No. 18-6174

In the Supreme Court of the United States

EDWARD LANG,

Petitioner,

v.

TIM SHOOP, WARDEN

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did Ohio's courts reasonably apply *Strickland v. Washington*, 466 U.S. 668 (1984), when they rejected Petitioner Edward Lang's claim that his counsel provided constitutionally ineffective assistance through their mitigation efforts at his trial's penalty stage?

2. Did the Ohio Supreme Court reasonably apply this Court's decisions in *Remmer v. United States*, 347 U.S. 227 (1954), and *Smith v. Phillips*, 455 U.S. 209 (1982), when it held that the short presence on the jury of a relative of one of Lang's victims did not improperly influence the other jurors who found him guilty?

LIST OF PARTIES

The Petitioner is Edward Lang, an inmate at the Chillicothe Correctional Institution in Chillicothe, Ohio.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution, who is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

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INTRODUCTION

Edward Lang and Antonio Walker schemed to arrange a drug deal and rob the dealer, Jaron Burditte, when Burditte arrived at the deal's planned location. Burditte did not show up alone, however. In the car with him was a passenger, Marnell Cheek. Lang got into the car with Burditte and Cheek, shot them in the back of the head, and killed them both. Lang was convicted of the murders and sentenced to death. The Ohio Supreme Court affirmed Lang's convictions and sentence on direct appeal, and an Ohio intermediate court rejected his postconviction claims. The Sixth Circuit affirmed the denial of Lang's federal habeas petition, applying the deferential standards of review in the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d). Rebuffed by every state and federal court to have considered his claims, Lang now asks this Court to intervene. But neither of his two Questions Presented warrants review.

Ineffective Assistance. Lang's first Question Presented involves a routine ineffective-assistance claim governed by well-settled precedent. The Ohio courts reasonably applied the two elements from *Strickland v. Washington*, 466 U.S. 668 (1984), when they held both that Lang's counsel undertook adequate mitigation efforts and that Lang had not been prejudiced by their performance. Lang seeks only fact-bound review of those state decisions. Pet. 17-28. But AEDPA creates a "doubly" deferential standard for *Strickland* claims, *Harrington v. Richter*, 562 U.S. 86, 105 (2011), and requires Lang to show an "'extreme malfunction[] in [Ohio's] criminal justice system,'" *id.* at 102 (citation omitted). He has not done so. As the district court and Sixth Circuit recognized, the mitigation evidence that Lang

claims trial counsel should have introduced was "cumulative of other evidence that was presented," Pet. App. 40, and "replete with references to Lang's violent and defiant behavior," Pet. App. 41; *see* Pet. App. 11-12.

As his alleged legal error, Lang suggests that the Ohio intermediate court did not apply the correct "prejudice" standard from *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). Pet. 23. The state court asked whether there was "a reasonable probability that the jury would have recommended a life sentence," Pet. App. 91, but Lang says it should have asked whether there was a reasonable probability that *one juror* would have recommended a life sentence, Pet. 23. Yet *Wiggins* itself included language similar to the language in the state court's decision. 539 U.S. at 536 (examining whether "there is a reasonable probability that [the jury] would have returned with a different sentence"). Indeed, Ohio's jury-unanimity requirement (like the Maryland jury-unanimity requirement in *Wiggins*, 539 U.S. at 537) shows that there is no meaningful difference between the two phrases. Lang's semantic debate does not establish a legal error under *Wiggins*.

Juror Bias. The Ohio Supreme Court likewise applied the controlling legal standards when it rejected Lang's juror-bias claim. Citing *Remmer v. United States*, 347 U.S. 227 (1954), and *Smith v. Phillips*, 455 U.S. 209 (1982), the court reasonably concluded that the trial court properly conducted a hearing to determine whether the jury had been tainted by the brief presence of Juror No. 386, whose mother was married to the brother of one of the victims. That is all that *Remmer* requires: a hearing to evaluate claims that jurors were biased. The hearing

revealed that the only evidence of possible improper bias related to Juror No. 386 alone—and she was swiftly removed from the jury well before deliberations started.

Lang's argument that the circuit courts disagree over whether *Remmer* creates an *automatic* presumption of prejudice for all improper juror contacts does not help him because of this case's procedural posture. The Court should wait to clarify any potential confusion over the continuing vitality of such a presumption in a case arising on *direct appeal*, not one under *AEDPA's standards*. In the latter context, any potential circuit confusion about the applicable legal standard providers a reason to *deny* review. After all, it shows that the law in this area is not "clearly established" under AEDPA. *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006).

COUNTERSTATEMENT

A. Edward Lang Executed Jaron Burditte And Marnell Cheek During A Robbery And Drug Deal

In need of money, Edward Lang and Antonio Walker schemed to rob Jaron Burditte, a drug dealer. Pet. App. 103. Lang made arrangements to purchase crack cocaine from Burditte over the phone. Pet. App. 102. Walker and Lang planned to coerce money from Burditte when he showed up to complete the deal. *Id.*

As Walker testified at trial, Burditte and a passenger, Marnell Cheek, pulled up at the planned location. Pet. App. 103. Lang got into the back seat of the car. *Id.* Walker, who remained outside, heard two gunshots and saw Lang get out of the car and run. *Id.* Walker then ran from the scene. *Id.* Burditte's vehicle careened out of control and crashed into a parked car. Pet. App. 102. Hearing the commotion, a neighbor called 911. Pet. App. 86. When the police arrived, they

discovered the bodies of Burditte and Cheek, both of whom had been shot in the back of the head. Pet. App. 102. (In an interview with police, Lang claimed that Walker shot the victims, but the day after the murder he told another individual that "'he killed two people.'" *Id.*)

B. After A Jury Convicted Lang And Recommended A Death Sentence, Ohio Courts Upheld His Conviction And Sentence On Appeal And In Postconviction Proceedings

1. The State charged Lang with, among other counts, two counts of aggravated murder. Pet. App. 104. After Lang's trial started, Marnell Cheek's father informed the prosecutor that "'Juror No. 386's mother is married to [Cheek]'s brother.'" Pet. App. 106. That juror had failed to disclose this relationship before trial, and the prosecutor conveyed the information to the trial court. *Id.* At the next break in testimony, the trial court, prosecutor, and defense counsel questioned Juror No. 386 about her relationship to Cheek. *Id.*; Doc.22-2, Tr., PageID#7426-41. The juror stated that, although she had met Cheek and attended her funeral, she had not discussed the case with her mother, other relatives, or anyone else. Pet. App. 106. She also stated that she had not talked to any other juror about her relationship to Cheek. *Id.* The prosecution moved for Juror No. 386 to be excused for cause, and defense counsel agreed. *Id.* Before resuming the trial, the trial court informed the remaining jurors that the court had excused Juror No. 386 because she may have had some relation to an individual involved in the case. *Id.* The court asked the jurors as a group whether Juror No. 386 had discussed that fact with any of them. *Id.* None indicated that she had. *Id.*

The jury (without Juror No. 386) found Lang guilty on all counts. Pet. App. 104. It further found that Lang was the principal offender in both murders. *Id.* Lang was sentenced to death for the murder of Cheek and to life without parole for the murder of Burditte. *Id.*

Lang appealed to the Ohio Supreme Court, which affirmed his convictions and sentence. *Id.* Lang argued, among other things, that he was denied a fair trial because of Juror No. 386's relationship to Cheek, Pet. App. 106-08, and that he received ineffective assistance during the trial's penalty stage because of counsel's mitigation efforts, Pet. App. 124-26. The court rejected both claims.

With respect to Lang's ineffective-assistance claim, the Ohio Supreme Court found that the record showed that Lang's trial counsel "thoroughly prepared for the penalty phase of the trial." Pet. App. 124. "Defense counsel employed a mitigation expert, a psychologist, and a criminal investigator in preparing for trial," and also "requested records about Lang from the Department of Social Services in Baltimore, Maryland, which was Lang's childhood home." Pet. App. 124-25. In addition, defense counsel introduced the testimony of Tracie Carter (Lang's mother) and Yahnena Robinson (Lang's half-sister), who discussed "Lang's background, his father's abuse, and the mental-health problems Lang suffered before and after living with his father for two years." Pet. App. 125; Doc.22-3, Tr., PageID#8015-47. The court likewise rejected Lang's theory that "his counsel misrepresented the evidence during closing argument" by suggesting that the jury had "'learned that [Lang] had siblings, that . . . like the prosecutor said, *pretty normal childhood up*

until he was ten.'" Pet. App. 125; Doc.22-3, Tr., PageID#8065. The Ohio Supreme Court reasoned that counsel could strategically believe it best to focus on the abuse that Lang suffered during the time that Lang's father abducted him. *Id.*

The Ohio Supreme Court also rejected Lang's argument that the jury was biased because of Juror No. 386's presence on it. Pet. App. 106-08. The court recognized that *Remmer v. United States*, 347 U.S. 227 (1954), and *Smith v. Phillips*, 455 U.S. 209 (1982), directed trial courts to hold hearings when jurors may have been improperly influenced. Pet. App. 106. The Ohio Supreme Court added that "'a court will not reverse a judgment based upon juror misconduct unless prejudice to the complaining party is shown.'" Pet. App. 107 (citation omitted). As applied here, the Ohio Supreme Court concluded that the trial court properly held a *Remmer* hearing, and that "[n]othing in the record support[ed] Lang's claim that the jury was tainted by the presence of juror No. 386." *Id.* Juror No. 386 explained that she had not told other jurors about her relationship to Cheek. *Id.* And the court asked the other jurors as a group if Juror No. 386 had spoken to them about that relationship. No juror responded that she had. *Id.* As for Lang's claim that *Remmer* required the trial court to question the other jurors more thoroughly than it had, the Ohio Supreme Court responded that defense counsel had not "objected to the questioning or requested an additional inquiry." *Id.*

2. While his appeal was pending, Lang filed a petition for postconviction relief in the trial court. Pet. App. 86. This petition again challenged the performance of his attorneys during his trial's penalty phase and introduced

additional records to support this claim. Pet. App. 89-91. Those records included, among other items, documents related to his childhood in Baltimore, and evidence that his abusive father "was around [Lang] for part of his toddler years" before he turned 10. Pet. App. 89. During this time, Lang's father abused him and raped his mother in front of him, and Lang's brother also abused him. Pet. App. 89-90. When Lang turned 10, his father abducted him for two years, and "[t]he years that followed [Lang's] stay with his father included numerous psychiatric hospitalizations and more than one suicide attempt." *Id.*

The trial court rejected Lang's postconviction petition and an intermediate court affirmed. Pet. App. 92. As for *Strickland*'s performance prong, the appellate court indicated that "our review of the additional documentation at issue leads us to conclude that the impact thereof is largely speculative." Pet. App. 91. The court noted that trial counsel "already presented mitigation evidence about [Lang's] youth and the horrors of his life growing up," including that he "had been in a psychiatric facility more than twenty-eight times." *Id.* It added that counsel developed a reasonable strategy designed to humanize Lang's difficult life and elicit sympathy for his mother rather than portray her in a negative light, "a strategy that easily could have been derailed with excessive information about her role in [Lang's] unfortunate upbringing." *Id.* Turning to *Strickland*'s prejudice prong, the court was "unpersuaded that additional and more detailed evidence about [Lang]'s upbringing and mental health issues would have created a reasonable probability

that the jury would have recommended a life sentence, rather than the death penalty, for the Marnell Cheek killing." *Id.*

Although Lang sought to appeal that decision, the Ohio Supreme Court declined to accept it for review. *See State v. Lang*, 963 N.E.2d 824 (Ohio 2012).

C. The District Court And The Sixth Circuit Denied Habeas Relief

1. After the state courts rejected Lang's claims, he filed a federal habeas petition. Pet. App. 31-32. Lang argued, among other things, that the state courts unreasonably resolved both his claim that he received ineffective assistance during his trial's penalty phase and his claim that the jury was biased because of Juror No. 386's temporary presence on it. *Id.*

The district court denied Lang's petition, recognizing that his claims were governed by AEDPA's deferential standards. Pet. App. 24, 32-33. It held that the state courts had not unreasonably concluded that Lang's "trial counsel's efforts to prepare for the mitigation phase of trial were constitutionally adequate." Pet. App. 39-40. Like the state courts, the court found that "the record demonstrates that trial counsel . . . did a substantial amount of mitigation investigation well before the trial began." Pet. App. 39. And it noted that trial counsel reasonably decided to convey Lang's mother as a sympathetic figure rather than present evidence casting her in a negative light. Pet. App. 40. It continued that much of Lang's new evidence in postconviction proceedings was "cumulative of other evidence that was presented." *Id.* That evidence also could have been used against Lang because it was "replete with references to Lang's violent and defiant behavior" and information that would have undermined his mother's credibility. Pet. App. 41.

Lang, for example, was denied placement at a residential treatment center for violent and behaviorally disturbed youth because he was considered too violent. *Id.* The court also found that the state courts could reasonably conclude that there was no prejudice from the failure to introduce the additional mitigation evidence. *Id.*

The district court relatedly held that the state courts reasonably determined that trial counsel's statement in closing argument about Lang's "normal" childhood did not constitute ineffective assistance. Pet. App. 45-46. While "Lang did not have a 'normal' life before age ten," the Ohio court "reasonably determined that trial counsel's comment during closing did not misrepresent the testimony presented in mitigation," which sought to focus on the abuse from Lang's father. Pet. App. 46.

Turning to Lang's juror-bias claim, the district court rejected his argument that the Ohio Supreme Court should have *presumed* prejudice from Juror No. 386's short stint on the jury (rather than require Lang to prove prejudice). Pet. App. 55-56. Presumed prejudice, the district court reasoned, is found only in "certain 'extreme' or 'exceptional' cases." Pet. App. 55 (quoting *Johnson v. Luoma*, 425 F.3d 318, 326 (6th Cir. 2005)). Noting that Juror No. 386 was removed long before deliberations started, the district court held that the Ohio Supreme Court could reasonably conclude that "Juror 386's brief presence on the jury did not affect the fundamental fairness of Lang's trial." Pet. App. 56. The district court further found that the Ohio Supreme Court reasonably applied *Remmer* and *Smith* when it held that the trial court's hearings concerning Juror No. 386 sufficed to comport with due process. Pet. App. 59.

The district court granted Lang a Certificate of Appealability so that he could appeal his ineffective-assistance and juror-bias claims. Pet. App. 81.

2. The Sixth Circuit recognized that the appeal involved "two main issues," and it affirmed the district court's decision on both. Pet. App. 4. The court held that the Ohio Supreme Court and the state postconviction court, both of which considered the ineffective-assistance claim, reasonably applied *Strickland*'s two elements within the meaning of AEDPA. Pet. App. 11-12. It agreed with the district court that the additional evidence presented in postconviction proceedings could have been used against Lang and was cumulative of the trial evidence. *Id.* And it found counsel's statements in closing argument to be consistent with counsel's strategy of focusing on his father's abuse. Pet. App. 12.

The Sixth Circuit also held that the Ohio Supreme Court reasonably resolved Lang's juror-bias claim under *Remmer* and *Smith*. Pet. App. 8-10. The Sixth Circuit's own precedent had interpreted *Remmer* and *Smith* generally to require the challenger to prove prejudice from potential jury misconduct. Pet. App. 8. The court also noted that "Juror 386 was removed from the jury well before deliberations, and Lang presented no evidence that the remaining jurors were tainted by Juror 386's connection with Cheek." Pet. App. 10.

Judge Moore dissented on both grounds. Pet. App. 12-20.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT FOLLOWED SETTLED LAW WHEN IT DENIED LANG'S INEFFECTIVE-ASSISTANCE CLAIM BASED ON THE DOUBLY DEFERENTIAL STANDARDS THAT GOVERN *STRICKLAND* CLAIMS UNDER AEDPA

The Court should deny Lang's first Question Presented because his ineffective-assistance claim raises a highly fact-bound issue over which the law is well settled. And, even if the Court were inclined to consider a case-specific application of *Strickland v. Washington*, 466 U.S. 668 (1984), this case would be a poor candidate to do so because Lang's ineffective-assistance claim lacks merit.

A. Lang Identifies No Circuit Conflict Over The Well-Settled And Highly Deferential Standards Governing Ineffective-Assistance Claims Under AEDPA

Lang's petition does not warrant review because he identifies no circuit conflict over the established standards that apply in this area. Pet. 17-28. To begin with, there can be no dispute about the legal standards that control ineffective-assistance claims. Those claims have two parts. A defendant must initially show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To do so, a defendant must "overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry,* 540 U.S. 1, 8 (2003) (per curiam). If a defendant can prove deficient performance, the defendant must then prove prejudice—"that counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687. The "defendant

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Under AEDPA, the standard for evaluating ineffective-assistance claims raised in habeas proceedings is similarly settled. And it is even more deferential. AEDPA's standards make *Strickland*'s already deferential test "doubly" so. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Habeas petitioners must initially "surmount[] *Strickland*'s high bar," *Padilla v. Kentucky*, 559 U.S. 356, 371-72 (2010), for proving both deficient performance and actual prejudice, *Strickland*, 466 U.S. at 687. They then must prove that there is no "reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105. This requires them to show that a state court's decision was "an *unreasonable* application of federal law," which is different from "an *incorrect* application." *Williams v. Taylor*, 529 U.S. 362, 410-11 (2000). An unreasonable application requires more than just an ordinary error; it requires an "'extreme malfunction[] in the state criminal justice system,'" *Harrington*, 562 U.S. at 102 (citation omitted).

The lower courts faithfully followed these standards here. The Ohio Supreme Court and state postconviction court cited and applied *Strickland*'s two-part test when they rejected Lang's ineffective-assistance claims. Pet. App. 124-25; Pet. App. 89. And the Sixth Circuit applied the additional level of deference that AEDPA demands. Pet. App. 11-12. Indeed, even Lang himself appears to acknowledge that the state courts identified the correct legal standard; his ineffective-assistance

argument largely focuses on alleged errors that the state courts made in *applying* *Strickland* to his unique facts. *See, e.g.*, Pet. 17 (arguing that the state postconviction decision was a "misapplication of *Strickland*'s first prong"). But that type of error correction is "outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of the certiorari." S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013).

B. This Case Provides A Poor Vehicle To Address The Ineffective-Assistance Framework Because Lang's Claim Lacks Merit

The Court should also deny review because the Sixth Circuit correctly applied AEDPA by holding that the state courts had reasonably determined that Lang failed to satisfy either of *Strickland*'s two prongs.

1. The Ohio courts reasonably decided that Lang's counsel undertook sufficient mitigation efforts during his trial's penalty phase

Lang challenges two aspects of his counsel's mitigation efforts: (1) counsel's investigation into (and introduction of) mitigation evidence, and (2) counsel's remark during closing argument that a portion of Lang's childhood was "normal." Pet. 17-28. None of Lang's arguments "overcome[s] the presumption that, under the circumstances, [a] challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 690 (citation omitted). And his arguments are certainly not sufficient to show that the Ohio courts that rejected his ineffective-assistance claim made "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

Lang initially suggests that this case involves more than a routine application of *Strickland* and AEDPA with the argument that his counsel was ineffective for presenting "false" evidence. Pet. 18-19. But the Ohio Supreme Court reasonably rejected that characterization of the penalty proceedings. Pet. App. 125 (finding that counsel's closing argument did not misrepresent the evidence presented during mitigation); *see also* Pet. App. 12. Lang claims, for example, that counsel failed to introduce his mental-health problems. Pet. 18. But his mother testified about his "behavioral problems" and the medication that an outpatient center prescribed for him. Doc.22-3, Tr., PageID#8033. She also noted that he was "in a psychiatric facility" "[o]ver 28 times." *Id.*, PageID#8035-36. Likewise, she mentioned that Lang's father got "abusive" when she was pregnant with Lang, that his father was "around until he was incarcerated," and that his father was imprisoned for "[s]etting my apartment on fire and stabbing me and domestic violence." *Id.*, PageID#8026.

Lang also attacks counsel for deciding to emphasize the abuse that Lang suffered starting at the age of 10, while failing to highlight evidence that he suffered abuse much earlier. *See* Pet. 19-23. Yet decisions about the kind of evidence to present in mitigation are quintessential strategic choices left to counsel. *Strickland*, 466 U.S. at 699 (decisions about what mitigation evidence to present were "the result of reasonable professional judgment"). And the state postconviction court reasonably rejected Lang's claim that his counsel should have highlighted more of the abuse that Lang suffered as a toddler, finding that counsel's mitigation

approach reflected a reasonable trial strategy. Pet. App. 91. Counsel sought to "treat [Lang's] mother as a sympathetic character and not to portray her in a negative light, a strategy that easily could have been derailed with excessive information about her role in [Lang's] unfortunate upbringing." *Id.* As part of his closing argument, Lang's counsel sought to invoke the jury's sympathy for Lang's mother, *see* Pet. App. 129, who had asked the jury "not to kill my child" during her mitigation testimony, Doc.22-3, Tr., PageID#8039. It was at least reasonable to conclude that such an appeal would carry less weight had counsel introduced evidence that made the jury less likely to find his mother worthy of sympathy.

Contrary to Lang's claim, Pet. 20, the state courts also reasonably concluded that trial counsel conducted a sufficient mitigation investigation. As the Ohio Supreme Court noted, Lang's counsel hired a mitigation expert, psychologist, and criminal investigator, and had requested records from the Department of Social Services in Baltimore months before trial. Pet. App. 124-25. The state postconviction court also reasonably concluded that Lang's contrary argument was "speculative." Pet. App. 91. Lang's argument relied on such things as notes from his psychologist about the lack of records. *See* Pet. App. 39. But other records show that counsel spent substantial time reviewing discovery. *Id.*

In addition, the state courts could reasonably find the additional postconviction evidence on which Lang relies to be cumulative of evidence that was presented. Pet. App. 40. The evidence was also double-edged, in that it was "replete with references to Lang's violent and defiant behavior." Pet. App. 41. For

example, "[a] psychologist's expert report filed by Lang in his post-conviction materials indicated that Lang had no friends, threatened people, set fires, made improper sexual advances, was too violent to be placed in juvenile detention, and did not comply with mental health treatment." Pet. App. 11. These facts make this case far removed from the principal case on which Lang relies—*Wiggins v. Smith*, 539 U.S. 510 (2003). Pet. 20. There, counsel simply failed to put on a mitigation case, "introduc[ing] no evidence of Wiggins' life history." 539 U.S. at 516. Here, as the state court said, Lang's mother and half-sister testified about Lang's history and detailed "the horrors of his life growing up." Pet. App. 91.

2. The Ohio courts reasonably decided that Lang was not prejudiced by his trial counsel's mitigation strategy

Additionally, the state courts reasonably concluded that Lang could not prove that he was prejudiced by his counsel's performance at the penalty stage of his trial. As for the aggravating circumstances, the jury found that Lang "brutally murdered" two people execution style after attempting an aggravated robbery. Pet. App. 129. As for the mitigating circumstances, Lang's "mental illness and childhood were presented to the jury through the mitigation witnesses." Pet. App. 91. Indeed, the Ohio Supreme Court, under its independent evaluation of the capital sentence on direct appeal, "[gave] some weight to Lang's history and background," highlighting that he "was abused by his father" and required "extensive counseling and psychiatric treatment." Pet. App. 129. The state courts could reasonably find that additional evidence on those same matters would not have created "a reasonable probability that the jury would have recommended a life sentence, rather than the

death penalty." Pet. App. 91; *see White v. Woodall*, 572 U.S. 415, 419 (2014) (an unreasonable application of law is "not merely wrong; even 'clear error' will not suffice" (citation omitted)). Their decisions were not the rare extreme malfunction of the state judicial system for which habeas relief is reserved. *Harrington*, 562 U.S. at 102.

Lang's arguments to the contrary are unpersuasive. To rebut the mitigation evidence that counsel did present, he notes that "[t]his Court has 'never limited the prejudice inquiry under *Strickland* to cases in which there was only little or no mitigation evidence presented.'" Pet. 21 (quoting *Sears v. Upton*, 561 U.S. 945, 954 (2010), and citing *Porter v. McCollum*, 558 U.S. 30 (2009)). Yet these cases do not help Lang because the evidence in *Sears* and *Porter* considered an altogether different mitigation theory (rather than additional evidence in support of the same theory). In *Porter*, "counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties" arising from it. *Sears*, 561 U.S. at 955; *see Porter*, 558 U.S. at 40. In *Sears*, counsel presented evidence suggesting that the defendant's "childhood [was] stable, loving, and essentially without incident," but failed to uncover that the defendant had "suffered 'significant frontal lobe abnormalities.'" 561 U.S. at 948-49.

This case is different. Lang's relatives *did* testify about his mental-health problems and did testify about "the horrors of his life growing up." Pet. App. 91; Pet. App. 129. Lang simply asserts that counsel should have presented *more*

mitigation evidence of that same general type. Thus, the state courts could reasonably find that the additional evidence was "cumulative" in this case in a way that the additional evidence in *Porter* (concerning military service) and *Sears* (concerning brain injuries) was not. Pet. App. 40.

Lang next suggests that the Ohio postconviction court adopted the wrong post-*Wiggins* standard for prejudice because it held that the additional evidence would not have created "'a reasonable probability that the jury would have recommended a life sentence, rather than the death penalty.'" Pet. 23 (quoting Pet. App. 91). Lang contends that the court should have instead asked whether "'at least one juror would have struck a different balance.'" *Id.* (quoting *Wiggins*, 539 U.S. at 537). He is again mistaken. To begin with, Lang selectively cites *Wiggins*. He overlooks that the *Wiggins* Court *also* asked whether there was "a reasonable probability that [the jury] would have returned with a different sentence" had the jury considered the additional mitigating evidence. 539 U.S. at 536.

That *Wiggins* used both formulations shows that no meaningful difference exists between them. The imposition of the death penalty in Ohio requires a unanimous jury recommendation. *State v. Brooks*, 661 N.E.2d 1030, 1042 (Ohio 1996) ("In Ohio, a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors."). Because it takes only one dissenting juror to render a defendant ineligible for the death penalty, the distinction between the state court's language and Lang's preferred language is one without a difference. In fact, there

is not even a distinction; the language from *Wiggins* on which Lang now relies referred to a similar unanimity requirement from Maryland. *Wiggins*, 539 U.S. at 537.

II. THE SIXTH CIRCUIT CORRECTLY APPLIED SETTLED LAW WHEN IT DENIED LANG'S JUROR-BIAS CLAIM

Lang's second Question Presented is also unworthy of review. He argues that the Ohio Supreme Court unreasonably applied *Remmer v. United States*, 347 U.S. 227 (1954), because it failed to invoke a presumption of prejudice based on Juror No. 386's short stint on the jury. Pet. 28-40. Lang adds that the Sixth Circuit's refusal to apply an automatic presumption of prejudice has created a circuit conflict. *Id.* These arguments provide no basis for the Court's review.

A. The Ohio Supreme Court's Rejection Of Lang's Juror-Bias Claim Reasonably Applied This Court's Precedent Under AEDPA

A combination of the Due Process Clause and the Sixth Amendment's right to an impartial jury requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). This Court has issued several cases detailing this right.

In *Remmer*, a juror had been contacted by an unnamed individual about potentially profiting from a verdict for the defendant, and the FBI conducted an investigation while the trial was ongoing. 347 U.S. at 228-29. In that context, the Court noted: "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, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." 347 U.S. at 229. According to the Court, the burden rested on the government to show that such contact was harmless. *Id.* When potentially improper contact occurred, the Court continued, a trial court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 229-30.

Since *Remmer*, this Court has also recognized that "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith*, 455 U.S. at 217. In *Smith*, a jury had "submitted during the trial an application for employment as a major felony investigator in the District Attorney's Office." *Id.* at 212. When the prosecution brought this fact to the trial court's attention after the verdict, the court held a hearing and found that the application had not prejudiced the defendant. *Id.* at 213-14. This Court upheld the conviction. It noted that "the remedy for allegations of juror partiality is a hearing *in which the defendant has the opportunity to prove actual bias*." *Id.* at 215 (emphasis added). The Court found the hearing in that case sufficient. *Id.* at 217. Thus, while "[t]here may be cases where an intrusion should be presumed prejudicial, . . . a presumption of prejudice as opposed to a specific analysis does not

change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *United States v. Olano*, 507 U.S. 725, 739 (1993).

Under AEDPA, the Ohio Supreme Court reasonably applied this Court's precedent when it rejected Lang's juror-bias claim. Citing both *Remmer* and *Smith*, the court held that Lang's claim that the rest of his jury was biased by the presence of Juror No. 386 was "speculative and unsupported by the evidence." Pet. App. 106-07. Among other things, the Ohio Supreme Court noted that once Juror No. 386's relationship to one of the victims was called to the trial court's attention, the court conducted a hearing to determine whether Lang had been prejudiced by that juror's presence on the jury. Pet. App. 106-07. The focus was ultimately not on Juror No. 386 (who was removed), but on whether *other* jurors were influenced by Juror No. 386 before her removal. All of the evidence before the trial court said no. During the *Remmer* hearing, the juror in question testified that she had not talked to any of the other jurors about her relationship to the victim. *Id.* The other jurors confirmed this fact. *Id.* When the trial court asked them whether they had discussed the issue with juror No. 386, not one of them indicated that they had. *Id.* It was only after conducting the requisite hearing, removing Juror No. 386, *and* concluding that none of the remaining jurors had been influenced by her presence that the trial court allowed the trial to move forward. *Id.*

It was at least reasonable for the Ohio Supreme Court to conclude that the trial court's decision to proceed after a hearing was consistent with this Court's precedent. Put simply, there was no evidence that Juror No. 386 influenced or

attempted to influence any of the other jurors. In the absence of any such evidence, it was not unreasonable for the state courts to have concluded that there was no need to question those jurors further. *Cf. United States v. Claxton*, 766 F.3d 280, 300 (3d Cir. 2014) (court did not need to conduct *Remmer* hearing of entire jury); *Baher v. Phillips*, 385 Fed. Appx. 43, 45 (2d Cir. 2010) (clearly established federal law did not require jurors to be questioned individually).

Attempting to show otherwise, Lang argues that the trial court's *Remmer* hearing was inadequate and that it was not sufficient to overcome what he describes as *Remmer*'s presumption of prejudice. Pet. 31-32. Yet, as the Ohio Supreme Court noted, "neither the state nor the defense counsel objected to the questioning or requested an additional inquiry." Pet. App. 107. If Lang thought that the trial court should have asked additional questions to the other jurors, he should have contemporaneously asked the trial court to do so. Furthermore, *Remmer* says little about the procedures that must be followed when evaluating improper juror contact claims. *See generally Remmer*, 347 U.S. at 228-30. It simply instructs that when courts are faced with certain juror-bias claims, they must consider those claims in a hearing in which all parties may participate. *Remmer*, 347 U.S. at 230. That command was unequivocally satisfied here.

Because this Court has not spoken on the specific procedures required by *Remmer*, there are no specific procedures that are clearly established for purposes of § 2254(d)(1). "[W]here the precise contours of [a] right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *White*, 572 U.S.

at 424 (quotations and citations omitted). State courts also cannot be faulted for failing to extend this Court's decisions beyond their specific circumstances; if extension of a decision is required then the law was not "clearly established at the time of the state court's decision." *See id.* at 426 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). Thus, even if the Court finds reason to question the scope of the trial court's *Remmer* hearing, the Ohio Supreme Court's decision was not an unreasonable application of clearly established law.

Lang also suggests that the state court's hearing was inadequate because it was inconsistent with the requirements of Sixth Circuit panel precedent. *See* Pet. 15 n.8, 31 n.13. Such an argument is inappropriate under AEDPA. The Court has repeatedly stressed that federal habeas courts may not consider their own precedent when determining whether relief is warranted; they may only apply clearly established federal law as determined by *this Court*. *Parker v. Matthews*, 567 U.S. 37, 48 (2012); *see also White*, 572 U.S. at 420 n.2 (same).

B. Lang Wrongly Claims That The Decision Below Conflicts With Decisions From Other Circuit Courts That Apply An Automatic Presumption Of Prejudice In All Cases

Lang wrongly claims that the Sixth Circuit's decision below created a conflict with all other circuit courts by refusing to apply an *automatic* presumption of prejudice for any improper jury contacts. Pet. 30-31, 36-38. The circuit courts have a more nuanced framework than he alleges.

Like the Sixth Circuit, most circuits recognize that *Remmer* does not create an *automatic* presumption of prejudice. Lang, for example, suggests that the decision below conflicts with *United States v. Pagan-Romero*, 894 F.3d 441 (1st Cir.

2018). Pet. 37. But that case *refused* to apply any such presumption to a juror's improper use of the dictionary, noting that it was "well established that less serious instances of potential taint should be addressed using the abuse-of-discretion standard, with the presumption of prejudice being reserved for more serious instances." *Pagan-Romero*, 894 F.3d at 447 ("The facts of this case do not, as Appellant contends, require that we presume prejudice."). Other cases that Lang cites as applying a presumption of prejudice likewise show that those circuits do not do so *in all cases*. *See United States v. Cardena*, 842 F.3d 959, 979 (7th Cir. 2016) (noting that "not all extraneous influences are presumptively prejudicial such that they require a *Remmer* hearing"); *United States v. Honken*, 541 F.3d 1146, 1167 (8th Cir. 2008) (noting that "the *Remmer* presumption of prejudice [did] not apply" when a juror's boss allegedly told her to say something "outrageous" to get removed from the jury); *United States v. Williams-Davis*, 90 F.3d 490, 497 (D.C. Cir. 1996) (noting that "the district court was correct under the Supreme Court's and our cases to inquire whether any particular intrusion showed enough of a 'likelihood of prejudice' to justify assigning the government a burden of proving harmlessness").

Many other cases have made similar statements. In a case where a prospective juror made comments during voir dire about recognizing the defendant, the Tenth Circuit noted: "We have found no cases applying [the] *Remmer* [presumption] in a case such as this, where a presumptive juror provides information to other potential jurors during voir dire, and we decline to extend it in this case." *United States v. Hawley*, 660 F. App'x 702, 709 n.9 (10th Cir. 2016).

Likewise, the Fifth Circuit has noted that "only when the court determines that prejudice is likely should the government be required to prove its absence." *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998). And the Fourth Circuit has suggested that the *Remmer* presumption applies only if an improper contact is of such a character to "'reasonably draw into question the integrity of the verdict.'" *United States v. Barahona*, 606 F. App'x 51, 68-69 (4th Cir. 2015) (citation omitted).

C. This Case Offers A Bad Vehicle To Address The Scope and Continued Vitality Of *Remmer*'s Presumption Of Prejudice

Even if there is some tension between some of the circuit decisions regarding the scope of *Remmer*'s presumption of prejudice, this case is a poor vehicle to resolve that tension. The Court should consider such a question on *direct review*—not in *habeas proceedings subject to AEDPA*. Lang's brief confirms this. Nearly every case that he cites as evidence of a split arose on direct review. *See* Pet. 37-38. As a result, Lang's second Question Presented is not one that the Court can now answer in this habeas proceeding. Habeas cases do not provide the opportunity to establish new federal law, but only to determine whether a state court reasonably applied the law that was already clearly established. 28 U.S.C. § 2254(d)(1) (question for habeas proceeding is whether state courts unreasonably applied clearly established federal law); *cf. Wiggins*, 539 U.S. at 522 (the Court "made no new law" in *Williams v. Taylor*, 529 U.S. 362 (2000) because that case arose on habeas review).

To be sure, two of the cases that Lang cites did involve habeas claims. Pet. 37; *Godoy v. Spearman*, 861 F.3d 956 (9th Cir. 2017) (en banc); *Stouffer v. Duckworth*, 825 F.3d 1167 (10th Cir. 2016). Yet neither case is relevant; the legal

questions at issue in each were decidedly different from the question presented here, and those cases thus say nothing about whether *this* case is a suitable candidate for this Court's review. In *Godoy*, the state court relied on the documentary record alone and failed to hold a *Remmer* hearing to determine whether the defendant had been prejudiced by a juror who had communicated about the case while it was ongoing. *See* 861 F.3d at 958-60. The Ninth Circuit found this lack of a hearing problematic. *See id.* (noting that it was error for the state court to rely on an alternate juror's declaration "both to raise the presumption of prejudice and to rebut it."). By comparison, Lang does not dispute that the state court in this case held a hearing. He merely challenges the scope and extent of it. *See* Pet. 31-32. *Stouffer* involved de novo review (not AEDPA review) of an improper juror contact. 825 F.3d at 1179. And the court declined to address how *Remmer*'s presumption-of-prejudice language applies. *Id.* at 1181 n.6.

If anything, any tension across the circuit courts over the scope of *Remmer*'s presumption of prejudice confirms that Lang's claim must fail. As the Court knows, the relevant legal question for purposes of habeas review is whether a state court "unreasonably applied *clearly established* federal law." *See* 28 U.S.C. § 2254(d)(1) (emphasis added). The existence of circuit confusion about the meaning of this Court's precedent proves that the relevant law is *not* clearly established. *See Carey v. Musladin*, 549 U.S. 70, 76-77 (2006). Thus, even if Lang were correct about the existence of a circuit conflict over *Remmer*'s scope, that fact would only provide a reason for this Court to deny review given this case's AEDPA posture.

CONCLUSION

For the above reasons, the petition should be denied.

Respectfully submitted,

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