

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO  
COLUMBUS, OHIO**

**STATE OF OHIO,**

**CASE NO. 2007-1741**

**Plaintiff-Appellee,**

**vs.**

**EDWARD LEE LANG, III,**

**DEATH PENALTY CASE**

**Defendant-Appellant.**

**FILED**  
SEP 22 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

**ON MOTION FOR RECONSIDERATION**

**THE OHIO COURT OF COMMON PLEA FOR STARK COUNTY,  
CASE NO. 2006-CR-1824(A)**

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**RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION  
OF PLAINTIFF-APPELLEE, STATE OF OHIO**

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The State of Ohio moves the Court to overrule the motion for reconsideration filed by Edward Lee Lang, III, which asks this Court to reverse its ruling affirming Lang's convictions and death sentence. Lang has failed to state adequate or sufficient reasons for the Court to reconsider its decision. None of the three claims posited by Lang meet this Court's standard for vacating its decision and reconsidering its ruling. As a result, the Court should overrule the motion.

The accompanying memorandum sets forth more detailed reasons, as well as specifically addressing the three claims raised by Lang.

Respectfully submitted,

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**MEMORANDUM IN OPPOSITION**

Lang has filed a motion for reconsideration, pursuant to Supreme Court Practice Rule

11.2(B)(4),<sup>1</sup> seeking to have this Court reconsider its holding and opinion issued in this case on August 31, 2010. In his motion, Lang asserts that this Court incorrectly decided three of his claims, and that ruling differently on any of these claims will result in either his convictions or his death sentence being reversed. None of Lang's arguments in support of these three claims meet the standard for reconsideration motions, and thus his motion should be overruled.

The standard for reviewing motions for reconsideration before this Court is set out in the rule: "A motion for reconsideration shall not constitute a reargument of the case." Lang's arguments in support of his motion for reconsideration are simple rearguments of the particular issues he has raised, asserting that the Court simply decided the issue wrong. Such rearguments are not sufficient to warrant reconsideration of the three issues raised by Lang.

Each of these issues – alleged juror misconduct, the admission of expert testimony on DNA evidence, and the appropriateness of the death penalty – were thoroughly reviewed by this Court in its opinion.<sup>2</sup> The Court reviewed the arguments by the parties, set forth the applicable standards of review, and applied those standards to the facts and circumstances present in this case for each of these three issues. Lang has not offered anything other than a rehashing of his arguments, claiming that this Court simply reached the wrong conclusion on these issues. Since these arguments do not satisfy the standard for reconsideration motions, the Court should overrule the motion.

This response will now address each of these three issues individually.

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<sup>1</sup>Lang incorrectly cites the rule as Supreme Court Practice Rule XI, Section 2(A)(4).

<sup>2</sup>See *State v. Lang*, \_\_ Ohio St.3d \_\_, 2011-Ohio-4215, \_\_ N.E.2d \_\_ (2011 WL 3862536), at ¶¶47-63 (juror misconduct issue), at ¶¶ 64-91 (expert testimony on DNA evidence issue), and at ¶¶ 312-341 (appropriateness of death sentence).

## **PROPOSITION OF LAW NO. I (Juror Misconduct)**

Lang first challenges this Court's ruling on his first proposition of law that argued that the trial court erred in its *Remmer* hearing on the issue of alleged juror misconduct. The proposition focused specifically on Juror No. 386, who knew one of Lang's victims (her stepfather was Marnell Cheek's brother). Lang urges this Court to reconsider its ruling that the trial court conducted an adequate *Remmer* hearing with regard to this juror. While he argues that the trial court should have made a deeper inquiry than the one it did, Lang also claims that he was not arguing for an individual voir dire of the jury on possible contamination from Juror No. 386.

This Court, however, applied the correct standard in reviewing the argument in favor of the most demanding standard, i.e., that the trial court should have inquired of each juror individually. The Court applied the standard set forth for juror issues by the United States Supreme Court in *Remmer*,<sup>3</sup> as modified by *Smith v. Phillips*.<sup>4</sup> This Court reaffirmed *Remmer*'s basic proposition that "a court will not reverse a judgment based upon juror misconduct unless prejudice to the complaining party is shown."<sup>5</sup>

Applying this standard to Lang's best argument – that the trial court erred in not

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<sup>3</sup>*Remmer v. United States* (1954), 347 U.S. 227 (when issues arise concerning the integrity of the jury proceedings, a trial court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate").

<sup>4</sup>*Smith v. Phillips* (1982), 455 U.S. 209, 217. The United States Court of Appeals for the Sixth Circuit has recently discussed the impact of *Smith v. Phillips* on *Remmer*, noting that the defendant has the burden of showing *actual* prejudice in *Remmer* situations. See *Sheppard v. Bagley* (C.A. 6, Sept. 13, 2011), \_\_ F.3d \_\_ (2011 WL 4031097), at \*3-\*4. Chief Judge Batchelder specifically addressed this impact in her concurrence, asserting that *Smith v. Phillips* abrogated *Remmer*'s requirements concerning the burden of proof. See *Sheppard*, supra, at \*8 (Batchelder, C.J., concurring).

<sup>5</sup>*Lang*, \_\_ Ohio St.3d \_\_, 2011-Ohio-4215, \_\_ N.E.2d \_\_ (2011 WL 3862536), at ¶ 54 (quoting *State v. Keith* (1997), 79 Ohio St.3d 514, 526, 684 N.E.2d 47, 60).

questioning the jurors individually about any contact with Juror No. 386 – this Court correctly found that Lang had not shown any actual prejudice as a result of the trial court’s inquiry into this issue. The trial court, upon learning of Juror No. 386’s relationship with Cheek, removed the juror, without objection from the parties, and inquired of the jury as a group whether its remaining members had had any discussions with the removed juror about the case. The remaining jurors indicated that they had not. This Court held that the trial court did not abuse its discretion in conducting the *Remmer* hearing in this manner. The Court noted that neither Lang nor the State objected to the trial court’s inquiry, or requested that the trial court address each juror individually. This case was not one in which the trial court conducted no inquiry; it was, instead, one in which the trial court conducted the inquiry in a manner that Lang objects to for the first time in this appeal. This inquiry did not reveal any contamination between Juror No. 386 and the remaining members of the jury, and thus Lang failed to demonstrate any actual prejudice. The assertion that an individual inquiry would have unearthed actual prejudice is fanciful and speculative.

Lang has not presented this Court with anything other than a reargument of his assertions and claims in support of this proposition of law. As a result, the Court should reject this argument in support of his reconsideration motion.

**PROPOSITION OF LAW NO. II (Expert Testimony on DNA Evidence)**

Lang next argues that this Court incorrectly decided his second proposition of law that challenge the admission of expert testimony of DNA evidence in this case. The evidence presented at trial was DNA evidence found on the gun used in the execution deaths of Cheek and Jaron Burditte. As Lang notes in his motion, this Court found that this 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 this probative evidence “helped corroborate other evidence showing that Lang was the principal offender.”<sup>6</sup> Lang’s argument is the same argument he made before this Court, and essentially asks this Court to change its mind on the resolution of this issue. In other words, Lang does not argue that the Court applied the wrong standard to the wrong evidence – he argues that the Court came to the wrong conclusion in applying the correct standard to the evidence in this case. The DNA evidence was properly admitted.

In rehashing his argument, Lang minimizes the probative value of the DNA evidence while maximizing its prejudicial effect. He concedes yet again, however, that one would expect Lang’s DNA evidence to be on the handgun since it was his handgun.<sup>7</sup> This fact alone seriously undermines Lang’s prejudice argument. The probity of this DNA evidence was that it further connected Lang to the murder weapon and corroborated the other evidence presented at trial that pointed to him as the killer. Again, these were all arguments previously made to this Court, which were extensively and adequately addressed. Lang’s rehashed arguments therefore do not meet the standard for reconsideration motions.

#### **PROPOSITION OF LAW NO. XVI (Appropriateness of Death Penalty)**

Lang’s third claim for reconsideration is the appropriateness of the death penalty for Marnell Cheek’s execution. Lang takes specific issue with the Court’s apparent requirement of a nexus between mitigation evidence and the crimes themselves. Lang misconstrues language from the Court’s decision to posit that the Court was requiring a causal connection between

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<sup>6</sup>*Lang*, \_\_ Ohio St.3d \_\_, 2011-Ohio-4215, \_\_ N.E.2d \_\_ (2011 WL 3862536), at ¶ 88.

<sup>7</sup>See *Lang*, \_\_ Ohio St.3d \_\_, 2011-Ohio-4215, \_\_ N.E.2d \_\_ (2011 WL 3862536), at ¶ 230.

mitigation evidence and the crimes.<sup>8</sup> The Court made no such finding or requirement, and thus Lang has failed to establish sufficient grounds to warrant reconsideration.

Lang takes issue with the Court's finding that the mitigation evidence pertaining to his childhood – and specifically to the time he spent with his father – was not connected (causally) to the execution of Cheek. Lang points out one line in the Court's extensive opinion to make this point: "Nevertheless, there is no evidence of any connection between Lang's abusive treatment and the two murders."<sup>9</sup> The full context of this line shows that the Court considered and weighed the evidence of Lang's abusive existence for two years with his father:

Although Lang's character offers nothing in mitigation, we give some weight to Lang's history and background. 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 [sic] after returning home to his mother. Nevertheless, there is no evidence of any connection between Lang's abusive treatment and the two murders. See, e.g., *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 265 (decisive weight seldom given to defendants with unstable childhoods).

*Lang*, \_\_ Ohio St.3d \_\_, 2011-Ohio-4215, \_\_ N.E.2d \_\_ (2011 WL 3862536), at ¶ 331.

The Court's noting of a lack of connection reflects the weight of this evidence, not its admissibility. This conclusion is bolstered by the Court's citation to the *Hale* decision, and noting that decisive weight is seldom given to defendants with unstable childhoods. This Court

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<sup>8</sup>If this were in fact true, the extensive evidence of a convicted killer's childhood, standard in the mitigation phases of Ohio capital trials, would be rendered inadmissible during the mitigation phases. The Court clearly did not so hold in the instant case as it weighed and considered the evidence of Lang's childhood and background in its appropriateness review.

<sup>9</sup>*Lang*, \_\_ Ohio St.3d \_\_, 2011-Ohio-4215, \_\_ N.E.2d \_\_ (2011 WL 3862536), at ¶ 331.

reviewed this mitigation evidence, as required by law, and did not ignore it.<sup>10</sup>

Lang, again, is objecting to the Court's application of the law to the facts in this case, taking issue with the outcome of the analysis. He wants the Court to reweigh the evidence in his case and arrive at a different conclusion, i.e., a life sentence instead of a death sentence. Lang therefore has not presented this Court with any justification for reconsideration. Accordingly, the Court should reject this claim and overrule the motion for reconsideration.

### **CONCLUSION**

Lang challenges the Court's resolution of three of his propositions of law. He has failed, however, to offer any support for his challenges to the Court's resolutions of these propositions other than the same arguments he presented earlier to this Court. His arguments, in other words, are essentially rearguments. They thus do not meet the standard for reconsideration, and the Court should reject each of the challenges and overrule the motion for reconsideration.

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<sup>10</sup>Cf. *Smith v. Texas* (2004), 543 U.S. 37, 45; *Tennard v. Dretke* (2004), 542 U.S. 274, 287.

**PROOF OF SERVICE**

A copy of the foregoing MEMORANDUM IN RESPONSE was sent by ordinary U.S. mail this 21st day of September, 2011, to RACHEL TROUTMAN and JENNIFER A. PRILLO, counsel for defendant-appellant, at Office of the Ohio Public Defender, 250 East Broad Street – Suite 1400, Columbus, Ohio 43215-2998.

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