

No. 18-6174

IN THE SUPREME COURT OF THE UNITED STATES

**EDWARD LANG,
PETITIONER,**

V.

**TIM SHOOP,¹
WARDEN**

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

CAPITAL CASE

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

KARL SCHWARTZ (38994 PA)
Law Office of Karl Schwartz
PO Box 8846
Elkins Park, PA 19027
(215) 450-3391
karl@kschwartzlaw.com

MICHAEL J. BENZA (0061454 OH)
The Law Office of Michael J. Benza, Inc.
17850 Geauga Lake Road
Chagrin Falls, OH 44023
(216) 319-1247
Michael.benza@case.edu

Counsel of Record

Counsel for Petitioner, Edward Lang

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¹ The Respondent, Tim Shoop, the Warden of the Chillicothe Correctional Institution, is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

TABLE OF CONTENTS

	PAGE(S)
Table of Contents	i
Table of Authorities	ii
Introduction.....	1
Reasons for Granting the Writ	2
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 <i>Strickland v. Washington</i>	2
B. The Court Should Grant Certiorari to Correct the Sixth Circuit’s Refusal to Apply the Presumption of Prejudice Required by <i>Remmer v. United States</i> , for Private Juror Contact Relating to the Matter Before the Jury.....	5
Conclusion	9

TABLE OF AUTHORITIES

	PAGE(S)
<i>Dietz v. Bouldin</i> , 136 S. Ct. 1885 (2016)	1
<i>Lang v. Bobby</i> , 2015 U.S. Dist. LEXIS 39365 (Mar. 27, 2015)	3
<i>Lang v. Bobby</i> , 889 F.3d 803 (6th Cir. 2018)	3
<i>Nix v. Whiteside</i> , 475 U.S. 157 (1986)	3, 5
<i>Remmer v. United States</i> , 347 U.S. 227 (1954)	1, 5-8
<i>Remmer v. United States</i> , 350 U.S. 377 (1956)	6
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005)	4
<i>State v. Lang</i> , 2010 Ohio App. LEXIS 3375 (Oh. Ap., 5th Dist., Stark County Aug. 23, 2010)	3
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	1-2
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	4

INTRODUCTION

This case presents two important questions for this Court's consideration: (1) Can the presentation of false mitigation evidence, in support of a false mitigation 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); and (2) 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)?

The arguments presented in Respondent's *Brief in Opposition* are not persuasive. Respondent improperly recasts Petitioner's argument as "a routine ineffective-assistance claim." See *Brief in Opposition*, p.1. Indeed, rather than address the substantive issue presented, Respondent simply asks this Court to ignore that Lang's counsel provided the jury with materially false information about his life, ignoring the actual mitigation evidence that was extant in his background. As to Petitioner's *Remmer* argument, contrary to Respondent's assertion, the recurrent confusion over (or more aptly, rejection of) this Court's *Remmer* presumption, exists only in the Sixth Circuit and requires this Court's correction. Under no reasonable application of *Remmer* was the hearing conducted in Lang's case the required "full hearing" to discover the presumptively prejudicial extrajudicial contact. Respondent's arguments that Lang's case is a "poor vehicle" to address either issue fail. Petitioner presents two, very serious issues, ripe for this Court's review: one, involving a new, ill-advised rule, that stands *Strickland's* first prong on its head; the second, an important federal question related to the rejection of the *Remmer* presumption

of prejudice, a ruling in conflict with a relevant decision of this Court (and every other circuit in the country). Thus, this Court should grant the writ of certiorari to address both questions.

REASONS FOR GRANTING THE WRIT

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

Respondent's attempt to miscast Lang's claim demonstrates why this Court must grant review of the matter. While this claim is straight-forward, it implicates the most fundamental aspect of the right to counsel: can counsel present a demonstrably false mitigation case to the jury? Contrary to the Respondent's assertion, this is not a "typical" or run of the mill ineffective assistance of counsel case. Lang's counsel failed to prepare for a mitigation case, failed to collect relevant materials regarding Lang's life, failed to interview witnesses about Lang's life, and failed to heed the requests of both the investigator and court appointed psychologist for more time to prepare for the mitigation phase of the case – and, because of these multiple failures presented what was unquestionably false evidence about his client.

Counsel pressed forward with what they knew, or should have known, was a false case: that Lang's early life was "normal." The false evidence presented in this regard was provided by Lang's mother. Thus, Respondent's observation that the Ohio Supreme Court found that counsel's "normalcy" argument did not misrepresent the (false) penalty phase evidence (*Brief in Opposition*, p. 14), is meaningless. The problem, and the Constitutional issue in this case, is that counsel knew enough about Lang's early life to know that his life was not by any stretch of the imagination "normal." In fact, while many capital defendants have faced appalling life histories, Lang's was particularly atrocious. Indeed, the Sixth Circuit recognized that Lang's "[c]hildhood [was] filled with horrific abuse and violence." *See* A12. Lang was subjected to *in utero* abuse when his mother

continued to abuse alcohol during pregnancy. R. 18-5 (PCEx-6) PageID#2511. Lang's father physically beat his mother during the pregnancy requiring at least one hospitalization. R. 18-4 (PCEx-6) PageID#2486. The physical assaults included rape, stabbing, and broken ribs. *Id.* After Lang was born, the physical and sexual abuse continued not only against Lang's mother but also against Lang. A medical examination at the age of 4 revealed "many non-specific" scars. R. 18-5 (PCEx-15) PageID#2586. The full details of Lang's life are set forth in the Petition for Writ of Certiorari.

While counsel for Lang did not know the full depth and detail of this material, they did know that Lang's life was not normal. But because of the failure to prepare for the mitigation phase of Lang's sentencing hearing, counsel chose to offer the testimony of Lang's mother and to present a false narrative that Lang's life was "normal."

This Court's review is required because the courts below all validated this tactic as legitimate trial strategy. *State v. Lang*, 2010 Ohio App. LEXIS 3375 (Oh. Ap., 5th Dist., Stark County Aug. 23, 2010); *Lang v. Bobby*, 2015 U.S. Dist. LEXIS 39365 (Mar. 27, 2015); *Lang v. Bobby*, 889 F.3d 803 (6th Cir. 2018). These holdings turn the Constitutional and ethical duties of defense counsel on their heads. The Sixth Amendment duty of counsel is to zealously represent the defendant within the boundaries of the law, and not to present a picture of their client that counsel knew was false. Indeed, *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) held that counsel cannot be found ineffective for a **refusal** to present false evidence (in that case, perjured testimony). Certainly, the obverse is true: counsel who presents false evidence to his client's detriment must be ineffective. And yet, this exact type of impermissible conduct was validated by the state and lower federal courts.

These decisions are all the more disturbing in that each of the courts recognized that the narrative presented by counsel was indeed false. Although courts struggle with the nuances of the right to effective assistance of counsel, this Court should validate and affirm the clear rule: the right to the effective assistance of counsel prohibits counsel from presenting false evidence and a false case in mitigation. Contrary to law and logic, the lower courts in Lang's case established a new Constitutional standard that cannot co-exist with this Court's Eighth Amendment/*Stickland/Wiggins* jurisprudence that it is not deficient performance to present false evidence and a false case to the jury.

The prejudice to Lang is clear from the evidence discovered and presented in state post-conviction proceedings laying out the truly horrific life Lang lived from *in utero* until his arrest in this matter. The true evidence of Lang's pained and brutal life history "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" Lang's culpability. *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005), *citing Wiggins v. Smith*, 539 U.S. 510, 538 (2003). As in *Rompilla*, this Court should remand for resentencing or for stipulation to a life sentence. *Id.*

Even if there could be some reasonable strategic reason to present a false narrative to the jury, the real facts of Lang's life present a picture of a child abused from before birth, subjected to horrendous physical and sexual assaults, neglected and abandoned by his mother, failed by those who are supposed to care the most, and lost to a society that turned its back on his suffering. Presentation of this evidence had a far greater likelihood of the jury unanimously returning a life sentence, and at the very least, would have insured that at least **one** member of the jury would have returned a life sentence. *See Id.*

Respondent's objections to this Court's review fail to address the issue before this Court. Most notably, Respondent at no point acknowledges what he previously conceded: "there is no dispute that Lang did not have a 'normal' childhood prior to age ten." Respondent-Appellee's Brief, Sixth Circuit Doc. 31, Page 57. Rather than address the substantive issue presented, Respondent simply asks this Court to ignore that Lang's counsel provided his jury with affirmatively false, material information about his life.

Allowing Lang's death sentence to stand establishes new and dangerous precedent pursuant to the Sixth Amendment right to counsel: the state and lower federal courts endorsement of attorney misrepresentations to the courts and the jury; not to mention that the true facts would have been of much greater value to the client. And, of course, if counsel can make such a strategic decision, then nothing precludes counsel's acquiescence to similar client demands. The impact of the state and lower court decisions is to contravene this Court's decision in *Nix*. Therefore, this Court must grant review to protect the integrity of capital sentencing proceedings, and to enforce the duty of counsel to zealously and *ethically* represent criminal defendants.

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

Respondent takes no issues with the facts: a family member of one of the victims failed to disclose the familial relationship in *voir dire* and participated in a significant portion of the trial until Lang himself discovered the misconduct.

First, in spite of Respondent's repeated assertions that the state court's decision "under AEDPA" was proper, the changes to 28 U.S.C. § 2254 imposed by AEDPA in no way impact the duty and standard of review of state courts. State courts are bound to properly and dutifully apply

this Court's precedent. AEPDA does not authorize the state courts to misapply or ignore the Constitutional law set forth by this Court.

Second, Lang's request for review is a proper vehicle for this Court to correct the Sixth Circuit's misapplication of this Court's holdings in *Remmer v. United States*, 347 U.S. 227 (1954). 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, though some have purported to modify the presumption. See *Petition for Writ of Certiorari*, p. 36-38. The Sixth Circuit stands alone in its outright rejection of the *Remmer* presumption. Because *Remmer* is settled law, this Court need not wait for a direct appeal matter to require the Circuit to apply clearly established Supreme Court precedent. This Court should clarify for the Sixth Circuit the presumption which *Remmer* creates: "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," *Remmer v. United States*, 347 U.S. at 229, and that this "presumptively prejudicial" contact "manifest[s] the need for a full hearing." *Remmer v. United States*, 350 U.S. 377, 380 (1956).

Finally, Respondent omits any factual discussion of what happened in the trial court. The omission is telling, as even a summary of what occurred below demonstrates the failures of the state courts, and the impact of the Sixth Circuit's abandonment of the *Remmer* rule.

After the State's case began, Lang saw one of the jurors "look[] out into the audience, smile[] and nod[] her head." R. 22-2 (Trial Transcript) PageID#7352. The prosecutor then explained that Juror 386 was related to the decedent. This information became known after the decedent's father told the prosecutor about this juror's relationship to the decedent's family and

that she was currently living with her family. *Id.* PageID#7353. The prosecutor did not explain why he had not revealed this information until after Lang noticed Juror 386’s behavior.

The trial court did not immediately remove the juror – instead waiting for the next break, so she continued to sit for additional testimony. *Id.* Defense counsel asked the trial court to deal with this issue “before...any further testimony.” *Id.* PageID#7354.

When questioned, Juror 386 admitted that her “mom is married to [the decedent’s] brother.” *Id.* PageID#7428. Juror 386 conceded that she did not disclose her familial connection during *voir dire*. *Id.* She admitted that she knew several people, other family members, in the back of the courtroom. *Id.* PageID#7429. She also admitted that she personally knew the decedent. *Id.* PageID#7430. She confessed that she attended her funeral and was there for the viewing of her body. *Id.* PageID#7431-32. She said, however, that she had not talked to her mother or other relatives about the case before coming to court. *Id.* PageID#7432. Juror 386 denied discussing her relationship to the decedent with any other jurors. *Id.* PageID#7432-7433, 7438-7439.

The prosecutor stated: “Judge, I think I have to move for cause.” *Id.* PageID#7436 (“...we have a relative, a direct relative of the deceased on the jury. I don’t care what she says...”). Defense counsel agreed, and Juror 386 was excused for cause. *Id.* PageID#7436-37.

After her dismissal, the remaining jurors returned to the courtroom. The trial court simply stated that 386 was dismissed because she “may have a relationship” with someone involved in the case and asked a single question of the remaining jurors as a group: “is there any member of the jury at all that she did discuss this with at all?” *Id.* PageID# 7441. No one answered and there was no further inquiry.

This was the full extent of the inquiry conducted by the trial court. Approved by the Sixth Circuit, it now stands for the proposition that *Remmer* is satisfied by asking the jurors en masse

simply if they are aware of the questioned juror's relations, without regard to any other influence the juror had upon her fellow jurors. Under no reasonable application of *Remmer* was this the required "full hearing" to discover the presumptively prejudicial extrajudicial contact. Therefore, the Court should grant the Writ.

CONCLUSION

For all of the foregoing reasons, a writ of *certiorari* should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on June 28, 2018.

Respectfully Submitted,

/s/ Karl Schwartz

KARL SCHWARTZ (38994 PA)
Law Office of Karl Schwartz
PO Box 8846
Elkins Park, PA 19027
(215) 450-3391
karl@kschwartzlaw.com
Counsel of Record

MICHAEL J. BENZA (0061454 OH)
The Law Office of Michael J. Benza, Inc.
17850 Geauga Lake Road
Chagrin Falls, OH 44023
(216) 319-1247
michael.benza@case.edu

Counsel for Petitioner, Edward Lang

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