No. CR-07-1270

IN THE ALABAMA COURT OF CRIMINAL APPEALS

MONTEZ SPRADLEY,	*	
Appellant,	*	
v.	*	On Appeal from Jefferson County Circuit Court Case Nos. CC-2006-2950, CC-2006-2951
STATE OF ALABAMA,	*	
Appellee.	*	

BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

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

Appellant 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.

There were serious errors at Appellant's trial, including, *inter alia*, at the guilt-innocence phase the introduction of false and/or highly misleading testimony on a material issue and the abundant admission of improper threat, fear, prior bad act and prior conviction evidence; and at the sentencing phase, the improper override of the jury's 10-2 vote for a life sentence.

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

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STATEMENT OF THE CASE

On June 30, 2006, Montez Spradley was indicted for capital murder committed during a robbery and intimidating a witness. (C. 70-71, 284-85.)[1] He was found guilty of both offenses on February 29, 2008. (R. 559.) A capital sentencing hearing commenced the same day. (R. 560.) The State submitted one aggravating circumstance, that the murder was committed during the course of a robbery. (R. 561.) The jury, by a 10-2 vote, recommended a sentence of life imprisonment without the possibility of parole. (C. 219; R. 642.) On April 21, 2008, the trial court, the Honorable Gloria Bahakel, overrode the jury's recommendation and sentenced Spradley to death on the capital murder charge. (R. 654.) The court sentenced Spradley to twenty years on the intimidation charge. (R. 654.) The court denied Spradley's Motion for New Trial by operation of law. (C. 245.) This appeal follows.

STATEMENT OF THE ISSUES

The prosecution in this capital case permitted the truth-seeking function of the trial forum to be corrupted. Its two most important witnesses both claimed that Spradley had confessed to them that he and Cedric "Ceboo" Atkins had

[1] "C." refers to the clerk's record. "R." refers to the reporter's record. "Supp." refers to the supplemental record. "Supp. R. PH." refers to the transcript of the preliminary hearing.

committed the murder. (R. 313, 416.) In summation, the State emphasized the consistency of their testimony. (R. 521, 523.) But the State kept hidden from the jury the discrediting fact that in her police statements one of the witnesses had claimed that Spradley had told her he had committed the offense with Antonio Atkins, Cedric's brother. (Supp. R. PH. 22.) Antonio Atkins had an airtight alibi. (R. 446-47.)

Furthermore, to deflect the jury's attention from its weak evidence and to suggest to the jury that Spradley was a dangerous criminal with a network of dangerous family members and friends, the State introduced highly prejudicial and inadmissible propensity evidence relating to alleged prior bad acts and a prior conviction, testimony of third party threats with no connection to Spradley, and irrelevant fear-of-the-defendant testimony. The State also employed inadmissible hearsay and other improper evidence to obtain these convictions. Overriding the jury's 10-2 vote for a life sentence and imposing a death sentence, the trial court failed to uphold the principles set forth in *Ex parte Carroll*, 852 So. 2d 833 (Ala. 2002), relied on misstatements of facts, failed to consider important mitigating evidence, and erred in finding the aggravating circumstance of

heinous, atrocious, and cruel. Spradley's trial was also rife with prosecutorial misconduct. For these and the other points of error addressed in this brief, this Court should reverse his convictions and death sentence.

STATEMENT OF FACTS

The prosecution's case against Montez Spradley was alarmingly thin. Its case hinged almost entirely[2] on the testimony of two witnesses who claimed that Spradley had confessed to them: Alisha Booker, Spradley's former girlfriend with whom he had a stormy relationship, and Matthew Bryant, an inmate who also faced a capital murder charge but who ended up receiving a sentence of five years active time and twenty years probation. Both Booker and Bryant testified that Spradley had told them that he and Cedric "Ceboo" Atkins had committed the murder. (R. 313, 416.) In summation, the State emphasized the consistency of their testimony. (R. 521, 523.) But the jury never heard that in her police statements Booker had claimed that Spradley had told her he had committed the offense with Antonio Atkins, Cedric's brother. (Supp. R. PH. 22.) Antonio Atkins had an airtight alibi. (R. 446-47.)

[2] The State's only other evidence sought to link Spradley to the use of the victim's credit card two days after her murder.

No physical evidence or eyewitness testimony connected Spradley to this capital murder, (R. 526), for which he has always maintained his innocence. (R. 7, 9, 648, 649.) Furthermore, Booker's and Bryant's vague trial testimonies were inconsistent with each other and inconsistent with the physical evidence.

The Murder of Marlene Jason

On the evening of January 9, 2004, Marlene Jason was found shot to death in front of her home in the Center Point area of Birmingham. (R. 224-26, 274.) Jefferson County Sheriff's Deputy Derrick King arrived at the scene shortly after 9:00 p.m. (R. 224-25.) He spoke with at least four or five neighbors who heard a gun shot and a car leaving the scene. (R. 228.) None of these neighbors had called the police, and none testified at Spradley's trial. *Id.*[3] Mrs. Jason's car was running, and groceries and other purchases were found in the front passenger seat. (R. 236, 255, 432.) Det. Don Edge, who headed the police investigation, testified that sales receipts indicated that Mrs. Jason had been shopping at Big Lots and T.J. Maxx near Century Plaza. (R. 433-34.) His investigation found no helpful information at these stores. (R. 434-35.)

[3] Only Mrs. Jason's next-door neighbor Michael Martin testified at trial. (R. 211-12.) Neither he nor his wife saw or heard anything unusual that night. (R. 214.)

A single .40 caliber shell casing was found next to Mrs. Jason's body, (R. 237, 239, 242), and one latent print was lifted from it. (R. 240, 244.) Six latent prints were also lifted from her car. (R. 244.) The shell casing was submitted to the Alabama Department of Forensic Sciences on two occasions, (R. 244, 251-52), but never resulted in an identification. (R. 245.) Not one of the prints proved usable. (R. 244-45.) Throughout the investigation, numerous firearms were submitted for forensic testing.[4] (R. 249, 251, 376, 466.) None matched the casing or the bullet recovered from Mrs. Jason's body. *Id.*

Forensic pathologist Dr. Gary Simmons determined that the cause of death was a single gunshot wound to the face and hand. (R. 274, 278.) He submitted a blood sample from the victim to the Sheriff's office for DNA comparison, but he was unaware if it had ever been tested. (R. 279.)

Use of Mrs. Jason's Credit Card

Det. Edge's investigation revealed that Mrs. Jason's credit card was used once the night of her murder, Friday, January 9, 2004, at the Roger Jolly Chevron Station in North Birmingham. (R. 439.) No evidence connected Spradley to the use of the credit card that night.

[4] No witness at trial discussed with specificity where these firearms were found, to whom law enforcement personnel suspected they belonged, or why they were believed to be connected to this crime. *See* (R. 249, 251, 381, 466).

The credit card was next used two days later on Sunday, January 11, 2004, when multiple charges occurred at more than three different gas stations.[5] (R. 439, 448, 479.) On January 11, 2004, the police received a complaint that two men - Orlando Rankins and Melvin Henderson, Jr. - were stealing gas at the Ensley station in the East Lake area. (R. 358-59.) Det. Edge eventually spoke with the two suspects, and Henderson[6] stated that a person in an old model green Cadillac Coupe DeVille offered to sell him gas by using a credit card in exchange for cash. (R. 442-44.) Neither he nor Rankins identified Spradley as the person who tried to sell them gas. (R. 360-61; 443.)

Eventually, from Henderson's identification of the car and from the Ensley video, the police traced the green Cadillac to Antonio Atkins.[7] (R. 444-45.) In 2004, Antonio Atkins was arrested and charged with this capital murder. (R. 446.) He admitted being present at the Roger Jolly Chevron and Ensley gas stations on January 11, 2004. At the Roger Jolly, he said, his friend Spradley had purchased gas

[5] In all, the credit card was used a total of six or seven times. (R. 479.) The police obtained videos from two gas stations where Mrs. Jason's credit card was used - Ensley and Cowboy's, both on January 11, 2004. (R. 440.) They did not obtain videos from the first two uses of the credit card, on January 9, 2004, and on January 11, 2004, both at the Roger Jolly Chevron. (R. 475.)
[6] State's witness Melvin Henderson testified at trial and denied speaking with Det. Edge or being at the Ensley Station in January 2004. (R. 319-20, 322-24.)
[7] It appears that Atkins had had contact with Rankins before. He testified that Rankins had tried to rob him outside of the Ensley station. (R. 346-47.)

for him.[8] (R. 447-48.) He also told the police that "he had heard on the street that Ceboo [Cedric Atkins, his brother] had been involved in this murder." (R. 462.) Antonio was released when he told the police that he had been working at McDonald's the night of Mrs. Jason's murder and Det. Edge verified his alibi. (R. 446-47.)

At trial, Det. Edge claimed that an individual shown on a video inside the Cowboy's gas station "looks extremely close to Montez Spradley." (R. 475-76.) Mrs. Jason's credit card was used outside at the pump. (R. 476.)

Based on his investigation, Det. Edge tried to obtain a warrant against Spradley for capital murder in August 2004 and warrants against him for fraudulent use of a credit card and other charges in October 2004. (R. 458-60.) The District Attorney's office declined both requests. *Id.* The case went cold.

Law Enforcement Personnel Pursue Other Leads

The continuing investigation led Det. Edge to St. Clair County to meet with detectives about two men who had been arrested for the armed robbery of a woman whose credit cards had been taken. (R. 457.) A Birmingham Police Department

[8] Antonio's account apparently changed between his police statement and his trial testimony. At trial, Antonio Atkins testified that he and Spradley rode together to the gas stations in his green Cadillac. (R. 329.) At the preliminary hearing, Det. Edge testified that Antonio Atkins had told him that he and Spradley drove in separate cars to the gas stations. (Supp. R. PH. 33.)

report noted that, following their arrests, "these types of robberies stopped." (R. 457-58.) The report also indicated that "[w]e believe that we have found the persons responsible for Ms. Jason's death but lack any physical evidence at this time to make a connection." (R. 458.)

Alisha Booker Comes Forward

In December 2005, nearly two years after Mrs. Jason's murder, Alisha Booker, Spradley's former girlfriend and mother to three of his children, (R. 384-85), contacted Det. Edge. *See* (R. 451-52); (Supp. R. PH. 20).[9] Booker and Spradley had an extremely stormy relationship, (R. 418, 583-89), and according to State witness Matthew Bryant, "she called the cops and got [Spradley] arrested, because he had a girlfriend that was in college at UAB." (R. 293.) Booker told Det. Edge that one day while she and Spradley were at church, Spradley confessed to her that he had killed a woman in Center Point. (R. 394-95.) She said he told her that Antonio Atkins had been his accomplice. (Supp. R. PH. 22.) No warrant was issued following Booker's statement.

On December 29, 2005, Booker filed a report with Officer Randy Martinez that she had been assaulted by

[9] Det. Edge first spoke with Booker early in the investigation, but at that time, "she did not provide any real pertinent information." (Supp. R. PH. 20; R. 462-63.)

Spradley on December 21, 2005. (R. 368-69.) No warrant or arrest was made following this report. (R. 371.)

Booker spoke with Det. Edge again in January 2006 and again claimed that Spradley had confessed to her. (R. 452.) On January 23, 2006, the police obtained a warrant for the arrest of Montez Spradley on the charge of intimidating a witness. (C. 286-87.) But they still did not obtain a warrant for capital murder against him.

On March 9, 2006, Spradley was arrested for intimidating a witness. (C. 223.) Once Spradley was at the Jefferson County Jail, fellow inmate Matthew Bryant allegedly began to talk with him. (R. 311.) Bryant was charged in St. Clair County with the capital murder of his father; he was facing the death penalty. (R. 290, 307.) Bryant approached Deputy McGowan at the jail and told him that Spradley had confessed to a murder to him. (R. 305.) Spradley allegedly told Bryant that Cedric Atkins was his accomplice. (R. 313.) Deputy McGowan arranged for Bryant to meet with Det. Edge. (R. 305-306, 453.)

Det. Edge spoke with Bryant three or four times, (R. 454), and arranged for Bryant to be wired to record a conversation with Spradley. (R. 311-12, 454.) Of the "fifty" times Bryant spoke with Spradley concerning the

crime, (R. 311), it just so happened that on this one occasion Spradley stated nothing incriminating. (R. 454-55.)

After speaking with Bryant, Det. Edge obtained a warrant against Spradley for capital murder. (R. 449, 455.) Spradley was served on March 30, 2006. (C. 2.) Law enforcement never bothered to conduct a search of Spradley's residence. (Supp. R. PH. 27-28.) Instead, they obtained a warrant to photograph his tattoos. (Supp. R. PH. 37-38.)

Montez Spradley's Alleged Confessions

At trial, Alisha Booker and Matthew Bryant were the only two witnesses connecting Spradley to the capital murder. Both testified that Spradley told them he had committed the murder with Cedric "Ceboo" Atkins, Antonio Atkins's brother. (R. 313, 416.) The jury never heard that Booker had told Det. Edge that Spradley had said he committed the murder with Antonio, (Supp. R. PH. 22), whose alibi the police had verified. Cedric Atkins has not been prosecuted for this crime.[10]

At trial, Booker and Bryant presented conflicting testimony concerning who Spradley said shot Mrs. Jason. Booker testified several times that she believed Spradley

[10] Booker had heard that Cedric was "crazier" than Spradley. (R. 415.) Cedric was known on the street as "hot" - "always robbing people and doing a lot of hot stuff." (R. 596.) Though he knew them to hang out together, Antonio Atkins did not recall seeing Cedric and Spradley together prior to January 11, 2004. (R. 335.)

told her that his accomplice was the one who had shot Mrs. Jason. (R. 398, 401, 412.) Bryant, in contrast, said that Spradley told him he approached and choked Mrs. Jason from behind, then shot her himself. (R. 294-95, 316.)

Booker's trial testimony contained an extraordinarily vague and halting account of Spradley's alleged confession. She could not recall, even approximately, when the alleged confession took place.[11] (R. 407.) She recalled details of the confession only when prodded by the prosecutor with her police statements. (R. 397, 399-403, 405-406, 408-10.) She could not remember whether Spradley had said he or his friend was the driver of the car. (R. 404.)

Booker acknowledged signing an affidavit on April 9, 2007, recanting her grand jury testimony and her statements to police incriminating Spradley for the murder. (R. 417-18; C. 524-25.) She tried to explain this recantation by claiming that people had been "brainwashing" her. (R. 416.) She also acknowledged that she had written a letter to Spradley in February 2007 while he was incarcerated which was highly inconsistent with her trial testimony, urging him to tell on Cedric Atkins and not to go to prison for someone else. (R. 421, C. 521-23.)

[11] Det. Edge indicated at the preliminary hearing that she informed him in December 2005 that the confession had occurred "about a year and a half prior to the interview we were having then." (Supp. R. PH. 21.)

Like Booker, Matthew Bryant offered little detail about the crime, claiming that Spradley was "always vague." (R. 294.)[12] Bryant admitted that he had begun talking with Spradley at the jail months before his own case settled (R. 308), and that he had been sentenced to five years active time and twenty years probation on his capital murder charge. (R. 310.) However, he claimed that he had not received a deal, (R. 290-91), and that he had pled out his case three or four days before he even approached law enforcement personnel with Spradley's confession.[13] (R. 310-11; 290-91.) In fact, Det. Edge testified that he was aware that Bryant had a **pending** capital murder charge when he spoke with Bryant. (R. 481.)

Booker and Bryant offered inconsistent and incredible testimony about Spradley's alleged statements regarding Mrs. Jason's credit card. Booker initially stated that Spradley told her he and a friend received credit cards from robbing Mrs. Jason, (R. 405), but she later testified that he had told her he received the card from a friend, and he may not

[12] Bryant initially testified that Spradley never told him what happened to the gun that killed Mrs. Jason, (R. 315), though when questioned about a prior statement, he backpedaled and said that Spradley may have told him he threw the gun in a dumpster. (R. 315-16.) He claimed that Spradley told him he and the friend had followed the woman home from a store, but maintained that Spradley never told him the name of the store. (R. 294.)

[13] Bryant testified that he pled his case in April or May 2006. (R. 308.) Det. Edge obtained a warrant on Spradley on March 30, 2006, (C. 2), after speaking with Bryant. (R. 449, 455.)

have known at the time that it belonged to the victim. (R. 406, 412-13.) Bryant testified that Spradley told him that Mrs. Jason's credit cards "turned out" to be "gas cards," and all he could do with them was sell gas. (R. 295-96.) In fact, Det. Edge testified that the only card used was Mrs. Jason's USAA Bank MasterCard (in other words, one general credit card, not "gas cards"). (R. 456.)

Both Booker and Bryant testified that Mrs. Jason had been choked, (R. 294-95, 313, 316, 403), but Dr. Simmons observed no physical signs of any choking. (R. 280-81.) Both witnesses claimed that Spradley had discussed the murder in front of others, *see* (R. 313-14; 402), yet no one else was identified or called to corroborate their testimony. The State also possessed taped recordings of Spradley's phone calls - documented on seven printed pages - from the Jefferson County Jail. (R. 10-11.) These tapes contained "nothing of value to the State." (R. 15.)

Trial Testimony Concerning the Credit Card

At the trial, no one with personal knowledge linked Spradley to the use of Mrs. Jason's credit card. Antonio Atkins testified that he was at the Ensley and Roger Jolly stations with Spradley on January 11, 2004.[14] He said that

[14] At trial, Antonio presented inconsistent testimony concerning the order of events, stating initially that they went to the Ensley station upon leaving his grandmother's house, (R. 329), then later that they went to the Roger

Spradley bought him gas that day, but he never saw Spradley possess or use a credit card. (R. 331-32.)

On this evidence, Spradley was convicted of capital murder. (R. 559.)

Evidence in Mitigation

At the sentencing phase before the jury, the defense presented testimony from Spradley's family members and psychologist Kimberley Ackerson. Both of Spradley's parents were drug addicts. (R. 575-76, 605.) His mother was addicted to crack cocaine, marijuana, and "window pane"[15] during her pregnancy and at his birth. (R. 575-76.) As a result, as an infant Spradley experienced withdrawal symptoms - "crying a lot, nausea, diarrhea." (R. 576.) His mother, in and out of his life during his early years, was sent to prison when he was six years old. (R. 605.) His grandmother raised him, with eleven others, in a very crowded household. (R. 578-79.) Spradley's father was rarely present in his youth. (R. 576-77, 598-99.)

This abandonment by both his parents marked Spradley's childhood. (R. 605-606.) His home life was chaotic, as he lived in different residences and attended different

Jolly Chevron first then the Ensley station. (R. 332, 339.)

[15] Window pane is a street name for LSD. *See* National Institute on Drug Abuse, *Hallucinogens and Dissociative Drugs* 3, 6 (Mar. 2001), *available at* http://www.drugabuse.gov/PDF/RRHalluc.pdf.

schools. (R. 606.) He suffered periods of depression and post-trauma anxiety and was institutionalized twice for depression. *Id.* When 13 years old, he was recruited by a 35-year-old father figure to sell drugs. (R. 581-82.)

In recent years, he had started to develop a positive relationship with his father, but then his father died of a heart attack. (R. 577.)

Dr. Ackerson did not detect any mental health problems with Spradley. (R. 605.) He is a dedicated father who loves his children dearly. (R. 584, 592, 595, 599-600.)

STATEMENT OF THE STANDARD OF REVIEW

Both questions of law and mixed questions of fact and law are reviewed *de novo*. *State v. C.M., C.D.M. & S.D.*, 746 So. 2d 410, 414 (Ala. Crim. App. 1999); *Campbell v. State*, 574 So. 2d 937, 941 (Ala. Crim. App. 1990). Findings of fact are reviewed for clear error. *Odom v. Hull*, 658 So. 2d 442 (Ala. 1995). In capital cases, this Court reviews the 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 State secured a conviction in this close case through rampant error, which requires reversal of Spradley's

convictions and death sentence. First, the State presented and failed to correct false or highly misleading testimony concerning the true contents of Booker's pretrial police statements, in which she claimed that Spradley told her that his accomplice was Antonio Atkins, not Cedric Atkins, as she and Bryant testified at trial. Second, the State introduced an abundance of inadmissible and highly prejudicial evidence that had no relevancy to Spradley's guilt, including evidence of a third-party threat with no connection to him, irrelevant testimony regarding its witnesses' fears of him, and propensity evidence in the form of alleged prior bad acts and a prior conviction. Third, the trial court committed serious errors in sentencing Spradley to death, including, *inter alia*, failing to give the jury's 10-2 vote for life imprisonment "overwhelming support," relying on facts not in evidence, failing to consider certain mitigating evidence, and finding that the offense was especially heinous, atrocious, and cruel.

Montez Spradley respectfully requests that this Court reverse his convictions and death sentence based on these errors and the additional errors addressed in this appeal.

ARGUMENT

I. THE STATE ALLOWED THE TRUTH-SEEKING FUNCTION OF THE TRIAL FORUM TO BE CORRUPTED BY KNOWINGLY PRESENTING AND/OR FAILING TO CORRECT FALSE OR HIGHLY MISLEADING TESTIMONY THAT WAS EXTREMELY MATERIAL TO THE CAPITAL CONVICTION.

A prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Accordingly, a prosecutor has an affirmative constitutional and ethical obligation to correct testimony before a tribunal which it knows, or should know, to be false or highly misleading. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *see also* ALA. R. PROF. CONDUCT 3.3(a)(3).

Here, the prosecution failed to comply with this obligation. It emphasized to the jury that Matthew Bryant and Alisha Booker – two witnesses who did not know each other – had "the exact same story." (R. 523.) *See also* (R. 521.) What the jury never heard was that Booker's police statements differed materially from her trial testimony and Bryant's trial testimony. At trial, both Booker and Bryant

testified that in his confessions to them Spradley had stated that his accomplice was Cedric Atkins. (R. 416, 313.) However, as Det. Edge testified at the preliminary hearing, in her police statements Booker claimed that Spradley had stated that his accomplice was Antonio Atkins, (Supp. R. PH. 22), who Det. Edge testified had an alibi on the night of Mrs. Jason's murder. (R. 446.) The jury in this case never heard this critical evidence because the State allowed Det. Edge to provide trial testimony concerning Booker's police statements that the State knew or should have known was false and/or highly misleading. Det. Edge testified at trial that in her police statements, Alisha Booker had not specifically identified the person who Spradley had allegedly told her was his accomplice. (R. 463.) This false or highly misleading testimony was extremely material and relevant to Booker's credibility as well as to the purported consistency of her and Bryant's claims regarding Spradley's alleged confessions to them.

Because Det. Edge's false or highly misleading trial testimony concerning the true contents of Booker's prior statement "may have had an effect on the outcome of the trial," *Napue*, 360 U.S. at 272, Appellant is entitled to a new trial on both charges under both the U.S. Constitution

and the Alabama Constitution.[16] *See* U.S. Const. amends. V, XIV; Ala. Const. § 6, 13.

A. Det. Edge's Trial Testimony Was False And/Or Highly Misleading.

At the preliminary hearing in this case, Det. Edge testified that Booker stated in her December 2005 police statement that Spradley had told her that he and a partner had "robbed and killed a lady out in the Centerpoint area." (Supp. R. PH. 21-22.) He testified that Booker told him that Montez Spradley had identified the partner as "'Tony,' which is Antonio Atkins," and that Antonio Atkins had been the individual who had choked and shot Mrs. Jason. *Id.* at 22.

At trial, Booker testified that Montez Spradley had told her that Cedric "Ceboo" Atkins, Antonio's brother, had been his accomplice. (R. 415-16, 417.) The State's other key witness, Matthew Bryant, also testified that Spradley had told him that Cedric Atkins had been his accomplice.

[16] *See Napue*, 360 U.S. at 269 (holding that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment") (citations omitted); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972); *Ex parte Womack*, 541 So. 2d 47, 59 (Ala. 1988); *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994); *Carter v. Mitchell*, 443 F.3d 517, 535 (6th Cir. 2006) ("defendant's right to a fair trial may be violated where the prosecution deliberately misleads a jury or allows misleading testimony to go uncorrected"); *United States v. Rivera Pedin*, 861 F.2d 1522, 1530 n.14 (11th Cir. 1988) (rejecting argument that "the prosecutor's failure to correct...false testimony should be excused because the prosecutor believed that [the false] denial was unwitting rather than knowing....[T]he *Napue* rule applies where testimony, 'even though technically not perjurious, would surely be highly misleading to the jury....'") (quoting *Dupart v. United States*, 541 F.2d 1148, 1150 (5th Cir. 1976)).

(R. 313.)

Det. Edge's trial testimony followed that of Booker and Bryant. On direct, Det. Edge testified that Booker's two pretrial statements in December 2005 and January 2006 were consistent with one another. (R. 452.) He also corroborated Antonio's alibi for the night of the murder. (R. 446-47.)

When defense counsel asked Det. Edge if in her prior statements Booker had identified the person who Spradley had told her had been his accomplice, Det. Edge stated, **"I don't think she named a person specifically. She mentioned Montez and a friend"**:

> Q: And during any of those times, did she ever tell you that Ceboo was the one that killed this person, this lady?
> A: **I don't think she named a person specifically. She mentioned Montez and a friend.**
> Q: Did you ask her who the friend was?
> A: One time during the interview, one of the interviews I asked her about another person that she was riding in a car with, with Montez.
> Q: Okay. On the - when - the night that this woman was murdered, did she tell you that Ceboo was there?
> A: I don't remember if she named a person, other than Montez, specifically. (R. 463)(emphasis added).

Accordingly, the jury never heard that in her pretrial statements Booker claimed that Spradley had told her Antonio Atkins had been his accomplice. The jury did hear that Antonio Atkins had an airtight alibi. (R. 446-47, 519.)

B. The State Knew or Should Have Known Det. Edge's Testimony Was False and/or Highly Misleading.

The State knew or should have known[17] that Det. Edge's testimony was false or highly misleading for two reasons. First, the prosecutors knew or should have known the contents of Booker's prior statements to Det. Edge. At the preliminary hearing, Det. Edge was questioned by a representative from the District Attorney's office[18] who elicited this information from Det. Edge. (Supp. R. PH. 22.) Further, during Booker's direct examination, Deputy District Attorney Anderton questioned her extensively concerning the contents of her prior statements, often reading entire sections verbatim. *See* (R. 397 *et seq.*). And the prosecution team also questioned Det. Edge about Booker's pretrial statements. (R. 450-52.)[19] The prosecution obviously possessed these statements and was aware of their contents during the trial.

Second, Det. Edge himself knew or should have known that Booker had asserted in her statements that Spradley had

[17] *See United States v. Agurs*, 427 U.S. 97, 103 (1976)(due process violation results when prosecutor knew, or should have known, that perjured testimony was presented, and testimony would have affected the outcome of the trial); *Womack*, 541 So. 2d at 59 (same); *Johnson v. State*, 470 So. 2d 1333, 1337 (Ala. Crim. App. 1985)("We resolutely condemn any effort by a prosecutor to knowingly or negligently use false testimony.").

[18] The District Attorney's office is to be treated as a single entity; knowledge of one prosecutor is imputed to the office. *Giglio*, 405 U.S. at 154.

[19] *See also* (C. 185)(Pre-Sentence Report noting, "According to Jefferson County District Attorney's Legal Facts," Booker told police that Spradley's "friend's name was 'Tony.'").

identified Antonio Atkins as his accomplice.[20] Det. Edge took the statements, testified about them at the preliminary hearing, and testified confidently at trial that they were consistent with one another. (R. 452.)

The State's good or bad faith is legally irrelevant to this claim.[21] Furthermore, unlike a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), relief under *Napue* does not depend on the diligence of defense counsel. *See, e.g., Napue*, 360 U.S. at 269-70 ("a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.... The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.").[22] The State had an independent,

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[20] Courts impute the knowledge of the "prosecution team" to the prosecutor, and Det. Edge, as the lead investigator on this case, was certainly a member of that team. *See, e.g., Ex parte Willingham*, 695 So. 2d 148, 152 (Ala. 1996)(knowledge of police officer who was "[c]learly...part of the prosecution team," imputed to the prosecution). *See also Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998)("knowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution")(collecting cases).

[21] *See Agurs*, 427 U.S. at 110 (State's constitutional obligation not to be "measured by the moral culpability, or the willfulness, of the prosecutor"); *Giglio*, 405 U.S. at 154 ("whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor").

[22] In a *Napue* claim, relief does not turn on "whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own." *Levin v. Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966)(finding lack of diligence by defense counsel not a defense); *United States v. Alli*, 344 F.3d 1002, 1007 (9th Cir. 2003)("Despite defense counsel's efforts on cross-examination, the government had an independent obligation immediately to take steps to correct known misstatements of its witnesses."); *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000)("the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false."); *State v. Davis*, No. M2000-00017-CCA-R3-CD, 2001 WL 741930, at *6-7 (Tenn. Crim. App. July 3, 2001)(same); *Imbler v. Craven*, 298 F. Supp. 795, 809 (D.C. Cal.

constitutional and ethical obligation to correct Det. Edge's false or highly misleading testimony. *See Agurs*, 427 U.S. at 110.

C. The False or Highly Misleading Testimony was Extremely Material.

Det. Edge's false or highly misleading testimony concerning the true contents of Booker's pretrial statement was no trivial fact in the State's case; it went to the very heart of the credibility and reliability of the State's key witnesses, Alisha Booker and Matthew Bryant. The prosecution obviously was acutely aware that these two witnesses were extremely problematic: Booker had been involved in a stormy relationship with Spradley and had recanted her testimony; Bryant had been convicted of the intentional murder (of his own father) and had received an extraordinarily light sentence. Accordingly, in closing argument the prosecution went to great lengths to emphasize that these witnesses, strangers to each other, had told the jury the same story. *See* (R. 521)(rhetorically asking "Isn't that amazing?" that the two witnesses "across town" have the exact same story); (R. 523)(defense counsel "has absolutely no way to explain these two separate people

1969)("[t]he fact that a more diligent counsel might have cured th[e] error does not negate it"); *Crutcher v. State*, 481 S.W.2d 113, 115-16 (Tex. Crim. App. 1972)("lack of diligence by the defense counsel" does not excuse *Napue* error).

having the exact same story"); (R. 524)("both of them are telling you the same story").

The jury never heard that, in fact, these two witnesses had not told the same story until Spradley's trial. The jury never heard that Booker had claimed that Spradley identified his accomplice as Antonio Atkins - a man who Det. Edge affirmed had an airtight alibi. (R. 446, 519.) Had the State brought this critical fact to the jury's attention, as it was constitutionally required to do, Booker's credibility would have been in tatters - and with it any purported consistency between Booker's and Bryant's testimony. Obviously, then, Det. Edge's false or highly misleading testimony could not have been more material.[23]

This case presents the severe risk that outright misinformation produced Spradley's capital conviction in violation of his constitutional rights. *See* U.S. Const. amends. V, XIV; Ala. Const. § 6, 13. By permitting false or highly misleading testimony by Det. Edge that Booker had not named a person specifically when in fact she had named a person with an airtight alibi, the State blindfolded the jury and turned this close case into a capital conviction. The truth-seeking function of the trial forum was utterly

[23] *See Napue*, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence ...'.").

corrupted, and because this critical fact would have severely damaged Booker's credibility overall, reversal of both convictions is required. *See Hamilton v. State*, 677 So. 2d 1254, 1259 (Ala. Crim. App. 1995)(new trial appropriate remedy for guilt-phase *Napue* violation).[24]

D. Admission of this False and/or Highly Misleading Evidence Rendered Appellant's Death Sentence Unreliable.

The prosecution's use of Det. Edge's false or highly misleading testimony also violated Spradley's rights under the Eighth Amendment and § 15 of the Alabama Constitution. *See Mills v. Maryland*, 486 U.S. 367, 383-384 (1988). The trial court's death sentence is unreliable because it rests on false or highly misleading testimony extremely relevant to the credibility of the State's two most important witnesses. Accordingly, Spradley's death sentence must be reversed.

II. THE PROSECUTION COMMITTED PLAIN ERROR BY, *INTER ALIA*, INTRODUCING INADMISSIBLE AND HIGHLY PREJUDICIAL EVIDENCE OF ALLEGED PRIOR BAD ACTS, A PRIOR CONVICTION, A THIRD-PARTY THREAT, AND WITNESSES' FEAR OF THE DEFENDANT; FURTHER, THE TRIAL COURT ERRED BY FAILING TO GIVE A LIMITING INSTRUCTION.

The prosecution in this case declared in opening

[24] This claim asserts that the State knowingly allowed false or highly misleading testimony to occur at trial in violation of *Napue*; it does not merely allege that perjured testimony occurred. Therefore, the standard of review set forth in *Ex parte Frazier*, 562 So. 2d 560, 570 (Ala. 1989), is inapplicable.

statement:

> You are going to be convinced a [sic] beyond a reasonable doubt that Montez Spradley was such that he felt like he could control the streets; he was going to be able to get away with this, he was going to be able to shut the witnesses up and be able to walk away, free and clear. I submit to you that we are not going to let that happen. (R. 201-02.)

Then, throughout the trial, the prosecution diverted the jury's attention from its thin evidence of guilt by presenting an unrelenting onslaught of plainly inadmissible, highly inflammatory evidence that unfairly portrayed Spradley as a dangerous criminal with a network of dangerous family members and friends. This evidence included: alleged prior bad acts, a prior conviction, irrelevant threat and fear testimony, and improper references to an alias. Its introduction, both individually and cumulatively, constituted plain error, ALA. R. APP. P. 45A, and violated Spradley's rights under Alabama law as well as his constitutional rights to the presumption of innocence, a fair trial, due process of law, confrontation, and to be free of cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15. It demands reversal.[25] Appellant's rights were also violated by the trial court's failure to give a limiting instruction.

[25] *See Ex parte Woods*, 789 So. 2d 941, 943 n.1 (Ala. 2001)(even if a single error is insufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may warrant reversal).

A. The State Violated Spradley's Rights When State-Witness Bryant Testified that Spradley Had Committed Similar Crimes in the Past and When State-Witness Booker Testified that Spradley and his Friends "Had Done A Lot of Bad Stuff ... All their Life."

In summation at the guilt-innocence phase, the prosecution argued that Spradley has "already killed one.... What about any others?" (R. 514.) Here, the prosecution was exploiting the seeds improperly planted by its two key witnesses, Matthew Bryant and Alisha Bryant.

When the State asked Bryant what Spradley had told him "about his tattoos, in relation to this particular case," Bryant responded:

> he said after he got his money, he went to a tattoo place.... **Every time that he does something like this**, he gets a clover tattooed on him; four-leaf clover. (R. 298)(emphasis added).

Bryant also testified that Spradley felt "lucky" for escaping prosecution for these past crimes. (R. 299.) The State proceeded to introduce photographs of Spradley's tattoos along his forearms and on his neck. (R. 299-303; C. 494-97.) This grossly prejudicial and irrelevant evidence improperly suggested to the jury that Spradley had previously committed crimes similar to Mrs. Jason's murder and had gotten away with them. *See* ALA. R. EVID. 402, 403.

The State's evidence should have been, but was not, limited to Spradley's alleged statement(s) to Bryant about the tattoo he received for this crime, as evidence of guilty knowledge.[26] The other evidence - Bryant's testimony concerning the other tattoos allegedly relating to past violent crimes and the introduction of the photographs reflecting the tattoos - was patently inadmissible prior bad act evidence and served only to inflame the jury. *See* ALA. R. EVID. 404(b)("[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith").[27] This other evidence was wholly unconnected to the offenses for which Spradley stood trial and possessed no legal relevance to the State's case. *See* ALA. R. EVID. 401.[28] Bryant's testimony, buttressed by the photographs, had no purpose other than to suggest that Spradley enjoyed a life of

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[26] Bryant's testimony regarding which tattoo Spradley allegedly received for this crime was confusing. First, he testified that Spradley always receives a four-leaf clover. (R. 298, 299.) Then, once shown the pictures of Spradley's arms, he testified that he thinks the leprechaun was the one relating to this crime. (R. 301.)

[27] *See also Ex parte Minor*, 780 So. 2d 796, 802-804 (Ala. 2000); *Woodard v. State*, 846 So. 2d 1102, 1106 (Ala. Crim. App. 2002).

[28] Additionally, any relevancy was substantially outweighed by the extraordinary prejudicial effect. ALA. R. EVID. 403. *See also Averette v. State*, 469 So. 2d 1371, 1374 (Ala. Crim. App. 1985)(evidence "'must not only be relevant, it must also be reasonably necessary to the government's case, and it must be plain, clear, and conclusive.")(citation omitted); *Bush v. State*, 695 So. 2d 70, 85 (Ala. Crim. App. 1995).

violent crime without accountability.[29] This kind of evidence "has almost an irreversible impact upon the minds of the jurors."[30] *Ex parte Cofer*, 440 So. 2d 1121, 1123 (Ala. 1983)(quoting Gamble, MCELROY'S ALABAMA EVIDENCE § 69.01(1)(3d ed. 1977). *See also Ex parte Drinkard*, 777 So. 2d 295, 301-02 (Ala. 2000)(reversing due to prejudicial introduction of prior criminal conduct evidence).

The State also adduced improper propensity evidence during its direct examination of Booker. The State asked her about the contents of a conversation she had overheard with Spradley and his friends, and she said they were discussing "a lot of bad stuff and all they did, all their life." (R. 402.) This testimony again had no purpose other than to paint Spradley as having a propensity for crime. The admission of this highly inflammable propensity evidence in this close case and the prosecution's reliance upon it in closing were plain error and require reversal. *See James v. State*, 723 So. 2d 776, 784 (Ala. Crim. App. 1998)(admission of police reports containing uncharged conduct by defendant

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[29] *See United States v. Thomas*, 321 F.3d 627, 631 (7th Cir. 2003)("We fail to see how the redacted photo of the tattoo [of two revolvers] was admitted for any purpose other than to establish Thomas's propensity to possess guns.").

[30] Indeed, Bryant's testimony had an irreversible impact on the mind of the trial judge. In the sentencing order, the trial court relied on Spradley's tattoos, the "permanent reminders of his wicked and evil deeds," to reach the conclusion that he is a "bad boy to the bone." (C. 54).

was reversible error (in a case also involving Prosecutor Anderton)).[31]

B. The State Violated Appellant's Rights by Presenting Evidence of a Third Party Threat with No Connection to Appellant.

Continuing to portray Spradley as a dangerous criminal with a network of dangerous family and friends, the prosecution presented and emphasized highly prejudicial testimony by Antonio Atkins that he had been threatened by an unidentified third party. The State made no attempt to connect this threat to Spradley.

During direct examination, the prosecution specifically asked Antonio if he had been threatened:

> Q: **Have you had any types of threats against you or your family about coming here to testify today?**
> A: Yeah.
> Q: And what form have those threats been in?
> A: I was told not to come testify.
> Q: And you were told that by who?
> A: Against Montez.
> Q: I'm sorry.
> A: I was told not to come testify against Montez.
> Q: And who told you not to come testify?
> A: Some - **I don't know if they were family members or not, but I was approached by someone on the street, telling me not to.**

(R. 335-36)(emphasis added).[32]

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[31] *See also Ex parte Woodall*, 730 So. 2d 652, 663-64 (Ala. 1998)(admission of three uncharged prior bad acts amounted to plain error); *Ex parte Johnson*, 507 So. 2d 1351, 1356-57 (Ala. 1986)(admission of fingerprint card containing defendant's past convictions and arrests was plain error); *Tabb v. State*, 553 So. 2d 628, 630 (Ala. Crim. App. 1988)(testimony elicited by prosecution that defendant was drug addict constituted plain error).

[32] Twice, defense counsel objected to this testimony on hearsay grounds. (R. 336, 337.) *See* Point II.B., *infra*.

Later, knowing that Antonio Atkins could not identify the person making the alleged threat, the State nonetheless returned to the subject:

> Q: You stated that you received threats. Okay. Where did those threats come from? Who?
> A: I don't know his name, but I know his face.
> Q: Where were you when you received those threats?
> A: East Lake.
> Q: Okay. And did this person come up to you personally?
> A: Yeah.
> Q: And what specifically did he say to you?
> [defense objection, overruled]
> A: I was told not to come to court and testify against Montez in the murder case.
> Q: And what did you say?
> A: I didn't say anything. I got in my car and took off. (R. 337-38.)

Again, the prosecution failed to present any evidence suggesting that Spradley had procured, promoted, or approved this threat in any way.

In summation, the prosecutor stressed this threat and Antonio's fear. The prosecutor described Antonio as "[t]errified. Sure he was, because threats[33] were made against him, and he testified to that." (R. 497.)

Alabama law is unequivocal. For a third-party threat to be admissible, a nexus between the defendant and the

[33] Atkins testified that **one** person told him on **one** occasion not to come to court. *See* (R. 338). *See also* Point VI.D., *infra*. The trial court mirrored the State's misstatement of the evidence in its sentencing order and assumed without evidentiary support that the threats had been made by Spradley's friends. *See* (C. 38) (Atkins "has been told by some of Montez's friends on the street in East Lake not to come and testify").

threat must be established. "Evidence of an attempt by a non-witness third person to suppress testimony is admissible **if, but only if,** it is shown that the party against whom such evidence is offered either procured, promoted or approved such attempt." Gamble, McElroy's Alabama Evidence § 190.03 (6th ed. 2009)(emphasis added). *See also Arthur v. State*, 575 So. 2d 1165, 1177-78 (Ala. Crim. App. 1990) (Jefferson County case in which this Court considers same claim under plain error rule and condemns virtually identical testimony because prosecution made no attempt to link threats to defendant; putting very same District Attorney's office on notice that this question "never should have been asked.").[34]

The admission of this highly prejudicial evidence was clearly improper. Also improper was the prosecution's reliance on it in summation. *See, e.g., id.* (holding that "prosecutorial comments" in summation concerning improper threat evidence "compounded the error"). Reversal is required.

[34] *See also Sims v. State*, 41 So. 413 (1906)(error when court permitted witness to testify that defendant's father had offered money to witness in order to keep him from testifying, when State offered no evidence that defendant had procured the offer); *Cf. Stewart v. State*, 398 So. 2d 369, 372-73 (Ala. Crim. App. 1981)(finding a sufficient connection when defendant had *personally* threatened victim, then victim injured later by someone who said he "wanted to get me back for what I did for [defendant]").

C. The State Violated Appellant's Rights by Presenting Evidence of Witnesses' Fear of Him.

The State continued to "inject more innuendo," *Arthur*, 575 So. 2d at 1177, that Spradley was a dangerous criminal by eliciting testimony from its witness Melvin Henderson about his fears of the Appellant. This evidence served no purpose other than to inflame the jurors and deflect their attention from the State's weak case. In addition, as with the State's inadmissible threat evidence, this evidence carried the clear implication that Henderson's fear of Spradley was justified.

After Henderson had testified that he did not know the defendant, (R. 321), and made clear that he had no intention of testifying to anything of substance, (R. 319-21), the State directly asked him if he was afraid of Spradley:

Q: Are you not testifying because you don't want to have anything to do with the defendant?
A: Yes, sir.
Q: Are you not testifying because you are afraid of testifying.
A: Yeah, I am afraid. I got family, too.
Q: And what are you afraid of?
A: All of y'all.
Q: You are afraid of the State?
A: Both sides. (R. 321-22)(emphasis added).)

The State then capitalized on Henderson's fear, which it never connected to any action by Spradley, in summation:

> Melvin Henderson came in here and wouldn't even look at this guy. You saw him. You saw him crouched over like this (demonstrating) the whole time he was talking.... [H]e sure looks scared to me, sure looked terrified to me. We are talking an inmate. Inmates aren't supposed to be scared. They are not supposed to show fear to anybody. Melvin Henderson sure looked terrified. (R. 519.)

Numerous state and federal courts "have consistently held that the prosecution's references to, or implications of, witness intimidation by a defendant are reversible error **unless the prosecutor also produces substantial credible evidence that the defendant was the source of the intimidation.**" *Lay v. State*, 886 P.2d 448, 450-51 (Nev. 1994) (collecting federal cases) (emphasis added).[35] Henderson's testimony was irrelevant,[36] highly prejudicial, and affected Appellant's substantial rights. ALA. R. EVID. 402, 403; ALA. R. APP. P. 45A. *See Arthur*, 575 So. 2d at 1177.[37] Additionally, the prosecution's references to Henderson's fear in summation also mandate reversal. *See, e.g., id.* (holding that "prosecutorial comments" in

[35] *See also People v. Mullen*, 566 N.E.2d 222, 228-29 (Ill. 1990); *State v. Bourgeois*, 945 P.2d 1120, 1125-28 (Wash. 1997).
[36] *See Eldred v. Kentucky*, 906 S.W.2d 694, 704 (Ky. 1994)(generic statements regarding witnesses' fear of defendant not relevant in capital murder trial).
[37] *See also People v. Mullen*, 566 N.E.2d 222, 227 (Ill. 1990)(trial court excluded any references to witness refusing to testify out of fear, over State's strenuous objection); *State v. Bourgeois*, 945 P.2d 1120, 1126 (Wash. 1997)(error when State bolstered credibility of its witnesses by seeking testimony on direct examination of their fear or reluctance to testify).

summation concerning improper threat evidence "compounded the error").

The State also introduced inadmissible fear evidence during Booker's direct examination. The State asked her whether she believed Spradley would harm her or her family in the future, and she responded, "Him or somebody he know." (R. 410.) She also testified that "folks" had been trying to change her mind about her testimony and that "he turned everybody against me." (R. 413-14, 416.) This testimony had no relevance to the jury's determination of Spradley's guilt. *See* ALA. R. EVID. 401-404. In closing argument, the prosecutor compounded the error by misrepresenting that Booker had testified about "constant calls she received from his family members," (R. 497), later emphasizing this misrepresentation:

> she told you in here that she is scared of not only Montez Spradley, but of his people out there, or his relatives, his family.... She has got every reason to be scared of him, because even now, even to this day, she has people calling her, pushing her, telling her 'Don't come to court.... Don't come to court in Montez's case.' (R. 521.)

In fact, Booker **never** said that Spradley's family had been calling her, or threatening her, or that she feared them. *See also* Point VI.D., *infra*.

The State's presentation of threat and fear evidence, without any link to Spradley and emphasized in summation, was legally irrelevant and highly prejudicial. The evidence created an unacceptable risk that Spradley was convicted on the basis of a third-party threat and witnesses' fears of him and his family and friends. It was plain error and requires reversal.[38]

D. The Prosecution Violated Appellant's Rights by Introducing Evidence of A Prior Conviction, An Alleged Prior Arrest, and Other Bad Acts.

Early in his testimony, Bryant stated that he had talked to Spradley about the instant case "the **second time** he came into the jail." (R. 291)(emphasis added). Rather than curbing this prejudicial testimony, the State pressed him about it: "What about the **first time that he came into the jail**, did --?" (R. 291)(emphasis added). *See also* (R. 292)(prosecution referencing "first time" Bryant encountered Appellant at jail). Further, in response to State questioning, Bryant stated that Spradley was in the jail "on a probation violation." (R. 294.) Bryant also testified

[38] *See Gordon v. Kelly*, No. 98-1905, 2000 WL 145144, at *10-11 (6th Cir. Feb. 1, 2000)(unpublished opinion)(granting habeas relief when prosecution solicited and emphasized pervasive fear testimony unconnected to defendant); *United States v. Rios*, 611 F.2d 1335, 1342-43 (10th Cir. 1979)(reversible error when prosecutor insinuated defendant had threatened witnesses when no link shown); *Lay*, 886 P.2d 448 at 450-51 ("[T]he prosecution's references to, or implications of, witness intimidation by a defendant are reversible error unless the prosecutor also produces substantial credible evidence that the defendant was the source of the intimidation."); *Mullen*, 566 N.E.2d at 228.

that he met Spradley when Spradley "got in trouble in one of the other blocks." (R. 292.)

The message to the jury was clear: Spradley had been convicted of a prior offense, had been placed on probation, had been charged with violating that probation and been placed in jail, where he "got in trouble." Because the admission of this prejudicial evidence "would have had an almost irreversible impact upon the minds of the jurors," reversal is required. *See Ex parte Johnson*, 507 So. 2d 1351, 1357 (Ala. 1986)("the jury could have readily inferred, at a minimum, that [the defendant] had been arrested in the past."); *Cofer*, 440 So. 2d at 1123.[39]

E. Appellant's Rights Were Violated Through Repeated References to his Alleged Alias.

Compounding these errors, the prosecutor and trial judge both read to the jury the indictment, which repeatedly references an alleged alias: Kevin Spradley. (R. 196, 530.) "Only when proof of an alias is relevant to identifying the defendant should a court allow its inclusion in the indictment and its subsequent introduction at trial."

[39]*See also United States v. Williams*, 739 F.2d 297, 299-300 (7th Cir. 1984)(testimony regarding defendant's nickname implied he had committed other crimes and was well known to police); *State v. Kelly*, 526 P.2d 720, 728-29 (Ariz. 1974)(testimony referencing defendant's mug shot led to inescapable conclusion that defendant had been arrested before); *Miller v. State*, 436 N.E.2d 1113, 1120 (Ind. 1982)(admission of mug shot from past charge raised inference of prior arrest).

United States v. Wilkerson, 456 F.2d 57, 59 (6th Cir. 1972). *See, e.g., Brown v. State*, 369 So. 2d 881, 883-84 (Ala. Crim. App. 1979)(reversing due to erroneous and prejudicial admission of finger print card with a "list of five aliases, and the F.B.I. number, 414102K1," prejudicially and irrelevantly suggesting prior criminal activity).[40] Because Spradley's alleged alias was irrelevant for identification or any other purpose, repeated references to it warrants reversal in this close case, particularly given the abundant other inadmissible "bad character" evidence.

F. Pervasive Admission of this Grossly Prejudicial Evidence Was Plain and Reversible Error.

There is a substantial and unacceptable likelihood that the pervasive admission of evidence of Spradley's alleged bad acts and prior conviction and of a third-party threat and irrelevant fear testimony, and the repeated references to his alleged alias, produced his capital murder conviction, not the State's evidence of guilt.[41] Both individually and cumulatively, the admission of this

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[40] *See also Partain v. State*, 933 So. 2d 415, 416 (Ala. Crim. App. 2005)(Cobb, J., concurring specially)(stating that "the use of aliases not relevant to identifying the defendant should be avoided"). *But cf. Wabbington v. State*, 446 So. 2d 665, 669 (Ala. Crim. App. 1983)("We find that the mere use of aliases in the indictment, although subject to criticism, is **not always** so inherently prejudicial as to warrant a reversal.")(emphasis added).

[41] The trial court's own conclusion that "the evidence presented at trial clearly reflected that [Spradley] is simply a 'bad boy to the bone,'" (C. 54), reflects the highly prejudicial nature of this improper evidence.

evidence was so prejudicial[42] as to affect Appellant's substantial constitutional rights. *See* ALA. R. APP. P. 45A; U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15. Its admission was plain error and this Court should reverse.

G. The Trial Court Committed Plain Error by Failing to Give a Limiting Instruction With Respect to This Evidence.

Furthermore, the trial court committed plain error by failing to provide an instruction limiting the jury's consideration of this evidence. *Cf. Ex parte Minor*, 780 So. 2d 796, 800 (Ala. 2000)(finding plain error in trial court's failure to give instruction limiting the use of defendant's prior convictions to impeachment evidence).[43] Even assuming *arguendo* that the evidence of Spradley's alleged bad acts and prior conviction was admissible for some purpose, the trial court failed to instruct the jury that the evidence could not be considered as substantive evidence of guilt. *Id.* at 804. Absent this or any guidance,[44] the jurors were

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[42] *See, e.g.*, Kalven & Zeisel, *The American Jury* 160 (1966) (presentation of a defendant's prior convictions to a jury reduces defendant's chance of acquittal when the State's case has contradictions from 68% to 38%).

[43] *But cf. Snyder v. State*, 893 So. 2d 482, 485 (Ala. 2001)(distinguishing *Minor* on grounds that prosecutor only briefly alluded to prior convictions in cross and did not emphasize them in closing).

[44] *Cf. Burgess v. State*, 962 So. 2d 272, 285 (Ala. Crim. App. 2005)(finding the following instruction sufficient in Burgess's particular case: "The accused is not on trial for any act, or conduct, not alleged in the indictment. Regardless of your personal views, as jurors, you are not to concern yourselves with the lawfulness, or the unlawfulness of any prior incidents of behavior between the Defendant and any victim in this case.")

free to consider this "presumptively prejudicial" evidence as proof that Spradley committed the capital murder. *Cofer*, 440 So. 2d at 1124.

Similarly, regarding the threat and fear evidence, the trial court failed to instruct the jury in two crucial respects. First, the jury should have been instructed that it could consider the threat and fear evidence *only if* the State proved that Appellant was in some way linked to the threat or the witnesses' fears (although the State introduced no evidence of any such link). *See Arthur*, 575 So. 2d at 1177 (requiring such a link). Second, the jury should have been instructed that *if* it did find such a link, its consideration of the evidence was limited to showing Appellant's consciousness of guilt (although the evidence could just as easily be understood as probative of consciousness of innocence) and could not be considered as propensity evidence. Such instructions are required (and routinely given) when threat evidence is admitted due to its inherently prejudicial nature.[45]

[45] *United States v. Brazel*, 102 F.3d 1120, 1154 (11th Cir. 1997) (trial court gave proper limiting instruction); *People v. Medina*, 51 P.3d 1006, 1013 (Colo. Ct. App. 2001)(similar); *State v. O'Neil*, 801 A.2d 730, 748-750 (Conn. 2002)(similar); *Baldwin v. State*, 784 So. 2d 148, 161-62 (Miss. 2001)(similar); *People v. Ramadhan*, 854 N.Y.S.2d 717, 718 (N.Y. App. Div. 2008) (similar).

In this close case built upon inadmissible evidence and innuendo, the trial court's failure to limit the jury's consideration of this grossly prejudicial evidence substantially prejudiced Appellant, constituted plain error, ALA. R. APP. P. 45A, and violated Appellant's constitutional rights. *See* U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15.

III. THE STATE VIOLATED APPELLANT'S RIGHTS BY CALLING UNWILLING WITNESS MELVIN HENDERSON TO TESTIFY THAT HE DID NOT WANT TO TESTIFY FOR FEAR OF APPELLANT.

From the outset of State witness Melvin Henderson's testimony, it was clear he did not want to testify. (R. 319-20.) Once the State started questioning him on substantive matters, Henderson simply refused to answer. Henderson explicitly stated that he did not want to testify and that he did not "know the defendant or the victim," and "really" did not "want to have no dealing with neither party." (R. 321.) Undeterred, the prosecutor then questioned Henderson as follows:

> Q: Do you want to be here to testify today, Melvin?
> A: No, ma'am. No, sir.
> Q: Would you testify to anything about that gas purchase today, if asked?
> A: No, I don't want no business - I don't want to be involved in it.
> Q: Are you not testifying because you don't want to have anything to do with the defendant?
> A: Yes, sir.

Q: Are you not testifying because you are afraid of testifying.
A: Yeah, I am afraid. I got family, too.
Q: And what are you afraid of?
A: All of y'all.
Q: You are afraid of the State?
A: Both sides. (R. 321-22.)

Thereafter, Henderson testified to nothing of any relevance, but imparted the highly prejudicial information that he feared Spradley. (R. 320-23.)

As discussed above, the State capitalized on Henderson's irrelevant[46] yet grossly prejudicial testimony in its summation. (R. 519.)

The State committed reversible error by calling and continuing to question a witness merely so that the witness would testify to his fear of Appellant.[47] *Cf. Huff v. State*, 678 So. 2d 293, 297-98 (Ala. Crim. App. 1995) (reversing conviction obtained in trial when prosecutor called codefendant merely to have him invoke his Fifth Amendment right not to testify).[48] Just as the State may not raise the inference of guilt through a codefendant's

[46] Henderson did not provide any testimony relevant to the charges in this trial. Though the State claimed that Henderson testified that someone tried to sell him gas, as noted in Point IV.A., *infra*, Henderson never testified to this point.

[47] Any claim by the State that it called Henderson and persisted in questioning him in front of the jury for proper purposes - even after Henderson said he would not answer questions when asked by the judge directly - is belied by the State's use of Henderson's testimony in its summation to show that Appellant was allegedly "terrif[ying]," even to inmates who "aren't supposed to be scared." (R. 519.)

[48] *See also, e.g., United States v. Castro*, 129 F.3d 226, 231 (1st Cir. 1997) (holding that defendant has no right to force witness to stand only to assert 5th Amendment right).

invocation of his right not to incriminate himself, the State may not call a witness merely to besmirch the defendant with the inherent prejudice of the witness stating he fears the defendant.

In addition, the prejudice could not be greater because the State relied on Henderson's fear testimony to portray Appellant as a frightening criminal in its summation. (R. 519.) *See, e.g., Arthur*, 575 So. 2d at 1177. In this close case, the individual and combined prejudice flowing from Henderson's testimony and the State's reliance on it in summation constituted plain error, ALA. R. APP. P. 45A, and violated Appellant's constitutional rights to the presumption of innocence, due process, a fair trial, and to be free from cruel and unusual punishment. *See* U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15. Reversal is required.

IV. THE PERVASIVE INTRODUCTION OF OTHER INADMISSIBLE AND HIGHLY PREJUDICIAL EVIDENCE VIOLATED APPELLANT'S RIGHTS UNDER STATE AND FEDERAL LAW.

At trial, the State sought to establish a link between Spradley and the use of Mrs. Jason's credit card on Sunday, January 11, 2004, two days following her murder.[49] The

[49] No evidence connected Spradley to the first use of the credit card, on Friday, January 9, 2004, the night of Mrs. Jason's murder.

overwhelming majority[50] of its evidence supporting this link was patently inadmissible, including: (1) hearsay evidence, (2) lay opinion testimony, (3) video evidence lacking a proper foundation; and (4) other inadmissible evidence. Both individually and cumulatively,[51] the admission of this evidence violated the Alabama Rules of Evidence and Spradley's rights to confront the witnesses against him, to the presumption of innocence, to a fair trial, to due process of law, and to be free of cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15. Where an objection was not raised at trial, the admission of the evidence seriously affected Appellant's substantial rights and constituted plain error. ALA. R. APP. P. 45A. Reversal is required.

A. The State's Pervasive Use Of Inadmissible Hearsay Evidence Violated Appellant's Rights.

Inadmissible, unreliable hearsay evidence permeated the State's case against Spradley, including, *inter alia*, (1)

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[50] The remaining evidence was unpersuasive. Matthew Bryant, in an attempt to explain why the card was used only at gas stations, testified that Spradley stated that he had obtained only gas cards: "turned out the credit cards were gas cards." (R. 295.) However, Det. Edge testified that only one card was used and it was a general MasterCard. (R. 438-39.) Alisha Booker's testimony concerning the credit cards was contradictory. She stated initially that Spradley told her he and a friend received them from robbing Mrs. Jason. (R. 405.) Later, she stated that he said he received them from a friend, and he may not have known at the time that they belonged to the victim. (R. 406, 412-13.)

[51] *Ex parte Woods*, 789 So. 2d 941, 942 n.1 (Ala. 2001)(even when single error is not sufficiently prejudicial to require reversal, cumulative effect of multiple errors may require reversal).

hearsay statements by Melvin Henderson, who was allegedly approached about paying cash for gas purchased with the victim's credit card; (2) hearsay statements by Antonio Atkins, who allegedly informed Det. Edge he saw Spradley possess a credit card; (3) hearsay testimony by a witness devoid of personal knowledge that the victim's credit card was used at Ensley Seafood and other locations that the State sought to link to Spradley; and (4) hearsay evidence that the State's chief witness regarding Spradley's alleged use of the credit card, Antonio Atkins, had a solid alibi.[52]

1. Use of Henderson's Prior Statements as Substantive Evidence.

The State claimed in opening that its witness Melvin Henderson would testify: "Yeah, some guy offered to fill up my tank and use his credit card, for five dollars. I said 'Yeah, that would be fine.'" (R. 199.) In summation, the State argued that Henderson had testified that someone had offered to sell him gas. (R. 519.) But Henderson never provided any such testimony. Rather, the State elicited testimony from Officer Steve Bashears and Det. Edge about Henderson's out-of-court statements to each of them and used these statements substantively.

[52]There are numerous other examples of inadmissible hearsay at Appellant's trial. *See, e.g.*, (R. 336)(Antonio Atkins testifying, over defense objection, that an unidentified person on the street told him not to come to court); (R. 338)(same).

a. Prior Statement to Officer Bashears.

During direct examination by the State, Ofc. Bashears testified that when he arrived at the Ensley station on January 11, 2004, the owner identified two "guys" as stealing gas.[53] (R. 358.) Ofc. Bashears identified them as Orlando Rankins and Melvin Henderson. (R. 358-59.) He testified that Henderson told him "a person was offering to fill their tanks up with gas for five dollars." (R. 361.)

This statement was inadmissible as substantive or impeachment evidence. First, the admission of Henderson's out-of-court statement violated Alabama's long-established prohibition against hearsay evidence (now contained in ALA. R. EVID. 801), so it was not to be admitted substantively.

Second, Henderson's statement to Ofc. Bashears was not inconsistent with his trial testimony and thus did not qualify as an inconsistent statement for purposes of ALA. R. EVID. 613. *See State v. Cousin*, 710 So. 2d 1065, 1071 (La. 1998)("there is nothing of substance in such a denial for the prosecutor to impeach. The denial itself is non-

[53] This out-of-court identification by the owner itself constituted inadmissible hearsay. Defense counsel had objected to Ofc. Bashears's testimony regarding any statements made by the owner, and the State agreed to move on. (R. 358.) Yet shortly thereafter, the State still elicited this information from Ofc. Bashears. *Id.*

evidence, and it is unnecessary to attack the credibility of non-evidence.").[54]

Third, during Henderson's direct examination, the State never confronted him with this out-of-court statement. Thus, even if the prior statement could have been used to impeach, the State was prohibited from presenting extrinsic evidence of the statement under ALA. R. EVID. 613(b).[55]

b. Prior Statement to Detective Edge.

The State had Det. Edge testify at trial that Henderson told him (1) "some guy was trying to sell him gasoline, using a credit card" (R. 442); (2) Henderson was going to pay a discount price for the gasoline (R. 443); (3) "the person was going to swipe the card and use the card for the purchase of the gasoline, but then Melvin Henderson was going to give him ... five or ten dollars" "for the fill-up" (R. 443); (4) and that way, "the guy with the credit card got cash and the card, the credit card took the charge" (R. 443); (5) Henderson gave Det. Edge a description of an

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[54] *See also Douglas v. Alabama*, 380 U.S. 415, 419 (1965)(witness invoking Fifth Amendment privilege "could not be cross-examined on a statement imputed to but not admitted by him"); *Huff v. State*, 639 So. 2d 539, 541-542 (Ala. Crim. App. 1993)(same even when witness does not have legal basis for refusing to testify).

[55] *See also Johnston v. State*, 455 So. 2d 152, 159 (Ala. Crim. App. 1984) ("witness cannot be impeached by proof of contradictory statements made by him, whether oral or in writing, without first asking him whether he made such declarations, specifying with reasonable certainty the time when, the place where, the person to whom such statement was made and the substance of such statement." (citations omitted)).

automobile, "an older model, green Cadillac Coupe Deville" which "had some markings on one of the sides." (R. 444.)[56] The State never asked Henderson about these five things.

As with Ofc. Bashears's testimony, Henderson's out-of-court statements to Det. Edge were inadmissible hearsay, as substantive or impeachment evidence. ALA. R. EVID. 801; 613. Their admission directly violated ALA. R. EVID. 613(b): absent inconsistency,[57] prior statements may not be proved with extrinsic evidence.

c. *Admission of Henderson's Prior Statements Was Harmful.*

The improper admission of Henderson's prior statements was clearly harmful. The State used the statements as substantive evidence that someone had approached Henderson at the Ensley station offering to sell him gas by using a credit card - the same station where Mrs. Jason's credit card was apparently used and the same station where Antonio Atkins placed Spradley. (R. 482-83; 519; 329.) Simply put, the State relied on Henderson's prior statements to connect Spradley to the use of Mrs. Jason's credit card.

Furthermore, even assuming *arguendo* that the evidence was

[56] Det. Edge then testified that some months later, Sergeant Jerry Frazier "spotted a vehicle matching this description," and Det. Edge found out (through hearsay since he obviously had no personal knowledge and no business records were introduced) that Antonio Atkins owned the car. (R. 445.)

[57] *See* BLACK'S LAW DICTIONARY 1193 (6th ed. 1990)(defining "[p]rior inconsistent statements" as "prior statements made by the witness which contradict statements made on the witness stand").

admissible for impeachment purposes, there is little question that without a limiting instruction the jury treated the statements as substantive evidence. *See* Point IV.G., *supra*. "'Impeachment is improper when employed as a guise to present substantive evidence to the jury that would be otherwise inadmissible.'" *Burgin v. State*, 857 So. 2d 162, 165 (Ala. Crim. App. 2002)(quoting *United States v. Gilbert*, 57 F.3d 709, 711 (9th Cir. 1995))(citations omitted).

In this close case, the State's circumvention of Henderson's unhelpful testimony by introducing his prior statements through Ofc. Bashears and Det. Edge constituted plain error. *See* ALA. R. APP. P. 45A. Reversal is required. *See Cousin*, 710 So. 2d at 1072 (court "compelled to reverse this conviction because of the prosecutor's flagrant misuse of that [impeachment] evidence [as substantive evidence]").

2. Use of Antonio Atkins's Prior Statement as Substantive Evidence.

The State also improperly adduced testimony from Det. Edge about Antonio Atkins's police statements. At trial, Antonio testified that Spradley bought him gas at the Roger Jolly station; he said he never saw Spradley with a credit card. (R. 332.) The State never asked him whether he told

Det. Edge during his police statement that he had seen Spradley use a credit card. Det. Edge testified that Atkins had told him that Spradley had used a credit card at the Roger Jolly Chevron station. (R. 482.)

Without confronting Atkins with the contents of his prior statement, the admission of Det. Edge's testimony was plain error for both substantive or impeachment purposes. As above, the State's improper introduction of and reliance on this extrinsic hearsay evidence violated ALA. R. EVID. 801 and 613(b). Its admission was far from harmless in this close case, as it meant the difference between circumstantial evidence that Spradley used the credit card (Atkins's trial testimony) and eyewitness testimony that Spradley had the card (Edge's account of Atkins's alleged prior statement). *See also Johnston*, 455 So. 2d at 159. Furthermore, the State relied upon the testimony in summation. (R. 520.)

3. Inadmissible testimony by a witness utterly devoid of personal knowledge and based on hearsay.

Det. Edge's testimony provided the only evidence at trial concerning the times, dates, and locations of the usage of Mrs. Jason's USAA Bank MasterCard. The State did not even attempt to introduce the credit card company's bank statement or any documentation from the locations where the

card was allegedly used. Instead, Det. Edge testified that he was able to use the bank statement to determine that the MasterCard was used at the Roger Jolly, Ensley, and Cowboy's stations, which usages the State sought to link to Montez Spradley. (R. 447-48; 479, 482.) Det. Edge testified further that Mrs. Jason's credit card was used at the pump at Ensley before Melvin Henderson pulled into it, without explaining how he reached that conclusion.[58] (R. 482-83.)

This testimony by Det. Edge was offered for its truth and was based on out-of-court statements, not personal knowledge. Nonetheless, in summation, the State insisted that these out-of-court statements verified its witnesses' testimony. (R. 520.) Det. Edge's testimony constituted inadmissible hearsay and violated Spradley's right to confrontation under both the Federal and Alabama Constitutions. ALA. R. EVID. 801, 802; *Crawford v. Washington*, 541 U.S. 36 (2004); *Floyd v. State*, No. CR-05-0935, 2008 WL 3989540, at *23 (Ala. Crim. App. Aug. 29, 2008)(following *Crawford*). Given the importance of this evidence to the State's theory that Montez Spradley used the victim's credit card, the errors were harmful.

[58] Indeed, just moments before, Det. Edge had testified, "They don't relate the charges to a particular car doing the pumping." (R. 479.)

4. Inadmissible testimony corroborating Antonio Atkins' alibi.

At Spradley's trial, Antonio Atkins testified that he was working at McDonald's the night of the offense. (R. 337.) Subsequently, the State called Det. Edge, who testified authoritatively that he had verified Antonio Atkins's alibi. *See* (R. 446)("I went to the McDonald's corporate headquarters ... and it showed that he was working"). The State relied on Det. Edge's "verification" of the alibi in summation. *See* (R. 496)("they got records to document that");(R. 519)("we verified that alibi").

The McDonald's records were not introduced into evidence, nor was a McDonald's employee called with personal knowledge regarding Antonio's alibi. Det. Edge himself had no personal knowledge that Antonio was working at McDonald's on the evening of January 9, 2004. His testimony merely reiterated out-of-court statements and was offered to prove that Antonio had a solid alibi. The testimony was, therefore, inadmissible under ALA. R. EVID. 602 and 802.

B. The State Violated Appellant's Rights By Presenting Inadmissible Lay Opinion Testimony.

At trial, the prosecution introduced inadmissible lay opinion testimony.[59] *See* ALA. R. EVID. 602, 701. Because the testimony was important to the State's attempt to link Spradley to the use of Mrs. Jason's credit card on January 11, 2004, its admission requires reversal.

1. Inadmissible lay opinion testimony by a witness utterly devoid of personal knowledge that Spradley "for certain" used the victim's credit card.

Det. Edge testified unequivocally that the only person he knew "for certain" to have used Mrs. Jason's credit card was Montez Spradley. (R. 461.) This testimony was a clear violation of ALA. R. EVID. 602 and 701. Det. Edge had no personal knowledge that Spradley had used the credit card; he simply inferred it from indirect, hearsay evidence not admitted at trial. With the imprimatur of a law enforcement officer - the lead investigator in this capital murder case - this statement was highly prejudicial.[60]

2. Inadmissible lay opinion testimony of a witness without personal knowledge linking Spradley to the credit card.

Antonio Atkins testified that he never saw Spradley with a credit card, and that, in fact, he never saw any

[59] To the extent the witness's perception is based on the out of court statement of another person rather than the witness's own knowledge, the testimony is inadmissible hearsay. *See* Point IV.A., *supra*, incorporated here.
[60] Indeed, in its sentencing order, the trial court relied upon and misinterpreted this statement, concluding that Det. Edge testified that he knew for certain that Spradley was the *only* one to have used Mrs. Jason's credit cards. (C. 42). *See* Section VII.B., *infra*.

credit cards when with Spradley on January 11, 2004. (R. 332.) He stated only that he concluded that Spradley used a credit card to buy him gas because "neither one of us had any money." *Id.* This testimony was inadmissible under ALA. R. EVID. 602 and 701. And because the State relied upon Atkins's testimony in arguing that Spradley had used the credit card, (R. 497, 520), it was harmful.

3. Inadmissible lay opinion testimony by a witness that an individual on a video "looks extremely close to Montez Spradley."

When first called by the State, Det. Edge testified twice that he "could not identify anybody" from the Ensley and Cowboy's videos obtained in the course of his investigation. (R. 456, 461.)[61] The State recalled him to the stand the following day and asked him if he could identify anyone in the Cowboy's video. Det. Edge replied: "there was one individual that looks extremely close to Montez Spradley on the inside [of the station]." (R. 475-76.)

This testimony was improper lay opinion testimony under Rules 701 and 704 of the Alabama Rules of Evidence and invaded the province of the jury as factfinder. *See* Gamble, MCELROY'S ALABAMA EVIDENCE § 127.01(2) (6th ed. 2009)(lay opinion

[61] *See also* (Supp. R. PH. 35.)

precluded when "witness can lay all the facts before the jurors in such a way as to place them in as good a position as the witness is in to reach an opinion"). Because Det. Edge did not personally observe the events at the gas station, the jury was in just as good a position as Det. Edge to evaluate whether Spradley was the person in the video. Permitting Det. Edge "to give an opinion [on identity] preempt[ed] the role assigned to jurors." ALA. R. EVID. 701, Advisory Committee's Notes.

C. The Trial Court Erred In Allowing the State to Introduce Video Evidence Without Establishing a Proper Foundation, Over Defense Objection.

During the testimony of Det. Edge, over defense objection, the State introduced two videos from two gas stations where Mrs. Jason's credit card was alleged to have been used without establishing a proper foundation. (R. 471, 476.) The videos purported to identify the times that particular events occurred - times allegedly coinciding with the use of Mrs. Jason's credit card. The trial court erred in admitting these videos.

Under Alabama law, if there is not a "qualified and competent witness who can testify that the sound recording or other medium accurately and reliably represents what he or she sensed at the time in question," then the party

seeking to introduce a video must present a witness who is able to "explain how the process or mechanism that created the item works and how the process or mechanism ensures reliability." *Ex parte Fuller*, 620 So. 2d 675, 678 (Ala. 1993).

The State did neither here. Det. Edge did not personally observe the events on the videos and had no personal knowledge regarding the creation of the videos or what they purported to depict.[62] *Cf.* ALA. R. EVID. 901 (b)(1). Moreover, these videos were not taken by any law enforcement officer; they are recordings from private business establishments, none of whose employees were called to establish their reliability. These out-of-court statements, admitted over defense objection, without a proper foundation, an opportunity to cross-examine a custodian, or a showing of unavailability, expressly violated Spradley's rights under ALA. R. EVID. 901, 802, 803, and 602 as well as his constitutionally-guaranteed right to confrontation. *See Crawford*, 541 U.S. at 68-69; U.S. Const. amend. VI; Ala. Const. § 6.

D. The Prosecution Improperly Admitted Alisha Booker's Out-Of-Court Statements.

[62] Indeed, when presented with State's Ex. 48, Det. Edge could identify only that it was "one of the parking lots - either the Seafood (sic) or Cowboy's." (R. 466; C. 506-07.) Det. Edge did not even personally obtain the videos from the gas stations. *See* (R. 440)(Lt. Green obtained the videos).

State witness Alisha Booker testified repeatedly that she could not recall details of her police statements about the Appellant's alleged confession to her. (R. 387, 391, 396, 398, 399, 400, 404.) In response to this testimony, the State should have sought to refresh Booker's recollection by allowing her to review her statements and see whether she obtained an independent recollection. *See* ALA. R. EVID. 612. Instead, the prosecutor quoted lengthy passages from Booker's statements and asked her if she remembered them, exposing the jury to the substance of the statements. *See* (R. 401, 402, 409-10).

The admission of this testimony was reversible error.[63] *See* MCCORMICK ON EVIDENCE, § 9, n.7 (6th ed. 2006)(Supp. 2006)("I]t is improper for counsel to read the writing aloud before the trier of fact.")(citations omitted).[64]

The State also introduced another prior statement of Booker's, a complaint made to Ofc. Martinez on December 29,

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[63] *Cf. Douglas*, 380 U.S. at 416-18 (improper for prosecutor, "under the guise of cross-examination to refresh [its witness's] recollection," to read entirety of uncooperative witness's out-of-court statement).

[64] Nor was Booker's police statement admissible as a recorded recollection under Rule 803(5) because she did not testify that at the time she gave her police statement she knew of its contents and knew them to be true. *See Lindley v. State*, 728 So. 2d 1153, 1155 (Ala. 1998)("Scott did not testify at trial that he personally observed the facts referred to in the writing or that at the time the statement was made he knew of its contents and knew them to be true. Testimony to that effect is required before a statement can be admissible under the doctrine of past recollection recorded. *See* C. Gamble, MCELROY'S ALABAMA EVIDENCE, § 116.03 at 528-33 (5th ed. 1996).")

2005, concerning an alleged incident that occurred eight days before. (R. 368.) The court allowed these statements under the excited utterance exception to the hearsay rule, ALA. R. EVID. 803(2), over defense counsel's objections. (R. 365, 369.) The court's ruling was clear error.[65] Under this exception, while "time alone is not a determining criterion," the statement "must be uttered **contemporaneously** with the excitement resulting from the startling event or condition." Gamble, MCELROY'S ALABAMA EVIDENCE § 265.01(2) (6th ed. 2009)(emphasis added). Booker obviously was not still excited eight days after the incident. Indeed, "the very nature of a formal written report suggests that it lacks spontaneity." *Dawson*, 867 S.W.2d at 497.

The error was harmful with regard to both of Spradley's convictions. Ofc. Martinez's testimony was critical to obtaining his conviction for intimidating a witness, which the State argued was evidence of his consciousness of guilt for the capital murder. (R. 497-98.)

E. The State Improperly Introduced Results of Forensic Tests Conducted by Out-of-Court Witnesses.

[65] *See, e.g., Dawson v. Commonwealth*, 867 S.W.2d 493, 496-97 (Ky. Ct. App. 1993)(victim's statement to officer immediately following incident of domestic violence admissible; victim's statement to another officer hours later inadmissible for lack of spontaneity).

The State improperly elicited testimony from two witnesses concerning forensic conclusions reached by others, violating Alabama's prohibition against hearsay evidence, and denying Spradley his constitutional right to confront the witnesses who actually conducted the tests. First, Deputy Holmes of the Jefferson County Sheriff's Office testified to two conclusions reached by the Alabama Department of Forensic Sciences (ADFS): (1) that all seven lifted fingerprints were unusable; and (2) that no firearms submitted to ADFS were linked to the shell casing found at the scene. (R. 245, 249.) The State used this latter testimony to insinuate that other suspects investigated in this case had been exonerated. *See* (R. 249-50). *See also* (R. 466)(Det. Edge testifying that he submitted firearms to ADFS whenever he collected any after robberies).

The State also called Heather Harrleson, ADFS section chief of the Firearms and Tool Mark Unit, to testify to the findings reached by her colleague, Ed Moran,[66] discipline chief of the same unit, that no guns submitted by the police department matched the shell casing found at the scene. (R. 376.)

[66] Though Harrleson "suppose[d]" Moran had the flu, (R. 373), *Crawford* requires both a showing of unavailability **and** a prior opportunity for cross-examination. *Crawford*, 540 U.S. at 54.

The results of these forensic tests constituted testimonial, out-of-court statements.[67] Their admission thus violated both the Alabama Rules of Evidence and Spradley's constitutional right to confront the witnesses against him. ALA. R. EVID. 802; *Crawford*, 541 U.S. at 68-69; U.S. const. amend. VI; Ala. Const. § 6. *See also Melendez-Diaz v. Massachusetts*, No. 07-591, 2009 WL 1789468, at *4 (U.S. June 25, 2009)(admission of lab analyst's affidavit at trial without opportunity to cross-examine analyst violated confrontation clause).

F. The Admission of this Improper Evidence, Individually and Cumulatively, Demands a New Trial

Admission of this evidence, individually and cumulatively, constituted plain error, ALA. R. APP. P. 45A, and violated Appellant's rights under Alabama law and under the U.S. Constitution. *See* U.S. Const. amends. V, VI, XIV; Ala. Const. §§ 6, 13. Reversal is mandated.[68]

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[67] *See Smith v. State*, 898 So. 2d 907, 917 (Ala. Crim. App. 2004)(admission of autopsy report without testimony from examiner who performed autopsy constituted confrontation clause violation, though harmless error).

[68] *See Ex parte Scroggins*, 727 So. 2d 131, 134 (Ala. 1998)(reversal of capital murder conviction where prosecution presented hearsay testimony of only eyewitness without sufficient showing of declarant's unavailability); *Ephraim v. State*, 627 So. 2d 1102, 1105 (Ala. Crim. App. 1993)(capital murder conviction reversed when out-of-court statement of codefendant admitted during police officer's testimony); *James*, 723 So. 2d at 784 (admission of police reports containing hearsay statements of victim and her grandmother alleging prior uncharged incidents of harassment and burglary required reversal); *Tabb v. State*, 553 So. 2d 628, 629-31 (Ala. Crim. App. 1988)(admission of investigator's hearsay testimony that defendant had prior drug abuse history was plain error requiring reversal of conviction and death sentence).

G. The Trial Court Erred by Failing to Give a Limiting Instruction.

Even assuming *arguendo* that some of this evidence was admissible for impeachment, the court committed plain error by failing to give an instruction limiting its use to that purpose. *See, e.g., Ex parte Minor*, 780 So. 2d at 800 (plain error for trial court to fail to give instruction limiting use of defendant's prior convictions to impeachment);[69] ALA. R. APP. P. 45A. The court's failure was extremely prejudicial given that, as outlined above, the prosecution used the evidence as substantive evidence.

V. THE TRIAL COURT'S GUILT-PHASE INSTRUCTIONS UNCONSTITUTIONALLY SHIFTED AND REDUCED THE STATE'S BURDEN OF PROOF.

Jury instructions may not reduce the state's burden of proving guilt beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 363-64 (1970); *Sandstrom v. Montana*, 442 U.S. 510, 519 (1979); *Francis v. Franklin*, 471 U.S. 307, 317 (1985). They also may not shift the burden to the defense. *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975). Using

[69] Courts have repeatedly found the failure to give limiting instructions in these circumstances to be plain error. *See McCracken v. State*, 820 A.2d 593, 602 (Md. Ct. Spec. App. 2003)(finding plain error in court's failure to give this limiting instruction where "impeachment testimony offered by the State focused on a fact directly relevant to the jury's determination of appellant's guilt"); *Towles v. United States*, 428 A.2d 836, 843 (D.C. 1981)(same due to the jury's "likely improper consideration of the impeaching statement as substantive evidence"); *State v. Davis*, 566 S.W.2d 437, 445-447 (Mo. 1978) (same and noting that it "is difficult if not impossible to expect the jury to give the statements commented upon by the prosecutor in his argument [as substantive evidence] the limited value for impeachment purposes").

erroneous instructions not contained in the pattern instructions, the trial court violated both of these precepts. The instructions were plain error, ALA. R. APP. P. 45A, and denied Appellant his constitutional rights to a fair jury trial, to due process of law, and to be convicted only upon proof beyond a reasonable doubt. *See* U.S. Const. amends. V, VI, XIV; Ala. Const. §§ 6, 11, 13.

A. Unconstitutional Instruction Requiring Jury To Credit Witnesses Who Testified Consistently.

Straying far from the Alabama pattern jury instructions,[70] the trial judge added the following addendum concerning witnesses' credibility, appearance, demeanor, bias, and prejudice:

> However, if you can reasonably reconcile the testimony of all of the witnesses, so as to make them all speak the truth, then you should do so. But in case you find that you cannot reasonably reconcile the testimony of all of the witnesses, so as to make them all speak the truth, then and in that event, you may disregard the testimony you find unworthy of belief and consider only the testimony you find to be true. (R. 534.)

Federal and state appellate courts have repeatedly criticized this type of instruction because it "impermissibly condition[s] the jury's right to disbelieve

[70] "The appellate courts of this state endorse the use of the Alabama Pattern Jury Instructions in criminal cases." *Ex parte McGriff*, 908 So. 2d 1024, 1033 (Ala. 2004)(citing *Ex parte Martin*, 548 So. 2d 496, 499 (Ala. 1989); *Russaw v. State*, 572 So. 2d 1288, 1292-93 (Ala. Crim. App. 1990)("A comparison of the charge given in this case with portions of the pattern jury instructions recommended by the Alabama Supreme Court reveals the glaring deficiencies of the jury instructions of the trial court.").

...uncontradicted testimony" and "interfere[s] with the common-sense factfinding process by which jurors labor toward verdicts...." *United States v. Holland*, 526 F.2d 284, 285-86 (5th Cir. 1976), *modified on reh'g*, 537 F.2d 821 (5th Cir. 1976).[71]

Moreover, this instruction both unconstitutionally reduced the State's burden of proof, shifted the burden to the defense, and violated Spradley's right to a fair jury trial. The State's burden of proof beyond a reasonable doubt applies not only to the elements of the charged offense, but also to "the facts necessary to establish" those elements. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). The first sentence of the instruction reduced the State's burden of proof by instructing the jury it "should" find the State's witnesses truthful if their testimony can be "reconcile[d]." (R. 534.)

In addition, the next sentence[72] of the instruction, by making the jury's inability to "reasonably reconcile the testimony of all of the witnesses" a condition precedent to the jury rejecting their testimony, the instruction unconstitutionally shifted the burden from the State to

[71] On rehearing, the court in *Holland* found the error harmless.
[72] "But in case you find that you cannot reasonably reconcile the testimony of all of the witnesses,...then and in that event, you may disregard the testimony you find unworthy of belief...." (R. 534.)

prove its witnesses truthful to the Appellant to show that the testimony of the State's witnesses could not be reconciled (and therefore not believed). *Mullaney*, 421 U.S. at 701. Finally, by invading the province of the jury to decide the facts, *Ex parte Brown*, 581 So. 2d 436, 437 (Ala. 1991), the instruction violated Appellant's constitutional right to a fair trial by jury. *Sullivan*, 508 U.S. at 278.

The trial court's instruction severely prejudiced Appellant's defense that Booker and Bryant were unworthy of belief even if their testimony was consistent. (R. 507-08.) The instruction also substantially bolstered the State's argument that Booker and Bryant were worthy of belief because their testimony was consistent. (R. 513-15.) Thus, the instruction prejudiced Appellant's substantial rights,[73] and was plain error requiring reversal. ALA. R. APP. P. 45A.

B. Unconstitutional Reasonable Doubt Instruction.

Straying from the pattern jury instructions on reasonable doubt, the trial court told the jury that it could acquit only if it were able to "assign a good,

[73] Although some courts have found this type of error to be harmless based on the facts and the jury having also heard proper instructions on credibility, *United States v. Brown*, 555 F.2d 407, 417-18 (5th Cir. 1997), a similar conclusion is unwarranted here. Here, on the facts, the instruction blatantly prejudiced Spradley's defense. Moreover, the court's other proper instructions on credibility did not alleviate this error at all because the court separated the proper instructions - given first - from the improper instructions by stating, "however," (R. 534), meaning "in spite of" or "on the other hand." Thus, the court completely negated the former proper instructions in favor of the erroneous conditional jury instructions at issue.

sensible reason" for its doubt about guilt.[74] (R. 532.) This instruction improperly shifted the burden of proof to the defense to explain *why* Appellant should be acquitted. *See Mullaney*, 421 U.S. at 701. In addition, by requiring jurors who might otherwise find the State's evidence lacking in proof beyond a reasonable doubt to explain their doubt in favor of acquittal with a "good sensible reason," the instruction both diluted the State's burden of proof and shifted the burden to the defense.[75] *See, e.g., Winship*, 397 U.S. at 363-64. This constitutional error prejudiced Appellant's substantial rights and was plain error requiring reversal. ALA. R. APP. P. 45A. *But see Jenkins v. State*, 627 So. 2d 1034, 1048 (Ala. Crim. App. 1992)(approving instruction containing the challenged language).

VI. PERVASIVE PROSECUTORIAL MISCONDUCT UNDERMINED THE FAIRNESS OF APPELLANT'S TRIAL.

At trial, the prosecution engaged in repeated and highly prejudicial misconduct that was plain error, "adversely affected the substantial right" of the Appellant, and so infected the trial with unfairness that Appellant was

[74] By contrast, the pattern instructions do not require jurors to articulate or assign a good, sensible reason for acquittal. ALABAMA PATTERN JURY INSTRUCTIONS, Criminal Instructions 1.4 and 1.5 (3d ed. 1994).

[75] *See Cage v. Louisiana*, 498 U.S. 39, 41 (1990)(holding that charge using terms "moral certainty," "grave uncertainty," and "actual substantial" doubt to define reasonable doubt based upon an unconstitutionally reduced burden of proof); *Mullaney*, 421 U.S. at 701.

denied a fair trial. *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 misconduct violated Appellant's constitutional rights to a fair trial, to participate in his defense, to confront all witnesses against him, to decline to testify, against self incrimination, to be present at all stages of his proceedings, to refuse to plead guilty and require the state to prove its case at a jury trial, to due process of law, and to be spared cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and §§ 6, 11, 13, 15 of the Alabama Constitution.

The test in Alabama for reviewing improper prosecutorial argument "is not whether the comments did influence the jury but whether they might have influenced the jury in arriving at the verdict." *See Quinlivan v. State*, 579 So. 2d 1386, 1390 (Ala. Crim. App. 1991)(citing *Ex parte Stubbs*, 522 So. 2d 322 (Ala. 1987)). As demonstrated below, that test is easily satisfied here.[76]

[76] *See Quinlivan*, 579 So. 2d at 1387 (reversing because of prosecutorial misconduct); *Arthur v. State*, 575 So. 2d 1165, 1185-86 (Ala. Crim. App. 1990) (finding prosecutorial misconduct); *Gillespie v. State*, 549 So. 2d 640, 641 (Ala. Crim. App. 1989)(cumulative effect of prosecutorial misconduct requires reversal.)

A. The Prosecutors "Testified" To Their Personal Knowledge And Personal Beliefs, Including Their Personal Views Of Montez Spradley's Guilt.

A prosecutor may not "testify" to the jury about facts not in evidence or about their personal beliefs. *See, e.g., Stubbs*, 522 So. 2d at 323 (reversing conviction because prosecutor gave unsworn testimony as to why the State did not call witness)(adopting dissenting opinion in *Stubbs* v. *State*, 522 So. 2d 317 (Ala. Crim. App. 1987).[77] Such unsworn testimony runs afoul of a defendant's constitutional rights to confront all witnesses and evidence against him, to a fair trial and to due process as guaranteed him by the Sixth, Eighth, and Fourteenth Amendments and §§ 6, 13, and 15 of the Alabama Constitution.[78] In a capital case, it also violates the Eighth Amendment's guarantee that a defendant not be sentenced to death on the basis of information he has had no opportunity to confront. *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986). Unsworn

[77] *See also Arthur*, 575 So. 2d at 1182 ("Attorneys must be careful to refrain from injecting their own personal experience or knowledge in support of their argument...") (citations and internal quotation marks omitted).

[78] *See Douglas*, 380 U.S. at 418-420 (defendant denied right to confrontation when prosecutor's statements and questions, although "not technically testimony," were the equivalent in the jury's eyes, thus triggering the right to confront); *Smith v. State*, No. CR-97-1258, 2000 WL 1868419, at *49, *52 (Ala. Crim. App. Dec. 22, 2000)(finding prosecutor's remarks that he did not have a deal with testifying witness "highly improper"), *rev'd in part on other grounds, Ex parte Smith*, No. 1010267, 2003 WL 1145475 (Ala. Mar 14, 2003); *Woods v. State*, 97 So. 179, 180 (Ala. Crim. App. 1923)("The right to a fair and impartial trial is violated by the misconduct of counsel in stating to the jury facts not in evidence because by so doing he fraudulently testifies without having been sworn as a witness.")(citation omitted).

testimony by a prosecutor is highly prejudicial because it carries the imprimatur of the prosecutor's office. *See Quinlivan*, 579 So. 2d at 1388 (quoting *United States v. Young*, 470 U.S. 1, 18-19 (1985)).

1. The Prosecution's Impermissible Testimony Corroborating Witness Matthew Bryant.

Important State witness Matthew Bryant testified that he pled his capital case and received a mere five-year sentence, (R. 310), but denied that this relative slap on the wrist had any connection to his testimony against Spradley. (R. 291.) Bryant specifically denied that the Jefferson County District Attorney's office had any role in the reduction in his sentence. *Id.* During their closing argument, defense counsel assailed Bryant's credibility on these points. (R. 504-05.) During Assistant District Attorney Anderton's ensuing rebuttal closing argument, he sought to corroborate Bryant's testimony by testifying that his office played no role in reducing Bryant's sentence:

> **I don't know what happened up in Blount County[79] [sic] that his case was reduced. I don't have a clue.** You don't have anything in front of you that any kind of deal was cut, of any kind, whatsoever, concerning his case. **I don't know.** We have all heard cases and read in the newspaper where cases are plea bargained around for all sorts of things, for whatever reason. **I don't know. That's not my case. I have got nothing to do with it.**

[79] Bryant in fact was charged with capital murder in St. Clair County. *See* (R. 289).

> **That's a whole different county.... I can't explain something I didn't have something to do with. I don't know....** (R. 518-19)(emphasis added).

This unsworn testimony was patently improper and clearly violated Spradley's rights. "When the prosecutor throws his own credibility onto the scales of decision, he tips the scales and changes the balance in an unlawful way." *King v. State*, 518 So. 2d 191, 197 (Ala. Crim. App. 1987).

2. The Prosecutors Impermissibly Conveyed Their Personal Opinions.

The State's central argument for guilt was that Spradley had confessed to Alisha Booker and Matthew Bryant. *See, e.g.*, (R. 512-514). In closing, defense counsel argued that the jury should be skeptical of the alleged confessions because, *inter alia*, they both contained a factual allegation that did not match the forensic evidence. (R. 507.) Defense counsel further suggested that the witnesses might have internalized this allegation by talking with the same investigating officers. (R. 507-08.) In response, Prosecutor Anderton impermissibly provided the jury with his **own personal opinion** about the defense theory:

> He is accusing the Jefferson County Sheriff's office of getting stories together and writing down a script for each one of these people to tell. **And I find that appalling....**
>
> ***

> But Mr. Sanford [defense counsel] wants to get you to either figure that Don Edge told each of these two people what to say, **so that we could build a case** and make all of this stuff up, and put an innocent guy in jail, **because that's the way we are,** or these two came up with this - this conspiracy. **I don't believe either one of them. I don't believe either of those theories. I think what you have got,** you have got some people who, for whatever reason, found a good bone in their hearts, found a good spot, found they had a bit of conscience, who came forward.
> (R. 523; 527)(emphasis added).

By expressing his own personal views about the defense theory, the prosecution violated Spradley's rights to due process, a fair trial, and confrontation. *Smith*, 2000 WL 1868419, at *49; *Douglas*, 380 U.S. at 418-420.

Prosecutor Streety also expressed his personal views, impermissibly assuring the jury: "This man is guilty, folks. Don't let the defense throw you a bone." (R. 501.) This unsworn testimony was highly improper and demands reversal.

3. The Prosecution's Baseless Allegations that Spradley May Have Killed Others.

Mr. Anderton also engaged in misconduct when he suggested to the jury that Montez Spradley may have killed other persons. (R. 514)("**He's already killed one, that she [Alisha Booker] knows of. What about any others?**") (emphasis added). This statement was clearly an "inflammatory appeal to arouse in the jurors a personal hostility towards, or fear of, the defendant." *Ex parte*

Smith, 581 So. 2d 531, 532-34 (Ala. 1991)(plain and reversible error where prosecutor argued that "if this defendant ever gets loose again, he's going to do it again. He's going to kill, and he's going to kill again.") (citation omitted).[80] And because it was delivered in the state's rebuttal closing argument, Spradley had no opportunity to confront it in violation of his Sixth and Eighth Amendment rights. *See Skipper*, 476 U.S. at 5 n.1.

4. The Prosecution's Unsupported And Prejudicial Allegations Concerning Spradley's Family Members.

The prosecution also argued facts with no evidentiary support when suggesting in penalty-phase closing that Spradley's children might have been in the car with him the night he supposedly committed this offense. (R. 624.)

The prosecution also argued facts not in evidence when in penalty-phase closing Mr. Anderton stated that Montez Spradley's "mama" shot someone. (R. 623.)[81]

B. The Prosecutors Vouched For The Credibility Of Their Witnesses.

[80] *See also Gillespie v. State*, 549 So. 2d 640, 646 (Ala. Crim. App. 1989) (reversing because "the prosecutor sought to bolster his case by prejudicial attacks upon [the defendant] which were not only completely unsupported by any evidence, but also concerned [other unproved, alleged crimes] which were totally inadmissible").

[81] The prosecutor argued, "What kind of example did he give his kids? 'Montrese, now, if you need some money, all you got to do is get a .40 caliber, and you can shoot somebody and get it. That would be alright. Don't worry about it. **My mama did it.** That's alright. I did it. It's alright. I'm your daddy, honey.'" (R. 623) (emphasis added).

"'The prosecutor's vouching for the credibility of witnesses...carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.'" *Quinlivan*, 579 So. 2d at 1388 (citation omitted). Such vouching is "not acceptable argument." *King*, 518 So. 2d at 195.

In closing argument, the prosecutors repeatedly vouched for their central witnesses. They said of Alisha Booker, "she came in here and **she told the truth.**" (R. 498) (emphasis added). In rebuttal closing, they said, "Alisha Booker, down deep, knows she can't lie about what this man told her. She can't do it. **It's the truth.**" (R. 522.) About Matthew Bryant, they said he "had absolutely nothing to gain by coming in here to testify.... Why would he come in here today to do that? No reason for it but **it's the truth**, that's why." (R. 499.) And about both Booker and Bryant, they said, "**I submit to you, they are telling the exact truth, the exact straight-up truth, the best as they know how.**" (R. 524)(emphasis added).

Further, the prosecutors said about Antonio Atkins that, "He knew it was the right thing to do to come in here and tell on him...." (R. 496.) As this Court has stated, however, "Truthfulness of testimony is for the triers of

fact." *Crosslin v. State*, 446 So. 2d 675, 680 (Ala. Crim. App. 1983)(citation omitted).

C. The Prosecutors Inflamed The Passions And Prejudices Of The Jury.

Prosecutors engage in misconduct when they seek to inflame the passions and the prejudices of the jury, including "by inflammatory appeal to arouse in the jurors a personal hostility towards, or fear of, the defendant." *Smith*, 581 So. 2d at 533-34.[82]

The prosecutors in this case repeatedly engaged in such misconduct. They repeatedly adduced evidence that their witnesses were afraid of the Appellant and his family, that their witnesses had been threatened by unidentified "friends and family" of the defendant, that the Appellant had engaged in prior bad acts, and that the appellant had a prior conviction. *See* Point II, *supra* (incorporated herein). The prosecution then proceeded to rely upon this clearly inadmissible and highly prejudicial evidence in closing argument. *See* (R. 496-97)(arguing Atkins was frightened); (R. 497-98, 521, 528)(Booker); (R. 519)(Henderson).

As discussed above, the prosecution also inflamed the passions and prejudices of the jury when it suggested that

[82] *See also Ex parte State (Berard v. State)*, 486 So. 2d 476 (Ala. 1985) (improper for prosecutor to conduct a cross-examination designed to unfairly prejudice defendant in eyes of jury).

Montez Spradley may have killed others. (R. 514.) *See Le v. Mullin*, 311 F.3d 1002, 1021 (10th Cir. 2002)(prosecutor's implication that defendant had murdered before improper).

Furthermore, Mr. Anderton inflamed the jury's passions when he played on the jurors' concerns about their own safety and about the sanctity of their homes. *See* (R. 524-25.) *See also United States v. Mooney*, 315 F.3d 54, 59 (1st Cir. 2002)(prosecutor's remarks contrasting jurors' sense of safety in community with armed robbery "improperly appealed to the jury to act in ways other than as dispassionate arbiters of the facts").

Mr. Anderton also inflamed the jury by arguing that it would be "throwing away a week" if it accepted the defense argument to acquit for lack of physical evidence. (R. 526.) And he continued to inflame the jury when he argued that only a guilty verdict would solve Marlene Jason's murder and figuratively remove her body from the street where it was found: "For all practical purposes, her body would still be laying out there [if Bryant and Booker had not come forward]. Because until this is solved, we can't do anything with it. She went home. She committed no crime. She went shopping. She came home, she was unpacking her car." (R. 527.) *Cf. Arthur*, 575 So. 2d at 1185 (error for

prosecutor to imply to jury that in order to "do its job" it can only reach a certain verdict)(citation omitted).

Moreover, Mr. Anderton inflamed the jury when he repeatedly denigrated the defendant with such names as "a clown," (R. 513), a "coward," (R. 513), and a "thug." (R. 517, 625.)

At the penalty phase, the prosecutors continued this pattern of inflaming the passions and prejudices of the jury. They improperly compared the defendant's rights to those of the victim, arguing that Montez Spradley should not be allowed to live so he could remain in his children's lives given that Marlene Jason would have no opportunity to love, hug, and care for her loved ones. (R. 624.) *See McNair v. State*, 653 So. 2d 320, 337-38 (Ala. Crim. App. 1992)(prosecutor's numerous comparisons of victim's rights to those of defendant were "clearly improper").[83] Mr. Anderton violated the Appellant's due process rights[84] by his constitutionally excessive discussion of the victim and her survivors. *See, e.g.*, generally the penalty-phase closing and rebuttal closing at (R. 614-15; 617-18; 622-28).

[83] *See also Brooks v. Kemp*, 762 F.2d 1383, 1411 (11th Cir. 1985)(impermissible "to imply that the system coddles criminals by providing them with more procedural protections than their victims").

[84] *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991)(victim-impact evidence and argument, while constitutionally admissible as a general rule, can become "so unduly prejudicial that it renders the trial fundamentally unfair.").

Undeniably, these inflammatory arguments "engender[ed] unduly the sympathies of the jury on the one hand, [and] inflame[d] their minds with prejudice and passion upon the other hand." *Arthur*, 575 So. 2d at 1185 (citation omitted). They were patently improper and unconstitutional and demand reversal.

D. The Prosecution Misstated The Evidence.

A prosecutor may not misstate the evidence adduced at trial. *See, e.g., Marshall v. Hendricks*, 307 F.3d 36, 65 (3d Cir. 2002)(prosecutor acted improperly by mischaracterizing testimony); *United States v. Wilson*, 135 F.3d 291, 297-302 (4th Cir. 1998)(same). In this case, the prosecutors seriously misstated the testimony of Dr. Simmons, the forensic pathologist. Dr. Simmons never testified that Marlene Jason was attempting to defend herself when she was killed. (R. 257 *et seq.*) But that is exactly what the prosecutor asserted in closing argument. *See* (R. 518)("She is trying to defend herself. She is not pulling a gun, she is not doing anything except trying to take care of herself. That's what Dr. Simmons told you. That's what he told you.").

The prosecution also misstated the evidence when it claimed that Melvin Henderson testified, "somebody tried to

sell him some gas." (R. 519.) Henderson testified to no such thing. *See also* Point IV.A., *supra*.

Further, the prosecution misstated the evidence when it claimed that Alisha Booker testified that she had received "constant calls" "from [Spradley's] family members." (R. 497.) Booker provided no such testimony. Similarly, the prosecution misstated the evidence when it argued that Booker testified that "she is scared of not only Montez Spradley, but of his people out there, or his relatives, his family ... [, who are] calling her, pushing her, telling her 'Don't come to court. Don't come to court in Montez's case.'" (R. 521.) Booker did not testify that she was scared of Spradley's relatives or his family.[85] And she never said that his family or friends had told her not to come to court. The state also insinuated that Antonio Atkins had received multiple threats, (R. 497), when in fact he testified that he received one threat from one person. (R. 338.)

E. The Prosecutors Improperly Argued That The Defendant Showed No Remorse And Commented On The Defendant's Demeanor at Trial.

The prosecution in penalty-phase closing argument told the jury: "**We are dealing with a cold-blooded man who hasn't**

[85] She testified vaguely that she thought "him or somebody he know" would hurt her. (R. 410.)

shown the first ounce of emotion through this whole trial proceeding. I submit to you that he has absolutely no remorse. He doesn't care. He would do it again in a minute." (R. 626-27)(emphasis added). These comments about Spradley's demeanor during trial and his lack of remorse (for a crime he denies committing) violated his constitutional rights to be present at this stage of the proceedings, to participate in his defense, to decline to testify,[86] to remain silent, to a fair jury trial, and to refuse to plead guilty. *See* U.S. Const. amends. V, VI, VIII, & XIV; ALA. R. CRIM. P. 14.4.

Numerous courts have held it is reversible error to comment on the defendant's alleged lack of remorse during trial.[87] *But see Loggins*, 771 So. 2d 1101-02. Numerous

[86] *See Griffin v. California*, 380 U.S. 609 (1965)(prosecutor may not comment on defendant's failure to testify); *Ex parte Yarber*, 375 So. 2d 1231, 1234 (Ala. 1979), *rev'd on other grounds*, 437 So. 2d 1330 (Ala. 1983); *cf. Ex parte Loggins*, 771 So. 2d 1093, 1102 (Ala. 2000) (prosecutor's comment about defendant's lack of remorse was not a comment on failure to testify because it was based on trial testimony that defendant lacked remorse); *but see Smith v. State*, 838 So. 2d 413, 459 (Ala. Crim. App. 2002).

[87] *See, e.g., Lesko v. Lehman*, 925 F.2d 1527, 1544-45 (3d Cir. 1991) (prosecutor's request that jury consider defendant's "arrogance" in failing to apologize for homicide while presenting mitigating evidence during penalty phase of murder prosecution was improper because comment condemned defendant's failure to testify during guilt phase); *State v. Johnson*, 360 S.E.2d 317, 319 (S.C. 1987)("We hold the solicitor's improper reference to appellant's lack of remorse was error because it was a comment upon his constitutional right to plead not guilty and put the state to its burden of proof."); *Pope v. State*, 441 So. 2d 1073 (Fla. 1983)(reference to lack of remorse in capital sentencing phase improper); *People v. Young*, 987 P.2d 889, 894-95 (Colo. Ct. App. 1999)(holding that the trial court's reliance on defendant's lack of remorse was improper); *State v. Ramires*, 37 P.3d 343, 352 (Wash. Ct. App. 2002) (holding that the trial court's consideration of defendant's lack of remorse was improper in giving defendant harsh sentence).

courts also have held that a prosecutor may not comment on a defendant's demeanor during trial.[88] *But see James v. State*, 564 So. 2d 1002, 1007 (Ala. Crim. App. 1990).

The prosecutor's speculation that Spradley lacked remorse injected into this case an impermissible non-statutory aggravator. *See Robinson v. State*, 520 So. 2d 1, 6 (Fla. 1988)(holding that "absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor")(internal quotation omitted); *but see Dobyne v. State*, 672 So. 2d 1319, 1349 (Ala. Crim. App. 1994). Consideration of non-statutory aggravation evidence is clearly impermissible. *See, e.g., Ex parte Stephens*, 982 So. 2d 1148, 1151-53 (Ala. 2006).

F. The Prosecutors Misstated The Law.

A prosecutor must not misstate the law to the jury. *Harich v. Wainwright*, 813 F.2d 1082, 1091 (11th Cir. 1987) (and cases cited therein), *vacated on other grounds*, 828 F.2d 1497 (1987). Here, a prosecutor misstated the law at penalty-phase closing when he stated "there is nothing that

[88] *See United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984) (defendant's nervousness not evidence subject to comment); *Blue v. State*, 674 So. 2d 1184, 1213-15 (Miss. 1996), *rev'd on other grounds, King v. State*, 784 So. 2d 884 (Miss. 2001)(explaining that the prosecutor may not comment on the nontestifying defendant's demeanor and appearance during trial); *Baldez v. State*, 679 So. 2d 825, 826 (Fla. Dist. Ct. App. 1996)(similar)(citing *Pope v. Wainwright*, 496 So. 2d 798, 802 (Fla. 1986)); *United States v. Carroll*, 678 F.2d 1208, 1209-10 (4th Cir. 1982).

says his age[89] is something that should be taken into consideration." (R. 625-26.) In fact, the defendant's relative youth, 21, was a constitutionally and statutorily relevant mitigating factor that the law requires jurors (and the sentencing judge) to consider when determining his sentence. *See Roberts v. Louisiana*, 431 U.S. 633, 637 (1977)("Circumstances such as the **youth of the offender**, ... are all examples of mitigating facts" (emphasis added)); ALA. CODE § 13A-5-51(7).

G. The Cumulative Effect Of The Prosecutors' Misconduct Warrants Reversal.

This pervasive misconduct constituted plain error, ALA. R. APP. P. 45A, and denied Spradley's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law. *See Berger*, 295 U.S. at 89 (reversing because "misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential").[90] A new trial is warranted.

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[89] The prosecution incorrectly identified Montez Spradley's age as 22. (R. 625-26.) In fact, he was 21 at the time of the offense. *See* (C. 52)(trial court's sentencing order identifying Spradley's age as 21); (R. 635) (prosecution when challenged by the judge conceded Spradley's age was 21); (R. 212)(date of offense was January 9, 2004).

[90] *See also Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (improper closing argument is unconstitutional if it works to deprive the defendant of a fair trial in its entirety); *United States v. Young*, 470 U.S. 1, 12 (1985)(court must examine entire record to determine whether prosecutor's improper comments amount to prejudicial error).

VII. ERRORS IN THE TRIAL COURT'S SENTENCING ORDER MANDATE RELIEF.

As demonstrated below, numerous errors in the trial court's sentencing order constituted plain error, ALA. R. APP. P. 45A, and violated Spradley's rights under both federal and Alabama law, including his constitutional rights to confront the witnesses against him, to the presumption of innocence, to a fair trial, to due process of law, and to be free of cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15. Accordingly, this Court should grant a new penalty trial. *See Wimberly v. State*, 759 So. 2d 568, 574 (Ala. Crim. App. 1999)(citation omitted). Alternatively, this Court should remand to the trial court to address these errors.

A. The Trial Court Failed To Give The Jury's 10-2 Recommendation For Life "Overwhelming Support."

The trial court failed to give proper weight to the jury's decisive 10-2 sentencing recommendation of life imprisonment. Although a trial court retains the authority to override a jury's advisory verdict under Alabama law, ALA. CODE § 13A-5-47, it must give a jury's vote of 10-2 for life imprisonment "overwhelming support" in its sentencing determination. *Ex parte Carroll*, 852 So. 2d at 837; *Ex parte Tomlin*, 909 So. 2d 283, 287 (Ala. 2003). The trial

court failed to do so here.

1. Strength of the Factual Basis For Jury's Recommendation.

Conflicting Evidence Concerning Identity of the Triggerman and Defendant's Alleged Confessions. The Alabama Supreme Court has specifically directed trial courts, when determining the weight due to a jury's life recommendation, to consider "conflicting evidence concerning the identity of the 'triggerman,'" *Carroll*, 852 So. 2d at 836,[91] and the "conflicting evidence concerning [Appellant's] alleged confession[s]." *Ex parte Martin*, 931 So. 2d 759, 771 (Ala. 2004). Both conflicts materialized at Spradley's trial: Spradley's two alleged confessions were conflicting regarding the identity of Mrs. Jason's murderer.

Booker testified several times that she believed Spradley told her that his friend was the one who had shot Mrs. Jason.[92] (R. 398, 401, 412.) In contrast, Bryant

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[91] *See also* ALA. CODE § 13A-5-51(4); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion)(defendant's lesser role in the offense is relevant consideration in mitigation); *Eddings v. Oklahoma*, 455 U.S. 104, 121 (1982) (same).

[92] The trial court concluded that Booker presented conflicting accounts of the identity of the triggerman within her own testimony. (C. 57-58.) Though Booker never specifically testified that Spradley had told her he had shot Mrs. Jason, she did acknowledge that she told "Don Edge that he had admitted to [her] that he killed the lady." (R. 399.) At the end of her direct examination, she also responded to the State's final question, "Did he, in fact, tell you he had killed a lady?" Booker replied, "Yes. Him and his friend." (R. 414.) The jury may well have considered these statements to be in conflict with the ones noted above. However, the jury also may have taken these statements to mean that Spradley participated generally in Mrs. Jason's killing, rather than to mean he pulled the trigger. Regardless, at a minimum, the jury was presented with conflicting evidence between these two witnesses

testified that Spradley told him he was the one who had shot Mrs. Jason. (R. 313.)

Wholly ignoring *Carroll*'s dictates, the trial court summarily dismissed these inconsistencies and concluded "beyond a reasonable doubt" that the jury would not have considered them in their sentencing recommendation. (C. 58.) It improperly conjectured that the jury must have completely discounted Booker's testimony and relied instead on the "overwhelming evidence of guilt" as evinced by the testimony of Matthew Bryant and Det. Edge.[93] (C. 58.) However, there was no basis for the court's conjecture. Indeed, Det. Edge did not testify to the identity of the triggerman.

No Physical Evidence or Eyewitness. In determining the weight to give the jury's recommendation, the trial court must also consider "the strength of the factual basis for such a recommendation...." *Carroll*, 852 So. 2d at 836. This consideration must include an assessment of the strength of the State's evidence of guilt, as the Alabama Supreme Court explained in *Martin*, 931 So. 2d at 771:

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and may have considered Booker's testimony conflicting in and of itself.

[93] *But compare* (C. 51)("the defendant **may have** had an accomplice")(emphasis added) *with* (C. 35)(noting that Spradley and "another person" committed the murder). Further, the trial court freely used the phrase "overwhelming evidence" even though it was clearly inappropriate. *See* (C. 54)(noting "overwhelming evidence" that Spradley dealt drugs when he was riding around with his children in his car, when no such evidence was ever presented at trial).

> As we held in *Carroll*, the weight to be given the jury's recommendation of life imprisonment without parole as a mitigating circumstance should depend upon the number of jurors recommending that sentence and also upon the strength of the factual basis for such a recommendation in the form of information known to the jury, such as the conflicting evidence concerning Martin's alleged confession to his fellow inmate and the probable cross-contamination of Martin's clothing.

This rule is consistent with the acknowledgment by numerous courts, including the U.S. Supreme Court, that, "'residual doubt has been recognized as an extremely effective argument for defendants in capital cases.'" *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (citation omitted).[94] The rule exists even though Alabama courts and the United States Supreme Court have rejected a right to a residual doubt instruction at the penalty phase, *see Ex Parte Lewis*, __ So. 2d __, No. 1070647, 2009 WL 1496836 at *2 (Ala. May 29, 2009), *Franklin v. Lynaugh*, 487 U.S. 164, 172-75 (1988), and Alabama courts have held that residual doubt is not a mitigating circumstance, *Lewis*, 2009 WL 1496836 at *3.

Here, the jury had no physical evidence connecting

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[94] *See also Chandler v. United States*, 218 F.3d 1305, 1311 (11th Cir. 2000); *Moore v. Johnson*, 194 F.3d 586, 618 (5th Cir. 1999); *Barnes v. State*, 496 S.E.2d 674, 688 (Ga. 1998); *United States v. Honken*, 378 F. Supp. 2d 1040, 1041 (N.D.Iowa 2004)(and cases cited therein); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998)("'residual doubt' ... is the most powerful 'mitigating' fact"); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 28 (1988)(residual doubt "most often recurring explanatory factor in the life recommendation cases [from Florida] studied."). *Cf.* note 117, *infra.*

Spradley to the murder.[95] (R. 526.) Further, the State presented no eyewitnesses. The testimony of the two State witnesses who alleged that Spradley had confessed to them did not correspond with the physical evidence or with each other. *See* Point XV, *infra*.

Not one of these critical facts was mentioned in the trial court's sentencing order. The court failed to consider the fact that the jury may well have been uncomfortable sentencing a man to death when no physical evidence or eyewitness connected him to the murder. Given the factual weaknesses in the State's case, the jury's recommendation was entitled to great weight. *Carroll*, 852 So. 2d at 836; *Martin*, 931 So. at 771.

2. The Trial Court Did Not Use Information Unknown to Jurors to Undermine a Mitigating Circumstance.

Carroll holds that a trial court's ability to override a jury's life verdict based on "information known only to the trial court" is limited to when the evidence is "used to undermine a mitigating circumstance." *Carroll*, 852 So. 2d at 836. *See also Tomlin*, 909 So. 2d at 287 (trial court improperly used information unknown to the jury as basis for override).

[95] Seven latent fingerprints were lifted at the scene, but none proved usable. (R. 245.) Several firearms were confiscated and submitted for comparison, but none matched the bullet or shell casing found at the scene. (R. 249.)

The trial court violated this holding. It sought to justify its override by asserting that the jury did not know about the defendant's conviction for second degree assault and a violation of the Firearms Act.[96] (C. 56, 57.)[97] However, the trial court did not (and could not) contend that this information undermined a mitigating circumstance. Defense counsel did not present evidence on or argue the mitigating circumstance of no significant history of prior criminal activity (ALA. CODE § 13A-5-51(1)). *See* (R. 620-22).[98]

Moreover, the trial court's speculation that the jurors' verdict would have been different had they known of Spradley's prior criminal record was baseless. Substantial allegations concerning bad acts by Spradley, much worse than his actual criminal record, were already before the jury (albeit improperly; see Point II, *supra*).[99] Thus, it is

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[96] The court also referred to additional "numerous prior adult convictions," (C. 56), but they merely consisted of several traffic violations and a misdemeanor conviction for "Failure to Obey Officer." *See* (C. 187).

[97] Curiously, the trial court concluded "beyond a reasonable doubt" that Spradley's jury and Carroll's jury voted for life based on their belief that the defendant had no prior violent criminal convictions. (C. 57.) The Honorable Gloria Bahakel did not preside over the trial of Taurus Carroll. *See Carroll*, 852 So. 2d at 833 (circuit judge was the Honorable Alfred Bahakel).

[98] The verdict form is silent on whether the jury found this mitigator. *See* (C. 219). This silence underscores its deficiencies. *See* Point XII, *infra*. Had the jury indicated, for instance, that they did not find this mitigating circumstance, then the court would have been completely prevented from engaging in this speculation.

[99] The jury heard that Spradley got a tattoo "[e]very time he does something like this." (R. 298.) It heard evidence that could have led it to the conclusion that he had assaulted Booker on many occasions. (R.

extremely unlikely that Spradley's actual criminal record would have changed the jury's verdict.

3. Defense Counsel's "Brilliant but Coercive" Penalty Closing.

The trial court "found" without any basis in the record that the great majority of the jurors voted for life because of defense counsel's "brilliant but coercive" closing argument.[100] (C. 58.) The court's justification of its override on the basis of its characterization of defense counsel's argument as "brilliant but coercive" violated Appellant's constitutional rights. *See* U.S. Const. amends. VI, VIII & XIV; Ala. Const. §§ 6, 13, 15.

Additionally, defense counsel's argument was by no means "brilliant but coercive." Asking capital jurors for mercy and reminding them of a defendant's children was hardly unusual[101] or improper and does not justify a judicial

388.) The jury had found him guilty of intimidating a witness. (R. 559.) The jurors heard testimony that he had been in jail before this charge and that he had faced a probation violation. (R. 291; 294.) They had heard that he had done "a lot of bad stuff...all [his] life." (R. 402.) There was testimony that Spradley had dealt drugs as a teenager. (R. 582.) As to the firearms violation, the jury had evidence before it that Spradley had guns, (R. 315), not to mention the fact that it had already found Spradley guilty of a murder involving a gun.

[100] In characterizing the argument in this manner, the court mirrored not only the literal language but also the rationale of a different trial court's sentencing order in another case. *Compare* (C. 58) *with Martin*, 931 So. 2d at 779 (quoting trial court's sentencing order, which characterized defense counsel's lengthy penalty phase argument regarding residual doubt as "brilliant but coercive."). In *Martin*, the jury's presumed reliance on defense counsel's argument persuaded the Honorable Ferrill McRae to override a jury's 8-4 recommendation for life. *Id.*

[101] Even among the capital cases the trial court has presided over, defense counsel's argument here was anything but novel. *See, e.g.*, Sent'g Order, *State v. Esaw Jackson*, Nos. CC-2006-2138, 2139, 2140, 2141 (Honorable Gloria Bahakel presiding)(Jackson Record C. 44)(defense counsel argued that

override of a life verdict.

4. These Errors Demand a Remand for Imposition of Life Without Parole, or Alternatively, Meaningful Reconsideration of the Carroll *Circumstances.*

The trial court failed to give the jury's recommendation proper weight as a mitigating circumstance and misapplied the Alabama Supreme Court's holding in *Carroll*. Contrary to the trial court's finding, the jury's "10-2 recommendation that [Spradley] not be sentenced to death tips the scales in favor of following the jury's recommendation," *Ex parte Carroll*, 852 So. 2d at 837, and this Court should remand the case to the trial court for imposition of a sentence of life imprisonment. *See* ALA. CODE § 13A-5-53(d)(3). Alternatively, this Court should remand with instructions to give the jury's recommendation "overwhelming support" and to comply with *Carroll*'s holding.

B. The Trial Court Relied On Facts Not in Evidence.

In deciding to sentence Spradley to death, the trial court relied on facts not in evidence in violation of his rights under the Eighth and Fourteenth Amendments.[102]

"defendant was a good person and a great father to his son; he was loved by his family and friends"); Sent'g Order, *State v. Randy Lewis*, Nos. CC-2006-3554, 3555 (Honorable Gloria Bahakel presiding)(Lewis Record C. 43)(defense counsel "argued in mitigation that the defendant was a father to his girlfriend's children").

[102] *See Gardner v. Florida*, 430 U.S. 349, 362 (1977)(defendant has due process right to confront and contest information used as basis for death sentence); *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994)(same); *Sumner v. Shuman*, 483 U.S. 66, 72 (1987)(Eighth Amendment demands heightened reliability in determining the appropriateness of a death sentence)(citations omitted).

Accordingly, his death sentence must not stand.

1. Reliance on Facts Not in Evidence Regarding the Crime.

In its sentencing order, the trial court asserted that, out of the multiple times Mrs. Jason's credit card was used, Det. Edge "knows for certain, that the defendant was the only one to use that card." (C. 42); *see also* (C. 51). In fact, Det. Edge testified that Montez Spradley was the only one **he knew** to use the card, **not** that Spradley was the only one to use the card.[103] (R. 461.) The error is of great significance because Det. Edge's true testimony allowed for the possibility that others had used the card whereas the trial court's misunderstanding of that testimony did not.

The trial court also erroneously concluded that "[a]n assortment of credit cards were taken from Mrs. Jason and used for quite some time after her death." (C. 35.) In his testimony, Det. Edge discussed only one credit card - a USAA MasterCard - and its usage only on the night of the murder and two days following the murder. (R. 447-49, 456.)

The trial court also misconstrued the evidence when explaining its finding that the offense was especially heinous, atrocious, or cruel. The court found that Mrs.

[103] Of course, Det. Edge had no personal knowledge that Spradley had used the credit card. *See* Point IV.B., *supra*.

Jason was alive and conscious when she suffered various nonfatal injuries based on the fact that she was bruised and swollen in the area of the injuries. (C. 49.)[104] There was no support in the record for these factual findings. The state's forensic pathologist, Dr. Simmons, testified only that he suspected one injury beyond the gun shot wound occurred ante-mortem. (R. 265)(scalp abrasions). He did not discuss when the other injuries might have occurred. Moreover, "[i]t is virtually impossible for a pathologist or examining physician to venture an opinion as to whether a bruise was delivered as part of an ante- or postmortem attack if it occurred within a few minutes after death." Andre Moenssens et al., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 719 (4th ed. 1995). Furthermore, even if alive, Mrs. Jason may have been unconscious when some or all of these injuries occurred. The trial court's erroneous factual findings and conclusions regarding this issue feature prominently in the sentencing order. (C. 35, 48, 49, 58-59, 60.) *See also* Point VII.G., *infra*.[105]

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[104] Similarly, the trial court, echoing the State's closing, concluded that Mrs. Jason "fought for her life," (C. 49), "was trying to ward off her attacker," (C. 48), and "was beaten mercilessly for a period of time prior to being shot," (C. 49), and characterized the "majority of her wounds" as defensive. (C. 48.)

[105] The trial court repeatedly misstated other testimony by the State's witnesses, always to the benefit of the State. As but one example, in its findings of fact, the court stated: "Ms. Booker testified that when she was in a Sheriff's car, on her way to the Sheriff's Department...someone she knew saw her - one of the defendant's friends - so she ducked down to hide from that person." (C. 39.) However, the extent of Booker's testimony

2. *Reliance on Facts Not in Evidence When Assessing and Weighing Mitigation.*

In assessing the weight of the non-statutory mitigating circumstance that Spradley "shows love and caring toward family members, and receives love and caring in return," (C. 54), the trial court referenced "overwhelming evidence that reflected the defendant was a dope dealer." *Id.* The **only** evidence that Spradley had ever dealt drugs came from his grandmother at the penalty phase, when she testified that he dealt drugs when 13 years old for a much older man. (R. 582.)

The trial court also relied on "overwhelming evidence...that when he was riding around with his kids in his car, he was dealing dope and putting them at risk." (C. 54.) Absolutely no evidence suggested that Spradley had ever dealt drugs - or conducted any criminal activity - with his children in his car.[106] The trial court further asserted that Spradley beat Booker in front of their children. (C. 54.) No such testimony was presented at trial.

These misstatements of the evidence - all of which favored the State's case - undermine the reliability of the

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regarding riding to the police department, obtained only through a series of leading questions, was that she **thought** she saw somebody who she didn't want to see, without mentioning who this person was at all, and she may have ducked down in the seat in response. (R. 387.)

[106] The State's closing argument contains similar factual errors. *See* (R. 624).

sentencing decision. The death sentence must be vacated.

C. The Trial Court Committed Reversible Error By Considering the Victim's Family Members' Views of the Appropriate Sentence When Deciding to Affix a Death Sentence.

In its sentencing order, the trial court provided a thorough description of the testimony of the victim's family members about the appropriate sentence for the defendant, including those of her husband, Edward Jason:

> The victim's husband, Edward Jason, extremely compellingly stated the following: "Speaking only as a layman, having observed only one Capital Murder trial in my life, Mr. Spradley gunned down and murdered a helpless, unarmed, harmless fifty-eight year old grandmother, merely for the contents of her purse. Again, as a layman, if that doesn't warrant the death penalty, then what more does a felon have to do for the Alabama statute of the death penalty to be effective? And I'm wondering, again, only as a layman, if Mr. Spradley is not awarded - given the death penalty, whether that does not serve to erode the effectiveness of the Alabama statute of the death penalty as a deterrent. Thank you. (C. 46-47.)

The trial court then apparently relied upon this testimony as a part of the evidence it considered in affixing the death sentence. (C. 47.) *See also* ALA. CODE § 13A-5-47(d). The trial court also relied upon this testimony when attempting to distinguish this case from *Carroll*, where the victim's family had recommended leniency. *See* (C. 56)("**In fact, the victim's husband extremely compelling [sic] asked the Court to sentence the defendant to death.**")(emphasis

added); (C. 57)("the victim's family did **not** recommend leniency. The facts in this case are clearly distinguishable from those in Carroll, and none of those factors 'tip the scales in favor of following the jury's recommendation.'")(emphasis in original). The trial court further stated that the "strong weight that should be" given to the jury's 10-2 life verdict "has been overcome, for the various reasons, as set out previously," apparently including the views of the survivors about the appropriate penalty. (C. 60.) *See also* (C. 61); ALA. CODE § 13A-5-47(d).

In relying upon the views of the survivors in imposing a death sentence, and in particular what the trial court itself characterized as the "compelling" request of Edward Jason for a death sentence, the trial court committed plain error, ALA. R. APP. P. 45A, and violated Spradley's rights under the Eighth and Fourteenth Amendments to the United States Constitution as well as his rights under Alabama case law. *See Booth v. Maryland*, 482 U.S. 496, 508-09 (1987), *modified on other grounds by Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991).[107]

[107] *See also Ex parte McWilliams*, 640 So. 2d 1015, 1016-17 (Ala. 1993) ("McWilliams's Eighth Amendment rights were violated if the trial judge in this case considered the portions of the victim impact statements wherein the victim's family members offered their characterizations or opinions of the defendant, the crime, or the appropriate punishment"; remanding for finding by trial court whether trial judge considered those portions of victim impact statements)(citing *Booth*). *See also United States v. Brown*, 441 F.3d 1330, 1351 (11th Cir. 2006)("The *Booth* prohibition against evidence of family

D. The Trial Court Failed To Find And/Or Give Meaningful Consideration to Various Statutory And Non-Statutory Mitigating Circumstances.

The trial court failed to consider and/or give meaningful consideration to various statutory and non-statutory mitigating circumstances, in violation of Spradley's Eighth and Fourteenth Amendment rights.[108] *Ex parte Henderson*, 616 So. 2d 348, 350 (Ala. 1992)(*Lockett* requires that "**any relevant mitigating evidence must be considered by the court** in order to ensure that capital sentencing is consistent with public standards of decency and fairness")(emphasis added).[109] First, the trial court

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members' opinions and characterizations of the crime, the defendant, and the appropriate sentence remains good law."); *Humphries v. Ozmint*, 397 F.3d 206, 217 (4th Cir. 2005)(en banc)(same); *Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999)(same); *Hain v. Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002)(same); *United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir. 1998) (same); *Woods v. Johnson*, 75 F.3d 1017, 1038 (5th Cir. 1996) (same); *Fautenberry v. Mitchell*, 515 F.3d 614, 638 (6th Cir. 2008)(same), *cert. denied*, 129 S. Ct. 412 (2008).

[108] The trial court's sentencing order included a catchall statement that it considered "all relevant evidence" in mitigation, even evidence not delineated in the order. (C. 53.) This Court should not use this bald assertion as a basis for concluding that the trial court gave key mitigation evidence not discussed in the order meaningful consideration, particularly given how comprehensive the court's 31-page order was.

[109] *See also Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982)("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, **as a matter of law**, any relevant mitigating evidence.... The sentencer, and the [appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.")(emphasis in original); *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998)(Supreme Court's "cases have established that the sentencer may not be precluded from considering, **and may not refuse to consider**, any constitutionally relevant mitigating evidence.")(emphasis added)(citations omitted); *Henderson*, 616 So. 2d at 350 (ordering remand because trial court failed to find and weigh uncontested non-statutory mitigation evidence and concluding that "any relevant mitigating evidence must be considered by the court in order to ensure that capital sentencing is consistent with public standards of decency and fairness").

failed to consider the fact that, even under the State's theory, at least one perpetrator of this crime has escaped prosecution. (C. 35.)[110] *See Ex parte Burgess*, 811 So. 2d 617, 628 (Ala. 2000)(remanding for trial court to give great weight to fact that none of five codefendants was prosecuted); *see also* ALA. CODE § 13A-5-53(b)(3).

Second, the trial court failed to consider the "post-trauma anxiety" that Spradley experienced in his childhood as a result of his abandonment by his mother, as described by Dr. Ackerson. (R. 606.) The trial court found that the lack of parental contact in Spradley's childhood was "tempered by the apparent love and other relationships the defendant was also provided during his formative years. So despite the lack of parental presence in his life, the defendant has not lived a life completely devoid of love." (C. 53.) These findings failed to give meaningful consideration to the psychological consequences of his abandonment by his parents, particularly his mother - an experience altogether separate from any love he received from others.

Third, the trial court rejected and refused to consider as mitigation the fact that the Appellant was 21 years of

[110] Bryant and Booker both testified that Spradley told them he and a friend committed the crime. (R. 313, 401.) In the more than five years following Mrs. Jason's murder, only Spradley has been prosecuted for this crime.

age at the time of the offense. (C. 52)("The Court does not find that the defendant's age is a mitigating factor"). *See Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987)(petitioner's age, 20 years old at time of offense, was mitigating);[111] *but see Ingram v. State*, 779 So. 2d 1225, 1244-45 (Ala. Crim. App. 1999).

Fourth, while conceding that Montez Spradley's love for and dedication to his family was a mitigating circumstance, the court refused to give that love and dedication any genuine weight. (C. 54-55)("[T]he Court finds the defendant's love and devotion to his family and their love and devotion to him to be a non-statutory mitigating circumstance. However, the Court feels this mitigating circumstance should be given extremely minimal weight."). *See Hitchcock*, 481 U.S. at 397-99 (describing evidence of defendant's "fond and affectionate" relationship with nephews as mitigating evidence that should have been considered). Further, the trial court used Spradley's

[111] *See also Graham v. Collins*, 950 F.2d 1009, 1030 n.25 (5th Cir. 1992) ("Nor can we accept the notion that twenty-two is not youthful for purposes of any constitutionally mandated rule that the capital sentencer must be able to take into account the defendant's 'youth' at the time of the offense. Texas clearly regards those in their early twenties as youthful for this purpose."); *State v. Smith*, No. L-94-093, 1998 WL 65490, at *10 (Ohio Ct. App. Feb. 6, 1998)("The Court finds that the age of the Defendant, twenty-one, is a mitigating factor that must be considered in the determination of the sentencing herein."); *Ex parte Henderson*, 616 So. 2d at 349 (defendant's age of 21 is mitigation that must be weighed by appellate court).

violent relationship with Booker to diminish the weight given to this mitigating circumstance, but the court refused to hear evidence that might have put their relationship in a different light. (R. 586-87.) *See* Points VIII & IX, *infra*. It was thus improper for the court to use this evidence to undercut a mitigating circumstance.

Fifth, the trial court refused to give virtually any weight to the fact that Spradley grew up without parents. The court stated that it "finds that the lack of parental contact, especially a father figure, is a non-statutory mitigating factor." (C. 53.) However, the court then stated that "the Court places extremely minimal weight on this mitigating circumstance, due to the very serious aggravating circumstances proven in the Capital Murder case." (C. 54.) *See Eddings*, 455 U.S. at 113-14 (sentencer violated Eighth Amendment by refusing to consider defendant's troubled family history); *Hitchcock*, 481 U.S. at 397 (sentencer unconstitutionally refused to consider "the difficult circumstances of his upbringing").

Sixth, although it found as a non-statutory mitigating factor that the defendant could be a force for good if given a life sentence, including for his children, the trial court refused to give genuine effect to this evidence, concluding

that "this mitigating circumstance should be given extremely minimal weight due to the very serious aggravating circumstances proven in the Capital Murder case." (C. 55.) *See Hitchcock*, 481 U.S. at 397 (sentencer refused to consider "potential for rehabilitation").

Because the trial court failed to consider and/or give meaningful weight to Spradley's mitigating circumstances, his death sentenced cannot stand under the Eighth Amendment. *Eddings*, 455 U.S. at 113-15.

E. The Trial Court Erroneously Applied A "Nexus" Requirement for the Mitigating Factor of the Defendant's Love and Devotion to and from His Family.

As discussed *supra*, Montez Spradley's loving relationship with his family was a mitigating factor which the court was required to consider and give effect to. However, the trial judge erroneously failed to give genuine adequate weight to this mitigating evidence by unconstitutionally requiring that it mitigate the crime. (C. 54-55)("the Court feels **this mitigating circumstance should be given extremely minimal weight as the listed attributes are inconsistent with the violent nature of the Capital offense.** Moreover, **the love and devotion to family does**

little or nothing to mitigate the horrible manner in which the defendant killed Mrs. Jason.").

Under the Eighth Amendment, a sentencer may not refuse to consider mitigating evidence merely because it does not mitigate the crime. *See Tennard v. Dretke*, 542 U.S. 274, 289 (2004)(rejecting as unconstitutional a requirement that mitigating evidence have a "nexus" to the crime).[112]

By failing to give weight to the mitigating evidence of Spradley's loving relationship with his family because it was "inconsistent with the violent nature" of the crime and did "little or nothing to mitigate the horrible manner" of the crime, the trial judge impermissibly created a nexus requirement for this mitigating evidence in violation of the Eighth Amendment. *Id.* at 289. Spradley's death sentence must be vacated.

F. The Trial Court Erred in Considering a Non-Statutory Aggravating Circumstance.

The trial court improperly considered a non-statutory aggravating circumstance in sentencing Spradley to death. "A trial court may consider only those aggravating circumstances listed in § 13A-5-49 in fixing the death

[112] *See also Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (mitigation is any evidence which serves as "a basis for a sentence less than death," regardless of whether it reduces the defendant's culpability for the crime) (quoting *Lockett*, 438 U.S. at 604).

penalty." *Ponder v. State*, 688 So. 2d 280, 285 (Ala. Crim. App. 1996)(quotation omitted).

In support of its finding that Spradley had previously been convicted of a felony involving the use of violence, the trial court noted: "The commission of such crime gives notice to the world that the defendant is a dangerous and violent individual, which he in fact is, and that he is likely to prove dangerous to life on some future occasion." (C. 49.) The trial court should not have considered the non-statutory aggravating circumstance of future dangerousness, which does not appear anywhere in ALA. CODE § 13A-5-49. *Cf. Scott v. State*, 937 So. 2d 1065, 1084 (Ala. Crim. App. 2005) (in determining whether a crime is heinous, atrocious, or cruel, improper to consider defendant's lack of remorse).

G. The Trial Court Erred in Finding the Offense Especially Heinous, Atrocious, Or Cruel.

The trial court erred in finding that the crime was especially heinous, atrocious, or cruel under ALA. CODE § 13A-5-49(8). (C. 49.) To so find, a capital offense must be "conscienceless or pitiless" **and** "unnecessarily torturous to the victim." *Lawhorn v. State*, 581 So. 2d 1159, 1174

(Ala. Crim. App. 1990) (citations omitted).[113] The crime must involve such cruelty as to distinguish it from other capital cases, as all murders are, by their very nature, cruel. *Ex parte Kyzer*, 399 So. 2d 330, 334 (Ala. 1981). The evidence here did not establish the existence of this aggravating circumstance so defined.[114] The turn of events surrounding Mrs. Jason's death are unclear. The only certainty is that Mrs. Jason died from a gun shot wound at close range, and as Alabama law acknowledges, "an instantaneous death caused by gunfire is not ordinarily a heinous killing." *Ex parte Rieber*, 663 So. 2d 999, 1003 (Ala. 1995)(citation omitted).

In addition, the trial court's finding of this aggravator "subverted the narrowing function" of Alabama's limiting construction of this aggravator by "obscuring the boundaries of the class of cases to which" that limiting construction applies. *Lindsey*, 875 F.2d at 1514. Thus, the finding violated Appellant's rights under the Eighth and Fourteenth Amendments and §§ 6 and 13 of the Alabama

[113] The constitutionality of this aggravating factor can only be upheld if it is applied in a limited manner. *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). *See also Lindsey v. Thigpen*, 875 F.2d 1509, 1514 (11th Cir. 1989); *Norris v. State*, 793 So. 2d 847, 853 (Ala. Crim. App. 1999).

[114] Tellingly, the State did not submit this aggravating circumstance to the jury or the trial court. (R. 561; 647 *et seq.*)

Constitution. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

VIII. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO PRESENT MITIGATION EVIDENCE AND TO REBUT THE STATE'S ALLEGATIONS.

At the guilt-innocence phase, Alisha Booker, formerly Spradley's long-time girlfriend and mother of three of his children, alleged that Appellant physically abused her and confessed to the capital murder. (R. 388-89, 394-97.) The State adopted this testimony at the penalty phase, (R. 563), where Appellant's counsel sought to put into context his "home situation" and "how life is for Montez Spradley," (R. 585), by presenting testimony by his grandmother, Johnnie Coleman, about his and Booker's tumultuous relationship. The State objected, and the judge responded: "All right. Let's see how far this goes." (R. 585.) Ms. Coleman proceeded to recount an incident in which Booker pulled a gun on Appellant and beat up another girlfriend of Spradley, and to testify that Booker's nickname was "Boocoo," which stands for "crazy." (R. 586-87.) When defense counsel asked Ms. Coleman whether Booker used drugs, the trial court interjected, apparently *sua sponte*, that Ms. Coleman's testimony improperly "put down" and "bash[ed]" Booker, that "Alisha's nickname...on the street is not relevant to these

proceedings," and instructed counsel to "stick with Montez." (R. 587.) The ruling effectively shut down defense counsel's examination. *Id.* The court's ruling violated Appellant's constitutional rights by blocking the introduction of relevant mitigation and rebuttal evidence. *See* U.S. Const. amends. VI, VIII, XIV; Ala. Const. §§ 6, 11, 15. *See also* ALA. CODE §§ 13A-5-45(d), 13A-5-52.

First, Booker was an integral part of Spradley's life and thus her drug use and her reputation in the community were relevant mitigation evidence.[115] *See Ex parte Hodges*, 856 So. 2d 936, 947 (Ala. 2003)(evidence of defendant's home life was relevant mitigating evidence that should not have been excluded).[116] Spradley had an Eighth Amendment right to present "a complete picture of the impact [of his] dysfunctional family." *Ex parte Smith*, No. 1010267, 2003 WL 1145475, at *5 (Ala. Mar. 14, 2003)(reversing death sentence when mitigation evidence concerning family members excluded), *rev'd on other grounds*, *Smith v. State*, No. 10604027, 2007 WL 1519869 (Ala. May 25, 2007).

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[115] Indeed, in its sentencing order, the trial court discounted Appellant's mitigating evidence about his family life by concluding that he was not a "positive influence or a good role model to his kids when he fought with their mother and beat her in front of them." (C. 54.)

[116] *See also Roberts v. State*, 735 So. 2d 1244, 1266 (Ala. Crim. App. 1997) (same where trial court precluded admission of hearsay evidence in support of defense case in mitigation); *Lockett*, 438 U.S. 586 at 608.

Second, Booker was a key State witness against Spradley and evidence of her drug use and reputation in the community was relevant impeachment evidence regarding her credibility. ALA. R. EVID. 608, 616. Weaknesses in the State's case are grounds for a life sentence and against judicial override of a life verdict. *Martin*, 931 So. 2d at 771. In addition, Spradley had an Eighth Amendment[117] and due process right to rebut Booker's testimony with evidence about Booker's precarious mental health and drug abuse.[118]

Given that the excluded evidence would have weighed against the court's override decision and against the death-verdict decision of two jurors, the error was highly prejudicial and the death sentence should be vacated.

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[117] *See Oregon v. Guzek*, 546 U.S. 517, 527 (2006) (leaving open whether there is constitutional right to present residual doubt evidence). Though Alabama courts and the U.S. Supreme Court have rejected a right to a residual doubt instruction at the penalty phase, *see Ex Parte Lewis*, __ So. 2d __ 2009 WL 1496836 at *2 (Ala. May 29, 2009), *Franklin v. Lynaugh*, 487 U.S. 164, 172-75 (1988), and Alabama courts have held that residual doubt is not a mitigating circumstance, *Ex Parte Lewis, supra*, at *3 these holdings do not mean that a defendant cannot seek to establish an evidentiary basis for residual doubt at the penalty phase. *See Rompilla v. Beard*, 545 U.S. 374, 386-91 (2005) (discussing defense counsel's residual doubt defense at penalty phase). As explained *supra* in footnote 94 and accompanying text, numerous courts, both state and federal, recognize that "residual doubt" is an appropriate consideration for a juror at a capital sentencing phase.

[118] *See Simmons v. South Carolina*, 512 U.S. 154 (1994)(due process violation when defense not permitted to rebut State's future dangerousness argument); *id.* at 172-73 (Souter, J., concurring)(Eighth Amendment violation when defense not permitted to rebut State's future dangerousness argument).

IX. BECAUSE THE TRIAL JUDGE COULD NOT FAIRLY CONSIDER A LIFE SENTENCE, SHE WAS NOT QUALIFIED TO SERVE AS A CAPITAL SENTENCER.

This Court should vacate the death sentence in this case because the trial judge who overrode the jury's 10-2 life verdict was not fairly able to consider a life sentence in violation of Spradley's rights under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

A capital sentencer must be able to fairly consider imposition of a life sentence. *See Morgan v. Illinois*, 504 U.S. 719, 738-39 (1992). In *Morgan*, the Court held that a capital defendant has a due process right to exclude for cause jurors who cannot consider a life sentence or whose ability to do so is substantially impaired. *Id.* at 738-39; 733-34. The Court expressly stated that its holding applied to judges when they are the capital sentencers. *Id.* at 738-39.

The trial judge sitting as the capital sentencer in this case was plain error. ALA. R. APP. P. 45A. The judge has a duty to *sua sponte* recuse herself given her inability to fairly consider a life sentence in this case. *See Morgan*, 504 U.S. at 739 (a judge who cannot fairly consider

a life or death sentence "should disqualify himself or herself").[119]

A. The Trial Court's Views Regarding Robbery-Murder Convictions Substantially Impaired Its Ability to Consider A Life Verdict.

The trial judge's sentencing order establishes that she lacked the impartiality demanded by due process and the Sixth Amendment as well as the ability to vindicate Spradley's right to individualized sentencing[120] guaranteed by the Eighth Amendment. It states:

> The Court weighs the fact that the defendant intentionally killed Mrs. Jason, during a Robbery in the first degree heavily in favor of imposing the death penalty. **In fact, the Court finds it very hard to imagine a combination of mitigating circumstances that could fairly outweigh this aggravating circumstance as proven.** (C. 48)(emphasis added).

With this admission, the trial court conceded that its ability to consider a life verdict was substantially impaired given the defendant's conviction for capital murder during a robbery. If a prospective juror stated that he or she would find it "very hard to imagine a combination of mitigating circumstances that could fairly outweigh" the aggravating circumstance that was also an element of the

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[119] *See also* Alabama Canons of Judicial Ethics Canon 3.C.(1) (2008)("A judge should disqualify himself in a proceeding in which ... his impartiality might reasonably be questioned").

[120] *See Zant v. Stephens*, 462 U.S. 862, 879 (1983)("What is important at the selection stage is an **individualized** determination on the basis of the character of the individual and the circumstances of the crime.")(emphasis in original)(citations omitted).

capital offense,[121] that juror could not serve under *Morgan*. *See* 504 U.S. at 735.[122] The trial court's override must be reversed. *Id.*[123]

B. The Trial Court's Ability to Consider and Give Effect to Mitigation Was Substantially Impaired.

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 739; *Tennard*, 542 U.S. at 278 (capital sentencer must be able to "consider and give effect" to mitigating evidence in imposing sentence)(citation omitted).

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[121] The trial court's statement concerning the facts - that the defendant **intentionally killed the victim during a first degree murder** - merely recites the facts necessary for the capital conviction. *See* ALA. CODE §§ 13A-5-40(a)(2); 13A-5-40(b); 13A-6-2(a)(1).

[122] *See also Uttecht v. Brown*, 551 U.S. 1, __, 127 S. Ct. 2218, 2230-31 (2007)(capital sentencer must be able to fairly consider death penalty or life sentence under facts of case to be tried); *Williams v. Maggio*, 679 F.2d 381, 386 (5th Cir. 1982)(upholding exclusion of juror who could not consider both sentences where the crime charged was murder committed during a robbery); *State v. Maxie*, 653 So. 2d 526, 538 (La. 1995)(trial court erred in denying defendant's challenge of prospective juror who would not consider life sentence because case involved rape and murder) (*citing State v. Robertson*, 630 So. 2d 1278, 1284 (La. 1994)(same)); *State v. Williams*, 550 A.2d 1172, 1184 (N.J. 1988)(juror who cannot credit mitigation if offense is a rape/murder is "substantially impaired").

[123] The sentencing order contains additional evidence of the trial court's inability to fairly consider a life sentence. In seeking to justify her override of the jury's life verdict, the judge cited language from *Gregg v. Georgia*, 428 U.S. 153 (1976), that "certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." (C. 60.) However, the United States Supreme Court has consistently held that the death penalty may not be imposed on a defendant based solely on his crime; rather, the capital sentencer must also consider the defendant's character and background. *See Woodson v. North Carolina*, 428 U.S. 280, 287 n. 6, 301-305 (1976)(plurality opinion)(striking down North Carolina's mandatory death penalty statute); *Roberts v. Louisiana*, 428 U.S. 325 (1976)(striking down Louisiana's mandatory death penalty statute). Furthermore, despite the trial court's claims, there is nothing "extreme" about this case involving (1) weak evidence of guilt; (2) a relatively young defendant who (3) grew up without parents but who (4) himself has demonstrated great love and dedication to his own children.

The sentencing order reveals the court's impaired ability to consider and weigh mitigation. The order candidly acknowledged:

> The Court finds there is nothing about the defendant, his character, his prior accomplishments, or lack thereof, any trait of character or any other mitigating circumstance in any way connected with the defendant or his life or the Capital offense for which he was convicted which serve [sic] **or should serve to mitigate the sentence of death.** (C. 61)(emphasis added).

By stating that none of the defendant's mitigation "should serve to mitigate" the death sentence, the judge was confessing her inability to follow the law. *See Morgan*, 504 U.S. at 738-39; *Eddings*, 455 U.S. at 114-15 n.10 ("neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence"). The trial court was unable to and did not consider and give effect to numerous statutory and non-statutory mitigating circumstances. These include:[124] (1) the defendant's age (*compare* (C. 52) *with* ALA. CODE § 13A-5-51(7)); (2) the defendant's love and devotion to his family, (C. 54-55); (3) defendant's growing up without parents, (C. 53-54); and (4) the fact that the defendant could be a force for good if given a life sentence, including for his children. (C. 55.)

[124] *See also* Point VII.D. (discussing the constitutional authority requiring consideration of each of these mitigating circumstances).

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

X. APPELLANT'S CONVICTION FOR INTIMIDATING A WITNESS MUST BE REVERSED AND, AS A CONSEQUENCE, HIS CAPITAL CONVICTION MUST ALSO BE REVERSED.

Appellant's conviction for intimidating a witness must be reversed for the reasons set forth below.[125] And because the State's evidence regarding and the Appellant's conviction for intimidation played a significant role in establishing his guilt for capital murder,[126] his conviction for capital murder must also be reversed. *Cf. Johnson v. Mississippi*, 486 U.S. 578, 590 (1988)(vacating death sentence predicated on defendant's prior felony conviction which was subsequently set aside).

On December 29, 2005, Booker filed a report with Ofc. Randy Martinez claiming that she had been assaulted eight days earlier, on December 21, 2005, by her boyfriend Montez Spradley. (R. 368-69.) On January 23, 2006, Booker gave a

[125] Trial counsel preserved these errors in its Motion for Judgment of Acquittal at the close of State's evidence and in its Motion for a New Trial. (R. 484; C. 424.) *See, e.g., Ex parte Hightower*, 443 So. 2d 1272 (Ala. 1983). Alternatively, these errors should be reviewed for plain error. *See* ALA. R. APP. P. 45A. The State received the substantial benefits of consolidating these two charges for trial, apparently ordered *sua sponte* by the trial court, (C. 18), and presenting evidence on this charge as consciousness of guilt that Spradley committed the capital murder. *But see Ex parte Woodall*, 730 So. 2d 652, 665 (Ala. 1998)(declining to review non-capital conviction under plain error standard, though defendant sentenced to death in same trial).

[126] The prosecutor in summation used the allegations of intimidation to suggest Spradley's guilt for the capital murder charge and to bolster Booker's credibility. (R. 521.)

statement to the police claiming that Spradley had confessed to Mrs. Jason's murder. (R. 408.) The same day the police issued a warrant against Spradley for intimidating a witness, Booker. (C. 286.) The Pre-Sentence Report noted that "between 1:00 PM on 1/16/06 and 1:00 PM on 1/22/06, Montez Spradley called Alisha Booker and threatened to kill her if she continued with a case in which she (Booker) was the victim and Spradley was the defendant." (C. 186.) The Case Action Summary reported the date of offense as January 16, 2006. (C. 223.)

At trial, Booker testified numerous times that she had not been, or could not recall being, threatened by Spradley if she came to court. (R. 385, 390-91, 392, 411.) On other occasions, she claimed that Spradley said he would kill her "before I let you send me back." (R. 409-10; *see also* 391.) Booker did not state when this alleged threat was made, and did not testify that she had been summoned to a official proceeding at the time it was made.

A. The Indictment For Intimidating A Witness Was Unconstitutionally Vague And Denied Appellant Adequate Notice Of The Charges Against Him.

The indictment for intimidating a witness was unconstitutionally vague and deprived Spradley of his right to proper notice of the charges against him. *See* U.S.

Const. amends. V, VI, XIV; Ala. Const. § 6; ALA. CODE § 15-8-25. *See also Ex parte Hightower*, 443 So. 2d 1272, 1273 (Ala. 1983)(citing Ala. Const. § 6); *Lankford v. Idaho*, 500 U.S. 110, 126 (1991).

Tracking the language of ALA. CODE § 13A-10-123(a)(3), the indictment against Spradley for intimidation, (C. 284.) was unconstitutionally vague in three respects: (1) it did not indicate the underlying criminal offense for which the alleged intimidation took place, stating only generally "State of Alabama vs. Montez Spradley"; (2) it did not specify the "official proceeding" to which Booker had been legally summoned (or the proceeding to which Spradley believed she would be summoned); and (3) it failed to specify the date of the alleged offense.[127]

The indictment did not provide Spradley with adequate notice of the charges against him. At trial, the State argued that the intimidation related to Booker's involvement in the capital murder investigation. (R. 521-22; 528-29.) But Spradley could have believed it related to the December 2005 incident[128] in which Booker claimed he had assaulted

[127] Although an indictment need not specify the date of the offense if it is not an element of the offense, ALA. R. CRIM. P. 13.2(d), the cumulative effect of the lack of specificity in the indictment deprived Spradley of adequate notice of the allegations. *See* ALA. R. CRIM. P. 13.2(a).

[128] Around this time, Spradley may have been facing a probation violation, (R. 15-16), so it was also possible the threat could have related to that proceeding.

her.[129] The vagueness of the allegations in the indictment severely prejudiced Spradley's ability to pursue a defense. His convictions must be reversed.

B. The Evidence Against Appellant For Intimidating A Witness Was Insufficient To Sustain A Conviction.

The evidence was insufficient to support Spradley's conviction for intimidation because at the time of the alleged threat Booker had not been summoned to an official proceeding as averred in the indictment. Therefore, his conviction was plain error, ALA. R. APP. P. 45A, and violated his rights under the Fourteenth Amendment to the U.S. Constitution and § 6 of the state Constitution.

The language in the indictment, read to the jury, tracked section (a)(3) of the intimidation statute, an element of which is seeking to induce the witness "to absent himself from an official proceeding to which he **has been legally summoned.**" ALA. CRIM. CODE § 13A-10-123(a)(3)(emphasis added). Unlike the preceding two sections, Section (a)(3)'s plain language requires proof that the witness had been summoned to an official proceeding at the time the intimidation occurred. *See Ex parte*

[129] *See* (C. 186)(Pre-Sentence Report noting District Attorney's Legal Facts alleging that Spradley called Booker and "threatened to kill her if she continued with a case in which she (Booker) was the **victim** and Spradley was the defendant")(emphasis added).

Jackson, 614 So. 2d 405, 406 (Ala. 1993)(statutes creating criminal liability must be "strictly construed in favor of the accused")(citation omitted).[130]

At trial, the State offered no proof that Booker had been legally summoned to an official proceeding when the threat allegedly occurred or even by the time the warrant was issued, on January 23, 2006.[131] Thus, the evidence was legally insufficient to sustain a conviction.

C. There Was a Material Variance Between Allegations In the Indictment and Proof at Trial.

Additionally, there was a material, fatal variance between the allegations in the indictment and the State's proof at trial. "A variance...is fatal if the proof offered by the State is of a different crime, or of the same crime, but under a set of facts different from those set out in the indictment." *Ex parte Hamm*, 564 So. 2d 469, 471 (Ala. 1990)(citing *Hightower*, 443 So. 2d at 1274).

The indictment alleged that Spradley had threatened Booker to induce her "to absent herself from said official proceeding to which he [sic] had been legally summoned...."

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[130] *Johnson v. State*, 932 So. 2d 979 (Ala. Crim. App. 2005), is not to the contrary. There, this Court merely indicated that a pending official proceeding at the time of the intimidation is not required under 13A-10-123(a) as a whole, and relied upon *Barnette v. State*, 855 So. 2d 1129, 1130 (Ala. Crim. App. 2003), which involved a bribery conviction under ALA. CODE § 13A-10-121(a)(1)(the provision identical to § 13A-10-123(a)(1)).

[131] On the date Spradley was arrested on the intimidation charge, March 9, 2006 (C. 223), there was still no "official proceeding" pending against Spradley to which Booker had been summoned as a witness.

(C. 284.) The State presented no evidence that when the threat was made Booker had been legally summoned to an official proceeding. This variance requires reversal of Spradley's convictions. *See Ex parte Verzone*, 868 So. 2d 399, 402-03 (Ala. 2003).

D. The State Deprived Appellant Of His Right To Adequate Notice By Failing To Elect The Incident For Which It Sought A Conviction.

The State's evidence disclosed two or more occasions in which the threat could have occurred, "growing out of distinct and separate transactions," *Deason v. State*, 363 So. 2d 1001, 1006 (Ala. 1978). Thus, the State should have been required to elect one of them. *Id.*

It is not clear whether the State was submitting to the jury that Booker was threatened on the date of the alleged assault in December 2005 or during the January 16-22, 2006, encounter.[132] The State should have been compelled to elect between the incidents. *See id.* at 1006. "There is simply no way to know which incident or incidents...underpinned the

[132] The record indicates the prosecution was seeking any evidence of threats, without regard to the date of offense. *See* (R. 521-22; 528-29)(generic summation arguments in support of this charge); (R. 390-91)(asking Booker if generally she had been threatened at all). The State directed much of its proof of intimidation to the alleged assault in December 2005 and introduced six highly prejudicial photographs of Booker's injuries. (C. 500-505.) Were the defense on notice, for instance, that the threat occurred in January 2006, counsel may have successfully objected to any evidence, and particularly these photographs, concerning the December 2005 incident as irrelevant.

jury's verdict." *Ex parte King*, 707 So. 2d 657, 659 (Ala. 1997).

The State's failure to elect violated Spradley's rights under Alabama law and to due process, to be informed of the nature and charge against him, and against double jeopardy. U.S. Const. amends V, VI, XIV; Ala. Const. § 6.

XI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY BARRING DEFENSE COUNSEL FROM EXAMINING THE CRIME SCENE.

The trial court committed reversible error when it refused to "grant[] the Defendant's counsel the right to examine and photograph the scene of" the murder. (C. 117); (Supp. R. 8-9.) The trial court's ruling violated Spradley's right to access to evidence contained in the Fourteenth Amendment and § 13 of the Alabama Constitution. The "right to inspect the scene of the crime falls within the genre of 'what might loosely be called the area of [cases establishing a] constitutionally guaranteed access to evidence.'" *Brown v. Rice*, 693 F. Supp. 381, 387 (W.D.N.C. 1988)(quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). Additionally, the ruling violated his right to counsel under the Sixth Amendment and § 6 of the Alabama Constitution. *Kansas v. Ventris*, 129 S. Ct. 1841, 1845 (2009)("core" of Sixth Amendment right to counsel is

"'the opportunity for a defendant to ... have [his attorney] **investigate the case** and prepare a defense for trial'")(emphasis added)(quoting *Michigan v. Harvey*, 494 U.S. 344, 348 (1990)). Such errors are structural and mandate reversal.[133] In any event, this constitutional violation cannot be deemed harmless. *Chapman v. California*, 386 U.S. 18, 23-24 (1967). The State introduced a diagram of the crime scene, (R. 248), and relied on crime-scene evidence in successfully arguing its case to the jury.[134] Thus, reversal is required.

XII. SPRADLEY'S DEATH SENTENCE WAS UNCONSTITUTIONALLY IMPOSED.

A. Alabama's Capital Sentencing Scheme Generally and the Practice of Judicial Override Specifically Violate a Defendant's Constitutional Rights.

The U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), rendered Appellant's judicially-imposed death sentence plain error and unconstitutional. U.S.

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[133] It is well settled that state interference with counsel's duties, in violation of the Sixth Amendment, "constitutes a structural defect which defies harmless error analysis and requires automatic reversal." *Jones v. Vacco*, 126 F.3d 408, 416 (2d Cir. 1997). *See also Perry v. Leeke*, 488 U.S. 272, 280 (1989)(finding that deprivation of counsel pursuant to *Geders v. United States*, 425 U.S. 80, 91 (1976), constitutes structural error immune to harmless error analysis); *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) (finding pervasive denial of counsel can never be considered harmless error).

[134] *See* (R. 495)(citing ballistics evidence collected from the scene); (R. 525) ("Right there. That's her body right there (indicating). That's how Marlene Jason's body was found; dead in the street, her blood in the gutter."); (R. 526)(arguing to excuse lack of "physical evidence in this case," while failing to acknowledge that the defense had no opportunity to collect evidence supporting defense of innocence).

Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15; ALA. R. APP. P. 45A.

1. The Jury Did Not Make the Two Factual Findings Required Under Alabama Law Before a Defendant May be Sentenced to Death.

In Alabama, a defendant can receive a death sentence only after two requisite findings: (1) the State has proven an aggravating circumstance exists beyond a reasonable doubt; **and** (2) the aggravating circumstance(s) outweigh any mitigating circumstances. ALA. CODE §§ 13A-5-45(e), 13A-5-47(e). Without these two findings, the defendant may not be sentenced to death. *Ex parte Woodard*, 631 So. 2d 1065, 1071 (Ala. Crim. App. 1993).

In *Ring*, the United States Supreme Court held that under the Sixth Amendment, "[c]apital defendants...are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. Therefore, under *Ring*, before he may receive a constitutional death sentence, a capital defendant in Alabama is entitled to a jury determination of both that the State has proven an aggravating circumstance(s) and that the aggravating circumstance(s) outweighs the mitigating circumstances. *But see Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002)(holding

weighing determination is not factual finding under *Ring*). Here, given the jury verdict's silence on the issue, it cannot be said with certainty that all twelve jurors found the aggravating circumstance (even though it was identical to an element of the underlying capital offense). *But see id.* at 1187. In any event, ten of the twelve jurors clearly did **not** make both of these two distinct findings. Therefore, Spradley must receive a life sentence.

Additionally, he must be sentenced to life under the Eighth Amendment, which, as Justice Breyer noted in his *Ring* concurrence, "requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." 536 U.S. at 619.

2. The Jury's Guilt Phase Verdict Can Not Satisfy the Requirements of Due Process, Equal Protection, and the 8th Amendment.

The jury was never informed at the guilt phase that under Alabama law Spradley could be sentenced to death solely on the basis of their verdict finding him guilty of the capital offense. Because his jury was never informed of the nature and consequences of its decision, Spradley's death sentence violates due process of law. *See Simmons*, 512 U.S. at 162. Furthermore, *Waldrop*'s construction of Alabama's statute violates equal protection of the law

because it results in disparate treatment among Alabama's capital offenders, with some, like Spradley, death eligible upon capital conviction, and others not death eligible until a jury finds an aggravating circumstance at the penalty phase. This framework, moreover, undermines the reliability of the capital sentencing process and unfairly skews sentencing toward death in cases such as Spradley's. *Adams v. Texas*, 448 U.S. 38, 46-47 (1980).

3. The Trial Court Failed to Determine and Adopt the Mitigating Circumstances Found by the Jury.

Because the trial court failed to require a special verdict form, the court did not determine and could not adopt the jury's findings on mitigating circumstances. This failure created a constitutionally intolerable risk that the trial court did not weigh mitigating circumstances found by the jury when sentencing Spradley to death and that Spradley was given a penalty exceeding the maximum he would have received had he been punished according to the facts found by the jury. *See Ring*, 536 U.S. at 602.

4. The Trial Court Relied on Two Aggravating Circumstances Never Found by the Jury Beyond a Reasonable Doubt.

Ring also requires this Court to vacate the death sentence because, in overriding the jury's life verdict, the

trial court relied upon two aggravating circumstances not submitted to the jury, a prior violent felony[135] and that the crime was especially heinous, atrocious, or cruel. ALA. CODE § 13A-5-49(2),(8). Given that the existence of these circumstances were factual questions, Spradley was clearly entitled under *Ring* to a jury determination of their existence before they could be used as a basis for sentencing him to death. 536 U.S. at 609. The trial court's findings of these aggravating circumstances violated Spradley's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and Alabama law. solely by

B. Alabama's Standardless Override Procedure Violates the Equal Protection Clause.

With no standards,[136] Alabama's judicial override procedure fails to "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Across Alabama, judges have upheld countless life recommendations by juries,[137] including when the life

[135] It is puzzling, at best, why the State did not submit the prior violent felony aggravating circumstance to the jury. Instead, the State reserved it to use in the judicial sentencing phase, which the trial court then used as "information known only to the trial court and not the jury." *Carroll*, 852 So. 2d at 836. This Court should not sanction such a practice.

[136] Spradley acknowledges the Alabama Supreme Court's recent attempts to rein in judicial discretion in this area. *Carroll*, 852 So. 2d at 837; *Tomlin*, 909 So. 2d at 287. Affirmation of the trial court's override here, however, would reveal that *Carroll* and *Tomlin* have had no impact on Alabama's override law.

[137] In Jefferson County, as across the state, defendants for whom the jury recommends life imprisonment overwhelmingly receive life sentences by the

vote was not as strong as here.[138] Imposed by a judge unrestrained by standards to ensure evenhandedness, Spradley's death sentence was plain error, ALA. R. APP. P. 45A, and obtained in violation of his rights to equal protection of the laws[139] and to be free of cruel or unusual punishment. U.S. Const. amends. VIII, XIV; Ala. Const. §§ 13, 15.

C. Judicial Override Violates Due Process When A Death Sentence Is Imposed by an Elected Judge.

A death sentence imposed by an elected judge over a jury's life recommendation is plain error, ALA. R. APP. P. 45A, and violates the defendant's rights under the Eighth

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trial court. *See, e.g., Rowell v. State,* 570 So. 2d 848 (Ala. Crim. App. 1990); *Jackson v. State,* 674 So. 2d 1370 (Ala. Crim. App. 1995); *Handley v. State,* 515 So. 2d 121 (Ala. Crim. App. 1987); *Cannon v. State,* 470 So. 2d 1351 (Ala. Crim. App. 1985); *Fox v. State,* 602 So. 2d 484 (Ala. Crim. App. 1992); *Kontos v. State,* 363 So. 2d 1025 (Ala. Crim. App. 1978); *Brown v. State,* 630 So. 2d 481 (Ala. Crim. App. 1993); *Carter v. State,* 442 So. 2d 150 (Ala. Crim. App. 1983); *Coleman v. State,* 487 So. 2d 1380 (Ala. Crim. App. 1986); *Agee v. State,* 465 So. 2d 1196, (Ala. Crim. App. 1984); *Ford v. State,* 514 So. 2d 1057 (Ala. Crim. App. 1987); *Breckenridge v. State,* 628 So. 2d 1012 (Ala. Crim. App. 1993); *Moore v. State,* 878 So. 2d 328 (Ala. Crim. App. 2003); *Neal v. State,* 460 So. 2d 257 (Ala. Crim. App. 1984); *Reese v. State,* 381 So. 2d 107 (Ala. Crim. App. 1980); *Bradley v. State,* 577 So. 2d 541 (Ala. Crim. App. 1990); *Smith v. State,* 531 So. 2d 1245 (Ala. Crim. App. 1987); *Merriweather v. State,* 629 So. 2d 77 (Ala. Crim. App. 1993); Eric Velasco, *Killers of Teenagers Sentenced,* BIRMINGHAM NEWS, Oct. 17, 2008, at 1 (John Ashley sentenced to life for murder of two teenagers, following jury's 9-3 recommendation); Chanda Temple, *Means Given Life In Guard's Slaying,* BIRMINGHAM NEWS, Mar. 16, 2002, at 13 (William Means sentenced to life for capital murder-robbery, following jury's recommendation).

[138] *See, e.g., Seritt v. State,* 647 So. 2d 1 (Ala. Crim. App. 1994); *Wagner v. State,* 555 So. 2d 1141 (Ala. Crim. App. 1989); *Perry v. State,* 586 So. 2d 236 (Ala. Crim. App. 1990); *Arnold v. State,* 448 So. 2d 489 (Ala. Crim. App. 1984).

[139] *See also Bush v. Gore,* 531 U.S. 98, 102, 106 (2000)(uniform and specific standards required to prevent arbitrary and disparate treatment of similarly-situated people when fundamental right is at stake). *But see Lewis v. State,* -- So. 2d --, 2006 WL 1120648, at *4 (Ala. Crim. App. April 28, 2006)(opinion on return to remand)(rejecting this claim).

Amendment and to due process of law. *See Tumey v. Ohio*, 273 U.S. 510, 534-35 (1927).

Statistical analysis demonstrates that judicial overrides increase as elections near.[140] Moreover, because of what scholars have attributed to Alabama's contested, partisan judicial elections,[141] Alabama's greater than ten-to-one ratio of life-verdict overrides to death-verdict overrides vastly exceeds that of other override states.[142] In high-profile capital cases, an elected judge's incentive to appease a constituency threatens the independence of the judiciary and violates a defendant's right to due process.

Further, judicial override is "directly responsible for inserting the illegitimate extralegal factor of reelection into the capital sentencing process and thereby violate[s] the Eighth Amendment's prohibition of arbitrary sentencing." Burnside, *supra*, at 1048-49.

Appellant's death sentence must be vacated. U.S. const. amends. VIII, XIV.

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[140]*See* Fred Burnside, *Dying to Get Elected*, 1999 Wis. L. Rev. 1017, 1039-42 (1999); *see also* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death*, 75 B.U. L. Rev. 759, 786 (1995).

[141]*See* James S. Liebman et al., BROKEN SYSTEM II 405 (Feb. 11, 2002), *available at* www2.law.columbia.edu/brokensystem2/report.pdf (judicial overrides are "**most** especially risky in Alabama" due to marriage of political pressure in partisan judicial elections and standardless judicial discretion to override jury verdicts)(emphasis in original). *See also* John Richardson, *Reforming the Jury Override*, 94 J. Crim. L. & Criminology 455, 469 (Winter 2004).

[142]*See* BROKEN SYSTEM II, *supra*, at n.915 (noting Alabama's grossly disproportionate use of the override, compared to Florida and Indiana).

D. Alabama's Capital Sentencing Scheme Violates the Prohibition Against Double Jeopardy.

In Alabama, capital defendants must defend against the death penalty twice: before the jury and then before the judge. ALA. CODE §§ 13A-5-46(e), 13A-5-47. This relitigation violates the double jeopardy clause of the Fifth Amendment. *See Bullington v. Missouri*, 451 U.S. 430 (1981)(applying double jeopardy clause to capital sentencing proceedings).[143]

The jury acquitted Appellant of a death sentence.[144] This finding was "sufficient to establish legal entitlement to the life sentence." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003). Here, as in *Bullington*, the State was given the "opportunity to convince a second factfinder of its view of the facts," 451 U.S. at 440, including its views of the aggravating circumstances, the mitigating circumstances, and the appropriateness of a death sentence. But the State should have been collaterally estopped from this relitigation. *See id.*

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[143] *See also Spaziano*, 468 U.S. at 475 n.14 (Stevens, J., dissenting)(arguing that override gives the state two bites at the apple). *But see id.* at 465 (summarily rejecting double-jeopardy challenge to Florida's procedure).

[144] By voting ten to two in favor of life, Spradley's jury greatly exceeded the seven votes required for acquittal of the death penalty under Alabama law. ALA. CODE § 13A-5-46(f). The jury's acquittal in this case triggered the protections of the double jeopardy clause of the Fifth Amendment. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)(holding formal acquittal not required; this requirement applies "with realism and rationality").

E. Capital Murderers Who Receive Overwhelming Life Jury Verdicts Are Not the Most Deserving of Execution.

Defendants such as Spradley who receive decisive majority votes for life imprisonment by a death-qualified jury are not "the most deserving of execution," and thus their death sentences violate the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Their execution can no longer be said to comport with society's "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).[145]

A "national consensus" has developed against executing defendants whose juries have sentenced them to life imprisonment.[146] Forty-seven states[147] and the federal system now ensure that an offender will not be sentenced to death if a sentencing jury has voted for life imprisonment.[148]

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[145] *Harris v. Alabama*, 513 U.S. 504 (1995), and *Spaziano* v. *Florida*, 468 U.S. 447 (1984), do not control this claim. Neither addressed whether defendants whose juries recommend life should be categorically excluded from execution under proportionality principles. If they do control, they should be overruled.

[146] When *Ring* was decided, five states left the sentencing decision entirely to judges. *Ring*, 536 U.S. at 608 n.6. Four states - Alabama, Delaware, Florida, and Indiana - employed a "hybrid" statutory scheme. *Id.* In *Ring*'s wake, only Montana and Nebraska leave no sentencing role to juries. MONT. CODE. § 46-18-305; NEB. REV. STAT. § 29-2521. Among the hybrid states, Indiana revised its statute to prohibit the judge from overriding the jury's life verdict. *See* IND. CODE § 35-50-2-9(e).

[147] This number includes states which have rejected the death penalty entirely and states which do not have an active death penalty statute.

[148] This number surpasses the 45 jurisdictions in *Kennedy v. Louisiana*, 554 U.S. -, 128 S. Ct. 2641 (2008), the 30 states in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005), and the 42 states in *Enmund v. Florida*, 458 U.S. 782 (1982), "that prohibited the death penalty under the circumstances those cases considered." *Kennedy*, 128 S. Ct. at 2653 (*citing Atkins, Roper, Enmund, supra*).

Furthermore, in the past ten years, only three offenders whose juries recommended life have been executed,[149] all in Alabama.[150] This rarity of executions reflects a strong national consensus.

Spradley's death sentence was plain error and should be vacated. U.S. Const. amends. VIII, XIV; Ala. Const. § 15; ALA. R. APP. P. 45A.

XIII. APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE AND WAS ARBITRARILY AND CAPRICIOUSLY IMPOSED.

Alabama Code § 13A-5-53(b), the Eighth Amendment's prohibition against arbitrary and discriminatory death sentencing,[151] and § 15 of the Alabama Constitution require this Court to: (1) determine whether Spradley's sentence is proportionate when compared to the crimes and defendants in other Alabama life and death capital cases;[152] (2) conduct an independent weighing of the mitigating and aggravating

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[149] *See Atkins*, 536 U.S. at 316 (considering this factor); *Roper*, 543 U.S. at 565 (same); *Kennedy*, 128 S. Ct. at 2651 (same).

[150] They are: Willie McNair (May 14, 2009), Anthony Keith Johnson (Dec. 16, 2002), Robert Lee Tarver (April 14, 2000). *See* Ala. Dep't of Corr., *Inmates Executed in Alabama*, available at http://www.doc.state.al.us/execution.asp (last visited July 6, 2009).

[151] *See Furman v. Georgia* 408 U.S. 238, 309 (1972). In *Gregg v. Georgia*, 428 U.S. 153, 198 (1976), the Supreme Court found Georgia's death penalty statute constitutional, relying in significant part on its proportionality review. *Id.* at 206. *See also Walker v. Georgia*, 129 S. Ct. 453 (2008) (Stevens, J., statement respecting denial of cert.)(explaining that *Gregg* was "founded on an understanding that the new procedures the statute prescribed" - including proportionality review - "would protect against the imposition of death sentences influenced by impermissible factors such as race").

[152] Life verdicts are "eminently relevant to" this proportionality review. *Walker*, 129 S. Ct. at 456 (Statement of Stevens, J.). *But see Perkins v. State*, 808 So. 2d 1041, 1140 (Ala. Crim. App. 1999)(comparison of life sentence cases not constitutionally required); *Davis v. State*, 718 So. 2d 1148, 1166 (Ala. Crim. App. 1995).

circumstances to determine whether death is the appropriate sentence;[153] and (3) determine if race or other discriminatory factors contributed to Spradley's death verdict.[154] Under these analyses, Spradley's death sentence is disproportionate when compared to similar cases; the aggravating circumstance(s) do not outweigh the mitigating circumstances; and there is a constitutionally intolerable risk that his death sentence was the product of discrimination.

Montez Spradley's death sentence is disproportionate, considering both the "crime and the defendant." He was convicted of a capital robbery-murder.[155] While many death sentences have been imposed in robbery-murder cases, so too have many life sentences. In Jefferson County alone, numerous other robbery-murder capital cases resulted in life sentences.[156] As concerns "the defendant," the abundant

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[153] ALA. CODE § 13A-5-53(b); *Lewis*, 2009 WL 1496836, at *5.

[154] ALA. CODE § 13A-5-53(b); U.S. Const. amends. VIII, XIV; Ala. Const. § 15. *See also Beck v. State*, 396 So. 2d 645, 664 (Ala. 1980).

[155] The trial court found two additional aggravating circumstances applied, that Spradley had previously been convicted of a crime of violence and that the crime was heinous, atrocious and cruel. The trial court's finding of heinous, atrocious, and cruel is not supported by the evidence. *See* Point VII.G., *supra*.

[156] *See, e.g., Woody v. State*, 986 So. 2d 1229 (Ala. Crim. App. 2007); *Burke v. State*, 991 So. 2d 308 (Ala. Crim. App. 2007); *Mangione v. State*, 740 So. 2d 444 (Ala. Crim. App. 1998); *Jones v. State*, 680 So. 2d 964 (Ala. Crim. App. 1996); *Wilkerson v. State*, 686 So. 2d 1266 (Ala. Crim. App. 1996); *Jackson v. State*, 674 So. 2d 1370 (Ala. Crim. App. 1995); *Brown v. State*, 623 So. 2d 416 (Ala. Crim. App. 1993); *Merriweather v. State*, 629 So. 2d 77 (Ala. Crim. App. 1993); *Roberts v. State*, 579 So. 2d 62 (Ala. Crim. App. 1991); *Towner v. State*, 595 So. 2d 544 (Ala. Crim. App. 1991); *Grier v. State*, 589 So. 2d 792 (Ala. Crim. App. 1991); *Woods v. State*, 592 So. 2d 631 (Ala. Crim. App. 1991); *Langley v. State*, 570 So. 2d 868 (Ala. Crim. App. 1990); *Rowell v. State*, 570

mitigation evidence (set out briefly below and elsewhere in this brief) demonstrates that Spradley is most similar to those who have received life sentences for this crime and that his death sentence is disproportionate. *See, e.g., Besaraba v. State*, 656 So. 2d 441, 447 (Fla. 1995)("death sentence is disproportionate" given mitigation evidence); *Ex parte Carroll*, 852 So. 2d 821, 828 (Ala. 2001)(Houston, J., concurring in part and dissenting in part).

Similarly, the death sentence should be set aside because the aggravating circumstance(s) do not outweigh the mitigating circumstances. *Ex parte Carroll*, 852 So. 2d at 837. Abundant mitigating evidence supports a life sentence.[157] Spradley's young age, 21, and evidence he acted

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So. 2d 848 (Ala. Crim. App. 1990); *Harris v. State*, 545 So. 2d 146 (Ala. Crim. App. 1988); *Sabiar v. State*, 526 So. 2d 661 (Ala. Crim. App. 1988); *Smith v. State*, 531 So. 2d 1245 (Ala. Crim. App. 1987); *Coleman v. State*, 487 So. 2d 1380 (Ala. Crim. App. 1986); *McNeill v. State*, 496 So. 2d 108 (Ala. Crim. App. 1986); *Arnold v. State*, 448 So. 2d 489 (Ala. Crim. App. 1984); *Agee v. State*, 465 So. 2d 1196 (Ala. Crim. App. 1984); *Lewis v. State*, 456 So. 2d 413 (Ala. Crim. App. 1984); *Nelson v. State*, 452 So. 2d 1367 (Ala. Crim. App. 1984); *Carter v. State*, 442 So. 2d 150 (Ala. Crim. App. 1983); *Christine W. Moulds v. State*, 429 So. 2d 1176 (Ala. Crim. App. 1983); *Danny E. Moulds v. State*, 426 So. 2d 942 (Ala. Crim. App. 1982). In some Jefferson County capital murder-robbery cases, the District Attorney chose not to seek the death penalty, *see, e.g., Gordon v. State*, 611 So. 2d 453 (Ala. Crim. App. 1992), and in others the parties agreed to a plea to life without parole. *See, e.g., Benton v. State*, 887 So. 2d 304 (Ala. Crim. App. 2003).

[157] The trial court found four non-statutory mitigating circumstances: (1) defendant's background and home life, in particular his lack of parental contact; (2) the love and caring between Spradley and his family members; (3) the arguments for mercy, including Spradley's potential for redemption in prison; and (4) the jury's vote for life. *See* (C. 53-55). The trial court's failures to find the remaining mitigating circumstances set forth herein were not supported by the evidence. See ALA. CODE § 13A-5-53(a); *Lewis*, 2009 WL 1496836 at *4 ("the Court of Criminal Appeals must determine whether the trial court's failure to find a circumstance to be mitigating is 'supported by the evidence,' as required by § 13A-5-53(a)").

as an accomplice are statutory mitigating factors.[158] Non-statutory mitigating evidence includes Spradley's deprived and unstable childhood in which he constantly moved and changed schools (R. 605-606); his childhood abandonment to his grandmother by his drug-using parents, resulting in his living in his grandmother's crowded house, (R. 575-76, 578-79, 605); post-trauma anxiety and depression as a child, (R. 606); his mother's prenatal drug-abuse, resulting in his withdrawal symptoms as an infant, (R. 576); his positive relationships with his family as an adult, (R. 577, 591, 593, 599); and the mutual love and caring between him and his children, (R. 584, 587, 591, 592, 595, 599-600). Moreover, the jury's 10 to 2 vote in favor of life constitutes overwhelming mitigation. *Martin*, 931 So. 2d at 771.

Furthermore, there is a constitutionally intolerable risk under § 15 of the Alabama Constitution and the Eighth Amendment[159] that Spradley's death sentence resulted from

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[158] *See* Point VII.D., *supra* (discussing why youthful age is a statutory mitigating factor); Point VII.A., *supra* (discussing conflicting evidence of who the actual triggerman was according to the prosecution's witnesses).

[159] 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, 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. *McCleskey* has been

racial bias. A young African-American male, he was convicted of the murder of a 58-year-old white woman. The race and gender of victims and defendants continue to play significant roles in Alabama capital sentencing. *See Many Murders, Few Executions*, BIRMINGHAM NEWS, Nov. 7, 2005.

XIV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO REQUIRE THE JURY TO MAKE *TISON V.ARIZONA/ENMUND V. FLORIDA* FINDINGS.

For the accused to receive a death sentence consistent with the Eighth Amendment's proportionality component, the State must prove that he or she killed, attempted or intended to kill, *Enmund v. Florida*, 458 U.S. 782, 801 (1982), or was a major participant in a felony murder while acting with reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

Here, the jury did not make factual findings that Appellant killed, attempted to kill, intended to kill, or

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roundly condemned as the "low point" in the quest for equality. *See Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1073 (Cal. 2000); Hugh Dedau, *Someday McCleskey Will Be Death Penalty's Dred Scott*, LOS ANGELES TIMES, May 1, 1987. Justice Lewis Powell, one of the five justices to vote in the majority, after retirement publicly acknowledged that *McCleskey* stands as the sole case in which he would change his vote. *See* John C. Jeffries, JUSTICE LEWIS F. POWELL, JR. 451 (1994). Other state courts have rejected *McCleskey* under their state constitutions. *See State v. Loftin*, 157 N.J. 253, 298, 724 A.2d 129, 151 (N.J. 1999)(rejecting *McCleskey* and criticizing its holding that racial disparities are inevitable); *Claims of Racial Disparity v. Comm'r of Corr.*, No. CV054000632S, 2008 WL 713763, at *6 (Conn. Super. Feb. 27, 2008) (holding that petitioner "may seek to demonstrate that the imposition of the death penalty in Connecticut violates the state Constitution, even though such a statistical attack might be unavailing on the federal arena [under *McCleskey*]"). This Court should reject *McCleskey* as inapplicable under Alabama constitutional jurisprudence and as contravening the U.S. Constitution. *But see Davis v. State*, 718 So. 2d 1148, 1163 (Ala. Crim. App. 1995).

was a major participant in a felony murder while acting with reckless indifference to human life.[160] Thus, this plain error, ALA. R. APP. P. 45A, violated Appellant's Sixth and Eighth Amendment rights. *See Ring v. Arizona,* 536 U.S. 584 (2002). Reversal is required.

XV. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN APPELLANT'S CAPITAL MURDER CONVICTION.

No physical evidence or eyewitness connected Spradley to this capital crime. The State's case against him was based almost entirely on alleged confessions he made to two unreliable witnesses - Booker and Bryant - confessions which were not consistent with each other[161] nor with the physical evidence.[162] The State also presented evidence connecting Spradley to the use of Mrs. Jason's credit card two days after her murder.[163] However, the State offered no evidence

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[160] Although the Supreme Court ruled in *Cabana v. Bullock*, 474 U.S. 376, 385-86 (1986), that this factual determination may be made by a judge, the Court implicitly overruled *Cabana* in *Ring v. Arizona*, where it held that the Sixth Amendment requires juries to make all factual determinations necessary for a death sentence. 536 U.S. at 609.

[161] *See, e.g.,* (R. 401)(Booker testifying that Spradley's friend shot Mrs. Jason); (R. 313)(Bryant testifying that Spradley choked and shot Mrs. Jason).

[162] For example, neither witness explained Mrs. Jason's injuries to her scalp, lip, elbow, and left hand. Both witnesses referenced Mrs. Jason being choked, (R. 313, 403), though the physical evidence did not reveal any signs of choking. (R. 280-81.)

[163] The testimony of Antonio Atkins, at best, placed Spradley at the Ensley and Roger Jolly stations where, according to Det. Edge, Mrs. Jason's credit card was used two days after her murder. (R. 475.) Atkins did not see Spradley possess or use a credit card. (R. 332.) The State also introduced a video from the Cowboy's station depicting a man who supposedly resembled Spradley purchasing something inside the store. (R. 475-76.) The purchase on Mrs. Jason's card at Cowboy's apparently occurred at the pump around the same time. (R. 476.)

connecting him to the use of the card on the night of the murder, January 9, 2004.

This evidence was insufficient to support a finding of guilt beyond a reasonable doubt. *See Thomas v. State*, 363 So. 2d 1020, 1022 (Ala. Crim. App. 1978)(citations omitted).[164] Spradley's capital conviction must be reversed under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and §§ 6, 13, and 15 of the Alabama Constitution. *See Jackson v. Virginia*, 443 U.S. 307 (1979).

XVI. STANDARDLESS PROSECUTORIAL DISCRETION IN SEEKING DEATH VIOLATES EQUAL PROTECTION, DUE PROCESS AND THE EIGHTH AMENDMENT.

Alabama lacks statewide standards governing the decision of local prosecutors to seek or decline to seek the execution of death-eligible defendants. *See* ALA. CODE §§ 13A-5-39–13A-5-59.[165] Thus, Appellant's death sentence violates his rights to equal protection, due process, and to be free from cruel and unusual punishment. *See* U.S. Const. amends. V, VI, VIII, XIV; Ala. Const. §§ 6, 13, 15.

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[164] This issue was preserved in trial counsel's Motion for Judgment of Acquittal at the close of state's evidence and Motion for New Trial. (R. 484, C. 220.) Alternatively, it is plain error. ALA. R. APP. P. 45A.

[165] See *Many Murders, Few Executions*, BIRMINGHAM NEWS, Nov. 7, 2005, at 6 (discussing different policies reported directly by District Attorneys from Jefferson and Talladega Counties); American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* 83, 89 (June 2006)(discussing local prosecutors' standardless discretion)(available at http://www.abanet.org/moratorium/assessmentproject/alabama/report.pdf).

Equal protection. "[U]niform" and "specific" standards are required to prevent the arbitrary and disparate treatment of similarly-situated people when a fundamental right, such as the right to life, is at stake. *See Bush v. Gore*, 531 U.S. 98, 102, 106 (2000)(applying principle to right to vote). Because Alabama does not even provide an "abstract proposition" or a "starting principle," *id.* at 106, as to how local prosecutors should decide who should face the death penalty, similarly-situated defendants are not being treated equally. *See Many Murders, Few Executions*, BIRMINGHAM NEWS, Nov. 7, 2005 (race of victims and defendants, geography, and socioeconomic status continue to play significant roles in Alabama capital sentencing).

Due process. The standardless discretion granted to Alabama prosecutors violates Appellant's right to due process under the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The interest at stake - the right to life - is the most fundamental of all. Given the lack of standards, the risk of an erroneous deprivation of life is substantial, and statewide standards would significantly reduce the risk and could be adopted with relative ease. The State's interest in granting prosecutors this unbridled discretion is minimal at best.

Cruel and unusual punishment. Under the Eighth Amendment, because a prosecutor's "decision whether or not to seek capital punishment is no less important than the jury's[,]...[his] 'discretion must [also] be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *DeGarmo v. Texas*, 474 U.S. 973, 975 (1985)(Brennan, J., dissenting from denial of cert.)(quoting *Gregg*, 428 U.S. at 189). Alabama's lack of standards governing prosecutorial decisions to seek death sentences violates the Eighth Amendment. This Court should reverse.

XVII. THE TRIAL COURT FAILED TO CONDUCT A *BATSON* HEARING AFTER A *PRIMA FACIE* SHOWING OF RACIAL DISCRIMINATION IN THE STATE'S STRIKING OF POTENTIAL JURORS

The "Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). When the record establishes *a prima facie* showing of discrimination,[166] the trial court has a duty to conduct a

[166] Appellant requested that the jury venire and strike lists be incorporated in the record in its Second Motion to Supplement dated May 5, 2009. On June 19, 2009, this Court denied the Motion to Supplement generally, on the basis of the response filed by the court reporter. The court reporter noted she did possess the venire and strike lists but she informed the Clerk that "she did not know whom the Court was ordering to furnish the jury venire list and the jury strike list; whether it be the trial Court, the Clerk, or the Court Reporter." Attachment to 6/19/09 Order, at 2. In addition to the Court

hearing, at which time the prosecutor must declare race-neutral reasons for the strikes. *See Lemley* v. State, 599 So. 2d 64, 69 (Ala. 1992).

In this capital case involving a black defendant and white victim, the State used six of its thirteen (46%) strikes to remove African-Americans from the jury, a proportion greater than the proportion of African-Americans in the venire (38%) and the population of African-Americans in Jefferson County (41.2%).[167]

In a prosecutorial district with a history of discrimination in exercising its strikes against African-Americans,[168], in a case involving an interracial crime, when the prosecutor failed to conduct any questioning at all with

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Reporter, undersigned counsel has a copy of both lists should the Court find them appropriate to consider.

[167]*See* U.S. Census Bureau, *Jefferson County QuickFacts*, available at http://quickfacts.census.gov/qfd/states/01/01073.html (last visited July 14, 2009).

[168]*See Cochran v. Herring*, 43 F.3d 1404, 1410 (11th Cir. 1995)(noting Jefferson County District Attorney's Office subscribed to an "informal practice of using peremptory challenges to strike black jurors based, at least in part, on their race."); *Ex parte Bankhead*, 625 So. 2d 1146, 1148 (Ala. 1993)(reversing conviction because Jefferson County prosecutors violated Equal Protection Clause during jury selection); *Smith v. State*, 620 So. 2d 732, 734 (Ala. Crim. App. 1992)(affirming Jefferson County trial judge's decision to set aside conviction for equal protection violation); *Ex parte Williams*, 571 So. 2d 987, 990 (Ala. 1990)(same); *McElemore v. State*, 798 So. 2d 693, 702 (Ala. Crim. App. 2000)(same); *Miesner v. State*, 665 So. 2d 978, 981 (Ala. Crim. App. 1995)(same); *Hodge v. State*, 665 So. 2d 959, 961 (Ala. Crim. App. 1995)(same); *Richmond v. State*, 590 So. 2d 384, 387 (Ala. Crim. App. 1991)(same). A Court has found that Prosecutor Anderton discriminated against African-American veniremembers in the past. *See Nickerson v. State*, 523 So. 2d 504, 505 (Ala. Crim. App. 1987)(quoting trial record in which defense counsel alleged, "Previous to this trial when Mr. Anderton has been the prosecutor he has used his strikes to systematically eliminate all blacks from the venire....[In] two previous cases [] he used his strikes to eliminate all blacks.") On remand in *Nickerson*, he failed to provide race-neutral reasons for the striking of African-Americans, and a new trial was granted. *Id.* at 508 (opinion on remand).

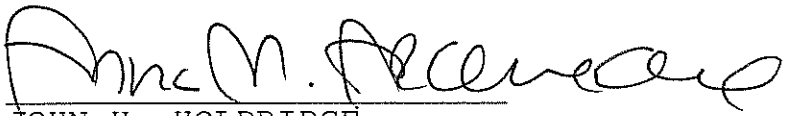
respect to its first and last strikes of African-Americans,[169] and when the record reveals disparate treatment of African-Americans and white veniremembers, the trial court's failure to conduct a hearing in a death penalty case after this *prima facie* showing violated the Equal Protection Clause and was plain error. U.S. Const. XIV; Ala. Const. § 15; ALA. R. APP. P. 45A. This case must be remanded for a *Batson* hearing at which the prosecutor must be required to provide its reasons for the removal of these African-American veniremembers.

CONCLUSION

For the above reasons, individually and cumulatively, Appellant respectfully requests that this Court reverse his convictions 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.

[169]Jurors Cluster Boyd (Number 54) and Kewanee Carlton (Number 83).

Respectfully Submitted,



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Dated: July 14, 2009

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2009, I served a copy of the attached pleading by first-class mail, postage prepaid to:

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APPENDIX A:
SUMMARY OF RULINGS AND ACTIONS ADVERSE TO APPELLANT

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C. 19	Denying Defense Motion for Discovery of All Voting Records and Other Information Concerning Potential Jurors
C. 19	Denying Defense Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire
C. 19	Denying Defense Motion for Court to Declare Unconstitutional State Statutory Limits on Attorney Compensation
C. 19	Denying Defense Motion for Court to Conduct In Camera Inspection of the District Attorney's File for all Material Favorable to the Defendant
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