

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

Ronald M Adams
CLERK SUPERIOR COURT

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

5.6
DEFENDANTS' RESPONSE TO COURT'S INQUIRY
REGARDING PRELIMINARY JURY INSTRUCTION

Defendants, GREGORY MCMICHAEL and TRAVIS MCMICHAEL, through counsel, in accordance with this Court's instruction at the July 22, 2021, Pretrial Conference, have reviewed the State's Motion in Limine 4.64 seeking to Pre-Charge the Jury on Additional Law, as well as the Pattern Jury Instructions, and propose the following as the Court's pretrial charge to the jury. This proposal adopts the following:

1. All of the instructions proposed by the State in its Motion In Limine,
2. The bulk of the Preliminary Pattern Jury Instructions, adapted for this case,

3. The Pattern Jury Instruction on Multiple Defendants; and
4. The Pattern Jury Instruction on Juror Use of Electronic Technology to Research or Communicate About a Case.

All edits to the Pattern Jury Instructions are set forth in yellow highlights.

0.01.00 Preliminary Jury Instructions^[SEP] (After having administered the trial oath, give the following instructions.)

~~This instruction is offered as a suggested guide only. The pattern jury instruction committee suggests that you review this instruction and tailor it to the legal culture of your jurisdiction.~~

Ladies and gentlemen, you have been sworn and empanelled, and you are about to try a criminal case, entitled the State of Georgia versus **Travis McMichael, Gregory McMichael, and William R. Bryan.**

The defendants **have** been indicted by the Grand Jury of **Glynn** County in an indictment composed of the following counts that I will read to you at this time. (Read indictment.)

To this indictment that I have just read to you, the defendant **has** **have** has-pled not guilty and **deny** denies each and every allegation therein. This is what forms the issue that you have been selected, sworn, and empanelled to try.

~~(Note: You may have already covered the foregoing instruction during voir dire. If so, you may omit repeating it here.)~~

Before we begin the trial, I am going to give you some preliminary instructions on fundamental principles of criminal law. I will also instruct you on the role of the Judge, the jury, and the lawyers and give you an overview of the trial procedure. Many of you may have never served on a jury before. It is therefore necessary that these instructions be given so that you have a general understanding of procedure in a criminal trial, what will be expected of you, and how you are to conduct yourself during the trial.

The defendants are charged in the indictment with crimes that are violations of certain laws of the State of Georgia. I want to emphasize to you that the indictment, including all of the counts therein, and the plea of not guilty are the legal procedures by which these criminal charges are brought against the defendants. The charges and pleas of not guilty are not evidence of guilt, and you should not consider them as evidence or implication of guilt of any crime whatsoever. Each of these defendants are presumed to be innocent unless or until he is proven guilty. The defendant enters upon the trial of the case with a presumption of innocence in his favor, and this presumption remains with each defendant unless or until it is overcome by the State with evidence that is sufficient to convince you beyond a reasonable doubt that the defendant is guilty of the crime or crimes charged.

No person shall be convicted of any crime unless and until each element of the crime is proven beyond a reasonable doubt. The burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crimes charged beyond a reasonable doubt. ~~However, the State is not required to prove the guilt of the accused beyond all doubt or to a mathematical certainty.¹~~

A reasonable doubt means just what it says. It is a doubt of a fair-minded, impartial juror honestly seeking the truth. It is a doubt based upon common sense and reason. It does not mean a vague or arbitrary doubt, but it is a doubt for which a reason can be given arising from a consideration of the evidence or lack of evidence, a conflict in the evidence, or any combination of these. There is no burden of proof upon the defendant whatsoever, and the burden never shifts to the defendant to prove his innocence.

If, after giving consideration to all of the facts and circumstances of this case, your minds are wavering, unsettled, or unsatisfied, then that is a doubt of the law, and you must acquit the defendant. But if no doubt exists in your minds about the guilt of the accused, then you will be authorized to convict the defendant. If the State fails to prove the defendant's guilt beyond a reasonable doubt, it would be your duty to acquit the defendant.

¹ See Defendant McMichaels Motion 5.7 to Eliminate the “All Doubt” and “Mathematical Certainty” Sentence from Jury Charge on Reasonable Doubt.

INSERT 1.60.12 Multiple Defendants^{SEP}(The following charge should be given in every case, even without a request, when there are multiple defendants on trial.)

Though you may consider all of the evidence as a whole, conviction of one defendant does not necessarily require conviction of another ~~(or all)~~. You, the jury, must determine whether the State has proven the guilt of each defendant, beyond a reasonable doubt, for ~~or innocence of~~ each defendant separately.

Under our system, it is my duty as the trial judge to determine the law that applies to this case and to instruct you, the jury, on the specific rules of law that you must apply to the facts in arriving at a verdict. I am giving you some of those instructions now. I will give you more detailed instructions after the evidence has been presented and the lawyers have made their closing arguments.

During the trial, I may be called upon to rule on motions or objections to evidence. Nothing I say in making these rulings or at any time during the trial is evidence and should not be considered as an indication that I have any leaning in this case whatsoever. My only interest in this case is to see that it is fairly tried according to the laws and the constitution of the State of Georgia and the Constitution of the United States.

As expected, the lawyers serve as advocates for their clients and are duty-bound to represent their clients to the best of their ability. The lawyers also serve as officers of this court, and as such are bound to follow applicable laws, trial procedure, and rules of evidence during the trial. If at any time the lawyers believe that any law, procedure, or rule of evidence is being violated, they may make motions regarding the conduct of the trial or objections to the admission of evidence. In making these motions or objections, the lawyers are simply seeking to fulfill their duties to their clients and to the court. Sometimes, these motions or objections may require the court to consider outside your presence the questions raised, and you will be excused to the jury room. We will try to minimize the number and length of these interruptions and ask for your patience in this regard.

Ladies and gentlemen, trial procedure in a criminal trial is generally as follows: first, the attorneys for both sides have the opportunity to make what is called an opening statement. This opening statement is not evidence. Remember that what the lawyers say is not evidence but is a preview or an outline of what they expect the evidence to be.

Following the opening statements, the evidence will be presented. Evidence can be in the form of testimony given by witnesses or physical evidence that will be labeled with exhibit numbers for identification.

After the presentation of all of the evidence, the attorneys have the opportunity to make what is called a closing argument, or summation. At this time, the attorneys may suggest which laws are applicable and how they should be considered in light of the evidence and point out to you certain parts of the evidence that they think are favorable to their position. The goal of a closing argument is to persuade you to decide the case in their favor. Following the closing arguments, I will charge you more specifically on the law that applies to this case. I will then ask you to retire to the jury room to deliberate and reach your verdict.

The jury has a very important role. It is your duty to determine the facts of the case and to apply the law to those facts. I will instruct you on the laws that apply to this case, but you must determine the facts from the evidence.

Evidence, by definition, is the means by which any fact in issue is established or disproved. Evidence consists of two things: testimony and exhibits. Testimony is the testimony that you will hear under oath from those who take the witness stand. Exhibits are those documents, photographs, or other physical evidence that are admitted into evidence.

Ladies and gentlemen, the object of this trial is to discover the truth. During the trial, the admission of evidence will be governed by certain rules of evidence. Those rules were drafted with one prominent purpose in mind, and that purpose is the discovery of truth. Consequently, the rules of evidence seek to assure that only the best and highest evidence is admitted for your consideration.

During the trial, the attorneys have a right to object to the admission of evidence if they believe its admission would violate a rule of evidence. I will admit or exclude the evidence according to those rules. If I overrule an objection, this means that you are allowed to consider the evidence being offered. On the other hand, if I sustain an objection, this means you may not consider the evidence being offered. You should consider only that testimony and only those exhibits that are admitted, and you should draw no inferences and make no assumptions about the evidence objected to if the objection was sustained. In the event that you hear or see inadmissible evidence before an objection can be made and ruled upon, if the objection is sustained, I will instruct you to disregard it, and you should disregard that evidence entirely in your deliberations and in arriving at your verdict.

You, the jury, must determine the credibility and believability of the witnesses. It is for you to determine which witness or witnesses you will believe and which witness or witnesses you will not believe, if there are some whom you do not believe. In determining the credibility or believability of witnesses, you may consider all of the facts and circumstances of the case, the manner in which witnesses testify, **their intelligence**, their interest or lack of interest in the case, their means and opportunity for knowing the facts about which they testify, the nature of the facts about which they testify, the probability or improbability of their testimony, and the occurrences about which they testify. You may also consider their personal credibility insofar as it may appear to you from the trial of the case.

Ladies and gentlemen, it is important that you pay close attention to the evidence as it is presented during the trial. If at any time you are unable to hear or see any evidence being presented or if you are suffering from any discomfort that diverts your attention, please feel free to inform me, and I will do whatever is necessary to assure that you are able to hear and see the evidence being presented and give it your undivided attention. If you are in need of a recess at any time, please raise your hand and I will recognize you. It is vitally important that you are as comfortable as possible so that you can focus on the evidence being presented.

~~(Jurors are not permitted to question witnesses. However, if you have a question that you feel is vital to your duty as the fact finder, please put your question in writing and deliver it to the bailiff, who will then pass it to me for consideration. Please keep in mind, however, that if you have a question during the presentation of evidence, all of the evidence is not yet in, and your question may very well be answered by the time all of the evidence has been presented.)~~

~~Story v. State, 157 Ga. App. 490 (1981);^[SEP]Eubanks v. State, 240 Ga. 544(2) (1978);^[SEP]Matchett v. State, 257 Ga. 785(2) (1988);^[SEP]Lance v. State, 275 Ga. 11 (2002);^[SEP]CAVEAT Steele v. Atlanta Maternal-Fetal Medicine, 271 Ga. App. 622 (2) (2005) (imprudent to encourage jury questions)~~

It is important that you view this evidence with an open mind at all times and reach no final conclusions until the trial is over. Do not jump to conclusions before all of the evidence is presented. Also, remember that during the course of this trial, it would be improper for you to discuss this case with anyone or to allow anyone to discuss the case with you or in your presence or hearing. This applies even to discussions among yourselves in the jury room or elsewhere before actual deliberations begin.

Regarding juror note taking: I have asked the bailiff to provide you with pencils and note pads for your use during the trial. You may take notes, but you are not required to do so. If you decide to take notes, please remember that note taking should not divert you from paying full attention to the evidence and evaluating witness credibility. Your observations of the witnesses during their testimony can be vital to your determination of the believability of their testimony. The notes that you take are for your use only and are not to be shared with anyone until you begin deliberation with your fellow jurors. Notes are not evidence, only memory aids, and should not take precedence over your recollection. It is the duty of each juror to recall the evidence, and while you may consider another juror's notes to refresh your memory, you should rely on your own recollection of the proceedings. Do not be influenced by the notes of other jurors, unless their notes help you in determining your own independent recollection. Notes are not entitled to any greater weight than the recollection or impression of each juror as to what the evidence may have been. After the trial is over, the notes will be

collected and destroyed.

I instruct you, ladies and gentlemen, that you must decide this case for yourself solely on the testimony you hear from the witness stand and the exhibits admitted into evidence. You may not visit any scenes depicted by the evidence. You may not utilize any books or documents not in evidence during your deliberations. You may not read or listen to any accounts of the trial that might appear in the news media. You may not discuss this case with anyone other than your fellow jurors during deliberations.

INSERT 0.01.10 Juror Use of Electronic Technology to Conduct Research on or Communicate about a Case

(Before Trial:)

To preserve the integrity of the jury system, you as finders of facts must decide this case solely upon evidence presented in this courtroom. This means that during the trial, you must not conduct any independent research about this case, the matters in the case, and the individuals ~~or corporations~~ involved in the case. In other words, you should not consult dictionaries or reference materials; search the internet, websites, or blogs; or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom— to include media of any sort or online legal research.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. ~~I hope that for all of you this case is interesting and noteworthy.~~ I know that many of you use cell phones, **notebooks** ~~Blackberries~~, the internet, and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, ~~Blackberry~~, **smart phone**, text messaging, or on Twitter; through any blog or website; through any

internet chat room; or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

(Note: Reiterate the importance of not speaking to lawyers, witnesses, or parties during the course of the trial.)

INSERT THE FIVE INSTRUCTIONS SET FORTH IN 4.64: STATE'S MOTION IN LIMINE TO PRE-CHARGE THE JURY ON ADDITIONAL LAW.

1. Burglary 1st Degree
2. Burglary – Intent to Steal
3. Criminal Trespass
4. Citizen's Arrest
5. "Bruton" Charge

That concludes my preliminary instructions, and we are now ready for the lawyers to give their opening statements.

This 1st day of September, 2021.

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Certificate of Service

I hereby certify by my signature that I have served a copy of **5.6 Defendants' Response to Court's Inquiry Regarding Preliminary Jury Instructions** on the Office of the District Attorney for the Cobb Judicial Circuit by delivering it by email to:

Linda Dunikoski
Cobb County District Attorney's Office
70 Haynes Street
Marietta, GA 30090
Linda.dunikoski@cobbcounty.org

This 1st day of September, 2021.

s/Laura D. Hogue
LAURA D. HOGUE