IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	
v.	:	**INDICTMENT NO. CR-2000433**
TRAVIS MCMICHAEL	:	
	:	
GREGORY MCMICHAEL,	:	
	:	
Defendants.	:	

5.5
MOTION TO ENSURE THAT ANY "REHABILITATION" QUESTIONING OF PROSPECTIVE JURORS COMPLIES WITH DEFENDANTS' STATE AND FEDERAL CONSTITUTIONAL GUARANTEE TO A FAIR AND IMPARTIAL JURY

Travis McMichael and Gregory McMichael, through counsel, move for a hearing concerning the scope, content, and form of "rehabilitation" questions to members of the venire. In support of this Motion, Defendants show this Court the following:

I. INTRODUCTION

The unprecedented volume of pretrial publicity in this case means that jury selection will necessarily require extraordinary care and attention to ensure that the right to a "fair trial by a panel of impartial, 'indifferent' jurors" is realized. *Irvin v. Dowd*, 366 U.S. 717, 721 (1961); *see*

also U.S. Const. amends. VI, XIV; Ga. Const. Art. I, Sec. I, Par. I, XI. Trial by an impartial jury is the most precious of the safeguards of "individual liberty and the dignity and worth" of every person. *Irvin,* 366 U.S. at 721. Properly conducted voir dire is essential to "discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." *J.E.B. v. Alabama*, 511 U.S. 127, 143-44 (1994). A court abuses its discretion by failing to permit the defense voir dire sufficient "to discover that bias[.]" *Ellington v. State*, 292 Ga. 109, 135, 735 S.E.2d 736, 759 (2012), *disapproved on other grounds, Willis v. State*, 304 Ga. 686, 820 S.E.2d 640 (2018).

To ensure that jury selection proceeds efficiently and fairly, Defendants ask this Court to enter an order governing so-called "rehabilitation" questions of prospective jurors whose answers reveal possible bias, as detailed below.

II. CITATION TO AUTHORITIES AND LEGAL ARGUMENT

A. Asking so-called "rehabilitation" questions of any prospective juror should be carefully governed by this Court.

1. No "rehabilitation" questions should be interposed during counsel's questioning.

When a prospective juror's answers indicate partiality, "trial counsel should be given the broadest of latitude" in further questioning "to develop competent evidence as to bias[.]" *Kim v. Walls*, 275 Ga. 177, 178, 563 S.E.2d 847, 849 (2002) (trial court abused its discretion when it "failed to allow plaintiff's counsel to develop competent evidence as to bias" with questions "of sufficient scope and depth to ascertain any partiality."). "A court may not cut off inquiry and rely on an affirmative answer to a rehabilitative question from the bench as a talisman to show that the juror has magically, suddenly become unbiased and impartial." *Guoth v. Hamilton*, 273 Ga. App. 435, 438, 615 S.E.2d 239, 242 (2005) (internal quotation marks and citations omitted) (trial court's "rehabilitation" questions were an abuse of discretion).

To ensure that jury selection satisfies the state and federal constitutional requirement of seating impartial jurors, Defendants ask this Court to prevent any interruption of counsel's *voir dire* for purposes of "rehabilitation" of prospective jurors. Such interruptions degenerate into a game of cat and mouse between the court and counsel with members of the venire caught in the middle and cannot be squared with the "most

priceless" safeguard of liberty: a fair and impartial jury. *Irvin*, 366 U.S. at 722.

2. Prospective jurors should not be asked to assess their own fitness to serve.

Asking prospective jurors whether they can be fair "require[s] an uncommon self diagnosis" that is of little help to seating an impartial jury. *Bell v. State*, 725 So.2d 836, 845 (Miss. 1998). This approach is condemned in Georgia:

> In too many cases, trial courts confronted with clearly biased and partial jurors use their significant discretion to "rehabilitate" these jurors by asking a version of this loaded question: After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law? Not so remarkably, jurors confronted with this question from the bench almost inevitably say, "yes."

Walls v. Kim, 250 Ga. App. 259, 259, 549 S.E.2d 797, 799 (2001), *affirmed sub nom Kim v. Walls, supra*. Because the result is antithetical to a court's obligation to ensure that all prospective jurors whose impartiality is in question be excused, this practice is pejoratively referred to as asking "the magic question." *See, e.g., Montgomery v. Commonwealth*, 819 S.W.2d 713, 717-718 (Ky. 1991) ("[T]he 'magic question' does not provide a device to

'rehabilitate' a juror who should be considered disqualified by his personal knowledge or his past experience, or his attitude as expressed on voir dire…. There is no 'magic' in the 'magic question.'"); *Poole v. State*, 291 Ga. 848, 851, 734 S.E.2d 1, 7 (2012) ("A juror's opinion of his qualification to serve is not determinative on the issue of his ability to be fair and impartial.").

It is widely acknowledged that prospective jurors often tell judges what they think they want to hear, even at the cost of candor. Chief Justice John Marshall noted that a prospective juror who admits to biased feelings about a case "may declare that notwithstanding these prejudices he is determined to listen to the evidence and be governed by it; but the law will not trust him." *United States v. Burr*, 25 F. Cas. 49, 50 (Cir. D. Va. 1807). *See also, e.g.*, *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) ("Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias[.]") (O'Connor, J., concurring)); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 558 (1984) (prospective juror may give "what he subjectively believes to be an honest answer, yet that same answer is objectively incorrect and therefore suggests that the individual would be a biased juror in the

particular case.") (Brennan, J. and Marshall. J., concurring in the judgment)).

And the respect (and in many cases, the fear) prospective jurors feel in a courtroom also diminishes their ability to answer a self-assessment question truthfully, especially when posed by a judge. When called for jury service, a person surrenders almost all control to the court. The court decides, for example: when the prospective juror must arrive and may leave the courthouse; when and where they may sit; when the prospective juror may eat and drink; when the prospective juror may use the restroom; what the prospective juror is allowed to read or view on media platforms; and what the prospective juror may talk about with friends, family members, employers and others. As a result, prospective jurors understand that the court is in a position of considerable power and authority over them. This explicitly unequal power dynamic makes "can you set aside your bias and be fair" questions highly unlikely to produce reliable responses.

As one federal judge[1] has observed:

> [E]mpirical research suggests that potential jurors respond more candidly and are less likely to give socially desirable answers to questions from lawyers than from judges. As a district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can "be fair." I find it remarkable when a juror has the self-knowledge and courage to answer that he or she cannot be fair in a particular case, and even more remarkable when the juror's explanation for that inability is based on a factor that neither I, nor the parties, have raised. There is also a temptation, not always resisted on my part, to pose questions with the intent of educating jurors about proper responses, in light of the presumption of innocence or other considerations in the trial.

Bennett, *Unraveling the Gordian Knot of Implicit Bias In Jury Selection: The Problems of Judge-Dominated Voir Dire, The Failed Promise of Batson, And Proposed Solutions*, 4 Harvard Law & Pol'y Rev. 149, 160 (Winter 2010).

Judge Bennett concluded that the pressure venire members feel to tell the court they will follow the law and be fair, regardless of their ability to do so in light of the life experiences that have shaped their views and

[1] The Hon. Mark W. Bennett served on the United States District Court for the Northern District of Iowa from 1994 to 2019.

beliefs, makes a trial judge "the person in the courtroom least able" to identify bias in prospective jurors. *Id.*

"[T]he influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894); *see also, e.g.*, *People v. Mays*, 188 Ill. App. 3d 974, 983, 544 N.E.2d 1264, 1271 (1989) (most jurors "view most judges with some degree of respect, and accord to them a knowledge of law somewhat superior to that of the attorneys" in the case) (internal quotation marks and citations omitted); *People v. Tyburski*, 445 Mich. 606, 627-28, 518 N.W.2d 441, 450 (1994) (reversing conviction for court's abuse of discretion; after trial court "lectured" prospective jurors who said they had bias based on pretrial publicity, "it [was] not surprising, then, that as the questions went on, fewer and fewer jurors volunteered this information."); *Bell*, 725 So.3d at 844-45 ("[T]rial judges should exercise caution in performing their profound duty to select fair, impartial and competent juries. Words coming from the judge bear special weight with those citizens who are asked to try the facts of cases, both civil and criminal.").

Social pressure, unavoidable intimidation of prospective jurors, and the practical impossibility of an individual's ability to measure his or her own cognitive bias render self-assessment questions uniquely unhelpful in jury selection. The overwhelming, relentless pretrial publicity has already imperiled Defendants' fundamental constitutional right to a fair trial by an impartial jury. To prevent eroding that right further, Defendants ask that all forms of the self-assessment question should be strictly prohibited during jury selection in this case.

3. *Following a challenge for cause, additional questioning should be limited only to clarifying any identified ambiguities in the prospective jurors' responses by open-ended questions outside the presence of other jurors.*

Given that the purpose of jury selection is to identify and excuse biased jurors and facilitate the intelligent exercise of peremptory challenges, "[n]either the court nor the parties should incessantly interrogate the juror in a manner calculated only to elicit a response contrary to the one originally given." *Ivey v. State*, 258 Ga. App. 587, 592, 574 S.E.2d 664, 667 (2002), *disapproved on other grounds, Willis, supra.* Following a challenge for cause, "the court should limit further questions to clarification of the answer." *Id.*

And any clarifying questions should be carefully framed to avoid suggesting the "right" answer to prospective jurors and posed in an open-ended form. It is "completely improper for counsel, and especially for the trial court, to browbeat the juror into affirmative answers to rehabilitative questions by using multiple, leading questions." *Doss v. State*, 264 Ga. App. 205, 210-11, 590 S.E.2d 208, 213 (2003). *See also Price v. State*, 538 So.2d 486, 389 (Fla. 3d DCA 1989) ("We have no doubt but that a juror who is being asked leading questions by the judge is more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions[.]"); *Marsch v. Commonwealth*, 743 S.W.2d 830, 834 (Ky. 1987) (prospective jurors' responses "to leading questions, that they would disregard all previous information, opinions and relationships should not [be] taken at face value.").

Defendants ask that, following a challenge for cause by either party, if this Court or opposing counsel believe there is an ambiguity in the prospective juror's answers, the parties will reconvene outside the presence of the venire to identify that alleged ambiguity, discuss proposed subsequent questions and place any objections on the record. If the Court decides to permit subsequent clarifying questions before ruling on the

challenge for cause, the prospective juror should be questioned outside the presence of the rest of the venire, to avoid any potential influence on other members of the venire that would decrease confidence in the fairness of the proceedings. *See Tyburski,* 518 N.W.2d at 451 (when other prospective jurors witnessed "rehabilitative questions," it "sent a strong message that the court did not approve of those who volunteered that they were biased."). In no case may subsequent questions ask prospective jurors whether they can "follow the law" as charged by this Court or "be fair," for the reasons and authorities in section II(A)(2), *supra.*

B. Disposition of challenges for cause should "err on the side of caution."

Denying a challenge for cause to a biased juror infects the trial with error. *Cannon v. State*, 250 Ga. App. 777, 780, 52 S.E.2d 922, 925 (2001), *disapproved on other grounds, Willis, supra.* And such rulings are troubling because "a solution (excusing the juror for partiality) [is] so readily available." *Id.* Although Georgia affords trial courts broad discretion to determine a prospective juror's impartiality, "[a] trial judge should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors[.]" *Joiner-Carosi v. Adekoya*, 357 Ga. App. 388, 390, 850 S.E.2d 823, 827

(2020) (internal quotation marks and citations omitted). Considering the nature of the constitutional rights at stake, "the better practice is for judges simply to use their discretion to remove such partial jurors, even when the question of a particular juror's impartiality is a very close call." *Walls*, 250 Ga. App. at 259, 549 S.E.2d at 799.

C. A contemporaneous record of all bases for this Court's ruling on challenges for cause is necessary to protect Defendants' right to meaningful appellate review.

Defendants are guaranteed meaningful appellate review consonant with the demands of the Due Process and Equal Protection Clauses of the Constitution. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). This right imposes upon trial courts the obligation to adequately explain their rulings. *See, e.g., United States v. Pujayasa*, 654 Fed. App'x 976, 978 (11th Cir. 2016) (remand required because no meaningful appellate review was possible when trial court failed to adequately explain its reasoning).

To facilitate meaningful appellate review of this Court's disposition of any challenges for cause, Defendants ask that this Court articulate on the record each reason for its rulings contemporaneous with those rulings. *See, e.g., Cannon,* 250 Ga. App. at 780, 552 S.E.2d at 925.

This 14th day of July, 2021.

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Certificate of Service

I hereby certify by my signature that I have served a copy **of 5.5 Motion to Ensure that any "Rehabilitation" Questioning of Prospective Jurors Complies with Defendants' State and Federal Constitutional Guarantee to a Fair and Impartial Jury** on the Office of the District Attorney for the Cobb Judicial Circuit by delivering it by email to:

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