petition for a writ of habeas corpus in federal court. While the district court denied his petition, the Sixth Circuit Court of Appeals reversed and remanded with instructions that the panel consider Davis' new mitigation evidence that was left unconsidered after the first remand in *Davis II*. *Davis v. Coyle* (C.A. 6 2007), 475 F.3d 761 (*Davis VI*).

{¶8} During the passage of time between the appeals, one judge from the

Original Panel passed away, and the other two retired. The Butler County Court of Common Pleas assembled a new three-judge panel (New Panel) and considered all of the mitigating evidence, including evidence that arose since the time of Davis' first hearing before the Original Panel. The New Panel sentenced Davis to death. Davis now appeals the New Panel's decision, raising the following assignments of error. We have combined several assignments of error when appropriate, and for ease of discussion.

{¶9} Assignment of Error No. 1:

{¶10} "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."

{¶11} Assignment of Error No. 3:

{¶12} "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)."

{¶13} In Davis' first assignment of error, he argues that the New Panel erred in not granting his motion to withdraw his jury waiver, and in his third, that the New Panel did not have the option to consider the death penalty under a since-modified provision of R.C. 2929.03. These arguments lack merit.

{¶14} After Davis was first indicted for aggravated murder and having weapons under disability, he moved to sever the counts, arguing that the jury would be prejudiced by knowledge of his prior conviction for murdering Ernestine. Davis argued that if the murder charge was heard separately from the weapons under disability charge, and because the judge would not have to make a finding regarding

the aggravating circumstance under the murder charge unless there was a penalty phase, the jury would never know during the guilt phase of his trial that he had previously killed his wife. The trial court denied Davis' motion, finding instead, that the charges were properly joined under Crim.R. 8(A). Davis then waived his right to a jury trial, and signed a waiver after the trial court's colloquy ensuring an intelligent, knowing, and voluntary waiver of rights.

{¶15} According to R.C. 2945.05, a defendant may waive his right to have his case tried in front of a jury so long as the waiver is written, made in open court after the defendant has been arraigned, and has had an opportunity to consult with counsel. Once a defendant executes a waiver, "such waiver may be withdrawn by the defendant at any time before the commencement of the trial." R.C. 2945.05.

{¶16} In the past, Davis has challenged the validity of his waiver, and in the process, raised multiple challenges on appeal. However, each reviewing court has upheld the validity of the waiver, finding that Davis made it knowingly, voluntarily, and intelligently. In our past review of Davis' appeals, this court has noted that Davis' habitual challenges regarding his jury waiver were barred by the doctrines of res judicata or law of the case. We find those same doctrines apply in Davis' current appeal.

{¶17} "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*, 77 Ohio St.3d 93, 95, 1996-Ohio-337. (Emphasis sic.)

See, also, *State v. Reynolds* (Oct. 27, 1999), Summit App. No. 19062, 1999 WL 980568, *8 (finding appellant's assignment of error barred by res judicata where the claim "was addressed and rejected by [the] Court and by the Ohio Supreme Court during an appeal of right in a capital murder case").

{¶18} Davis argues that res judicata does not apply because he has not been properly convicted in the Butler County Court of Common Pleas, and cites *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, for the proposition that his final conviction has not been entered properly. However, *Baker* was specific to resolving a certified conflict regarding what a judgment of conviction must include pursuant to Crim.R. 32(C) in order to become a final appealable order. As Davis is not challenging whether his conviction by the Original Panel is in fact a final appealable order, his reliance on *Baker* is misplaced. Furthermore, the court in *Baker* specifically defined 'conviction' as "an act or process of judicially finding someone guilty of a crime" or "the state of having been proved guilty." Id. at ¶11. Davis was found guilty by the Original Panel, and that finding has never been disturbed by a reviewing court.

{¶19} The *Baker* court settled the certified conflict by finding that "a judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." Id. at syllabus. Davis' judgment of conviction contains (1) finding of guilt; (2) the sentence of death by the New Panel; (3) the signatures of all three judges who comprised the New Panel; and (4) an entry on the journal by the clerk of courts. Davis' has therefore been convicted, and his judgment of conviction is a final

appealable order properly before this court.

{¶20} A review of Davis' earliest appeals reveals that he failed to directly challenge his jury waiver. Because he could have challenged his jury waiver on due process or other grounds within his first two appeals, the doctrine of res judicata applies to his current challenge. On appeal to this court in *Davis I*, Davis argued that "the court erred in denying defendant's motion to bifurcate the trial and to sever the charges," but did not otherwise challenge the validity of his wavier. *Davis I* at 5. On appeal to the Ohio Supreme Court in *Davis II*, Davis again argued that the trial court should have granted his motion to sever, and that by denying such motion, he was "forced to waive the jury trial," but did not otherwise challenge the overall validity of the waiver itself. 38 Ohio St.3d at 363.

{¶21} Both this court and the Ohio Supreme Court rejected Davis' claim that he was forced into signing the jury waiver by virtue of the trial court's denial of his motion to sever. According to the doctrine of res judicata, Davis is barred from challenging the validity of his jury waiver in any other capacity or alleging that his due process rights were violated because those arguments should have been raised on his first appeal from the Original Panel's judgment.

{¶22} "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. * * * Thus, the decision of an appellate court in a prior appeal will ordinarily be followed in a later appeal in the same case and court. Absent extraordinary circumstances, such as an intervening decision by the Ohio Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same

case." *State v. Prom*, Butler App. No. CA2004-07-174, 2005-Ohio-2272, ¶19-20. (Internal citations omitted.)

{¶23} Once Davis' death sentence from the Original Panel was vacated and the case was remanded for re-sentencing, Davis began his direct challenges against the waiver. Time and again, and whichever court reviewed the claim, the waiver withstood scrutiny and has been upheld in each instance. According to the law of the case, as established by this court and others, Davis' waiver is valid.

{¶24} Davis argued on his second appeal to this court that his waiver was "invalid because he was not aware of the consequences of such a waiver, i.e. that he could be resentenced to death if the original death sentence was reversed." *Davis III* at 8. In overruling Davis' assignment of error, we concluded that "there is no evidence in the record, however, that [Davis] was ever misinformed about the consequences of his waiver, or that the wavier was other than knowing, intelligent and voluntary when made. The fact that subsequent decisional law may or may not have affected the tactical decision to waive the right to trial by jury provides no avenue of relief for [Davis] at this stage of the proceedings." Id. at 8-9.

{¶25} On appeal to the Ohio Supreme Court in *Davis IV*, Davis argued that he should have been permitted to withdraw his jury waiver because "he did not make an 'informed choice' between being tried by a panel or by a jury because he was not aware at the time he signed the wavier that his choice between panel or jury could ultimately affect his eligibility to be resentenced to death." 63 Ohio St.3d at 48-49. However, the court rejected Davis' argument, finding instead that "nothing in the record suggests that [Davis] was misinformed regarding the distinctions between trial by panel or trial by jury at the time [Davis] signed the 1984 waiver ***." Id. at 49.

{¶26} In his federal petition for habeas corpus, Davis argued once more that his wavier was involuntary after his motion to sever the counts was denied. He also argued that his waiver was not knowing and intelligent because when he signed his waiver, he could not anticipate that the Ohio Supreme Court would hold that a capital defendant whose sentence is set aside after a jury verdict would have been ineligible for re-imposition of the death penalty on a re-sentencing remand.[1] The Sixth Circuit denied Davis' claim, finding instead, that the denial was not a due process violation, and that the Ohio Supreme Court's ruling "cannot be said to have rendered his waiver of a jury trial involuntary." 475 F.3d at 779. The court also held that the jury waiver did not violate Davis' equal protection rights.

{¶27} We also note that when Davis appealed the trial court's denial of his petition for postconviction relief, he argued that his jury trial wavier was made unknowingly, and set forth several reasons for its invalidity. Davis argued he had not been informed that two of the judges on the Original Panel had represented a mortgage company in a 1970 foreclosure action against him, that he was never informed that "under R.C. 2929.03(D) there is an 'increased risk of being sentenced to death when tried before a three-judge panel,'" and that he "was misinformed as to the standard of proof in the colloquy with the trial court regarding [his] jury waiver." *Davis V* at 17. After we rejected these arguments, we affirmed the decision to deny postconviction relief.

{¶28} At each stage of Davis' appellate proceedings and his request for post-conviction relief, he has, either directly or indirectly, challenged the jury waiver for a

1. R.C. 2929.06(B) has since been modified by the Ohio General Assembly to allow a trial court to empanel a new jury should a defendant's death sentence be set aside due to an error in the sentencing phase.

myriad of reasons. Once more, Davis now challenges the validity of his waiver, claiming that denying his motion to withdraw the waiver constitutes cruel and unusual punishment or is otherwise a due process violation. However, as each court has held, it is clear from the record that Davis knowingly, voluntarily, and intelligently waived his right to a jury trial and elected to have his case heard by a three-judge panel. Nonetheless, and although we find the doctrines of res judicata and law of the case applicable to Davis' appeal, we will analyze the waiver's validity as it applies to Davis' argument that the age of his waiver causes a violation of due process and that the New Panel is not permitted to sentence him to death.

{¶29} We reiterate that the trial court, before accepting Davis' waiver, performed a colloquy advising Davis of his rights and what he was giving up by executing his waiver. While it is true that Davis could not have necessarily foreseen 26 years of court proceedings, the Ohio Supreme Court has held that "a defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it. Nor is the trial court required to inform the defendant of all the possible implications of waiver. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶68. The court went on to quote the United States Supreme Court's statement that "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. (Emphasis sic.)

{¶30} Holding Davis to his valid waiver does not constitute cruel and unusual punishment or otherwise violate his due process rights, as the mere passage of time

or changes in Davis' life do not invalidate an otherwise valid waiver. Regardless of Davis' arguments, it remains undisputed that R.C. 2945.05 does not enforce a time limit or otherwise curtail the validity of the waiver due to the passage of time. We also note that contrary to Davis' argument, the waiver is not invalidated because there are "different facts and equities" in play compared to 1983 when Davis elected to waive his jury right.

{¶31} In support of this contention, Davis relies on *State v. McGee* (1998), 128 Ohio App.3d 541, 545, in which the Third District Court of Appeals ruled that McGee was entitled to withdraw her jury waiver after the Ohio Supreme Court reversed her conviction "on the basis that she was neither charged nor found guilty of an essential element of the offense." The court went on to state, "we further conclude that McGee's previous waiver of a jury trial is also inherently revoked by the reversal of the conviction and the new indictment in this case." Id.

{¶32} Unlike McGee, Davis' conviction has never been reversed. The courts in *Davis I* and *II* directly considered whether his convictions were supported by the manifest weight of the evidence, and affirmed the Original Panel's finding of guilt. The state proved the essential elements of Davis' aggravated murder charge, and was never directed to amend the indictment or prove his guilt over again. Davis misapplies the holding in *McGee* and asks this court to allow him to withdraw his waiver because there are new facts and evidence that would be presented at his re-sentencing. However, the holding in *McGee* was specific to an instance where the state was required to go back and amend the indictment and "proceed anew from arraignment on the amended indictment to a new trial." Id. at 545. We therefore find *McGee* distinguishable from Davis' case, and do not agree with Davis that his "case

is no different than *McGee*."

{¶33} In addition to his reliance on *McGee*, Davis also cites the Sixth Circuit's opinion in *Davis VI* for the proposition that because the sentencing proceeding was a separate trial, he should have been permitted to withdraw his jury waiver. The court expressed its opinion that the penalty phase was the "functional equivalent" of a trial and conveyed its concerns regarding the age of the waiver. However, the court did not consider the impact Ohio's capital statutes have on jury waiver, or place the wavier in context of Ohio law. Regardless of the Sixth Circuit's concerns, we need not decide the issue of whether the penalty proceeding is a separate trial because the Ohio legislature has statutorily foreclosed the possibility of withdrawing a jury waiver after a panel of three judges determines guilt.

{¶34} As we previously recognized, R.C. 2929.03(C)(2)(b) states that once a defendant waives his right to a jury trial, that waiver applies to the penalty proceeding as well. R.C. 2945.05 does not permit the defendant to withdraw his waiver once the trial has begun, neither does the statute permit the defendant to withdraw his waiver in between the guilt and penalty phase of a capital trial. Davis was aware that by waiving his right to a jury, he was giving up that right for both the guilt phase of the trial, as well as the sentencing proceeding.

{¶35} Specifically, R.C. 2929.03(C)(2)(b) mandates that once a defendant in a capital case chooses to have his case heard by a three-judge panel in lieu of a jury trial, his penalty "shall be determined" by a panel of judges as well. Ohio's capital proceedings, therefore, do not permit a three-judge panel to hear the guilt phase, but then empanel a jury to determine the sentence. What Davis now asks this court to do as it pertains to withdrawing his wavier so that he can have his penalty phase

heard by a jury is in direct dereliction of Ohio's capital statutory scheme.

{¶36} The Ohio Supreme Court's analysis of a capital defendant's rights upon pleading guilty before a three-judge panel provides guidance as we analyze the case at bar. In *State v. Ketterer*, Ketterer waived his right to a jury and pled guilty to, among other crimes, aggravated murder. 2006-Ohio-5283 at ¶10. After the three-judge panel accepted Ketterer's guilty plea, it sentenced him to death. On appeal, Ketterer argued that the trial court denied his constitutional right to have a jury determine his penalty. The court rejected his argument, finding instead, that Ketterer had knowingly, intelligently, and voluntarily waived his right to a jury, and had therefore "acknowledged that he was waiving any right to have a jury decide what penalty to impose for the aggravated murder. Having freely relinquished his right, he cannot now argue that the trial court denied that right." Id. at ¶123.

{¶37} In addition to the application of waiver, the court went on to state, "further, the applicable statute, R.C. 2945.06, as well as Crim.R. 11(C)(3), contains no provisions permitting an accused charged with aggravated murder to waive a jury, request that three judges determine guilt upon a plea of guilty, and then have a jury decide the penalty. Instead, R.C. 2945.06 directs, 'If the accused pleads guilty to aggravated murder, a *court composed of three judges* shall examine the witnesses *** [and determine guilt] and *pronounce sentence accordingly*.'" Id. at ¶123. (Emphasis sic.)

{¶38} The court also noted that it had previously issued a writ of prohibition against a trial judge who had "created a hybrid procedure – a jury sentencing hearing to make certain findings upon which [the trial judge] would base his sentencing decision. We held that by creating a nonstatutory procedure to convene a jury, the

trial court proceeded in a manner in which he patently and unambiguously lacked jurisdiction to act." Id. at ¶124, citing *State ex. rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, overruled on other grounds.

{¶39} Although Ketterer pled guilty, whereas Davis was found guilty by the Original Panel, the statutory provision in R.C. 2945.06, as cited in *Ketterer*, also applies to defendants who waive their right to a jury and elect to have their guilt determined by a three-judge panel. We therefore find the holding in *Ketterer* highly analogous to the case at bar, and determine that Davis' waiver precludes him from having his punishment determined by a jury.

{¶40} As we've previously discussed, R.C. 2929.03(C)(2)(b) pronounces that upon a jury waiver and a guilty finding by a three-judge panel, the penalty "shall be" determined by the panel of three judges that found the defendant guilty. Davis argues next that his waiver should be voided because his death sentence was handed down by the New Panel, rather than the panel who tried him and determined his guilt.

{¶41} Justice Holmes' concurrence in *Davis II*, (decided in 1988) aptly foreshadowed the current issue, and stated persuasively that "the legislature was apparently not concerned about the possibility that the composition or the mental attitude of the three-judge panel may have changed on remand, as R.C. 2929.06 does not require *the* three-judge panel to make the resentencing decision thereunder." 38 Ohio St.3d 374. (Emphasis sic.) Justice Holmes' statement was later verified when the legislature amended R.C. 2929.06(B), expressly defeating Davis' argument that only the Original Panel can sentence him to death.

{¶42} According to R.C. 2929.06(B), "whenever any court of this state or 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 *** 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.)

{¶43} Although the statute clearly authorizes a new panel to consider the sentence, Davis nonetheless challenges the application of the statute, and argues that his case should be determined under the version of R.C. 2929.06(B) in place when he signed his waiver. At the time of his waiver, the statute did not include an express provision naming a new panel to determine sentencing if necessary.

{¶44} According to Davis' argument in his third assignment of error, should this court apply the current version of R.C. 2929.06(B), such application would violate the Ohio Constitution's prohibition against retroactive laws, as well as the ex post facto clause of the federal constitution.[2] We disagree.

{¶45} Section 28, Article II of the Ohio Constitution provides that the General Assembly "shall have no power to pass retroactive laws." The Ohio Supreme Court has stated, "it is now settled in Ohio that a statute runs afoul of this provision if it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *State v. Walls*, 96 Ohio St.3d 437,

2. This court is aware that the Ohio Supreme Court is now considering a similar issue in *State v. White*, Case No. 2009-1661. In *White*, the court is considering whether the retroactive application of R.C. 2929.06 as it relates to jury trials violates the Ohio Constitution. As Davis was tried by a three-judge panel, we will perform the following analysis as it relates directly to a jury waiver because different standards are applied to panels versus juries throughout Ohio's capital statutes.

2002-Ohio-5059, ¶9. The court then set forth a two-part test to determine whether a statute is impermissibly retroactive, which requires a court to identify first "a clearly expressed legislative intent that a statute apply retroactively" and second, to determine "whether the challenged statute is substantive or remedial." Id. at ¶10.

{¶46} According to R.C. 2929.06(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." This language expresses the clear legislative intent that the two-part test calls for. We also note that Davis meets the above-quoted standard in that he was sentenced to death prior to March 23, 2005, had his sentence set aside, and remained unsentenced prior to 2005, due to the Federal Court's remand in 2007.

{¶47} Regarding the second factor, Davis contends that the statute is substantive because once he signed his jury waiver, he had a "vested right" to have his guilt and sentence determined by the Original Panel. However, we disagree, and find the challenged statute remedial in nature.

{¶48} The *Walls* court defined remedial as "those laws affecting merely the methods and procedures by which rights are recognized, protected and enforced, not the rights themselves." 2002-Ohio-5059 at ¶15. The court went on to further clarify what constitutes a remedial statute, and explained that "it is generally true that laws

that relate to procedures are ordinarily remedial in nature." Id. at ¶17. In finding that the statute under which Walls was convicted was not impermissibly retroactive, the court concluded that "under 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 ***." Id.

{¶49} The change to R.C. 2929.06(B) is remedial, in that it affects only the methods or procedures by which the Butler County Court of Common Pleas implemented Davis' jury waiver. The amendment merely supplies an alternative should the first panel to hear a case be unable to perform its duty. The amendment did not, however, change the fact that Davis had the right to avoid a jury and have his guilt and penalty determined by a panel of judges.

{¶50} We also note that much like Walls, Davis was on notice that should a judge from the Original Panel become unable to participate in sentencing, another judge would take his place. According to Crim.R. 25 (B), "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."

{¶51} Even before the Ohio Assembly codified the ability of a new panel to participate in the sentencing proceeding of a capital case in R.C. 2929.06(B), the rules of criminal procedure addressed the contingency of a judge becoming disabled from participation in his duties after a verdict or finding of guilt. Crim.R. 25(B) was in effect at the time of Davis' original trial and penalty proceeding, and therefore controlled at the time of Davis' original jury waiver and remained in effect throughout

the subsequent proceedings.

{¶52} For the forgoing reasons, the amendment is remedial and moreover, curative, in that the legislators could have expressly authorized a new panel to hear a case when necessary, but did not add the express provision until the amendment. See *Burgett v. Norris* (1874), 25 Ohio St. 308, 317 (finding statutes curative when the legislature "could cure and render valid, by remedial retrospective statutes, that which it could have authorized in the first instance by proper enactment").

{¶53} Specific to Davis' contention that he had a vested right in having the Original Panel hear his case, we note that Davis does not challenge the finding of guilt by the Original Panel. His challenges are directed to the penalty phase, and his waiver as it related to the New Panel once the Original Panel could no longer be reconvened. While it is true that his waiver form listed the three judges who would comprise the panel, and the judges were named in open court during the colloquy, Davis signed and executed the waiver form, which specifically stated that "I am waiving said trial by jury, and making this election to be tried by *a court composed of three judges*." (Emphasis added.) The trial court then concluded that "this jury waiver and *election to be tried by a three-judge panel* is hereby accepted and entered upon the journal of this court." (Emphasis added.) These two specific statements demonstrate that Davis was waiving his right to a jury so that he could be tried before a three-judge panel, not that he was entitled to have only the Original Panel hear his case.

{¶54} Further, his arguments on appeal clearly demonstrate that Davis did not waive his right to a jury in order to have his case heard before the three judges who comprised the Original Panel, and who, we note, ultimately found him guilty and

sentenced him to death twice. As stated, Davis worried that a jury would be too prejudiced by his prior convictions to consider the aggravated murder charge with a complete lack of bias. In support of his argument on appeal that his waiver was involuntarily made, Davis filed an affidavit in which he stated, "on May 4, 1984, I elected to have the prior murder specification determined by a judge pursuant to O.R.C. 2929.022. I made this decision because I did not want the jury to hear about my prior murder during the guilt phase of my capital trial. I also wanted my weapon under disability charge to be tried separately. Accordingly, my attorneys filed a Motion to Sever that count. On May 8, 1984, the trial court overruled that motion. With the trial court's decision I knew the jury would hear about my prior murder. At this point I felt the jury would not be able to separate my prior murder from the current capital charge. As a result, I had no choice but to waive my right to a trial by jury. Had the trial court severed the charges, I would not have waived my trial by jury."

{¶55} Contrary to his contention that he had a vested right in having his case heard by the Original Panel, a defendant's right to waive his right to a jury is just that. It is a right to have his case heard before a panel of judges in lieu of a jury. It is not a right to choose which judges will hear the case. Davis' right to avoid having a jury determine his guilt and penalty, and instead have his case heard before an impartial, highly skilled, and knowledgeable panel of judges, remained exactly the same before and after the amendment. The right vested upon waiver, avoiding what Davis feared would be a prejudiced jury, was not compromised by the amendment in the least.

{¶56} While not directly on point, 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. (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.

{¶57} We also find that the amendment is not in violation of the ex post facto clause of the federal constitution. As stated by the Supreme Court, "although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." *Collins v. Youngblood* (1990), 497 U.S. 37, 41, 110 S.Ct. 2715. The court went on to list a four-part test when determining whether a statute is ex post facto. "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 42. (Emphasis sic.)

{¶58} Davis asserts that R.C. 2929.06(B) is ex post facto because the amendment changed the possible punishment and inflicted a greater punishment than he could have received under the former version of the statute, thereby meeting the third factor of the test set forth above. According to Davis' argument, under the former version of the statute, only the Original Panel could have sentenced him to

death so that his sentence would have defaulted to life imprisonment once the Original Panel was no longer able to convene.

{¶59} However, the statute, former or amended, does not lend weight to Davis' interpretation. There is no language in the previous version that directed a court to enter a life sentence if the panel could not perform its duties. Nor does Davis' argument take into consideration that Crim.R. 25(B) permitted replacement in the event that a judge was not able to perform postconviction duties such as sentencing.

{¶60} The Ohio Supreme Court addressed Davis' previous claim that once his sentenced was vacated, he could only be sentenced to life imprisonment. On appeal in *Davis II*, Davis cited the court's holding in *State v. Penix* (1987), 32 Ohio St.3d 369, in which the court held that a defendant whose death sentence is vacated after a jury trial is not subject to re-imposition of the death penalty upon resentencing. (As previously mentioned, the Ohio Legislature has since modified R.C. 2929.06[B] to state otherwise.) However, when directly confronted with its holding in *Penix* and how that holding applied to Davis, the court held that "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 *** such reviewing court may 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." *Davis II* at 373. (Emphasis added.)

{¶61} While the court did not specifically state that an entirely new panel could re-sentence Davis to death, it nonetheless stated that upon remand to the trial court, the state could seek the death penalty, and further refused to extend its holding in *Penix* to instances involving a panel. No statement by the Ohio Legislature or our

superior court supports Davis' contention that the New Panel was foreclosed from resentencing him to death, or that his sentence defaulted to life imprisonment once the Original Panel was no longer able to reconvene for resentencing.

{¶62} Under the former version of the statute, Davis was subject to either life imprisonment or death. Under the amended version of the statute, he was subject to either life imprisonment or death. The punishment under either version of the statute is the same, and was not increased due to the amendment in any way.

{¶63} Having found that Davis' jury waiver is still valid, and that R.C. 2929.06(B) is not unlawfully retroactive or does not otherwise violate the ex post facto clause of the United States Constitution, Davis' first and third assignments of error are overruled.

{¶64} Assignment of Error No. 2:

{¶65} "THE THREE JUDGE PANEL ERRED IN NOT CONSIDERING AND GIVING EFFECT TO CERTAIN MITIGATING EVIDENCE."

{¶66} Assignment of Error No. 4:

{¶67} "APPELLANT'S DEATH SENTENCE IS DISPORPORTIONATE (sic) AND INAPPROPRIATE."

{¶68} In his second and fourth assignments of error, Davis argues that the New Panel erred by not considering or giving the proper effect to his mitigation evidence, and that the panel's sentence was improper. There is no merit to these arguments.

{¶69} R.C. 2929.04(B) sets forth the procedure for sentencing a defendant to death, and requires that the trier of fact, "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" as well as a list of other factors. Those factors include: "(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."

{¶70} In addition to the catch-all provision within the seventh factor, R.C. 2929.04(C) instructs that, "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." However, the statute goes on to specifically state that "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." (Emphasis added.)

{¶71} The Ohio Supreme Court has further clarified the standard expected of a

court when weighing the mitigating factors against the aggravating circumstances. "*** [W]hile R.C. 2929.04(B)(7) evinces the legislature's intent that a defendant in a capital case be given wide latitude to introduce any evidence the defendant considers to be mitigating, this does not mean that the court is necessarily required to accept as mitigating everything offered by the defendant and admitted. 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." *State v. Steffen* (1987), 31 Ohio St.3d 111, 129.

{¶72} The court went on to give an example of a defendant's choice to introduce testimony from a high school teacher that he behaved well in school and was prepared in class. The court addressed this hypothetical mitigating evidence and stated that "the jury, or the 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." Id.

{¶73} While the trier of fact may decide to assign no weight to the mitigating evidence, it must, nonetheless, consider the evidence. According to the Supreme Court, in capital cases, "the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." *Skipper v. South Carolina* (1986), 476 U.S. 1, 4, 106 S.Ct. 1669. It was the Original Panel's refusal to consider Davis' new mitigation evidence that resulted in a *Skipper* error and entitled him to

resentencing.

{¶74} Upon remand, "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 decisionmaker." *State v. Newton*, 108 Ohio St.3d 13, 2006-Ohio-81, ¶60.

{¶75} Davis claims that the New Panel erred by failing to consider relevant mitigating factors, just as the Original Panel had done after the *Davis II* remand. However, a review of the record indicates otherwise. The New Panel considered the following mitigating factors: Davis' borderline personality disorder, alcohol abuse, love and support of family members and friends, the testimony of Davis' daughter that she has forgiven her father for killing her mother, Davis' good behavior in prison, childhood and family experience, and the impact of each upon Davis' personality development and mental health, remorse and apology, age (62), probability of no release from prison, whether a sentence of life in prison would bring closure to the victim's family, and the savings to taxpayers should a life sentence be imposed.

{¶76} The New Panel noted that in relation to these factors, it heard evidence from Davis' family and friends, including his daughter, explaining Davis' positive aspects and importance in their lives. The New Panel also considered testimony from prison personnel regarding Davis' good behavior and that his sole instance of misconduct occurred in 1990.

{¶77} Cynthia Mausser, Chairperson of the Ohio Parole Board, also testified and described the Parole Board's various policies and procedures. Mausser testified that it was "unlikely" that Davis would be paroled at the first opportunity and would "likely" spend a substantial portion of his life in prison. However, Mausser could not

state with certainty that any petition Davis made for parole would be denied, and further stated that Davis would be considered for parole at intervals ranging from one to 10 years for the rest of his life.

{¶78} The New Panel also heard from a clinical psychologist and certified addiction specialist who testified that Davis had a borderline personality disorder and alcohol dependence. The psychologist testified that Davis' personality disorder and alcohol dependence helped to explain how or why Davis could kill Butler, but did not otherwise excuse or justify his actions. According to the psychologist, Davis' good behavior while in prison is not surprising because individuals with borderline personality disorders function well in a highly-structured environment, such as prison.

{¶79} The state presented evidence that the aggravating circumstance was that Davis had been convicted of murdering Ernestine, an essential element of which was the purposeful killing of another. The state re-introduced the journal entry from 1971 wherein Davis was convicted for second degree murder, as well as Davis' original stipulation to the entry of conviction.

{¶80} Davis now challenges the way in which the New Panel weighed the evidence, and asserts that the New Panel's decision to assign little or no weight to some of the mitigating factors rendered the factors unconsidered. However, as noted above, the Ohio Supreme Court has specifically stated that while a trier of fact need consider the evidence, it need not accept as mitigating everything offered by the defendant, and further, may properly choose to assign absolutely no weight to this evidence if it considers it to be nonmitigating.

{¶81} In the sentencing opinion, the New Panel considered the aggravating circumstance and afforded Davis' previous conviction for killing Ernestine "great

weight." The New Panel then considered each piece of evidence Davis offered as mitigation, and assigned a corresponding weight to each factor. The fact that the Panel assigned little or no weight to some factors does not demonstrate that it failed to consider the evidence, nor does such weighing result in another *Skipper* error as Davis contends.

{¶82} The New Panel noted that the testimony offered to show that Davis is loved and supported by family is not atypical, and therefore did not deserve significant weight. The New Panel also considered the fact that Davis' daughter testified that she had forgiven her father for killing her mother, but found this factor deserved very little weight. According to the sentencing opinion, the New Panel also considered the testimony regarding Davis' dysfunctional family and childhood experiences to be unconvincing and entitled to little or no weight. The New Panel also found discrepancies between testimony from Davis' family and the psychologist's report. It nonetheless assumed that even if Davis' background contributed in some way to the development of his borderline personality disorder or alcohol dependence, the psychologist's diagnosis was entitled to little weight.

{¶83} Regarding Mausser's testimony, the New Panel determined that her opinion that Davis was unlikely to be released was "highly speculative and unconvincing." The New Panel, therefore, afforded no weight to Mausser's testimony. While the panel afforded no weight to the possible savings to tax payers, the record is clear that the New Panel considered the evidence because it overruled the state's objection that the cost issue should not be considered by the panel. The New Panel also considered and afforded little weight to Davis' good behavior while in prison, his advanced age, and his remorse and apology for murdering Butler.

{¶84} After considering and weighing all of the evidence, the New Panel found that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt and sentenced Davis to death. While Davis disagrees with the amount of weight, (whether it was great, little, or none), the panel assigned to each factor, the fact that the panel assigned less weight to the factors than he believes they deserve is not the same as the panel failing to consider the evidence. See *Newton*, 2006-Ohio-81 at ¶60 (dismissing Newton's claim that the trier of fact excluded relevant mitigating evidence where "the panel was aware of Newton's guilty plea, and its decision to give his guilty plea less weight than Newton argues it deserves is not equivalent to excluding the plea from evidence").

{¶85} We also briefly address Davis' contention that the New Panel erred because it assigned different weight to the factors than did the Ohio Supreme Court during its reviews in *Davis II* and *IV*. For example, 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.

{¶86} However, and for this very reason, the Ohio Supreme 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 decisionmaker." *Newton,* 2006-Ohio-81 at ¶60. 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.

{¶87} Regarding our own review of the proportionality and appropriateness of the sentence, we are guided by R.C. 2929.05(A), which requires this court to "review the judgment in the case and the sentence of death imposed by the court or panel of three judges *** [and] review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate."

{¶88} Specific to our independent review, we will address Davis' mitigation evidence as it compared to the aggravating circumstance. Once again, we reiterate the evidence Davis presented in mitigation.

{¶89} Davis presented testimony from the psychologist that he suffers from a borderline personality disorder. We give this evidence little weight because it is widely recognized that personality disorders are commonplace in murder cases. See *State v. Taylor*, 78 Ohio St.3d 15, 33, 1997-Ohio-243, (noting that the court "normally has accorded little weight to 'personality disorders' as a mitigating 'other factor'"). Furthermore, the psychologist testified that whatever disorder Davis had, it did not excuse or justify his actions. Similarly, Davis' dependence on alcohol is entitled to little weight for similar reasons. See *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276 (finding Johnson's personality disorder and drug dependence entitled to little weight).

{¶90} Davis also presented testimony from his mother, stepfather, younger sister, younger brother, daughter, and two friends regarding the positive aspects of

his life, how important he is to them, as well as their continued contact with him despite his incarceration on death row. We consider the fact that each witness opposed the re-imposition of the death penalty, and accord this factor some weight. Though certainly not an absolute, it can be expected that a defendant's family and friends would oppose a death sentence of their loved-one and offer some show of love and support. The support Davis receives from his witnesses, however, is not so out of the ordinary to afford this factor any greater weight than we have given it.

{¶91} Regarding the testimony of Davis' daughter that she has forgiven her father for killing her mother, we afford 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.

{¶92} Davis' good behavior in prison, however, does speak to Davis himself, and his choice to act in accordance with the prison's rules and regulations. We consider the testimony of the prison personnel that Davis has had a positive record during his incarceration and has even earned extended privileges while on death row. We afford this factor some weight.

{¶93} We have considered Davis' childhood and family experience, and the impact of each upon Davis' personality development and mental health, and afford this factor some weight. Much like substance abuse and personality disorders, negative childhood experiences are commonplace in death penalty cases. We

recognize that a negative upbringing can have a lasting impact on a person. However, we find nothing in Davis' childhood so horrific or distinctive to garner more weight than we afforded. We also note that courts have afforded similar or less weight to other capital defendants who have had comparatively worse upbringings and childhoods. See *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶136 (affirming death penalty even where Adams was found to be "certainly at the worst end of * * * disruptive families," had a physically and sexually abusive father, and began drinking alcohol at five or six years of age).

{¶94} We lend little weight to Davis' remorse and apology. Davis fought his conviction, claiming that a third party killed Butler and that he was innocent of the crime. Years later, Davis offered an unsworn statement to the New Panel, apologizing for his conduct, and called Butler's murder "nothing but an evil act by me." However, this remorse does little to alleviate Davis' moral culpability.

{¶95} We have considered that Davis is a man of advanced age, and apply no weight to this factor. At the time of his resentencing, he was 62 years old. Unlike the capital jurisprudence regarding juveniles, there is nothing inherently mitigating about sentencing a 62-year-old man to death. Davis was 36 when he was sentenced to death the first time, and nothing in the passage of time has increased the mitigation weight we will afford his age.

{¶96} According to Cynthia Mausser's testimony, Davis is "unlikely" to be paroled at his first opportunity. We afford this evidence little weight. Mausser 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.

{¶97} We afford no weight to evidence that imposing a life sentence in lieu of a death sentence would save taxpayers money or provide closure for the victim's family. We have 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. Similarly, Davis' contention that a life sentence would bring closure to Butler's family deserves little weight. The Butler family's state of mind has nothing to do with Davis' moral culpability and is not mitigating evidence we will lend significant weight to.

{¶98} We find that the aggravating circumstance is entitled to great weight. Previous to killing Butler, Davis killed his estranged wife Ernestine. He then pled guilty to second-degree murder, an essential element of which was the purposeful killing of another. See *Taylor*, 78 Ohio St.3d at 34 (noting that "a prior murder conviction can be even more grave than other aggravating circumstances").

{¶99} Upon review of all of the facts and evidence, including all of the new mitigation evidence that has arisen since the time of Davis' incarceration for Butler's murder, we find that the aggravating factor outweighs the mitigating evidence beyond a reasonable doubt.

{¶100} Davis was sentenced to death for an offense committed before January 1, 1995. Therefore, in compliance with R.C. 2929.05(A), before we determine whether the sentence of death is appropriate, this court "also shall review all of the facts and other evidence to determine if the evidence supports the finding of

the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case."

{¶101} After performing our statutory duty under R.C. 2929.05, we find that the sentence of death is appropriate. This court has reviewed the facts and all evidence, and finds that the evidence supports the finding of the aggravating circumstance.

{¶102} According to R.C. 2929.04(A)(5), the state may seek the death penalty if it is able to prove that, "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 ***." The record demonstrates that the evidence supports the finding of the aggravating circumstance because the state produced Davis' 1971 entry of conviction for the second degree murder of Ernestine, an essential element of which was the purposeful killing of another.

{¶103} Based on our discussion of Davis' second assignment of error, we have established that the New Panel properly weighed the aggravating circumstance Davis was found guilty of committing, and the mitigating factors. We are also persuaded from the record that the aggravated circumstance for which Davis was found guilty, his prior conviction of murder in the second degree, outweighs the

mitigating factors present in the case beyond a reasonable doubt.

{¶104} According to R.C. 2929.05(A), we are also directed to "consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases." This statutory requirement is "satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." *Steffen*, 31 Ohio St.3d at 123-124. Davis has submitted several cases for our review in which the court decided to impose a life sentence in lieu of the death penalty. However, the Ohio Supreme Court has stated that we need not consider "any case where the death penalty was sought but not obtained or where the death sentence could have been sought but was not." Id. at 124.

{¶105} A review of the cases in which this court has found the death penalty appropriate demonstrates that the penalty imposed in the case at bar is not excessive or disproportionate. In *State v. DePew* (June 29, 1987), Butler App. No. CA85-07-075, we reviewed a death sentence imposed after DePew was convicted for killing three people and setting fire to their home during the commission of a robbery. In mitigation, we considered that DePew had never been arrested or convicted previously, he was helpful to others, and he did not initially intend to kill anyone during the burglary. We upheld the sentence of death.

{¶106} In *State v. Lawson* (June 4, 1990), Clermont App. No. CA88-05-044, Lawson was sentenced to death after he kidnapped and later shot and killed a man who implicated Lawson and his brother for numerous criminal activities. In mitigation, we considered that Lawson had an extensive history of alcohol and drug abuse, was sexually abused by a relative as a teen, had a low IQ, reacted impulsively to stress, and was described as being very close to and protective of his family. We upheld the

sentence of death.

{¶107} In *State v. Webb* (May 24, 1993), Clermont App. No. CA91-08-053, we reviewed the sentence of death imposed upon Webb after he killed his son by setting fire to the family home. We weighed Webb's aggravating circumstance against the evidence that he was only twelve years old when his father, who he idolized, died in an automobile accident, that he had a low IQ, that he was devastated after his first wife died in an automobile accident, and that friends and relatives of Webb and his deceased son pleaded for a life sentence because they felt that Webb could still contribute positively to their lives. We found that the mitigating evidence did not outweigh the aggravating circumstance.

{¶108} In *State v. Williams* (Nov. 2, 1992), Butler App. Nos. CA91-04-060, CA92-06-110, Williams challenged the death sentence imposed upon him after he shot and killed a cab driver during the commission of a robbery. In mitigation, Williams offered evidence that his family relationships with his mother and his maternal grandmother were good, that he was helpful around the house to both his mother and grandmother, that he had a fairly happy childhood, but that he had also experienced difficulties in life due to the lack of contact with his natural father who barely acknowledged his existence. Williams also offered testimony from a psychiatrist who diagnosed him as having paranoid schizophrenia which "played a role" in his actions the night of the shooting. We found the death penalty appropriate.

{¶109} In *State v. Loza* (Apr. 19, 1993), Butler App. No. CA 91-11-198, we considered the appropriateness of the death penalty where Loza shot and killed his pregnant girlfriend's family after they refused to allow her to move to California with him. Loza offered the following mitigation evidence: he was born in Guadalajara,

Mexico, where his father abandoned the family when he was four or five years old, he had not seen his father since that time and was devastated by the loss. Loza also offered evidence that his mother moved to the United States and left him in the care of his siblings, and he did not see his mother until four years later when she hired a smuggler to bring her family to Los Angeles. Loza also presented evidence that he grew up in a state of emotional insecurity with a need for a family of his own and was obsessed with having a family so he could make amends for his own father's mistakes. We also considered that Loza had a deeply ingrained sense of loyalty to his girlfriend and unborn child that caused him to take whatever steps he thought were necessary to protect them, and that the victims had continually abused him both physically and verbally. We found that these mitigating factors did not outweigh the aggravating circumstances of his crime.

{¶110} *State v. McGuire* (Apr. 15, 1996), Preble App. No. CA95-01-001, presented an opportunity for this court to review a death sentence imposed upon McGuire after he raped and killed his victim. In mitigation, McGuire provided evidence that his childhood was unstable, he did not have a close relationship with either parent, that he started using drugs at an early age, and that he had a number of special needs as a child that went unidentified and untreated in his adolescence. McGuire also presented evidence that he had adjusted well to prison life, was educating himself, and that he received special privileges in prison for his good behavior. This court found the death penalty appropriate.

{¶111} Finally, in *State v. Benge* (Dec. 5, 1994), Butler App. No. CA93-06-116, we reviewed the death sentence imposed on Benge after he killed his girlfriend during an argument and attempted to conceal her body. Benge presented evidence

that he suffered from personality disorders, had addiction issues, and that he never knew his father or had a relationship with him. Benge's family and friends stated that they loved him and did not want to see the death sentence imposed, and Benge expressed remorse for his actions. We found that the mitigating evidence did not outweigh the aggravating circumstance of his crime.

{¶112} Other than *Davis I* and *III*, this court has not considered the death penalty in an instance where the defendant's aggravating circumstance was a prior murder conviction under R.C. 2929.04(A)(5). Therefore, we are also guided by the Ohio Supreme Court's rulings in cases where the aggravating circumstance was prior to the offense at bar, the offender was convicted of an offense where an essential element of which was the purposeful killing of or attempt to kill another. See *Taylor,* 78 Ohio St.3d 15 (affirming death penalty where Taylor shot and killed his girlfriend's ex-lover and was previously convicted for murder); and *State v. Carter,* 64 Ohio St.3d 218, 1992-Ohio-127 (upholding death penalty where Carter was incarcerated for a previous murder conviction and then killed his cell mate).

{¶113} A review of the aforementioned cases demonstrates that the defendants in these cases offered mitigation evidence of similar import as Davis has offered, and that in each instances, death was found to be an appropriate penalty. We therefore find that Davis' sentence of death is not excessive or disproportionate.

{¶114} After fulfilling the review requirements set forth in R.C. 2929.05(A), we therefore find the sentence of death appropriate in this case and overrule Davis' second and fourth assignments of error.

{¶115} Assignment of Error No. 5:

{¶116} "TWENTY-SIX YEARS ON OHIO'S DEATH ROW CONSTITUTES

CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTION, AND INTERNATIONAL LAW."

{¶117} Davis contends, in his final assignment of error, that spending 26 years on death row is cruel and unusual punishment, and further violates international law. These arguments lack merit.

{¶118} According to the Eighth Amendment, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Section 9, Article I of the Ohio Constitution sets forth the same restriction: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."

{¶119} Davis argues that his lengthy stay on death row constitutes cruel and unusual punishment, and bases his proposition on a memorandum from Justice Stevens expressing his dissent from denial of certiorari in *Lackey v. Texas* (1995), 514 U.S. 1045, 115 S.Ct. 1421. However, the memorandum is not binding on this, or any, court. It merely expressed Justice Steven's desire to have the court address at what point the state's desire for retribution is satisfied by imprisonment as opposed to execution.

{¶120} The fact that the Supreme Court chose not to accept a case in which the defendant had been on death row for 17 years, does not aid Davis' argument that his time spent on death row constitutes cruel and unusual punishment. The Ohio Supreme Court, in Davis' own appeals and countless others, has upheld the constitutionality of the death penalty and definitively holds that capital punishment does not constitute cruel and unusual punishment. See *State v. Bradley* (1989), 42 Ohio St.3d 136. We fail to see how punishment deemed constitutional becomes

unconstitutional by waiting to implement it. We also note that the passage of time from Davis' original conviction and sentence to his current appeal is due to his own appeals.

{¶121} We are in no way blaming Davis for executing his right of appeal; appeals that we note have been successful. However, if Davis hopes to avail himself of these rights, and assuming future appeals of our current decision, he cannot claim that taking the time to thoroughly address and exhaust all possible appeals has violated his right to be free from cruel and unusual punishment. See *McKenzie v. Day* (C.A.9, 1995), 57 F.3d 1461, 1467 (noting that "most of these procedural safeguards have been imposed by the Supreme Court in recognition of the fact that the common law practice of imposing swift and certain executions could result in arbitrariness and error in carrying out the death penalty").

{¶122} We also note that several other state and federal courts have considered and rejected similar arguments. See *Thompson v. State* (Fla.2009), 3 So.3d 1237 (dismissing Thompson's claim that 31 years on death row was cruel and unusual punishment); *McKenzie*, 57 F.3d 1461 (rejecting McKenzie's argument that 20 years on death row constitutes cruel and unusual punishment); *White v. Johnson* (C.A.5, 1996), 79 F.3d 432 (overruling Johnson's claim that 17 years on death row was a violation of the Eight Amendment); *Ex parte Bush* (Ala.1997), 695 So.2d 138 (declining to find a 16-year stay on death row a violation of the Eighth Amendment); and *Stafford v. Ward* (C.A.10, 1995), 59 F.3d 1025 (denying an Eighth Amendment challenge to spending 15 years on death row).

{¶123} More recently, the Supreme Court was again offered the opportunity to address whether a lengthy stay of 32 years on death row constitutes cruel and

unusual punishment, and declined to do so. *Thompson v. McNeil* (2009), __U.S.__, 129 S.Ct 1299. As in *Lackey*, discussed above, Justice Stevens dissented in the court's decision to deny certiorari and stated his opinion that the issue should be reviewed. Justice Thomas, conversely, offered an explanation for his decision to concur in denial, and stated that he remained "unaware of any support 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. at 1301. He went on to quote *Turner v. Jabe* (C.A.4, 1995), 58 F.3d 924, 933, for the proposition that "it makes 'a mockery of our system of justice ... for a convicted murderer, who, through his own interminable efforts of delay ... has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.'" *Thompson* at 1301.

{¶124} Davis also contends that his time on death row, as well as the death penalty in general, violates international law specific to Article VII of the International Covenant on Civil and Political Rights. The Sixth Circuit has explained that international law agreements and treaties to which the United States belong (such as the International Covenant and Charter of the Organization of American States) do not prohibit the death penalty. *Buell v. Mitchell* (C.A.6, 2001), 274 F.3d 337. "Moreover, the United States has approved each agreement with reservations that preserve the power of each of the several states and of the United States, under the Constitution." Id. at 371. The effect of this reservation is that United States courts are not bound by international law on the issue of capital punishment where the death penalty is upheld as constitutional.

{¶125} In *State v. Williams*, we discussed the application and effect of international law on death penalty issues, and quoted the Fifth Circuit for the proposition 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." Butler App. Nos. CA91-04-060, CA92-06-110, 19, citing *Celesteine v. Butler* (C.A.5, 1987), 823 F.2d 74, 79-80, certiorari denied (1987), 483 U.S. 1036, 108 S.Ct. 6.

{¶126} The *Buell* Court specifically noted that in relation to the International Covenant's Article VII, "the United States agreed to abide by this prohibition only to the extent that the Fifth, Eighth, and Fourteenth Amendments ban cruel and unusual punishment." 274 F.3d 371. As we have previously determined that the years Davis has spent on death row do not constitute cruel and unusual punishment, his challenge under the guise of international law must also fail.

{¶127} Having found that a 26-year delay in Davis' execution does not constitute cruel and unusual punishment under federal, Ohio, or international law, we overrule Davis' final assignment of error.

{¶128} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.