

Randall 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 , :
 :
GREG MCMICHAEL, :
 :
Defendants. :
 :

1.9
DEFENDANTS' OBJECTION TO EXHIBIT 4 ON
STATE'S "EVIDENCE EXHIBITS LIST" FOR
BOND HEARING

Defendants Travis McMichael and Greg McMichael object to Exhibit 4 on the State's "Evidence Exhibits List" for the bond hearing, scheduled for November 12, 2020. Exhibit 4 is the "Preliminary Hearing/Probable Cause Transcript." The notice of the State's intent to introduce and use this 274-page transcript fails to comply with this Court's "Notice of Hearing," filed on October 8, 2020.

The Court's "Notice of Hearing" states: "Responses must be specific. Reference to pleadings, discovery or other sources of information is not a sufficient response." If by "response" the Court means each party's response to the Court's Notice, which is how the defendants read it, then

the State's "response," which consists of merely referring to a 274-page preliminary hearing transcript, is "not a sufficient response." The defendants move this court to require the State to cite what allegations of fact from that transcript it believes it can prove by a preponderance of the evidence at a bond hearing and, moreover, that carry some relevant predictive power to support an argument that the defendants pose one or more of the statutory bond risks in significant measure.

ARGUMENT AND CITATION OF AUTHORITY

A preliminary hearing, also known as a commitment hearing, requires a court of inquiry to inform the accused of the charges against him, his right to an evidentiary hearing to determine whether probable cause supports those charges, his right to remain silent at the hearing (since the burden of proof is on the State), and his right to counsel at that hearing.¹ If the court finds probable cause, then the case shall be bound over to the court having jurisdiction of the most serious offense. The standard of proof is "probable cause," which means "sufficient reason to suspect the guilt of the accused," which, if found, gives the court of inquiry

¹ OCGA § 17-7-20 et seq. See also U.Sup.Ct.R. 26.2.

authority “to require [the accused] to appear and answer before the court competent to try him.”²

Reasonable suspicion of guilt, or probable cause, is a lower standard of proof than preponderance of the evidence.³ At a preliminary hearing, therefore, both the standard of proof and the purpose of the hearing differ markedly from the standard and purpose in a bond hearing. As a consequence, the defendant typically conducts a style of cross examination, using open-ended non-leading questions, that most competent and experienced criminal defense lawyers will never employ after that early stage. The preliminary hearing usually occurs within days of arrest, sometimes weeks, but long before receipt of discovery from the State and before any in-depth defense investigation has been conducted. The defendant, moreover, will usually exercise his right to remain silent and will choose not to introduce any evidence at the preliminary hearing.⁴

² OCGA § 17-7-23(a).

³ “‘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.” OCGA § 24-1-1(5).

⁴ All of which occurred in this case.

At a bond hearing, by contrast, where the burden of production is on the defendant but the burden of proof is on the State, the defendant will offer evidence and, if the State puts up witnesses to rebut the defendant's case for bond, counsel will conduct a cross-examination with closed-ended leading questions where the goals of cross differ from those goals at a preliminary hearing, since the issues are very different between the two types of hearings.

These important differences in burdens, standards of proof, and issues between a preliminary hearing and a bond hearing render the court's reliance at a bond hearing on the State's evidence from a preliminary hearing insufficient and unreliable for determining whether the State has met its burden of proving by a preponderance of the evidence that the defendant poses one of the significant risks of flight, danger, or obstruction and, if they do prove such facts, that those facts predict future bad behavior sufficient to deny the defendants their freedom prior to trial.

Instructive by way of analogy, the Georgia Court of Appeals reversed a conviction for aggravated assault in a case where the defendant was tried but acquitted of malice murder, at which trial the court admitted into evidence an audio recording of a deceased witness's interview with law

enforcement on the day of the homicide on the theory that the defendant had exercised his opportunity to cross-examine the witness at a bond hearing. The Court wrote:

In order 'to insure that the party against whom the testimony is later offered had an adequate opportunity to cross-examine the witness at the previous proceeding,' the prior hearing must have addressed 'substantially the same issues' as those presented at trial. *Craft v. State*, 154 Ga.App. 682, 683(1), 269 S.E.2d 490 (1980). In *Craft*, this Court held that the trial court correctly refused to allow the defendant to introduce his sister's testimony from his own bond hearing because the State did not have an adequate opportunity to cross-examine her at that time regarding the merits of the allegations against the defendant. *Id.* The court held that while the State 'had an opportunity . . . to cross-examine the witness . . . the opportunity was not adequate in view of the limited scope of inquiry pursued at the bond hearing.' *Id.* at 683-684, 269 S.E.2d 490. This ruling was based on the premise that at a bond hearing 'the court does not pass on the merits of the case . . . [but rather], the question before the judge is whether the appearance of the accused for trial may be reasonably assured.' *Id.* at 683, 269 S.E.2d 490. The rule in *Craft* dictates the conclusion in this case: that Dickson did not have an adequate opportunity to cross-examine his father at the bond hearing regarding his father's statement to the investigator because the focus of the bond hearing was whether to allow the defendant to be released on bond, not whether the criminal allegations were supported.⁵

⁵ *Dickson v. State*, 281 Ga.App. 539, 540, 636 S.E.2d 721 (2006), citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) for the proposition that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."

Applying this principle to our bond hearing, simply introducing the transcript of a preliminary hearing, which, in this case, consists primarily of the testimony of GBI Agent Richard Dial, without even citing which allegations Agent Dial made at that hearing that the State contends are relevant in a bond hearing, is insufficient to allow the defense to attempt to rebut those allegations on either their failure to meet the preponderance standard or the failure to hold any predictive power relevant to the statutory bond risks.

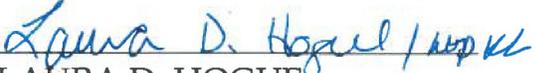
CONCLUSION

For these reasons, this Court should require the State, in conformity with this Court's "Notice of Hearing," as well as the law cited in this Objection, to cite the specific allegations of fact within the 274-page preliminary hearing transcript that the State contends was proven by a preponderance of the evidence at a probable cause hearing *and* that carries relevant power to predict future behavior by the defendants that would support a finding by this Court that the defendants pose one or more of the statutory bond risks in significant measure.

November 9, 2020.

Signatures next page


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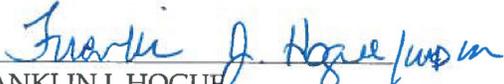
Certificate of Service

I hereby certify by my signature that I have served a copy of 1.9, DEFENDANTS' OBJECTION TO EXHIBIT 4 ON STATE'S "EVIDENCE EXHIBITS LIST" FOR BOND HEARING on the Office of the District Attorney for the Cobb Judicial Circuit by delivering it to District Attorney Joyette Holmes, by emailing it to:

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November 9, 2020.


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