IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	Indictment:
V.	*	CR 2000433
	*	
TRAVIS MCMICHAEL	*	
GREG MCMICHAEL	*	**Request for Hearing**

3.1 STATE'S MOTION FOR COURT TO CONDUCT AN EX-PARTE HEARING TO ASCERTAIN THE EXISTENCE OF ANY CONFLICTS OF INTEREST

COMES NOW the State of Georgia, through the District Attorney Pro Tempore, Cobb County District Attorney Joyette Holmes, and submits this motion, respectfully requesting that this Court conduct an ex-parte hearing (outside the presence of the State, with the record to be sealed) to ascertain whether any conflicts of interest exist in this case, where counsel for the father and son co-defendants, Greg McMichael and Travis McMichael respectively, may be operating under a conflict of interest, as the State has an interest in ensuring a trial free from avoidable error.[1]

[1] Wiggins v. State, 338 Ga. App. 273, 290 (2016) (Holding that the Supreme Court in Strickland determined that a defendant is relieved of his burden to establish the second prong of

I. CONFLICTS MAY EXIST BETWEEN COUNSEL REPRESENTING FATHER AND SON CO-DEFENDANTS

"Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. The right to counsel's undivided loyalty is a critical component of the right to assistance of counsel; when counsel is burdened by a conflict of interest, he deprives his client of his Sixth Amendment right as surely as if he failed to appear at trial. When an attorney has a conflict of interest, that attorney violates his duty of loyalty to his client and fails to provide effective assistance of counsel." [Citations and punctuation omitted.] Britt v. State, 282 Ga. 746, 753 (2007).

Upon information and belief, the State submits that conflicts may exist for the attorneys representing the co-defendants Greg McMichael and Travis McMichael in this case, such that this Court should, at the very least, inquire into those conflicts and to secure a waiver, on the record, as to those actual or anticipated conflicts.[2]

The state bases its information and belief on the following:

1) The McMichael defendants have filed numerous joint motions, obviously closely consulting with one another (See defense motions 3.1 and 3.2 (Demurrers),

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ineffective assistance of counsel if his counsel labors under an actual conflict of interest that adversely affects his performance).

[2] The State does not anticipate that the conflicts of interest would disqualify the attorneys from representing a defendant, as any actual or anticipated conflicts can be properly and effectively waived by a defendant.

1.2 (Joint Motion to Enter into Discovery) 1.6 (Joint Supplemental Motion on Bond)).[3]

2) The State has had several conference phone calls, with both sets of the McMichael attorneys on the calls, without the presence of co-defendant Bryan's attorney. In addition, there have been emails sent to the State from an attorney for one of the McMichael defendants, where the other McMichael attorneys were copied, however, co-defendant Bryan's attorney was not copied on the email.

3) The attorneys for the McMichael defendants gave interviews to Bill Rankin of the Atlanta Journal-Constitution, on or about September 11th 2020. Bill Rankin was provided with numerous photos of Travis McMichael and Greg McMichael, along with Travis's young son. The news article, which was featured in the Atlanta Journal-Constitution newspaper, both in print and on-line, was entitled "Lawyers: McMichaels did not target Arbery because he was Black." Both sets of lawyers were interviewed and made statements supporting a joint theory of the case:

"This is what was in their head," Hogue said. "Not the narrative you're hearing: Ah, there's a Black man running in our neighborhood. Let's go track him

[3] The State understands that both defendants may have decided that it is in their best interest to move forward with a joint trial strategy. And if that is the case, it should be on the record, to avoid a later assertion, by an appellate attorney, that one defendant wanted a different strategy, and their trial counsel forced them into a joint strategy due to a conflict of interest.

down and shoot him.' It's far from that." Rubin agreed. "This case is not about race," he said. "Mr. Arbery was not targeted because he was Black.".

In addition, both sets of attorney's were interviewed and made oral statements that were then played in the AJC "'Breakdown' podcast, Ep. 4: Father and son."

4) It is unknown how the attorneys are being paid.[4] The McMichael's were renting the residence at Satilla Shores and thus they cannot be using any equity in that home as collateral for a loan to finance their defense. When co-defendant's attorneys are being paid from the same source, an example being Greg McMichael's retirement accounts, they may be beholden to the defense strategy most favored by the party paying the bills. Another example would be if Mrs. McMichael, wife of Greg McMichael and mother of Travis McMichael, had taken money from her retirement accounts in order to pay both sets of attorneys. At which point in time both sets of attorneys may feel beholden to Mrs. McMichael who wishes to protect both her husband and her son. She may be providing aggressive input into the

[4] The State finds the attorneys for the McMichaels to have outstanding reputations. And the State assumes that they will assert that it is none of the State's business as to how they are being paid. However, it has been the State's experience that a defendant will claim at a Motion for New Trial or on Habeas that he did not know his trial counsel was operating under a conflict of interest due to the fees being paid by a family member, who then interfered and influenced the representation. It has also been the State's experience that when trial counsel has not been fully paid, a conflict arises. Trial counsel is usually reluctant to reveal, during motions or on the eve of trial, that he or she failed to receive all their money. Thus they go forward to trial, but then later, at a Motion for New Trial, claim that they failed to investigate the case, failed to interview witnesses or simply abandoned the case, pending payment that never came. The only way to avoid such situations is to inquire into them in advance and create a record.

defense, she may be requiring feedback and information that one attorney may not want relayed to the co-defendant and she may be demanding that the defenses be in concert with one another, as opposed to one defendant adopting a strategy that would be in his best interest, but which may be unfavorable to his co-defendant.

"It is well established that potential conflicts of interest may exist between counsel and client based on an attorney's private pecuniary interests. E.g., United States v. Magini, 973 F2d 261, 264 (4th Cir. 1992) (conflict of interest arising from forfeiture provision affecting attorney fees). A conflict over the fees counsel seeks to be paid for those services he may render his client would necessarily permeate every aspect of counsel's representation of that client." Britt v. State, 282 Ga. 746, 753 (2007).

These are the types of conflicts, among others, that are only brought to the attention of the court after trial.

II. THIS COURT SHOULD INQUIRE INTO THE POTENTIAL CONFLICTS AND SECURE WAIVERS FROM THE DEFENDANTS

There are various kinds of conflicts of interest for a defense attorney. The majority of cases on the subject of conflicts of interest deal with instances where one defense attorney represents two co-defendants, or where a defense attorney has

previously represented a victim or witness.[5] In this case, where father and son are represented by different defense attorneys, but it appears that the defense teams are working closely in concert with each other, there is potential for an actual conflict of interest.[6]

"An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance," not just "a mere theoretical division of loyalties." Mickens v. Taylor, 535 U. S. 162, 171, 172 n.5 (122 SCt 1237, 152 LE2d 291) (2002). In this case, there is the potential for one co-defendant to desire a plea bargain, there is the possibility that it would be in the best interest of one co-defendant to testify in the case, and each co-defendant may have a different defense theory, based on the law and their actions as a party to the crime, which may dictate using a strategy that is unappealing to the other co-defendant. *See* Tarwater v. State, 259 Ga. 516 (1989); Registe v. State, 287 Ga. 542 (2010). However, the State also recognizes that co-defendants, especially father and son, may wish to proceed with a strategy that presents a "united front." See Holloway v. Arkansas, 435 U. S. 475, 482 (II) (98 SCt 1173, 55 LE2d 426) (1978) ("[I]ndeed, in some cases, certain advantages might accrue from joint representation. . . . Joint representation is a means

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[5] See Heidt v. State, 292 Ga. 343, 346, 736 S.E.2d 384 (2013); Wheat v. United States, 486 U. S. 153, 159 (II), 108 SC 1692, 100 L.E.2d 140 (1988); Registe v. State, 287 Ga. 542, 544 (2), 697 S.E.2d 804 (2010).

[6] The State does note that most cases cited to herein stem from claims of "conflict of interest" which arose when there was only one attorney representing two co-defendants or when two co-defendant are represented by attorneys from the same public defender's office.

of insuring against reciprocal recrimination.") (punctuation omitted). See also Tolbert v. State, 298 Ga. 147, 157 (2015) (Holding there was no conflict of interest in a joint representation where two co-defendants had the theory that a third co-defendant had acted in self-defense and that, even if the evidence of self-defense failed, the other two co-defendants were not parties to the crime of murder).

The State contends that, should it prevail at trial, the defendants may attempt to establish ineffective assistance of counsel, arising from a conflict of interest, by showing the existence of an actual conflict that adversely affected counsel's performance, such as an inability to cross-examine a testifying co-defendant. State v. Abernathy, 289 Ga. 603, 607 (715 SE2d 48) (2011). Other examples, where after trial a defendant wishes to then claim their counsel was operating under a conflict of interest, include claims that trial counsel was under pressure to adopt a particular strategy from the person who provided payment, that trial counsel refrained from raising a potentially meritorious issue due to the conflict, that trial counsel did not tender inculpatory evidence against the co-defendant, that trial counsel did not present a meritorious, but antagonistic defense, at trial or that trial counsel failed to attempt plea negotiations due to the conflict of interest.

There is no way for the State, nor the Court, to know if there are such conflicts of interest unless the Court holds an ex-parte hearing, outside the presence of the State, inquires into any potential conflicts of interest, informs the defendants

regarding conflicts of interest and has them waive any such actual or potential conflicts on the record. The Court may find that the co-defendants have made a knowing and intelligent decision as to a joint trial strategy, and have waived any future claim of conflict of interest. However, if the Court finds that a defendant is unaware of a potential conflict of interest, does not understand how a conflict of interest could occur, or that there is in fact a conflict of interest for his attorney, the Court should have the defendants waive the conflict on the record, in order to avoid a later assertion, for instance at a Motion for New Trial, that their counsel was ineffective, operating under a conflict, and thus arguing that the outcome of the trial would have been different had their trial counsel been conflict-free.

The State is not contending that trial counsel for these defendants is purposefully attempting to interject reversible error into the case. However, the State's experience has been that a very good appellate attorney, years from now, will make "conflict of interest" an issue, based on the above indicators, and attempt to have the case reversed unless a record is made in advance where the defendants were advised of the conflicts of interest, or the potential for conflict, and waived it. A perfect example of this is the Tolbert case from above, where, despite a "united

front" in his defense with his co-defendant, his appellate attorney still claimed ineffective assistance of counsel based on a conflict of interest on appeal.[7]

Whether to accept a waiver is a decision left to the sound discretion of the trial court and will not be disturbed absent abuse of that discretion. Registe, 287 Ga. at 544 (2), and Heidt, 292 Ga. 346. This Court should use its discretion and require conflict-free counsel for each defendant in order to prevent future conflicts, to lessen the appearance of impropriety in this case and to ensure a trial free from avoidable error.

III. CONCLUSION AND REQUEST FOR HEARING

The State respectfully requests that this Court conduct a hearing inquiring into the actual or potential conflicts of interest that the State submits exist in this case and secure waivers of those conflicts, on the record, which should then be sealed.

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[7] The standard on appeal has been set out in Burns v. State, 274 Ga. App. 687, 690-691 (2005) (Holding that a defendant must "prove that his counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. By actual conflict, the law means more than the bare possibility that a conflict may have developed. The conflict must be palpable and have a substantial basis in fact. The representation must have deprived either defendant of the undivided loyalty of counsel, i.e., counsel slighted one defendant to favor the other. The premise of a defendant's claim that he was denied conflict-free assistance because of joint representation must be that his lawyer would have done something differently if there was no conflict.")

This the 29th day of September, 2020.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served opposing counsel with a true and correct copy of the above Motion via the Odyssey E-File System to:

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This the 29th day of September, 2020.

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