No. 15-922

IN THE

# Supreme Court of the United States

LAM LUONG,

*Petitioner,*

v.

ALABAMA,

*Respondent.*

**On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Alabama**

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


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February 22, 2016

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**On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Alabama**

## MOTION OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 (b) of the Rules of this Court, the National Association of Criminal Defense Lawyers ("NACDL") hereby requests leave to file the accompanying *amicus curiae* brief in support of petitioner. NACDL has obtained petitioner's consent. Respondent's counsel has denied NACDL's request for consent.

Because of press of business and health issues, counsel of record failed to request consent within the ten day period specified in Rule 37.2 (b). Notice was given and consent requested on February 19, 2016. Respondent refused consent on the ground that NACDL's late notice prejudiced respondent. Both the

brief in opposition and the *amicus curiae* brief are due, simultaneously, on Monday, February 22, 2016.

For these reasons NACDL respectfully requests that the Court grant its motion for leave to file an *amicus curiae* brief in support of petitioner.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

Founded in 1958, NACDL has approximately 9,000 direct members in 28 countries - and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys - including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Of particular significance here, NACDL submitted an amicus brief to this Court in *Skilling* v. *United States*, 561 U.S. 358 (2010), arguing in part that the court of appeals erred when it held that a district court's perfunctory, five-hour voir dire overcame the presumption of prejudice from pretrial publicity and produced a fair jury.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The question presented goes to the heart of the Sixth Amendment guarantee of an impartial jury. Because the Alabama Supreme Court's ruling on the scope and nature of voir dire represents a dangerous departure from this Court's decisions protecting that right, NACDL urges review.

## INTRODUCTION

The community where Petitioner Lam Luong's crime occurred was saturated with press coverage and deeply affected by his actions. Despite this, the trial court's voir dire consisted of nothing more than a few cursory group questions, and entirely failed to ask whether any jurors had prejudged Mr. Luong's guilt or deservedness of capital punishment. Those infirm procedures highlight the need not only for reversal in this case, but also for the Court to resolve lower court confusion over the appropriate handling of voir dire in high profile cases. See *Skilling* v. *United States*, 561 U.S. 358, 388-89 (2010) (holding that juror screening and voir dire are the primary means of guarding a defendant's right to an impartial jury against the taint of pretrial publicity).[2]

## SUMMARY OF ARGUMENT

In this publicity-drenched case, the Alabama Supreme Court's approval of perfunctory, collective voir dire conflicts with this Court's decisions, and reflects confusion in the lower courts regarding the scope of

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[2] Mr. Luong's petition for a writ of certiorari review also raises questions regarding the Alabama Supreme Court's erroneous application of change of venue jurisprudence, and that court's improper approval of the prosecution's discrimination against women in jury selection. NACDL focuses this amicus brief only on Luong's voir dire claim, but urges the Court to grant review on the other two issues as well.

voir dire needed to root out publicity-induced bias. The state supreme court's erroneous holding presents an issue of vital importance in the modern era of pervasive, sensationalist media coverage, necessitating the Court's clarification of the essential elements of voir dire in cases involving extraordinarily prejudicial pretrial publicity, especially capital cases.

Put another way, the critical question is whether a trial court must, at a minimum, ask potential jurors who admit exposure to highly prejudiced pretrial publicity if they have formed opinions about guilt and allow further questioning to uncover bias. The Alabama Supreme Court said no, holding that courts may rely on those jurors' collective, untested assurance that they can be fair. That ruling conflicts with decisions of this Court and must be corrected.

## ARGUMENT

### I. THE COURT SHOULD GRANT THE WRIT TO PROTECT THE SIXTH AMENDMENT RIGHT TO AN UNBIASED JURY.

As detailed in Mr. Luong's petition, the crime and trial in this case invited an overwhelming, singular deluge of community attention. Television stations, on just their first day of reporting, ran a combined 105 stories. In the two weeks following, newspaper stories ran daily, sometimes three each day. Television news often interrupted regular programming when there was a break in the case. Between January 9, 2008, when the crime was first reported, and January 23, when the last child's body was found, over 600 news stories had been transmitted over the airwaves. And, of course, the community was both deeply affected and actively involved. Volunteers helped to search and recover the bodies of Mr. Luong's children. Local businesses donated to the

children's mother. Memorials were erected. Heavily-attended services and gatherings were held.

The local attention to the case was often sensational. Mr. Luong's initial guilty plea and request to be executed was widely publicized. The coverage was also often inaccurate. The newspaper referred to Mr. Luong as "EVIL" and alleged he had undergone a "violent change" and "hit the kids all the time." Other coverage claimed Mr. Luong wanted to be more famous than the Virginia Tech or September 11 defendants. "Experts" opined in the media about Mr. Luong's drug use and how it could not have affected his conduct. None of these claims were borne out at trial. They did, however, have a profound impact on the citizenry.

That impact was evinced by angry and violent sentiments expressed toward Mr. Luong in newspaper editorials, blogs, and call-in phone lines. The barrage of negative attention continued right up until the time of trial. In the month before trial alone, 81 news stories aired on television. See *United States* v. *McVeigh*, 918 F. Supp. 1467, 1470 (W.D. Okla. 1996) (finding the effects on the community "so profound and pervasive that no detailed discussion of the evidence is necessary."); *Irvin* v. *Dowd*, 366 U.S. 717, 727 (1961) ("The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.").

In spite of such unusual circumstances, and the prosecution's notice that it intended to seek death the trial judge permitted only the most limited of voir dire inquiries. Questionnaires were given to 155 prospective jurors. Only 15 people indicated they had not heard about the case. After collecting the questionnaires, the trial judge asked whether anyone heard

about the case. The response was so overwhelming there was laughter in the courtroom. When the judge asked who had not heard about the case, only two prospective jurors raised their hands. Instead of permitting voir dire of each juror at this point, the trial judge asked the group if any of them would identify themselves as unfair: "Would any of you, based on what you have read, seen, or heard, or remember, could you set those things aside and serve as a fair and impartial juror?" Nobody responded. The judge next asked whether it would be impossible for any juror to sit as a fair, impartial juror. There was but one response.

Mr. Luong's trial judge never required a verbal response of any juror and *never asked whether any juror had formed opinions about Mr. Luong's guilt or the appropriate penalty*. Defense counsel objected, but the trial judge ruled the group inquiry was sufficient. Yet the final count revealed that *all twelve* jurors had heard about the case before trial. At least six knew Mr. Luong attempted to plead guilty. At least one heard Mr. Luong had confessed. Two jurors indicated extensive exposure to news about the case. None of these jurors were questioned about whether they had prejudged Mr. Luong's fate at trial.

The perfunctory voir dire procedures employed in Mr. Luong's case are just an exemplar of the broader confusion among lower courts about the scope of voir dire that is constitutionally required under these circumstances. As set out in Mr. Luong's petition, in *Mu'Min* v. *Virginia*, 500 U.S. 415 (1991), the Court held that due process requires trial courts to conduct sufficient voir dire to select an impartial jury, but left open the question whether some cases may trigger heightened voir dire requirements, such as individual voir dire, where there is a wave of public passion. In

the absence of guidance, Mr. Luong's petition notes, lower courts differ over whether extraordinarily prejudicial media exposure imposes heightened voir dire requirements, including individual voir dire. Specifically, state courts are in conflict on whether individual voir dire is required in cases involving extensive retrial publicity.[3] The federal courts are in conflict on this issue as well.[4]

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[3] *See, e.g., Brown* v. *State*, 601 P.2d 221, 231 (Alaska 1979) (defendant must be allowed "searching inquiry" where potential juror may have been exposed to "prejudicial publicity"); *Hughes* v. *State*, 490 A.2d 1034, 1041-42 (Del. 1985) (finding "limited form of group voir dire" inadequate in light of "probable prejudice on account of the pretrial publicity"); *Bolin* v. *State*, 736 So. 2d 1160, 1165 (Fla. 1999) ("preferred approach" is to conduct individual voir dire whenever the timing and content of pretrial publicity "creates the probability that prospective jurors have been exposed to prejudicial information that will not be admissible at trial."); *State* v. *Pokini*, 526 P.2d 94, 100 (Haw. 1974) ("perfunctory and generalized" voir dire questions insufficient in light of "quantity, quality, and timing" of pretrial publicity); *Morris* v. *Commonwealth*, 766 S.W.2d 58, 59-60 (Ky. 1989) ("When there has been extensive pre-trial publicity, great care must be exercised on voir dire examination to ascertain just what information a prospective juror has accumulated."); *People* v. *Jendrzejewski*, 566 N.W.2d 530, 537-38 (Mich. 1997) ("[W]here there is extensive pretrial publicity, jurors should be adequately questioned so that challenges for cause and peremptory challenges can be intelligently exercised."); *Commonwealth* v. *Johnson*, 269 A.2d 752, 757 (Pa. 1970) ("When there is present in a case inflammatory pretrial publicity which creates the possibility that a trial could be prejudiced, there are exactly those circumstances present which require each juror to be questioned out of the hearing of the other jurors."). *But see, e.g., Luong* v. *State*, 2014 Ala. LEXIS 39, at *23-*40 (Ala. Mar. 14, 2014) (upholding denial of individual voir dire in case involving extensive adverse publicity); *Carr* v. *State*, 655 So. 2d 824, 843 (Miss. 1995) (same); *State* v. *Martin*, 944 A.2d 867, 875-76 (Vt. 2007) (same).

One case from the Sixth Circuit merits particular attention and highlights the need for the Court to step in. In *Jackson* v. *Houk*, the Sixth Circuit confronted a capital case where two defendants opened fire on a roomful of three teenagers and a fourth man who had sold one of the defendants drugs earlier that day. The defendants robbed the victims, shot until both their guns were emptied of ammunition, and killed two of the teenagers. Both men were sentenced to death. 687 F.3d 723, 727-28 (6th Cir. 2012).

In the wake of the crime, newspapers and television consistently identified the defendants as the sole suspects. "Nearly every step of the legal proceedings against them was chronicled, beginning with their first appearance in court, which the *Lima News* covered with photographs of the two men in bullet proof vests and an article relating that '[e]xtra officers were brought in for added security due to the publicity surrounding the crime' and quoting a victim's family member as saying, 'I can't wait to see what they're going to get.'" *Id.* at 730. Pretrial rulings were detailed in the press. Opening arguments were head-

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[4] *Compare United States* v. *McDonnell*, 792 F.3d 478, 496-98 (4th Cir. 2015) (denying defendant the right to know whether potential jurors who admit exposure to pretrial publicity have formed opinions about guilt) (*cert. denied* as to this issue, No. 15-474, 2016 WL 205948 (Jan. 15, 2016)) *with Patriarca* v. *Unitfed States*, 402 F.2d 314, 318 (1st Cir. 1968) ("[W]here there is . . . a significant possibility that jurors have been exposed to potentially prejudicial material, and on request of counsel, we think that the court should proceed to examine each prospective juror apart from other jurors and prospective jurors . . . ."); *United States ex rel. Bloeth* v. *Denno*, 313 F.2d 364, 372 (2d Cir. 1963) (en banc); *Waldorf* v. *Shuta*, 3 F.3d 705, 712 (3d Cir. 1993); *United States* v. *Dellinger*, 472 F.2d 340, 375-77 (7th Cir. 1972); *Silverthorne* v. *United States*, 400 F.2d 627, 639 (9th Cir. 1968); *Jordan* v. *Lippman*, 763 F.2d 1265, 1281 (11th Cir. 1985).

lined in the newspaper as "'New Year's Massacre' on Eureka Street." The jury pool was keenly aware of the media coverage. Of the tweleve seated jurors, all but one reported knowing of the case through the media. *Id.*

The trial court in that case conducted, and the Sixth Circuit approved, a voir dire in which potential jurors could not be questioned about the content of what they knew or the source of their knowledge. The venire panel was approved merely on the basis of jurors' affirmation that they could be fair and unbiased "without regard to their knowledge of the case arising from the extensive pretrial publicity." *Id.* at 733. Moreover, in a case with such substantial and inflammatory media coverage, the Sixth Circuit declined to conduct meaningful review of the voir dire and instead deferred to the trial court:

> That [*Mu'Min*] standard and our uncertainty as to the scope and content of the jurors' knowledge leads us to defer to the state trial judge's rejection of a change of venue from the small town where the case was tried to another county of the state. Absent more detailed knowledge of what the jurors knew from the press, we are unable to say what effect the publicity had. *Mu'Min*' s deferential *voir dire* rule eliminates the factual basis for an appellate finding of "manifest error" by the trial judge.

*Id.* at 734. Such extreme deference to trial courts' voir dire decisions, especially in cases with significant prejudicial publicity, is inconsistent with this Court's precedent.

First, the Court has often expressed skepticism about jurors' assurances of impartiality in the face of vitriolic publicity. The Court has recognized that, in

extreme cases, even jurors' sincere assertions that they can put aside their feelings and beliefs and perform their duty fairly "should not be believed." *Mu'Min*, 500 U.S. at 429 (quotation omitted); see*, e.g.*, *Sheppard* v. *Maxwell*, 384 U.S. 333, 362-63 (1966); *Rideau* v. *Louisiana*, 373 U.S. 723, 727 (1963). As the Court has noted: "No doubt each juror was sincere when he said that he would be fair and impartial . . . but the psychological impact requiring such a declaration before one's peers is often its father." *Irvin*, 366 U.S. at 728. In *Murphy* v. *Florida*, the Court held that "[a] juror's assurances that he is equal to this task [of laying aside his opinions and being fair] cannot be dispositive of the accused's rights." 421 U.S. 794, 800 (1975).[5] In this case, the trial court did not even obtain the venire members' superficial assurances, but rather relied on their silence. This can only be viewed as even more unreliable than the verbal assurances at which the Court often looks askance.

Second, the Court has long required lower courts to ask potential jurors exposed to prejudicial pretrial

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[5] Federal circuit courts agree that courts cannot accept jurors' assurances of impartiality at face value. *See, e.g., Patriarca*, 402 F.2d at 318 ("[W]here there is . . . a significant possibility that jurors have been exposed to potentially prejudicial material, and on request of counsel, we think that the court should proceed to examine each prospective juror apart from other jurors and prospective jurors, with a view to eliciting the kind and degree of his exposure to the case or the parties, the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence."). Likewise, many state courts favor individual voir dire in cases involving extensive pretrial publicity. *See, e.g., Brown*, 601 P.2d at 231 (defendant must be allowed "searching inquiry" where potential juror may have been exposed to "prejudicial publicity"); *Hughes*, 490 A.2d at 1041-42 (finding "limited form of group voir dire" inadequate in light of "probable prejudice on account of the pretrial publicity").

publicity whether they have formed opinions about guilt as a result. For example, in *Patton* v. *Yount*, the Court held that "[t]he relevant question is . . . whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." 467 U.S. 1025, 1035 (1984). Likewise, *Mu'Min* v. *Virginia* explained that trial courts "must" decide "is this juror to be believed when he says he has not formed an opinion about the case?" 500 U.S. at 425; see also *United States* v. *Pratt*, 728 F.3d 463, 470 (5th Cir. 2013) (forbidding trial courts from relying "solely on a juror's assertion of impartiality but instead must conduct a sufficiently probing inquiry to permit the court to reach its own conclusion."); *United States* v. *Rahman*, 189 F.3d 88, 121 (2d Cir. 1999) ("[T]he Constitution requires only that the Court determine whether they have formed an opinion about the case."). In this case, it is impossible to know whether a juror's opinion is "fixed," or whether a juror is truly "impartial" because the trial court refused to ask whether publicity-exposed jurors formed opinions in the first place.

Third, the Alabama Supreme Court's decision affirming the trial court's perfunctory voir dire is particularly indefensible in light of the Court's analysis in *Skilling* v. *United States*, 561 U.S. 358 (2010). In that case, the Court rejected a voir dire challenge only after finding that the trial court "examined each prospective juror individually, thus preventing the spread of any prejudicial information to other venire members" and accorded the parties "an opportunity to ask follow-up questions of every prospective juror brought to the bench for colloquy." 561 U.S. at 389. Three Justices nontheless dissented. See *id.* at 427 (Sotomayor, Stevens, Breyer, JJ., dissenting in part); see also *id.* U.S. at 426-27 (Alito, J., concurring in

part) ("I share some of Justice Sotomayor's concerns about the adequacy of the *voir dire* in this case and the trial judge's findings that certain jurors could be impartial. . . . But those highly fact-specific issues are not within the question presented.") (citation omitted).

The Alabama Supreme Court's decision is entirely contrary to the analysis in *Skilling*. That case, like this one, featured intense, pervasive, uniformly hostile, and often inaccurate media coverage that saturated the community from which the jurors were drawn. Skilling maintained that in such circumstances, the Sixth Amendment required a change of venue, because jurors' assurances of impartiality could not be trusted. This Court rejected that contention and found no constitutional violation, because the trial judge: (a) submitted a questionnaire that included the question, among others: "Based on anything you have heard, read, or been told, do you have any opinion about the guilt or innocence of Jeffrey Skilling," with a request to explain an affirmative answer, 561 U.S. at 371 n.4 (brackets and ellipses omitted); (b) conducted individual voir dire, see *id.* at 373-74; and (c) permitted counsel to ask follow-up questions to the jurors during the individual, sequestered voir dire, see *id.* at 374. Through this careful process, the trial judge could assess the prospective jurors' "inflection, sincerity, demeanor, candor, body language, and apprehension of duty" and make individualized findings on possible bias. *Id.* at 386. This Court concluded that the district court's findings based on these procedures deserved considerable deference. See *id.* at 386-87.

Here, by contrast, the trial court conducted no inquiry into the jurors' opinions about Mr. Luong's guilt or the appropriate sentence, nor did the trial court

permit defense counsel to conduct one. The trial court thus had no evidence - no observations of "inflection, sincerity, demeanor, candor, body language, and apprehension of duty" - on which to make individualized findings concerning potential jurors' ability to disregard the hostile media reports and decide the case fairly on the evidence. In the absence of such a record, there are no trial court findings that make deference feasible at all.

This case presents an excellent vehicle for making clear that *Skilling* and its predecessors mandate meaningful inquiring concerning the possible effect of prejudicial pretrial publicity. If the bedrock constitutional right to indifferent jurors, see *Sheppard*, 384 U.S. at 362, is to mean anything in this era of around-the-clock news and new forms of journalism, it must at least require trial courts to conduct probing individual voir dire of potential jurors who have been exposed to an avalanche of negative publicity concerning the defendant.

Finally, this case presents even more compelling circumstances than *Skilling*. Prosecutors charged Mr. Luong with capital murder and sought the death penalty. In such circumstances, it is well-established that the highest standards of constitutional protections apply. *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976); *Gregg* v. *Georgia*, 428 U.S. 153 (1976); *Furman* v. *Georgia*, 408 U.S. 238 (1972). A life or death decision is "qualitatively different" from decisions involved in any other kind of case. *Woodson,* 428 U.S. at 305. Death penalty trials require especially stringent due process from both the judge and attorneys, and may not be treated as standard criminal cases. See*, e.g.*, *Gardner* v. *Florida*, 430 U.S. 349 (1977); see also *Simmons* v. *South Carolina*, 512 U.S. 154 (1994); *Lankford* v. *Idaho*, 500 U.S. 110 (1991).

Courts must go to "extraordinary measures" to ensure that a death penalty trial is fair. *Caldwell* v. *Mississippi*, 472 U.S. 320, 329 n.2 (1985) (quoting *Eddings* v. *Oklahoma*, 455 U.S. 104, 118 (1982)). It is through this lens of heightened constitutional scrutiny that the Court should review the decision of the Alabama courts to permit Mr. Luong's capital jury to be selected without any meaningful protection against potentially prejudicial community sentiment.

## CONCLUSION

In this case, the state supreme court blessed a perfunctory voir dire that this Court's decisions foreclose. This is an increasingly important issue worthy of the Court's review. The right to an impartial jury is the cornerstone of our criminal justice system. Voir dire is the primary mechanism for protecting that right. The minimum requirements for voir dire - the rules that ensure it supplies more than empty theater - present an important, recurring question of law. And it is one that becomes more important every day, as media coverage becomes increasingly pervasive, sensationalist, and vituperative.

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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