No. ___

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD LANG,
PETITIONER,

V.

DAVID BOBBY,
WARDEN.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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September 26, 2018

CAPITAL CASE

QUESTIONS PRESENTED

A. **Can the presentation of false evidence, in support of a false theory, that trial counsel knew or should have known was false, ever constitute a reasonable trial strategy, to rebut a claim of deficient performance, under *Strickland v. Washington,* 466 U.S. 668 (1984)?**

B. **Should the Sixth Circuit be permitted to unilaterally abrogate the presumption of prejudice that arises in a criminal case from "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury," required by *Remmer v. United States*, 347 U.S. 227, 229 (1954), and reaffirmed in *Dietz v. Bouldin,* 136 S. Ct. 1885, 1893 (2016)?**

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I. PETITION FOR WRIT OF CERTIORARI

EDWARD LANG, a death-sentenced prisoner in the State of Ohio, petitions the Court for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit in his case.

II. OPINIONS BELOW

The Court of Appeals' panel opinion (one dissenting opinion), *Lang v. Bobby*, 889 F.3d 803 (6th Cir. 2018), is at Appendix A (page A1). Its order denying rehearing, *Lang v. Bobby*, 2018 U.S. App. LEXIS 17866 (6th Cir. June 28, 2018), is at Appendix B (A21). The district court's opinion and order denying relief, *Lang v. Bobby*, 2015 U.S. Dist. LEXIS 39365 (N.D. Oh. March 27, 2015), is at Appendix C (A23). The Ohio Court of Appeals opinion and order affirming the denial of post-conviction relief, *State v. Lang*, 2010 Ohio App. LEXIS 3375 (Oh. Ap., 5th Dist., Stark County Aug. 23, 2010), is at Appendix D (A82). The Ohio Supreme Court's opinion affirming Petitioner's conviction and sentence, *State v. Lang*, 954 N.E.2d 596 (Oh. 2011), is at Appendix E (A93).

III. JURISDICTION

The Court of Appeals entered judgment on May 11, 2018. *See* A1. A timely petition for rehearing *en banc* was denied *See* A21. This Court has jurisdiction under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute governing federal habeas corpus review for state prisoners, 28 U.S.C.§ 2254, is at issue here. It provides in part that a "district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[1] Petitioner's habeas corpus petition asserted that he had been denied the effective assistance of counsel at the sentencing phase of his state capital trial, due to his trial counsel's failure to conduct

[1] The text of 28 U.S.C. § 2254 is at Appendix H (A139).

a reasonably competent investigation of his client's life, which would have revealed powerfully mitigating evidence never presented to the sentencing jury, in violation of the Sixth Amendment. *See* U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence.").[2] The petition also asserts that the presence of a biased juror on his jury for a portion of his trial violated his rights to a fair and impartial jury as guaranteed by the Sixth Amendment, *see* U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .") and his right to due process under the Fourteenth Amendment. *See* U.S. Const. Amend. XIV (". . . [no] State [shall] deprive any person of life, liberty, or property, without due process of law . . . .").[3]

V. STATEMENT OF THE CASE

A. INTRODUCTION

The first Question Presented raises the issue of whether the presentation of a mitigation theory and evidence in support of that theory that all parties concede was false, may be deemed reasonable trial strategy to rebut a claim of deficient performance. Petitioner Edward Lang was sentenced to death by a state court in Ohio following a sentencing hearing where his trial counsel presented evidence and argument that his life up until age 10 was "pretty normal." The evidence and argument were false. In fact, Petitioner had been brutally abused sexually and physically by his father and older brother since birth and suffered profound mental illness as a result of that abuse and a genetic predisposition, beginning at age 7. He was repeatedly abandoned by his mentally ill, drug abusing mother, and she was deemed "unfit" by the various institutions that sought to intervene in the dysfunctional and chaotic life of her family. Because Petitioner's mother was one of only two

[2] The text of the U.S. CONST. amend. VI is at Appendix F.
[3] The text of the U.S. CONST. amend. XIV is at Appendix G.

sentencing phase witnesses, the state court found that the false presentation of evidence of normalcy was a reasonable strategy to humanize Petitioner's mother, his primary caretaker in his first 10 years of life. The Sixth Circuit recognized the falsity of trial counsel's "theory," yet found that even a false theory can constitute reasonable trial strategy. This Court should grant certiorari to forcefully reject this new, ill-advised rule, that stands *Strickland*'s first prong on its head.

The second Question Presented raises the issue of whether the Sixth Circuit may unilaterally jettison the clearly established presumption of prejudice that attaches under *Remmer v. United States*, 347 U.S. 227 (1954), when a juror has private contact about the matter pending before the jury. During voir dire, one of the prospective jurors failed to disclose that one of the decedents was her aunt (i.e., her step-father's sister). As a result, she sat on Petitioner's jury, until she was observed smiling and nodding to family members in the courtroom gallery. After she was removed, the trial court conducted a *Remmer* hearing that consisted of one single question, whether the juror had disclosed to the others that she had a relative involved in the case. Upon hearing no answer, the trial court allowed the trial to proceed with an alternate replacing the juror. The Ohio Supreme Court and the Sixth Circuit ruled that the hearing satisfied *Remmer* because *Remmer*'s presumption of prejudice for extrinsic contact relating to the case was no longer good law, and that absent a presumption Petitioner did not meet his burden to demonstrate prejudice. This Court should grant certiorari because the circuit has decided an important federal question in a way that conflicts with a relevant decision of this Court (and every other circuit in the country).

B. RELEVANT PRIOR PROCEEDINGS

1. PETITIONER'S CAPITAL TRIAL

In December of 2006, Petitioner was charged with two counts of aggravated murder in a drug-related shooting. The State of Ohio sought the death penalty for both counts. The state alleged

that a man named Walker developed a plan whereby he and Petitioner would rob a drug dealer (Burditte) whom Walker knew. The dealer was known to carry cash, and under the guise of a drug deal, they would rob him. He arrived in a car at a prearranged meeting place. He was accompanied by a woman named Cheek. Both Burditte and Cheek were shot and killed while in the car.

Whether it was Walker or Petitioner who shot the decedents was a disputed issue at trial. The state made a deal with Walker and utilized him as a cooperating witness. He testified that Petitioner was the shooter, and that when the two victims pulled up in the car, only Petitioner entered the car. However, in statements to police, Petitioner asserted that Walker accompanied him into the car, and Walker alone shot the decedents. At trial, it was also revealed that prior to the shooting, Walker had wiped his fingerprints off of the gun. Tests on Petitioner's clothing revealed no gunshot residue. Walker's clothing was never tested.

In closing to the jury, the prosecution argued that, even if Petitioner did not shoot the decedents, he was guilty as an aider and abetter. The court instructed the jury on aider and abetter liability. The jury was also told to view Walker's testimony with grave suspicion. The jury returned a verdict of guilty on all counts. Following a sentencing hearing, the jury recommended a life sentence for the killing of the drug dealer Burditte and a sentence of death for the killing of Cheek. The trial court then conducted its independent review as mandated under Ohio law, and followed the jury's recommendation, imposing a sentence of death upon Petitioner for the Cheek killing.

a. Facts relevant to the juror bias issue

A seated juror, Juror 386, failed to reveal during voir dire that her stepfather was the brother of Ms. Cheek (the decedent for whom the jury imposed death). R. 22-1, Transcript, Page ID#7353.[4]

[4] The state court record in this case is contained in the Warden's appendix to the return of the writ, which has been filed electronically in the District Court. The abbreviation "R." refers to the appendix to the return of the writ.

Juror 386 responded with silence when asked whether "someone that is very close to you has had some type of involvement in the criminal justice system." *Id.* at 6551. When the trial court twice clarified that "involvement" would mean a family member or friend who had been a "victim," Juror 386 said nothing. *Id.* at 6552, 6554. On her jury questionnaire Juror 386 indicated that she was not related to a victim of crime (R. 55-1 (Juror Questionnaire, PageID#10972), and that her "personal knowledge" of the "shooting death" of the decedent, her aunt, was confined to what she read in the newspaper. *Id.* at 10976. The questioning of jurors about familial connections to the criminal justice system covered twelve pages of transcript. At no point did Juror 386 reveal that her stepfather was the decedent's brother.

On the second day of trial, trial counsel informed the court that Petitioner had seen one of the jurors nodding and smiling to people in in the gallery. R. 22-2, Transcript, PageID#7352. In response, the prosecutor stated that the decedent's father had told him that Juror 386 was the decedent's niece by marriage.[5] *Id.* at 7352–53. The trial resumed, and at the next break, the trial court questioned Juror 386, and she admitted that her mother was married to the decedent's brother. *Id.* at 7428. She acknowledged that she did not disclose this information during voir dire. *Id.* In voir dire, Juror 386 claimed that she had not discussed the case with anyone and that what she knew about the case she had read in the newspaper. *Id.* at 7429. However, when questioned at the break, Juror 386 admitted that it was her grandfather who told her that her aunt had died. *d.* at 7433. She attended the decedent's viewing and funeral. *Id,* at 7431-32. The people she nodded and smiled to in the gallery were members of the family. *Id.* at 7429-30. Juror 386 admitted that she and her mother used to visit with them in their homes. *Id.* at 7430. The trial court mentioned that he noticed Juror 386 had

[5] At no point did the prosecutor explain why he only revealed this information after Petitioner raised his concerns.

been friendly with at least one other juror. *Id.* at 7432. The trial court asked Juror 386 one question, whether she had disclosed her relationship with the decedent to the other jurors, and she answered "no." *Id.* at 7432-33; 7438-39. The prosecutor moved to excuse Juror 386, stating "we have a relative, a direct relative of the deceased on the jury." *Id.* at 7436. The defense agreed. *Id.* The trial court excused the juror. *Id.* at 7438. The remaining jurors returned to the courtroom and the judge then asked them as a group, one question, whether Juror 386 had discussed that she had a "relative relationship with either a witness or a party of somebody that was involved in the case." *Id.* at 7441. There was no answer. *Id.* at 7441. The trial continued with an alternate replacing Juror 386.

b. Facts relevant to the sentencing phase issue

All but two years of Petitioner's childhood and adolescence were spent in Baltimore, Maryland. Trial counsel did not obtain a court order for Baltimore social service records until approximately a month before the sentencing phase began. R. 18-4 (PCEx-2) PageID#2446.[6] On July 9, 2007, nine days before the sentencing phase began, the psychologist retained by the defense sent a fax to trial counsel advising "No Lang records yet, I gather…???". R. 19-3 (PCEx-43) PageID#2852. On the day the sentencing phase began, that same psychologist noted "lots of case-relevant recs. Just coming in now." R. 19-3 (PCEx-44) PageID#2853 (emphasis in original). The earliest indication in the post-conviction record of social service documents beginning to arrive is a letter from Baltimore Social Services on July 12, 2007, six days before the sentencing hearing. R. 19-3 (PCEx-42) PageID#2851. The letter specifically identified a full volume of records and "several other records" that had yet to be released. *Id.*

The state put on two witnesses at penalty related to victim impact evidence. Two

[6] The designation "PCEx" refers to exhibits filed in the state post-conviction record. As with the transcripts, they are contained in the Warden's appendix to the return of the writ, which has been filed electronically in the District Court.

witnesses testified on Petitioner's behalf. The defense did not present any documents, medical reports, or other evidence. Petitioner's half-sister Yahnena Robinson, and his mother, Tracie Carter, testified about his turbulent family life, from age 12 on up, involving numerous psychiatric hospitalizations. A major theme of trial counsel's presentation was that Petitioner had a "pretty normal childhood up until he was ten," during which time he lived with his mother and sister (trial counsel's closing) R. 22-3, Transcript, PageID#8065. The State agreed with this characterization, telling the jury "that until the age of 10 life seemed to be pretty good. From age 10 to 12 his life was allegedly not so good." (State's closing) *Id*. PageID#8061. According to the defense, Petitioner's first ten years were "normal," in part because "Eddie didn't meet his [abusive] biological father until he was almost ten." (trial counsel's opening) R. 22-3, Transcript, PageID#8001. In support of counsel's theory, Petitioner's sister testified that up until age 10, she and Petitioner were "close" and "shared and did things together." R. 22-3, Transcript, PageID#8017. At school he was "a class clown," but "basically a good student." *Id.* His mother testified that there was nothing about his pre-10 behavior that was "abnormal." *Id.* at 8032-33. "He had his little outbursts," "like all kids," which she associated with a "sibling rivalry." *Id.* Closely related to trial counsel's "normalcy" theme was that Petitioner's mother was "the one constant in his life." (trial counsel's closing) *Id.* at 8066.

Trial counsel maintained to the jury that it was Petitioner's two-year stay with his father that led to his descent into mental illness, substance abuse and criminality. Petitioner's mother testified that at age 10 Petitioner, who had been living with her in Baltimore all of his life, went to visit his father in Delaware. *Id.* at 8029. His father retained custody of him, against her wishes, for two years. *Id.* Trial counsel provided no evidence as to what occurred during those two years,

other than alleged changes allegedly observed in Petitioner after his mother regained custody.[7] Trial counsel conceded as much, telling the jury that "[w]e will never know what happened to Eddie those two years because he won't talk about it." *Id.* at 8066. The prosecutor endorsed and exploited this concession, telling the jury that "it is all speculation as to what happened in that two-year period of time. Nobody knows. But they want you to speculate that bad things happened when there is absolutely no evidence of that." *Id.* at 8071.

2. PETITIONER'S STATE POST-CONVICTION PROCEEDING

a. What post-conviction counsel presented

In state post-conviction proceedings, the state public defender obtained and reviewed thousands of pages of educational, mental health, social service and law enforcement records from dozens of institutions of in the Baltimore area. R. 18-4 (PCEx-6) PageID#2474-2481. The public defender developed and proffered the following evidence, none of which was presented at Petitioner's sentencing hearing:

The assaults on Petitioner began *in utero* via Petitioner's mother's consumption of alcohol during her pregnancy. R.18-5 (PCEx-6) PageID#2511 and his father beating his mother during the pregnancy. R.18-4, PCEx-3) PageID#2448. Petitioner's mother required hospitalization after his father kicked her in the stomach during the pregnancy. R. 18-4 (PCEX-6) PageID#2486. He also raped her, stabbed her, and broke her ribs while she was pregnant. *Id.* He even punched her in the stomach on the way to deliver Petitioner. R.18-5 (PCEx-6) PageID#2510. Petitioner's birth was

[7] According to Petitioner's mother and sister, when Petitioner resumed living with his mother, after living with his father for two years, he was "withdrawn," "quiet," "hurt," and "angry." *Id.* at 8020-21; 8034, Petitioner's mother testified that when she picked him up at age 12, she noticed he looked undernourished, had some bruising, a gash on his hand and a burn (none of which she reported to authorities). *Id.* at 8031-32.

complicated by meconium staining secondary to fetal distress and oxygen deprivation (R. 19-1 (PCEx-17) PageID#2592), which is directly linked to issues of mental health and development. R. 18-5 (PCEx-6) PageID#2511.

Petitioner did not first meet his father at age 10, but rather had significant contact with him as an infant, toddler and young child. Petitioner's father sexually abused him as early as 3 years-old. R. 18-5 (PCEx-14) PageID#2577, 2582, 2583. Investigating agencies confirmed physical and sexual abuse of Petitioner as well as his siblings. *Id*. PageID#2576; R. 18-4 (PCEx-6) PageID#2486 (notes cigarette burns on body at age 2); R. 18-5 (PCEx-15) PageID#2585 ("sexual abuse…is indicated"). There was no documentation that Petitioner's mother reported the abuse to authorities. The records further indicate that Petitioner's father set the house on fire while Petitioner and his siblings were still inside. R. 18-5 (PCEx-14) PageID#2581. Additionally, Baltimore Mercy Medical Center records, upon "general exam," noted "many non-specific" scars on Petitioner at age 4. R. 18-5 (PCEx-15) PageID#2586. Prior to his tenth birthday, Petitioner watched his mother being beaten, tied-up for days at a time, stabbed, shot and raped numerous times by his father and a succession of men with whom she found herself involved in abusive relationships. R. 18-4 (PCEx-6) PageID#2486; R. 18-5 (PCEx-14) PageID#2579; R. 19-1 (PCEx-18) PageID#2604-05, 2609.

During Petitioner's childhood before age 10, while Petitioner was in his mother's care, his older brother physically and sexually abused him, forcing him to perform fellatio on him. R. 18-5 (PCEx-14) PageID#2576; R. 18- 4 (PCEx-6) PageID#2487. Petitioner's brother was described as homicidal, and he "brutally beat" his siblings. *Id*. Petitioner's brother attempted to suffocate Petitioner with a pillow, and he struck him on the head with a baseball bat. R. 18-4 (PCEx-6) PageID#2486; R. 19-1 (PCEx-18) PageID#2596. Petitioner's brother was remorseless for these continuous assaults. *Id*. PageID#2597. He was eventually admitted to a psychiatric hospital. R. 18-

5 (PCEx-14) PageID#2576. Petitioner's mother suffered from bipolar disorder, and his maternal grandmother also suffered from a mental illness that required multiple hospitalizations. R. 18-4 (PCEx-3) PageID#2447, 2450; R. 19-1 (PCEx-17) PageID#2592; R. 19-3 (PCEx-38) PageID#2819-20. During post-conviction proceedings Petitioner's mother acknowledged beating her children and not being able to control her anger. R. 18-4 (PCEx-3) PageID#2450. Institutional records revealed that Petitioner, predisposed to bipolar disorder due to the multi-generational history, had an extensive psychiatric history from the age of seven (7) (R. 18-4 (PCEx-5) PageID#2470), and since age eight (8) had been consistently diagnosed with bipolar disorder. D. 19-1 (PCEx-16).

Petitioner's mother's mental illness and its impact on her behavior resulted in her being absent or, when present, being unable to parent as needed in already difficult and impoverished circumstances. Petitioner's psychiatric therapist when he was 14-years-old attested that Petitioner's mother could not adequately parent him, leaving the family home to live with boyfriends, and continuing to abuse illicit drugs. R. 18-4 (PCEx-5) PageID#2471. When Petitioner was 15 years-old a Child Maltreatment Report was filed against his mother, alleging "lack of supervision" and that she often stayed with her boyfriend rather than at home. R. 19-4 (PCEx-39) PageID#2825-2826. His State of Maryland Case Plan noted that his mother was not "able to provide for child." R. 19-4 (PCEx-34) PageID#2806. A casework report later that same year found that Petitioner's contact with his mother "usually ends up not in the best interest of the child." R. 19-4 (PCEx-40) PageID#2828. When Petitioner was 16, his mother's case manager noted that she lacked the "rudiments" of "patience and other pertinent skills related to parenting." R. 19-1 (PCEx-19) PageID#2629. ("lack of supervision," left children at home alone for extended periods while living with boyfriend). Petitioner's mother admitted in post-conviction that she unilaterally stopped Petitioner's medication on her own. R. 18-4 (PCEx-3) PageID#2450; *Id*. PageID#2449 (stopped

meds because felt doctors were treating her children like "guinea pigs"); *Id*. (PCEx-6) PageID# 2497 (mother did not administer medicine as required); R. 18-5 (PCEx-6) PageID#2505 (noting court orders to stop medications due to physical side effects on Petitioner).

Petitioner's psychiatric therapist from Johns Hopkins described him as "a very psychiatrically ill child," at times appearing "psychotic," with "ongoing crises in his life." R. 18-4, Transcript, PageID#2470. His multiple diagnoses included bipolar disorder, ADHD, possible neurological damage or deficits, and PTSD. *Id.* He had multiple psychiatric hospitalizations, however, any progress that was made was undermined by his mother's subsequent abandonment when he returned home. *See, e.g.*, R. 18-5 (PCEx-10) PageID#2568 (school psychologist's report noting that after return from successful residential placement mother leaves him unattended at home, when she chooses to live with a boyfriend). This unstable home situation greatly impacted Petitioner's emotional/psychiatric development—he could not function day to day. *See* R. 18-4 (PCEx-5) 2470-2471 (psychiatrist therapist's affidavit noting Petitioner "didn't have consistent treatment and because his life was always in crisis," and that Petitioner's mother "couldn't give Edward the structure he needed," leaving him unattended).

Post-conviction counsel also developed and proffered evidence proving what actually occurred in the two-year period Petitioner was with his father. He was physically and sexually abused. R. 18-4 (PCEx-5) PageID#2487-88; his father told him that his mother was dead *id.* at 2488; he was forced to stay in his bedroom for days at a time, especially in the heat of the summer when school was not in session, *id.*; his father, an alcoholic, would get drunk, and beat him for no apparent reason, using "anything within reach," even a 2 by 4 on his birthday. *Id.*

b. The state court post-conviction opinion (sentencing claim)

On August 23, 2010, the Ohio Court of Appeals denied Petitioner's claim that trial counsel had been ineffective for failing to discover and present the mitigating evidence developed during those proceedings. 2010 Ohio App. LEXIS 3375 (Oh. Ap., 5th Dist., Stark County Aug. 23, 2010) (A91). The court held that the evidence developed in post-conviction did not create "a reasonable probability that the jury would have recommended a life sentence, rather than the death penalty." *Id.* The court found that any impact the undiscovered evidence would have had upon the sentencing phase jury was "largely speculative" and cumulative. *Id.*

As to deficient performance, the court found that the receipt of some but not all of the social service records one week before the sentencing phase was of little concern, because "few conclusions can be reached" as to what value they would have had to Petitioner. *Id.* The court credited the truth of the post-conviction evidence demonstrating that Petitioner's pre-10 life was decidedly abnormal. A89-90. Yet, it found that counsel's "decision" to not present that evidence was justified by his tactic of portraying the "mother as a sympathetic character" and Petitioner's life with her as normal, which could "easily have been derailed" by the physical and sexual abuse, trauma, and abandonment Petitioner suffered while in her "care." *Id.* The court also found that whatever "scientific terms" might be in the voluminous records obtained in post-conviction, could have "damaged" trial counsel's attempt to "humanize" Petitioner's difficulties. *Id.*

3. THE STATE COURT DIRECT APPEAL OPINION ADDRESSING JUROR BIAS

On June 2, 2011, the Ohio Supreme Court denied Petitioner's direct appeal argument that the trial court failed to employ the proper standard for the juror bias hearing established in *Remmer v. United States,* 347 U.S. 227 (1954). *State v. Lang,* 954 N.E.2d 596 (Oh. 2011) (A93). Petitioner argued that if a juror has off-the-record contact about a case-related matter, the prejudicial effect

spills over and is viewed as having presumptively tainted all jurors. Citing *Remmer*, he argued that the burden "rests heavily on the government to establish that the contact with the juror was harmless." *Id.* at 229. The one limited question focused only on whether Juror 386 revealed a relationship did not satisfy *Remmer*.

The Ohio Supreme Court acknowledged Juror 386's multiple failures to disclose. *See* A106 ("Before she was seated as a juror, No. 386 failed to disclose that her stepfather was Cheek's brother;" *id.* "Juror No. 386 failed to mention this relationship on either her juror questionnaire or her pretrial-publicity questionnaire;" *id.* "Juror No. 386 also failed to disclose her relationship to Cheek during voir dire"). Yet the court denied relief. The court cited an earlier Ohio state case that rejected a presumption of prejudice in any juror bias case (*State v. Keith*, 684 N.E.2d 47, 57 (Oh. 1997), and reiterated that in Ohio, the burden remains on the defendant alone to prove prejudice. A107. Thus, the court found the trial court was entitled to rely on the jurors' silence in response to the single question it asked to find that all of the remaining jurors remained impartial. *Id.* at 118.

4. THE DISTRICT COURT OPINION

On March 27, 2015, the district court denied relief. *Lang v. Bobby,* 2015 U.S. Dist. LEXIS 39365 (Mar. 27, 2015) (A23). Regarding the ineffectiveness claim, the court found that trial counsel's review of unspecified records and discovery, and representations to the trial court that the mitigation investigation was on track, defeated any claim of deficient performance relating to counsel's preparation. A39-40. Like the state court, the district court found that counsel had a strategic basis to not present the evidence of abandonment, sexual and physical abuse and neglect during Petitioner's first 10 years of life, since it would have reflected poorly on Petitioner's mother and counsel's theme that she facilitated a normal environment. A40. Additionally, the district court credited the state court's rationale that "scientific terms" which in all likelihood were contained in

the records would counteract trial counsel's "humanizing" strategy. *Id.* As to prejudice, the district court endorsed the state court's finding that the evidence developed in post-conviction was cumulative. *Id.*

As to the juror taint issue, Petitioner argued that the Ohio Supreme Court's decision was contrary to and an unreasonable application of clearly established federal law, because it improperly applied *Remmer,* by not applying its presumption of prejudice, and shifting the initial burden to Petitioner. Petitioner argued that a single question focused solely on whether the juror disclosed her relationship to the decedent, and nothing else (such as whether she expressed animus toward the defendant or opinions about his guilt or innocence) could not sustain the state's burden. The court, however, held that the *Remmer* presumption was no longer good law, finding that this Court's decision in *Smith v. Phillips,* 455 U.S. 2090 (1982) abrogated it. A58.

5. THE CIRCUIT COURT OPINION

The Sixth Circuit affirmed the district court, *Lang v. Bobby*, 889 F.3d 803 (6th Cir. 2018) (A1). As to the ineffectiveness issue at sentencing, the court found that trial counsel's preparation was satisfactory, since he produced invoices showing he "began preparing for the mitigation hearing soon after taking Lang's case[, and] hired a mitigation investigator and psychologist and spent several hundred hours preparing for trial." A12. The court found that it was a reasonable strategy for trial counsel to keep from the jury the trauma, abuse and neglect of Petitioner's first 10 years because its introduction would have "opened the door" to "bad character" evidence. A12. The state court never mentioned this rationale, and the circuit court did not explain why evidence of Petitioner's suffering would "open the door" to bad character evidence, while evidence that he was normal would not have. The court also found that the Ohio court's determination that not presenting

the evidence of the horrors of Petitioner's first 10 years of life was a reasonable strategy to "humanize" Petitioner and his mother, and was not an unreasonable application of *Strickland.*

The court agreed with Petitioner that in contrast to what his trial attorney and the prosecutor argued to the jury, his early childhood was not normal. *See* A12. The court found that in light of a "[c]hildhood filled with horrific abuse and violence," his "childhood prior to age ten was anything but normal." A12. The court, however, found trial counsel's decision to present evidence and argument that it was normal was a reasonable trial strategy under the Sixth Amendment, because it allowed trial counsel to "avoid blaming Lang's mother – his primary mitigation witness – for his client's difficulties." *Id.*

As to the juror bias claim, the circuit court opinion echoed the district court finding that *Phillips* abrogated the *Remmer* standard, and the burden was no longer on the government to rebut prejudice. A9. Thus, because the defense did not produce evidence of "actual prejudice," and the record contained only the jurors' silence in response to the question, the Ohio court's ruling was neither contrary to or an unreasonable application of *Remmer. Id.* at 8-10.[8]

Judge Karen Nelson Moore dissented from the decision, and would have granted relief on both grounds. As to trial counsel's performance at the sentencing phase, Judge Moore found that in several respects, the Ohio Court of Appeals unreasonably applied clearly established federal law. First, she found (as Petitioner had argued) that the state court's holding that the omitted evidence would not have "created a reasonable probability that the jury would have recommended a life

[8] The Circuit acknowledged that its own *Remmer* precedent holds that a trial court abuses its discretion when it conducts a *Remmer* hearing the way the Ohio trial court did in this case. A9. Under Sixth Circuit precedent, when a *Remmer* hearing is required, the resolution of the bias issue may not rest upon juror silence or inaction, in response to a trial court inquiry. *Id.* This is because "a juror who was hesitant about coming forward could simply do nothing." *United States v. Corrado,* 227 F.3d 528, 536 (6th Cir. 2000).

sentence (A91), was an incorrect standard. She cited to *Wiggins v. Smith*, 539 U.S. 510, 537 (2003), for the correct standard (i.e., whether "there is a reasonable probability that at least one juror would have struck a different balance."). A18. Second, she found "the state court's characterization of the omitted evidence as cumulative is unreasonable[, since Petitioner's] trial counsel failed at the mitigation phase to present any evidence of the sexual and physical abuse of Lang starting from when he was a toddler at the hands of both his father and brother. Thus, any evidence about this abuse could not have been cumulative." *Id.* Judge Moore also found that by falsely claiming that Petitioner's childhood was "normal," trial counsel "minimize[ed] the deprivations endured by Lang in his early childhood," and "undermined key mitigation evidence." A20. As to the juror bias issue, Judge Moore found that the trial court's inquiry "was less than minimal." A13. She found that the state court opinion was an unreasonable interpretation of *Remmer*'s requirement that "a trial court, when faced with a claim of jury bias, "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." *Id.* (citing *Remmer*, 347 U.S. at 230). She found that "[the single] question was overly narrow because it focused only on whether Juror 386 had revealed her relationship to Cheek to her fellow jurors, and not on whether Juror 386 had tainted the remaining jurors' ability to be impartial through other biased comments." A14.

VI. REASONS FOR GRANTING THE PETITION

This case satisfies the Court's criteria for certiorari. The questions presented are squarely presented on the record, and were resolved below in a manner that conflicts with this Court's precedent, by a Circuit Court that decided important federal questions in ways that conflict with relevant decisions of this Court.

A. THE COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT PRESENTATION OF FALSE EVIDENCE IN SUPPORT OF A FALSE THEORY CANNOT REBUT A CLAIM OF DEFICIENT PERFORMANCE UNDER *STRICKLAND V. WASHINGTON*

At the sentencing phase of Petitioner's capital trial, his trial counsel presented Petitioner's mother's and sister's testimony that his life was "normal" up to age. 10. Trial counsel explicitly reiterated this theme in closing argument, as did the state. However, as the circuit court later held (and the state conceded), the post-conviction evidence revealed that Petitioner's life up to age 10 was "anything but normal." There was a wealth of evidence, never presented by trial counsel, that Petitioner suffered chronic sexual and physical abuse at the hands of his father and older sibling, was diagnosed as profoundly mentally ill, and was neglected and abandoned by his sole caretaker, his mother. The state court held that it was a reasonable tactical decision for trial counsel to have not presented this evidence, because he needed to present Petitioner's mother to the jury in a favorable light. The circuit court endorsed the state court's rationale.

Based on this Court's precedent regarding capital counsel's responsibilities at the sentencing phase of a capital trial under the framework of *Strickland v. Washington,* 466 U.S. 668 (1984), trial counsel's performance was utterly deficient, and the deficiency prejudiced Petitioner. Especially troubling, and the basis of the Question Presented, is the circuit court's express approval of a sentencing phase theory, and evidence in support of that theory, that the circuit acknowledges is false, to defeat a claim of deficient performance. This Court must reject that analysis, based on its established precedent, *Nix v. Whiteside,* 475 U.S. 157, 176 (1986), holding that an attorney's presentation of false evidence is a concept foreign to the notion of effective assistance of counsel. This is an ideal case in which to address this troubling and unprecedented misapplication of *Strickland*'s first prong: Considering that central to trial counsel's inexplicable theory that Petitioner's young childhood was normal was denuding from his presentation the most sympathetic

aspect of Petitioner's childhood – the terror, abuse and neglect that he suffered – it is beyond dispute that he was also prejudiced by trial counsel's purported "tactical" decision."

1. THE STATE COURT ENDORSES A FALSE THEORY OF MITIGATION AND FALSE EVIDENCE IN SUPPORT OF THAT THEORY

The sentencing phase evidence that counsel presented was false in a number of respects. Petitioner's mother testified that Petitioner first met his father when he was 10 years old. R. 22-3, Transcript, PageID#8026. In fact, institutional records obtained in post-conviction demonstrated that Petitioner's father had been abusing him physically and sexually from birth, in his mother's home. His father forced Petitioner to watch as he tied up, beat, stabbed, shot and raped Petitioner's mother. His father also set the house on fire while Petitioner and his siblings were inside (flatly refuting the defense contention that Petitioner did not meet his father before age 10). The physical assaults upon Petitioner began *in utero,* causing oxygen deprivation and fetal distress.

Petitioner's mother also testified that Petitioner was "like all kids," and did not act in any way that would be considered "abnormal." *Id.* at 8032. In fact, Petitioner exhibited severe psychiatric symptoms from age 7, and was diagnosed with bipolar disorder by age 8. She told the jury that Petitioner's "little outbursts" were simply the result of a sibling rivalry. *Id.* at 8032-33. However, while Petitioner lived in his mother's home, her severely mentally ill older son brutally beat and sexually abused Petitioner, forcing Petitioner to fellate him.

In support of the false notion of "normalcy" in the maternal home, trial counsel told the jury that Petitioner's mother was the "one constant" in his life, and had her testify that it was institutional failure that doomed Petitioner, rather than her abandonment of him to live in the homes of her paramours, when he returned from institutional care. *Id.* at 8036-37. Mother also kept from the jury that she suffered from bi-polar disorder, and that her often untreated mental illness imperiled Petitioner, that she beat Petitioner, was abusing drugs during his childhood and adolescence, and

was found to be unfit by a series of child protective services workers. Finally, mother kept from the jury that she did not shield Petitioner from his father during his childhood (prior to age 10), as she had testified; rather, father had been abusing him, and terrorizing him from infancy.

The state court credited post-conviction counsel's evidence demonstrating the unremitting horrors of Petitioner's childhood (A89-90). Yet the court found (as the circuit court did later), that trial counsel's presentation of that childhood as "normal" to be a reasonable trial strategy so as to present mother as a sympathetic character. A91. The analysis legitimizes counsel providing the jury with false information about a defendant's life. As discussed below, such a strategy can never be regarded as reasonable trial strategy under *Strickland.*

2. EVEN ASIDE FROM ITS ENDORSEMENT OF FALSE EVIDENCE AND A FALSE THEORY, IN EVERY OTHER RESPECT THE STATE COURT'S *STRICKLAND* RULING IS CONTRARY TO AND AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED SUPREME COURT LAW AND AN UNREASONABLE DETERMINATION OF THE FACTS

The evidence presented in state post-conviction demonstrated that by no stretch of the imagination was this a "normal childhood." Trial counsel was only able tell the jury that Petitioner's mother was the "one constant" in his life, because he presented none of the evidence of how her abandonment, neglect, mental illness and drug abuse fostered a dysfunctional and chaotic life for her young child. And counsel failed to present the evidence because he never obtained the records of Petitioner's life. The state court unreasonably determined trial counsel's false picture of Petitioner's first 10 years was necessary to contrast the two awful years he spent with his father. Even if that were true, one would expect trial counsel to have investigated that two-year period and present evidence of what actually occurred. He did not; allowing the prosecutor to argue that the defense theory that something untoward happened at the father's house was all speculation. Contrary to the defense (and prosecution) theory that "we will never know what happened to Eddie

those two years [he lived with his father]," the proffered post-conviction evidence of that two-year period revealed physical, sexual and psychological abuse, and forced long-term physical isolation.

The evidence available to trial counsel but not presented is "the kind of troubled history [the Court has] declared relevant to assessing a defendant's moral culpability." *Wiggins v. Smith,* 539 U.S. 510, 535 (2003). Petitioner's mitigating evidence was highly relevant "because of the belief, long held by this society, that defendants who commit criminal acts that are attributed to a disadvantaged background may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). A proper investigation would have revealed this wealth of evidence, documents, materials, and witnesses, would have expanded the mitigation evidence into areas Petitioner's mother did not address, and would have provided the jury a complete picture of Petitioner's life. It would also have eliminated the prosecutor's only point of argument: that Petitioner's mother's testimony about the impact of Petitioner's time with his father was uncorroborated and therefore unworthy of belief. See R. 22-3 (Trial Transcript) PageID#8071. As is now clear, available to counsel but not developed and/or utilized were extensive records of social service agencies, mental health professionals, mental health facilities and educational facilities irrefutably demonstrating the horror of young Petitioner's life, and life during the two-year period with his father. Fully developed and supported with documentation and witnesses, and explained by mental health professionals, these documents and witnesses would have provided essential context for how his life descended into mental illness to the point of committing this crime and would have insured that at least one member of the jury would have returned a life sentence. *Rompilla v. Beard,* 545 U.S. 374, 392-93 (2005) ("This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury . . . the undiscovered

'mitigating evidence, taken as a whole 'might well have influenced the jury's appraisal of [Rompilla's] culpability.' (citing *Wiggins v. Smith*, 539 U.S. 510, 533 (2003))")

The Ohio Court of Appeals found no prejudice in trial counsel's failure to present the haunting and overwhelming evidence in mitigation of the first 10 years of Petitioner's life, because in its view Petitioner's "trial counsel had already presented mitigation evidence about Petitioner's youth and the horrors of his life growing up." A91. This is an unreasonable determination of the facts, as it is simply not borne out by the record. The record is vacant regarding difficulties during the first 10 years of Petitioner's life. In fact, on direct appeal the Ohio Supreme Court found that trial counsel's statement to the jury that Petitioner's life until age 10 was "pretty normal" was an accurate representation of the defense evidence. A125.

That some mitigating evidence relating to Petitioner's life after 12 years old was presented does not resolve the prejudice question. This Court has "never limited the prejudice inquiry under *Strickland* to cases in which there was only little or no mitigation evidence presented." *Sears v. Upton*, 561 U.S. 945, 954 (2010). "[C]ounsel's effort to present some mitigation evidence should [not] foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.* at 955. That is especially the case where, as here, the evidence that was not presented at the sentencing phase would have provided the jury with a wholly different type of mitigation. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 34-36 (2009) (post-conviction evidence related to *inter alia* military service, not presented at the sentencing phase of the trial). As in *Sears*, the normalcy of Petitioner's childhood that was presented to the sentencing phase jury was contradicted by the evidence produced in post-conviction demonstrating the horrific reality of his childhood. *Id.* at 948. The sentencing jury was also unaware of the long-term mental health implications of that abuse – PTSD as well as bipolar disorder. This evidence, along with the

evidence of his unstable family and his exposure to brutal familial violence has long been considered mitigating. *See e.g., Penry v. Lynaugh,* 492 U.S. 302, 322 (1989) (a "history of childhood abuse" may convince a juror to "conclude that [a defendant is] less morally culpable than defendants who have no such excuse"); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (troubled childhood and emotional disturbance is effective mitigation). The unpresented evidence was different in force and type, from the evidence of Petitioner's teenage years presented at trial. The jurors never heard that at ***a tender age,*** when a child cannot not reasonably be expected to defend himself, seek out help or act volitionally, he was brutally and regularly attacked and violated.

As to deficient performance, the state court refused to find a failure of investigation (A91), despite that a week before the sentencing phase the bulk of the institutional records had not even been delivered to counsel, and nothing in the thousands of pages of records obtained in post-conviction proceedings was referenced or introduced at trial. Additionally, the court made this finding in the face of closings from both sides that reiterated that the mitigation defense was based on the uncorroborated speculation the something happened to Petitioner during his stay with dad. R. 22- 3 PageID#8065, 8071. The court's analysis in this regard was both an unreasonable determination of the facts, and an unreasonable application of *Strickland.*

So too were its determinations that "scientific terms" that would undoubtably be found in institutional records would have somehow dehumanized Petitioner (A91) and that presenting the florid and unremitting abuse that Petitioner suffered while in the custody of his mother might have made her seem like less of a sympathetic character. The "scientific terms" rationale is a *non sequitur,* and is nothing more than a "'strategic decision' the state court[] invoke[d] to justify counsel's limited pursuit of mitigating evidence[,] resembl[ing] more a post-hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing. *Wiggins,*

539 U.S. at 526-27. As to the court's concern about mother, it was misplaced. It was Petitioner who was on trial for his life, not his mother. To the extent that presenting the truth of Petitioner's first ten years of life might have negatively reflected upon his mother, this Court has held that even where "not all of the additional evidence was favorable [] the failure to introduce the comparatively voluminous amount of evidence that did speak in [Petitioner's] favor was not justified by a tactical decision to focus on [the evidence that was presented.]" *Williams v. Taylor,* 529 U.S. 362, 396 (2000). In *Sears v. Upton,* 561 U.S. 945, 951 (2010), this Court recognized that "the fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising[,] given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive . . . ." *Id.* at 951. So too here. Petitioner's mother's abandonment, neglect, drug use, mental illness and enabling others to abuse her son, is the paradigmatic mitigation any competent capital practitioner would move mountains to present. In post-conviction mother, who while raising Petitioner was challenged by her circumstances in many ways, owned up to the truths of her son's upbringing. R. 18-4 (PCEx. 3) PageID#2447). She would have cut a very sympathetic figure before the sentencing phase jury.

Finally, the state court applied an unconstitutionally heightened standard in denying relief, finding that the evidence presented in post-conviction did not create "a reasonable probability that the jury would have recommended a life sentence, rather than the death penalty . . . ." A91. That standard was an unreasonable application of *Wiggins,* 539 U.S. at 537, which held that *Strickland* prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance." If, in lieu of hearing about a childhood devoid of abuse, the jury had heard that from before birth Petitioner suffered brutal abuse at the hands of his father and brother, there is a reasonable probability that one juror would have struck a different balance.

3. THE CIRCUIT COURT ENDORSES A FALSE THEORY OF MITIGATION AND FALSE EVIDENCE IN SUPPORT OF THAT THEORY

The circuit court acknowledged that, after a sentencing phase hearing in which there was no evidence of abuse, the evidence in post-conviction revealed:

> Lang's father's physical and sexual abuse of Lang's mother, Lang's brother's physical and sexual abuse of Lang and his sister, and Lang's father's sexual, physical, and emotional abuse of Lang . . . .

A10-11. Based on this evidence, the court had little trouble finding that Petitioner's "childhood prior to ten was anything but normal." A12. That, however, was the central and ill-advised tenet of the defense theory, i.e., that all was well in Petitioner's mother's home, and it was only after he left to visit his father that his life took a left turn. Indeed, the court pointed out that this false and highly prejudicial theory of mitigation "echoed the prosecutor's characterization of Lang's early life as 'normal.'" *Id.* While it is astounding that trial counsel wanted the jury to believe Petitioner's life up to age 10 was normal, it is entirely understandable why the prosecutor would want the jury to believe it. After post-conviction proceedings, however, the prosecutor, like the circuit court, knew better. The State could no longer ethically maintain such a fiction. *See* A19.

Thus, the circuit was confronted with a mitigation theory that it knew to false, accompanied by the presentation of evidence of normalcy that it knew to be false (and said so).[9] The absurdity of the notion of normalcy during Petitioner's first 10 years of life, and the certainty that the jury accepted that fact (how could they not, since both the State and defense agreed on it?), did not concern the circuit court. It found that the false picture of Petitioner's first 10 years of life allowed trial counsel to "avoid blaming Lang's mother – his primary mitigation witness – for his client's

[9] In dissent, Judge Moore observed that "the protections guaranteed by our Constitution are [not] so minimal, or our review so constrained by the standard of review, that we are forced to condone the egregious mistakes that occurred during Lang's trial." *Id.* A20.

difficulties." A12. (echoing and endorsing the state court's rationale). According to the circuit, the presentation of this false theory "allowed the defense to focus the jury's attention on defense counsel's argument that addressed Lang's abuse after his father abducted him." *Id.* The court was, apparently, unconcerned that the readily available evidence of what actually occurred in the father's home was never found or presented to the sentencing phase jury.

Beyond its approval of the presentation of false evidence, the panel majority's analysis is flawed in that Petitioner's mother was counsel's main witness in mitigation only because he did not do the investigation that revealed numerous – impartial, objective – witnesses who were ready to testify to the unrelenting trauma, abuse and chaos that characterized Petitioner's life in his mother's and father's houses. Any tactical decision to avoid "blaming" her, could only be justified following a "thorough investigation of [the] facts relevant to plausible options." *Wiggins v. Smith,* 539 U.S. 510, 521 (2003). Here there was no such investigation. As to the concern over evidence that might reflect badly on her, Petitioner incorporates his argument made *supra* at 22-23. Properly prepared, mother would have been a competent counsel's most compelling witness as to the ***actual*** mitigation.

While the flaws in the state and circuit courts' analysis runs afoul to the considerations undergirding sentencing phase counsel's duties of investigation as developed by this Court's capital jurisprudence,[10] the state and circuit courts endorsed a practice that goes above and beyond mere approval of deficient performance. They countenanced presentation of false evidence in support of a false theory, as long as it tied to strategy. This Court should take the opportunity to condemn that practice.

[10] *See Williams v. Taylor,* 529 U.S. 362 (2000); *Wiggins v Smith,* 539 U.S. 510 (2003); *Rompilla v. Beard,* 545 U.S. 374 (2005); *Porter v. McCollum,* 558 U.S. 30 (2009); *Sears v. Upton,* 561 U.S. 945 (2010).

4. THIS COURT SHOULD NOT ALLOW A COURT TO APPROVE A FALSE MITIGATION THEORY SIMPLY BECAUSE IT IS TETHERED TO SOME STRATEGY.

As revealed in state post-conviction proceedings, a central pillar of the defense theory – that Petitioner's life up to age 10 was normal – was false. After being deluged with the state post-conviction evidence, the State of Ohio conceded that it was not normal. A19. The circuit court conceded the point as well. A12. The proposition that Petitioner's life was normal up to age 10, and that his mother was the "one constant in his life," were gross misrepresentations of Petitioner's life, which – "Monday morning" concession or not -- the prosecutor earlier exploited to obtain a death sentence. *See* R. 22-3, Transcript, PageID#8065. Yet the circuit court found it to be sound trial strategy, holding that the Ohio court's determination that trial counsel's utterly false theory of normalcy "allowed the defense to focus the jury's attention on defense counsel's argument that addressed Lang's abuse after his father abducted him," was not objectively unreasonable. A12.[11]

In *Nix v. Whiteside*, 475 U.S. 157, 176 (1986), the Court held that counsel cannot be deemed ineffective for refusing to present false evidence. The Court made clear that when counsel is aware of the falsity of the evidence he or she "is precluded from taking steps or in any way assisting [] in presenting false evidence." *Id.* at 166. The concern does not relate solely to ethics of the individual lawyer, but also to the imperative that false evidence not be presented and considered in the courtroom. *See id.* at 168 ("it specifically ensures that the client may not use false evidence"). Citing *Strickland*, the Court also described as lawless, a proceeding that is reliant upon false testimony. *See id.* at 175 ("the benchmark of an ineffective-assistance claim is the fairness of the

[11] The circuit court did not address why the abuse Petitioner suffered up to age 10 would be inconsistent with presentation of the abuse he suffered after his father abducted him. *See Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (where two sentencing strategies are not mutually exclusive, no basis to prioritize one over the other, absent investigation).

adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, a defendant has no entitlement to the luck of a lawless decisionmaker") (citation, quotation marks, and internal alterations omitted).

The circuit court's approval of presenting Petitioner's first ten years as life as normal cannot be squared with *Whiteside.* It endorses the presentation of a theory, and evidence in support of that theory, that is false. Such an endorsement is discarded from the deficient performance calculous for the same reason a lawyer may not be deemed ineffective for refusing to present false evidence. A defendant's Sixth Amendment right to effective assistance of counsel does not include a right to present false evidence. *United States v. Havens,* 446 U.S. 620, 626-27 (1980); *Harris v. New York,* 401 U.S. 222, 225 (1971). The state court's and Sixth Circuit's determinations that it represents reasonable trial strategy wrongly affirm that it does.

The record demonstrates that trial counsel did virtually no investigation into Petitioner's background.[12] However, in the event that the state court's factual determination is correct (i.e., trial counsel was aware of the torment of Petitioner's first 10 years, and made a tactical decision not to present it), then the circuit court's imprimatur of approval is even more troubling. It would mean that, even if trial counsel knows that the evidence he is presenting is false, if he can tie it to a strategic rationale, he or she will not be deemed deficient. On the other hand, if as Petitioner maintains, trial counsel had no clue of Petitioner's background, then his failure to do the investigation fits squarely within the *Strickland* paradigm of deficient performance. In that event, giving the jury a false picture of Petitioner's background cannot be justified on a post-hoc rationale that it might have been reasonable trial strategy, had counsel known about his background.

[12] *See* A17 (trial counsel's psychologist's fax indicating "[n]o Lang records" received a week before the sentencing phase).

5. CONCLUSION

Certiorari should be granted, to allow this Court to correct the state court's and Sixth Circuit's misapprehension that a theory supported by false evidence, which counsel should have known was false, can defeat a claim of deficient performance. *Strickland*'s requirement is not so formulaic and divorced from a lawyer's professional obligations, to permit such a standard. Rather the standard must be: counsel's performance is deficient when counsel presents demonstrably false evidence to the jury especially when that falsehood would have been apparent to counsel upon any reasonable investigation.

Alternatively, because Petitioner demonstrated that the state court's application of *Strickland* was both contrary to and an unreasonable application of this Court's precedent, and an unreasonable determination of the facts, the Court should grant the writ, vacate the judgment of the Court of Appeals, remand the matter, and direct that the habeas petition be granted.

B. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE SIXTH CIRCUIT'S JETTISONING OF THE PRESUMPTION OF PREJUDICE REQUIRED BY *REMMER V. UNITED STATES,* FOR PRIVATE JUROR CONTACT RELATING TO THE MATTER BEFORE THE JURY

> *To take a step back: A relative of Lang's victim was empaneled on his jury. We have no record evidence of how this affected the jury's verdict of guilt because the trial court's one-question inquiry allowing a response via silence was less than minimal. Lang v. Bobby,* 889 F.3d 803, 826 (6th Cir. 2018) (Moore, J., dissenting).

The Sixth Circuit continues to fail to comprehend the standard of review imposed by the AEDPA amendments to 28 U.S.C. § 2254. The issue before the Circuit was clear: was the Ohio Supreme Court's reliance on a state court decision abrogating this Court's decision in *Remmer v. United States*, 347 U.S. 227 (1954), contrary to or an unreasonable application of binding Constitutional law? Rather than reviewing the Ohio Supreme Court decision under this rubric the

Sixth Circuit relied on Circuit precedent to disregard this Court's decision in *Remmer* and deny habeas relief to Petitioner.

One of Petitioner's Jurors, who sat for a significant portion of the trial, failed to disclose during voir dire that the decedent was her aunt. Upon disclosure of her relationship the State of Ohio conceded that she was biased and needed to be removed from the jury for cause. *See* R.22-2, PageID#7436. The trial court removed the juror for cause and then purported to conduct a "hearing" pursuant to *Remmer v. United States,* 347 U.S. 227 (1954). The hearing consisted of a single question to the jury as a group, whether the biased juror had disclosed that she had a "relative relationship with either a witness or a party of somebody that was involved in the case," which was met by silence. Petitioner argued that the hearing failed to comply with *Remmer's* requirement that under such circumstances prejudice be presumed, and that the prosecution bears the burden of rebutting that presumption. The Sixth Circuit did not take issue with Petitioner's argument; rather, it held that, consistent with Sixth Circuit precedent, that the *Remmer* presumption is no longer good law. The Circuit's *Remmer* precedent finds no basis in this Court's precedent, and is at odds with every other Circuit in the country, which in one form or another, continues to apply the *Remmer* presumption. It is a sound and easily applied standard, that protects a defendant, especially in a capital case, from extraneous, illicit and improper private influence upon jury deliberations. This Court should grant the writ to bring the Sixth Circuit into compliance with this Court's precedent.

1. THE COURTS BELOW DENIED RELIEF BASED ON FINDINGS THAT THIS COURT'S HOLDING IN *REMMER* IS NO LONGER GOOD LAW

In *Remmer v. United States,* 347 U.S. 227, 229 (1954), this Court held that a rebuttable presumption of prejudice arises from "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury." This "presumptively prejudicial" contact "manifest[s] the need for a full hearing." *Id.* "Due process

requires that an accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). The *Remmer* rule provides a workable mechanism to ensure the vindication of this due process right, while affording the Government the ability to prove that the contact will not (or did not) affect the verdict. *See Remmer*, 347 U.S. at 229 ("The presumption is not conclusive, but the burden rests heavily upon the Government to establish [] that such contact with the juror was harmless to the defendant." In a capital case like Petitioner's, this Court has recognized that the "finality of the death sentence [] requires a correspondingly greater degree of scrutiny" to ensure that extra-record considerations do not inform the jury's verdict. *See, e.g.*, *Turner v. Murray*, 476 U.S. 28, 38 (1986) (vacating death sentence where risk of influence of racial prejudice would not have been exposed by the voir dire permitted by trial court). *See also Mattox v. United States*, 146 U.S. 140, 149 (1892) ("It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment.").

Circuit courts have interpreted the *Remmer* "presumption" consistent with its ordinary meaning, such that once private contact about the matter pending before the jury has been demonstrated, the government bears the responsibility of rebutting the presumption of prejudice. *See, e.g., Stouffer v. Duckworth*, 825 F.3d 1167, 1178 (10th Cir. 2016) (any private contact is presumptively prejudicial, and while the "presumption is not conclusive, [] the burden rests heavily upon the Government to establish" harmlessness of such contact); *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996) (if the contact was "more than innocuous," a "minimal standard," "the presumption is triggered automatically." The prosecution then bears burden to prove "there exists no reasonable possibility" of jury taint) (citations omitted); *United States v. Henley*, 238 F.3d 1111,

1114 (9th Cir. 2001) ("tampering with a sitting juror was presumptively prejudicial," presumption can be overcome by a showing of lack of harm).

In Petitioner's case, a sitting juror was, in the words of the prosecutor "a direct relative" of the decedent, and had an ongoing relationship with members of the decedent's family. Even the prosecutor recognized the presumptively prejudicial impact of having this juror serve. See R. 22-2, Transcript, PageID#7436 ("Judge, I think I have to move for cause. [W]e have a relative, a direct relative of the deceased on the jury. I don't care what she says ---"). *Cf. Smith v. Gearinger,* 888 F.2d 1334, 1338 (11th Cir. 1989) (noting state rule presuming partiality of juror who is related to victim, "because such jurors can be expected to sympathize with the victim and influence the other jurors against the defendant."). The trial court's single question to the jurors sitting as a group, whether Juror 386 told any of them she had a "relative relationship with either a witness or a party of somebody that was involved in the case," (R. 22, Transcript, PageID#7441), could not have rebutted the *Remmer* presumption.[13] Considering (1) Juror 386's relationship to the decedent; (2) how "friendly" she had been with at least one other juror; (3) her courtroom nonverbal communications with other members of the decedent's family; and (4) her failures to disclose her relationship with the decedent; more was required to overcome the presumption. In her discussions with the other jurors, did she express animus toward the defendant? Did she discuss his guilt or innocence? Did the other jurors notice her communicating with the decedent's family? The answers to these questions would determine "what actually transpired," and the "circumstances [and] impact thereof upon the juror[s]." *Remmer*, 347 U.S. at 229, 231.

Thus, the Ohio Supreme Court was only able to deny relief by improperly applying

[13] The panel acknowledged that a single question to the jury as a group would not have been sufficient under Sixth Circuit precedent interpreting *Remmer,* but was sufficient under AEDPA. A9.

Remmer and shifting the burden to Petitioner. A107. The state court improperly modified *Remmer,* rejecting Petitioner's argument that the state was required to rebut the presumption of prejudice, and requiring an affirmative "show[ing]" to the "complaining party," without distinguishing between the state or the defendant. *Id.* The court cited to *State v. Keith*, 79 Ohio St.3d 514 (1997), an earlier Ohio case that rejected the "presumption of prejudice" in all juror bias cases. *Id.* According to the clear principle of *Remmer*, Juror 386's conduct is presumptively prejudicial. *Remmer,* 347 U.S. at 229. The burden of overcoming that presumption rested "heavily on the Government." *Id*. Applying the wrong legal standard is contrary to clearly established law, *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and unreasonably applies the law. *Id*. at 407. The Ohio Supreme Court grafted an erroneous state requirement onto the Constitutional standard, and thus, acted contrary to and/or unreasonable under *Remmer*. In applying that Ohio-modified standard, the court relied on the lack of evidence to deny relief. A107. Given this conclusion, the absence of evidence means that the Government failed to overcome the presumption of prejudice and the denial of relief was both contrary to and/or an unreasonable application of *Remmer*.

The Sixth Circuit endorsed the state court's approach, finding that the single question was constitutionally sufficient, because there no longer is a presumption of prejudice that arises from private contact relating to the matter on trial. *See* A9 ('no presumption of prejudice arises from the unauthorized contact with a juror"; "The burden was on Lang to show that a juror who decided his case was actually biased against him."). The burden is borne solely by the defendant, and regardless of nature of the improper contact or the likelihood that it would taint the jury, the prosecution no longer needs to rebut the presumption. *Id.*

The Sixth Circuit stands alone among the circuits in its determination that this Court has *sub silentio,* overruled *Remmer*'s central tenet. The Sixth Circuit first arrived at this conclusion in

United States v. Pennell, 737 F.2d 521, 532 (1984), concluding that this Court's opinion in *Smith v. Phillips,* 455 U.S. 209 (1982), abrogated the *Remmer* presumption. *Id. Phillips,* however, did nothing of the kind (*see* argument below). In *Remmer,* this Court established a mechanism for vindicating a defendant's rights to due process and a fair trial under the Sixth and Fourteenth Amendments that has worked effectively for over sixty years. It is a standard that is consistent with the presumption of innocence, placing the burden on the government to disprove taint in an extreme scenario, when private contact relating to the matter before the jury has been demonstrated. It is clearly established federal law, and certiorari should be granted because the circuit has decided an important federal question in a way that conflicts with a seminal decision of this Court.

Abandoning the *Remmer* presumption allowed the panel in this case to find that merely asking the jurors as a group if Juror 386's relationship to the decedent was disclosed to them satisfied Petitioner's rights to due process and a fair and impartial jury. A9. According to the Panel, this is because "[c]ourts enjoy leeway when applying a general standard." A9 (citing *Yarborough v Alvarado*, 541 U.S. 652, 664 (2004)). *Yarborough*, however, also holds that "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough*, 541 U.S. at 666. *Remmer*'s fundamental rule is that private contacts regarding a matter pending before the jury are deemed presumptively prejudicial. This fundamental principle ensures that the risk of error, once private contact is established, is not borne by the defendant. The Sixth Circuit's unilateral *Remmer* jurisprudence ensures – contrary to this Court's pronouncement – that the risk is borne by the defendant.

2. THE COURT HAS NOT RETREATED FROM *REMMER*

In *Dietz v. Bouldin,* 136 S. Ct. 1885, 1897 (2016), the Court held that a federal district court had "a limited inherent power to rescind a discharge order and recall a jury in a civil case."

The power, however, is limited because of the concern over "external influences that can taint a juror." *Id.* at 1893. In support of that proposition, the Court cited *Remmer*, and restated – without qualification -- *Remmer*'s principle holding: "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial"). *Id.* Notably, the *Remmer* reference addressed no other aspect of the *Remmer* holding, other than its most important feature, the presumption. This is compelling evidence that the Sixth Circuit's determination in *United States v. Pennell,* 737 F.2d 521, 533 (6th Cir. 1984), that after *Smith v. Phillips,* 455 U.S. 209 (1982), *Remmer* only stands for the proposition that some kind of hearing should be held when taint is alleged, is wrong. This Court has never qualified, abrogated or questioned *Remmer*'s presumption. And why would it? It is a straightforward, easily applied standard, that only arises in the extreme situation where the outside influence is related to the matter at issue.

Even before *Dietz,* the Sixth Circuit's reliance on *Smith v. Phillips,* 455 U.S. 209 (1982), for the proposition that the *Remmer* presumption was abrogated was misplaced, for several reasons. First, *Phillips* did not involve the scenario addressed by this Court in *Remmer*, where the private contact relates to the pending matter. In *Smith,* the contact involved a juror's job application to the same Manhattan, N.Y. District Attorney's Office that was prosecuting the defendant. *Id.* at 212-214. The application was submitted during the course of the trial. *Id.* Not only was the contact unrelated to the issues on trial, but other than the submission of the application, there was no contact between the District Attorney's Office and the juror during the trial. *Id.* The Court held that the post-trial hearing into the question of juror bias comported with the federal constitution. *Id.* at 221. Thus, the district court's grant of habeas relief (affirmed by the circuit) was reversed. *Id.* In language indicating approval of hearings like the one conducted

by the trial court, the Court held that such hearings give the defendant "the opportunity to prove actual bias." *Id.* at 215. Even assuming, without conceding, that the Court's use of the phrase "prove actual bias," refers to the burden of proof, juror contact that is unrelated to the matters on trial, which can (and does) occur in a myriad of scenarios,[14] does not implicate *Remmer*'s heightened concern for the situation in which the connection relates to the "matter pending before the jury." *Remmer,* 347 U.S. at 229. This was the conclusion of the court in *Stockton v. Virginia,* 852 F.2d 740, 744 (4th Cir. 1988), in which the Fourth Circuit held that *Phillips* did not overturn *Remmer*'s presumption of prejudice for contacts relating to the matter at issue. In *Stockton,* the contact was a comment made by a person to a group of jurors while they lunched at a local restaurant. *Id.* at 743. Because the contact related to the matter on trial (and thus might impact the "deliberative process of the jury"), as opposed to an issue of "juror impairment or predisposition," "the defendant's right to an impartial jury require[d] that the government bear the burden of establishing the nonprejudicial character of the contact." *Id.* at 744.

Second, when read in proper context, the reference in *Phillips* is less a comment about burden of proof and more one about the efficacy of a hearing. The Court's statement that the "remedy for allegation of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias," came in response to the respondent's argument that in his case, the trial court should not have relied on the evidence adduced at the taint hearing, and that bias should have been implied. *Phillips,* 455 U.S. at 215. Burden of proof at a taint hearing was not at issue and was never mentioned. The court in *Hall v. Zenk,* 692 F.3d 793, 800 (7th Cir. 2012), came to this same conclusion, finding that "[t]he focus of *Phillips* [] was the defendant's mere right to a

[14] *See Smith,* 455 U.S. at 217 ("[I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.")

hearing, as opposed to an automatic new trial, when jury bias is suspected." In Petitioner's case, the state agreed that Juror 386's familial relationship with the descendent demonstrated actual bias and warranted her removal for cause.

Third, in *Phillips,* the Court specifically referenced *Remmer* and its "presumptively prejudicial" standard, without suggesting that it was no longer valid in cases where the contact relates to the matters on trial.[15] *Id.* at 215-16. Again, the *Hall* court cited this reference as support for the continued vitality of the *Remmer* presumption. *See id.* ("The Court even mentioned, not disapprovingly, its former characterization of an attempted bribe as 'presumptively prejudicial,' thereby supporting the notion that a presumption of prejudice still existed in at least some, if not all, situations involving a potential lack of jury impartiality. *Id.* at 215-16. This implication is bolstered by the dissent's offhand, seemingly uncontroversial comment that the Court, in the past, had "strongly presumed that contact with a juror initiated by a third party is prejudicial." *Id.* at 228 (Marshall, J., dissenting).").

3. THE SIXTH CIRCUIT STANDS ALONE IN ITS OUTRIGHT REJECTION OF THE *REMMER* PRESUMPTION.

All of the circuits, with the exception of the Sixth, have continued to apply the *Remmer* presumption as directed by the express language of the opinion. Some of the circuits have purported to modify the presumption, however, most of those purported modifications seem to assume that *Remmer* initially applied to all cases of juror bias (which it did not), and simply employ conditions that hew to *Remmer*'s express language. Thus, circuit decisions that reserve the presumption for "serious" matters (*see Pagan-Romero* below), only extrinsic (i.e., private) contacts (*see Lawson*

[15] Later, in *United States v. Olano,* 507 U.S. 725, 739 (1993), the Court again referenced *Remmer,* observing that *Remmer* determinations "should be evaluated in terms of 'prejudice,' without questioning its presumption of prejudice for contact relating to the matter on trial. The Court also noted cases where an "intrusion" may be presumed prejudicial. *Id.*

and *Nieto* below) or contacts related to the matter on trial (*see Honken* below), are entirely consistent with *Remmer*.

Thus, *Remmer* is followed, everywhere in the nation, other than in the Sixth Circuit. *See United States v. Pagan-Romero,* 894 F.3d 441, 447 (1st Cir. 2018) (circuit will apply *Remmer* presumption in "serious instances"); *United States v. Morrison,* 580 Fed. Appx. 20, 21-22 (2d Cir. 2014) (when a juror is exposed to extrajudicial influence, the trial court's "task was to determine whether the government had rebutted the presumption of prejudice by coming forward with information that the extraneous influence was harmless"); *United States v. Claxton,* 764 F.3d 280, 299-300 (3d Cir. 2014) (applying *Remmer* presumption of prejudice standard); *United States v. Lawson,* 677 F.3d 629, 642 (4th Cir. 2012) ("This Court's decisions addressing such external influences on a jury's deliberations reflect that the *Remmer* rebuttable presumption remains live and well in the Fourth Circuit."); *United States v. Nieto,* 721 F.3d 357, 369-370 (5th Cir. 2013) (applying presumption in cases of extrinsic influence, but giving the trial judge "broad discretion" in conducting the inquiry); *United States v. Cardena,* 842 F.3d 959, 976 (7th Cir. 2016) (*Remmer* presumption invoked when "the extraneous communication to the juror must be of a character that creates a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury"); *United States v. Honken,* 541 F.3d 1146, 1167 (8th Cir. 2008) (*Remmer* presumption applies when juror is "exposed to a fact not in evidence"); *Godoy v. Spearman,* 834 F.3d 1078, 1087 (9th Cir. 2015) (affirming *Remmer* presumption of prejudice standard, but questioning whether it applies when the "alleged contact" does not concern the "matter pending before the jury"); *Stouffer v. Duckworth,* 825 F.3d 1167, 1178, 1178 n.3 (10th Cir. 2016) (affirming and applying *Remmer* presumption of prejudice standard, and noting that "the presumption of prejudice approach relieves the moving party of any burden and forces the

nonmovant to prove any exposure was harmless."); *United States v. Schlecht,* 679 Fed. Appx. 817, 818 (11th Cir. 2017) (recognizing and applying *Remmer* presumption of prejudice standard); *United States v. Williams-Davis,* 90 F.3d 490, 490 (D.C. Cir. 1996) (holding *Remmer* presumption of prejudice applies where "particular intrusion showed enough of a likelihood of prejudice to justify assigning the government a burden of proving harmlessness").

4. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THIS QUESTION

A new trial is warranted when "a party demonstrate[s] that a juror failed to answer honestly a material question on *voir dire*, and then further shows that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (1984). When juror dishonesty in voir dire relates to an issue of taint, the rule of *McDonough* not only protects against the dishonest and unfit juror, but it also protects against the dishonest juror who would influence other jurors, and not disclose that influence. The record suggests that Juror 386 falls within this last category, and it also demonstrates that the absence of the *Remmer* presumption created too heightened a risk that this would go undetected.

The state court, noted Juror 386's multiple "failures" to disclose that the decedent was her aunt in response to voir dire questions about her personal knowledge of the case and whether family members had been victims of crimes. However, it made no finding that she had been dishonest. The panel majority therefore found that the question of the juror's honesty was a non-issue. A106. In a similar scenario, however, this Court found that the juror's failure to disclose was "deliberate." *Williams v. Taylor*, 529 U.S. 420, 441-42 (2000). In denying relief in *Williams,* the Fourth Circuit had held that when a juror was asked if she were related to any of the witnesses, and then withheld the fact that she had formerly been married to one of them, it was "hardly clear" that she was related to the witness. *Id*. at 425, 428. In reversing the Circuit Court, this Court regarded the juror's

omission quite differently, describing it as a "technical or literal interpretation of the question," and a "deliberate omission of material information" probative of "an unwillingness to be forthcoming." *Id*. at 441-42. As discussed *supra* at 4-5, the questions put to Juror 386 were more direct than in *Williams.* It is thus more than plausible that Juror 386 was intentionally skirting her duty to be honest with the trial court, and that if (as she maintained), she kept her relationship to the decedent from the other jurors, she may have been doing so to allow her to project hostility toward the defendant without exposing her bias.

Petitioner does not ask this Court to make such a finding. He points out Juror 386's prevarications, and its potential influence, to underscore the imperative of the *Remmer* presumption. Had it not been obliterated by the Sixth Circuit, then the fact that the juror, in the words of the prosecutor, was a "direct relative" of the decedent would have triggered the presumption. Such a scenario fits squarely within *Remmer,* involving as it does a private contact (the decedent's aunt) relating to the matter before the jury (her death). Because prejudice would have been presumed, the prosecutor would have been required to rebut it. It would have been his burden to resolve issues such as whether Juror 386's "omissions" were "deliberate," and if so whether she was dishonest in her representation that she did not discuss he relationship to the decedent with the other jurors, as well as whether she expressed her bias against the alleged killer of her aunt to the other jurors. Because the trial court, and Sixth Circuit imposed that burden on Petitioner, the silent record as to these questions, was held against him.

Simply asking the jurors as a group whether Juror 386 had discussed a potential relationship with someone involved in the case, and taking their silence as a "no," fails *Remmer* because its sole focus is on whether the juror revealed her relationship, to the exclusion of anything else Juror 386 might have said to the other jurors informed by her bias toward the man accused of killing her aunt.

Judge Moore, in dissent made these points in addressing the inadequacy of the *Remmer* hearing the trial court conducted. A14. When the presumption is cast aside, and the initial burden is placed on the defendant, the risk of error will reside with the defendant, and the inadequacy of the hearing will always enure his or her detriment. The protection that this Court erected in *Remmer* to ensure that in the most extreme and egregious cases of external influence on a defendant's jury, the risk of error is assigned (at least initially) to the prosecution, was taken away by the Sixth Circuit.

5. CONCLUSION

This Court should grant the writ of certiorari, or in the alternative grant the writ, vacate the order of the Sixth Circuit, and remand to the Circuit with instructions to review Petitioner's claim pursuant to the standard of presumptive prejudice required by *Remmer*.

VII. PRAYER FOR RELIEF

For all of the foregoing reasons, the Court should review the Sixth Circuit's judgment affirming the district court's denial of the petition for writ of habeas corpus, and grant the writ of certiorari as to both questions presented.

Respectfully Submitted:

s/Karl Schwartz

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