**No. CR-08-1219**

IN THE ALABAMA COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| LAM LUONG, | * | |
| | * | |
| Appellant, | * | |
| | * | On Appeal from |
| v. | * | Mobile County Circuit Court |
| | * | Case No. CC-2008-840 |
| STATE OF ALABAMA, | * | |
| | * | |
| Appellee. | * | |
| | * | |

---

# BRIEF OF THE APPELLANT

---

CASSANDRA STUBBS
ANNA ARCENEAUX
ACLU Capital Punishment Project
201 W. Main Street Suite 402
Durham, NC 27701
PH: (919) 682-5659
FAX: (919) 682-5961
cstubbs@aclu.org
aarceneaux@aclu.org

GLENN DAVIDSON
Collins, Davidson LLC
1203 Dauphin Street
Mobile, AL 36604
PH: (251) 432-0400
FAX: (251) 432-0714
gldavidson@comcast.net

*Counsel for Lam Luong*

May 18, 2010

**ORAL ARGUMENT REQUESTED**

## STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Alabama Rules of Appellate Procedure, Lam Luong, through counsel, respectfully requests oral argument.

Luong is under sentence of death at Holman State Prison. The Alabama legislature has required heightened appellate review by this Court of cases in which a death sentence has been imposed. Ala. Code § 13A-5-53, 55.

Serious errors occurred in the trial of this high profile capital case, including, among other things, the court's denial of defense counsel's motion for a change of venue and motion for a continuance in the wake of his withdrawn guilty plea, failure to conduct adequate voir dire regarding the flood of prejudicial pretrial publicity, and failure to investigate evidence that members of the venire had prejudged Luong's penalty at death. The court also erred in denying defense counsel's motion for an *ex parte* determination of their request for mitigation travel expenses mitigation funds.

This Court's consideration and adjudication of the issues presented would benefit from oral argument due to their complexity and importance.

**TABLE OF CONTENTS**

**PART II. PRE-TRIAL AND TRIAL ERRORS.**

**PART IV. OTHER ERRORS.**

## TABLE OF AUTHORITIES

### FEDERAL CASES

**STATE CASES**

**STATUTES AND RULES**

**MISCELLANEOUS**

## STATEMENT OF THE CASE

On February 22, 2008, Lam Luong was indicted for five counts of capital murder, pursuant to Ala. Code § 13A-5-40(a)(10),(15). C.18-19.[1] On March 5, 2009, Luong entered a plea of guilty, R.319, C.13, but withdrew his plea on March 11. R.379. The case proceeded to trial. R.394, C.13. A Mobile County jury found him guilty on all counts on March 19. R.1491-92, C.20-24. The sentencing phase began and concluded the next day. R.1497. The jury recommended a death sentence. R.1665, C.25. On April 30, 2009, the trial court sentenced Luong to death. C.17. This appeal follows.

## STATEMENT OF THE ISSUES

In this extraordinarily high profile capital case which captivated the Mobile area, the trial court erroneously denied defense counsel's motion for a change of venue. The court also failed to ensure adequate voir dire concerning the venire's exposure to highly prejudicial pretrial publicity. The court erred in failing to investigate evidence that venire members had tainted the jury pool by calling for Luong's execution. The court also erred in denying defense counsel's request to be heard *ex parte* on its application for mitigation investigation funds. For these and the other points of error

[1] "C." refers to the clerk's record. "R." refers to the reporter's record. "R2." refers to the reporter's record for the June 12, 2008 pretrial hearing."SR." refers to the supplemental record. "SR2." refers to the second supplemental record. "SR3." refers to the third supplemental record.

addressed herein, this Court should reverse Luong's conviction and death sentence.

## STATEMENT OF FACTS

The Mobile community had formed strong opinions pre-trial that Luong was guilty and deserved the death penalty. Polling results of a community survey from January 2009, a year after the crime and two months before the trial, showed that 75% of individuals responded that their friends believed Luong was guilty and 71% believed him guilty themselves. C.51-58. An online forum devoted to the topic of "how should this baby killer be dealt with?"[2] reported a near perfect[3] consensus that Luong should receive the death penalty and/or be brutally tortured. C.776-783. Community members "flooded" a call-in opinion line and other TV station-sponsored internet forums to call for the death penalty. *Id.*; C.519-21.

Luong's prosecution and the deaths of his four children riveted the Mobile area media. A deluge of TV, radio, print, and internet media covered every aspect of the story, from Luong's confession, to the discovery of the bodies, to in-depth profiles of the children and surviving family members, to speculation about Luong's "evil" character. *See, e.g.*,

[2]This online forum, one of numerous forums devoted to the community's outrage about the case, had over 16,000 views one month before trial. C.774.

[3]50-plus responses called for Luong's execution or torture. *See, e.g.*, C.776 (Luong should "be thrown off the bridge with a rock tied to his ankles"). In contrast, one respondent asked whether the readers had forgiveness, C.780, and another indicated that he or she was disturbed by some of the posts.

C.400, 490-93, 526-28, 552-54, 614-19-6, 773-783. In the first week, over 700 articles worldwide covered the case. C.593. On peak days, local TV stations ran over 50 daily clips about the case. C.720-21, 723-39. The story was the top news story in the state for 2008. C.712. One prospective juror characterized the media exposure as "information overload," noting that the case was always in the newspaper and on television, and concluding that the public was "saturated" with facts. R.896.

In pretrial proceedings, the trial judge pledged several protections to prevent the massive publicity from eroding Luong's rights to a fair trial and due process. Acknowledging that it might be a challenge to select a jury from the Mobile pool, the judge promised to conduct thorough, individual, sequestered voir dire of all jurors who knew about the case and to transfer venue if necessary. R.27, 46, 47-49, 391. He authorized the defense to retain a polling expert to investigate the level of community bias. C.5,7, 110-115. He granted the defense's motion to sequester the jury during the trial. C.5, 119; R.48-49.

Luong faced five counts of capital murder for the deaths of his four children: Ryan Phan, Lindsey Luong, Hannah Luong, and Danny Luong.[4] After initially reporting that the children were missing after he left them with a woman named Kim, Luong

[4]Kieu Phan, Luong's common law wife, was pregnant with Ryan when Luong met her. Nonetheless Luong raised him as his own. R.998-99.

eventually confessed to Capt. Darryl Wilson of the Bayou La Batre Police Department ("BLBPD") that he had thrown the children from the top of the Dauphin Island Bridge. R.1116. Their bodies were all ultimately recovered in the waters along the Gulf Coast. R.1311-15, 1320.

At a pretrial hearing one week before trial, Luong gave his attorneys a letter written in Vietnamese and addressed to the judge. R.334. Luong's interpreter translated the entire letter in open court:

> I am [sic] plead guilty for what I have done, and that was the matter of killing my four children. **From the day they die I am [sic] no longer want to live**, but I don't know how to die. Just please grant my wish. I hereby request the death penalty as soon as possible, and that is my wish.

R.334-35(emphasis added).

Luong had previously expressed a desire to plead guilty and receive the death penalty in November 2008 to state psychologist Dr. McKeown. C.215, R.141-42. Luong had also been suicidal while in jail awaiting trial, cutting himself with makeshift tools from his cell.[5] His jail medical records describe additional disturbed behavior, including an incident when he wrote in blood on his cell wall "I love you," next to small hand prints and four faces with smiles, also drawn in blood. SR2.643, 687, 690. Luong suffered from auditory

[5] *See* SR2.98, 135, 144, 153, 195, 187, 200-01.

hallucinations, SR2.83, and was treated with anti-psychotic and anti-depressant medication. SR2.91, 187.

After receiving the guilty plea letter, the court questioned Luong and accepted his guilty plea without ordering a competency evaluation or hearing. R.327-30.[6] The court indicated that the jury trial would proceed as scheduled the following week but court noted that the case would now go much faster because pretrial publicity was no longer an issue and jury selection could proceed more quickly. R.338, 343. The court ruled that a venue change was "off the table," the jury would not be sequestered, and the defense's motion to require the State to produce victim impact evidence was no longer relevant. R.337, 338, 339, 343, 345.

On March 11th, the judge announced that he had been thinking about the guilty plea "over the last couple of days," and that he had decided to review the plea with Luong one more time to confirm that he understood it. R.350. The judge asked Luong if he understood what the attorneys and interpreter had said about the plea and Luong responded that he did not. R.351. Luong expressed nervousness, confusion, and a desire to end the proceedings. *See, e.g.*, R.358-59, 361, 365. At one

[6]On the day of the guilty plea, Luong's counsel told the court that although they had explained the trial and plea process to Luong "many times," he remained "confused, for lack of a better word." R.309-10. Defense counsel, however, informed the court that Luong had been evaluated by a defense psychiatrist who had concluded that Luong was competent to stand trial and plead guilty. R.311, 314. The psychiatrist's evaluation had been on February 6, 2009, approximately one month before the guilty plea. R.308, C.267.

point the judge instructed defense counsel to take Luong out of the room to try to clear up Luong's confusion. R.373. When they returned, after several minutes of questioning, Luong stated that he wished to enter a not guilty plea. R.379.

The judge permitted Luong to withdraw his guilty plea; however, he did not restore the protections he had previously promised. R.379. The judge denied the defense's motion for a continuance, R.383, denied the defense's renewed motion to sequester the jury, R.387, denied the defense an opportunity to call their polling expert to testify about the degree of community prejudice in support of its change of venue, R.593-95, denied the defense the opportunity to individually voir dire jurors regarding their media exposure, R.455, 585-86, 592, and denied the motion for a change of venue. R.915.

In light of the media exposure surrounding the guilty plea, defense counsel had renewed their motion for a change of venue and moved for a continuance. R.380-381. They pointed out that the majority of the prospective jurors had indicated in their questionnaires that they had heard media reports of the guilty plea. R.380. Only 15 of the 156 prospective jurors indicated in their questionnaires that they had not previously heard or read anything about the case.[7] When the jurors were

[7] *See* SR2.279, 564, 729, 861, 876, 938, 971, 1092, 1103, 1268, 1399, 1575, 1674, 1751, and 1883.

questioned, only two of the 155[8] jurors responded that they had not heard, read, or seen anything about the case. R.453-54. Although virtually the entire pool had been exposed to facts about the case and many to Luong's guilty plea the week before, the court did not permit individual voir dire regarding pre-trial publicity, what jurors knew about the case, or whether facts or publicity caused them to prejudge the case. R.453-55, 585-86, 592.

As a result, much of the voir dire was done in a mass panel comprised of all 155 jurors. R.413-578. The court did permit the defense to ask whether jurors had ever stated an opinion about what punishment Luong should receive and, even in this enormous panel, 12 admitted that they had previously told someone that Luong should receive the death penalty. R.562-66, 851-52. At the State's urging, the defense questioned this group of jurors in an individual, sequestered setting.[9] R.851-99. One juror explained that he had said that if Luong were guilty, "his hands should be tied and he should be thrown off the bridge." R.864. Because this juror said he could not change his opinion, the trial court excused him, but commented that "we – some of us probably can appreciate what you are thinking." R.865. The court allowed the State to

[8]The court had excused one juror because her family members had been in a serious car accident. R.413.
[9]This was the only individual, sequestered voir dire afforded to the defense.

attempt to rehabilitate these other jurors. R.851-899.

In contrast, the court dismissed "en masse" 20 jurors who expressed their opposition to the death penalty in group panel without any individual voir dire or an opportunity for rehabilitation by the defense. R.737-45. The State was afforded individual, sequestered voir dire of many jurors, including those who had not talked about the death penalty during group voir dire, who gave "ambiguous" answers to group questions, and who made statements like the "punishment should fit the crime." *See, e.g.*, R.613, 762, 801, 844.

At the end of voir dire, the judge called potential juror Ellen Lambert for questioning because she had written on her questionnaire that she had heard other jurors talking about the case. R.900-901. Lambert told the judge that she had overheard other prospective jurors say that "the death penalty would be too quick" for Luong and that he should be "[hung] in Bienville Square" or "whipp[ed] with reeds." R.901. Defense counsel moved for a mistrial on the ground that the jury panel had been tainted by these statements. R.904. The judge denied the motion and refused to conduct any further investigation of which jurors made or heard these statements. R.905-06.

The 12 jurors who deliberated in Luong's case had all heard about the case before trial.[10] At least six of them knew

[10]SR.202, 367, 520, 751, 850, 927, 960, 1136, 1147, 1718, 1773, 1828.

that Luong had attempted to plead guilty before trial.[11] None was individually questioned about his or her knowledge of the case, whether he or she had heard the jurors state that the death penalty would be too quick, or whether he or she had prejudged Luong's guilt. *See* R.453-55, 586, 905-06.

At trial, State witness Wilson was permitted to give his own personal, highly prejudicial opinions regarding Luong's intended meaning in his police statements. R.1176. For example, Wilson testified that based on his expertise in Vietnamese culture he knew that when Luong had "said 'I'll' and [] stopped," Luong had meant that he wanted to be the person to tell his wife about the children and watch her reaction. R.1177.

At the penalty phase, although Wilson was not qualified as an expert, the court allowed him to testify, over defense objection, about the distance, time, and speed of the children's descents based on his own scientific experiment. R.1501, 1531-35. Wilson was also permitted to play an extremely prejudicial video of the experiment reenacting the crime, where he dropped four sandbags, representing the four children, off the bridge. R.1534. In penalty summation, the State relied heavily on the experiment and video in arguing that the children's deaths were heinous, atrocious, or cruel.

[11]SR.202,367, 960, 1136, 1147, 1718, 1828.

R.1626-27.

The defense theory at the guilt phase was that Luong, a previously loving father, lacked the specific intent to kill his children because he was under the influence of crack cocaine at the time. R.1432-39. At the penalty phase, the defense's mitigation evidence was limited to the testimony of a mental health expert, Dr. Paul Leung, and one family member, Luong's cousin, Christina Luong. R.1542-53, 1561-95, 1618-19. Unlike Luong's family members in Vietnam with whom he remained in contact and had recently visited, C.224, Christina had spoken to Lam Luong only once in some 20 years. R.1556-57. The defense had filed an *ex parte* motion seeking funds to travel to Vietnam to investigate Luong's childhood and to discover additional mitigation themes and witnesses, C. 218, but the judge denied the request to proceed *ex parte* and then later denied funds for the investigation. R.76, 163-4, 168.

Christina Luong and Dr. Leung described the extraordinary discrimination Luong was made to endure in Vietnam as the son of a black American solider and a Vietnamese mother. R.1544-47, 1566-70. He was unable to attend school because of the discrimination against children of American servicemen, also known as Amerasians, who were referred to as American "remnant[s]," or "dust of sin." R.1546, 1569. As an Amerasian,

he was also deprived of residence status in his community. R.1569. Luong faced even harsher discrimination because his father was black. R.1546, 1569. Children threw rocks at him and called him a black dog. R.1546-47. Even his stepfather beat him and refused to let him sit at the table. R.1549. He would sit in the corner, eating alone and crying. *Id.*

At 14, Luong fled to the United States. R.1570-71. He came with two cousins but no adult. *Id.*, R.1550. He lived initially in the basement of a church, and then with a family. *Id*. By 16 or 17, Luong was living on his own and working on a shrimp boat in Mississippi. He worked on shrimp boats for approximately 15 years, until Hurricane Katrina devastated the industry. R.1552, 1572.

Luong had become addicted to cocaine while working on the boats. R.1573. Typically, he would go on a two or three week work trip and then return to shore, where he would spend all of his money on drugs, alcohol, and illicit sex. *Id.* In 2003, Luong met his wife, Kieu Phan, and changed his lifestyle. R.1573. He came home after work and he and his wife took care of the four children. R.1573-74. But after Katrina, he had difficulty finding work. By the time of the offense Luong had lapsed back into heavy cocaine use and severe depression. R.1578-79.

The jurors - at least half of whom knew that Luong had pled guilty before trial and many of whom knew that he had wanted the death penalty - convicted him in less than an hour, R.1490, and returned a death verdict in an hour and ten minutes. R.1663. At sentencing, the trial judge adopted almost verbatim the State's proposed sentencing order, failing to consider a number of Luong's mitigating circumstances, including his profound remorse. *See* R.1695; C.887. In sentencing Luong to death, the judge ordered the Department of Corrections to show Luong pictures of his children every day while awaiting execution. R.1706.

**STATEMENT OF THE STANDARD OF REVIEW**

Questions of law and mixed questions of fact are reviewed *de novo*. *State v. C.M., C.D.M. & S.D.*, 746 So.2d 410, 414 (Ala. Crim. App. 1999). Fact findings are reviewed for clear error. *Odom v. Hull*, 658 So.2d 442 (Ala. 1995). In capital cases, this Court reviews proceedings below for "any plain error or defect" that "has or probably has adversely affected the substantial right of the appellant." ALA. R. APP. P. 45A.

**SUMMARY OF THE ARGUMENT**

The trial court failed to safeguard against the deluge of highly prejudicial pretrial publicity concerning Luong's case that consumed the Mobile community, the venire, and members of

Luong's jury. First, the court erred in denying defense counsel's request for a change of venue, and to develop and present evidence in support of their motion. Second, the court erred in refusing to grant the defense a continuance in the wake of Luong's withdrawn guilty plea and the ensuing spike in media coverage. Third, the court erred in its wholly inadequate questioning of the panel about their prior media exposure and its effect on their ability to be impartial. Reneging on an earlier promise, the court also refused to allow defense counsel to question jurors individually regarding the flood of prejudicial publicity. Fourth, the court erred in its refusal to investigate evidence that venire members had made highly prejudicial statements calling for Luong's execution in front of the venire panel. Fifth, the court's error in refusing to allow defense counsel to be heard *ex parte* on their request for mitigation funds for travel to Vietnam required defense counsel to reveal their mitigation theories to the State.

Lam Luong respectfully requests that this Court reverse his conviction and death sentence based on these errors and the additional errors addressed in this appeal.

## ARGUMENT

### 1. The trial court committed reversible error by denying Luong's motions for a change of venue and continuance.

Media coverage blanketed the Mobile community about the deaths of the four children, the search efforts, the questioning and prosecution of Luong, Luong's character, his withdrawn guilty plea, and the trial. The sensational and inflammatory media coverage included calls by community members for Luong's torture and execution as well as reporting of the highly prejudicial facts that Luong had previously pled guilty and sought to receive the death penalty. Nevertheless, the trial court denied Luong's motions for a change of venue and continuance.[12] These denials of a change of venue and continuance violated Luong's constitutional and statutory rights. ALA. R. CRIM. P. 10.1; ALA. CODE § 15-2-20; Ala. Const. §§ 6, 13, 15; U.S. Const. amends. VI, VIII, XIV.

Due process requires a change of venue or continuance[13] if an impartial jury cannot be selected from the district where the crime was committed. *See Wilson v. State*, 480 So.2d 78, 80 (Ala. Crim. App. 1985)("[O]ur forefathers fought and suffered for...the right to a trial by an impartial jury.... Thus, if an impartial jury selected from the district wherein the crime

[12]The defense filed a motion for a change of venue on April 10, 2008. *See* C. 181-85. The defense also moved orally before trial both for a change of venue and for a continuance. R.380-81. The court denied the motion for a change of venue, ruling first that "certainly there was widespread media coverage of the events surrounding this case," R.381-83, 913-15, and then concluding that the "publicity in this case was factual and objective," and that the "bulk of the publicity surrounding this case dealt with the details of the Defendant's offense, and the developments in the case." R.915. The judge ruled that there was "no evidence of actual prejudice" against Luong. *Id.* Defense counsel objected to the ruling. R.916.

[13]*Coleman v. Zant,* 708 F.2d 541, 544 (11th Cir. 1983)(same legal standard applies to motion for change of venue and continuance).

was committed cannot be impaneled, then to refuse the request for a change of venue is a denial of due process of law.")(internal quotation omitted); *Murphy v. Florida*, 421 U.S. 794, 799 (1975). The right to a change of venue is also protected by Alabama statutory law. *See* ALA. CODE § 15-2-20(a). A defendant is entitled to a change of venue or continuance if the community is saturated with prejudicial publicity so that a presumption of prejudice arises or if there is "actual prejudice" against the defendant. *See Ex parte Grayson*, 479 So.2d 76, 80 (Ala. 1985); *Coleman*, 708 F.2d at 544.

Although the decision whether to grant a change of venue is discretionary with the trial judge, Alabama law specifies that on appeal the "review of the trial court ruling is to be *de novo*, without any presumption in favor of that ruling." *Wilson*, 480 So.2d at 80 (*quoting Gilliland v. State*, 277 So.2d 901, 903 (Ala. 1973); ALA. CODE § 15-2-20(b)(same).[14]

**A. Luong satisfied the "presumed prejudice" standard.**

If prejudice is presumed, the trial court must grant a change of venue. *Hunt v. State*, 642 So.2d 999, 1042-43 (Ala. Crim. App. 1993). For prejudice to be presumed, the defendant must show: "(1) that the pretrial publicity was prejudicial

[14]Some appellate decisions state that the courts will review denial of venue for abuse of discretion, without noting the need to review the trial court's order under the *de novo* standard. *See e.g., Hunt v. State*, 642 So.2d 999, 1042-43 (Ala. Crim. App. 1993). Under clear Alabama law, such deference is improper. However, even under a "gross abuse of discretion" standard, Luong is entitled to relief. *Id*. at 1042.

and inflammatory and (2) that the prejudicial pretrial publicity saturated the community where the trial was held." *Jones v. State*, No. CR-05-0527, 2007 WL 2459244, at *5 (Ala. Crim. App. Aug. 31, 2007). Prejudice must be presumed if the defendant demonstrates that "a feeling of deep and bitter prejudice exist[ed] in [the] county." *Sale v. State,* 8 So.3d 330, 342-43 (Ala. Crim. App. 2008)(citation and quotation omitted), *cert. denied*, 129 S.Ct. 2062 (2009). Presumed prejudice cases are rare, and a defendant has a heavy burden. *Slagle v. State,* 606 So.2d 193, 195 (Ala. Crim. App. 1992).

**Community Saturation**. The defense introduced more than enough evidence to meet its burden, including 64 newspaper articles, over 800 television clips,[15] hundreds of internet posts,[16] and a community polling survey.[17] According to the

[15]WKRG-TV, a news station for the Mobile-Pensacola area, ran 442 clips about Luong and the children's deaths between January 9, 2008 and January 28, 2009. C.720-728. WALA, a Fox News affiliate, ran over 300 clips in the first year leading up to the trial. C.729-754. The NBC affiliate, UTV44, ran over 90 clips during that first year. C.755-772. During some of the peak days of coverage, the TV stations ran over 50 clips about the case throughout the day. *See, e.g.*, C.720-21 (WKRG ran 51 clips on January 10, 2008); C.733-39 (WALA ran 58 clips on January 9, 2008).

[16]One of the local TV stations, WKRG, administered a forum titled "Children Thrown from the Bridge" with 27 subtopics, most with thousands of views. C. 774-75. There were over 11,000 views of the "Just a note to [District Attorney] Tyson" forum, over 14,000 views of the "Four Angels Bridge," and over 16,000 views of "How Should this Baby Killer Be Delt [sic] With?" C.774

[17]The Defense introduced 11 exhibits in support of its motion for change of venue: (1) CV of Verne Kennedy (expert who conducted the media poll), C.383-86; (2) media poll results, C.387-397; (3) *Press-Register* coverage from 1/9/08 through 12/31/08, C.398-718; (4) WKRG TV coverage from 1/9/08 through 1/28/09, C.719-728; (5) WALA TV coverage from 1/9/08 through 1/29/09, C.729-54; (6) NBC 15/UTV 44 TV coverage from 1/9/08 through 1/28/09, C.755-772; (7) WKRG Community Forum posts, C.773-783; (8) Affidavit of Wes Finely from NBC-15, C. 794-811; (9) Affidavit of Dewey English from the *Press-Register*, C. 812-813; (10) Affidavit of Bob Cashen from the WALA-TV, C. 814-843; (11) Affidavit of Christian Stapleton from WKRG-TV, C.844. All of these exhibits were admitted. R.388-89, 912, 1293.

District Attorney, there were over 700 worldwide print articles about the case within the first week. C.593. A prospective juror described the relentless media coverage in these terms:

> Well, [there was] just pretty much information overload from the media. Anytime you turned on the TV set or read a paper, it was always in the paper. And really played up to the hilt, you know, and been saturated with the facts as we know them. R.896.

The Mobile community was consumed by the case. *See, e.g.*, C.593 (*Press-Register* reporting that community members and assigned reporters "just can't seem to let go of the story").[18] The *Press-Register* described the case as the "top story" in the entire state for 2008. C.712.

**Prejudicial, inflammatory, and sensational coverage.** The barrage of publicity was highly prejudicial, reporting calls for Luong's execution and torture, discussions about Luong's guilt, his prior convictions and character, and opinions by lay persons about his guilt and punishment. *See Irvin v. Dowd*, 366 U.S. 717, 725 (1961)(extensive media coverage of the defendant's case, including details about his background, prior convictions, the evidence against him, his confession, and the defendant's character was clearly prejudicial).

[18]The memorial coverage is further evidence of the degree to which the community was riveted. *See* C.654-56 ("Heartbreaking Final Farewell: Grief-stricken Bayou bids farewell to 4 young children" article described "an outpouring of support," including cards, letters, songs, drawings and a community quilt); C.570-72 ("Expressions of love and empathy for the family of Kieu Phan have become widespread in the Bayou community."); C.473 ("Memorial for the ages" stating the city's stone memorial of angels to the victims).

**Calls for Luong's Execution.** The media reported that residents repeatedly clamored for Luong's execution. *See, e.g.,* C.519 (newspaper editorial observing that Mobile residents "want Luong to die, and they are not particularly worried about his right to a fair trial"). Community members "flooded" local TV station forums and a newspaper's "Sound Off" call-in number to demand the death penalty. *Id.* They compared Luong to Timothy McVeigh and Ted Bundy, suggested Luong should be stuck on an ant hill for the pleasure of listening to his screams, and said that he "deserves to be dead immediately." C.658, 519.

One TV station administered an entire online forum to the question of the appropriate punishment for Luong, entitled "How Should this Baby Killer Be Delt [sic] With?" C.774. *See Irvin*, 366 U.S. at 725 ("curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter..."). This forum reported the views that Luong should be "executed in the Middle of Downtown Mobile in full view of the public," and "thrown off the bridge with a rock tied to his ankles," C.776, "hung from the bridge," *id.*, dropped from the bridge on bungee cords, C.777, drowned, C. 776-78, 780, "die asap," C.778, shot, C.778, 783, attacked by

other jail inmates and killed, C.777, beaten with a cat of 9 tails, C.780, put in agonizing pain, *id.*, slowly drowned to death by the tide, *id.*, and have his teeth yanked out before being put in a holding pin full of half-starved blue crabs so that they could eat him alive "piece by tiny piece." C.782. The police apparently took these death threats seriously enough that Luong's "customary courtroom gear" included a "brown, bullet-proof vest." C.710.

**Luong's guilty plea and desire for execution.** The highly prejudicial coverage reported that Luong had confessed, desired to plead guilty, wanted to receive the death penalty, and had actually sought to plead guilty. *See* C.479 ("Father Reconsiders Guilty Plea, Execution Wish");[19] C.398 ("Dad says he threw 4 tots off Dauphin Island Bridge").[20] The pretrial publicity of his withdrawn guilty plea was unquestionably prejudicial.[21]

[19]This article reported that "[e]xactly a week ago, Lam Luong expressed his hope that the state would execute him for methodically tossing his four children to their deaths off the Dauphin Island Bridge in January, a Mobile County Circuit judge announced Thursday."

[20]The juror questionnaires, administered on the first day of voir dire, referred to recent media coverage about Luong's guilty plea. In response to the question "what did you hear," multiple jurors referred to recent coverage about the withdrawn guilty plea. *See, e.g*, SR.268 (potential juror heard "last week heard about guilty plea"); SR.421 (heard defendant "plead guilty with wish to die last week"); SR.432 (heard "last week he said he was guilty"); SR.586 (heard "the case was going to trial this week & he had pled guilty and wanted the death penalty - via the radio"); SR.839 (heard "last weekend that accused said he was guilty & wanted death penalty"); SR.916 (watched "tv broadcast last week of admitted guilt of defendant"); SR.1257 ("last week I heard he pleaded guilty & wants to die").

[21]*See Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963)(prejudice presumed where public repeatedly exposed to spectacle of defendant's guilty plea); *United States v. Thompson*, 908 F.2d 648, 650 (10th Cir. 1990)(holding that a media report "containing information concerning a prior plea agreement signed by [the defendant] was highly prejudicial"); *United States v. Gray*, 788 F.2d

**Prejudged Guilt.** The relentless reporting reflected the "deep and bitter prejudice" that existed in the community, which had prejudged Luong's guilt. *Sale*, 8 So.3d at 343. Polling results even before the coverage of the withdrawn guilty plea showed that the vast majority of residents surveyed were both aware of the Lam Luong case and believed him to be guilty. C.55-56 (defense expert's poll finding 85% of respondents had some awareness of case; 71% of respondents believed Luong to be guilty).

**"Evil" and other character attacks.** The local paper, *Mobile Press-Register*, which reaches over 80% of adults in the Mobile area, C.812-13, ran over 22 banner headlines about Luong and the case, including an article entitled "Explaining EVIL." C.408-09. This article, subtitled, "News of the Alleged Murders of Four Children Affects Not Only the Family, but the Community As a Whole," quoted a local Mobile judge describing the crimes as "heinous" and both a grief therapist and Baptist pastor stating that "evil" exists in the world. *Id.* Another article, titled "Relative noticed a violent change," falsely reported that before the children's death Luong had begun to "hit the kids all the time." C.400-401, 486-89.[22]

1031, 1032-33 (4th Cir. 1986)(finding newspaper article disclosing prior acquittal and prior convictions "inflammatory" and "prejudicial"). *See also* Point 12.

[22]At trial, Luong's family members testified that they had never before witnessed any violence between Luong and his children and that they had no reason to suspect he would take any violent action. R.1004-1005, 1022, 1049-50. These false allegations about Luong's purported violence were picked up

The newspaper articles included prejudicial information about critical issues at trial, including so-called "expert" opinions about the role drugs played in the crime and about Luong's motives. In an article titled, "Local Experts Weigh in on Why Parents Kill," a psychologist speculated that Luong's actions could not be explained by his cocaine use, an issue that related directly to Luong's trial defense. C.418-19, 552-54. The coverage also included prejudicial quotes by the prosecution and law enforcement about Luong's purported motives, why his drug use alone did not explain his actions, and his purported fluency in English. C.483-85, 568, 578, 666.[23]

Cumulatively, this coverage was overwhelmingly prejudicial. *Irvin,* 366 U.S. at 725-727*; Wilson,* 480 So.2d at 81 (reversing for trial court's failure to grant venue change where bias pervaded community); *Rideau*, 373 U.S. at 726-27. Despite the compelling evidence of severe prejudice, the judge inexplicably concluded that "any" trial coverage was "factual," rather than prejudicial. R.381; R.915.[24] This

and run in multiple other stories, including a column and editorial. C.508-10, 517.

[23]C.483-85 (District Attorney Tyson saying that Luong would be charged with four counts of capital murder, and commenting "That's as bad as it gets under Alabama law."); C.568 (Tyson reported as stating "we want to be sure to establish with the court - *and everybody else* - that this man is capable of understanding and speaking the English Language well.")(emphasis added); C.578 (police asserting "Luong threw [his children] off the 80-foot-tall span as an act of revenge against their mother"); C.666 (Mobile County Sheriff Sam Cochran arguing that although Luong was a drug user, there are "thousands of crack addicts out there that haven't thrown their kids off a bridge").

[24]Although under Alabama law, this Court must review the denial of a change of

conclusion was a gross abuse of the court's discretion.

The court dismissed the obviously prejudicial effect of the media coverage regarding Luong's withdrawn guilty plea and his request for the death penalty on the ground that it was "invited error" because Luong had not objected to the reading of his letter in open court seeking the death penalty. R.381-82. This rationale cannot withstand scrutiny.[25] The defense objected on multiple occasions to discussing his desire to plead guilty in open court.[26] The trial court chose to overrule those objections, to refer to Luong's desire to seek the death penalty and plead guilty in open court, and to conduct the

---

venue without deference to the trial court's ruling, in this case, the trial court's factual rulings are not entitled to deference. The trial court ruled "*whatever news coverage there was* with regards to that was factual and accurate," apparently based on its own observations of the coverage. R.381 (emphasis added). Defense counsel had objected on the ground that there had been prejudicial press coverage of the guilty plea but had not introduced any transcripts or evidence of the recent coverage. The trial court's reliance on facts not in the record was improper, and is not entitled to deference. *See e.g., Sullivan v. State*, 944 So.2d 164, 166 (Ala. Crim. App. 2006)(error for the trial court to base a finding of fact on evidence outside of the record). Similarly, when ruling on defendant's motion for change of venue, the trial court stated, "After reviewing the Defense exhibits relating to the issue of pretrial publicity, and the testimony adduced at the hearing on this question, including polling results, I conclude that the publicity in this case was factual and objective." R.915. In fact, there was no testimony adduced, including testimony about the polling results, because the trial court denied defense counsel the opportunity to call their expert. This finding is also not entitled to deference. *Id.*

[25]In capital cases, this Court must review under the plain error doctrine even those claims that are appropriately deemed "invited error." *Snyder v. State*, 893 So.2d 488, 518-19 (Ala. Crim. App. 2003).

[26]*See* R.141 (defense counsel objecting at a bench conference, out of fear that the jury pool would be tainted, to any discussion in open court about a confidential mental health report that contained language about Luong wanting to plead guilty and seeking the death penalty); R.312-18 (defense counsel noted at a bench conference that Luong had vacillated about whether he wanted to plead guilty and arguing against proceeding in open court with the media present because the jury pool would be tainted if Luong withdrew his plea). Furthermore, there is absolutely no evidence that Luong sought media coverage of his guilty plea or letter to the judge, nor that he sought to have the plea or letter disclosed in open court. Therefore, he did not "invite" the error.

guilty plea proceedings in front of the media.[27]

Because Luong demonstrated both that the media coverage was highly prejudicial and that it saturated Mobile County, he was entitled to a presumption of prejudice. Accordingly, the trial court abused his discretion by denying the motion for a change of venue and continuance, and reversal is required.[28]

**Denial of Defense Expert Testimony.** In the event that this Court concludes that Luong did not satisfy the standard for presumption of prejudice, then reversal is nonetheless required because Luong was denied the opportunity to meet this burden when the trial court prevented his highly qualified expert, Dr. Verne Kennedy, from testifying regarding prejudicial pretrial publicity and its degree of community saturation.[29]

Pretrial, the court authorized an expenditure of $6,000 to $8,000 for Kennedy to conduct a community survey poll in support of the defense's motion.[30] The defense introduced the

[27]See R.148 (trial court stating on the record, in front of the media, that Luong had told the psychologist that "he wanted the death penalty" and that "he wanted to change his position in this case and change his plea"); R.317 (refusing to conduct the guilty plea in a less public venue and saying "I'm not going to go into hiding.").

[28]When a "presumption of prejudice in a community" arises, "the jurors' claims that they can be impartial should not be believed." *Mu'Min v. Virginia*, 500 U.S. 415, 429-30 (1991). Thus, any such claims offer no basis for affirming the trial court's denial of Luong's motion to change venue.

[29]*Washington v. Texas*, 388 U.S. 14, 19 (1967)("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense...."); *Green v. Georgia*, 442 U.S. 95, 97 (1979)(exclusion of relevant testimony at capital sentencing phase violated due process).

[30]The court took care to note his respect for Dr. Kennedy and his faith that his polling methods would be accurate ones. R2. 5, 47, 55-59. Kennedy had been admitted as an expert in other state and federal cases. C. 192-93. His

results of Kennedy's survey in support of the motion for a change of venue and sought to call Kennedy. R.592.[31] The defense proffered that Kennedy's testimony would explain the survey results and his analysis, and give his opinion that the results showed that the publicity was prejudicial and had saturated the community. R.593. The trial judge excluded Kennedy on the ground that his testimony would not be of assistance to the court. R.595-99.

The court's ruling that Kennedy's testimony would be irrelevant was error as a matter of law because his testimony was probative to the questions of community saturation and prejudice under the "presumed prejudice standard". *See Slagle*, 606 So.2d 193, 194 (Ala. Crim. App. 1992)(citing standard); *Jones*, 2007 WL 2459244, at *5 (presumed prejudice is judged under "totality of surrounding facts"). The results of community surveys have repeatedly been recognized as relevant evidence to the question whether a community is so saturated by pretrial publicity as to require a change of venue.[32]

qualifications were never challenged by the State.

[31]The polling results, based on a poll of 350 Mobile County residents, showed that as of January 2009, almost half of the residents polled had "a great deal" of knowledge about the case. C. 51. 75% of the individuals responded that their friends believed Luong was guilty and 71% responded that they themselves believed him guilty. C. 52. Kennedy was not given an opportunity to explain the meaning of these results. The judge further denied defense the opportunity to have Kennedy attest to the validity and methods of the survey. R.593.

[32]*See Ex parte Fowler*, 574 So.2d 745, 748 (Ala. 1990)(discussing survey results as evidence of the reach of the pretrial publicity); *Hammonds v. State*, 777 So.2d 750, 769 (Ala. Crim. App. 1999)("It is clear from the answers of those people in Hammonds's survey that many people within Houston County had heard about the murder, and that most had gained their knowledge

The trial court erred by denying the defendant an opportunity to present material and favorable, highly relevant evidence from a highly qualified expert that provided critical support for his claim that he was prejudiced by the pretrial publicity. *Cf. Ex parte Archer*, 643 So.2d 601, 603 (Ala. 1992)(remanding for new hearing because trial court denied defendant an opportunity to present evidence relevant to his claim of prejudice by trial delay). His ruling violated Luong's statutory and constitutional rights to present evidence in support of his motion for change of venue. *Id.*, *Washington* 388 U.S. at 19; *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *Green*, 442 U.S. at 97.

**B. Luong was "actually prejudiced" by the pretrial publicity.**

Luong also demonstrated that he was actually prejudiced by the publicity. In reviewing a claim of actual prejudice, courts review the voir dire record and analyze the expressions of the seated jurors. *Hunt*, 642 So.2d at 1043. A defendant is entitled to a change of venue if a juror has formed an impression or opinion, the "nature and strength" of which raise a presumption of partiality. *Irvin*, 366 U.S. at 722-23.[33]

through the local media coverage.").

[33]This Court has previously observed that a defendant must demonstrate that "at least one of the jurors who heard the case entertained an opinion that the defendant was guilty before hearing the evidence" to demonstrate actual prejudice. *Sale*, 8 So.3d at 342. Defense counsel was denied the opportunity to meet this standard. This definition of "actual bias" is overly narrow and would exclude, for example, a claim of demonstrated bias because jurors had prejudged the penalty.

All 12 of the jurors who deliberated in Luong's case knew about the case before trial,[34] all 12 listened to the radio, and all 12 either read the *Press-Register* regularly or watched the local news.[35] Six jurors knew that Luong had sought to plead guilty, and one had heard that Luong had confessed, unquestionably prejudicial facts. *See supra*, n.34. *See also Thompson*, 908 F.2d at 650; *Gray*, 788 F.2d at 1032-33; *Rideau*, 373 U.S. at 726-27.[36]

[34]The jurors' responses to question 51, what they had heard about the case, are as follows: SR.202 (juror Jacobs: "That the defendant pled guilty"); SR.367 (juror Collins: "That he threw his kids off the DI bridge and that he confessed to it"); SR.520 (juror A. Franks: "Its on the news every night"); SR.751 (juror Hall, "I heard that the young man was arrested for the murder of his children."); SR.850 (juror McHenry: "All local media coverage (paper & TV)"); SR.927 (juror R. Franks: "I only read the sport section in the paper but I heard people talking about it before."); SR.960 (juror Hardy: "man pleaded guilty"); SR.1136 (juror Brooks: "the person pleaded guilty"); SR.1147 (juror Linley: "accused pledge [sic] guilty"); SR.1773 (juror Camp: "I watch very little news or read it in the paper. I have heard that someone supposidly [sic] threw children off a bridge."); SR.1718 (juror Burgett: "that a confession letter (of guilt) was submitted to the court"); SR.1828 (juror Moore: "When this first happened, I watched the news as they were finding the children. I don't recall reading the paper about that time. My mother told me that defendant pled guilty last week but I have not watched the news or read the paper about that.").

[35]*See* SR.201 (*Press-Register*); SR.366 (WKRG, CBS); SR.520-21 (*Press-Register*, NBC, FOX); SR.750-52 (*Press-Register*, FOX); SR.849-51 (*Press-Register*, CBS); SR.926-28 (*Press- Register*, FOX); SR.959-61 (*Press-Register*, FOX, CBS, ABC); SR.1135-37 (*Press-Register*, NBC); SR.1146-48 (*Press-Register*, FOX, CBS); SR.1717-19 (*Press-Register*, FOX); SR.1772-74 (Press-Register, CBS); SR.1827-29 (*Press-Register*, FOX).

[36]In *Patton v. Yount*, 467 U.S. 1025 (1984), the Supreme Court found that exposure by the seated jurors to press articles about the case, including potential exposure to an inadmissible confession, was not actual prejudice requiring a reversal because of "totality of the circumstances," including the four year lapse of time between the prejudicial media exposure and the trial, a lapse that had "a profound effect" on reducing the jury's potential bias. 467 U.S. at 1032-33. The extensive, 10-day sequestered voir dire conducted in that case demonstrated that the jurors' "passions had not been inflamed nor their thoughts biased by the publicity." 467 U.S. at 1034. There is no such evidence in this case. The publicity - including the publicity about Luong's withdrawn guilty plea - continued until the eve of trial. *See, e.g*, SR.268 (potential juror wrote on questionnaire on first day of jury selection that "last week heard about guilty plea"); SR.421 (heard defendant "plead [sic] guilty with wish to die last week"); SR.432 (heard "last week he said he was guilty"); SR.586 (heard "[t]he case was going to trial this week & he had pled guilty and wanted the death penalty – via the radio"); SR.839 (heard "last weekend that accused said he was guilty [and] wanted death penalty"); SR.916 (reported "tv broadcast last week of admitted guilt of defendant"); SR.1257

The entire jury panel heard 15 veniremembers admit that they had previously told someone that Luong deserved the death penalty. R.562-566. The panel also may have been tainted by the highly prejudicial comments of some potential jurors that Luong should be hung in Bienville Square or whipped with reeds. R.901; *see also* Point 3. The trial court abused its discretion and committed reversible error by failing to grant the motion for a change of venue and failing to grant a continuance. *Irvin*, 366 U.S. at 722-23.

In the event that this Court somehow finds the evidence of actual prejudice insufficient, it must conclude that this is due to trial court error. The court erroneously denied the defense counsel the opportunity to individually question jurors about their media exposure or the strength of any prior opinions about Luong's guilt or innocence (*see* R.586-92; Point 2(C), *infra*),[37] thus preventing the defense from obtaining additional important information about actual prejudice to

("last week I heard he pleaded guilty"). Furthermore, voir dire, which began just over a year after the crime occurred, lasted only two days, only a few minutes of which was devoted to the topic of media exposure. R.453-455.

[37]Nonetheless, it is clear from the handful of jurors for whom the defense was permitted to individually voir dire that the venire members had strong feelings of Luong's guilt, rising to the level of actual prejudice. *See, e.g.*, voir dire of Lloyd Barlett, R.860-63 (admitting during the individual voir dire that he couldn't be fair and that his mind was made up about the case); *see also*, *supra*, n.34 (collecting questionnaire statements by jurors regarding knowledge of the case, on which the defense was denied individual follow-up questioning).

support its motion.[38] *See Jordan v. Lippman*, 763 F.2d 1265, 1275 (11th Cir. 1985)("[I]t is clear that the Court [in *Irvin*] presupposed the right to a searching and extensive voir dire where the potential of prejudice exists as a result of pre-trial publicity.").

**2. The trial court committed reversible error by failing to ensure adequate voir dire regarding the flood of prejudicial pretrial publicity.**

The trial judge failed to ensure adequate voir dire regarding prejudicial publicity in violation of Loung's rights to due process, effective assistance of counsel, a fair trial, and an impartial jury. U.S. Const. amends. VI, VIII, XIV; Ala. Const. § 6, 13, 15. Due process requires voir dire adequate to ensure the defendant's right to a fair and impartial jury is not imperiled by prejudicial media. *Mu'Min v. Virginia*, 500 U.S. 415, 424-25 (1991).

**A. Voir dire regarding pretrial publicity was limited to a few perfunctory, group questions, rather than the promised thorough, individual questioning.**

From the first hearing in the case, the trial judge promised that he would provide thorough, individual voir dire to examine jurors' pre-formed opinions from the pretrial publicity. R.27, 46, 47. The actual voir dire fell far short

[38]"[I]n order for a defendant to show prejudice, the proper manner for ascertaining whether adverse publicity may have biased the prospective jurors is through the voir dire examination." *Oryang v. State*, 642 So.2d 979, 983 (Ala. Crim. App. 1993)(quoting *Ex parte Grayson*, 479 So.2d at 80 (internal citation and quotation omitted)).

of this promise.

The court administered questionnaires to 156 potential jurors. C.14. Only 15 indicated that they had not heard or read anything about the case.[39] Many indicated that they had heard about Luong's guilty plea.[40] Based on these responses and the flood of prejudicial pretrial publicity, defense counsel renewed its motion for a change of venue and sought a continuance. R.381. The judge denied the motions, R.383, but promised to permit individual, sequestered voir dire of anyone who had heard anything about the case. R.390-91. Later that day, the judge asked the entire 155-person[41] panel whether anyone had heard or seen anything about the case. Based on the response, the judge stated, "Okay. I think a better question would be - please put your hands down. (laughter). Who among you have not heard, read or seen anything about this case?" Only two jurors responded that they had **not** heard, read or seen anything about the case. R.453-54. The judge then asked a series of cursory, confusing and conflicting questions to the 153 jurors who had heard about the case, and took their en mass silence as sufficient evidence that they could be fair and impartial.

[39]Jurors 9, 35, 50, 62, 63, 69, 72, 83, 84, 99, 111, 127, 136, 140, and 155 responded that they had not heard or read anything about the case.
[40]*See e.g., supra,* n.34 (citing to questionnaire responses by 6 of the 12 jurors indicating that they had heard about the guilty plea before court); *see also* R.380 (defense counsel observing that questionnaires show that the bulk of jurors knew about the guilty plea).
[41]The court had excused juror 59 from service.

Contrary to his promise, the judge did not call the 153 jurors who indicated they had heard something about the case for individual, sequestered voir dire, and he denied the defense the opportunity to individually question the jurors, whether in private or not. *Id.*; R.585; 588-92. The defense objected to the court's cursory panel questioning and sought follow-up to "question the jurors individually about their exposure to publicity," and to investigate "the existence of actual prejudice, the degree to which they had been exposed to prejudicial publicity, and how that exposure had affected them and their attitudes toward the trial." R.586-88. The trial court overruled the defense's objection and ruled that his group voir dire was sufficient. R.588-89, 592.

### B. The trial court failed to ensure adequate voir dire regarding the jurors' exposure to pretrial publicity and their actual prejudice.

The trial court's failure to ensure meaningful voir dire regarding exposure to prejudicial media violated Luong's right to an impartial jury.[42] In *Mu'Min v. Virginia*, 500 U.S. 415 (1991), the Supreme Court held that due process requires that trial courts conduct sufficient voir dire regarding pretrial publicity to select an impartial jury. 500 U.S. at 431. The

[42]A criminal defendant's constitutional right to a fair trial requires that jurors decide the case based on the evidence presented in court rather than external publicity. *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966). The trial judge has a responsibility to ensure that the defendant's right to a fair trial is not jeopardized by reliance on pretrial publicity rather than the evidence from trial. *Chandler v. Florida*, 449 U.S. 560, 574 (1981).

Court upheld the voir dire regarding publicity before it because it was "by no means perfunctory," stressing that the court had followed up mass venire questioning with further questions to panels of four jurors and had asked **individually** each juror exposed to pretrial publicity whether he had formed an opinion. 500 U.S. at 431. After *Mu'Min,* the Alabama Supreme Court affirmed that the "crucial requirement [for voir dire of publicity] is that the trial court get enough information to make a **meaningful** determination of juror impartiality." *Brown v. State,* 632 So.2d 14, 16-17 (Ala. 1992).

The voir dire permitted by the trial court failed to gather anything close to sufficient information for a "meaningful determination of impartiality" given the widespread and prejudicial nature of the media exposure in this case[43] and fell substantially short of the voir dire approved in *Mu'Min*. *See Brown*, 632 So.2d at 16-17; *Mu'Min*, 500 U.S. at 431; *Parker v. State*, 587 So.2d 1072, 1078-79 (Ala. Crim. App. 1991)(adequacy of voir dire must be reviewed under circumstances of the case, including the amount of pretrial publicity and the extensiveness of the voir dire permitted).[44]

[43]*See* Point 1, *supra*.

[44]*See also Jordan v. Lippman,* 763 F.2d 1265, 1275 (11th Cir. 1985) (collecting cases that "recognize the principle that relief is required where there is a significant possibility of prejudice plus inadequate voir dire to unearth such potential prejudice in the jury pool"); *U.S. v. Thompson*, 908 F.2d 648, 652 (10th Cir. 1990)(reversing for trial court's failure to conduct adequate voir dire to determine if jurors read article discussing defendant's withdrawn guilty plea).

It was "unreasonable," in violation of ALA. R. CRIM. P. 18.4(c), and violated Luong's right to an impartial jury, fair trial, and due process.

The court's questions had five fatal deficiencies: (1) the language was confusing and wholly inadequate to determine whether the jurors had prejudged the case and whether they could be impartial; (2) the judge relied on the jurors' own assessments of impartiality; (3) the judge failed to ask whether the jurors had formed an opinion about the case or prejudged Luong's guilt; (4) the judge failed to question the jurors regarding the content of the media to which they had been exposed; and (5) the setting for questioning, a large 155-person panel, was inadequate to learn the jurors' feelings about the prejudicial media.

**1. Inadequate and conflicting questioning.** The court posed four questions to the jurors. The court first asked, "Would any of you, based on what you have read, seen, or heard, or remember, could you set those things aside and serve as a fair and impartial juror?" R.454. No juror responded. The failure of any juror to respond suggests either that no juror believed him or herself capable of impartiality or that the jurors were uncomfortable responding in the group setting. Yet the court apparently took this silence to mean that the

jurors agreed they could be fair and impartial.

The second and third questions, which it indicated were alternatives to the first, even though they were directly contrary to the first, asked if it would be impossible for any juror to set aside his or her recollection of the case and be fair and impartial. R.454. In light of the first question, these questions were confusing. *Id*. Furthermore, the use of the phrase "would be impossible" impermissibly suggested that a juror must be certain of his or her own disqualification before responding. Only one juror, Turberville, responded to these questions. *Id*. Yet again, the court apparently took the silence of the remaining jurors to mean that all of the jurors agreed that they could be fair and impartial.

The last question by the trial judge, was a long, compound question:

> All right. The rest of you are telling me that even though you may have heard, read, or seen matters about this case, and you may have some preconceived impression or opinion...that you could sit as a juror in this case, base your verdict only on the evidence only [from the trial]...and your could render a fair and impartial verdict...? You can do that.

R.455. Again there was no response to this question.

At this point, the court had asked multiple questions about whether the jurors believed "they could be fair and impartial." R.454-55. As the judge knew from the testimony of

defense polling expert Kennedy, the questions posed to jurors about whether they could "put aside any opinion in the case and base the verdict on the evidence presented at trial" were likely to generate only the "politically correct" responses based on what jurors believed the judge wanted to hear. R2.44-45.[45] *See also supra* Point 1A; *Morgan v. Illinois,* 504 U.S. 719, 734-36 (1992)("As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed").

In short, this series of questions was misleading, conflicting, and confusing, and the silence by all but one juror cannot be taken as anything close to convincing evidence that the jurors indicated their impartiality.

The questioning was also inadequate to uncover whether the jurors could set aside preconceived opinions or outside evidence when rendering their vote at the penalty stage of the

[45]At a hearing about the polling questions, Kennedy explained the importance of using third party questioning first before asking people about their own opinions because individuals may be reluctant to acknowledge their own biases and often try to provide the answers they believe the court is seeking. The judge indicated he understood why it would be necessary to first "soften them up" before asking the hard questions about their own personal biases. C.24-25 ("Well, I see the relevance now in that you've explained to me that people might not admit certain things."). In response to questioning by the State, Kennedy testified that "there are some questions of which people will not be totally honest," and that the question "would you be able to put aside any opinion in the case and base the verdict on the evidence presented at trial and law as given by the judge" is likely to get only "the politically correct response." R2.44-45.

trial. The questioning referred to the jurors' potential "verdict," R.455-56, and did not ask whether the jurors could set aside preconceived penalty opinions or outside evidence at the penalty stage.[46]

**2. Failure to ask if jurors had preformed opinions.** The court further erred by failing to ask whether the jurors had formed an opinion about the case or prejudged Luong's guilt.[47]

**3. Reliance on jurors' own assessments.** The trial judge also should not have relied on the jurors' own assessments of their ability to be impartial. *Langham v. State*, 494 So.2d 910, 913 (Ala. Crim. App. 1986)("the juror's assurances that he can lay aside his impression or opinion and render a verdict based on the evidence presented in court cannot be dispositive of the accused's rights...").[48] This is

[46]Although the defense was not granted individual voir dire regarding pretrial publicity, it was permitted to ask in group voir dire how many veniremembers had made prior statements to others that they believed Luong should be sentenced to death. R.562. Twelve veniremembers, or almost 10% of the venire, affirmed that they had. R.562-66. The defense was then permitted limited individual, sequestered voir dire to question these 12 veniremembers about these statements. R.563. These individual voir dire responses reveal the strength of the prejudicial opinions held by some of the jurors. For example, potential juror Bartlett said that he had heard about the case for a whole year from the news and that after hearing about it he told his coworker that Luong should receive the death penalty. R.860-61. Bartlett in individual voir dire admitted that after thinking about it, he couldn't be fair and that his mind was made up about the case. R.860-63. Another juror said he formed his opinion a "long time ago" that death was the appropriate punishment for this case. R.895-97.

[47]*Cf. Mu'Min*, 500 U.S. at 420 (jurors who had been exposed to pretrial publicity were asked "whether [t]he[y] had formed an opinion" and none of the selected jurors had formed an opinion); *Wilkerson v. State*, 686 So.2d 1266, 1269 (Ala. Crim. App. 1996)(no error where defense counsel afforded opportunity to individually question juror about fixed opinion of guilt as a result of pretrial publicity); *but see Ex parte Brown*, 632 So.2d 14, 15-16 (Ala. 1992)(upholding voir dire where trial judge asked if jurors had formed an opinion that would interfere with their ability to listen to the evidence and render a fair and impartial verdict).

[48] *See also United States v. Davis*, 583 F.2d 190, 197 (5th Cir. 1978)("[W]hen

particularly so when the jurors' assurances are obtained in group voir dire. *Irvin*, 366 U.S. at 728 ("No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father."). *See also infra*, subpoint 6.

**4. Failure to ask about content of media exposure.** The court also erred by not questioning the jurors about the content of the media to which they had been exposed. Through the questionnaires, it is clear that the jurors who actually deliberated in Luong's case had seen, for example, "the news every night," SR.520, or "all local media coverage (paper & TV)." SR.850. The court did not ask, however, and therefore did not learn about, the content of the coverage. This information would have been critical to assessing whether the jurors had been impermissibly tainted by pretrial publicity. *See Mu'Min*, 500 U.S. at 424 (acknowledging the "commonsense appeal" to the argument that "'content questions' would materially assist in obtaining a jury less likely to be

---

a juror is exposed to potentially prejudicial pretrial publicity, it is necessary to determine whether the juror can lay aside any impression or opinion due to the exposure. The juror is poorly placed to make a determination as to his own impartiality."); *People v. Tyburski*, 518 N.W.2d 441, 448 (Mich. 1994)("It is imperative, in securing the rights of the parties to an impartial jury, for the court to allow the elicitation of enough information so that the court itself can make an **independent** determination of a juror's ability to be impartial.")(emphasis added); *Jordan,* 763 F.2d at 1274 ("[W]here pretrial publicity is a factor, a juror's conclusory statement of impartiality is insufficient.").

tainted by pretrial publicity"). Under both the Alabama and federal constitutions, the trial court should have inquired about the content of the media exposure once he knew the breadth of exposure and the possibility for prejudice.

**5. Failure to require affirmation in response to questions.** The trial court's questions were also inadequate because they did not require the jurors to affirmatively agree that they could judge the case based on the evidence at trial. Their silence was taken as sufficient evidence of their impartiality. In the context of the high stakes of the case, the confusing language of the questions, and the large group setting, this collective silence was inadequate evidence of their impartiality.

**6. Inadequate setting.** Any confidence in the responses of the venire to the confusing and limited questioning must be further reduced by the setting of the questioning and size of the panel. *Irvin,* 366 U.S. at 728.[49] There was no opportunity

[49]The court was on notice of the likelihood that all jurors would not respond to all applicable questions in such a large panel. Two court personnel members, a probation officer and a bailiff, had declined to raise their hands when asked in the large group if they knew the prosecutor or defense counsel. *See* R.597-98 (trial judge observing "those guys have not opened their mouth to anything that's been asked in this case. I am a little bit stunned by it because I know they know everybody here. And they didn't answer that question."). The limits of the large panel format were further evidenced during the limited follow-up voir dire afforded to defense counsel. Defense counsel was permitted to question individually in a sequestered setting the jurors who had indicated that they had previously said Luong should receive the death penalty. R.851-900. One of these questioned jurors, Bartlett, admitted for the first time that he could not be fair and impartial about the case. R.860-63. The fact that the judge knew jurors were not responding to the mass questioning should have prompted him to engage in smaller group or individual questioning regarding the critical issue of pretrial prejudice. *Cf. Mu'Min,* 500 U.S. at 431 ("It is quite possible that if voir dire interrogation

in the 155-person panel to assess the credibility of jurors.[50]

The limited and confusing questioning of the prospective jurors who had been exposed to heavy pretrial publicity, conducted only in an extremely large panel, did not provide the court with a sufficient basis to evaluate the jurors' ability to be fair and impartial. Accordingly, the court's voir dire in this case cannot be squared with the constitutional and statutory requirements of a fair trial and impartial jury owed to Luong. A new trial is required.

### C. The trial court erred by denying the individual voir dire follow-up requested by defense counsel.

Whether to grant individual voir dire is a matter reserved for the discretion of the trial judge. *See, e.g., Whisenhant v. State*, 555 So.2d 219, 224 (Ala. Crim. App. 1988); ALA. R. CRIM. P. 18.4(c). Here, the trial judge abused his discretion by denying individual voir dire because it prevented defense counsel from uncovering evidence of bias, fully developing the record of actual prejudice for the change of venue motion, and exercising their peremptory challenges.[51]

had revealed one or more jurors who had formed an opinion about the case, the trial court might have decided to question succeeding jurors more extensively.").

[50]*Cf. Mu'Min*, 500 U.S. at 420 (approving of follow-up questioning in groups of four); *Hall v. State*, 820 So.2d 113, 123-124 (Ala. Crim. App. 1999) (describing with approval the "thorough and sifting" voir dire "conducted in panels of six," whereby the majority of the jurors who had seen an article about the case in the local newspaper were excluded for cause); *but see Ex parte Brown*, 632 So.2d at 17 (concluding that "[t]he method of determining impartiality is not critical").

[51]The judge's denial of individual voir dire also constituted an abuse of discretion because he arbitrarily changed his ruling without any change in the facts that would warrant it. As noted above, the judge himself acknowledged

R.586-592.

The trial court's denial of individual voir dire left the defense without an opportunity to inquire about the "bare assurances" of the veniremembers from the group questioning. *Langham*, 494 So.2d at 913 ("...the juror's assurances that he can lay aside his impression or opinion and render a verdict based on the evidence presented in court cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality"). As described above, the court's confusing and generic mass questioning was inadequate to uncover the biases of individual jurors. *See also Jordan,* 763 F.2d at 1275*; State v. Howell*, 868 S.W.2d 238, 248 (Tenn. 1993). Defense counsel was thus stripped of a necessary tool to uncover bias for cause challenges. *Id.;* ALA. R. CRIM. P. 18.4(d). Furthermore, the court's denial of the defense's motion to individually voir dire those jurors who had been exposed to pretrial publicity denied counsel the opportunity to make the required

repeatedly the need for individual voir dire given the media coverage in this case, including at the beginning of voir dire. R.47, 384-85, 391. The exposure to media grew by the day. Although 15 jurors had responded on their questionnaires on Monday, March 9, 2009 that they had not heard anything about the case, *supra*, n. 36, two days later, on March 11th, only two jurors indicated they had not heard, read or seen anything about the case. R.453-54. The court's arbitrary change in his ruling on individual voir dire, without any factual change that would merit it, was an abuse of discretion. *See, e.g., Ex parte Anonymous,* 803 So.2d 542, 557 (Ala. 2001)(abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable")(internal citations and quotations omitted).

showing of prejudice in support of their motion to change venue. *See* Point 1.B., *supra*.

Luong was also denied an opportunity to learn important information for exercising his peremptory challenges. *See* ALA. R. CRIM. P. 18.4(d); *Mu'Min,* 500 U.S. at 431 ("Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."). The individual voir dire requested by the defense would have afforded it a mechanism to establish actual prejudice in support of the venue motion, gain information relevant to their exercise of peremptory challenges, and move for cause dismissal of qualified jurors. And if permitted in a sequestered setting, this mechanism would not have posed any risk that the remaining jurors would be tainted.[52]

The trial judge's failure to grant the individual voir dire, which he himself had acknowledged would be necessary, was an abuse of discretion and is reversible error.

### 3. The trial court erred by failing to investigate juror misconduct.

The trial court committed reversible error by denying the

[52]Individual sequestered voir dire is necessary to remove the threat of taint of other jurors. *See e.g., Tyburski*, 518 N.W.2d at 450 (describing the problem with large group voir dire about media exposure: "[i]f the court had asked sufficiently probing questions into the jurors' media exposure and their opinions and attitudes toward it, then the entire panel may have been tainted by the answer").

defense's motion for a mistrial without investigating evidence that three prospective jurors had made statements to other venire members that the death penalty would be "too quick" for Luong and that he should instead be hung in Bienville Square or whipped with reeds. R.901-906.

Prospective juror Lambert noted on her questionnaire: "Heard fellow juriors [sic] whispering about what they thought his punishment should be prior to knowledge that we may serve as his jurior [sic]." SR.388. When questioned individually, Lambert told the court that when the prospective jurors went upstairs before filling out the questionnaires, "there were just a few people on the panel standing next to me, talking about, you know, what they would do." R.901. She explained that these prospective jurors "were talking about that the death penalty would be too quick, and that they were thinking of other items, you know, like hanging in Bienville Square, whipping with reeds, that kind of thing." *Id.*

Lambert stated that the jurors whom she heard making the statements were in the panel from which Luong's jury was selected. R.903. When asked by defense counsel if the jurors whom she heard were "part of the people who have been in here", Lambert answered, "Yes, sir. And I can't give you names because there was, what, a hundred and fifty-something of us."

R.903. She stated that she believed there were "about three" prospective jurors who made the comments. R.903.

Defense counsel then moved for a mistrial because the jury pool was tainted. R.904. The trial court denied the motion, and conducted no inquiry into who had made the statements or whether anyone else had heard them. R.905. The trial judge speculated that the jurors prejudging the case may not have ended up in the jury pool, saying he had "no idea" whether they were on the panel. R.905-06.

Luong needed only to show that the misconduct"might have influenced" his jurors to act unlawfully. *See Ex parte Lasley*, 505 So.2d 1263, 1264 (Ala. 1987). "This test casts a 'light burden' on the defendant." *Id.* at 1264 (*quoting Troha*, 462 So.2d at 954). Here, the evidence that three prospective jurors prejudged the case by discussing unlawful punishments for Luong during jury selection, and that at least one other juror heard them, easily meets the law's "light burden."

To ensure juror impartiality[53] the trial court has a duty to conduct a "reasonable investigation of irregularities claimed to have been committed" by jurors. *Phillips v. State*, 462 So.2d 981, 990 (Ala. Crim. App. 1984).[54] This

[53]It is fundamental to a fair trial that jurors consider only the evidence presented at trial. *Ex parte Troha*, 462 So.2d 953, 954 (Ala. 1984); *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965); *see also* ALA. CODE § 12-16-150(7). The right to jury impartiality extends to capital sentencing. *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992).

[54]The court's duty to conduct an investigation existed even when defense counsel asked for a mistrial but did not request any investigation. *See*

investigation "should include a 'painstaking and careful' inquiry into the alleged juror misconduct." *Price v. State*, 725 So.2d 1003, 1015 (Ala. Crim. App. 1997)(*quoting Lauderdale v. State*, 112 So. 92, 93 (Ala. Ct. App. 1927)).

Where the trial court does not investigate such misconduct, the conviction must be overturned. *See Holland v. State*, 588 So.2d 543, 545-46 (Ala. Crim. App. 1991)(trial judge abused discretion by failing to inquire into whether a prospective juror had called the defendant guilty and whether anyone else heard the remark and was prejudiced by it).[55] The trial court generally carries out a sufficient investigation when it questions the members of the venire[56] to determine any prejudicial effect of the misconduct. *See Burgess v. State*, 827 So.2d 134, 155-58 (Ala. Crim. App. 1998); *Sistrunk v. State*, 596 So.2d 644, 649 (Ala. Crim. App. 1992).[57] Here, there is evidence that multiple prospective jurors in Luong's jury pool had already determined that he was guilty and should

*Phillips*, 462 So.2d at 990.

[55]Other cases have been remanded for a hearing after the court failed to investigate claims that jurors prejudged the case. *See, e.g., Hayes v. State*, 647 So.2d 11, 14 (Ala. Crim. App. 1994). Here, Luong's conviction should be overturned because the court would not be able to determine through a hearing who the prejudging jurors were, what other jurors heard their statements or the prejudicial effect of those statements. R.901-04; *Holland*, 588 So.2d at 549-50 (conviction overturned after failure to investigate).

[56]The court abuses its discretion even when the misconduct is committed by prospective jurors rather than empaneled jurors. *Holland*, 588 So.2d at 546.

[57]For example, a trial court may fulfill its obligation to investigate by individually calling each juror into chambers to determine whether he or she had heard prejudicial comments and if so whether they could give a fair verdict based on evidence presented in court. *See Newsome v. State*, 570 So.2d 703, 712-14 (Ala. Crim. App. 1989).

be cruelly punished. The trial court abused its discretion by conducting **no investigation whatsoever** before ruling upon defense counsel's motion for a mistrial. *See Holland*, 588 So.2d at 549-50.

The court made no effort to determine which jurors had made the remarks, whether anyone else heard them, and what prejudicial effect they may have had on other prospective or actual jurors, other than Lambert.[58] The trial court's stated explanation for not granting a mistrial – that he "ha[d] no idea" whether the jurors who made the statements or heard the statements "got on this panel," R.905 – was itself an acknowledgment of the need for investigation. Lambert stated that the jurors who made the comments were in the panel questioned in Luong's case. The only way the Court could have been satisfied that no juror in Luong's venire was tainted or had prejudged the case was through further investigation.[59] The court's discretion does not permit such a cursory dismissal of direct and credible evidence of prejudicial juror misconduct.

The court's failure to conduct any investigation into the alleged juror misconduct before denying defense counsel's

[58]The judge asked Lambert some of the questions that he should have asked the other prospective jurors, including what she had heard, R.901, whether it was her mind set, R.902, whether hearing the statements affected her "in any way," R.902, and whether it would "change [her] opinion with regard to guilt or innocence." R.901-02. *See Newsome*, 570 So.2d at 712.

[59] The court's statement that the prejudging jurors may not have been on Luong's panel was baseless speculation that directly contradicted Lambert's testimony.

motion for a mistrial – and thereby possibly permitting jurors who had personally prejudged Luong's guilt and punishment and jurors who may have overheard their comments – to serve on his jury violated Luong's rights to due process, a fair trial, to be tried by an impartial jury, and to be free of cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15; ALA. R. CRIM. P. 18.4. His conviction and death sentence must be reversed.

**4. The trial court erred by reversing its initial order and denying jury sequestration.**

The jury in this extremely high profile case was not sequestered. The trial court initially granted Luong's motion to sequester the jury, C.5, 119 and then denied the State's motion to reconsider, stating, "Are you kidding me? ... I'm not going to let [the jury] be out...while every television station and newspaper in this part of the state is going to be probably covering this matter." R.48-49. Yet after Luong withdrew his plea of guilty and asserted his constitutional rights to trial, the court abruptly reversed course, and denied the renewed defense motion to sequester the jury. R.386-87. This ruling violated Luong's statutory right to sequestration in these narrow circumstances, ALA. CODE § 12-16-9; ALA. R. CRIM. P. 19.3 (a), and his constitutional rights. U.S. Const. amends. VI, VIII, XIV; Ala. Const. §§ 6, 13, 15.

The danger of the jurors encountering outside information was particularly problematic in light of the trial court's self-defeating admonitions to the juror's regarding media,[60] including his inappropriate statement to the jury that the media coverage could be "factual." R.1405. It would be nearly impossible for the jurors to avoid the swirl of publicity about the trial. Unlike high publicity cases where denial of sequestration was not error, the trial court abused its discretion because **all** of the jurors had been exposed to "media coverage of the case," Luong's change of venue motion had been denied, and the claim was preserved. R.913-16.[61]

**5. The record establishes a prima facie case of gender discrimination in the prosecution's use of peremptory strikes.**

Pursuant to ALA. R. APP. P. 45A, under the plain error doctrine, this Court must review the record for Equal Protection violations in jury selection. *See, e.g., Ex parte Sharp,* No. 1080959, 2009 WL 4506564, at *10 (Ala. Dec. 4,

[60]The court's instructions regarding media were inadequate. He told jurors that they could watch cable network TV and read parts of the newspaper. R.961.

[61]*Compare with Centobie v. State*, 861 So.2d 1111, 1134 (Ala. Crim. App. 2001)(affirming trial court's failure to sequester where defense did not request sequestration, only one prospective juror was exposed to "media coverage of the case," and the defendant's change of venue motion had been granted). *See also People v. Vialpando*, 809 P.2d 1082, 1083-84 (Colo. Ct. App. 1990)(reversing murder conviction obtained in highly publicized trial due to cumulative error, including trial court's abuse of discretion by, *inter alia*, failing to sequester jury); *Lowery v. State,* 434 N.E.2d 868, 870 (Ind. 1982) (reversing capital conviction where sequestration was denied over objection by the defendant and noting that "no case has presented itself in which a defendant has been ordered put to death by an American court as punishment for crime upon the verdict of a jury which was permitted to separate and return to commingle in the general community during the trial, over the timely objection of the accused").

2009); *Floyd v. State*, No. CR-05-0935, 2007 WL 2811968, at *3 (Ala. Crim. App. Sept. 28, 2007). The record here establishes a prima facie case of purposeful gender discrimination in the State's sweeping removal of potential female jurors, in violation of equal protection. *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Ex parte Trawick*, 698 So.2d 162, 167 (Ala. 1997); *Floyd*, 2007 WL 2811968, at *3. Accordingly, this Court should remand this case to the trial court to conduct a *J.E.B.* hearing to determine if the State had valid, gender-neutral reasons for its removal of women from this jury. *See id.*

### A. The State's grossly disproportionate use of peremptory strikes to remove women from Luong's jury created an inference of discrimination.

The State used a large majority of its peremptory strikes – 71.7% – to remove women from Luong's jury. The State's desire to purge women from the venire is particularly evident in the pattern of its early strikes: the State used all of its first nine strikes[62] and 18 out of its first 21 strikes to rid the jury of females.[63] From the 104-person venire from which the parties began to strike,[64] which consisted of slightly more females than males (53.8%) and reflected the Mobile County

[62] They were: Friend, Lambert, Thompson, White, Emerson, Atnip, E. Johnson, Veale, and Evans. R.934-36; SR.29-34.
[63] In addition to the above, they were: Edmond, Overstreet, Alexander, Bonner, McConnell, Phelion, Abrams, Thornton, Quartey. R.936-38; SR.29-34.
[64]The venire initially consisted of 84 women and 72 men. Fifty-one individuals, including 27 females, were removed for cause. At the court's request, Chief Patterson struck one juror to even out the pool. R.934.

female population as a whole,[65] the State struck 33 women and only 13 men.[66] As a result of the State's disproportionate strike pattern, only four females were seated on the jury.[67] The State's grossly disproportionate removal of women from the venire raises an inference of discrimination.[68]

### B. The female veniremembers struck by the State shared only their gender.

The women struck by the State "were as heterogeneous as the community as a whole," which also supports a prima facie case of discrimination. *Ex parte Branch*, 526 So.2d 609, 622 (Ala. 1987). The women were diverse in, *inter alia*, race,[69] age,[70] place of residence,[71] marital status,[72] number of children,[73] religion,[74] education,[75] personal or familial

[65]Women account for approximately 52.2% of the Mobile County population. *See* U.S. Census Bureau, QuickFacts, Mobile County, *available at* http://quickfacts.census.gov/qfd/states/01/01097.html (last checked May 12, 2010).
[66]In contrast, the defense used 19 of its peremptory strikes to strike women and 27 to strike men.
[67]They were Jackson, Moore, Brooks, Collins. Only three women deliberated, however, after Jackson was improperly dismissed and replaced with alternate Burgett. *See Point* 25, *infra*.
[68]*See, e.g., Floyd*, 2007 WL 2811968, at *2 (State used 66.6% of its strikes to remove women); *Ex parte Bird*, 594 So.2d 676, 680 (Ala. 1991)(suspicion of discrimination aroused when there is disparate representation of the class on the seated jury from a higher representation in the initial venire); *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)("In total, 10 of the prosecutors' 14 peremptory strikes [71.4%] were used against African-Americans. Happenstance is unlikely to produce this disparity.").
[69]The women included 17 African-Americans, 15 Caucasians, and one woman of an unidentified race. *See* SR.29-43; R.934-48.
[70]The struck women ranged in age from 20- to 71-years old. SR.929, 1182.
[71]They hailed from towns across the county: Mobile, Saraland, Theodore, Satsuma, Eight Mile, Semmes, and Citronelle. *See* SR.599, 852, 1006, 423, 434, 380, 786.
[72]The women were single, married, separated, divorced, and widowed. *See, e.g.*, SR.787, 1172, 1545, 633, 1183.
[73]The women had a single child, multiple children, stepchildren, or no children. *See, e.g.*, SR.1611, 402, 380A, 130.
[74]Their religious attendance ran the gamut from weekly, SR.1222, to 2 to 3 times per year, SR.628, to never, SR.606. They had been raised in Baptist,

criminal history,[76] the public figures they respected,[77] and prior juror service.[78] They shared only their gender, raising an inference of discrimination. *Bird*, 594 So.2d at 679.

### C. The Mobile County District Attorney's office has a long history of discrimination.

The Mobile County District Attorney's office has a long history of unconstitutionally discriminating against historically disenfranchised groups, including women, in its use of peremptory strikes.[79]

Before the *J.E.B.* decision barred gender-based exclusion of jurors, the Mobile County District Attorney's office

---

Catholic, Holiness, Church of Christ, Lutheran, Greek Orthodox, and Episcopalian churches. *See, e.g.*, SR.1651, 409, 475, 937, 1179, 1223, 1014.

[75]Some women had post-graduate degrees, *see, e.g.*, SR.479; some had obtained a G.E.D. *See, e.g.*, SR.974.

[76]Some had criminal convictions, *see, e.g.*, SR.603, or family members with convictions, to varying degrees of severity, SR.1175, SR.471, 427, 1219, 405. Many had none. *See, e.g.*, SR.482, 1383, 1548.

[77]They listed, among others, Billy Graham, President Obama, Former President Bush, Nick Saban, Bill Cosby, and Dr. Phil as the male public figures they most respect, SR.234, 1179, 497, 387, 1640, 640; Laura Bush, Oprah Winfrey, Hillary Clinton, Angelina Jolie, and Michelle Obama ranked among the female public figures. SR.1014, 133, 640, 937, 607.

[78]Some had served on a grand jury, a criminal jury, or a civil jury, *see, e.g.*, 495, 429, 484; some had never served on any jury before. SR.605.

[79]*See Maddox v. State*, 708 So.2d 220, 229 (Ala. Crim. App. 1997)(reversing conviction as prosecutor gave explanations for strikes which were not race- or gender-neutral); *Jessie v. State*, 659 So.2d 167 (Ala. Crim. App. 1994)(reversing conviction when prosecutor gave pretextual reason for striking African-American female juror); *Carter v. State*, 603 So.2d 1137, 1140 (Ala. Crim. App. 1992)(in reversing on *Batson* grounds, this Court found "significant the pattern of jury strikes against black members arising from Mobile County meriting reversal"); *Jones v. Davis*, 906 F.2d 552 (11th Cir. 1990); *Harrell v. State*, 571 So.2d 1270, 1272 (Ala. 1990)(taking judicial notice of Mobile County district attorney's office's history of discrimination); *Jackson v. State*, 557 So.2d 855 (Ala. Crim. App. 1990); *Madison v. State*, 545 So.2d 94, 99 (Ala. Crim. App. 1987); *Chatom v. State*, 591 So.2d 101, 104 (Ala. Crim. App. 1990)(Court, had it not reversed on other grounds, would have felt compelled to remand for a *Batson* hearing upon showing that prosecution struck all 11 of 11 black persons on the venire); *Williams v. State*, 507 So.2d 566, 568 (Ala. Crim. App. 1987)(new trial ordered when prosecutor could not articulate race-neutral or recall reasons for strikes).

explicitly acknowledged that it removed potential jurors for being female. *See, e.g.*, *Williams v. State*, 634 So.2d 1034, 1039 (Ala. Crim. App. 1993)(prosecutor's striking two jurors for being young and female was found to be sufficiently race-neutral). The office has continued to discriminate against women in *J.E.B.*'s wake. *See, e.g., Maddox v. State*, 708 So.2d 220, 229 (Ala. Crim. App. 1997)(finding that the state struck six jurors on basis of race or gender); *see also id. at* 230 (Long, J., concurring in result)(prosecutor's explanation of strike of black female veniremember was "based expressly on gender stereotypes" and "evidenced an inherently discriminatory intent"). The District Attorney's office's history of discrimination against historically disenfranchised groups, and women specifically, supports the prima facie case.

### D. The State engaged in disparate treatment of male and female veniremembers.

The State's disparate treatment of males allowed to serve on the jury and females struck is additional evidence raising an inference of discrimination. For example, male jurors had similar views of capital punishment as women removed by the State.[80] Seated male jurors and excluded women also had similar responses with respect to exposure to the case before jury

[80]*See e.g.*, SR.514, 745, 800, 921, 1767 (selected male jurors); SR.80, 382, 470, 1174, 1185, 1635, 1646 (struck females).

selection,[81] whether their friends and family members had criminal prosecutions,[82] and views of mental health professionals.[83]

These characteristics are but a few examples of the characteristics shared by male jurors allowed to serve and women removed by the State; the similarities span many more categories of information available to the State about the venire.[84] This disparate treatment raises an inference of discrimination. *See Snyder v. Louisiana*, 128 S. Ct. 1203, 1211-12 (2008)(disparate treatment of jurors debunked State's pretextual, discriminatory reasons for strikes); *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)(placing great weight on comparative juror analysis); *Bird*, 594 So.2d at 681.

**E. The State engaged in limited or no voir dire with many of the struck females.**

The State's decision to strike many of these female veniremembers was not based on a thorough or meaningful voir dire. For instance, the prosecution struck females Emerson, Overstreet, Thornton, Quartey, Zalopany, Claiborne, Robinson-Williams, Bracy, and Pettway without questioning them at all.

[81] *See, e.g.*, SR.202, 751, 850, 927, 960, 1147, 1773. All but one of the women struck by the State had heard about the case prior to coming to the courthouse. *See* R.453.
[82] *See, e.g.*, SR.197, 845, 955, 1142 (male jurors); SR.405, 427, 471, 1175, 1219 (struck females).
[83] *See, e.g.*, SR.200, 749, 848, 925, 958, 1145, 1716, 1771 (male jurors); SR.485, 639, 804, 1189, 1244, 1650 (struck females).
[84] *See, e.g.*, R.570-74 (group responding affirmatively to defense questioning included male jurors and struck females).

The State only cursorily examined veniremembers White, Williams, Evans, Abrams, and Doss in group voir dire regarding family members with criminal convictions; all indicated they could serve on the jury with impartiality. R.475, 470-71, 472, 483, 489-90, 491. The limited examination of potential female jurors is additional evidence that supports a prima facie case of gender discrimination. *See Trawick*, 698 So.2d at 168.

**Conclusion**. These factors individually and collectively establish a prima facie case of discrimination against potential female jurors. *See Smith v. State*, 698 So.2d 1166, 1169 (Ala. Crim. App. 1997). This compelling evidence supporting a prima facie case requires a remand for the trial court to determine whether the prosecutor had gender-neutral reasons for these strikes. *See, e.g., Ex parte Adkins*, 600 So.2d 1067, 1069 (Ala. 1992).[85] Failure to address the prosecution's discriminatory use of peremptory strikes would violate the excluded jurors' rights to equal protection and Luong's rights to a fair trial, due process, and equal protection. U.S. Const. amends. V, VI, XIV; Ala. Const. §§ 6, 13; ALA. CODE §§ 12-16-55, 56; ALA. R. APP. P. 45A.[86]

[85]Even in the absence of an objection, "the trial judge, as the presiding officer of the court, should take the necessary steps to ensure that discrimination will not mar the proceedings in his courtroom." *Lemley v. State,* 599 So.2d 64, 69 (Ala. Crim. App. 1992).

[86]"Even one unconstitutional peremptory strike of a prospective juror requires reversal of a conviction and a new trial." *Maddox,* 708 So.2d at 229 (citing *Ex parte Bird,* 594 So.2d at 683).

### 6. This Court should remand this case for a hearing to determine whether the State had valid race-neutral reasons for removing racial minorities from the jury.

The circumstances here, including the State's pattern of striking a disproportionate share of racial minorities from the venire[87] and the heterogeneity among the struck minority members raise an inference of discrimination and satisfy the defendant's burden of establishing a prima facie case of racial discrimination by the prosecution in its use of peremptory challenges in violation of Equal Protection. *See Ex parte Branch*, 526 So.2d at 622-23; *Batson v. Kentucky*, 476 U.S. 79, 89, 97 (1986). Accordingly, this Court should remand this case to the trial court to conduct a hearing to determine if the State had valid, race-neutral reasons for its removal of racial minorities from the jury. *Ex parte Branch*, 526 So.2d at 627; ALA. CODE §§ 12-16-55, 56; ALA. R. APP. P. 45A.

#### A. The State struck a disproportionate number of racial minorities from Luong's jury.

After challenges for cause, 33 African-Americans,[88] 70 white jurors, and one person with race listed as "other" remained on the venire. The State struck 20 of the 34 minority

[87]Though several African-Americans served on the jury, "[e]ven one unconstitutional peremptory strike of a prospective juror requires reversal of a conviction and a new trial." *Maddox,* 708 So.2d at 229 (citation omitted).

[88]The African-American composition of the eligible pool of 104 venirepersons (31.7%) closely reflected the African-American composition of Mobile County as a whole (34.4%). *See* U.S. Census Bureau, QuickFacts, Mobile County, available at http://quickfacts.census.gov/qfd/states/01/01097.html (last checked May 12, 2010).

jurors with peremptory strikes. In contrast, the State used only 26 peremptory strikes (including strikes for alternates) on the 70 white jurors. In other words, the State struck minority jurors at a rate almost twice as frequently as it struck white jurors.[89] The rate was also nearly twice the percentage of eligible minority jurors.[90]

An even more powerful discriminatory pattern emerges when race is paired with gender. Twenty-five minority women remained after strikes for cause, representing a mere 24% of the pool. The prosecution used peremptory challenges to remove 18 of these women of color - a lopsided 72%.[91] The State's disproportionate removal of minorities, and minority women in particular, raises an inference of discrimination.

**B. The minority veniremembers struck by the State shared only their race.**

The minority prospective jurors struck by the State "were as heterogeneous as the community as a whole," which also supports a prima facie case of discrimination. *Ex parte Branch*, 526 So.2d at 622. Their characteristics varied

[89]The State struck 59% (20/34) of all eligible minority jurors and only 37% (26/70) of all eligible white jurors.

[90]*Cf. United States v. Alvarado*, 923 F.2d 253, 255-56 (2d Cir. 1991)("a challenge rate nearly twice the likely minority percentage of the venire strongly supports a prima facie case under *Batson*"); *Jarvis v. Consol. Rail Corp.*, 2004 WL 858929, *3 (Ohio App. Dist. Apr. 22, 2004)(same). *See also Fernandez v. Roe,* 286 F.3d 1073, 1078 (9th Cir. 2002)(finding disproportionate disparity when percentages nearly twice as much); *Jones v. State,* 938 A.2d 626, 632 (Del. 2007)(similar); *Linscomb v. State,* 829 S.W.2d 164, 165-66 (Tex. Crim. App. 1992)(similar).

[91]When the court removed African-American female juror Jackson, the State said, "Good." R.1425. One female of color remained on the jury.

according to, among other things, their gender,[92] age,[93] place of residence,[94] marital status,[95] education,[96] personal or familial criminal history,[97] and prior juror service.[98] They shared only their membership in a minority race, raising an inference of discrimination. *Ex parte Bird*, 594 So.2d at 679; *Yancey v. State*, 813 So.2d 1, 2 (Ala. Crim. App. 2001).

### C. The District Attorney's office has a long history of discrimination against racial minorities.

The Mobile County District Attorney's office has a long history of unconstitutionally discriminating against racial minorities in its use of peremptory strikes,[99] which supports the prima facie case. *Ex parte Branch*, 526 So.2d at 623.

### D. The State engaged in disparate treatment of white and non-white veniremembers.

The State's disparate treatment of whites it permitted to serve on the jury and non-whites it struck is additional evidence of discrimination. For example, white jurors who the State did not strike had similar views of capital punishment

[92]The group included 18 females and 2 males. *See* SR.29-43; R.934-48.
[93]Their ages ranged from 21 years old, SR.1610, to 71 years old. SR.1182.
[94]They hailed from towns across Mobile County: Mobile, Theodore, Eight Mile, Semmes, and Citronelle. *See, e.g.,* SR.1302, 1874, 434, 1632, 786.
[95]They were single, married, separated, and divorced. *See, e.g.*, SR.1534, 1172, 1545, 1523.
[96]Some minority members had post-graduate degrees, *see, e.g.*, SR.1644; some had a high school diploma. *See, e.g.,* SR.1303.
[97]Some had been accused of a crime, *see, e.g.*, SR.1537, or had family members with convictions of varying degrees of severity, SR.625, 1175, 1647. Many had neither. *See, e.g.,* SR.1306, 1526, 1548.
[98]Some had served on a criminal or civil jury before, *see, e.g.*, SR.627, 1122, 1188; others had never served. *See, e.g.,* SR.605, 792, 803.
[99]The Alabama Supreme Court has taken judicial notice of the county's history of discrimination. *Harrell*, 571 So.2d at 1272. *See also supra,* n.79.

as minorities it removed.[100] Seated white jurors and excluded minorities also had similar responses regarding exposure to the case before jury selection,[101] service on a criminal jury and voting guilty,[102] views of mental health professionals,[103] and views about substance abuse.[104]

These characteristics are but a few examples of the characteristics shared by white jurors allowed to serve and non-whites removed by the State. This disparate treatment raises an inference of discrimination. *See Snyder*, 128 S.Ct. at 1211-12 (disparate treatment of jurors debunked State's pretextual, discriminatory reasons for strikes); *Miller-El*, 545 U.S. at 241; *Ex parte Bird*, 594 So.2d at 681.

### E. The State engaged in limited or no voir dire with many of the struck non-white jurors.

The State's decision to strike many non-white veniremembers was not based on a thorough or meaningful voir dire. For instance, the prosecution struck African-American venirepersons Quartey, Bracy, Thornton, Robinson-Williams, and Singleton, without questioning them.[105] The limited examination

[100]*See, e.g.*, SR.361, 844, 1767, 1822 (white jurors); SR.470, 1174, 1185, 1305, 1635, 1646, 1877 (struck minorities).
[101]*See, e.g.*, SR.367, 850, 1773, 1828 (white jurors); SR.795, 982, 1542, 1553 (struck minority jurors).
[102]*See, e.g.*, SR.847 (white juror); SR.627, 1122 (struck minority jurors).
[103]*See, e.g.*, SR.365, 848, 1771, 1826 (white jurors); SR.793, 804, 1540, 1881 (struck minority jurors).
[104]*See, e.g.*, SR.365, 848, 1771, 1826(white jurors); SR.474, 804, 1309, 1639 (struck minority jurors).
[105]The State only cursorily examined African-American veniremembers White, Evans, Abrams, and Doss in group voir dire regarding family members with criminal convictions. R.475, 483, 489-90, 491.

of non-white jurors, supports a prima facie case of racial discrimination. *See Ex parte Trawick*, 698 So.2d at 168.

The foregoing factors, individually and collectively, establish a prima facie case of discrimination against minorities and require a remand for the trial court to determine whether the prosecutor had race-neutral reasons for the strikes. *See Smith v. State*, 698 So.2d 1166, 1169 (Ala. Crim. App. 1997). *Adkins*, 600 So.2d at 1069. Failure to address the prosecution's discriminatory use of peremptory strikes would violate the excluded jurors' right to equal protection and Luong's rights to a fair trial, due process, and equal protection. U.S. Const. amends. V, VI, XIV; Ala. Const. §§ 6, 13; ALA. R.APP. P. 45A.

**7. The trial court committed reversible error by denying the defense's motion for an *ex parte* determination of their request for mitigation travel expenses.**

The trial court committed reversible error by denying the defense's request for an *ex parte* determination of their application for travel expenses for mitigation investigation. The trial court erroneously required defense counsel to reveal their mitigation investigation plan to the State in violation of Luong's constitutional rights to equal protection of the law, to be free from self-incrimination, to the assistance of counsel, to present a defense, to a fair trial, and to a

reliable sentencing determination. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 11, 13, 15.

On August 18, 2008, the defense filed an "Ex Parte Application For Travel Expenses," seeking funds to travel to Vietnam to investigate mitigating evidence from Luong's childhood. C.9, 218-239. In an unrecorded in-chambers proceeding,[106] the trial court denied the defense's request for an *ex parte* hearing, ruling that the motion would be heard in open court. C.9; R.76. The court required defense counsel to reveal their mitigation strategy during the hearings,[107] in the presence of the State, over the defense's objection. R.114 ("Quite frankly, judge, the mitigation testimony, the strategy that we are hoping to develop, is being disclosed here today because of the fact that this man is indigent.").

The court's ruling was reversible error. The court held three days of hearing on the request, all in the State's presence. C.9-11, 218; R.76-93, 103-39, 151-85. The judge permitted the State to observe and participate in discussions that directly went to both the reasonableness and the necessity of the defense mitigation expenses. Defense counsel

[106]The Case Action Summary entry for this motion states: "Ex parte motion filed by the Defendant's attorneys . . . in the judge's office September 15, 2008. Court orders that said motion will not be heard Ex Parte and is set for hearing September 23, 2008 at 2:00 p.m." C.9. Undersigned counsel filed a motion in the trial court seeking a copy of the transcript of the proceedings from that day. SR.20. The trial court issued an order indicating that the only discussion about the motion was the one held in open court. SR.26.

[107]The trial court held a total of three hearings on the motion. *See* R.76-93, 104-36, 152-84.

were forced to reveal whom they intended to call at trial as their mitigation expert, R.105, 107, how many mitigation witnesses the defense anticipated interviewing, R.152-55, 177-78, and the identity of the mitigation witnesses. *Id.*[108]

Defense counsel were also forced to reveal their theory of mitigation at the hearing. *See, e.g.,* R.110-12 (defense counsel recounting that Luong was banished from living with his mother in Saigon and sent to live in a rural province because he was the child of a black American soldier and Vietnamese woman, that he was subjected to treatment far worse than mere segregation, that he was not permitted to be educated, that his family was poor, and that he immigrated at the age of 13 without any adult family member). In addition, the State was permitted to argue against the necessity of the trip. R.107, 134-35.

The law is well-settled that an indigent defendant is entitled to seek funds for his defense in *ex parte* proceedings. *Ex parte Moody*, 684 So.2d 114, 120 (Ala. 1996); *Ex parte Bui*, 888 So.2d 1227, 1230 (Ala. 2004); *Finch v. State*, 715 So.2d 906, 909 (Ala. Crim. App. 1997); *see also Ake v. Oklahoma,* 470 U.S. 68 (1985). Requiring an indigent

[108]Witness lists and statements of witnesses to the defense are not discoverable under Alabama law. *See* ALA. R. CRIM. P. 16.2(d). "The names of witnesses to be called by the defendant could easily aid the government in determining the strategy the defendant plans to use at trial." *Ex parte Moody,* 684 So.2d at 120 (internal quotations and citation omitted).

defendant to disclose his theory of defense or preview defense evidence in the presence of the State violates his privilege against self-incrimination and impermissibly creates inequality between classes of defendants based on ability to pay. *Ex parte Moody*, 684 So.2d at 120. It further violates his right to effective assistance of counsel. *Finch*, 715 So.2d 906 at 909.

In *Bui,* counsel sought $54,000 in special funds to travel to Vietnam to conduct a mitigation investigation, including expenses for business class air fare. 888 So.2d at 1231. The Supreme Court held that the State could participate in a hearing on the propriety of the *amount of the sum* but could not "otherwise challeng[e] the necessity" of the costs. *Id*. Citing *Ex parte Moody*, the Court held that hearing should afford the state an opportunity to assert its objections "without compromising Bui's right to prevent the State from gaining access to his trial strategy." 888 So.2d at 1230.

In sum, the court committed reversible error by requiring the defense to seek funds for mitigation investigation in open court rather than *ex parte* proceedings and to disclose privileged and confidential defense information.

**8. The trial court committed reversible error by failing to hold a competency hearing immediately prior to and during Luong's trial.**

A trial court is obligated to hold a *sua sponte* competency hearing if there is a *bona fide* doubt about the defendant's competence. *See Pate v. Robinson*, 383 U.S. 375, 385 (1966); *Demos v. Johnston*, 835 F.2d 840, 843 (11th Cir. 1988); *Drope v. Missouri,* 420 U.S. 162, 181 (1975)("Even when a defendant is competent at the commencement of his trial, **a trial court must always be alert to circumstances suggesting a change** that would render the accused unable to meet the standards of competence to stand trial.")(emphasis added).

As shown below, the trial court here failed to meet this constitutional obligation, violating Luong's jury trial right as well as his rights to Due Process and a fair trial. U.S. Const. amend. VI, VIII, XIV; Ala. Const. §§ 6, 11, 13, 15.

**Standard of review**. Alabama courts have held that "it is left to the discretion of the trial court as to whether [] a reasonable and *bona fide* doubt of sanity exists" and that "[t]he decision of the trial judge on such a matter is raised on appeal only upon proof of abuse of discretion." *Livingston v. State*, 419 So.2d 270 (Ala. Crim. App. 1982). As demonstrated below, the trial court abused its discretion here. However, application of the abuse of discretion standard would violate Luong's rights to due process, a fair trial, and reliable sentencing under the federal and Alabama

constitutions because comprehensive review – asking what a reasonable trial judge would have done – is required. *See, e.g., de Kaplany v. Enomoto,* 540 F.2d 975, 983 (9th Cir. 1976); *Williams v. Bordenkircher* 696 F.2d 464, 467 (6th Cir. 1983).[109]

Alabama courts also have held that the appellant bears the burden of demonstrating that a reasonable doubt as to his competency existed. *See e.g., Waldrop v. State,* 459 So.2d 953, 955 (Ala. Crim. App. 1983), a*ffirme*d, *Ex parte Waldrop,* 459 So.2d 959 (Ala. 1984). As demonstrated below, Luong clearly meets this burden. This standard, however, violates Luong's rights to due process, a fair trial and reliable sentencing because the trial court has an independent, *sua sponte* duty to ensure that the defendant is competent throughout the trial proceedings. *See, e.g, Pate,* 383 U.S. at 385.

### A. The evidence in this case raised a *bona fide* doubt as to Luong's competency to stand trial.

The trial court had a constitutional obligation to determine Luong's competency during the pretrial proceeding on March 5, 2009 and during the pretrial and trial proceedings beginning on March 11, 2009, which revealed Luong to be suicidal and confused. On March 5, 2009, at the outset of the

[109]*See also Pedrero v. Wainwright* 590 F.2d 1383, 1388 (5th Cir. 1979)("The test is an objective one. The duty to hold a competency hearing turns not on what the trial judge in fact had in mind, but whether the facts before him were such as to create a reasonable doubt as to the defendant's competency.").

pretrial hearing, Luong submitted a note to his lawyers, written in Vietnamese. R.334-35. As translated, the note stated that Luong "plead(s) guilty," that he "no longer wants to live," and "requests the death penalty as soon as possible." *Id*. Luong signed his name five times at the bottom of the note. C.784.[110] Luong's counsel informed the judge that although they had tried to explain the trial and plea process to Luong "many times," he remained "confused, for lack of a better word." R.309-10. Defense counsel stated that he doesn't know "what sort of demons are in [Luong] over this whole business," but told the Court that he believed Luong had been adequately examined regarding his mentality. R.311, 314. The trial judge proceeded to ask Luong if he wanted to plead guilty, and then asked him, through an interpreter, a number of questions regarding the guilty plea, to all of which Luong responded in single word replies (yes, no, or okay). The trial court then accepted Luong's guilty plea without ordering a competency evaluation or hearing. R.330.

Six days later, on March 11, 2009, Luong again appeared before the trial court. R.349. After stating that he had been thinking about the plea "over the last couple of days," the trial court decided to go over it again to make sure Luong understood it. R.350. The trial court asked Luong if he

[110]The trial court did not inquire why Luong signed his name so many times, an obviously unusual step.

understood what the attorneys and interpreter said about the plea form and Luong responded that he did not. R.351. Luong expressed confusion and his desire to merely end the proceedings, rather than any understanding of them.[111] In light of Luong's strange responses and confusion, the trial court asked defense counsel to state again for the record the findings of prior mental heath examinations. R.366. The court did not, however, order a competency evaluation nor did the court conduct a competency hearing to determine Luong's then current mental state and capacity to stand trial. Jury selection began that same day. R.395. The events on March 6th and March 11th need to be assessed in light of other information available to the trial court concerning Luong's mental health. That includes:

**1. Bizarre and irrational behavior: evidence from jail records.** The trial judge was aware of Luong's prior suicide attempts and of his troubling and disturbed behavior while in jail awaiting trial. In February 2009, just weeks before the trial began, the judge ordered the jail to produce Luong's

[111] *See, e.g.*, R.358-59 (in response to the court's question whether he understands his right to remain silent, Luong asks "I say something?," and then says "I would like - I authorize the attorneys speak for me, and I'm afraid of all kind of questions. So please ask that the lawyer don't ask me."); R.361-62 (in response to continued questioning by the judge about waiver of his trial rights, Luong said "My leg is numb. Please let me get a seat. And let the lawyer do anything they want to do."); R.365 (Luong told the judge he had been on suicide watch and that his mental condition "they say very, very low" and that "any suggestion that help me to get out that condition, I would like accept that"); R.373 (the trial judge instructs the lawyers, "Y'all take him back. He says he is a little confused about something, and I want to know what it is.").

medical records, including all records related to "an incident alleged to have occurred on or about April 21, 2008 in which the Defendant allegedly cut himself multiple times with a makeshift knife or other object." C.174. The court received these records from the jail and designated them as Court's Exhibit 2. R.307. The records reveal that Luong had attempted suicide on numerous occasions, frequently cutting his arms with makeshift tools from his cell.[112] These records describe bizarre and disturbed behavior by Luong, including an incident when he wrote in blood on the wall of his cell "I love you," next to small hand prints and four faces with smiles, also written in blood. SR2.643, 687, 690. The records report that Luong repeatedly banged his head on his cell block wall, drawing blood, bruising his forehead, and laughing. *See e.g.*, SR2.95, 153, 181. They further report that Luong suffered from auditory hallucinations, SR2.83, and was treated with anti-psychotic and anti-depressant medication while in jail. SR2.91, 187 (Luong was injected with Haldol and Ativan).

The records also document that Luong's mental state cycled through periods of improvement and deterioration while

[112]*See* SR2.135 (April 21, 2008, Luong cut himself 20 times on arms); SR2.200-01 (May 14, 2008, Luong is depressed and upset, scratches his arms until bleeding); SR2.195 (May 22, 2008, Luong scratched his arms with paint chips); SR2. 187 (June 3, 2008, Luong "appears determined in inflict injury to himself"); SR2.153 (July 25, 2008, describing "suicide attempt this morning" by Luong, cutting his stomach with an object); SR2.144, 98 (Aug. 12, 2008, Luong again on suicide watch for cutting himself with a piece of metal).

in jail.[113] The prior suicide attempts and bizarre behavior should have alerted the judge to the need to closely monitor Luong's competency. *See Drope*, 420 U.S. at 178-79.

**2. Prior medical opinions.** A prior competency report produced by the State's expert, Dr. Doug McKeown, is additional important background evidence that should have alerted the court to the need to closely monitor Luong for signs that his mental health state was deteriorating. The court reviewed the report on November 13, 2008. R.140-41.[114] Although McKeown concluded that Luong was competent, he noted that the defendant's ability to "interact and communicate" with counsel was "at a somewhat limited level." C.215. He noted that Luong reported visual and auditory hallucinations associated with prior drug use, and that he suffered from cocaine addiction. C.213. He found that Luong could not identify similarities between a boat and a car or ice and steam and that his "thought style...suggests somewhat reduced productivity." C.212. McKeown also noted that Luong had experienced audio and visual hallucinations associated with his chronic cocaine use. C.213. Dr. Leung, the defense

[113]*See, e.g.*, SR2.667-70 (describing suicide attempt on Aug. 14, 2008 and Aug. 21, 2008); SR2.109, 106 (describing Luong as "feeling great," on Aug. 16, 2008, in between two suicide attempts and as "alert and chatty" and in "good spirits" on Sept. 15, 2008, one month later).

[114]McKeown examined Luong on October 24, 2008 and November 7, 2008. C.210. The jail medical reports from the fall describe Luong as "in good spirits" and do not report any suicide attempts, self-mutilation or other disturbed behavior during this period. SR2.106 (Sept. 15, 2008, "Relates most pleasantly, is alert and chatty, seems in good spirits and denies suicidal or homicidal ideation."); SR2.104 (Nov. 10, 2008, "in good spirits, denied suicidal ideation, showed no thinking disorder").

psychiatrist, also evaluated Luong and determined that he suffered from a cocaine addiction and major depression disorder, an Axis I disorder. R.368, 1579; APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 369 (4th ed. 2000).

Under this totality of the circumstances, the trial judge should have had a substantial doubt regarding Luong's competency to stand trial. *Pate*, 383 U.S. at 387; *Ex parte Janezic*, 723 So.2d 725, 729 (Ala. 1997).[115]

It was constitutional error for the court to fail to order a contemporaneous evaluation and hold a competency hearing. Accordingly, Luong's conviction and sentence should be reversed. *Janezic,* 723 So.2d at 729-30. Alternatively, this Court could order a remand to the trial court to determine whether a retrospective competency hearing is feasible. *Id*. at 729.

To the extent that the case law holds that a method short of a hearing on competency is sufficient to resolve a *bona fide* doubt regarding the defendant's competency, it violates the Alabama Code as well as the state and federal

[115]Indeed, the record demonstrates that the trial judge himself recognized the cause for concern about Luong's continued competency. He asked the lawyers on two separate occasions whether the defendant had been adequately examined. R.314, 366-67. In response to this questioning, the defense counsel and prosecution stated that in their opinions, Luong had been sufficiently evaluated. R.366-69. The State's comments were based on McKeown's evaluation, who issued a report and examined Luong months earlier, in October and November. R.368-69. The defense based their comments upon the alleged findings of Dr. Leung, which were never addressed by Leung himself.

constitutional protections of competency.[116] By statute, Alabama law directs the trial court to convene a separate jury to evaluate the competency of the defendant when the court "shall have reasonable ground to doubt" the defendant's competency. *See* ALA. CODE § 15-16-21. Alabama courts have interpreted this language to require that trial courts hold a jury hearing or "establish some alternative method of determining his competency" when the court has "a reasonable and bona fide doubt" regarding the defendant's sanity. *See, e.g., Anderson v. State*, 510 So.2d 578, 580 (Ala. Crim. App. 1987). In this case, the trial court failed to hold a jury hearing or otherwise determine Luong's competency once the new evidence came to light. Accordingly, reversal is required even under the Alabama case law construing Alabama Code § 15-16-21.

### B. The trial court erred by not impaneling a separate jury to determine Luong's competency to stand trial.

Because there was a substantial doubt as to Luong's competency to stand trial, Luong was entitled to a have a separate jury empaneled to determine his competency. *See Ex*

[116] *Cf. Pierce v. State*, 293 So.2d 489, 492 (Ala. 1974) (Lawson, S.J., concurring in quashing of the writ)("The law is now settled that if sufficient doubt of the defendant's present mental competency is raised before or during trial, then it is mandatory *that there be a judicial hearing* to determine his mental competency to stand trial...."); *Ex parte Neal*, 551 So.2d 933, 934 (Ala. 1989)(trial court may not substitute a psychiatric examination "as an alternative determination in deprivation of the defendant's constitutional right to a jury trial on the issue of competency to stand trial"); *Ex parte LaFlore*, 445 So.2d 932, 935 (Ala. 1983)(holding that a defendant "is constitutionally entitled to a jury trial on the issue of [his or] her mental competency to stand trial" under § 11 of the Alabama Constitution).

*parte Neal*, 551 So.2d at 934; *Ex parte LaFlore*, 445 So.2d at 935, Ala. Const. § 11. The failure of the Court to empanel a separate jury violated his right to jury trial, due process, and a fair trial under the state and federal constitutions.

**9. The court erred in admitting inaccurate and unreliable transcripts of audio and video recordings of Luong's police statements, over defense objection.**

The State introduced and provided to the jurors transcripts of Luong's three recorded police statements: 1) a January 8, 2008 statement at the Bayou La Batre Police Department (video); 2) a January 8, 2008 statement in Chief Joyner's truck on the way to the Dauphin Island Bridge (audio); and 3) a January 9, 2008 statement at the Mobile County Metro Jail (audio). SR.137-181 (State trial exhibits 13, 15, 20); R.1130, 1132. 1145-46. Apparently the transcripts were provided to the jury during deliberations. R.1490. Although the transcripts contained numerous prejudicial inaccuracies, the court admitted the transcripts over defense objection, based only on State witness Captain Darryl Wilson's assurances that they were accurate. R.1132-33. The admission of these three transcripts containing pervasive errors and omissions, and without proper authentication, violated the Alabama Rules of Evidence and Luong's constitutional rights to a fair trial, due process, counsel, a reliable sentencing

determination, to decline to testify, and against self-incrimination. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15; ALA. R. EVID. 901, 1002.

**A. The transcripts were highly inaccurate.**

**The transcripts omitted substantial dialogue.** Several of these omissions occurred at times when Luong's words would have supported the defense's theory of the case – that Luong suffered from a diminished capacity at the time of the crime. For instance, the January 8th BLBPD transcript totally omitted a segment in which Luong described his substance abuse the morning of the crime. In response to Wilson's question, "Why, why did you pick that bridge and not the bayou bridge?" the State transcript reads:

> LL: Something made me go, I don't want to do anything. I do turn around long time but something make me go, do it **(unintelligible).**
> DG:[117] So you slept okay.
> LL: Yeah.

SR.154 (emphasis added). In fact, where the transcript notes "unintelligible," Luong stated that his commission of the crime was related to his ingestion of drugs the night before:

> LL: Something make me go, I don't want to do anything. I do turn around long time but something make me go, do it. I had a lot of [drugs/dope] that morning, too.
> DG: You did?
> LL: [several unintelligible words] until about 4 o'clock [several unintelligible words].

[117]Detective Dan Gomien of the BLBPD.

DG: So you slept okay.
LL: Yeah.

State Ex. 14, at 31:35. Luong appeared to be describing his drug use on another occasion, which also was omitted in the State's transcript. Where the transcript simply notes "unintelligible," SR.153, line 555, on the video, Luong appears to say: "what had happened [several unintelligible words] buy some dope, buy some beer, that far back...." State Ex. 14, at 27:13-40.

The transcript contains other omissions of missing dialogue. *See, e.g.,* State Ex. 14 at 13:00, 15:28, 16:20, 16:30, 16:50, 20:50, 25:09, 25:16, 27:15-40; State Ex. 19, at 15:40, 21:37, 37:06, 38:30, 39:28, 42:00, 45:08.

**The transcripts often erroneously indicated that Luong was giving an affirmative response.** On multiple occasions, the transcripts noted affirmative responses of "uh-huh" when, in fact, Luong either made a mere "uh" or "hm" sound, or said nothing at all, including erroneous affirmative responses that favored the State.

For instance, Wilson asked Luong at the BLBPD, "So you speak English pretty good because all day long we've talked back and forth and we've been able to understand one another. Okay? You also speak Vietnamese well to [sic] right?", to which Luong replied - according to the transcript - "Uh Huh."

SR.142. Luong, in fact, said nothing in response. State Ex. 14, at 3:09. An affirmative response was certainly more helpful to the State, which took the position that Luong understood English in defending against his motion to suppress and in eliciting testimony of his communications with State witnesses. *See, e.g.,* R.192, 195, 202, 212, 216, 229, 236-37, 257, 265, 1073, 1078-79, 1085, 1094, 1101, 1245, 1271-72.

Similarly, in an exchange critical to the State's case, Wilson asked Luong:

> DW: You wanted to watch your wife's face after you told her that you had killed them?
> LL: Uh-huh.
> DW: And you got to see that today?
> LL: No. Still...

SR.147, lines 267-71. The transcript's affirmative "Uh-huh" is an inaccurate portrayal of Luong's actual response to Wilson's question on the video, which sounds more like an "um" or "hm." State Ex. 14, at 11:58.[118]

**The transcripts misrepresented words.** The transcripts also unfairly converted Luong's unintelligible sounds to English words and included incorrect English words when his actual words could be made out. For instance, the BLBPD

[118]The transcript also minimizes Luong's apparent protest of Wilson's "And you got to see that today" as he tries to explain that Wilson has misunderstood him. In response, Luong, in fact, said something along the lines of, "[unintelligible word or words] no, no [unintelligible words] still, same thing." State Ex. 14, at 12:02. The State relied on the transcript's account, buttressed by Wilson's testimony, that Luong did not kill himself because he wanted to see his wife's face when he broke the news to her, and that he had had a chance to do that in the jail. R.1427, 1642. *See* Point 10, *infra*.

statement transcript reads:

> DW: Why'd you throw your kids off the bridge?
> LL: Because my family they make me.

SR.145. In fact, Luong responded, "Ask my family. They know that." State Ex. 14, at 8:10. The same transcript also notes that Luong said, "Been knowing long time." SR.148, line 308. In fact, Luong said, "Been **smoking** long time." State Ex. 14, at 15:20.[119] Again, these examples are but a few of the transcripts' misrepresentations.[120]

### B The inaccurate transcripts were not properly authenticated.

To authenticate the transcripts, after defense counsel's objection, the court only required Wilson, who was present during all three statements, to testify that he had reviewed the transcripts while listening to the recordings and that they were accurate. R.1132-33. The State never identified the transcriber(s).[121] This Court has rejected that a witness other than the one who transcribed the statements can authenticate them, even when the witness observed the statement firsthand.

[119]Luong used the word "smoking" to mean "smoking crack." R.1155.
[120]While many of Luong's words presented a great transcription challenge, the transcripts' mere "inaudible" or "unintelligible" notations fail to reflect significant portions of dialogue spoken by Luong and mislead the reader into thinking only a handful of words were unintelligible. This distortion of the recordings favored the State's case, by implying that Luong had a greater understanding of English than the actual recordings illustrate.
[121]The prosecution had apparently gone through at least two versions of the transcripts. The State interrupted defense counsel's questioning of Wilson on Luong's statements, saying, "you are using the uncorrected copy." R.1170. The transcript provided to defense counsel initially had apparently been "corrected," with an account more favorable to the State. *See id.* (Luong's response in an earlier version was a question, rather than a statement). *See also* R.266.

*See Gordon v. State*, 41 So.2d 608, 609 (Ala. App. 1949)(the transcript's "correctness [must] be first established by the person who took the notes and transcribed them."). *But see Hawkins v. State*, 443 So.2d 1312, 1314 (Ala. Crim. App. 1983)(officer witness can properly authenticate transcript of recorded confession).[122] Without proper authentication, these transcripts amounted to "bolstering, by documentary evidence" of Wilson's oral account of Luong's statement. *Gordon,* 41 So.2d at 610. Because the accuracy and reliability of the transcripts were never clearly established, the court abused its discretion in allowing their admission.

The missing and inaudible sections of the transcript in particular required greater scrutiny by the trial court. At a minimum, the trial court should have reviewed the transcript independently before permitting it to go to the jury. *See, e.g., Byrd v. Bentley,* 850 So.2d 232, 236 (Ala. 2002)("prior to its being played to the jury, the trial court and attorneys listened to the tape recording and compared it to the transcript, outside the presence of the jury").

[122]Although this Court permitted an officer's authentication of a transcript in *Hawkins*, it acknowledged that the evidentiary question was governed by the best evidence rule. 443 So.2d at 1314 (quoting *Bennefield v. State*, 202 So.2d 55 (1967)("[T]he best evidence rule govern[s] the question of identifying the writing setting forth the [recorded] confession.")); *but see Withee v. State,* 728 So.2d 684, 689 (Ala. Crim. App. 1998)(apparently holding that because best evidence rule does not apply to tape recordings, it does not apply to transcripts of recordings). Under the best evidence rule, the authentication of the transcripts (writings) was improper because the recordings themselves were available, and indeed, played for the jury.

### C. The transcripts prejudiced Luong.

These problematic transcripts, full of errors, were greatly prejudicial. Though the judge instructed the jury not to rely on the transcripts over what they viewed on the video themselves, R.1130, the State emphasized repeatedly how Wilson was in a better position than them to hear Luong's words because of his access to better technology. R.1133-35. Given the enormous challenge the jurors faced in hearing and understanding Luong's actual words on the recordings, the transcripts were a powerful crutch for them to rely on in assessing Luong's statements. *See Gordon*, 41 So.2d at 610. "Undoubtedly, in the jury's mind some verity must [] have attached [to the statement]. The disadvantage thus resulting to appellant is obvious." *Id.* at 609.[123] For these reasons, the court's instructions were utterly insufficient to overcome the transcripts' inaccuracy and unreliability.

The transcripts' improper admission requires reversal. *See id.* at 610; *Robinson*, 707 F.2d at 879 (finding trial court's "decision to permit juror use of transcripts to be a manifest abuse of discretion").

## 10. The trial court committed reversible error by allowing lay witness Capt. Wilson to provide expert testimony on the meaning of Luong's words, over repeated objections.

[123] *See also U.S. v. Robinson*, 707 F.2d 872, 878 (6th Cir. 1983)("Where, as here, the tapes are partially inaudible, the juror is precluded from making an intelligent comparison.)

Over defense objection, the State's central witness, Capt. Wilson, "interpreted" for the jury two statements by Luong, and these interpretations provided critical support to the State's theory of the case. Wilson testified that, "based off my experience investigating the Vietnamese," he knew right away that when Luong said to him, "I'll –," Luong meant he wanted to see the look on his wife's face when she learned that the children were dead. R.1177; 1114. He also testified that when Luong told him later that day that he did not kill himself because he "wanted to see what [his] wife and family looked like," he knew Luong meant the same thing. R.1177.[124] The court committed reversible error in allowing Wilson to testify as an unqualified expert, on subjects not proper for expert testimony, to distort and infer meaning from Luong's words. Any interpretation of Luong's ambiguous words should have been reserved for the jury.

### A. Wilson's interpretation of Luong's words was an improper subject for opinion testimony.

Addressing the uncommunicated mental operations of a witness (Luong), Wilson's testimony was wholly inappropriate as the subject of expert or lay opinion. ALA. R. EVID. 701, 702. Alabama courts have long held that "[a] witness may not testify to the uncommunicated mental operations of another."

[124]The court overruled the defense objection on grounds that counsel had "opened it up." R.1177. This rationale was improper, as counsel had simply crossed Wilson on the varying interpretations of Luong's words. R.1171-72.

*Bishop v. State*, 690 So.2d 502, 509 (Ala. Crim. App. 1996); *Perry v. Brakefield*, 534 So.2d 602, 608 (Ala. 1988).

Further, Wilson's purported expert insight into the meaning of Luong's words failed to meet the rigorous demands of reliability and relevance required of expert testimony.[125] Wilson's testimony was also improper as a lay witness. The lay opinion rule precludes "testimony consisting of guesses, conjecture or speculation." MCELROY'S ALABAMA EVIDENCE § 127.01(4) n.4 (6th ed. 2009)*(citing Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 659 (7th Cir. 1991)(opinion must not be "flights of fancy, speculations, hunches, intuitions or rumors"). *See also* ALA. R. EVID. 602, 701. Wilson's testimony amounted to nothing more than baseless speculation. Moreover, his testimony, whether expert or lay, was improper because it invaded the province of the jury. By showing jurors the video of Luong's statement that he "wanted to see what my wife and family looked like," and providing them a transcript of the statement (albeit one with errors), R.1135-36, the State placed them in as good a position as Wilson to interpret the meaning of Luong's own words. ALA. R. EVID. 701, 704.[126]

[125]*See* ALA. R. EVID. 401, 702; *Simmons v. State*, 797 So.2d 1134, 1154 (Ala. Crim. App. 1999); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137,147-48(1999)(*Daubert's* "gatekeeping" obligation, requiring inquiry into both relevance and reliability, applies not only to "scientific" testimony, but to all expert testimony); *but cf. Barber v. State*, 952 So.2d 393, 415 (Ala. Crim. App. 2005).

[126]Even if Luong's words had been the proper subject of expert interpretation and even if the State had presented a qualified expert and somehow tied his

### B. Wilson was not qualified to offer an expert opinion as to the meaning of Luong's statements.

Even if Luong's statements had been an appropriate topic for expert interpretation, the State did not establish Wilson's expert qualifications. As a foundation for Wilson's testimony, the State asked Wilson several questions related to his exposure to the Bayou La Batre Vietnamese community and his knowledge of Asian culture generally. R.1175-77. Wilson testified that he had 18 years of experience interacting with Vietnamese people in the Bayou La Batre community, that he is "very familiar with the culture and the community," has experience "conversing with [Vietnamese people]," and had made the culture of Bayou La Batre his "specialty." R.1175. Wilson testified that he had read books about "their culture," taken and taught courses on Vietnamese gangs, arrested Asian criminals, and interacted with Asian witnesses. R.1176.

This limited and general experience hardly provided a sufficient basis for him to be considered an expert in deciphering the meaning of a specific Vietnamese defendant's broken English phrases. ALA. R. EVID. 702; *Frye*, 293 F. at 1013; *Daubert*, 509 U.S. 579. Moreover, Wilson was never formally tendered as an expert. Accordingly, it was error to

expertise to an interpretation of Luong's words, the introduction of this testimony was so highly prejudicial that it was inadmissible under ALA. R.EVID. 403 and violated Luong's constitutional rights to a fair trial, due process, and a reliable sentencing determination.

permit him to testify about conclusions - here, his interpretations of Luong's meanings - based on this purported and utterly inadequate "expertise."

### C. Wilson's interpretation was critical to the State's case.

Wilson's testimony about the meaning of Luong's words was grossly prejudicial. The prosecution relied on Wilson's interpretation in both its guilt and penalty summations to argue that Luong "wanted to see these babies' mother to see and to hear him, what happened to them, when he told her." R.1427, 1642. In its final words to the jury, the State acknowledged that this recurrent theme, which it had hammered throughout the trial, was surely stuck in their minds. R.1642. The improper admission of this highly prejudicial testimony violated Luong's rights under Ala. R. Evid. 401, 403, 602, 701, 702, and 704, and Alabama case law, as well as Luong's rights to a fair trial, counsel, due process, and a reliable sentencing determination. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15. Reversal is required.

## 11. The court committed reversible error by overruling defendant's objections to the State's introduction of lay testimony regarding a "junk science" experimental crime reenactment.

The trial court erred in allowing the State to introduce through a lay witness testimony and video evidence requiring

"scientific, technical, or other specialized knowledge" reserved for expert witnesses, over defense counsel's repeated objections. R.924-26; R.1501-06. In a vivid, purported re-enactment of the crime, at the penalty phase State witness Capt. Wilson presented a video of a "junk science" experiment in which he dropped four sandbags, representing each of the four children, from the Dauphin Island Bridge, and then offered his conclusions regarding the time, distance, and speed of the children's falls. R.1531-33; State Ex. 103. The trial court's rulings were reversible error. *See Frye*, 293 F. at 1014; *Daubert*, 509 U.S. at 594-95 (expert testimony must be reliable and relevant).[127]

### A. Wilson was impermissibly permitted to give expert scientific testimony without qualification and without showing its general acceptance and reliability.

The State never tendered Wilson as an expert, nor offered any evidence that he was qualified as an expert by knowledge, skill, experience, training or education. *See* ALA. R. EVID. 701, 702. Yet the nature of his testimony and the video of his

[127] *See also Ex parte Phillips*, 962 So.2d 159, 162 (Ala. 2006)(reversible error in failure to lay reliability and relevance predicate for scientific testimony); *Ex parte Malone*, 575 So.2d 106, 107 (Ala. 1990)(despite overwhelming evidence of guilt, reversible error in State's failure to lay a proper predicate "due to the scientific nature of the test and the disproportionate impact it might have had on the jury's decision-making process"). The State's argument at trial that the video was admissible so long as it was "properly authenticated and identified," R.1505, was misplaced, as established herein.

junk science experiment undoubtedly fit the bill of expert scientific evidence.

Wilson explained that in carrying out his experiment he "took the weights [of each child] at the time of the autopsy," "made sandbags to the approximate weights," "went to the spot on the top of Dauphin Island Bridge," "took a standard stopwatch," dropped each bag, timed its fall, and "stopped it when it hit the water." R.1532. Based on this experiment and his understanding of physics principles, he offered his conclusions regarding the time and speed of the children's falls. R.1531-33.

Defense counsel objected to this evidence, arguing Wilson's re-enactment was "[i]n the nature of a scientific experiment," and not "something just anybody could do..., like measuring the length of this table." R.1506. The court overruled the objection. R.1505-1506. Because Wilson's opinion testimony and junk science video required scientific, technical, or other specialized knowledge, it could have been presented only by a qualified expert under Alabama law. The court abused its discretion in admitting this evidence.

Further, as a result of his lack of any expertise, Wilson utilized inaccurate physics principles in calculating the time and speed of the children's falls. Under Alabama law, "a

person who offers an opinion as a scientific expert must prove that he relied on scientific principles, methods, or procedures that have gained general acceptance in the field in which the expert is testifying." *Slay v. Keller Indus., Inc.*, 823 So.2d 623, 626 (Ala. 2001) (citing *Frye*, 293 F. at 1014).

Wilson's testimony and video flunked this test. He testified that "objects fall at the same rate of speed, regardless of the weight." R.1532. In fact, objects of different weights do not necessarily fall at the same rate of speed in the air; they only fall at the same rate of speed in a **vacuum**. Raymond A. Serway and John W. Jewett, Jr., PRINCIPLES OF PHYSICS: A CALCULUS-BASED TEXT 60-61 (Harcourt College Publishers 2002).[128] To determine the speed of the sandbags' falls, Wilson used a "conversion calculator" that he found online. R.1532. He inputted only his assumption of the distance from the bridge to the water and an average time he calculated for the four falls of the sandbags, *id.*, without considering the many other factors affecting the speed of a fall. *See* SERWAY & JEWETT, at 60-62, 158-59 (air resistance, mass of object, shape of object, force behind throw, and other conditions could all affect the speed of a falling object).

Based on his inaccurate calculations, Wilson proffered an

[128] The trial court had a similar misunderstanding, believing all objects to fall at the same speed in air (rather than the same **rate of speed** in a **vacuum**). R.1502-03.

expert opinion that the children fell at a speed of about 25 mph. R.1533. This calculation assumed that the children's speed would have been the same as the sandbag of equal weight. This assumption was patently false. As noted above, many variables not considered by Wilson affect the speed of the fall, including the shape and mass of the object. *See* SERWAY & JEWETT, at 60-62, 158-59.

### B. The State failed to establish an adequate foundation for the admission of Wilson's bag drop video and testimony, which were unreliable, irrelevant and unduly prejudicial.

The court also committed reversible error by admitting Wilson's bag drop video and testimony because the State failed to establish an adequate foundation for their admission and because they were unreliable, irrelevant and unduly prejudicial.

Defense counsel unsuccessfully argued that Wilson's testimony and the video should not be admitted given the likelihood that the weather, wind, and tide conditions were different on the day of the experiment from the day of the crime, in addition to "so many other variables" which would impact the fall. R.1501-02. The State failed to establish an adequate (or, indeed, any) foundation demonstrating that the bag drop experiment and the offenses were sufficiently similar to permit its admission and Wilson's testimony about it. *See*

*Woodall v. State*, 730 So.2d 627, 646 (Ala. Crim. App. 1997)(video must represent accurate portrayal of scene, and any differences disclosed to the jury). The time it took the children to reach the water was dependent upon the individual speeds at which they traveled and the distance they traveled. The distance they traveled was dependent upon the water levels (i.e., tide). Their speeds were dependent upon the weather conditions (i.e., air resistance); the force of the throws; and their shape and mass, among other factors. SERWAY & JEWETT, at 60-62, 158-59. The State offered no evidence that the weather and water conditions were substantially the same on the day of the experiment as the day of the crime, or how they differed. Pretrial, the State casually argued to the court, without basis, that the "weather conditions were not substantially different," that "[t]here was not a strong wind one day or the other day...." R.1504. In fact, in the culpability phase Paul Stewart of the Sheriff's Flotilla described unusual weather conditions in the days surrounding the crime, including heavy fog, rough winds, very cold temperatures, and hard currents. *See* R.1302, 1305, 1306, 1309-10, 1315. The State also presented no evidence establishing that the sandbags had the same mass and shape or were thrown with the same force as the children.

Furthermore, Wilson never explained how he reached the conclusion that the distance of the children's fall was 108 feet. *Cf.* C.578 (news report indicating height of 80 feet).

The State argued, without proof, that the distance of the fall was unimportant, as it would only change the time of the fall "by a tenth or a hundredth of a second that a stopwatch couldn't even get anyway." R.1504. In fact, the distance from the bridge to the water was a critical component even in Wilson's rudimentary calculation. R.1533.

The admission of Wilson's bag drop video and testimony was reversible error because the State failed to establish an adequate foundation and because they were unreliable, irrelevant under Rule 401 of the Alabama Rules of Evidence, and unduly prejudicial under Rule 403.[129]

**C. Wilson's testimony and video prejudiced Luong.**

The court allowed the prosecution to present Wilson's junk science reenactment of the crime with the authoritative imprimatur of a law enforcement officer. This reenactment, with its "big visual impact," as defense counsel noted, R.925, carried an extreme risk of prejudice to Luong. As McCormick has observed about reconstructions of events on video, "[t]he

[129]Even if the State had presented a qualified expert who had conducted a scientifically valid, reliable experiment, the introduction of the sandbag video was so highly prejudicial, it was inadmissible under Ala. R. Evid. 403 and violated Luong's constitutional rights to a fair trial, due process, and reliable sentencing determination.

extreme vividness and verisimilitude of pictorial evidence is a two-edged sword. For not only is the danger that the jury may confuse art with reality particularly great, but the impressions generated by the evidence may prove particularly difficult to limit....” John W. Strong, MCCORMICK ON EVIDENCE 19-20, § 214 (5th ed. 1999). Watching the frightening descent of four sandbags thrown from the very bridge where the crime occurred undeniably left an indelible, highly prejudicial (albeit scientifically bogus), image in the minds of the jury and court.

The State placed great reliance on the video. R.1531-35. The State submitted the video to show that the distance of the fall, the time of the fall, and the speed at which the children hit the water - a purported 25 miles per hour - rendered the crime especially heinous, atrocious, or cruel. R.926, 1504. The State extensively referenced this evidence in its penalty opening and closing arguments to the jury, and in support of a death sentence to the court. R.1511-12; R.1624-26; R.1671. The trial court, too, relied on the testimony in finding HAC and sentencing Luong to death. C.884.

The improper admission of Wilson’s highly prejudicial video and testimony violated Luong’s rights under Ala. R.Evid. 401, 403, 701 and 702 and Alabama case law as well as Luong’s

constitutional rights to a fair trial, due process, confrontation, counsel and a reliable sentencing determination. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15. His death sentence must be reversed.

**12. Luong's constitutional rights were violated because the trial judge publicly announced Luong's desire to plead guilty and receive the death penalty and because it allowed jurors to serve who had learned these facts.**

Despite defense counsel's requests and objections, the trial court impermissibly disclosed to the public statements by Luong that he wanted to plead guilty and receive the death penalty. R.147-48, 312, 317-18. As a result, the jury pool was repeatedly exposed to these prejudicial statements by Luong. The court compounded these errors by failing to remove jurors who were exposed to these statements and by failing to allow defense counsel an opportunity to question them regarding this exposure. *See also* Point 2(A). Ultimately, at least six of the 12 jurors seated in Luong's case were aware of Luong's withdrawn guilty plea and his desire for the death penalty.[130] The court's rulings and actions separately and collectively violated Luong's constitutional rights to a fair trial, to an

[130]The jurors were asked in the questionnaire, with four narrow lines of space provided to answer, "what did you hear [concerning this case]?". In this space six jurors specifically identified hearing about the guilty plea. SR.202, 960, 1136, 1147, 1718, 1828. Other jurors gave answers such as, "That he threw his kids off the DI Bridge and that he confessed to it," SR.367, "Its on the news every night," SR.520, and "I heard that the young man was arrested for the murder of his children," SR.751, "I heard people talking about it," SR.927. It is unclear from these answers whether these jurors were aware of the withdrawn guilty plea.

impartial jury, to effective assistance of counsel, to be free from self-incrimination, and to due process. U.S. Const. amends. VI, VIII, XIV; Ala. Const. §§ 6, 11, 13, 15.

Pretrial, at the request of the State, the court ordered a mental examination of Luong's competency to stand trial and his mental condition at the time of the offense. C.206-07. In the resulting report, which the State introduced at a pretrial hearing, Luong was quoted as saying that he wanted to plead guilty and receive a death sentence. R.141. On November 13, 2008, the defense objected to any public reference to the report and asked that it be kept confidential to protect Luong's right to a fair jury trial. R.141-42. The trial court agreed to seal the mental examination report, R.142, but then referred to its contents in open court, with the media present, including the facts that Luong had told the doctor that he wanted to change his plea to guilty and that he wanted a death sentence. R.147-48. This was a clear violation of Luong's statutory and constitutional rights to be free from self-incrimination, to effective assistance of counsel, to due process, and to a fair trial. *Cf.* ALA. R. CRIM. P. 11.2(b)(2)[131]; *Estelle v. Smith*, 451 U.S. 454, 463 (1981).

[131]*See also Ex parte Brownfield,* No. 1070255, 2009 WL 4980354, *3 (Ala. Dec. 23, 2009)("The plain language of Rule 11.2(b)(2) unequivocally forbids the admission of statements made by a defendant or evidence derived from the defendant's statements during a pretrial mental examination unless the defendant testifies about his or her mental condition.")

Luong was severely prejudiced by this error. As the defense feared, the press reported these confidential statements. *See* C.709, *Father Reconsiders Guilty Plea, Execution Wish*, MOBILE PRESS-REGISTER, Nov. 14, 2008. On March 5, 2009, less than a week before trial, and contrary to defense counsel's direct request, the trial judge exposed potential jurors to Luong's guilty plea. Defense counsel had asked the court to conduct the guilty plea proceedings out of the presence of the media. R.317-18.[132] The court denied the request. *Id.* The following week at trial, after Luong had withdrawn his guilty plea, defense counsel sought to conduct individual voir dire regarding potential jurors' exposure to the fact that Luong had previously pled guilty. R.586-88. The judge denied this voir dire. R.588-92. Again, at least six jurors who ultimately served in the case were exposed to the withdrawn guilty plea. *See supra* n. 34, 130.

It was error for the trial judge to permit jurors to serve on Luong's case who had been exposed to the withdrawn guilty plea. *See Miracle v. Com.*, 646 S.W.2d 720, 720 (Ky. 1983)(permitting jury to be drawn from panel comprising potential jurors who "were present on a previous occasion when

[132]Defense counsel obviously anticipated that Luong may seek to withdraw his guilty plea. At the time of his guilty plea, the parties and the trial court were aware that Luong had previously vacillated about his desire to plead guilty. *See* R.147-51 (discussing Luong's changing opinions regarding the guilty plea in November, 2008); R.309-310, 315 (counsel describing Luong's confusion and "waffling" about possible guilty plea).

the [defendant] entered a guilty plea [that was] later withdrawn" was reversible error).[133] Reversal is required. *Id.*

**13. The trial court erred in denying defense counsel's motion to suppress Luong's police statements.**

The trial court denied defense counsel's motion to suppress Luong's confession and other statements. C.204-05; R.273. The State introduced these statements at trial, including three recorded statements.[134] The court erred in denying the motion for four reasons: 1) his *Miranda* waivers were not knowing, intelligent, and voluntary; 2) his statements were not voluntary; 3) law enforcement failed to scrupulously honor his right to remain silent; and 4) law enforcement failed to clarify his request for an attorney. The admission of Luong's statements thus violated his rights against self-incrimination, to counsel, to a fair trial, and to due process as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, §§ 6, 13, 15

[133]The law has long recognized that is it prejudicial error for the trial court or prosecution to inform the jury that the defendant had previously attempted to plead guilty. *See Kercheval v. United States*, 274 U.S. 220, 224 (1927) (trial court committed reversible error by permitting the State to use evidence of the withdrawn guilty plea as evidence against the defendant); *Jamial v. United States*, (5th Cir. 1930)(prejudicial error for the trial court to inform jury of the defendant's previous guilty plea). The Rules of Evidence prohibit the use of withdrawn guilty pleas in any criminal proceeding. *See* ALA. R. EVID. 410.

[134]Though the statements challenged here were custodial, it is not relevant to this Court's analysis. All of these statements occurred after Luong had been advised his *Miranda* rights, on the evening of January 7, 2008. R.193. "[O]nce a police officer informs a person of his or her rights under *Miranda*, the police must honor that person's exercise of those rights even if the individual is not in custody." *Ex parte Comer,* 591 So.2d 13, 15-16 (Ala. 1991).

of the Alabama Constitution, and Alabama law.[135]

### A. Luong's waiver of *Miranda* rights was not knowing, voluntary, and intelligent.

Some time after 10PM on January 7, 2008, the first time Luong came into contact with law enforcement concerning his missing children, Luong purportedly signed a *Miranda* warnings form.[136] R.193. The next morning, after being at the station for several hours, Luong signed a *Miranda* form with Wilson before he began interrogating him. R.239; C.335. Neither waiver was audio or video-recorded. *See* R.1167 (later truck interview was first recorded statement).

Under the totality of the circumstances, including Luong's limited English proficiency, education level, mental illness, and substance abuse, the prosecution failed to meet its "heavy burden" demonstrating that Luong's purported *Miranda* waivers were knowing, voluntary, and intelligent.[137] *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Arizona v. Fulminante*, 499 U.S. 279, 285-88 (1991).

---

[135]"In reviewing a trial court's ruling on a motion to suppress, this Court may consider the evidence adduced both at the suppression hearing and at the trial." *Smith v. State,* 797 So.2d 503, 526 (Ala. Crim. App. 2000)(*quoting Henry v. State*, 468 So.2d 896, 899 (Ala. Crim. App. 1984)). The suppression hearing is contained in the record at R.188-275.

[136]This form was never introduced in evidence.

[137]None of Luong's alleged waivers were recorded. On the truck ride to the bridge, Luong does not respond to Wilson's initial question about the "rights form." SR.137. He later acknowledges only that he knows of the form he signed earlier. *Id.* Contrary to Wilson's testimony at the suppression hearing, R.250, Luong did not acknowledge that he understood his *Miranda* rights during this conversation. SR.137. During the interrogation later that evening, Luong acknowledges that his signature is on the form and that he "did help" Wilson with it. SR.141.

A defendant's lack of proficiency in English can render a *Miranda* waiver invalid. *See United States v. Guay*, 108 F.3d 545, 549 (4th Cir. 1997); *United States v. Garibay*, 143 F.3d 534 (9th Cir. 1998). The court provided Luong an interpreter for court proceedings and to communicate with counsel due to his limited understanding of English, over the State's objection. C.2, 76-77. Beyond simple one-word answers in English, Luong communicated to the court only by speaking Vietnamese and using an interpreter. *See, e.g.*, R.359. The State's mental health expert used an interpreter in his second meeting with Luong, and noted Luong's limited communication skills in his report. C.211, 215. A jail doctor also noted Luong's limitations in expressing himself. SR2. 273. There was no evidence in the record that Luong reads or writes in English.[138] His wife testified that he spoke only broken English. R.1029.

Wilson testified that he asked Luong several initial questions before beginning any questioning to ensure that Luong "could understand me and understand the questions that I was asking him." R.1101, 236. One of Luong's answers should have signaled to him from the start that he had trouble with English (or was extremely disoriented). When asked his age, Luong responded, "34." R.236. In fact, Luong was 37. C.2.

[138]Luong's letter to the court was written in Vietnamese. C.784.

Luong's lack of understanding was made clear during his final police statement, which also happened to be the only recorded conversation regarding his understanding of *Miranda* rights. At the start, Wilson reviewed the rights and asked Luong, "Do you understand that?" SR.160. Luong replied, "**A little bit**." *Id.* (emphasis added). Wilson continued:

> DW: Do you understand that you have the right to have an attorney here?
> LL: Uh.
> DW: Just like last night.
> LL: **Vietnamese. They will give me Vietnamese attorney?**

*Id.* (emphasis added). Luong's question about whether he would get a Vietnamese attorney illustrated that he, indeed, only understood his rights "a little bit."

The statements themselves also establish Luong's limited English proficiency. Wilson and other interrogators had to rephrase many questions because Luong did not understand them. *See, e.g.,* SR.145, lines 189-192 (did not understand that "her" meant his wife, though they had just been talking about her); *id.*, lines 207-212 (could not confirm what kind of dope he smoked with Wilson); SR.137, lines 33-35 (does not understand question "Was she with you?" though asked two times). Even then, his answers were often unresponsive.

Luong's education was extremely limited. *See Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *Withrow v. Williams*, 507

U.S. 680, 693-94 (1993)(relevant circumstances include defendant's education); *Garibay*, 143 F.3d at 536. *See* R.1571-72.

Luong also suffered from major depressive disorder, and chronic cocaine addiction. R.368, 1579; C.213. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986)(mental illness is a "significant factor in the 'voluntariness' calculus"); *Withrow*, 507 U.S. at 693-94 (relevant circumstances include defendant's mental health). The State psychologist also noted limitations with regard to Luong's cultural and environmental experience. C.213. Further, Luong had limited exposure to the criminal justice system, with one prior conviction for drug use over 10 years earlier. R.1694.

In addition, during his interrogations, Luong was tired and emotional. R.1162, SR.139, line 101, SR.166. *See Mincey v. Arizona*, 437 U.S. 385, 398-399 (1978)(relevant circumstances include defendant's mental status). Luong had stayed out partying and using crack cocaine until the early morning hours of January 7th. SR.168. Luong explained in his final police statement that he had confessed the day before because of the officers' persistent questioning, and their refusal to let him look for his children on his own. *See* SR 167. He explained that he told them what they wanted to hear. *See* SR.168, 171.

The totality of these circumstances rendered Luong's *Miranda* waivers invalid.

**B. Luong's statements were not voluntary.**

"[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession...." *Jackson v. Denno*, 378 U.S. 368, 376 (1964). The prosecution bears the burden to establish by a preponderance of the evidence that the defendant's will was not overborne by law enforcement, but that he made an independent and informed choice of his own free will. *See Mincey*, 437 U.S. at 398, 401; *Jackson v. State*, 562 So.2d 1373, 1380 (Ala. Crim. App. 1990). As with *Miranda* waivers, "courts look to the totality of circumstances to determine whether a confession was voluntary." *Withrow*, 507 U.S. at 693. Those circumstances include the defendant's education, physical condition, substance abuse, and mental health. *Id.* Luong's confessions were involuntary due to the same totality of the circumstances that rendered his *Miranda* waivers invalid. *See supra,* subsection A. The circumstances demonstrated that Luong's will was overborne by the actions of law enforcement.

**C. Law enforcement failed to scrupulously honor Luong's invocations of his right to cut off questioning.**

"Included in the right to remain silent is a right to cut off questioning." *Gamble v. State*, 791 So.2d 409, 427-28 (Ala. Crim. App. 2000)(*citing Miranda*, 384 U.S. at 474). "[A] suspect invokes his privilege against self-incrimination...[by] asking that an ongoing interrogation be terminated."). *Campaneria v. Reid*, 891 F.2d 1014, 1021 (2nd Cir. 1989)(citing *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975)).

Both before he left with Wilson on the trip to Biloxi and during the trip, Luong requested to be released from police custody. R.243, 244. Rather than scrupulously honoring Luong's invocations, Wilson both times refused to allow him to leave police custody. R.243, 245. The court erred in failing to suppress all of Luong's statements subsequent to these two invocations, including the three recorded statements.

**D. Law enforcement failed to honor Luong's request for an attorney.**

As discussed above, when Wilson asked Luong if he understood his right to counsel during his final police statement, Luong replied, "Vietnamese. They will give me Vietnamese attorney?" SR.160. Luong's request should have been recognized as a pre-waiver ambiguous invocation of his right to counsel, and law enforcement should have clarified his request. *See Davis v. United States*, 512 U.S. 452 (1994);

*State v. Collins*, 937 So.2d 86, 93 (Ala. Crim. App. 2005). Instead, Wilson treated Luong's question to mean that he wanted to know whether he would get a Vietnamese attorney at trial, but he failed to clarify this with Luong. *See* SR.160.

**Conclusion.** For these reasons, Luong's statements should have been suppressed. The State considered Luong's confession to be the "most convincing evidence of Luong's guilt." SR3.31 (findings of fact in State's proposed sentencing order). The improper admission of his statements at trial violated his rights against self-incrimination and to a fair trial, counsel and due process, and requires reversal. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15.

**14. The trial court's guilt-innocence phase instructions violated Luong's rights.**

The court gave a number of culpability phase instructions that violated Luong's rights under Alabama law and constitutional rights to a fair jury trial, to due process, to be convicted only upon proof beyond a reasonable doubt, and to be free of cruel and unusual punishment.[139] *See* U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 11, 13, 15. These instructions prejudiced Luong's substantial rights, and are plain error requiring reversal. ALA. R.APP. P. 45A.

**Intoxication instructions.** The trial court's instructions

[139] The trial court referenced these instructions during his sentencing-phase charge. R.1645.

regarding voluntary intoxication were in contravention of Alabama law. Alabama Code § 13A-3-2 could not be clearer. With only one exception, intoxication is not a defense to a criminal charge but evidence of intoxication is admissible "whenever it is relevant to negate an element of the offense charged." § 13A-3-2(a). The one exception is that involuntary intoxication is a defense to prosecution if and only if "the actor lacks capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." § 13A-3-2(c). Section 13A-3-2, therefore, imposes no requirement that evidence of intoxication admitted to negate an element of the offense charged must show that the "the actor lacks capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." That requirement concerns only the defense of involuntary intoxication.

In its charge to the jury, the trial court committed plain error by conflating these two rules. The court's charge instructed the jury that in order to find that the defendant's intoxication negated his intent the jury had to find he was insane. R.1460-62. That charge was contrary to the plain meaning of ALA. CODE § 13A-3-2. *But see Ex parte Bankhead*, 585 So.2d 112, 120-21 (Ala. 1991).

**Instructions on witness credibility**. The trial judge instructed the jury as follows:

> It is your duty to attempt to reconcile the testimony of all witnesses so as to make them all speak the truth if this can be reasonably done. If you cannot reasonably reconcile all of the testimony, then it's your duty to consider the testimony with a view of determining what the truth is.

R.1453. The court also charged the jury: "if you find a conflict in the evidence, you may look to the witness' means of knowledge and opportunities of that witness for observing and knowing the facts that they testified about in determining where you find the truth." R.1455.

These instructions "impermissibly condition[ed] the jury's right to disbelieve...uncontradicted testimony" and "interfere[d] with the common-sense factfinding process by which jurors labor toward verdicts...." *U.S. v. Holland*, 526 F.2d 284, 285-86 (5th Cir. 1976), *modified on rh'g*, 537 F.2d 821 (5th Cir. 1976); *see also Ex parte Brown*, 581 So.2d 436, 437 (Ala. 1991).

Moreover, these instructions both unconstitutionally reduced the State's burden of proof and shifted the burden of proof to the defense. *See In re Winship*, 397 U.S. 358, 363-64 (1970), *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975). They reduced the State's burden of proof by instructing the jury it

should find the State's witnesses truthful merely if their testimony could be "reconcile[d]." They shifted the burden to the defense by instructing only if the jury found "a conflict in the evidence" should it "look to the witness' means of knowledge and opportunities of that witness for observing and knowing the facts that they testified about in determining where you find the truth." R.1455.

The court's instruction that "[i]f you cannot reasonably reconcile all of the testimony, then it's your duty to consider the testimony with a view of determining what the truth is," R.1453, also shifted the burden of proof from the State to the defense. *Mullaney*, 421 U.S. at 701. It made the jury's finding that testimonies were irreconcilable a condition precedent to the jury determining what the truth is. By conditioning the jury's inherent ability to determine what the truth is on the jury's inability to "reconcile the testimony of all of the witnesses," the instruction unconstitutionally shifted the burden from the State to prove its witnesses truthful to Luong to show that the State's testimonies could not be reconciled (and therefore not believed).

Finally, by invading the province of the jury to decide the facts, *Ex parte Brown*, 581 So.2d at 437, the instructions

violated Luong's constitutional right to trial by jury. *Sullivan*, 508 U.S. at 278.

**Reasonable doubt instructions.** The trial court gave unconstitutional reasonable doubt instructions that reduced the State's degree of proof below that required by the Due Process Clause, i.e., proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged. *In re Winship*, 397 U.S. 358 (1970). *See also Cage v. Louisiana*, 498 U.S. 39, 41 (1990)(trial court's charge unconstitutionally reduced the state's burden of proof). The court told the jury:

> [A]fter considering all of the evidence in this case, you ask yourself the question 'Is Lam Luong guilty?' and if the answer that freely and naturally flows back to you is 'I doubt that he is' and if that doubt is based on evidence that has come before you or the lack of it, then the law says that that's the kind of doubt that would entitle a person to a finding of not guilty.

R.1464-65. This instruction substantially reduced the State's burden by suggesting that the defendant was "entitled" to an acquittal only if the jurors' decision that there was a reasonable doubt "freely and naturally flows back to you." The Constitution does not permit a finding of reasonable doubt to be limited to those doubts that "freely and naturally flow back" to jurors.

The court also erroneously instructed the jury that "the

phrase 'beyond a reasonable doubt' is somewhat a subjective term." R.1463. In fact, "beyond a reasonable doubt" is an objective legal standard required by the U.S. Constitution and jurors are not free to construe it according to their own subjective understandings. This instruction, too, therefore, violated Luong's due process rights.

**Circumstantial evidence instruction.** The trial court gave an incomplete and hence erroneous instruction of circumstantial evidence. The court charged the jury: "Circumstantial evidence is entitled to the same weight as direct evidence, provided it points to the guilt of the accused. Circumstantial evidence alone may be sufficient to prove Lam Luong's commission of or participation in the crime as long as it is so cogent as to exclude every reasonable hypothesis except that of his guilt." R.1457. The court, however, failed to instruct the jury that circumstantial evidence is also entitled to the same weight as direct evidence when it points to the defendant's innocence. The court also failed to instruct the jury that circumstantial evidence "alone may be sufficient" to establish a reasonable doubt as to Luong's guilt. The trial court's one-sided instruction on circumstantial evidence violated Luong's rights to a fair jury trial, to due process of law, to be convicted

only upon proof beyond a reasonable doubt, and to be free of cruel and unusual punishment. *See* U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 11, 13, 15.

**Instructions on intent.** The court's jury charge unconstitutionally misstated the intent element of Alabama law regarding the offense of murder. Section 13A-6-2(a)(1) of the Alabama Code provides, in pertinent part, that "[a] person commits the crime of murder if ... **[w]ith intent to cause the death of another person**, he or she causes the death of that person...." (emphasis added). In other words, the State has the burden of proving beyond a reasonable doubt that the defendant **intended to cause the death** of another person, not merely that the defendant intended the actions that caused the death of another person. In a number of places, the trial court's charge stated this law incorrectly. *See* R.1459.[140] Accordingly, reversal is required.

**15. Errors in the court's sentencing order mandate relief.**

Numerous errors in the trial court's sentencing order, adopted nearly verbatim from the State's proposed order, constituted plain error, ALA. R.APP. P. 45A, and, individually and cumulatively, violated Luong's rights under ALA. CODE § 13A-5-47, and under both the federal and state Constitutions,

[140] *But see* R.1469; 1474-75.

including his rights to a fair trial, due process of law, and a reliable sentencing determination. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15. *See Wimberly v. State*, 759 So.2d 568, 573 (Ala. Crim. App. 1999). These errors require reversal. Alternatively, this Court should remand to the trial court to address these errors.

### A. The court relied upon facts without evidentiary support in the record.

In sentencing Luong to death, the trial court found and relied upon facts not in evidence in violation of his rights under the Eighth and Fourteenth Amendments.[141]

In finding the "especially heinous, atrocious, or cruel" aggravating circumstance, the court found that after being thrown into the water the children were probably left "gasping for breath for an unspecified period of time while the[ir] lungs fill[ed] with water." C.884; R.1691. The court also found that the children "did not die quickly." *Id.* No evidence supported either finding. Medical examiner Dr. Kelly never offered an opinion as to how long the children lived, if any time at all, or whether they remained conscious after impact. *See* R.1374-95.

In rejecting the statutory mitigating circumstances that

[141]*See Gardner v. Florida*, 430 U.S. 349, 362 (1977)(defendant has due process right to confront and contest information used as a basis for a death sentence); *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994)(same); *Sumner v. Shuman*, 483 U.S. 66, 72 (1987).

Luong was suffering from an extreme mental or emotional disturbance and/or diminished capacity at the time of the crime, the court erroneously found that Luong "wait[ed] for cars to pass before throwing a child over." C.887. *See also* C.888 (referencing Luong's actions as reason to reject the diminished capacity mitigating circumstance). Although Wilson testified that Luong made this assertion in his police statement, R.1124-25, the transcript of the statement reveals that he did not. Rather, Luong said that he did not pay attention to traffic on the bridge; when asked why it took "a little while" to throw his children over, Luong replied "[b]ecause of my kids." C.343.

The court also erroneously found that Luong "wouldn't work" when he was in Georgia with his family. C.878, R.1683. In fact, Kieu Phan testified that Luong worked two jobs in Georgia during the nearly two years they were there: first washing cars, then cooking in a restaurant. R.1028.

In its order, the court explicitly stated that it "considered all the evidence...in the pre-sentence report." C.877. That report contained at least one significant error, claiming Luong had told Wilson that "his children were happy now." C.870. Luong said nothing of the sort. *See* C.336-39.

**B. The court relied upon a non-existent expert report.**

Defense expert Dr. Leung testified in the sentencing phase that, as a result of Luong's major depressive disorder and withdrawal from crack cocaine and alcohol, he was under an "extreme mental or emotional disturbance" at the time of the offense. R.158. In rejecting this mitigating circumstance entirely,[142] the trial court noted that it "carefully reviewed and weighed" Leung's report. C.887. However, following an order from this Court to supplement the record with the report, the court disclosed in a supplemental order that, in fact, no report by Leung exists. SR3. 23.

The court's reliance upon an "erroneous factual predicate," *Gardner,* 430 U.S. at 362, to reject completely a powerful mitigating circumstance violated Luong's statutory and constitutional rights. *Simmons*, 512 U.S. at 161; ALA. CODE § 13A-5-47(e); ALA. CODE § 13A-5-51(2).

### C. The trial court erred in refusing to consider mitigation if it did not meet the insanity standard.

The trial court refused to consider highly mitigating circumstances because they did not meet the burden of legal insanity, thus violating Luong's statutory and constitutional rights.[143] Ala. Const. §§ 6, 13, 15; U.S. Const. amends. V, VI,

[142]Even the State acknowledged this mitigator was due "some weight." R.1672.
[143]Luong's sanity at the time of the crime was irrelevant in his capital sentencing phase. *See Ivery v. State*, 686 So.2d 495, 503 (Ala. Crim. App. 1996)(burden for diminished capacity mitigation in sentencing is "substantially less" than burden for insanity in guilt); *Hardwick v. Crosby,* 320 F.3d 1127, 1185 n.207 (11th Cir. 2003)("trial judge's reference to [defendant's] sanity at the time of the crime...is inappropriate legally in penalty-phase analysis"). Considering mitigation only when it amounts to a

VIII, XIV.

**Diminished capacity.** In rejecting the statutory mitigating circumstance that Luong was substantially impaired in his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, the court addressed a different question, finding that "the Defendant could appreciate the criminality of his conduct and conform his conduct to the requirements of law." C.889. This mitigating circumstance asks whether the defendant was **substantially impaired** in his ability to appreciate the criminality of his conduct, not whether or not he could appreciate the criminality of his conduct and conform his conduct to the requirements of the law - the standard of the insanity defense. *Compare* ALA. CODE § 13A-5-51(6) *with* ALA. CODE § 13A-3-1(a). The court's analysis was error.

**Extreme Mental or Emotional Disturbance.** Similarly, in concluding that the mitigating circumstance of extreme mental or emotional disturbance contained in ALA. CODE § 13A-5-51(2) "does not exist," C.888, the court "balanced" Luong's "troubled history and possible psychological disorder **...against the conclusions the Defendant could appreciate the wrongfulness of his acts....**" which is the definition of legal

legal excuse from criminal liability is constitutional error. *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982)(*citing Lockett v. Ohio*, 438 U.S. 586 (1978)).

sanity. C.887, R.1695 (emphasis added). Again, the court's analysis was error.

**Drug Abuse**. Although the court found there was "no dispute" that Luong had abused crack cocaine for years, C.891, it improperly assigned very little weight to his severe drug addiction because it "did not affect his ability to know right from wrong, the nature and quality or wrongfulness of his actions," which again is the definition of legal sanity. C.891; R.1701. Thus, and again, the trial court erred in assessing the strength of this mitigating circumstance against the insanity defense.

### D. Improper Treatment of Diminished Capacity Mitigating Circumstance

In addition to its erroneous conflation of diminished capacity and insanity, the trial court's rejection of the diminished capacity statutory mitigating circumstance was analytically flawed for other reasons.

#### *1. The court erred by rejecting this mitigating circumstance because there was no "compelling evidence" that Luong was under the influence of drugs or alcohol at the time of the offense.*

Dr. Leung testified that Luong suffered from a "very severe clinical depression" which was "complicated by his drug problems." R.1587. Leung concluded that Luong's clinical depressive disorder, paired with his withdrawal from crack

cocaine immediately preceding the crime, would have substantially impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. R.1588-89. In rejecting the diminished capacity mitigator, the court found that there was "no compelling evidence" that Luong was under the influence of drugs or alcohol at the time of the crime. C.888. This finding demonstrated a fundamental misunderstanding of Leung's testimony and, thus, was reversible error.[144] Additionally, neither the Eighth Amendment nor Alabama law require that a defendant produce "compelling evidence" before a mitigating circumstance may be considered. *See* ALA. CODE § 13A-5-45(g); *Eddings*, 455 U.S. at 113-14. This court's analysis, and imposition of a higher burden, was error.

*2. The court improperly used the jury's guilty verdict as evidence against diminished capacity.*

The court also erred in relying upon the jury's guilty verdict as proof that the jury rejected the mitigating circumstance of diminished capacity. C.888-89. *See Smith v. State*, No. CR-97-1258, 2000 WL 1868419, at *25 (Ala. Crim. App. Dec. 22, 2000). This reliance was improper for a number of reasons. First, defense counsel did not -- and could not -- present evidence of Luong's diminished capacity until the

[144] *Kuenzel v. State*, 577 So.2d 474, 528 (Ala. Crim. App. 1990)(due process is violated when trial court relies on materially false information in sentencing).

sentencing phase, when it did so through Dr. Leung. R.1588-89. Second, the court's intoxication jury instruction erroneously required intoxication to result in temporary insanity and the defendant may not be held to the insanity standard in establishing this mitigating circumstance, as explained *supra*. *See also* Point 14, *supra*. Therefore, the jury's rejection of intoxication was not probative regarding this mitigating circumstance. Third, the guilt-phase issue of whether a defendant's intoxication negated the defendant's intent to commit the crime is entirely different from the issue of whether intoxication establishes the diminished capacity mitigator. Fourth, the defendant's burden of proof regarding intoxication evidence at the guilt phase, where he must prove his intoxication rendered him incapable of forming the intent to kill, is vastly different at penalty phase, when he must simply interject a mitigating circumstance to require the State to disprove it by a preponderance of the evidence. *Ex parte Bankhead*, 585 So.2d 112, 121 (Ala. 1991); ALA. CODE §§ 13A-3-2(a), 13A-5-45(g). Thus, the jury's guilty verdict had no probative value regarding the diminished capacity mitigating circumstance. The court's reliance on it was error.

*3. The court ignored critical evidence in rejecting the diminished capacity mitigator.*

The court also erred by ignoring critical evidence in

asserting that "there was **no evidence** to indicate that the Defendant could not appreciate the criminality of his conduct or conform his conduct to the requirements of law." C.888 (emphasis added). In fact, as noted above, Dr. Leung testified that Luong's Major Depressive Disorder, paired with his chronic drug abuse, would have substantially impaired his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. R.1588-89.

### E. The court erred in finding that extreme mental or emotional disturbance did not exist despite the uncontradicted evidence to the contrary.

The trial court further erred by concluding that the statutory mitigating circumstance of extreme mental or emotional disturbance "does not exist." C.888. Dr. Leung provided uncontradicted testimony that Luong, by virtue of his major depressive disorder and severe addiction to crack cocaine, and staying out until the early hours of the morning on the day of the crime, was suffering from an extreme mental or emotional disturbance at the time of the crime. R.1587-88. Under Alabama law, a trial court must consider uncontradicted mitigating evidence in determining a capital defendant's sentence, and the court failed to do so here. *See Hadley*, 575 So.2d at 157-58*; Eddings*, 455 U.S. at 114. The court's total rejection of this mitigator was error. *See Eddings*, 455 U.S.

at 114; *Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986).

**F. The court erred in failing to consider Luong's extreme remorse.**

Faced throughout pretrial and trial proceedings with compelling evidence of Luong's deeply-felt remorse for his actions, the trial court's conclusion that Luong "has shown no remorse," C.894, R.1704, was utterly unsupported in the record.

As early as November 2008, when the parties discussed state psychologist Dr. McKeown's report, R.141, through April 30, 2009, the day of Luong's sentencing, R.1677, the court was confronted with substantial evidence that Luong felt immense, overpowering remorse for causing the deaths of his children, to the point that as atonement, he believed his own life should end. *See* R.316, 334-35, 370, 1016-17, 1024, 1038-40, 1107, 1162, 1594; C.214-15, 784, 874.[145]

In its order, the court addressed every non-statutory mitigating circumstance submitted by the defense except the categories of Remorse and Ability to Adapt to Incarceration. *Compare* C.904-906 (defense counsel's proposed order) *with* C.890-91 (court's order).

Both Alabama courts and the U.S. Supreme Court have recognized a defendant's remorse as a mitigating circumstance.

[145]*See also* SR2. 127, 129, 144, 153, 181, 187, 194-95, 200 (Luong's efforts in the jail to carry out his wish to die).

*See, e.g., Brownfield v. State*, No. CR-04-0743, 2007 WL 1229388, at *34 (Ala. Crim. App. Apr. 27, 2007); *Williams v. State*, 795 So.2d 753, 785 (Ala. Crim. App. 1999); *Brown v. Payton*, 544 U.S. 133, 142-143 (2005). The court's refusal to consider Luong's remorse was constitutional and statutory error.

### G. The court erred in assigning no weight to Luong's lack of significant history of prior criminal activity.

One defense theme was that the offense represented a complete break from Luong's nonviolent past. *See* R.1435-36, 1633, 1674-76. Every family member described Luong's loving and caring behavior towards his children prior to the crime. R.998-99, 1018, 1020, 1049-50. The trial court rightly found that "Luong has no history of violence and no significant criminal history." C.886.[146] But rather than treating this evidence as the statutory mitigating circumstance that it was, *see Cook v. State*, 369 So.2d 1251, 1257 (Ala. 1978), the court improperly refused to give it **any** weight. C.886 ("the Court assigns it no weight"). This was error. *Eddings*, 455 U.S. at 113-115 (capital sentencer can determine weight to give relevant mitigating evidence, but "may not give it no weight").

[146]In addressing this mitigator, the court acknowledged Luong's single conviction for a 10-year old felony drug possession case in Mississippi, but noted that it "did not consider this prior conviction in arriving at its sentencing decision." C.886.

### H. The court erred in failing to consider Luong's lack of future dangerousness and ability to adapt in prison.

Dr. Leung offered uncontested testimony that Luong would not pose a threat of future danger in lifelong incarceration and would be able to adapt to a correctional institutional setting. R.1592-93. Defense counsel included these mitigators in their proposed sentencing order. C.905-906. The court erred by failing to consider these mitigators in determining Luong's sentence. *See Skipper v. South Carolina*, 476 U.S. 1, 6-7 (1986)(evidence of defendant's good behavior in prison is "by its nature" a relevant sentencing consideration).

### I. The court improperly discounted Luong's abusive childhood.

The court erroneously applied the wrong standard when he discounted Luong's abusive childhood on grounds that it was not "a license for violence" and did not "justify any act of senseless rage." C.890, R.1699-700. A sentencer may not refuse to consider mitigating evidence because it does not constitute a legal excuse for violent acts or because it does not mitigate the crime. *See Eddings,* 455 U.S. at 113-16*; Tennard v. Dretke*, 542 U.S. 274, 289 (2004); *Skipper*, 476 U.S. at 4-5. By failing to give genuine weight to Luong's abusive childhood because it did not justify the crime, the trial court violated the Eighth Amendment.

### J. The court erred in relying on non-statutory aggravating factors in sentencing Luong to death.

In support of his finding that "the aggravating circumstances **far** outweigh the mitigating circumstances," C.894 (emphasis in original), the trial court pointed to two non-statutory aggravating factors: that the victims were "innocent children murdered by the man who should have been their protector" and that his motive in the crime was "to emotionally torture his wife." C.894. The court improperly considered Luong's relationship to his victims and his motive as non-statutory aggravating circumstances. Under Alabama law, "[a] trial court may consider only those aggravating circumstances listed in § 13A-5-49 in fixing the death penalty." *Ponder v. State*, 688 So.2d 280, 285 (Ala. Crim. App. 1996)(*quoting Bush v. State*, 695 So.2d 70, 92 (Ala. Crim. App. 1995)). The trial court's consideration of non-aggravating circumstances demands reversal.

### K. The trial court erred in finding that the offense was especially heinous, atrocious, and cruel.

The court erred by finding the "especially heinous, atrocious, or cruel" ("HAC") aggravating circumstance. ALA. CODE § 13A-5-49(8). This aggravator can be found only if the victims experienced "physical violence beyond that necessary to cause death, appreciable suffering after a swift initial

assault, [or] psychological torture." *Scott v. State*, 937 So.2d 1065, 1083 (Ala. Crim. App. 2005)(*citing Norris v. State*, 793 So.2d 847, 854-60 (Ala. Crim. App. 1999)). Such torture exists when the victim "is in intense fear and is aware of, but helpless to prevent, impending death," *Ex parte Key*, 891 So.2d 384, 390 (Ala. 2004), which "generally must occur over an appreciable amount of time, prolonged enough to separate it from an 'ordinary' murder." *Scott*, 937 So.2d at 1083. The evidence, however, did not show that the children experienced violence beyond that necessary to cause their deaths, prolonged suffering, or psychological torture.

The State argued, and the court found, that this aggravator existed due to the crime's "long...and protracted" nature and the manner of the children's deaths. R.1671-72; C.883-84. But the only support for this theory was Wilson's testimony that Luong told him he waited to drop each child after traffic had cleared. R.1124-25. In fact, Luong stated only that it took "a little while" to commit the offense "because of my kids," and that he did not pay any attention to whether cars could see him or not. C.343. The State's other evidence confirmed that Luong's actions had nothing to do with traffic. Jeff Coolidge testified that as he drove **closer** to the van on the bridge, he observed an object being thrown

over, and that as he drove by he observed three toddlers, with one of the girls **smiling** at him. R.1219, 1220, 1225. Driving over the bridge around the same time, Alton Knight observed a girl with dark hair and pigtails crawling around the van, and she gave no indication that she was in any distress. R.1233-34. *See Norris,* 793 So.2d at 861 (HAC aggravator did not apply when victims died without anticipation of death).

As explained *supra* at Point 15(A) and incorporated herein in full, the court's conclusions that the children "did not die quickly," that their manner of death would have "produced extreme fear and pain," and that the children likely would have been "gasping for breath for an unspecified period of time while the lungs fill with water" were without any evidentiary support. C.884, R.1691. There is no evidence that the children were "subjected to additional injury" beyond the fall which caused their deaths. *Norris*, 793 So.2d at 854. How long the children were conscious after the fall and how long they lived after impact and whether they were conscious after impact are "mere speculation." *Ex parte Clark*, 728 So.2d 1126, 1140 (Ala. 1998). There is no evidence suggesting that the children experienced violence "beyond that necessary or sufficient to cause death." *Norris*, 793 So.2d at 854.

Further, the court's determination that this crime met the HAC aggravator undermined the narrowing of this circumstance accomplished by the Alabama Supreme Court's decision in *Kyzer v. Alabama*, 399 So.2d 330 (Ala. 1981). *Lindsey v. Thigpen*, 875 F.2d 1509, 1514 (11th Cir. 1989). Thus, the finding violated the Eighth and Fourteenth Amendments and §§ 6 and 13 of the Alabama Constitution. *Jackson v. Virginia*, 443 U.S. 307, 314-15 (1979); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

**L. The court erred in refusing to make a factual determination regarding the "2 or more" aggravator and instead relying upon the jury's guilty verdict.**

In its order, the court treated the aggravating circumstance that the "defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct," ALA. CODE § 13A-5-49(9), as "self-proved, meaning the jury did not have to make a finding the State must prove its existence beyond a reasonable doubt for a second time during the penalty phase. It was proven in the guilt phase." C.883. Alabama Code § 13A-5-47(d), however, requires an independent finding of the evidence in aggravation by the court in sentencing, even when the aggravating circumstance mirrors a capital offense. *See* ALA. CODE § 13A-5-50. The court's reliance on the jury's guilt phase verdict

deprived Luong of constitutionally protected procedural safeguards and his rights to due process and a jury trial. *See Mills v. State*, No. 06-2246, 2008 WL 2554011, at *16-17 (Ala. Crim. App. June 27, 2008)*; Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); U.S. Const. amends. V, VI, XIV; Ala. Const. §§ 6, 11, 13, 15.

**16. The trial court's sentencing phase instructions violated Luong's rights.**

The trial court's sentencing phase instructions violated Luong's rights under Alabama law and his constitutional rights to a fair jury trial, to due process of law, and to be free of cruel and unusual punishment. *See* U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 11, 13, 15.

**A. Charge regarding the "HAC" aggravating circumstance.**

The trial court's instruction regarding the "especially heinous, atrocious or cruel" aggravating circumstance, R.1651-53, was reversible error for a number of reasons. First, the instruction did not comport with the Alabama appellate courts' limiting construction of this aggravator, which permits this aggravator to be found only if the jury finds that the offense was a "'conscienceless or pitiless homicide[] which [was] unnecessarily torturous to the victim." *Lindsey v. Thigpen*, 875 F.2d 1509, 1514 (11th Cir. 1989)(*quoting Kyzer*, 399 So.2d at 334). Here, the trial court gave the jury a different

charge, instructing it that only when determining whether the offense was "especially cruel" did it have to decide whether the offense was a conscienceless or pitiless homicide which was unnecessarily torturous to the victim. There is a reasonable likelihood that the jury interpreted the court's charge to permit it to find the offense was "especially heinous" or "especially atrocious" **without** finding that it was a conscienceless or pitiless homicide which was unnecessarily torturous to the victim. Such a finding was contrary to Alabama law and violated the Eighth Amendment. *See Maynard v. Cartwright,* 486 U.S. 356 (1988).

Furthermore, despite the holdings in *Clemons v. Mississippi*, 494 U.S. 738 (1990), and *Lawhorn v. State*, 581 So.2d 1159 (Ala. Crim. App. 1990), Alabama courts can no longer cure this unconstitutionality by independently determining beyond a reasonable doubt whether the offense was "especially heinous, atrocious or cruel" using a constitutional limiting construction. *See Ring v. Arizona*, 536 U.S. 584 (2002). In *Ring*, the Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), and held that capital defendants have a right under the Sixth and Fourteenth Amendments to have a jury decide whether the state has proven aggravating circumstances beyond a reasonable doubt. 536 U.S. at 589.

Additionally, even if the Alabama courts could make such a determination, the prosecution's evidence does not support a finding beyond a reasonable doubt that this offense was "especially heinous, atrocious or cruel" as that phrase has been interpreted by Alabama appellate courts. *See* Point 15(K), *infra*. Moreover, under *Brown v. Sanders*, 546 U.S. 212 (2006), this Court cannot find the error harmless because, *inter alia*, the jurors had no other sentencing factor with which to weigh the evidence presented by the prosecution in support of this aggravating circumstance. What's more, the State cannot prove beyond a reasonable doubt that absent the error the jury would have returned a death verdict. *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). The prosecution argued this aggravator extensively to the jury. R.1624-27, 1643-44.

**b. Charge regarding the "two or more persons" aggravating circumstance.**

The trial court's instruction to the jury regarding the "two or more persons" aggravating circumstance contained at Ala. Code § 13A-5-49(9), R. 1651-52, was unconstitutional for three reasons. First, it applied the doctrine of collateral estoppel against a criminal defendant in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the U. S. Constitution, including his right to due process of law. *See United States v. Dixon*, 509 U.S. 688, 710 n.15

(1993)(plurality); *Simpson v. Florida*, 403 U.S. 384 (1971)(per curiam). Second, it was an illegal directed verdict on an aggravating circumstance in violation of *Ring*, 536 U.S. at 609, which requires a jury to determine the existence of aggravating circumstances. *But see Ex parte Waldrop*, 859 So.2d 1181 (Ala. 2002). Third, the instruction violated Luong's federal constitutional liberty interest as established by Ala. Code §§ 13A-5-46(e) and 13A-5-50[147] to have the jury make a separate finding at the penalty phase of all aggravating circumstances, including those that duplicate elements of the capital offense. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

These errors are structural errors and cannot be subject to harmless error analysis. *See Rose v. Clark*, 478 U.S. 570, 578 (1986). *Cf. Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). *But cf. Washington v. Recuenco*, 548 U.S. 212 (2006). In any event, under *Brown v. Sanders*, 546 U.S. 212 (2006), this Court cannot find the error harmless because, *inter alia*, the jurors had no other sentencing factor with which to weigh the evidence presented by the prosecution in support of this aggravating circumstance. Furthermore, the State cannot prove

[147]"The fact that a particular capital offense as defined in Section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in Section 13A-5-49 shall not be construed to preclude **the finding** and consideration of that relevant circumstance or circumstances in determining sentence."(emphasis added).

beyond a reasonable doubt that absent the error the jury would have returned a death verdict. *Satterwhite*, 486 U.S. at 258. The prosecution argued this aggravator repeatedly to the jury. R.1624, 1626, 1642.

The trial court's erroneous instructions prejudiced Luong's substantial rights, and are plain error requiring a new sentencing trial. ALA. R.APP. P. 45A.

**17. Because the trial judge could not fairly consider a life sentence, he was not qualified to serve as a capital sentencer.**

This Court should vacate the death sentence because the trial judge was not fairly able to consider a life sentence in violation of Luong's rights under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. A capital sentencer, whether judge or jury, must be able to fairly consider imposition of a life sentence. *See Morgan v. Illinois*, 504 U.S. 719, 733-34, 738-39 (1992).

The judge had a duty to *sua sponte* recuse himself and thus his sitting as the capital sentencer in this case was plain error. ALA. R. APP. P. 45A. *See Morgan*, 504 U.S. at 739 (a judge who cannot fairly consider a life or death sentence "should disqualify himself or herself").

A comment made by the court during voir dire demonstrated that it lacked the impartiality demanded by the Constitution.

Potential juror Stacey announced to the court that, being a father of four children himself, he had made a prior out-of-court statement that Luong should be punished by death. R.863-64. He also had a very specific method in mind: his "hands should be tied and he should be thrown off the bridge." R.864. Stacey said that he would "absolutely" vote for death if Luong was found guilty, that he would "not want to" consider any punishment less than death, and that faced with the option of death or life without parole, he would only "be in favor of death." R.864-65.

Based on Stacey's unequivocal support for the death penalty. R.865. The court told Stacey that he "appreciate[d] his candidness," that him appearing for jury service "meant a great deal to all of us." *Id*. Then he added that "**we – some of us probably can appreciate what you are thinking**." *Id*. (emphasis added). Just as Stacey was properly removed for cause under *Morgan*, the court, should have recused himself from determining punishment. Accordingly, Luong's sentence must be reversed.

The trial court's sentencing verdict must also be reversed because the court could not adequately consider and give effect to mitigating evidence. *Morgan*, 504 U.S. at 738-39; *Tennard,* 542 U.S. at 278.

Early pretrial proceedings revealed the trial court's impaired ability to consider and weigh mitigation. The court announced that there was "a limit to what this trial court should have to consider when determining the appropriate penalty when one is found guilty of capital murder." R.165. The court added that it must "determine a reasonable limit for the investigation and introduction of mitigating evidence." *Id*. The court's statements revealed his inability to follow the law. *See Morgan*, 504 U.S. at 738-39; *Eddings*, 455 U.S. 104 at 114. Neither Alabama nor federal law, in fact, provides a limit on relevant mitigating evidence. *See id.*; ALA. CODE § 13A-5-52.

The court's impaired ability regarding mitigation also surfaced in his sentencing order. The court was unable to and did not consider and give effect to numerous statutory and non-statutory mitigating circumstances, including:[148] Luong's 1) extreme mental or emotional disturbance at the time of the crime; 2)substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; 3) profound remorse; 4) lack of prior significant criminal history; and 5) ability to adapt to incarceration. *See* C.886-91.

[148]*See also* Point 15, *supra* (discussing the constitutional authority requiring consideration of each of these mitigating circumstances).

This Court should vacate Luong's death sentence. U.S. Const. amends. VI, VIII, XIV; Ala. Const. §§ 6, 13, 15.

**18. Luong is entitled to a new trial because the record is incomplete and, accordingly, this Court cannot adequately review the record on appeal.**

The record on this appeal is still missing a critical transcript of voir dire despite Appellant's attempts to supplement the record with them.[149] Without this transcript, this Court cannot fulfill its obligation to search the complete record for any error adversely affecting Luong's rights, to review his death sentence as set forth in Ala. Code § 13A-5-53, and to conduct meaningful appellate review, as required by Alabama law and state and federal constitutions. U.S. Const. amends. VI, VIII, XIV; Ala. Const. §§ 6, 13, 15. *See* ALA. CODE § 13A-5-53 (1975); ALA. R. APP. P. 45A.[150] In light

[149]On September 8, 2009, Luong timely filed a motion to supplement the record with the missing proceedings from the first day of voir dire. *See* SR.19-20. After the trial judge denied the motion in relevant part, Luong filed a subsequent motion in the trial court seeking a reconstruction hearing on this issue. *See* Appellant's Motion to Correct or Supplement the Record with Missing Voir Dire Proceedings and Audio Recordings of Pretrial and Trial Hearings, Jan. 14, 2010, Attach. A (incorporated herein). This motion was denied. SR2.27. Luong then filed a motion to supplement the record in this Court seeking a reconstruction hearing regarding the missing jury instructions. *See* App. Mot. to Supp. Jan. 14, 2010. This Court denied the portion of Luong's motion seeking a reconstruction hearing on the missing voir dire instructions. SR3.22. For the reasons identified here and in Luong's other appeal papers, the denial was error.

[150]*See also Harris v. State*, 552 So.2d 857, 860 (Ala. Crim. App. 1987) (courts have a "duty to examine the entire record to determine whether any error exists prejudicial to the defendant"); *Mayer v. City of Chicago*, 404 U.S. 189, 194 (1971) ("In terms of a trial record, [due process requires] that the State must afford the indigent a record of sufficient completeness to permit proper consideration of [his or her] claims."); *Bounds v. Smith*, 430 U.S. 817, 822 (1977)("[A]dequate and effective appellate review is impossible without a trial transcript or adequate substitute...."); *Parker v. Dugger*, 498 U.S. 308, 321 (1991)("meaningful appellate review" is crucial "in ensuring that the death penalty is not imposed arbitrarily or irrationally ...").

of these obligations, and the incomplete record in this case, reversal is required. *See Hammond v. State*, 665 So.2d 968, 970 (Ala. Crim. App. 1994).

Jury selection began on March 9, 2009, when without counsel or the defendant present the court gave instructions to the jurors and distributed questionnaires. C.14, SR.27. There is no transcript in the record of the trial judge's instructions. SR.27. In response to appellate counsel's request for the record to be supplemented with the missing instructions, SR.19-25, the trial court ruled:

> March 9, 2009. There were no in-court or in-chambers proceedings held on this date. This Court went to the jury assembly room, instructed the prospective jurors to fill out the individual juror questionnaire, turn them in to court personnel and ordered the prospective jurors to return on Wednesday, March 11th, 2009 for the jury selection process.

SR.27. In fact, the questionnaires reveal that the judge gave additional instructions.[151] The court's brief and incomplete summary about what occurred on that day is insufficient. *See Edwards v. State*, 253 So.2d 513, 518 (Ala. 1971)(finding trial court's conclusory, narrative summary of missing voir dire proceedings inadequate). The instructions from the first day are relevant to numerous points of error alleged in this

[151]*See, e.g.*, SR.773 (juror questionnaire stating juror knew about the case because of "Judge Graddick telling us the case that we will or potentially serve on"); SR.1048 (describing "Judge Graddick going over the rules and what is expected of us if we are picked as a juror"); SR.1806 ("In the courthouse the judge only mentioned the case with instructions to disregard anything heard previously, as only what is presented in court is pertinent.")

appeal.[152] The judge may have also instructed the jurors that Luong had pled guilty.[153]

The missing transcript mandates reversal. *See Floyd v. State*, 486 So.2d 1309, 1314-15 (Ala. Crim. App. 1984); *Hammond*, 665 So.2d at 970.

**19. The interpretation at trial and pretrial proceedings was inadequate and unreliable.**

The court-appointed interpreters in this case gave inadequate, unreliable, and incomplete translation in violation of Alabama law and Luong's constitutional rights to a fair trial, effective assistance of counsel, due process, confrontation, meaningful appellate review, and a reliable sentencing determination. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15; ALA. R.APP. P. 45A. *See United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985)(due process violation when "the accuracy and scope of a translation at a hearing or trial is subject to grave doubt").

**Inadequate and unreliable interpretation by an**

[152]For example, in Point 2, *supra*, Luong challenges the court's inadequate voir dire, including its perfunctory short questions about whether jurors could set aside what they have heard and be fair and impartial. If the judge had already instructed the jurors that the law requires them to do so, *see, e.g*, SR.1806, then the jurors may well have felt additional pressure to agree that they could set aside what they had previously heard, rather than answering candidly about their pre-formed opinions. In addition, the instructions may have resulted in other errors which undersigned counsel have no way of knowing about given the incomplete record.

[153]The judge distributed the questionnaires on March 9, 2009, after Luong pled guilty and before he withdrew his guilty plea on March 11, 2009. R.330, 379; C.14. The judge had told the lawyers at the time of the guilty plea that he planned to tell the jurors that Luong had pled guilty. R.317 ("We're going to tell them when he pleads guilty that he has pled guilty."). *See also* SR.773 (juror questionnaire saying Judge Graddick told them about the case).

**uncertified, unregistered court reporter.** Angie Hawker, a court-appointed Vietnamese interpreter, interpreted some or all[154] of the testimony of State witnesses Dung Phan, Thanh "Tracy" Phan, and Kieu Phan. R.986-87, 1026, 1018, 1522-23, 1525, 1527.[155] Hawker was not registered or certified as required by the Administrative Office of Courts's 2008 regulations.[156] The circuit court was aware of the new regulations, R.182, 1541, and had placed a heightened importance on registration. *See* R.1535-40. Yet the court failed to ensure that Hawker had registered.

The record documents significant problems with Hawker's interpretation. First, Hawker often answered counsel's questions herself rather than interpreting the question for the witnesses to answer themselves. *See* R.995-96, 988, 992,

[154]Apparently, prosecution witnesses used the interpreter sporadically. *See* R.1173 (Dr. Leung acknowledges that some witnesses testified in English on direct examination but then used the interpreter on cross). The reporting in the record does not always distinguish between direct and interpreted testimony. For instance, during the cross-examination of Tracy Phan, the court reporter notes her answers are "through interpreter" when she spoke in Vietnamese or "in English, after translation" when she spoke in English. *See generally* R.1018-25. In contrast, Kieu Phan indicates that she wished to use an interpreter, but there are no corresponding notations to indicate when she was responding "through interpreter." *See* R.1027 *et seq*.

[155]After the court did not allow defense counsel to use their own interpreter for their sentencing phase witness Christina Luong, R.1535-41, Hawker also translated for her. R.1542.

[156]*See* AOC, *Policies and Procedures for Foreign Language Interpreters,* (Sept. 2008), at 4-5, *available at* http://elegal.alacourt.gov/Documents/Interpreters/ForeignLanguage/InterpreterPolicies.pdf ("foreign language interpreters...**shall** register with the Alabama Administrative Office of the Courts (AOC)," effective October 1, 2008, months before Luong's trial; "The court **shall** advise any qualified interpreter not listed by the AOC FLS Registry to immediately register with the AOC.")(emphasis added). As of April 16, 2010, over one year after Luong's trial, Hawker was still not registered or certified on the AOC registry of foreign language interpreters. *See* AOC, *Foreign Language Interpreter Registry*, *Registered Interpreters* (April 16, 2010), *available at* http://elegal.alacourt.gov/frmBody.aspx?key=21-51-44-0.

1022, 1029, 1526. Hawker also interjected her own comments rather than translating the question for the witness. *See* R.1006-1007.[157] *See also* R.990, 1000. Hawker elaborated upon the witness's testimony, rather than directing the question back to the witness for the witness's own elaboration. *See* R.1001. Further, Hawker apparently did not translate the entirety of each witness's testimony. For instance, during the guilt phase testimony of Dung Phan, Hawker again interjected her own opinion that "She keep answering out of context" rather than translating what Phan had actually said, whether it was out of context or not. R.1001. Hawker then continued a dialogue with defense counsel rather than engaging the witness for a response at all. R.1001-02. As defense counsel sought clarification of Phan's testimony, Hawker proceeded to clarify the testimony herself, explaining that Phan had "said when they moved to Georgia they took only Hannah and Ryan." R.1002. Hawker had not interpreted any statement by Phan along those lines before.

Hawker's performance as an interpreter did not adhere to the principles set forth in the AOC guidelines.[158] Her numerous

[157]On this occasion, the judge actually corrected her: "you will have to translate what the witness says as opposed to yourself." R.1007.

[158]*See* AOC, *Ethical Standards for Interpreters*, *available at* http://elegal.alacourt.gov/Documents/Interpreters/ForeignLanguage/EthicalStandards.pdf (last checked May 13, 2010)(interpreters should, among other things, work unobtrusively; avoid alteration, addition or omission of witness statement; refrain from expressing personal opinions). *See also Policies and Procedures for Foreign Language Interpreters, The Proper Role of an Interpreter*, *supra*, at 8-9 (interpreters shall not interject; interpreters shall request

errors fundamentally altered the testimony of witnesses at Luong's trial and thus violated his right to due process. *Baltazar-Monterrosa v. State*, 137 P.3d 1137, 1142 (Nev. 2006); *Cirrincione*, 780 F.2d at 634.

The record also suggests gaps in interpretation by Luong's interpreter. Early on, the court granted defense counsel's request for funds to hire a Vietnamese interpreter, as Luong had a "very limited ability to speak English," over the State's objection. C.2, 76-77. Trial counsel hired Tam Vo to interpret for Luong in attorney-client meetings and court proceedings. R.17. The record suggests, however, that proceedings were held with only partial or entirely without interpretation for Luong.

On March 11, 2009, the court announced that he wanted to review the plea colloquy with Luong again. R.350. The court reporter's notations of this hearing suggest that Vo interpreted for Luong only when the court asked Luong a direct question.[159] At one point, defense counsel specifically directs Vo to interpret his argument to the court for Luong. R.362. After Luong, through Vo, informed the court that his thinking was "very confusing," the court had a lengthy discussion with

clarification in third person).

[159]*See, e.g.,* R.351 (no translation noted of court's announcement that he will be reviewing guilty plea with Luong for a second time); R.351 (no translation noted of court's questions to defense counsel); R.352 (no translation noted of court's instructions and defense counsel's question); R.362 (no translation once Luong is seated and court directs question to defense counsel).

the prosecution and defense counsel, none of which appears to have been translated. R.366-72.

When a defendant does not understand the English language sufficiently, he "has a due process right to an interpreter at all crucial stages of the criminal process." *Ton v. State*, 878 P.2d 986, 987 (Nev. 1994)(citation omitted); *State v. Hansen*, 705 P.2d 466 (Ariz. Ct. App. 1985); *Parra v. Page*, 430 P.2d 834 (Okla. Crim. App. 1967)). A due process violation will also occur when "what is told [to the defendant] is incomprehensible [or]...the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension...." *Cirrincione*, 780 F.2d at 634.

This hearing could not have been more critical. The inadequacy of interpretation violated Luong's rights to be present,[160] participate in his own defense, due process, confrontation, and a fair trial, and was plain error. U.S. Const. amends. VI, VIII, XIV; Ala. Const. §§ 6, 13, 15; ALA. R. APP. P. 45A. *See Negron*, 434 F.2d 386, 389 (2d Cir. 1970).

Other critical stages may have suffered from inadequate – or total lack of – interpretation for Luong as well. *See, e.g.*, R.20-34 (Apr. 1, 2008 arraignment)(only noting interpretation when Luong answers question through

[160]Alabama courts and Alabama law have recognized a capital defendant's right to be present at all critical stages of the proceedings against him. *Burgess v. State*, 723 So.2d 742, 760 (Ala. Crim. App. 1997); ALA. R. CRIM. P. 9.1.

interpreter; defense counsel speaks on Luong's behalf for the rest of the hearing). *Press-Register* articles also suggest that Vo may not have interpreted for Luong during two other pretrial proceedings.[161] These articles suggest that these two, and possibly other, critical proceedings, took place without Luong's full participation.

The record raises serious concerns about the adequacy of Hawker and Vo's translation. Luong's appellate counsel requested that the court reporter's audio recordings be supplemented into the record, or alternatively, requested that this Court order the court reporter to maintain the audio recordings. *See* App. Mot. Jan. 14, 2010 and App. Appeal Jan. 25, 2010. *See Ouanbengboune v. State*, 220 P.3d 1122, 1126-27 (Nev. 2009)(adopting procedure to supplement the record for review of translation on direct appeal); App. Mot. Jan. 14, 2010, App. Appeal Jan. 25, 2010 (incorporated herein). This Court summarily denied the motion in relevant part. SR3.22. As a result, the record remains incomplete. This Court therefore can not fully evaluate this claim and adequately conduct its requisite plain error, statutory, and constitutional review.

[161]*See* C.700, Aug. 8, 2008 article (Vo translated "from time to time"). That day, the court discussed the defense's polling expert, the defendant's mental health evaluation, communication issues with Luong, and other matters. R.35-71. *See also* C.703, Oct. 15, 2008 article ("the interpreter was beside him again, but rarely uttered a word to Luong..."). On Oct. 15, 2008, the court heard argument on the defense request to conduct mitigation investigation in Vietnam. *See* R.103-137. As the only person in the courtroom with knowledge of his family's situation in Vietnam, Luong's full participation was critical.

ALA. R. APP. P. 45A; ALA. CODE §13A-5-53; *Parker*, 498 U.S. at 321; *Floyd*, 486 So.2d at 1314-15; *Harris*, 552 So.2d at 860.

**20. The trial court committed reversible error by failing to authorize funds for the mitigation investigation.**

The court erred by denying the defense's motion for funds to travel to Vietnam to conduct critical mitigation interviews. The court's denial of travel funds violated Luong's rights to effective assistance of counsel, to present a defense, to a fair trial, to due process, and to reliable sentencing in violation. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15; ALA. CODE § 15-2-2.

Defense counsel sought funds in the amount of $12,000 to travel to Vietnam and investigate Luong's childhood, including the severe discrimination and social ostracization Luong suffered as an Amerasian child and as a result of his abandonment by his mother. C.218-25. The court held hearings on the motion in open court. R.76-93; 104-36; 152-180. The defense offered to reduce the requested amount of funds to $7,500, volunteering to pay for some expenses themselves, such as meals. R.115.[162]

The judge ordered the defense to investigate the costs of videoconferencing. R.90. The defense did investigate those costs,[163] but at subsequent hearings pointed out that

[162]The defense later submitted a higher requested amount, $17,000, due to rises in travel costs because the tickets had not been purchased earlier. C.242.
[163]The estimate for videoconferencing was $4,390.00. C.242.

videoconferencing would not be a realistic option for the very poor, rural Vinh Long residents who had no way to travel to Saigon. R.119; *see also* SR2.74.

The judge denied the defense's motion for funds to travel to Vietnam, ordering instead that funds be made available for videoconferencing. R.170. He ordered that videoconferencing be made available for both the defense and State to talk with Luong's mother and other family members. *Id.*

In denying the request for funds, the court erred both as a matter of law and as a matter of fact. The trial court erroneously applied the legal standard governing whether Luong was entitled to *expert* assistance to the separate issue of whether trial counsel was entitled to travel funds. *See* R.167 (discussing *Ex parte Moody,* 684 So.2d at 120, and denying travel funds on the ground that the defense failed to make a "particularized showing of what will be developed," and failed to show that the denial of funds would have "a substantial and injurious impact in determining the jury's verdict or recommendation"). In contrast, for other expenses incurred by defense counsel during the course of representation, the defense must show only that the expenses are "reasonable." ALA. CODE § 15-12-21(d); *Ex parte Barksdale*, 680 So.2d 1029, 1030 (Ala. Crim. App. 1996); *State v. Bui*, 888 So.2d 1227,

1230 (Ala. 2004).

In *Bui*, the Alabama Supreme Court held that in order to determine the "reasonableness" of the request, the trial court must determine "whether the known evidence would lead a reasonable attorney to investigate further." *Id.* (*citing Wiggins v. Smith*, 539 U.S. 510, 527 (2003)). The court erred in this case by failing to apply this standard and imposing the higher standard of whether the denial would have a substantial impact on the jury's verdict.

Under either standard, however, the trial court erred by denying the motion for travel funds because Luong introduced a wealth of evidence demonstrating the importance and necessity of the investigation into Luong's childhood in Vietnam. C.223-239; R.78-80, 110, 119, 124, 136, 153-54.

Even if videoconferencing had been available to the rural witnesses and an acceptable substitute for in-person interviews, the trial court erroneously conditioned it upon participation by the State, R.171, and thus it was not a constitutionally viable option. Defense counsel cannot be forced to reveal their evidence in the presence of the State. *Ex parte Moody*, 684 So.2d at 120; *Finch*, 715 So.2d at 909. The court committed reversible error by failing to grant the defense's modest request for travel expenses.

**21. The court erred by dismissing "en masse" 20 prospective jurors in a panel and three jurors in individual voir dire based on their views of the death penalty.**

The court committed reversible error by dismissing "en masse" without any individual voir dire and without the defense being given an opportunity to rehabilitate them 20 prospective jurors. R.601, 737-39. The court called together 20 prospective jurors who had said they could not give the death penalty during panel questioning and asked the group if they would be able to impose the death penalty.[164] R.737-38, 741-42. The prospective jurors each answered negatively and were struck over defense objection. R.742-43, 745. Of the 20 jurors, more than had half given ambiguous, or even favorable, opinions of the death penalty in their questionnaires. *See e.g.*, SR.448 ("I DO believe in the death penalty"); *see also* SR.646, 657, 1020, 1075, 1207, 1470,1657, 1679, 1690, 1888.

A trial court "shall permit the parties or their attorneys to conduct a reasonable examination of prospective jurors." ALA. R. CRIM. P. 18.4(c). Though the court has discretion in conducting voir dire, it should engage in an "exacting" interrogation of the "reservations of conscience" of prospective jurors. *See Hall v. State*, 820 So.2d 113, 125

[164]The court said, "Is there any of you who, no matter what the evidence, no matter what the circumstances, would be absolutely unable to vote to impose the death penalty? In other words, under no circumstances would you vote to impose the death penalty no matter how grievous or heinous the crime. Is that true? No matter what the law in this state is, you would be unable to impose the death penalty." R.741-42.

(Ala. Crim. App. 1999)*(quoting Hubbard v. State*, 231 So.2d 86, 87 (Ala. 1970)). The court abused its discretion by allowing no rehabilitation opportunity by defense counsel, and by conducting no individual voir dire himself. *See, e.g., McLain v. Routzong*, 608 So.2d 722, 724 (Ala. 1992).

The court also erroneously dismissed three prospective jurors during individual voir dire without allowing any defense rehabilitation on their views of the death penalty. R.656, 658, 686.

By not allowing any individual rehabilitative voir dire of the 20 dismissed and three individual jurors, the court violated Luong's right to due process, to a fair trial, to be tried by an impartial jury, and to be free of cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15; ALA. R. CRIM. P. 18.4.

**22. The trial court repeatedly exhibited bias against Luong during voir dire.**

The trial court erred by employing double standards throughout voir dire that biased Luong and by impeding defense counsel's attempts at individual voir dire. Based on the court's bias in jury selection, Luong's conviction and sentence should be reversed. *See Johnson v. Mississippi*, 403 U.S. 212, 216 (1978); *State v. Moore*, 988 So.2d 597, 599 (Ala. Crim. App. 2007).

During panel voir dire, 15 prospective jurors said they had expressed the opinion that Luong should receive the death penalty. The State requested follow-up questioning of these jurors, and 13 were later questioned individually. R.652-53.

Earlier in panel voir dire, 23 jurors who said they could not impose the death penalty in response to group questioning were dismissed with no opportunity for follow-up questioning by the defense, despite defense counsel's request. R.738-39. In granting the State's request while denying the defense's, the court employed a double standard and demonstrated bias against Luong.

The court further demonstrated bias by repeatedly denying requests by defense counsel to question prospective jurors but granting all similar requests by the State. The court rejected defense counsel's request to voir dire the 20 prospective jurors who were dismissed as a group, R.738-39, several individuals who said they could not give the death penalty, R.655-56, 656-58, 682-86, and all prospective jurors on the issue of pretrial publicity. R.586-92.

However, the court never denied any request by the State to voir dire prospective jurors. The court allowed the State to question jurors for any reason it proffered, including numerous issues that had already been covered in the

questionnaires[165] and "wishy-washy" answers on the death penalty. R.468-521, 584. The judge implicitly acknowledged his bias, pointing out that if the State continued to take such expansive voir dire, he would have to allow the defense individual voir dire for the same reasons as the State.[166]

The court's bias against Luong in voir dire constituted plain error and violated Luong's right to due process of law, to a fair trial before an impartial jury, and to an individualized sentencing determination. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 11, 13, 15; *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); ALA. R. APP. P. 45A.

**23. The in-court identifications of Luong by two State witnesses violated Luong's constitutional rights.**

The introduction of two extraordinarily suggestive and unreliable in-court identifications of Luong were plain error and violated Luong's rights to confrontation, a fair trial, due process, and to be free of self-incrimination. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15; *Brazell v. State*, 369 So.2d 25, 28-29 (Ala. Crim. App. 1978). An in-court identification is unreliable and impermissibly suggestive by its very nature. *See U.S. v. Rogers,* 126 F.3d 655, 658 (5th

[165]For example, the State individually questioned jurors on whether they, their family, or anyone they knew had committed a crime or been a victim of a crime. R.468-521. These questions were asked in the questionnaires. *See* SR.186-87.
[166]The court said, "So am I going to have to let the Defendant bring everybody who has not said anything about...the death penalty in here so that they can talk to them?" R.847.

Cir. 1997)(citing other federal decisions); *Moore v. Illinois*, 434 U.S. 220, 229 (1977).

Thus, this Court must consider whether the procedure was "so conducive to irreparable mistaken identification...or ...[gave] rise to a very substantial likelihood of irreparable misidentification [such] that allowing the witness to make an in-court identification would be a denial of due process." *Brazell*, 369 So.2d at 28-29 (citation and quotation omitted). In evaluating this question, the Court should consider several factors: the witness's 1) opportunity to observe the criminal at the time of the crime; 2) degree of attention; 3) prior description's accuracy; 4) level of certainty; and 5) the time between the crime and the identification. *Neil v. Biggers*, 409 U.S. 188, 199 (1972); *Brazell*, 369 So.2d at 29. The Court must then weigh these factors "against...the corrupting effect of the suggestive identification." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). This test is met here as well.

Two State witnesses, Jeff Coolidge and Frank Collier, testified that while driving or riding on the Dauphin Island Bridge on the morning of January 7, 2008, they observed a man on the bridge sitting by a van on a concrete barrier. Both positively identified Luong in court. R.1222-23, 1230. The State presented no evidence that they had identified Luong in

any objective way to law enforcement before trial.

Both men had limited opportunity to observe the man on the bridge. Both were on the opposite side of the road as the van. R.1219, 1228. Coolidge must have been paying attention, to some extent, to his driving. As he passed the van, his focus turned to three children inside; he saw a little girl smile at him. R.1220. By the time either made contact with law enforcement, Luong's picture, and the news of his arrest, had been plastered on the news. *See, e.g.*, C.398-401, 720, 729, 772 (early local media accounts of Luong's confession and arrest). Neither witness testified at trial regarding their certainty that Luong was the man they observed; they simply pointed him out in the courtroom. Over a year had passed since the crime when these men identified Luong in court at trial. These factors rendered the in-court procedure conducive to irreparable misidentification, or had such a tendency to give rise to a very substantial likelihood of irreparable misidentification. *Brazell*, 369 So.2d at 28. Further, any accuracy is outweighed by the "corrupting effect" of the suggestive identification. *Manson*, 432 U.S. at 114.

Coolidge and Collier were the only eyewitnesses who placed Luong on the Dauphin Island Bridge. Their unreliable and impermissibly suggestive in-court identifications of Luong

adversely affected his substantial rights, and require reversal. ALA. R. APP. P. 45A.

**24. The court violated Luong's rights by admitting prejudicial and irrelevant photographs and a video.**

The trial court committed plain error and violated Luong's constitutional rights by admitting into evidence a parade of gruesome, inflammatory, and irrelevant photographs, and a video, of children whose bodies and faces were ravaged by decay and feeding animals. While Alabama courts often admit autopsy and crime-scene photographs, "some probative value" must first be shown. *Caylor v. State*, 353 So.2d 8, 11 (Ala. Crim. App. 1977). *See also* ALA. R. EVID. 401. At least 15 of the 32 autopsy and recovery-scene photographs, and the recovery video of Hannah Luong, admitted by the State fail to meet this basic test. *See* State Ex. 60, 61, 65, 70, 71, 78, 79, 80, 81, 82, 89, 90, 93, 94, 96, 97.[167] Three of the children died from blunt force head trauma and asphyxiation due to drowning, R.1381, 1382, 1387, while the fourth died of asphyxiation due to drowning. R.1393. Yet the parade of autopsy and recovery photographs, and the video, depict gory, grotesque, and gruesome injuries that are completely irrelevant to these causes of death. These irrelevant photographs, displayed in color on a projector,[168] and the

[167]SR.100, 101, 104, 109, 131, 132, 133, 134, 110, 117, 118, 121, 122, 124, 125; R. 1336-37.

[168]*See, e.g.,* R.1307, 1383 (referencing use of a screen to display photos).

video, depict the children's bodies and faces in gruesome states of decay, and ravaged by "postmortem animal activity." R.1391. In addition, any probative value was substantially outweighed by the danger of unfair prejudice. *See* ALA. R. EVID. 403. Indeed, shrimper Wilbur Brown, confirmed that the video of Hannah Luong's body served little or no purpose except to arouse passion or sympathy on the part of the jurors: the "reason I took this video, if it made them [jurors] feel anything like it made me feel that day, bad feeling." R. 1338.

Moreover, Luong's constitutional rights – to due process of law, a fair trial, and freedom from cruel and unusual punishment[169] – entitled him to a trial free from this unduly inflammatory and unnecessary evidence, which "focused the jury's attention on the postmortem decomposition of the victim's body rather than on the character of the [defendant] and the circumstances of the crime." *Mann v. Oklahoma*, 488 U.S. 877, 877 (1988)(Marshall, J., dissenting from denial of cert.)(internal quotation marks and citation omitted).[170]

The photographs' and video's admission violated Luong's substantial rights and was plain error. *See* ALA. R. APP. P. 45A; U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6,

Exhibit 97 may not have been displayed on the screen. *See* R.1394.

[169] The jury had before it all of the culpability phase evidence. R.1663.

[170] *See also Thompson v. Oklahoma*, 487 U.S. 815, 838 n.48 (1988)(declining to resolve similar question, on which certiorari had initially been granted, death sentence vacated on other grounds); *McNeal v. State*, 551 So.2d 151, 159-160 (Miss. 1989); *Clark v. Commonwealth*, 833 S.W.2d 793, 794 (Ky. 1991); *Tobler v. State*, 688 P.2d 350, 355 (Okla. Crim. App. 1984).

13, 15.

**25. The court erred in removing juror Stephanie Jackson.**

Just before guilt/innocence deliberations were to begin, the court learned that juror Stephanie Jackson, was having an asthma attack and would be 20 minutes late. R.1425. The court incorrectly identified her as an alternate, discharged her from service, and replaced her with alternate Burgett, with parties' consent. R.1426. Jackson, in fact, was a juror. R.947-48.

The removal of a juror is warranted only when a juror "becomes so sick as to incapacitate him for the performance of his duty or any other cause renders it necessary, in the opinion of the court." ALA. CODE § 12-16-230. The court erred in removing Jackson for an asthma attack, which would have resulted in a mere 20-minute delay in a trial lasting weeks, in violation of Alabama law and Luong's rights to a fair trial, jury trial, and due process. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 11, 13, 15; ALA. R. APP. P. 45A.

**26. Prosecution misconduct produced an unfair trial.**

The State's prejudicial misconduct unconstitutionally pervaded the trial with unfairness and, where not objected to, constituted plain error. *See* ALA. R. APP. P. 45A; *Ex parte Windsor*, 683 So. 2d 1042, 1061 (Ala. 1996); *Darden v.*

*Wainwright*, 477 U.S. 168, 183 (1986).

**The prosecution "testified" to personal beliefs and facts outside the record, and misstated the evidence.** *See Ex parte Stubbs*, 522 So.2d 322 (Ala. 1987), adopting dissenting opinion in *Stubbs v. State*, 522 So.2d 317 (Ala. Crim. App. 1987). Asst. D.A. Murphree gave her personal opinion as to why the defendant committed the crime: "You know, sometimes there is just evil. Sometimes there is just evil. And that's what we have in this case, ladies and gentlemen." R.1447. She also testified to the jury when she said: "And when he is asked about that he says: Ask my family; they know why. I'm sure they don't." R.1431. She also went outside the record by stating, "Most people who commit murder are not especially happy, well-adjusted people. Okay? It's a sad fact of life, but that's the fact of life." R.1641.

The prosecution also misstated the evidence when it asserted that Luong timed the children's throws to avoid detection by passing traffic. R.1430. No testimony, other than Wilson's mischaracterization of Luong's statement, supported this argument. *See* C.144, lines 154-60. The prosecution also misstated the evidence when it stated that Luong had dated witness Mizell's sister-in-law when Kieu was pregnant with Hannah, Luong's child. *Compare* R.1442 *with* R.1285.

**The prosecutors misstated the law**. *See Harich v. Wainwright*, 813 F.2d 1082, 1091 (11th Cir. 1987)(and cases cited therein). Here, a prosecutor misstated the law when he conflated intended acts and an intended results, which is what is required by ALA. CODE. § 13A-6-2(a)(1). R.1431, 1447. The prosecution also improperly described manslaughter as an "excuse" rather than a lesser-included offense of murder (R. 1439), and improperly described intoxication as an excuse rather than evidence tending to negate the intent of the crime. R.1445. ALA. CODE § 13A-3-2. *See also* R.1440. The prosecution further misstated the law by telling the jury, "Your job is to decide what is a reasonable verdict." R.1446.

Additionally, in the penalty phase, Murphree improperly referred to Luong's drug problems as mere "excuses." R.1641. *See, e.g., State v. Kleypas,* 40 P.3d 139, 281 (Kan. 2001). Mitigating circumstances are not excuses. ALA. CODE § 13A-5-52.

**The prosecution improperly commented on defendant's exercise of his constitutional rights**. *See Griffin v. California*, 380 U.S. 609, 615 (1965)(improper for prosecutor to comment on defendant's exercise of constitutional rights); *Portuondo v. Agard*, 529 U.S. 61, 76 (2000)(Stevens, J., concurring)(condemning argument that "demeans" constitutional rights "serv[ing] the truth-seeking function of the adversary

process."). Here, the prosecutor twice improperly commented on Luong's exercise of his constitutional rights to assistance of counsel, to present a defense and to hold the State to its burden of proving guilt beyond a reasonable doubt. *See* R.1445 ("even when caught red-handed, the defense still has a right to come in here and try to get you to buy a story."); R.1446 ("it's just they have a right to do it. They have a right to do it.").

**27. Luong's death sentence is disproportionate, was arbitrarily and capriciously imposed, and violates his constitutional rights.**

This Court is required to: (1) determine whether Luong's sentence is proportionate; (2) independently weigh mitigating and aggravating circumstances to determine whether death is the appropriate sentence; and (3) determine if discriminatory factors contributed to Luong's death verdict. ALA. CODE § 13A-5-53(b); U.S. Const. amends. VIII, XIV; Ala. Const. § 15. Under these analyses, his death sentence must be reversed and the case remanded for a life sentence.

First, either Luong's death sentence violates the Equal Protection Clause because of gender bias or there is a constitutionally intolerable risk under § 15 of the Alabama Constitution and the Eighth Amendment[1] that his death sentence

[1]In *McCleskey v. Kemp*, a narrow majority concluded that a defendant cannot rely on statistical evidence of a "significant risk of racial bias" to prevail under a claim that discrimination violates the Eighth Amendment, and instead, must point to "exceptionally clear proof" of discrimination. 481 U.S. 279,

resulted from gender bias. "Women who kill their children almost never get executed for it." Victor Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 458-459 (2002).[1]

Second, Luong's death sentence should be set aside because the aggravating circumstance(s) do not outweigh the mitigating circumstances. *Ex parte Carroll,* 852 So.2d 833, 837 (Ala. 2002). Abundant mitigating evidence supports a life sentence in this case, including: Luong's lack of a significant history of prior criminal activity; his suffering from an extreme emotional or mental disturbance; his substantial impairment to conform his conduct to the requirements of the law; the oppressive and discriminatory environment he faced as a child in Vietnam; the absence of adult guidance in his childhood; his difficult transition in the United States as he tried to attend school in a language he did not understand; his major depressive disorder and crack cocaine addiction in adulthood; his loving and caring

296-99 (1987). This decision was wrongly decided under the U.S. Constitution for the reasons set forth in the dissents. *See id.* at 320-345 (Brennan, J., dissenting); *id.* at 345-366 (Blackmun, J., dissenting); *id.* at 366-367 (Stevens, J., dissenting). Additionally, it is not binding on this Court's interpretation of its own cruel punishment clause nor binding on the level of protection offered by the state proportionality statute.

[1]Since 1976, only 11 women have been executed in the United States, and only two for killing their children. Death Penalty Information Center, *Women and the Death Penalty*, http://www.deathpenaltyinfo.org/article.php?did=230&scid=24#facts (last visited May 4, 2010). As of June 30, 2009, there were only 13 women on death row for murdering their children (two also killed their spouse). Victor L. Streib, *Death Penalty for Female Offenders, January 1, 1973, Through June 30, 2009*, Issue #64, June 30, 2009, at 3, *available at* www.deathpenaltyinfo.org/files/FemDeathJune2009.doc.

relationship with the children prior to the crime; his ability to adapt well in prison and not represent a future danger to others; and his profound remorse.

Third, Luong's death sentence is disproportionate considering the mitigating circumstances in this case and the crime. Although fathers receive the death penalty more often than mothers for killing their children, even fathers rarely receive death sentences. Streib, *supra*, at 458-459.

**CONCLUSION**

For the above reasons, individually and cumulatively, Luong respectfully requests that this Court reverse his conviction and death sentence as illegally obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Alabama law set forth herein, and order the appropriate relief.

Respectfully Submitted,

/s Cassandra Stubbs
CASSANDRA STUBBS
ANNA ARCENEAUX
ACLU Capital Punishment Project
201 W. Main Street Suite 402
Durham, NC 27701

GLENN DAVIDSON
Collins, Davidson LLC
1203 Dauphin Street
Mobile, AL 36604

*Counsel for Lam Luong*

May 18, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 2010, I served a copy of the attached pleading by first-class mail, postage prepaid to:

Troy King
Attorney General
Office of the Attorney General
500 Dexter Avenue
Montgomery, AL 36130

/s Cassandra Stubbs
Cassandra Stubbs

**APPENDIX A:**

SUMMARY OF RULINGS AND ACTIONS ADVERSE TO APPELLANT

| Page No. | Summary |
|---|---|
| C.9 | Denying request motion for mitigation travel expenses to be heard ex parte. |
| C.128 | Overruling defense objection to prosecution's Rule 404(b) evidence. |
| C.132-34 | Denying motion to dismiss on grounds that the death penalty is unconstitutional. |
| C.139-40 | Denying motion to remove death penalty as sentence. |
| C.207 | Granting prosecution's motion for mental evaluation. |
| R.114 | Allowing prosecution to discover confidential mitigation strategy. |
| R.141-42 | Denying defense request that confidential mental health information not be revealed in open court. |
| R.164 | Denying motion for funds to travel to Vietnam for mitigation investigation. |
| R.273 | Denying motion to suppress defendant's statements. |
| R.317-18 | Denying defense request to discuss and enter guilty plea in camera. |
| R.383 | Denying motion for change of venue. |
| R.383 | Denying motion for continuance. |
| R.387 | Denying motion for jury sequestration. |
| R.553 | Sustaining prosecution's objection to defense voir dire questioning. |
| R.588-89 | Denying renewed motion for change of venue. & continuance? |
| R.592 | Denying motion to conduct individual voir dire on publicity. |
| R.596 | Denying defense request to present evidence on renewed change of venue motion, including expert's testimony. |
| R.601 | Overruling defense objection to questioning group of jurors en masse on their death penalty views. |
| R.656 | Excusing prospective juror Williamson for cause without opportunity for defense questioning. |
| R.658 | Excusing prospective juror Finch for cause without opportunity for defense questioning. |
| R.668 | Overruling defense objection to prosecution's |

| | |
|---|---|
| | demand of an equivocal answer from prospective juror Thompson. |
| R.686 | Excusing prospective juror Bearden for cause without opportunity for defense questioning. |
| R.739 | Excusing 20 prospective jurors for cause without individual voir dire by the court or opportunity for defense questioning. |
| R.769 | Overruling defense objection to prosecution's voir dire requiring speculation. |
| R.790 | Excusing prospective juror Kennedy for cause. |
| R.793 | Excusing prospective juror Poe for cause. |
| R.819-20 | Excusing prospective juror Jackson for cause. |
| R.850 | Sustaining prosecution objection to defense voir dire questioning. |
| R.875 | Sustaining prosecution objection to defense voir dire questioning. |
| R.878 | Sustaining prosecution objection to defense voir dire questioning. |
| R.905 | Denying motion for mistrial due to tainted jury pool. |
| R.915 | Denying renewed motion for change of venue. |
| R.921 | Overruling defense objection to 404(b) evidence. |
| R.1132-33 | Overruling defense objection to admission of transcripts. |
| R.1158 | Sustaining prosecution objection to defense questioning Wilson about cocaine use in the community. |
| R.1163 | Sustaining prosecution objection to defense questioning Wilson about reports of Luong's cocaine use from family. |
| R.1174 | Sustaining prosecution objection to defense questioning Wilson about Vietnamese community. |
| R.1175 | Overruling defense objection to prosecution qualifying lay witness as expert. |
| R.1177 | Overruling defense objection to witness testifying to mental operation of Luong. |
| R.1505-06 | Overruling defense objection to video evidence. |
| R.1638 | Sustaining prosecution objection to defense argument. |
| SR2.26-27 | Denying Appellant's request for a reconstruction hearing. |
| SR3.19 | Denying Appellant's motion to correct or supplement the record. |
| SR3.19 | Denying Appellant's motion to correct or supplement the record. |

| | |
|---|---|
| SR3.20 | Denying Appellant's motion to correct or supplement the record. |
| SR3.20 | Denying Appellant's motion to reconsider. |
| CCA Order Apr. 4, 2010 | Denying in part Appellant's motion to correct or supplement the record, and request for a reconstruction hearing. |