

ORIGINAL

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

**Appellant Edward Lang's Motion for Reconsideration**

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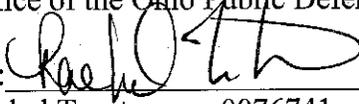
**Appellant Edward Lang's Motion for Reconsideration**

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Appellant Edward Lang requests that this Court reconsider its merits ruling of August 31, 2011, affirming both his convictions and death sentence. This request is made under Sup. Ct. Prac. R. XI § 2(A)(4). The reasons for this Motion are more fully set forth in the attached memorandum in support.

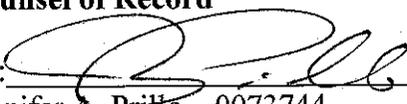
Respectfully submitted,

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## Memorandum In Support

### **Proposition of Law No. 1**

A defendant's right to due process is violated when a juror who is related to 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.

Appellant Lang respectfully requests that this Court reconsider its finding that the trial court conducted an adequate *Remmer* hearing. *State v. Lang*, 2011 Ohio 4215, P59 (Ohio Aug. 31, 2011). Because of juror 386's dishonesty, the only way to know what she said to the other jurors is to ask them. Juror 386 purposely withheld from everyone her relationship to the victim, so the trial judge's one question to the jurors—whether they knew of her relation to one of the parties—was the one and only question that was unnecessary. The trial judge never even asked the remaining jurors if Juror 386 had talked to them about the case.

Juror No. 386's dishonesty implied that she had an ulterior motive in getting on Lang's jury. She knew Marnell Cheek's family members, and she had been to the home of Ms. Cheek's mother for visits. Juror 386 attended Marnell Cheek's funeral, and she viewed the body. She disclosed none of this on her juror questionnaires, and she disclosed none of it during voir dire, despite being placed under oath for that questioning. She also saw Prospective Juror No. 385 get dismissed from jury duty after No. 385<sup>1</sup> admitted knowing one of the parties, but still No. 386 failed to come clean about her own relationship.

The law requires a deeper inquiry than the one Lang received. This Court acknowledged that, "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences *and to determine the effect of such occurrences when they happen.*" *Lang*, 2011-Ohio-4215, ¶54 ( (emphasis added).

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<sup>1</sup> She, too, knew Marnell Cheek.

The trial court's one question to the jurors about their interaction with juror No. 386 was not sufficient to "determine the effect" of the outside influence.

Even the judge's question to Prospective Juror No. 385 would have been more appropriate. Once No. 385 revealed her familiarity with the victim, the trial judge asked No. 385 during a sidebar if she said "anything to any other jurors that came in this morning about anything *about the case?*" Tr. p. 148 (emphasis added)

This Court also erroneously summarized Lang's argument. It stated, "Nevertheless, Lang argues that the trial court was obligated to individually question each of the jurors to ensure that juror No. 386 had not spoken to them about Cheek." *Lang*, 2011-Ohio-4215, ¶60. Although individual questioning would be preferable, Lang is not arguing that the trial court's error was in its failure to question each juror individually. Rather, the trial court failed to ask all of the jurors—together or individually—any questions to determine whether they had been prejudiced by Juror No. 386. No one even knows if they discussed the case with Juror No. 386.

A relative of the victim had pervasive contact with Eddie Lang's jury. She in fact sat on the jury for a portion of the trial. Lang deserves to have the remaining jurors answer questions under oath about the extent of their contact with Juror No. 386, and whether that contact prejudiced them. For the foregoing reasons, Lang respectfully requests that this Court remand this case for a *Remmer* hearing.

## 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.

Appellant Lang respectfully requests that this Court reconsider its finding that the testimony of Michelle Foster regarding DNA found on the murder weapon was properly admitted. *State v. Lang*, 2011-Ohio-4215 (Aug. 31, 2011). The DNA evidence should have been excluded under Ohio R. Evid. 403 because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

This Court found that the DNA evidence was "highly probative in showing that Lang could not be excluded as a contributor of the DNA found on the handgun" and that it "helped corroborate other evidence showing that Lang was the principle offender." *Lang*, 2011-Ohio-4215, P88. But, the fact that Lang could not be excluded as a source of one of the DNA profiles on the gun *is* the evidence presented. The question is how probative that evidence is of who shot the gun. In reality, there is very little probative value to this evidence.

First, it is not clear that the fact that someone's DNA is on a gun is a result of that person having fired it. The prosecutor overstated the significance of the DNA on the gun. The prosecutor argued that, "[Lang] is the one that pulled the trigger . . . and he is the principal offender . . . [b]ecause you don't get DNA on a gun unless you shoot it . . . ." However, the testimony of Michael Short from the Canton Stark County Crime Lab was much less definitive. He testified that, "[t]he discharging of a firearm would greatly increase the probability of finding this type of what they call touch DNA on the surfaces of a firearm . . . ." Tr. 1057.

Second, there were two DNA profiles found on the gun swabbings—a major profile and a minor profile. Tr. p. 1129. Michelle Foster from the crime lab testified that Lang could not be excluded as the minor source and that Walker was not the major source. *Id.* Foster could not, however, exclude anyone—“not even Antonio Walker”—as the minor source. Tr. p. 1139. And Foster did not testify as to where on the gun each profile was found, so it is not clear that the profile that *could* be Lang’s DNA, was even swabbed from the trigger.

Third, the gun belonged to Lang. This further decreases the probative value of the DNA evidence because one would expect to find his DNA on the gun. *See Lang*, 2011-Ohio-4215, ¶230.

Even if the DNA found on the gun had been matched to Lang, it would be questionable that the probative value of that evidence would pass muster under Ohio R. Evid. 403. But, that was not the case. It was such a low level that Foster could not say to a reasonable degree of scientific certainty that Lang was the source. Tr. 1129. There was such a small amount of DNA, that it could not even be run through CODIS. Tr. 1135. The chance of finding the DNA profile in question in the population is 1 in 3,461. Tr. 1129. That statistic is striking when considering that a CODIS run requires better than a 1 in 280,000,000,000 chance of finding the same DNA profile in the population. Tr. 1135.

Ohio R. Evid. 403 requires that, even if relevant, “evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” In this case, the probative value was very low, for all of the reasons stated above. Yet the danger was very high that the evidence would create unfair prejudice, that it would create confusion, and that it would mislead the jury. In fact, that is exactly what happened.

While we cannot know what kind of weight the jury gave the evidence or in what ways they interpreted it, we do know how the State utilized the evidence. The State argued that DNA is "unique to every individual." Tr. 1274. The prosecutor went on to argue that Antonio Walker's DNA was not found on the gun, but Lang's was. *Id.* But this was not a case in which the DNA was matched to Lang with any certainty. And, Walker could not be excluded as the source of the minor DNA profile. Tr. 1139. The prosecutor also misinterpreted the statistical evidence arguing that the DNA must be Lang's because there were not 3,461 people in the car, there were four and the DNA does not belong to any of the other four. Tr. 1275.

It is likely the jury interpreted the evidence in the same way that the State did. Courts must be careful to guard against the tendency that "once the jury settles on a source probability . . . it will equate source with guilt, ignoring the possibility of non-criminal reasons for the evidentiary link" between the defendant and the weapon. *United States v. Chischilly*, 30 F.3d 1144, 1156 (9th Cir. 1995). In this case, there was a non-criminal reason for the link, yet it is likely that the jury did exactly what the prosecutor did and concluded that the possible presence of Lang's DNA on the gun was evidence that he shot the victims. Moreover, the jury probably came to the same conclusion as the State that there were only four people in the car, and therefore the DNA must belong to Lang. And, these misperceptions were compounded by the fact that the testimony did not make it clear enough that Walker's DNA could have been on the gun. Tr. 1139. The minor profile could have been Walker's DNA as the analyst was not able to exclude him. *Id.*

"Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses." *Daubert*

*v. Merrell Dow Pharms.*, 509 U.S. 579, 595 (1993). “Rule 403 requires judicial vigilance against the risk that such evidence will inordinately distract the jury from or skew its perception of other, potentially exculpatory evidence lacking not so much probative force as scientific gloss.” *United States v. Chischilly*, 30 F.3d 1144, 1156 (9th Cir. 1995). In the instant case, the DNA evidence presented skewed the jury’s assessment of the evidence. The jury was left with the incorrect perceptions that Lang’s DNA was on the gun and that he therefore must have fired it if his DNA was on the gun. The trial court failed in its duty to prevent such misperceptions.

For the foregoing reasons, Lang respectfully requests that this Court vacate its opinion and remand this case for a new trial.

### Proposition of Law No. 16

A capital defendant's death sentence is inappropriate when the evidence in mitigation outweighs the aggravating circumstances. O.R.C. §§ 2929.03; 2929.04; U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

Lang respectfully requests that this Court reconsider its finding that the aggravating circumstances outweigh the mitigating factors. *State v. Lang*, 2011 Ohio 4215, ¶340. This Court appeared to discount Lang's mitigating evidence because there was no nexus between the mitigation and the crime. But a defendant is not required to establish such a link.

This Court observed that, "Lang was abused by his father during his childhood. He was also malnourished and physically abused during the two years that he stayed with his father. Moreover, Lang required extensive counseling and psychiatric after returning home to his mother." *Lang*, 2011-Ohio-4215, ¶331. But the Court went on to find that, "[n]evertheless, there is no evidence of any connection between Lang's abusive treatment and the two murders." *Id.*

The law does not mandate a causal connection between the evidence offered in mitigation and the crime. In fact, this Court has determined that mitigating factors are "not related to a defendant's culpability." *State v. Holloway*, 38 Ohio St. 3d 239, 242 (1988). Requiring a "connection" between the mitigation and the crime links mitigation to the defendant's culpability.

Such a "nexus" requirement has been rejected by the United States Supreme Court as well. *See Smith v. Texas*, 543 U.S. 37, 45 (2004); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). Lang's troubled childhood, the resulting traumas and difficulties, his youth, and his mental health problems are significant issues to be considered in mitigation of the crime.

For the foregoing reasons, this Court should reconsider its decision, vacate the death sentence, and impose a life sentence for Lang.

Respectfully submitted,

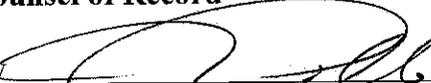
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### **Certificate of Service**

I hereby certify that a true copy of **Motion for Reconsideration** was forwarded by regular U.S. Mail to John D. Ferrero, Prosecutor and Mark Caldwell, Assistant Prosecutor, Stark County, 110 Central Plaza South, Suite 510, Canton, Ohio 44702, this 12 day of September, 2011.



Counsel for Appellant