

Ronald M Adams
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

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

**DEFENDANTS' MOTION TO SEAT ALL JURORS
IN THE JURY BOX DURING TRIAL**

Travis and Greg McMichael, through counsel, move this Court to seat all of the jurors and alternate jurors in the jury box during the trial of this case, respectfully showing the following:

This Court has indicated to the parties that it does not intend to seat all of the jurors in the jury box during the trial of this case. Instead, the Court intends to place four jurors in the jury box and seat the remaining jurors and alternate jurors in the gallery in seats behind the prosecution, two jurors to a row. The Court plans to re-arrange counsel tables at an angle in the courtroom so that the jurors seated in the gallery cannot see the prosecution's computer and notes. The purpose of such seating arrangement by the Court is to provide for a socially-distanced jury out of

concern for the spread of Covid-19, as provided for in various Covid-19 operating plans entered by the Brunswick Judicial Circuit and by the Superior Courts of Glynn County.

The McMichaels show that juror placement in the courtroom under the Court's current plan would impede the jurors' ability to effectively observe, hear, and follow the proceedings in a safe, controlled environment free from other distractions, in denigration of the purpose of a jury box, which would adversely affect the integrity and fairness of the proceedings and infringe upon the constitutionally protected rights of the defendants to due process and a fair trial. The McMichaels further show that, given the steep downward trend in Covid-19 cases in Glynn County, social distancing of the jurors is no longer necessary, and that the jurors would be adequately protected from any risk of infection by the requirement that they wear masks during the trial. Finally, the McMichaels show that this Court has the discretion to seat all of the jurors in the jury box and that it is not prohibited from doing so by any Covid-19 operating plan previously entered by the Brunswick Judicial Circuit or the by the Superior Courts of Glynn County.

Purpose of the Jury Box

A jury box is a special enclosure within a courtroom designed specifically for the jury. It is the place where the jury sits during the trial of a case. It is usually found in the front of the courtroom to facilitate jurors hearing and seeing the testimony and arguments made by either party. It is located to the side of the witness stand and the judge's bench. The jury box has served a vital function in the history of the court system, since the inception of jury trials, protecting the rights of the jurors, the rights of the parties to the litigation, and the integrity of the judicial system. According to the National Center for State Courts (“NCSC”), jury boxes in courtrooms are designed specifically to effectuate such important purposes.¹

As explained by the NCSC, “jurors are temporary officers of the court and should be afforded the comfort and courtesies appropriate to their role. They must be present and alert for long hours, often over several

¹ The National Center for State Courts is an independent, nonprofit court improvement organization founded at the urging of Chief Justice of the Supreme Court Warren E. Burger. He envisioned NCSC as a clearinghouse for research information and comparative data to support improvement in judicial administration in state courts. Over twenty years ago, the Institute for Court Management merged with NCSC, adding an educational curriculum especially designed for court managers. In the early 1990s, an international division was formed to offer a similar array of research, consulting, education, and information services to strengthen the rules of law in countries around the world. All of NCSC's services — research, information services, education, consulting — are focused on helping courts plan, make decisions, and implement improvements that save time and money, while ensuring judicial administration that supports fair and impartial decision-making. See, *ncsc.org*.

days. They must be protected from public contact, harassment, and intimidation. Although jury service is a civic duty required of all eligible citizens, many jurors serve at great personal sacrifice of wages and time.”² As per its recommendations for courthouse designs, the NCSC recommends that the path to the jury box “should be as direct as possible and should not require jurors to cross the courtroom or exit through the spectator seating area. Access to the jury deliberation rooms should be by way of a private corridor. Jurors should not have to pass near the criminal defendant.”³

Additionally, “the jury box should be situated so that the attorneys’ tables, witness box, judge, and audiovisual exhibit area are in full view. The jurors themselves should be in view of the court and the spectators to ensure the perception of an open and public trial. The jury box is best located on the same side of the judge as the witness box, and it should not extend past either the witness box or the attorney's tables, so that there is at least a 90-degree view of all participants. All jurors should be able to see witnesses and attorneys as nearly full-face as possible.”⁴

² <https://www.ncsc.org/courthouseplanning/space-planning-standards/jury-box>

³ <https://www.ncsc.org/courthouseplanning/space-planning-standards/jury-box>

⁴ <https://www.ncsc.org/courthouseplanning/space-planning-standards/jury-box>

As the NCSC further recommends, the jury box “should be far enough from the spectator area to inhibit any physical or verbal contact. Seven feet from the center of the first juror's chair to the bar separating spectators from the litigation area is adequate. A bailiff's station may be located between the jurors and the spectators to prevent any communication. Jurors should be far enough from the attorney's tables to prevent eavesdropping – a minimum of four feet to the table and six feet to the nearest attorney's chair. Jurors should not sit with their backs to the spectators; this tends to make the jurors uncomfortable and can cause distractions as jurors turn to see who may be entering or leaving.”⁵

Even the design of the jury box itself furthers the importance of its role in the trial process. “The first row of seating is traditionally elevated on one riser, and the second row elevated on two risers. This has several advantages: (1) as temporary officers of the court, the jurors receive the prominence they are due; (2) the jurors are at or above eye level of the witness, which reduces any psychological intimidation of the jurors by the witness, and (3) the jurors have a better view of the witness and the judicial proceedings.”⁶ As the NCSC has stated, jurors “must hear the judge,

⁵ <https://www.ncsc.org/courthouseplanning/space-planning-standards/jury-box>

⁶ <https://www.ncsc.org/courthouseplanning/space-planning-standards/jury-box>

witnesses, and attorneys clearly. They should have unobstructed sight lines to the judge, witness, attorneys, and exhibit area.”⁷ Jury seats should be comfortable, have armrests, and “be constructed to lessen juror fatigue during long periods, with adequate back support and leg room.”⁸ The jury box must also be designed to accommodate jurors with disabilities.

Moreover, the jury box is designed to ensure the safety of the jurors themselves. For this reason, the jury box “should incorporate a modesty railing/panel and shelf area to provide some distance from trial participants. A bailiff or court deputy may be stationed between the jury box and the spectators to prevent any communication or intimidation. Court rules and procedures often forbid cameras to focus on jurors. If video or closed circuit television cameras are used, jurors should be out of the cameras' view.”⁹

The jury box serves to ensure that jurors have the ability to hear and see all of the proceedings so that they can carry out their vital role in the trial. The jury box sets the jurors apart from the other persons present in the courtroom and serves to protect the jurors' privacy and to guard their

⁷ <https://www.ncsc.org/courthouseplanning/space-planning-standards/jury-box>

⁸ <https://www.ncsc.org/courthouseplanning/space-planning-standards/jury-box>

⁹ <https://www.ncsc.org/courthouseplanning/space-planning-standards/jury-box>

safety during the trial. Having the jurors sit in the jury box during the trial protects the very integrity of the proceedings, which, in turn, helps preserve the rights of the criminal defendant to a fair trial.

This Court's current plan for juror placement at trial allows for a variety of jury problems to arise during the trial, which issues could be eliminated by placing all of the jurors in the juror box. While some jurors will be seated in the jury box with a direct view of the witness box, the judge, the parties, the attorneys, and the gallery, the majority of the jurors will be scattered throughout the gallery. They will be seated behind the counsel tables and will be farther away from the judge, the witnesses, and the evidence than the jurors in the jury box, making it more difficult for them to observe the witnesses and see the evidence. During their testimony, the witnesses in the witness box will be facing directly towards the jurors seated in the jury box, but they will be facing away from the jurors seated in the gallery. Similarly, when an attorney is questioning a witness on the stand, the jurors in the gallery will not be able to view the attorney "as full face as possible." It simply is not possible for an attorney who is examining a witness to face the witness, face the jurors in the juror box, and also face the jurors seated in the gallery.

Nor will the jurors in the gallery have the same ability as the jurors in the box to hear the judge, to hear the witnesses, or to hear the attorneys, given the acoustics in the courtroom. The jurors seated in the gallery will have to filter out any noise coming from other persons seated in the gallery, as well as noise from the attorneys conferring with their clients at counsel tables – which counsel tables will be located between the jurors in the gallery and the witness box. The jurors in the gallery are also more likely to be distracted from people entering and leaving the courtroom, nearby to their seats.

More importantly, the jurors in the gallery are less likely to feel the same level of security and protection as the jurors seated in the jury box, who are separated by both the box itself and a bar from the courtroom gallery. The jurors in the juror box will know they are safe. They are located in a protected area of the courtroom with the judge and the attorneys. No persons, other than officers of the court, are seated anywhere near the jurors in the jury box – nor can any member of the public approach or try to speak to the jurors in the jury box. The jurors seated in the gallery, regardless of the number of bailiffs present in the courtroom, simply will not feel this same level of security and safety. These jurors

naturally will feel more vulnerable to anyone who enters the courtroom.

Members of the public may be more inclined to approach or try to speak to the jurors seated in the gallery with them. This will only tend to distract the jurors seated in the gallery and make them less likely to give their full attention to the testimony, evidence, and arguments being presented to them.

Placing all of the jurors in the jury box is the only way to ensure the safety of the jurors, the integrity of the trial process, and the rights of the defendants to a fair trial in this case.

Steeply Declining Covid-19 Numbers in Glynn County

The McMichaels next show that social distancing of the jury is no longer necessary to protect the jurors in this case from possible infection, given the steep decline in Covid-19 cases recently in Glynn County, and show that the requirement of masks in the courtroom will adequately protect the health of the jurors.

The Georgia Department of Public Health (DPH) has tracked Covid-19 infections throughout the State during the course of the pandemic and has accumulated data for all Georgia counties. The DPH for the Coastal Health District, which includes Glynn County, maintains a Covid-19 Data

website, that is updated each weekday at 3:00 p.m. The website includes various charts and graphs, tracking Covid-19 infections in Glynn County.¹⁰ The Glynn County website includes a chart titled “7-Day Rolling Average,” which is an average of the number of newly diagnosed cases in Glynn County over the previous 7 days, including positive cases from PCR and antigen tests. The website also includes a chart titled “Record Community Transmission Index,” which reflects the number of newly confirmed cases in Glynn County in the last 14 days per 100,000 residents. The “Percentage of Positive Tests” graph shows the percentage of COVID-19 tests that were positive in residents of this county in the last 4 weeks. Finally, the “Glynn County Hospitalizations” graph represents the daily number of COVID-19 positive inpatients at the Southeast Georgia Health System facility in Brunswick, since June 1, 2020.¹¹

The charts clearly reflect the onset and surge of infections in Glynn County from the Delta variant, beginning around mid-July of 2021. The 7-Day Rolling Average (number of new cases over the previous 7 days) on July 20, 2021, was 12.6 cases. This average quickly increased to 60.3 cases

¹⁰ <https://covid19.gachd.org/glynn-county-covid-19-data/>

¹¹ <https://covid19.gachd.org/glynn-county-covid-19-data/>

on August 1, 2021, and to its highest number of **201 cases** on August 31, 2021. Since that time, the 7-day rolling average has steadily decreased. On October 1, 2021, the average was down to 28 cases per day. Since October 1, 2021, the number has continued to steadily decline each day. As of October 29, 2021, the number of new cases over the previous 7 days was down to **4.7 cases** for Glynn County – a difference of some 196.3 cases from its highpoint of 201 cases less than two months prior.¹²

Since the peak of Covid-19 cases on August 31, 2021, the Community Transmission Index for Glynn County has also steadily decreased, as have the Percentage of Positive Tests and Glynn County Hospitalizations. Hospitalizations went from 144 on August 31, 2021, to only 4 hospitalizations in Glynn County on October 29, 2021. In the last four weeks the percentage of positive tests for residents in this county decreased from 5.7% to 1.9%.¹³ Furthermore, the Covid-19 vaccination rate for Glynn County as also steadily risen over the past few months, as reflected on the DPH website, rising from approximately 34.9% in mid-April of this year to 53.5% as of October 28, 2021.¹⁴

¹² <https://covid19.gachd.org/glynn-county-covid-19-data/>

¹³ <https://covid19.gachd.org/glynn-county-covid-19-data/>

¹⁴ <https://covid19.gachd.org/glynn-county-covid-19-data/>

The Center for Disease Control and Prevention (CDC) maintains its own Covid-19 Data Tracker for Glynn County and for the other counties in Georgia. According to the CDC website, Covid-19 cases in Glynn County have decreased by 24.32% over the last seven days, as of October 31, 2021. The percentage of positive tests has decreased by .05% over the past seven days, and the number of deaths have decreased by 60%. Based upon the data it has accumulated, the CDC currently makes the following recommendation on its website for citizens of Glynn County to help protect against Covid-19 infection: “Unvaccinated people in **Glynn County, Georgia** should wear a mask in public, indoor settings.”¹⁵

The data from the DPH and CDC is invaluable. The influx of new Covid-19 cases in Glynn County from the Delta variant has steeply declined over the past two months, and the county is nearing record-low numbers of infections since the beginning of the pandemic. The current rate of cases in Glynn County as of October 31, 2021, is 80 per 100,000 residents, which is under the level for “high community spread.” While precautions, such as masks, are still recommended – particularly for the unvaccinated – the vast drop in the infection rate no longer warrants more

¹⁵ See, https://covid.cdc.gov/covid-data-tracker/#county-view|Georgia|13127|Cases|Cases_7_day_count_change

stringent protections, such as social distancing of at least six feet apart. All of the jurors could wear masks, if they wish, as could court personnel, attorneys, the parties, and any members of the public in the courtroom. The McMichaels show that such precautions are more than adequate to protect the jurors from the risk of infection, even if the jurors are seated next to one another in the jury box.

As an anecdote and a mere example of an extreme case in which no precautions were taken by the court to lower the risk of Covid-19 infection, undersigned counsel (Franklin J. Hogue) was recently involved in a death penalty trial in Putnam County Superior Court. Jury selection took place in Grady County and lasted approximately three weeks, beginning August 24, 2021, and ending September 17, 2021. A jury of 16 was selected and bussed on a small van to Putnam County for the trial. The trial began on Monday, September 20, 2021, and continued until Thursday, October 30, 2021, weekends included. During that time, the jury was sequestered in a hotel, bussed to court every day and back again, and sat shoulder to shoulder in the jury box for the 11 straight days of trial. No lawyer wore a mask, no witness wore a mask, and nobody on the court staff – including the judge – wore a mask. Only three jurors chose to wear a mask during

trial. Not a single juror, lawyer, court staff, or witness contracted Covid in court during that month. This was during a period in which the Covid numbers from Delta variant were much higher than they are now. The McMichaels would not advocate such extreme lack of caution by this court, and undersigned counsel opposed it and moved to continue that death penalty case, to no avail, but they do have a good faith belief – based on recent data from the DPH and the CDC – that mask-wearing will sufficiently protect the jurors in this case from the risk of infection and that the jurors can safely sit together next to one another in the jury box.

Court Not Bound by Covid-19 Orders

As this Court is no doubt aware, the Superior Courts of the Brunswick Judicial Circuit put into place a “Covid-19 Operating Plan,” effective May 15, 2020, very early on in the pandemic. That Plan, in part, required all persons who entered any courthouse in the circuit to maintain adequate social distancing of at least six feet. The Superior Courts of Glynn County then implemented a “Covid-19 Resumption of Jury Trials Plan” to operate in conjunction with the judicial circuit’s Operating Plan. The Glynn Superior Court Plan likewise calls for social distancing, including social distancing among jurors: “To ensure at least six feet of distance between

jurors at all times, jurors will be placed with 4-5 seated in the jury box and the remaining jurors spaced throughout the gallery. Jurors will have the same assigned seat throughout the trial to assist with any potential contact tracing that may become necessary.” This appears to be the plan that the Court intends to implement in the McMichaels’ case.

The McMichaels assert that the Court has the discretion to vary from the terms of the Brunswick Judicial Circuit Covid-19 Operating Plan, as well as from the terms of the the Superior Courts of Glynn County Resumption of Jury Trials Plan, as to the placement of the jurors at trial. During the existence of the Judicial Emergency proclaimed by former Chief Justice Harold Melton and pursuant to the Supreme Court’s Sixth Order Extending Declaration of Statewide Judicial Emergency, the judicial circuits of this State were required to consult with a local committee of judicial system participants, including the local leaders of the Georgia Department of Health, and to implement a plan for the resumption of in-person jury trials in the circuit. The adoption of a plan was mandated before the circuit could resume in-person jury trials, and the plan had to be “in compliance with current public health guidance” for that circuit.

As a result, the Brunswick Judicial Circuit and the Superior Courts of Glynn County adopted their respective Covid-19 plans, which plans were in compliance with public health guidance at the time of their implementation in 2020. As we now know, public health guidance has changed since the implementation of the plans. According to the data supplied by the DPH and CDC, the risk of contracting Covid-19 in Glynn County has plunged since the peak of Delta variant infections and public health guidance no longer entails social distancing – only mask wearing for unvaccinated persons while indoors in a public setting.

This Court has broad discretion in controlling the proceedings before it, which would include the placement of the jury, and it is not bound by the terms of the implemented Covid-19 plans. See generally, *Csehy v. State*, 816 S.E.2d 833 (Ga. App. 2018) (noting that the discretion of the trial judge in regulating conduct of counsel, parties, and the witnesses, and in prescribing the manner in which the business of the court shall be conducted, is broad and enables the judge in any case to effect the purposes for which the power is inherently vested in the judge). This Court has already exercised its discretion and deviated from certain terms of the Covid-19 plans by allowing some spectators into the courtroom. According

to the “Covid-19 Resumption of Jury Trials Plan,” implemented by the Superior Courts of Glynn County, only court staff, attorneys, the parties, and jurors are allowed to be present in the courtroom for trial. Any members of the general public wishing to view the proceedings would be required to watch by live broadcast in the jury assembly room. As this Court has implicitly recognized by deviating from the implemented plans, it is no longer necessary for health reasons to restrict the courtroom to those limited categories of persons included in the plans.

While the Court has broad discretion in controlling its courtroom, such discretion is not unlimited. As the Court of Appeals stated in *Csehy*, supra, while a trial court’s discretion in fulfilling its duties is broad, the judge’s power “is not unlimited, for it must not be abused and it may not be exercised in such a way as to involve a deprivation of a right. . . . Thus, a court’s inherent ‘power to control the proceeding of the court is subject to the proviso that in so doing a judge does not take away or abridge any right of a party under the law.’” *Csehy*, 826 S.E.2d at 839-40. The McMichaels contend that placing four jurors in the jury box and scattering the remaining jurors throughout the gallery would interfere with the jury’s ability to carry out its duties, which in turn would infringe upon the

defendants' rights to due process and to a fair trial, as those rights are guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, Section I, Paragraphs I and II of the Georgia Constitution.

WHEREFORE, Defendants Gregory McMichael and Travis McMichael respectfully move this Court to seat all jurors in the jury box during the trial of their case.

November 1, 2021.

s/Franklin J. Hogue
FRANKLIN J. HOGUE
Attorney for Defendant
State Bar Number 360030
Hogue Hogue Fitzgerald & Griffin
341 Third Street
P.O. Box 1795
Macon, GA 31202-1795
478-750-8040
frank@hogueandhogue.com

s/Laura D. Hogue
LAURA D. HOGUE
Attorney for Defendant
State Bar Number 786090
Hogue Hogue Fitzgerald & Griffin
341 Third Street
P.O. Box 1795
Macon, GA 31202-1795
478-750-8040
laura@hogueandhogue.com

s/Robert G. Rubin
ROBERT G. RUBIN
Attorney for Defendant
State Bar Number 618635
Peters, Rubin, Sheffield & Hodges
2786 North Decatur Road
Suite 245
Decatur, GA 30033
404-296-5300

s/Jason B. Sheffield
JASON B. SHEFFIELD
Attorney for Defendant
State Bar Number 639719
Peters, Rubin, Sheffield & Hodges
2786 North Decatur Road
Suite 245
Decatur, GA 30033
404-296-5300

robertrubin@justiceingeorgia.com jasonsheffieldattorney@gmail.com

Certificate of Service

I hereby certify by my signature that I have served a copy of the foregoing upon the Office of the District Attorney for the Cobb Judicial Circuit by emailing it to the following persons:

Flynn Broady Jr.
Cobb County District Attorney's Office
70 Haynes Street
Marietta, GA 30090
Flynn.broady@cobbcounty.org

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

November 1, 2021.

s/Franklin J. Hogue
FRANKLIN J. HOGUE