

In The Supreme Court Of Ohio

State Of Ohio, :
Appellee, :
-vs- : Case No. 2007-1741
Edward Lang, :
Appellant. : **This Is A Capital Case.**

**On Appeal from the
Stark County Court of Common Pleas
Case No. 2006 CR 1824A**

**Appellant Edward Lang's Application For Reopening Pursuant To
S.Ct. Prac. R. XI, Section 5**

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SUPREME COURT OF OHIO

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Appellee,	:	
-vs-	:	Case No. 2007-1741
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Appellant Edward Lang asks this Court to grant his Application for Reopening. S.Ct. Prac. R. 11.6; *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

A. Lang's direct appeal counsel were constitutionally ineffective.

The Due Process Clause guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel must act as an advocate and support the cause of the client to the best of their ability. *See e.g., Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). Due to the failure to raise below Propositions I and II, as well as the failure to properly raise below Propositions III, IV, and V, it is clear that appellate counsel were prejudicially ineffective in this case.

There is no reasonable tactical basis for failing to raise the issues below. Ex. A. This Court must reopen the appeal. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992); S.Ct. Prac. R. 11.6.

The failure to present a meritorious issue for review constitutes ineffective assistance of appellate counsel. *See e.g., Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2007); *State v. Ketterer*, 111 Ohio St.3d 70 (2006). Had Appellant Lang's direct appeal counsel presented the following five propositions of law, the outcome of this appeal would have been different.

Proposition Of Law No. I: Trial Counsel Are Ineffective For Failing To Request, And A Trial Court Errs by Failing To Sua Sponte Provide, A Limiting Instruction To The Juror Related To The Proper Use Of The Co-Defendant's Plea Of Guilty To Complicity To Commit Murder. U.S. Const. amends. VI And XIV.

The Sixth and Fourteenth Amendments guarantee the accused the right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). When evaluating claims of ineffective assistance of counsel, this Court must determine if counsel's performance was deficient, and if so, whether petitioner was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984).

Lang was denied the effective assistance of counsel when his trial counsel failed to request a limiting instruction related to the convicted co-defendant's guilty plea to the murders being considered by the jury in Lang's case. Because guilt was an open question and the presumption of innocence remained untouched, it was error for trial counsel not to request a limiting instruction that the jury could not consider the co-defendant's guilty plea to these murders as evidence of anything in Lang's case-in-chief. See Tr. 1267 (prosecutor references plea in closing). Further, the trial court erred in not *sua sponte* providing the instruction.

While Walker pled guilty to complicity to commit the two murders, unquestionably Walker's guilty plea was not substantive evidence of Lang's guilt. However, the jury was not so instructed. This is improper and prejudicial error. See *United States v. Dougherty*, 810 F.2d 763, 767-68 (8th Cir. 1987).

As noted by the Tenth Circuit, "A codefendant's guilty plea may not be used as substantive evidence of a defendant's guilt...If the codefendant testifies, however, either the government or the defense may elicit evidence of a guilty plea for the jury to consider in assessing the codefendant's credibility as a witness...Because of the potential for prejudice, cautionary instructions limiting the jury's use of the guilty plea to permissible purposes are

critical.” *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983)(citations omitted). A reference to previous guilty pleas of a codefendant without cautionary instructions to the jury prejudices the defendant. *United States v. Smith*, 806 F.2d 971 (10th Cir. 1986); *United States v. Austin*, 786 F.2d 986 (10th Cir. 1986); *Baez*, 703 F.2d 453; see *United States v. Bright*, 1995 U.S. App. LEXIS 4706 (6th Cir. 1995) (“The guilty plea of a co-defendant cannot be used as substantive evidence of the guilt of any remaining defendant...‘one of the key factors in determining whether a defendant was prejudiced by the admission into evidence, for a proper purpose, of the guilty plea of a codefendant is the presence of cautionary instructions. As long as the jury is told in some form not to consider the guilty plea in deciding the guilt or innocence of the defendant on trial, the conviction will be upheld’ 8 Moore’s Federal Practice P 11.10(2). Furthermore, ‘the general rule as to the admission of evidence of guilty plea of a codefendant is that a conviction in a case in which such evidence was admitted will be upheld if...a cautionary instruction was given to the jury.’ *Id.*”).

Proposition Of Law No. II: The Trial Court’s Treatment Of A *Batson v. Kentucky*, 476 U.S. 79 (1986) Objection Was Error, And Trial Counsel’s Conduct During The Consideration Of The *Batson* Objection Was Prejudicially Ineffective. U.S. Const. amends. VI And XIV.

Lang’s trial counsel failed to object to the tortured application of *Batson* by the trial court; and the trial court erred when it was silent on *Batson*’s third prong. The *Batson* objection and the trial court’s consideration of the objection are contained at Tr. 746-51. The prosecutor indicated that he was going to strike an African-American juror, #405, and identified his race. Tr. 746. Thereafter and unprompted, the prosecutor started to offer race-neutral explanations that: 1) the juror did not seem to understand questions during voir dire; 2) interactions that deputies had with the juror evidenced confusion; 3) the jury commissioner indicated the juror seemed unaware of what was going on. *Id.* Thereafter, the trial prosecutor boiled the above

three reasons to an expression that an older person “will not be able to comprehend that evidence.” Tr. 747.

Defense counsel then objected. *Id.* The prosecutor then argued one African-American juror, #386, was on the panel, and that he had established a race neutral explanation for the strike. Tr. 748.¹ The trial court then asked the juror if his age caused health problems that would prevent him from serving. The juror responded that he had no concern for his health in that regard, but his wife was having issues and he had no one but his daughter to take care of her. Tr. 748-49. The juror admitted that he had some confusion as to when he was supposed to return but agreed he understood everything going on. Tr. 749.

The prosecutor then mischaracterized #405’s statement and added the concern that no one was caring for his wife so he would be distracted. Tr. 750. The prosecutor then refuted that a prima facie case had been established. *Id.* When he reiterated that it was #405’s age that was problematic, he also offered as yet another reason that he saw #405 in a hallway and he needed help down the stairs. *Id.* The prosecutor never asked #405 about these concerns. As the Supreme Court noted, “the failure to ask undermines the persuasiveness of the claimed concern.” *Miller-El v. Cockrell*, 545 U.S. 231, 250 n.8 (2005).

The trial court noted #405 seemed a little wobbly the other day and noted that his questions confirmed the jury commissioner argument made by the state. Tr. 751. Without anything more, the trial court indicated that he was going to allow the strike. *Id.* This inquiry was insufficient. The trial court failed to employ the analysis in *Batson*, specifically failing to consider the *Batson* three part test and providing a basis for its ruling.

¹ Recall, this juror was a victim’s family member and was ultimately removed as a juror.

In *Batson* the Supreme Court recognized that a “defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.” 476 U.S. at 85-86. *Batson* employs a three-step analysis. First, a defendant must establish a prima facie case showing that the prosecution exercised peremptory strikes on a discriminatory basis. Second, the prosecution must articulate a race-neutral explanation for the challenges. Third, the court must then decide if the defendant has carried the burden of proving purposeful discrimination. *Batson*, 476 U.S. at 96-98. The court did not make this finding here.

Because the prosecutor offered a race neutral explanation, the trial court and trial counsel failed to give full effect to Supreme Court’s decision *Hernandez v. New York*, 500 U.S. 352 (1991). In *Hernandez*, 500 U.S. at 359, the Supreme Court held that the offering of a race neutral explanation renders moot the first prong of *Batson*. Because the prosecutor proffered a race neutral reason, the focus should have turned to the second and third prongs of the constitutional test. However, it did not.

Further, the trial court failed to comply with *Purkett v. Elem*, 514 U.S. 765, 768-69 (1995), which held that simply denying discriminatory animus is insufficient to turn back a *Batson* challenge. This is especially true when the prosecutor disputes that the first prong has been satisfied. See Tr. 750. Trial counsel were ineffective in failing to object to this erroneous consideration of the *Batson* objection and failing to offer anything as to *Batson*’s third step.

Proposition Of Law No. III: The Trial Court Improperly Excluded Access To Mitigation In Violation Of *Eddings v. Oklahoma*, 455 U.S. 104 (1992) And *Lockett v. Ohio*, 438 U.S. 586 (1978) By Denying Access to the Grand Jury Transcripts of the Co-defendant’s Indictment. U.S. Const. Amend. VII, XIV.

Although Lang’s direct appeal counsel raised the denial of access to the grand jury transcripts of the co-defendant Walker, a key issue was overlooked. See Proposition of Law No.

6. Trial counsel specifically federalized and asserted that access to the grand jury transcripts

related to their attempts to present mitigating evidence. 5/9/07 Tr. p. 4. Appellate counsel erroneously failed to argue this critical aspect.

One of the most fundamental Eighth Amendment principles is that a defendant receive individualized consideration based on the circumstances of the crime and the character of the individual before a sentence of death may be imposed. *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

The Supreme Court has clearly and consistently ruled that the defendant, in a capital sentencing hearing, may not be precluded from presenting *any* relevant mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The Supreme Court simply does not tolerate a state court process that fails to consider and give effect to mitigation. *See also, Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007) (granting relief in Ohio capital case for *Eddings* violation.)

Appellate counsel failed to raise the critical aspect of this claim – that it relates to a theory of mitigation—relative culpability. Therefore, the trial court’s ruling excluded access to a category of evidence. This distinction was not lost on trial counsel, who effectively argued the issue in this unique fashion. Appellate counsel were ineffective in failing to raise the preserved aspect of this claim.

Proposition of Law No. IV: Gang Evidence Simply Is Not Allowed in a capital trial pursuant to *Dawson v. Delaware*, 503 U.S. 159 (1992). U.S. Const. amends. VI, VIII and XIV.

During his direct appeal, Lang’s appellate counsel touched upon the improper use by the State of Lang’s alleged gang activity. *See* Proposition of Law No. 8, subpart 3; Proposition of

Law No. 9, subpart 3.2. However, appellate counsel failed to cite the seminal Supreme Court authority on that point, *Dawson v. Delaware*, 503 U.S. 159 (1992).

In denying this claim, this Court appropriately held that “no evidence was presented at trial linking the two murders to gang activity.” *State v. Lang*, 129 Ohio St. 3d 512, 530 (2011). This recognition by the Court is dramatic, in that it established appellate counsel’s failure to cite this Court to the definitive ruling in *Dawson* which controls the nature of the claim. *See State v. Bethel*, 110 Ohio St.3d 416 (2006) (*Dawson* not violated because gang membership relevant to criminal activity).

The gang evidence was inherently prejudicial. The Supreme Court has determined that the submission of gang affiliation evidence in a criminal proceeding may be constitutional error when such evidence is irrelevant to the issues at hand. *See Dawson*, 503 U.S. at 165 (capital sentence vacated by the admission of gang evidence in sentencing proceedings where the evidence proved nothing more than his abstract beliefs). The Seventh Circuit has explained:

Gangs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury’s negative feelings toward gangs will influence its verdict. Guilt by association is a genuine concern whenever gang evidence is admitted.

United States v. Irvin, 87 F.3d 860, 865 (7th Cir. 1996).

Simply, evidence of gang membership, as with other evidence of uncharged misconduct intended to show criminal propensity, “deflects a jury’s attention from the immediate charges and causes it to prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged.” *United States v. Roark*, 924 F.2d 1426, 1434 (8th Cir. 1991) (citing *Michelson v. United States*, 335 U.S. 469, 476, (1948)). Put another way, the admission of the gang evidence eroded the presumption of innocence because it

encouraged jurors to find Lang guilty and impose death based upon his purported gang activity rather than the evidence presented at trial. Such a process is inconsistent with the demands of due process and the constitutional guarantee of a fair trial. *Dawson*, 503 U.S. 159.

Proposition Of Law No. V: Trial Counsel Were Ineffective In Failing To Request Further Inquiry Regarding Potential Prejudice From A Victim's Family Member Sitting As A Juror In Lang's Capital Trial. U.S. Const. amends. VI and XIV.

During his direct appeal, Lang's appellate counsel raised as error a family member sitting as a juror and trial counsel's ineffectiveness in not asking for individualized voir dire of the remaining jurors. *See* Proposition of Law No. 1; Proposition of Law No. 10, subpart 3. Juror #386 was dismissed because she failed to disclose, in spite of numerous questions, her familial relationship to a victim of this crime. Tr. 952.

After her dismissal, the trial court stated that #386 was dismissed because she "may have a relationship" with someone involved in the case. The trial court then asked a single question of the remaining eleven (11) jurors: "is there any member of the jury at all that she did discuss this with at all?" Tr. 953. No one answered, and there was no further inquiry. The trial court then moved on without any objection by trial counsel regarding the limited group inquiry or without a request for a more substantial group inquiry than a single question.

The law required a deeper inquiry. According to *Remmer v. United States*, 347 U.S. 227, (1954) and *Smith v. Phillips*, 455 U.S. 209 (1982), the trial court was required to 1) determine the circumstances; 2) determine the impact upon the juror(s); 3) determine whether the circumstances were prejudicial in a hearing with all interested parties permitted to participate.

While the trial court should have individually questioned the jurors (as previously argued), the trial court is not mandated to do so if such questioning can be handled as a group. Consequently, trial counsel failed to act effectively in failing to object when the trial court failed

to undertake what *Remmer* mandates, a probing group determination of whether any communication biased the juror. A single group question does not satisfy this standard and certainly does not probe at all into whether there was any communication that may have biased juror(s).

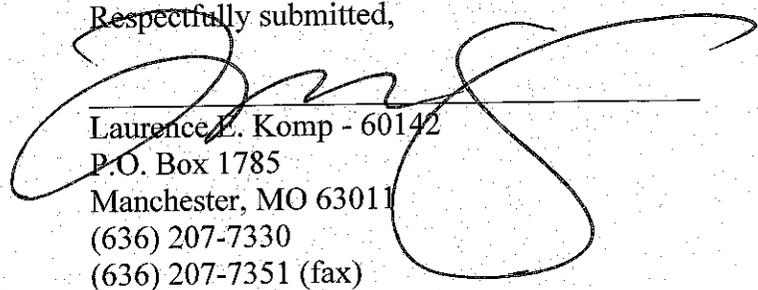
Lang was prejudiced when direct appeal counsel failed to raise trial counsel's ineffectiveness in this manner, i.e. not requesting additional group questioning. This failure by trial counsel was much more critical than counsel's failure to ask for individual voir dire. Indeed, this Court relied on this omission to deny Lang relief, stating: "the trial court questioned the other jurors as a group and obtained their assurance that they had not discussed this matter with juror #386. Neither the state nor the defense counsel objected to the questioning or requested an additional inquiry. Under these circumstances, we hold that no further inquiry was required." *Lang*, 129 Ohio St. 3d at 522. Thus, trial counsel's constitutional shortcomings were treated by this Court as evidence that the trial court's inquiry was sufficient.

If defense counsel had objected or requested further inquiry, it is very likely the trial court would have inquired further. The trial court recognized the problem was that the biased juror was in the presence of the other jurors when it noted that "there is no risk at this point. The jury is on its way up the hall right now, so they are not discussing the case right now because they are with the bailiff." Tr. 866-67. The trial court went on to say they would not give the juror any further opportunity "to go down and talk to the jury" because they will not let her leave the courtroom with the other jurors. Tr. 867. However, the trial court, due to trial counsel's ineffectiveness, never conducted an adequate inquiry to determine whether the juror had gotten that opportunity earlier.

C. Conclusion.

Appellant Lang has shown that there are genuine issues regarding whether he was deprived of effective assistance of counsel on appeal. Lang requests that this Application for Reopening be granted and full briefing be permitted. S.Ct. Prac. R. 11.6 and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

Respectfully submitted,



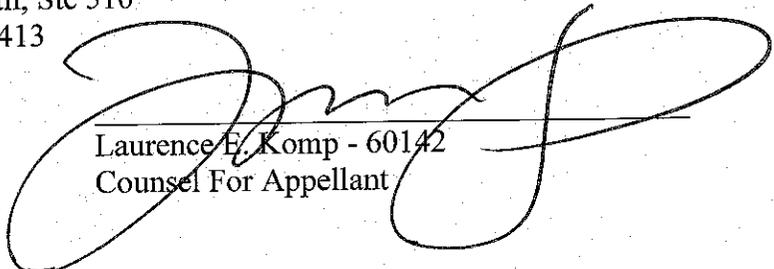
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COUNSEL FOR APPELLANT

Certificate of Service

I hereby certify that on January 27th, 2012, I served a copy of the foregoing by depositing it in the United States mail addressed to:

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Counsel For Appellant

EXHIBIT A

In The Supreme Court Of Ohio

State Of Ohio, :
Appellee, :
-vs- : Case No. 2007-1741
Edward Lang, :
Appellant. : **This Is A Capital Case.**

AFFIDAVIT OF LAURENCE E. KOMP

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Laurence E. Komp, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the State of Ohio, State of Missouri, and the Commonwealth of Kentucky.
2. I am a member of the following federal bars: United States Supreme Court, United States Court of Appeals for the Fifth, Sixth, Seventh and Eighth Circuits, United States District Court for the Southern and Northern Districts of Ohio, United States District Court for the Southern District of Indiana, United States District Court for the Eastern and Western Districts of Kentucky, and United States District Court for the Eastern District of Missouri
3. I have been practicing capital appellate, post-conviction, and habeas work since 1992. My sole area of practice is capital litigation and has been since 1992.
4. Some of the reported capital cases where I was counsel are: *Corcoran v. Wilson*, 651 F.3d 611 (7th Cir. 2011), *Corcoran v. Levenhagen*, 130 S. Ct. 8 (2009), *Allen v. Buss*, 558 F.3d 657 (7th Cir. 2009), *Morales v. Mitchell*, 507 F.3d 916 (6th Cir. 2007), *Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007), *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), *Franklin ex rel. Berry v. Francis*, 144 F.3d 429 (6th Cir. 1998), and *State v. Scudder*, 643 N.E.2d 524 (Ohio 1994)
5. This is not an exhaustive list of reported capital cases of which I have been counsel.

6. I was appointed for purposes of reviewing a record to determine whether an application to re-open pursuant to S.Ct. Prac. R. 11.6 should be filed.
7. I have reviewed the record in *State v. Lang*, Stark County Common Pleas Case No. 2006 CR 1824A. I have also reviewed the direct appeal briefs, oral argument presented to this Court, and, on January 26, 2012, examined the record in possession of this Court in this case.
8. I am Rule 20 certified to represent indigent clients in death penalty appeals.
9. Because of the focus of my practice of law, my Rule 20 certification, and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed.
10. The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).
11. Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Many substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues to raise and preserve them for appellate review.
12. Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts via a Petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state-court proceedings on the assumption that relief is likely to be sought in federal court.
13. It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be fairly presented and exhausted throughout the state courts. The standard of practice is to cite directly to the relevant provisions of the United States Constitution and appropriate United States Supreme Court authority in each proposition of law to avoid any fair presentment and exhaustion problems in federal court.
14. Based on the foregoing standards, I reviewed the record in Mr. Lang's case. I have identified the following issues that should have been presented by appellate counsel to the Ohio Supreme Court:
 - **Proposition Of Law No. I: Trial Counsel Are Ineffective For Failing To Request And A Trial Court Errs For Failing To Sua Sponte Provide A Limiting Instruction To The Juror Related To The Proper Use Of The Co-Defendant's Plea Of Guilty To Complicity To Commit Murder. U.S. Const. amends. VI And XIV.**

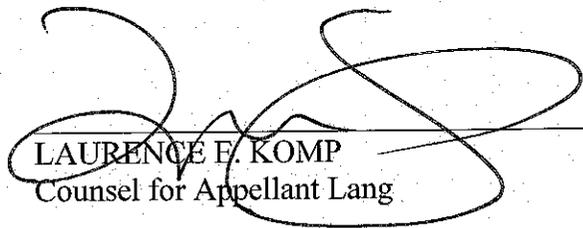
- **Proposition Of Law No. II: The Trial Court's Treatment Of A *Batson v. Kentucky*, 476 U.S. 79 (1986) Objection Was Error, And Trial Counsel's Conduct During The Consideration Of The *Batson* Objection Was Prejudicially Ineffective. U.S. Const. amends. VI And XIV.**
- **Proposition Of Law No. III: The Trial Court Improperly Excluded Access To Mitigation In Violation Of *Eddings v. Oklahoma*, 455 U.S. 104 (1992) And *Lockett v. Ohio*, 438 U.S. 586 (1978) By Denying Access to the Grand Jury Transcripts of the Co-defendant's Indictment. U.S. Const. amend. VII, XIV.**
- **Proposition Of Law No. IV: Gang Evidence Simply Is Not Allowed In A Capital Trial Pursuant To *Dawson v. Delaware*, 503 U.S. 159 (1992). U.S. Const. amends. VI, VIII and XIV.**
- **Proposition Of Law No. V: Trial Counsel Were Ineffective In Failing To Request Further Group Inquiry Regarding Potential Prejudice From A Victim's Family Member Sitting As A Juror In Lang's Capital Trial. U.S. Const. amends. VI and XIV.**

15. These issues are meritorious and warrant relief. There is no reasonable tactical decision for not raising these issues. Thus, appellate counsel's failure to present these errors amounts to ineffective assistance of appellate counsel in this case.

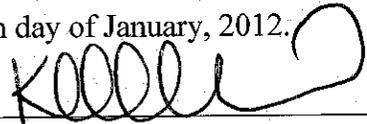
16. Appellate counsel failed to raise these issues in Mr. Lang's direct appeal. Based on my evaluation of the record and understanding of the law, I believe the issues raised in this Application for Reopening are meritorious. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal-court review.

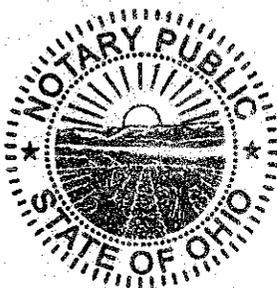
17. Therefore, Mr. Lang was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.


 LAURENCE F. KOMP
 Counsel for Appellant Lang

Sworn to and subscribed before me on this 26th day of January, 2012.


 Notary Public



KELLE HINDERER
 Notary Public
 In and for the State of Ohio
 My Commission Expires
 October 07 2013