In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-vs-	:	Case No. 2007-1741
Edward Lang,	:	
Appellant.	:	**Death Penalty Case**

On Appeal From the Court of Common Pleas
Stark County, Ohio
Case No. 2006 CR 1824A

Reply Brief of Appellant Edward Lang

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Preface

Appellant Edward Lang's Reply Brief addresses portions of the State's arguments contained in its Brief filed on October 27, 2008. By not responding to a specific argument, Lang does not concede that the State's argument is meritorious. Rather, Lang stands on the arguments set forth in his Merit Brief filed on June 9, 2008.

Statement of Facts

In its brief, the State mischaracterizes a number of key facts. It was Walker's idea to commit a robbery; Lang merely agreed to go along with it. (Vol. 4, T.p. 901.) Walker was also the one who furnished the target, a drug dealer he knew as Clyde (Jaron Burditte). (Id.) Once the plan was in motion, Walker and Lang waited for Burditte to arrive at the designated spot. During the interval, Lang did not load a round into the gun as the State claimed (State's Brief at p. 4.) but rather tried to chamber a round and instead caused it to fall on the ground. (Vol. 4, T.p. 883.) Walker picked it up and cleaned off his own fingerprints. (Id.)

The State also includes incorrect facts regarding the investigation of the murders. When the police interviewed Teddy Seery, he never said anything about Lang confessing. (State's Brief at pp. 6-7.) Only at trial, after working out a deal with police, did Seery testify that Lang confessed. (Id. at 935-36.)

The DNA that was collected was also a factor in the case, but not as the State said. The DNA testing performed on the pistol indicated that Walker was not the major source of DNA. (Id. at 1129.) Michele Foster of the Stark County Crime Laboratory could not exclude Lang as a possible minor source of the DNA. (Id.) But she could not say that Lang was, to a "reasonable degree of scientific certainty," the source of DNA on the gun. (Id.) In fact, she could not exclude any of the individuals involved in the case from the smaller DNA sample. (Id. at 1139.)

The State's account of the mitigation phase is also incorrect. Amongst defense counsel's failures was the failure to properly prepare. The attorneys misidentified their own expert, James Crates, as Krantz. (Mit. T.p. 85.) The State, in its brief, repeats this gaffe. (State's Brief at p. 10.) The State does not repeat its criticism of the mitigation evidence Lang presented during his trial. At trial, the State commented that the evidence was highly dubious, biased, and that Lang's

mother and sister had ample reason to lie. (Id. at 102.) Prosecutors attacked the witnesses as biased and noted the lack of corroboration for the defense's claims. (Id.) The prosecutor contended that, without any proof, the jury should dismiss the evidence as mere speculation. (Id.) In its brief, the State is generous with praise for defense counsel's mitigation efforts, describing Lang's mitigation witnesses as testifying "extensively" regarding his childhood and upbringing. (State's Brief at p. 8.)

Lang's trial attorneys only called two witnesses during the mitigation phase. Both were relatives, his mother and half-sister. Both testified to, but did not provide any other evidence of Lang's mental state. (Mit. T.p. 52, 63, 65.) Lang's mother testified to his numerous stays in mental health facilities but did not, nor did trial counsel supplement, any documentation or proof of his hospitalizations. (Id. at 17, 66-67.) Lang's mother also recounted his ordeal as his father's prisoner, but could not provide any police reports or any additional evidence of the abuse he suffered while in captivity. (Id. at 59, 62-63.) Defense counsel never called to the stand Dr. Jeffrey Smalldon and James Crates, their mitigation experts. (Id. at 85.)

Proposition of Law No. 1

A defendant's right to due process is violated when a juror who is related one of the victims, and has a prejudice and bias, is seated on the jury. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 10.

At trial, it came to light that Juror 386 had a personal relationship with Marnell Cheek, one of the victims. She did not disclose this relationship and upon discovery, the court did not hold a Remmer v. United States, 347 U.S. 227 (1954), hearing, as was required, to determine the extent of the damage done by a biased juror.

The State claims that there was no prejudice and that the court appropriately inquired into any taint in this matter. This creates too high a burden. "When a jury is composed, as this petitioner's was, of people who are personally familiar with the consequences of a defendant's crime, it cannot perform this function in an impartial manner." Brecheen v. Oklahoma, 485 U.S. 909, 912 (1988). The "presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000) (citations omitted); see also Hughes v. United States, 258 F.3d 453, 463 (6th Cir. 2001).

Even if the very presence of an impartial juror were not enough to taint the entire venire, the court did not conduct the requisite inquiry as the State contends. (State's Brief at pp. 16-17.) ("the trial court...conducted an adequate Remmer hearing, and Lang cannot now show that he was prejudiced by the manner in which the court conducted the Remmer proceeding. And a defendant is required to show actual prejudice in a Remmer situation in order to make a valid claim.") The court's failure to properly inquire prevented it from determining how much influence the biased juror did have. Without a proper inquiry, this Court cannot be convinced that Lang ever had a fair trial.

The court should have held a Remmer hearing. Only through a thorough and careful inquiry, could a malicious purpose or bias be uncovered. If any jurors were purposely lying to the court, as Juror 386 had, there was no way to determine it through a quick poll of the jury, as the judge did. Even if a juror was influenced but was not intent on disrupting the fairness of the trial, his or her very integrity may have prevented him or her from speaking freely, afraid of stepping forward in front of the judge and other jurors. An individualized hearing would have allowed these reticent individuals to step forward in an environment that was not intimidating.

The State tries to shift who has the burden in a Remmer hearing. In its brief, the State charges that in such situations where improper communication or contact is alleged, a "Remmer hearing, therefore, must be conducted in order to allow the defense an opportunity to explore whether the misconduct occurred, and what impact, if any, the misconduct had on the jury." (State's Brief at p. 16.) This is incorrect. Instead, "the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." Remmer, 347 U.S. at 229 (citing Mattox v. United States, 146 U.S. 140, 148-50 (1892); Wheaton v. United States, 133 F.2d 522, 527 (1943)). The trial court did not hold the required hearing, thus the State failed to do this and failed to assure that Lang's right to a fair and impartial trial had not been infringed.

Once the court discovered that Juror 386 had lied, it had no reason to believe her. This included her subsequent assurances that she had not spoken with any of the other jurors. The only reliable means of investigating the extent of her influence would have been an individualized inquiry of each juror, outside of the presence of the other jurors. But the court's investigation into this matter was never more than superficial. In United States v. Corrado, 227 F.3d 528, 536 (6th Cir. 2000), the Sixth Circuit found that when a court posed "three broadly-

worded questions to the jury as a group" and then asked for written responses, it "fell far short of the procedures set forth in Remmer." The Corrado court further held that the district court's failure to hold an evidentiary hearing pursuant to Remmer was an abuse of discretion and demanded remand for a proper inquiry. Id. The court's quick polling of the jury below was not enough for the government to meet its burden. See id. Given the inherently prejudicial nature of biased jurors, the interest of justice required further inquiry into Juror 386's influence. In failing to do so, the court deprived Lang of due process and an impartial jury. His conviction and sentence must be reversed and remanded.

Proposition of Law No. 2

> Expert scientific testimony that is not established to a reasonable degree of scientific certainty is unreliable and inadmissible. Admission of evidence that does not meet this standard violates a defendant's rights to equal protection, due process, and his rights to confrontation and to present a defense. U.S. Const. amends. V, XIV. It also violates Ohio R. Evid. 401-403.

In his Second Proposition of Law, Lang argued that unreliable scientific evidence, DNA, was admitted during his trial. He argued first and foremost that this Court should overrule its decision in State v. D'Ambrosio, 67 Ohio St. 3d 185, 616 N.E.2d 909 (1993), which allows for the admission of expert testimony coached only "in terms of possibility." Id. at 191, 616 N.E.2d at 915 (internal citations omitted).

In making his case for overruling D'Ambrosio, Lang noted that the admission of DNA evidence at his trial violated equal protection because the rule treats capital defendants differently than civil litigants, see, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886), and deprives him of his rights to confrontation and to present a defense. See, e.g., Davis v. Alaska, 415 U.S. 308, 315-16 (1974); Olden v. Kentucky, 488 U.S. 227, 231 (1988); Crane v. Kentucky, 476 U.S. 683, 690 (1986); California v. Trombetta, 467 U.S. 479, 485 (1984). Nowhere in its brief does the State address the constitutional concerns of the disparate treatment of expert testimony in capital cases or of the inability to defend and confront; instead, it cites to cases where the D'Ambrosio rule was followed. (See State's Brief at p. 21.) In fact, the State addressed precious little of the argument that Lang ***actually*** made. Its failure to defend D'Ambrosio strongly suggests that it is time for this Court to revisit that standard. Its failure to address Lang's argument that the admission of this unreliable evidence violated his rights to confrontation, equal protection, and right to present a defense similarly demonstrates their merit.

The State would have this Court ignore this error because the trial court instructed the jury that weighing this evidence was solely within the jury's province. (See State's Brief at p. 22.) This ignores the impact of scientific evidence on juries. Faced with a difficult decision, one that could be incorrect, "jurors may too willingly embrace the opinion of an 'expert.'" State v. Jones, 114 Ohio App. 3d 306, 319, 683 N.E.2d 87, 95 (1996); see also Daubert v. Merrell Dow Pharms., 509 U.S. 579, 595 (1993) (internal citation omitted); United States v. Frazier, 387 F.3d 1244, 1263 (11th Cir. 2004) ("Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse"); United States v. Rincon, 28 F.3d 921, 926 (9th Cir. 1994) ("Given the powerful nature of expert testimony, coupled with its potential to mislead the jury, we cannot say the district court erred in concluding that the proffered evidence would not assist the trier of fact and that it was likely to mislead the jury."); Karn v. Ingersoll Rand, 168 F.R.D. 633, 639 (N.D. Ind. 1996) ("[T]he impact of expert witnesses on modern-day litigation cannot be overstated"). Scientific "expert" evidence is particularly compelling to jurors, regardless of what weight it should really receive. See id.

And, the State did not merely argue that Lang's DNA was on the gun as suggested in its brief. (See State's Brief at p. 20.) Indeed, Lang agrees that it would be unsurprising to find his DNA on his own gun. But, that is not the argument made by the State. Instead the prosecutor proclaimed to the jury that the DNA evidence proved that Lang fired the gun that killed Burditte and Cheek. (Vol. 5, T.p. 1273-76; 1276-77; 1298-99; 1301; 1302.) Given the significance that jurors bestow on expert testimony and the improper manner in which the State of Ohio used this

evidence, the State cannot demonstrate beyond a reasonable doubt that this evidence did not affect the jury's decision. Chapman v. California, 386 U.S. 18 (1967).[1]

The DNA evidence presented below is so unreliable that the FBI will not allow it to be included in its CODIS database. There simply is no legitimate state interest in a capital conviction that rests on unreliable expert opinions. This Court should overrule D'Ambrosio. Admission of this unreliable evidence deprived Lang of equal protection, his right to present a defense, confrontation, as well as violating Ohio R. Evid. 401-03. This Court must vacate Lang's conviction.

[1] Repeatedly the State notes that Lang's trial counsel failed to object to this evidence. (See State's Brief at pp. 19-20.) Lang raised this failure to object as ineffective assistance of counsel in Proposition of Law No. 10.

Proposition of Law No. 3

> A defendant's right to Grand Jury indictment under the Ohio Constitution, and his rights to due process under both the State and Federal Constitutions are violated when the indictment fails to allege a mens rea element for the offense of aggravated robbery. U.S. Const. amends. V, XIV; Ohio Const. art. I, §§ 10, 16. This error also denies the defendant his rights against cruel and unusual punishment because it affects the jury's verdict on the O.R.C. § 2929.04(A)(7) specification. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, § 9.

At least one Ohio Court of Appeals has found that State v. Colon, 118 Ohio St. 3d 26, 885 N.E.2d 917 (2008), requires reversal where the indictment charging aggravated robbery under O.R.C. § 2911.01(A)(1) "omitted the mens rea element for the offense." State v. Lester, Case No. C-070383, 2008 Ohio App. LEXIS 3023 n.3 and **14 (Ham. Ct. App July 18, 2008).[2] Lester pre-dated State v. Colon II, 119 Ohio St. 3d 204, 893 N.E.2d 169 (2008). However, Colon II, which clarified when structural error is present, would not alter the Lester Court's decision that the O.R.C. § 2911.01(A)(1) count of an indictment must charge a mens rea element. See Lester, 2008 Ohio App. LEXIS 3023 n.3 and **14.

Even were O.R.C. § 2911.01(A)(1) a strict liability offense, as the State argues, this Court's analysis would not end there. Lang's charges of aggravated murder are based on the aggravated robbery felony, and those offenses were elevated to capital offenses based on that same felony. Any suggestion of "strict liability" fails with respect to the capital murder charge and related offenses.

Aggravated murder is not a strict liability offense. Instead, the defendant must possess the specific intent to kill. See, e.g., State v. Taylor, 98 Ohio St. 3d 27, 40, 781 N.E.2d 72, 85 (2002) ("the burden was on the state to prove specific intent to kill and that the jury was required

[2] This Court accepted Lester for discretionary review on December 3, 2008. State v. Lester, Case No. 2008-1725.

to find specific intent to kill before it could convict appellant of aggravated murder"). Any suggestion that "strict liability" applies in the capital context is inappropriate.

In assessing the impact of this error on Lang's trial, structural-error analysis is proper where the defective indictment resulted "in multiple errors that are inextricably linked to the flawed indictment." Colon II, 119 Ohio St. 3d at 205, 893 N.E.2d at 171. Like the error in Colon I, the indictment flaw herein "permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence." Colon I, 118 Ohio St. 3d at 31, 885 N.E.2d at 922 (citing State v. Perry, 101 Ohio St. 3d 118, 802 N.E.2d 643 (2004)).

The aggravated robbery was the central piece of the State's case. It underlies the State's charge of aggravated murder and it elevated this offense to a capital charge. While the trial court did charge the jury on "knowledge" with respect to the Aggravated Robbery charge (see Vol. 5, T.p. 1316-18, 1335, 1347-50), like Colon, there is no evidence that Lang knew of the uncharged element or that the prosecutor argued it. Colon II, 119 Ohio St. 3d at 205, 893 N.E.2d at 171 (citation omitted).

This error tainted both Lang's trial and sentencing phase.

Proposition of Law No. 4

When a defendant is charged with aggravated felony murder and the O.R.C. § 2929.04(A)(7) specification as either the principal offender or an aider and abetter, the jury must be given the option to find the defendant guilty under either the principal offender element or the prior calculation and design element of that specification. U.S. Const. amends. VIII, XIV, Ohio Const. art. I, §§ 9, 16.

At trial, Edward Lang's defense centered on his claim that Antonio Walker was the shooter (and Lang was his accomplice) in these two aggravated murders. However, the trial court omitted the prior calculation and design element from the jury instructions for the O.R.C. § 2929.04(A)(7) specifications on counts one and two. Thus, Lang argues in his brief that this error prejudiced his primary defense against the death penalty by effectively directing a jury verdict on the disputed principal offender element.

The State claims that Lang has waived this error because he did not object to it. The State argues that Lang was the principal offender (or shooter) in both aggravated murders so there is no genuine fact question regarding the omitted element on the (A)(7) specifications. The State also claims that the jury would have acquitted Lang of the (A)(7) specifications if it believed that he was the accomplice. And the State says that an instruction directing the jury to choose between the two (A)(7) elements would have created confusion over the jury's verdict — with a resulting claim of error on appeal. Each of the State's rejoinders fail.

1. Claim should be reviewed on merits

Lang's counsel did not object to this error but he is entitled to a merits review of this claim. This error should be noticed under Criminal Rule 52(B) because it affects Lang's substantial right to present mitigation under O.R.C. § 2929.04(B)(6). This error also affects his substantial right to present a defense against the death penalty under the Eighth and Fourteenth

Amendments. See Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citing Crane v. Kentucky, 476 U.S. 683 (1986)).[3]

2. Genuine fact question created by the evidence

In reviewing this claim on the merits, it is clear that the jury was presented with a genuine fact question as to whether Lang was the shooter or the accomplice. The State's claim that it put all its eggs in the principal offender basket at trial is unpersuasive on this record. The State is correct to say that its main position was Lang's guilt as the shooter. But the State also took the alternative position that Lang could be Walker's accomplice.

The trial prosecutor put Lang's statement — that he was guilty of conspiracy to commit murder — before the jury. (Vol. 4, T.p. 1005.) The trial prosecutor twice argued to the jury that Lang could be found guilty of the murders as an aider and abetter. (Vol. 5, T.p. 1264, 1297-98.) Moreover, the jury was instructed on counts one and two to consider Lang's culpability as an aider and abetter. (Vol. 5, T,p. 1312, 1314-15, 1330, 1332-33.) This instruction was given because the evidence supported it (and the State had no objection to it). The jury instructions on the aider and abetter theory establish a genuine fact question as to whether Lang was the shooter or the accomplice. Accordingly, the instructions on the (A)(7) specification should have conformed to that fact question.

The State challenges the evidence supporting Lang's accomplice theory by asserting that the only evidence to support it comes from Lang himself. The State dismisses Lang's statements as self-serving. However, the question of Lang's credibility is reserved for the jury and not an appellate court. See Barker v. Yukins, 199 F.3d 867, 874-75 (6th Cir. 1999). And the State's assertion of "self-serving testimony" applies with equal force to Walker's statements.

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[3] This error is also before this Court as a claim of ineffective assistance of counsel in Proposition of Law No. 10.

Walker pleaded guilty and he testified against Lang to avoid the death penalty. (Walker's lesser penalty reinforces the importance of giving Lang's jury the choice between the shooter and accomplice elements of the (A)(7) specifications. See O.R.C. § 2929.04(B)(6).) Walker's credibility was inherently suspicious as the jury was instructed to view his testimony with "grave suspicion." (Vol. 5, T.p. 1310-12.) Given the dearth of physical evidence connecting Lang to these murders, it is doubtful that the State could have convicted Lang without Walker's own self-serving statements. (See Propositions of Law Nos. 2 and 5.)

3. Risk of unreliable verdict on (A)(7) specifications

The State argues that this Court must presume that the jury would have acquitted Lang of the two (A)(7) specifications if it found that he was Walker's accomplice. Thus, the State claims that Lang actually benefitted from this instructional error. This argument is incorrect as it overlooks the logic of the rule announced in Beck v. Alabama, 447 U.S. 625 (1980).

Under Beck, a jury instruction on a lesser-included offense to a capital murder charge must be given if the evidence supports an acquittal of the greater offense and a conviction of the lesser one. Id. at 635-37. The Beck rule operates to prevent the risk of distortion in the jury's fact finding where the death penalty is involved. Id. at 637-38. This rule is designed to curb the risk of an unreliable conviction that occurs when the jury believes that the offender may not be guilty of each element of the capital murder charge but is nonetheless responsible for the victim's death. Id. at 634-38.

What Beck makes clear is that a reviewing court can not presume that a jury will follow the law to the letter in such situations. The risk identified in Beck is that of an unwarranted conviction where the capital defendant is obviously guilty of some offense. See id. at 634, 637. In other words, a jury may enter a guilty verdict to avoid the stark alternative of an acquittal, if it

believes that a defendant is responsible in some way for a victim's death, despite the government's failure prove to everything. See id. This constitutional rule of criminal procedure ignores the presumption of correctness that typically applies to the manner in which a jury deliberates after being instructed on the law. Id. at 634 ("[A] defendant is entitled to a lesser offense instruction ... precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory.").

As in Beck, there is a substantial risk that the jury would not acquit Lang of the (A)(7) specifications even if it had reasonable doubts that he was the shooter. Lang's participation in these double homicides was uncontested by his defense team. The only contested issue was Lang's degree of culpability; that is, whether Lang was the shooter or the accomplice. (See State's Brief at 49, "Lang's defense was clearly that Walker had been [the shooter] ....") Similar to the situation in Beck, the absence of an instruction on the accomplice element of the (A)(7) specifications (prior calculation and design) created the risk of distortion in the jury's fact finding process. Under the logic of Beck, the jury could have convicted Lang of these (A)(7) specifications because Lang obviously participated (somehow) in two capital murders.

4. No risk of confusion when jury properly instructed on (A)(7) alternatives

The State claims that confusion would result if the jury had been instructed on the prior calculation and design element of the specifications. In other words, the record would not show which element the jury selected. According to the State, Lang could exploit that confusion by claiming error on appeal based on a nebulous jury verdict. This argument lacks logic as it misses the point of Lang's claim and it overlooks this Court's pronouncements on the alternative elements of the (A)(7) specification.

The principal offender and prior calculation and design elements of the (A)(7) specification "are construed in the alternative." See State v. Penix, 32 Ohio St. 3d 369, 371, 513 N.E.2d 744, 747 (1987); id. at 374, 513 N.E.2d at 749 (Holmes, J., dissenting) (describing principal offender and prior calculation and design as "mutually exclusive"). A defendant may be charged, and the jury instructed, with both elements stated "disjunctively in the same specification." See State v. Moore, 81 Ohio St. 3d 22, 40, 689 N.E.2d 1, 17 (1998). However, a defendant may be convicted of only one of these elements. See id. ("The trial court erred in not instructing the jury to be unanimous in agreeing on which alternative Moore was guilty of."). The jury must therefore choose one alternative in this specification when it enters a verdict. Contrary to the State's argument, there is no confusion in the record when the jury is instructed to choose one "alternative" (A)(7) element. See Penix, 32 Ohio St. 3d at 371, 513 N.E.2d at 747. Proper instructions and verdict forms eliminate juror confusion and error on appeal. See Moore, 81 Ohio St. 3d at 40, 689 N.N.2d at 17.

Lang's claim is that he was entitled to have the jury choose one of these elements — and enter a specific verdict on one of them — because the evidence could support a verdict on either element. Cf. State v. Chinn, 85 Ohio St. 3d 548, 560, 709 N.E.2d 1166, 1177 (1999) ("There was no evidence to suggest that appellant if he was present at the time of the aggravated murder, was anything but the actual killer. Therefore, in order to find appellant guilty of the R.C. § 2929.04(A)(7) specifications, the jury would have had to conclude that appellant was the actual killer."). The evidence and the jury instructions on aider and abetter culpability created a genuine fact question if Lang was the shooter (principal offender) or if he acted as Walker's accomplice (prior calculation and design). But the instructions on the (A)(7) specifications failed to conform to the evidence, thereby prejudicing Lang's substantial rights. As in Beck, the trial

court's failure to instruct on the accomplice element of the (A)(7) specification creates the risk of an unreliable death sentence through distortion in the jury's fact finding process.

Proposition of Law No. 5

An accused is deprived of substantive and procedural due process rights when a conviction results despite the State's failure to introduce sufficient evidence. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 9, 16.

Lang's conviction was contrary to the manifest weight and sufficiency of the evidence. At trial, the State presented testimony from highly biased and incredible witnesses. The conclusiveness of the physical evidence was also overstated. The evidence does not support Lang's conviction.

1. Sufficiency of the Evidence

The State's requirement that to prevail on a sufficiency of the evidence claim, Lang "must demonstrate that the evidence, when viewed in a light more favorable to the prosecution, fails to demonstrate each and every element of the offenses charged[,]" impermissibly increases the difficulty of the standard. (State's Brief at p. 35.) The test for determining sufficiency of the evidence to establish guilt beyond a reasonable doubt is whether there was "substantial evidence upon which a jury could have reasonably concluded that all the elements of an offense have been proven beyond a reasonable doubt." State v. Eley, 56 Ohio St. 2d 169, 383 N.E.2d 132, syl. (1978). It is not Lang's job to refute "each and every element of the offenses charged." (State's Brief at p. 35.) Instead, "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318 (1979); see also State v. McKnight, 107 Ohio St. 3d 101, 112, 837 N.E.2d 315, 334 (2005); State v. Moore, 81 Ohio St. 3d 22, 40, 689 N.E.2d 1, 17 (1998). A conviction based upon insufficient evidence violates the Due Process Clause of the Fourteenth Amendment. Jackson, 443 U.S. at 316. Where there is

insufficient evidence to support an appellant's criminal conviction, vacating that conviction is the appropriate remedy. Id. at 317.

2. Verdict Forms-Actual Killer

The evidence pointing to Lang as the actual killer was insufficient. Lang was found guilty based on flawed verdict forms. The State claims that credible evidence existed proving Lang was the actual killer. (State's Brief at p. 38.) The evidence that the jury relied on in finding Lang was the principal offender (Actual Killer) was not credible evidence that he was the actual killer.[8] The State's contention that his statement "confirmed many of the crucial details given to detectives by Walker" discounts that the State argued against the rest of his statement, that he was not the shooter. (State's Brief at p. 39.) The flawed forms further exacerbated this contradiction. The jury was unable to take into account the defense Lang presented: that Lang was merely an accomplice. This instructional error, as discussed in Proposition of Law No. 4, calls into question genuine issues of fact and undermines the sufficiency of the evidence used to convict Lang.

In an attempt to bolster the claim that Lang was the actual killer, the State again claims that he provided Jaron Burditte's name. (State's Brief at pp. 38-39.) While this misstates the facts, (Walker provided the name (Vol. 4, T.p. 901.)) it also downplays Walker's role, making more plausible the claim that Lang was the principal offender.

3. Physical Evidence

The State also erroneously claims, "Walker's clothes were taken from him and tested by Foster for trace evidence." (State's Brief at p. 42.) In actuality, Walker gave the police some of his own clothing to test; he directed the police to the items he wore. (Vol. 4, T.p. 1011.) But the police never tested Walker's clothes for gunshot residue. (Id. at 1102.)

The circumstantial evidence does not prove Lang was the shooter. Lang was driving his girlfriend's car when he was arrested. Wrapped in a towel, in the back to the car, the police found his gun. (State's Brief at p. 41.) The gun was swabbed for DNA. (Vol. 4, T.p. 1139.) The State concludes that finding DNA on Lang's gun is conclusive proof that he was the shooter. (State's Brief at p. 41.) That he must be the killer because his own DNA was on his own gun reaches the very limits of circumstantial evidence. Lang was excluded as the major source of DNA, and at best, could not be excluded from the minor source, on his own gun. But none of the individuals involved in the case could be excluded from the smaller DNA sample, including Antonio Walker. (Id. at 1139.) There was no physical evidence presented that proved Lang ever fired the gun, let alone on the night of the murders.[4]

4. Conclusion

The State claims "[i]ronically, Lang argues that the State promptly ended its investigation when it 'amassed enough evidence' against Lang, admitting that all the evidence pointed to Lang as the actual killer." (State's Brief pp. at 41-42.) Allowing the State to make the claim that there is enough evidence to support a conviction anytime the police amass enough evidence to go to trial would make the courts superfluous. This is not an admission that the State's evidence was sufficient, rather it illustrates that the police did not investigate all leads or evidence, as justice required. A proper investigation pursues all leads until the discovery of the truth, rather than following one theory at the exclusion of all others. The State's argument also continues to ignore the fact that the evidence exculpating Lang as principal offender was never properly investigated or presented.

[4] Lang's second proposition of law is incorporated here by reference.

Further, the flawed verdict forms prevented the jury from considering all of the options. Had the verdict forms conformed to the law, they would have let the jury consider the defense's theory. Had the jurors been given both the evidence that Lang was not the principal offender and the chance to elect this option on a verdict form, they would have.

The evidence admitted against Lang was insufficient, as a matter of law, to support his conviction. It fell short of establishing all of the elements of the crimes beyond a reasonable doubt. Without proper evidentiary support, Lang's convictions violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jackson, 443 U.S. at 316. The evidence also lacked in weight; no jury could reasonably conclude that the State proved all of the charged elements beyond a reasonable doubt. This Court must vacate his convictions and remand his case for a new trial.

Proposition of Law No. 7

Admission of the prior consistent statement of a witness violates Ohio R. Evid. 801 and deprives a criminal defendant of a fair trial and due process. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

In his Seventh Proposition of Law, Lang argued that unreliable hearsay—Walker's testimony that his earlier statement to authorities was the same as his trial testimony—violated the Ohio Rules of Evidence and Lang's rights under the Confrontation and Due Process Clauses.

The State faults Lang for not objecting or arguing on appeal about Walker's earlier testimony, where he testified that his trial testimony was consistent with his earlier statement to Detective Kandel. (State's Brief at p. 49.) To be clear, Lang is raising as error any testimony given by Walker indicating that his trial testimony was the same as his earlier statement to police. If Lang failed to identify any such statement, this Court should review it on the merits to avoid a repetitious claim that Lang's appellate counsel were ineffective for failing to raise such (State v. Murnahan, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992)), particularly since the facts and law supporting this error have been squarely presented to this Court in Lang's Merit Brief. See Anderson v. Harless, 459 U.S. 4, 6 (1982) (citing Picard v. Connor, 404 U.S. 270, 276-77 (1971)) ("28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim.").

The State also argues against Lang's claim because Walker's testimony did not include a recitation of his entire prior statement. (State's Brief at p. 49.) It is of no consequence that Walker did not repeat his earlier statement during his testimony; his trial testimony that his prior statement was the same as his trial testimony did precisely that.

The State does not address Lang's argument that Walker's testimony was inadmissible because it was not made "before the alleged influence, or motive to fabricate, arose." Tome v. United States, 513 U.S. 150, 158 (1995); see also Motorists Mut. Ins. Co. v. Vance, 21 Ohio App. 3d 205, 207, 486 N.E.2d 1206, 1208 (1985) ("What the rule permits is the rehabilitation of a witness whose credibility has been attacked by means of a charge that he recently fabricated his story or falsified his testimony in response to improper motivation or influence, by admitting into evidence a consistent statement made by the witness prior to the time of the suggested invention or of the emergence of the motive or influence to invent or falsify, as tending to rebut the charge."). Walker was a suspect in these murders; he had a motive to fabricate from the outset of this investigation. He had a vested interest in minimizing his own participation to obtain leniency. And, the absence of a deal when he gave his statement actually made Walker's position even more precarious. Even if there were no Confrontation Clause violation, Walker's self-serving statement could not be admitted at trial. See id.

This error rendered Lang's trial fundamentally unfair. Identity of the shooter was the only issue at trial. And the question for the jury to answer was who fired the fatal shots—Lang or Walker? The evidence suggesting that Lang was the shooter was not overwhelming, as evidenced by the prosecutor's argument and instructions that the jury could find Lang guilty as an aider and abetter. (Vol. 5, T.p. 164, 1297-98, 1312, 1314-15, 1330, 1332-33 (argument); id. at 1312, 1314-15, 1330, 1332-33 (instructions).) The State's strongest piece of evidence against Lang was Walker's testimony, and Walker escaped the death penalty by pointing his finger at Lang. Walker's testimony was a blatantly improper attempt to bolster his credibility. It was both unreliable and inadmissible.

The State's use of this unreliable hearsay violated the Ohio Rules of Evidence and Lang's rights under the Confrontation and Due Process Clauses. This Court must reverse Lang's convictions and remand his case for a new trial.

Proposition of Law No. 8

Admission of irrelevant and prejudicial evidence during a capital defendant's trial deprives him of a fair trial and due process. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

In his Eighth Proposition of Law, Lang argued that the trial court admitted irrelevant and inflammatory evidence, which required reversal of his convictions and death sentence.

1. Evidence suggesting gang involvement

The State argues the evidence suggesting that Lang was gang-involved was both relevant and admissible. This evidence included testimony that Lang wore "red" frequently (Vol. 4, T.p. 874) and that John Dittmore was employed by the City of Canton's gang unit. (Id. at 955).

The State suggests testimony that Lang wore "red" was relevant "to demonstrate familiarity with firearms and firearm violence, as well as with the drug culture and its violent culture." (State's Brief at p. 53.) This argument serves as verification for the impropriety and inadmissibility of such evidence—the essence of the State's argument is that the testimony was admissible because it would cause the jury to infer Lang was gang-involved and to then further make the inference that Lang was enmeshed in the violent gang lifestyle. But there was no evidence presented at trial that these murders were gang-related. This is apparent from both the prosecutor's opening and closing arguments, neither of which suggests this crime was gang-related. This evidence was irrelevant and had a particularly high threshold to prejudice Lang because of the violence and negativity that surrounds the gang lifestyle.

Testimony that John Dittmore was a member of the gang unit had precisely the same effect. Identification of any involvement by the gang unit necessarily suggested that Lang was gang-involved, particularly when coupled with the testimony regarding the color "red." The State's argument that homicide detectives could not testify that they were homicide detectives is

a pathetic analogy. (State's Brief at p. 53.) No prejudice emanates from that identification; there are two dead bodies so clearly there were homicides committed. However, there were two possible perpetrators of this offense—Lang and Walker. Suggesting that one of those possible perpetrators was gang-involved, with all of the negative and violent baggage encompassing that culture, was irrelevant and inherently prejudicial.

This evidence was offered to encourage the impermissible inference that Lang was gang-involved and violent, and thus make it more likely that he committed these murders. "Guilt by association is a philosophy alien to the traditions of a free society." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982) (citation omitted); see also Driebel v. City of Milwaukee, 298 F.3d 622, 651 (7th Cir. 2002) (citation omitted) ("The concept of guilt by association is repugnant to our notion of elemental justice and fair play."). Given the portrayal of gangs in society, the prosecutor sought to make it easier for the jury to find that Lang was the actual shooter.

Admission of evidence attacking Lang's character by associating him with gang activity was "gravely improper argument." See State v. Keenan, 66 Ohio St. 3d 402, 409, 613 N.E.2d 203, 209 (1993). In Keenan, the prosecutor referenced the defendant's friends had told the jury that Keenan's acquaintance with these people "tells you something about this man." Id. The testimony about the color red and its implications, as well as the involvement of the gang unit, similarly encouraged Lang's jury to draw a negative inference about his character based on suggestions of gang membership. "[A]n accused cannot be convicted...by proving he...is a bad person.'" Id. (internal citation omitted). But evidence suggesting that Lang was gang involved, wholly irrelevant to any issue at trial, did precisely that. The evidence was offered to encourage

the impermissible inference that Lang was gang-involved and violent, and, thus, likely committed the murders at issue.

Throughout its Brief, the State makes Lang's case for him. "[T]he very nature of these crimes pointed to possible gang-related homicides. Two people were executed while in one of the victim's vehicles." (State's Brief at p. 53.) Killing two people in a car suggests gang involvement? (See id.) How? Is it the car or the two people? (State's Brief at p. 53.) ("the very nature of these crimes pointed to possible gang-related homicides. Two people were executed while in one of the victim's vehicles."). The State's far-fetched attempt to justify admission of evidence suggesting that Lang was gang-involved further demonstrates its impropriety.

Evidence suggesting that Lang was gang involved, wholly irrelevant to any issue at trial, encouraged the jury to convict based on Lang's bad character. Where gang membership is not linked to the offense at bar, its admission is error. See Dawson v. Delaware, 503 U.S. 159, 166 (1992) (finding error where evidence of gang membership was irrelevant to proceedings, "[f]or example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim."); United States v. Brown, Case No. 06-5167, 2008 U.S. App. LEXIS 16691, 14-15 (10th Cir. Aug. 5, 2008) (finding error where admission of Brown's gang membership had the potential to elicit an unfavorable reaction from the jury increasing the danger of "guilt by association."); United States v. McKay, 431 F.3d 1085, 1093 (8th Cir. 2005) (holding evidence of gang membership inadmissible where it is meant merely to prejudice the defendant or prove his guilt by association with unsavory characters). This testimony was inadmissible and its prejudicial nature warrants reversal. See also Lang's Reply Proposition of Law No. 9, incorporated herein by reference.

2. Nickname associates with gun and violence

In response to Lang's argument that two State's witnesses improperly testified that Lang's nickname was "Tech," the State argues that "[t]his was the name that Lang chose to go by—it wasn't the fault of Walker or Seery that he wanted to be known by his moniker." (State's Brief at p. 53.) "Even assuming (charitably) the evidence was relevant, it is not necessarily admissible." Brown, 2008 U.S. App. LEXIS 16691 at 14. The State does not get to introduce every piece of evidence that exists. Instead, Ohio R. Evid. 403 requires a balancing test that sorts out and excludes unduly prejudicial evidence. Again, the State's Brief actually assists Lang in making his argument, "[t]he fact that the nickname may refer to a specific a semiautomatic firearm is perhaps the precise connection Lang wanted people to make." (State's Brief at p. 53.) Certainly this was the connection the State wanted the jury to make. Perhaps such a nickname would have been relevant if a Tek 9 had been used in the commission of these offenses, but that was not the weapon used to kill Burditte and Cheek. (See State's Ex. 1) However, such an inference suggests guilt by association and bad character, which are wholly inappropriate in a criminal trial. See Keenan, 66 Ohio St. 3d at 409, 613 N.E.2d at 209. This evidence should not have been admitted at trial.

3. Throwing up

The State suggests that this comment was admissible to show his reaction to the double homicide and may have been a reference to crimes other than murder. (State's Brief at p. 54.) The State attempts to justify admission of this prejudicial testimony by arguing that only Lang knew what he meant. (See id.) The fact that only Lang knew what he meant is precisely the problem with this piece of evidence. It was subject to an extremely damaging interpretation—

that Lang had killed before. Given the other improperly admitted evidence suggesting that Lang was gang-involved, this was likely the interpretation Lang's jury gave the statement.

The State goes on to suggest that "he could have been referring [sic] robbing people of their drugs, knowing the likely danger such activity would place on him. Lang knew well enough to have a firearm when robbing someone of their drugs because of the risk of violence and retaliation." (State's Brief at p. 54.) Lang would be hard-pressed to come up with a better example illustrating the impropriety of the admission of this evidence; the State is explicitly drawing an improper propensity inference. While Lang believes the evidence was introduced to suggest he had killed before, even this lesser interpretation is irrelevant, inflammatory, and highly prejudicial character evidence.

Character evidence may not be used in this manner. See Ohio R. Evid. 404(B). ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith"). Other acts evidence is only admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id.; see also O.R.C. § 2945.59. Given the comment's lack of specificity, it could not meet any of the 404(b) prongs. Its ambiguity, and the likeliness of inflammatory and prejudicial interpretation, renders this evidence inadmissible.

4. Conclusion

The trial court's admission of irrelevant and inflammatory evidence during the trial violated Lang's right to due process. U.S. Const. amend. XIV; Ohio Const. art. I, § 16. Lang is entitled to a new trial.

Proposition of Law No. 9

> A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during the trial phase of his capital trial.

In his Ninth Proposition of Law, Lang argued that egregious acts of misconduct plagued his trial. These acts prejudiced Lang's rights and deprived him of a fair trial.

1. Clarifying standard of review

In responding to Lang's prosecutorial misconduct argument, the State incompletely identifies the standard of review. At page 61 of its Brief, the State asserts that Lang may only succeed on his prosecutorial misconduct claim if he demonstrates that the prosecutor's remarks "prejudicially affected [his] substantial rights." While Lang will succeed on the merits of his claim if he proves that the prosecutor's misconduct prejudiced a substantive right, see Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974) (citing Griffin v. California, 380 U.S. 609 (1965)) (footnote omitted); United States v. Carter, 236 F.3d 777, 785 (6th Cir. 2001), he also is entitled to relief if he demonstrates that the prosecutor's misconduct rendered the trial fundamentally unfair. See Berger v. United States, 295 U.S. 78 (1935); Gravley v. Mills, 87 F.3d 779, 786 (6th Cir. 1996).

The State also improperly treats each claim of misconduct individually in its brief. (See, e.g., State's Brief at p. 64.) ("This isolated question did not constitute reversible prosecutorial misconduct particularly when the trial court sustained the objection."). However, acts of misconduct are to be viewed cumulatively, not individually. See Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983) (the "cumulative effect" of misconduct committed by the state constituted denial of fundamental fairness).

2. Voir dire

In its brief, the State argues that "the record demonstrates that the prosecutor asked the jurors if they could follow the law." (State's brief at p. 63.) Lang does not take issue with any question asking a juror if he or she could follow the law. But here the prosecutor also asked for a commitment from jurors that they could impose a death sentence on the defendant, Edward Lang. (See, e.g. Vol. 1, T.p. 160-61 ("If all twelve of you agree that the aggravated circumstances in this case do outweigh the mitigating factors or all the mitigating factors that you have heard by proof beyond a reasonable doubt you shall sign a verdict that says the Defendant shall be sentenced to death. Do you all understand that? You all are capable of doing that? Juror 386?"), 166-68 ("That piece of paper is going to say, We, the jury, find beyond a reasonable doubt the aggravating circumstances do outweigh the mitigating factors and hereby sentence Edward Lang to death...Juror No. 374"; posing same question to Jurors No. 380, 384-87, 396) 213-16 ("It says: We, the jury, find by proof beyond a reasonable doubt that the aggravating circumstance/circumstances do outweigh the mitigating factors, hereby sentence this man, Edward Lang, to death. If you are convicted of that, convinced beyond a reasonable doubt, you are going to be asked to pick up a pen and sign your name to that piece of paper. Juror No. 397, can you do that?"; posing same question Jurors No. 398, 401, 409, 407, and 405) Similar questions were posed at Vol. I, T.p. 271-73, 323; Vol. 2, T.p. 386-87, 436-37, 488, 495, 534, 588-89, 637-38. The record demonstrates that the prosecutor did far more than ask the jurors if they would follow the law.

3. Gang involvement

Lang incorporates his Reply to his Eighth Proposition of Law herein as if completely re-written to address the State's arguments. In response to Lang's Eighth Proposition of Law, the

State offered explanations for why this evidence suggested Lang was gang-involved. When this same evidence is addressed in the context of prosecutorial misconduct, the State rejects these same types of explanations as "speculation." (State's Brief at p. 64.) Lang's point in incorporating this argument is that the State cannot have it both ways.

4. Drug sales—no admission of fact

The State's argument could be interpreted as asserting that Lang admitted he knew Burditte. (State's Brief at p. 65.) ("Admitting that Lang knew Burditte was relevant...".) To ensure Lang's argument is clear—Lang has not admitted that he knew Burditte. Instead, Lang's Merit Brief merely states that Dittmore's improper testimony was offered by the State in an effort to establish that Lang knew Burditte. It was Walker, not Lang, who knew Burditte. (Vol. 4, T.p. 876.)

Moreover, Lang has not admitted that such a fact would be relevant. Dittmore was not established at trial as an expert on drug buys. If a properly qualified expert testified that a dealer would not sell a large quantity of drugs to someone they did not know, and that the quantity found in Burditte's car qualified as large, such a fact would be relevant. Absent such testimony by a qualified expert, Lang offers no opinion on the relevancy of such a fact.

5. No admission under 804(B)(3)

The State argues herein that introduction of Lang's "throw up" comment was proper under Ohio R. Evid. 804(B)(3). (State's Brief at p. 66.) The State is simply wrong. As the advisory notes to Rule 804(B)(3) make clear, "[t]he declaration against interest applies to statements of persons other than parties to the action and should be distinguished from statements of parties to the action." As the defendant in this action, Lang was clearly a party, thus the State could not properly offer this statement under Ohio R. Evid. 804(B)(3).

6. Lang need not repeatedly object

The State agrees that Lang did object "to the playing of the tapes statement at trial," but faults Lang for failing to file a motion in limine or other motion to redact portions of the statement. (State's Brief at p. 66.) Counsel is not required to repeatedly object to the same misconduct brought to the trial court's attention for a ruling. See Lee v. Kemna, 534 U.S. 362, 378 (2002) ("Our decision, we added in Osborne, followed from "the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here.") (internal citations and quotation marks omitted); Osborne v. Ohio, 495 U.S. 103, 125 (1990) ("In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here. Concluding that no legitimate state interest would have been served by requiring repetition of a patently futile objection, we held that the Alabama procedural ruling did not preclude our consideration of the defendant's constitutional claim.") (internal quotations and citations omitted). The law simply requires Lang to object, not to file limine motions to preserve an error for appellate review.

7. DNA argument

In its Brief, the State has significantly understated its use of DNA evidence during Lang's trial. Because of the significance that juries place on this type of evidence, (see Proposition of Law No. 2), Lang reprints for this Court the prosecutor's exact language:

> Whose DNA do we fin don the gun. Not Antonio's. He is excluded form the DNA we find on it. ***But we find Eddie Lang's on this gun...How does it get here? By shooting it...***
>
> Remember Mike Short? Why do you swab those areas? Because when you fire a handgun, those are the areas where you are going to deposit DNA because of the action of shooting the gun. Because you have to grip it so tight because of the recoil, that's what leaves the DNA behind.
>
> ***That's what left Eddie's DNA behind in this one.***
>
> And, yep, it may be said in a little bit ***that it is only 1 in 3,461 people. Well, you know what? There weren't 3,461 people in that Durango.*** There were four...
>
> ***Whose is it? It is Eddie's. How does it get there? From firing the gun.***
>
> What does that prove to you? ***It proves, Ladies and Gentlemen, beyond a reasonable doubt that Eddie Lang, this man right here, is the actual killer.***

(Vol. 5, T.p. 1274-75)

> ***There is only one person in this case whose DNA was left behind on this gun because he fired it, and that's Eddie Lang's.***

(Id. at 1277)

As Lang argued in his Merit Brief, the prosecutor told the jury that DNA evidence proved that Lang was the shooter. This occurred despite the fact that (1) the DNA expert could not offer her results to a reasonable degree of scientific certainty (Vol. 4, T.p. 1129) and (2) DNA evidence cannot do what the prosecutor argued that it did herein. DNA test results can show that a suspect is not excluded as the source of the genetic material—along with a statistical probability of how often the known DNA profile appears within a population group, such as Caucasians or African-Americans. See Brown v. Farwell, Case No. 07-15592, 2008 U.S. App. LEXIS 9637, 21, n.5 (9th Cir. May 5, 2008). There is no "match" in DNA, only a failure to exclude. And here, the failure to exclude fails to pass scientific muster. Thus, the prosecutor's

comments were both inaccurate and extremely prejudicial. See also Reply Proposition of Law No. 2, incorporated herein by reference.

8. Conclusion

Egregious acts of misconduct were committed throughout Lang's trial, the effect of which carried over to the mitigation phase. State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 421 (1987). Individually, or cumulatively, these errors warrant relief. This Court should vacate Lang's convictions and remand this case for a new trial.

Proposition of Law No. 10

The defendant's right to the effective assistance of counsel is violated when counsel's performance during the culpability phase of a capital trial is deficient to the defendant's prejudice. U.S. Const. amends. VI and XIV; Ohio Const. art. I, § 10.

Edward Lang asserts that his counsel rendered ineffective assistance during the culpability phase of the trial. In response to this claim, the State argues that Edward Lang's trial counsel did not perform deficiently and Lang suffered no prejudice under the test set out in Strickland v. Washington, 466 U.S. 668 (1984). However, the State's arguments are unpersuasive.

1. Failure to challenge weak DNA evidence

Lang's claim is two fold. First, his trial counsel were ineffective because they did not object to the admission of unreliable DNA evidence. Lang references his reply to his second proposition of law to explain why this claim has merit. Second, Lang argues that his trial counsel essentially conceded that his DNA was found on the weapon.

The State answers this claim by stating that "trial counsel during Foster's cross examination pointed out that the DNA found on the pistol was so small that it couldn't be submitted for CODIS and that the second minor source of the DNA found on the pistol could not be identified because there was not enough." (State's Brief at 73-74.) However, this is why Lang was prejudiced when, during closing argument, counsel conceded that that "[i]t is conclusively Eddie Lang's DNA. Maybe that's true." (Vol. 5, T.p. 1296.) Whatever points that counsel scored with the jury during cross-examination were lost by counsel's damaging concession in argument.

2. Lynch mob comparison

Lang claims that his counsel erred to his prejudice when, during closing argument, counsel compared the jury's function to a lynch mob. The State answers that this approach was not ineffective because "trial counsel exhorted the jury to take its role seriously, weigh the evidence, and act as jurors who took an oath to do justice." (State's Brief at p. 74.) However, trial counsel could have accomplished each of those objectives without creating a strong probability of alienating jurors with a lynch mob comparison. Moreover, the State overlooks its own objection to counsel's lynch mob comparison during the trial. (Vol. 5, T.p. 1289.)

3. Failure to voir dire regarding juror 386

Juror 386 was empanelled despite her relationship to one of the victims (Marnell Cheek). The State answers by twisting Lang's claim: "Lang argues that somehow trial counsel should have ferreted out that Juror No. 386 knew the Cheek family." (State's Brief at p. 75.) However, since Juror 386's bias was revealed, and because she was removed from service, Lang does not claim that his counsel erred by not discovering her bias towards Cheek. Indeed, as Lang argues, this juror's bias was not revealed during voir dire because she was deliberately untruthful in her responses to questions that would have uncovered her bias toward Marnell Cheek. Lang instead argues that his trial counsel dropped the ball when they failed to request individual sequestered voir dire of the other jurors following the removal of 386. See Remmer v. United States, 347 U.S. 227, 228 (1954). Lang also refers the Court to his reply in his first proposition of law to further show why counsel's error was prejudicial.

4. No objection to instructions on (A)(7) specifications

In Lang's fourth proposition of law, he argues that the jury was effectively directed to find him guilty as the shooter because the jury instructions omitted the "prior calculation and design" element for the (A)(7) specifications attached to counts one and two. In response to Lang's claim that his trial counsel should have objected to this omission, the State curiously replies that the jury "could have sentenced him to death[]" if the jury had been instructed this way. (State's Brief at p. 75.) This argument overlooks the obvious fact that Lang was sentenced to death without a proper jury instruction. This argument also overlooks the obvious harm that followed from instructions that effectively directed the jury to find that Lang was the shooter: Lang was precluded from mitigating his punishment under O.R.C. § 2929.04(B)(6). Lang also relies on his reply for his fourth proposition of law, supra, support the merits of this Sixth Amendment claim.

5. Conclusion

Edward Lang was prejudiced by the each of the errors and omissions of his counsel, as set out in his merit brief. This Court should vacate Lang's convictions and remand his case for a new trial.

Proposition of Law No. 11

> Where the jury recommends the death sentence for one count of aggravated murder, but recommends a life sentence on another count, and the aggravating circumstances and mitigating factors are identical, the resulting death sentence is arbitrary and must be vacated. U.S. Const. amends. VIII, XIV.

In his Eleventh Proposition of Law, Lang argued that the jury's arbitrary penalty verdicts required that this Court vacate his sentence of death. Lang did not make a proportionality argument as the State incorrectly suggests. (State's Brief at p. 80.)

The State argues that the mitigating factors differed for each homicide. (State's Brief at p. 81.) In particular, the State tries to pretend that Cheek was "not a willing participant in this drug trafficking world and thus did not accept the risk of violence that is part and parcel of that world." (State's Brief at p. 82.) Cheek's boyfriend was a known drug dealer with prior felony convictions. And Burditte was found in the front seat of his car with a package of cocaine in his hand. Cheek was seated next to him. (Vol. IV, Tp. 1151-52; see also Ex. 33T.) While Lang has not asserted that Cheek was selling drugs, she was present for the transaction. And the State offered no evidence that she was being held against her will. To pretend that she did not know what was going on, particularly when Burditte had no legitimate job, but drove a flashy and expensive car, in addition to the fact that there were drugs in his hand, would frankly suspend reality. Resultantly, the mitigating factors for Burditte and Cheek's homicides were the same. The jury's inconsistent verdict as to Cheek's death demonstrates that the jury acted arbitrarily and capriciously. It gave more weight to identical aggravating circumstances in the count involving the victim who was seated next to, but was not herself, a drug dealer. The jury therefore weighed an aspect of the murder in its decision, which was wholly impermissible under Ohio law. See State v. Gumm, 73 Ohio St. 3d 413, 424, 653 N.E.2d 253, 264 (1995).

State v. Gapen, 104 Ohio St. 3d 358, 819 N.E.2d 1047 (2004), does not support the State's position. In Gapen, the aggravating circumstances on the respective counts were not identical. As this Court noted "[p]rior calculation and design were elements of the offense charged in Count 13 and an integral part of the nature and circumstances of that offense. Prior calculation and design were not elements of the felony-murders in Counts 14 through 16." Id. at 381, 819 N.E.2d at 1072.

The Eighth Amendment concerns distinguish Lang's case from Dowling v. United States, 493 U.S. 342 (1990), and its progeny. Because of the heightened need for certainty and the need for the appearance of reason over caprice and emotion in death penalty cases, this Court cannot allow these inconsistent verdicts on identical facts to stand. See, e.g., Godfrey v. Georgia, 446 U.S. 420, 428 (1980); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (Opinion of Justices Stewart, Powell, and Stevens); Zant v. Stephens, 462 U.S. 862, 885 (1983), (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).

The improper method by which the jury arrived at Lang's death sentence violates Ohio's sentencing scheme. Lang's death sentence is based on an improper recommendation and violates the Eighth and Fourteenth Amendments to the United States Constitution. This Court must vacate the death sentence and impose a life sentence.

Proposition of Law No. 12

A capital defendant's rights to due process and a fair trial are denied when a prosecutor engages in misconduct during the penalty phase. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, § 10.

The prosecutor engaged in a pattern of misconduct throughout the penalty phase. In responding to Lang's prosecutorial misconduct argument, the State incompletely identifies the standard of review. At page 61, the State asserts that Lang may only succeed on his prosecutorial misconduct claim if he demonstrates that the prosecutor's remarks "prejudicially affected [his] substantial rights." While Lang will succeed on the merits of his claim if he proves that the prosecutor's misconduct prejudiced a substantive right, see Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974) (citing Griffin v. California, 380 U.S. 609 (1965)) (footnote omitted); United States v. Carter, 236 F.3d 777, 785 (6th Cir. 2001), he also is entitled to relief if he demonstrates that the prosecutor's misconduct rendered the trial fundamentally unfair. See Berger v. United States, 295 U.S. 78 (1935); Gravley v. Mills, 87 F.3d 779, 786 (6th Cir. 1996).

The State also improperly treats each claim of misconduct individually. (See, e.g., State's brief at p. 64 ("This isolated question did not constitute reversible prosecutorial misconduct particularly when the trial court sustained the objection.")). However, acts of misconduct are to be viewed cumulatively, not individually. See Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983) (the "cumulative effect" of misconduct committed by the state constituted denial of fundamental fairness).

1. Guns and violence

The prosecutor referenced Lang's nickname, "Tek," as a means of linking him with guns and violence. ("The first is that Eddie Lang, also known as Tek, committed the offense..." and "The second is that Eddie Lang, also known as Tek, did commit...") (Mit. T.p. 29.) Had the

State presented actual evidence of Lang's violent, or otherwise firearm-fueled history, that testimony would have been subject to the rules of evidence. As innuendo, it could not be refuted and was far more damaging. The only way for Lang to counter this would have been to provide evidence of his own peaceful character, thus opening up further room for negative character evidence. Admission of this language was improper during the trial phase (see Proposition of Law No. 8) and had no more place in the mitigation phase. Repeated use of these allusions was only served to prejudice him.

2. Rendering Justice

It is undisputed that a prosecutor may not urge the jury to convict or sentence in order to quell the community's ire. "Likewise, it is improper for a prosecutor to make arguments that incite a jury to convict based upon public demand and community outrage, or to consider public opinion in rendering its verdict." (State's Brief at p. 71.) The prosecutor was not simply "calling for justice" as was the prosecutor in State v. Evans, 63 Ohio St. 3d 231, 240, 586 N.E. 2d 1042, 1051 (1992). The prosecutor called for the jury to "render justice, a sentence of death." (Mit. T.p. 103.) He was conflating justice and death to the exclusion of all other statutorily delineated sentences.

3. Conclusion

At the end of his trial, the State persisted in repeating the same improper and prejudicial arguments that it had been making since the start of the trial. The cumulative effect of these violations was sufficient to prejudice him and deprive him due process. His sentence must be vacated and his case remanded for re-sentencing. See O.R.C. § 2929.06 (B).

Proposition of Law No. 13

The defendant's right to the effective assistance of counsel is violated when counsel's performance, during the penalty phase of his capital trial, is deficient to the defendant's prejudice. U.S. Const. amend. VI; Ohio Const. art. I, § 10.

In his Thirteenth Proposition of Law, Lang argued that his trial counsel rendered ineffective assistance to his prejudice during the penalty phase of his capital trial.

The State asserts that "failure to present mitigating evidence does not constitute proof of ineffective assistance of counsel." (State's Brief at p. 78.) The State relies on State v. Hamblin, 37 Ohio St. 3d 153, 524 N.E.2d 476 (1988), for this proposition. Hamblin is odd authority for the State to rely on given that the Sixth Circuit Court of Appeals reversed Hamblin's death sentence because of ineffective assistance of counsel for failing to investigate and present mitigation evidence over five years ago. Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003). Indeed, the United States Supreme Court and the Sixth Court of Appeals have reversed numerous death sentences after finding counsel ineffective for failing to investigate and present mitigation evidence. See, e.g., Rompilla v. Beard, 545 U.S. 374 (2005) (finding counsel ineffective for failing to investigate and present mitigation evidence); Wiggins v. Smith, 539 U.S. 510 (2003) (same); Williams v. Taylor, 529 U.S. 362 (2000) (same); Johnson v. Bagley, 544 F.3d 592 (6th Cir. 2008) (same); Mason v. Mitchell, Case No. 05-4511, 2008 U.S. App. LEXIS 20840 (6th Cir. Oct. 3, 2008) (same); Van Hook v. Anderson, 535 F.3d 458 (6th Cir. 2008) (same, includes other findings of ineffective assistance) Jells v. Mitchell, 538 F.3d 478 (6th Cir. 2008) (same); Morales v. Mitchell, 507 F.3d 916 (6th Cir. 2007) (same); Haliym v. Mitchell, 492 F.3d 680 (6th Cir. 2007) (same); Dickerson v. Bagley, 453 F.3d 690 (6th Cir. 2006) (same); Williams v. Anderson, 460 F.3d 789 (6th Cir. 2006) (same); Frazier v. Huffman, 343 F.3d 780 (6th Cir. 2003) (same); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995) (same); see

also American Bar Associations Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, Guidelines 1.1, 10.7 (2003). Failing to present mitigation evidence can and does render counsel's performance deficient and prejudicial.

Moreover, the State's assertion that the record "does not indicate that other mitigating evidence was available and Lang's assertions to the contrary are pure speculation." (State's Brief at p. 78.) Lang's mother, Tracy Carter's, testimony identifies much evidence that likely would have been available had defense counsel done their job, including:

- Jail records evidenced by Mit. Tp. 58 (Lang's father went to jail for setting her apartment on fire and for stabbing her) and Mit. Tp. 57 (Lang's father went to prison for child molestation);

- Police records evidenced by Mit. Tp. 59 (Carter went to police for help, but got none when Lang was abducted by his father);

- Medical records evidenced by Mit. Tp. 62 (Carter took Lang to the doctor after she recovered Lang); and

- Psychiatric records evidenced by Mit. Tp. 66 (Lang was placed in a psychiatric facility over 28 times).

And, such evidence would have been particularly compelling given the prosecution's repeated suggestions that Lang's mom was embellishing, if not flat-out lying to save her son's life. (See, e.g., Mit. Tp. 71, 73, 75, 102.)

The State also takes offense at the suggestion that there was mitigation evidence ignored with respect to Cheek. But the State does not dispute the facts Lang has asserted as mitigating with respect to Cheek. (See State's Brief at p. 77.) Cheek's boyfriend was a known drug dealer with prior felony convictions. And Burditte was found in the front seat of his car with a package of cocaine in his hand. Cheek was seated next to him. (Vol. IV, Tp. 1151-52; see also Ex. 33T.) While Lang has not asserted that Cheek was selling drugs, she was present for the transaction.

To pretend that she did not know what was going on, particularly when Burditte had no legitimate job, but drove a flashy and expensive car, in addition to the fact that there were drugs in his hand, would frankly suspend reality. This matter was appropriate fodder for mitigation, particularly to counter the perception "that Cheek was nothing more than an innocent victim." (State's Brief at p. 77.) Counsel should have offered this as mitigation under O.R.C. § 2929.04(B)(1). See State v. Green, 66 Ohio St. 3d 141, 153, 609 N.E.2d 1253, 1263 (1993) ("Willis arguably "induced or facilitated" the offense because he illegally bought food stamps and sold liquor").

The cumulative effect of the errors and omissions by trial counsel infringed on Lang's Sixth Amendment right to effective assistance of counsel. See Harris by & Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (counsel's errors assessed for cumulative effect on defendant's right to fair trial). His convictions must be reversed and his case remanded for a new trial. Alternatively, his death sentence must be vacated and his case remanded for re-sentencing. See O.R.C. § 2929.06 (B).

Proposition of Law No. 21

> Ohio's death penalty law is unconstitutional. O.R.C. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Edward Lang. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 2, 9, 10, and 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.

In his Twenty-First Proposition of Law, Lang argued that Ohio's lethal injection statutes are unconstitutional. He writes here to add the additional authority of Walker v. Georgia, 555 U.S. ___, 129 S. Ct. 481 (2008) (Stevens, J., statement respecting denial of petition for certiorari) and Baze v. Rees, __ U.S. __, 128 S. Ct. 1520, 1551 (2008)(Stevens, J., concurring)(noting concern with "risk of discriminatory application of the death penalty"), in support of his attack on Ohio's proportionality review.

Conclusion

For the reasons set forth in his merit brief and for each of the foregoing reasons in this reply brief, Appellant Edward Lang's convictions and death sentence should be reversed.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of Reply Brief of Appellant Edward Lang was forwarded by regular U.S. Mail to Ronald Mark Caldwell and Kathleen Tatarsky, Assistant Prosecuting Attorneys, Stark County, 110 Central Plaza South, Suite 510, Canton, Ohio 44702, this 11th day of December, 2008.

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