IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	**INDICTMENT NO. CR-2000433**
v.	:	
	:	
GREG MCMICHAEL,	:	**EVIDENTIARY HEARING**

1.4
MOTION FOR BOND

Defendant GREG McMICHAEL moves this Court to set a reasonable bond in this case. In requesting an evidentiary hearing, Mr. McMichael will present evidence at a bond hearing to establish that he meets the conditions for pretrial release on a reasonable bond.

MEMORANDUM OF LAW

The burden of production initially rests with the defendant to show that he has roots in the community and is entitled to release on bond.[1] The burden will then shift to the State to offer rebuttal evidence, if the State so chooses, to attempt to prove by a preponderance of the evidence that Mr. McMichael poses a significant risk of flight or failure to appear in court when required, a significant risk of danger to persons or property in the

[1] *Ayala v. State*, 262 Ga. 704, 425 S.E.2d 282 (1993).

community, a significant risk of committing a felony while on pretrial release pending trial, or a significant risk of intimidating witnesses or otherwise obstructing the administration of justice.[2]

In order for the defendant "[t]o meet the burden of producing evidence, the 'evidence must be such that a reasonable man could draw from it the inference of the existence of the particular fact to be proved.' 3 C. McCormick Evidence § 338, at 953 (3d ed. 1984)."[3] To prove "roots in the community," and, thus, that none of the bail risks exist in significant proportion, "[t]hese factors [for community roots] include the defendant's length and character of residence in the community, employment status and history, past history of responding to legal process, and prior criminal record."[4] "Placing the burden of production on the defendant is fair because the accused is the best source of information on his or her community ties."[5]

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[2] *Ayala*; OCGA § 17-6-1(e)(1)(A)-(D).
[3] *Ayala* at 705, n. 2.
[4] *Ayala* at 705. S*ee Lane v. State*, 247 Ga. 387, 388, n. 2, 276 S.E.2d 644 (1981).
[5] *Ayala* at 706.

After this initial production of evidence by the defendant, the burden shifts to the State to attempt to rebut it with proof that meets the preponderance-of-the-evidence standard for each of the possible risks enumerated, risks that must be shown to exist in "significant" proportion.[6] "'Preponderance of evidence' means that superior weight of evidence upon the issues involved, which, while not enough to free the mind wholly from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other."[7] The "determination of whether there is evidence to show beyond a reasonable doubt that the defendant committed the alleged crimes is significantly more demanding and of a different focus than determining whether there is a significant risk that the defendant will flee, harm another, commit another felony, or intimidate witnesses pending the trial. The reasonable doubt standard and the significant risk standard cannot be equated; and determining whether a specific crime was committed reaches different issues than determining the possibility of future bad conduct by the defendant."[8]

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[6] *Ayala* at 705.
[7] OCGA § 24-1-1(5).
[8] *Dickson v. State*, 281 Ga.App. 539, 541, 636 S.E.2d 721 (2006).

"A person charged with any offense which is bailable only before a judge of the superior court as provided in [OCGA § 17-6-1(a)] may petition the superior court requesting that such person be released on bail. The court shall notify the district attorney and set a date for a hearing within ten days after receipt of such petition."[9] Murder, as charged in counts 1-5, and aggravated assault, as charged in counts 6 and 7, are bailable only before a judge of the superior court.[10] Since bail has not been set by any court for counts 8 and 9, which charge false imprisonment and criminal attempt to commit false imprisonment, respectively, Greg McMichael moves this court to set bail on all counts.

OCGA § 17-6-1(e)(2) requires that "[w]hen determining bail, as soon as possible, the court shall consider:

(A) The accused's financial resources and other assets, including whether any such assets are jointly controlled;

(B) The accused's earnings and other income;

(C) The accused's financial obligations, including obligations to dependents;

(D) The purpose of bail; and

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[9] OCGA § 17-6-1(d).
[10] OCGA § 17-6-1(a)(2) & (11).

(E) Any other factor the court deems appropriate."

With respect to OCGA § 17-6-1(e)(2)(D), the purpose of bail, "[t]he purpose of a pretrial bond is to prevent punishment before a conviction and to secure the appearance of the person in court for trial."[11] "The most fundamental premise of our criminal justice system is that a person ought not to be punished for a criminal offense until the state demonstrates guilt beyond a reasonable doubt."[12] "[I]n some limited circumstances, pretrial detention is permissible as a regulation serving a legitimate and 'sufficiently compelling' government interest."[13] Pretrial "[d]etention may be 'permissible regulation,' rather than 'impermissible punishment,' if it is 'rationally . . . connected' to a non-punitive purpose and it is not excessive in relation to that purpose."[14]

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[15] "Indeed, 'the most elemental of liberty interests [is] the interest in being free from physical

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[11] *Ayala* at 705, *citing Roberts v. State*, 32 Ga.App. 339, 340-41, 123 S.E. 151 (1924).
[12] *Vanderford v. Brand*, 126 Ga. 67, 70, 54 S.E. 822 (1906).
[13] *Carr v. State*, 303 Ga. 853, 815 S.E.2d 903, 909 (2018), *quoting United States v. Salerno*, 481 U.S. 739, 748, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).
[14] *Id.*
[15] *United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), *quoted in Carr v. State*, 303 Ga. 853, 815 S.E.2d 903, 908 (2018).

detention by one's own government.'"[16] "As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution."[17]

"In this state, unlike many other states, the presumption of innocence has always remained with the person accused of a capital offense, even during the trial."[18] "Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[19] "The defendant's guilt or innocence of the underlying charge is not an issue at the bail hearing, especially since the defendant enters the proceeding cloaked with a presumption of innocence."[20]

It is important to note here that OCGA § 17-6-1(e)(2)(E), which allows the court to "consider . . . [a]ny other factor the court deems appropriate" refers to factors in "determining bail," not denying bail, that is, factors in

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[16] *Carr* at 908, *quoting Hamdi v. Rumsfeld,* 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality). *See also Foucha v. Louisiana,* 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).
[17] *Carr* at 908, *quoting Foucha v. Louisiana* at 504 U.S. 71, 90.
[18] *Ayala* at 706.
[19] *Stack v. Boyle*, 342 U.S. 1, 4, 72 S.Ct. 1, 3, 96 L.Ed. 3 (1951).
[20] *Cowards v. State*, 266 Ga. 191, 465 S.E.2d 677 (1996).

determining the *amount* of bail. The Act of the General Assembly, SB 407, which took effect as law on July 1, 2018, adding OCGA § 17-6-1(2)(A)-(E), notes in the preamble that the purpose of the bill was "to amend Title 17 . . . so as to amend provisions relating to . . . *setting bail.*"[21] Thus, "any other factors" that the court deems appropriate means *financial factors* appropriate to determining the amount of bail.

Excessive bail is prohibited by the Georgia Constitution[22] and the Eighth Amendment to the U.S. Constitution.[23] For purposes of the Eighth Amendment, excessive bail is defined as bail set at an amount higher than an amount reasonably calculated to insure the presence of the defendant.[24] "When fixing bail in Georgia, a trial judge's foremost consideration is the probability that the accused, if freed, will appear at trial and to a lesser extent 'the accused's ability to pay, the seriousness of the offense, and the accused's character and reputation.'"[25] "'The gist of the problem confronting a court in setting the amount of bail is to place the amount

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[21] Ga. L. 2018, p. 550, § 2-4/SB 407.
[22] Ga. Const.1983, Art. I, Sec. I, Par. XVII.
[23] U.S. Const., Amend. VIII and XIV.
[24] *Stack v. Boyle*, 342 U.S. 1, 5, 72 S.Ct. 1, 96 L.Ed. 3 (1951). *See also Jones v. Grimes,* 219 Ga. 585, 587, 134 S.E.2d 790 (1964).
[25] *Mullinax v. State*, 271 Ga. 112, 515 S.E.2d 839 (1999), *quoting Spence v. State*, 252 Ga. 338, 341(2)(b), 313 S.E.2d 475 (1984). *See generally* OCGA § 17-6-1(e).

high enough to reasonably assure the presence of the defendant when it is required, and at the same time to avoid a figure higher than that reasonably calculated to fulfill this purpose, and therefore excessive.' 8 Am.Jur.2d 824, § 70."[26] "Excessive bail is the equivalent of a refusal to grant bail."[27]

CONCLUSION

In light of the statutory requirement that this court set a hearing on this motion within ten days of its filing,[28] and because of the request for an evidentiary hearing, which will require subpoenas to be served, documents to be gathered, marked, copied, and served, and because of the significant impediments we all now face in this pandemic, which will require the making of provisions for the safety of all concerned, especially witnesses whose health may make them more vulnerable to the ravages of COVID-19 and, thus, may require remote access to the court for their testimony, Mr. McMichael waives the ten-day requirement and asks the court to set the hearing for some time between ten and twenty days from the filing of this motion.

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[26] *Jones v. Grimes*, 219 Ga. 585, 587(2), 134 S.E.2d 790 (1964).
[27] *Howard v. State*, 197 Ga.App. 693, 399 S.E.2d 283 (1990), *citing Jones v. Grimes* at 587.
[28] OCGA § 17-6-1(d).