No. 22-721

IN THE

Supreme Court of the United States

DAMIAN MCELRATH,

Petitioner,

v.

GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 31, 2023
CERTIORARI GRANTED JUNE 30, 2023

322316

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APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE SUPERIOR COURT OF COBB COUNTY, STATE OF GEORGIA,
State of Georgia v. Damian McElrath
Case No. 12903972

Date Filed	Docket Description
10/05/2012	Indictment (Dkt. 1)
12/11/2017	Verdict (Dkt. 163)
12/14/2017	Sentence (Dkt. 166)
12/14/2017	Motion to Vacate Repugnant Verdicts (Dkt. 170)
12/28/2017	Motion for New Trial (Dkt. 175)
11/26/2018	Amended Motion for New Trial (Dkt. 188)
04/26/2019	Order Denying Motion for New Trial (Dkt. 202)
03/19/2021	Plea in Bar (Dkt. 221)
12/13/2021	Order Denying Plea in Bar (Dkt. 226)

Appendix A

RELEVANT DOCKET ENTRIES FROM THE SUPREME COURT OF GEORGIA,
Damian McElrath v. State of Georgia
Case No. S19A1361

Date Filed	Docket Description
6/18/2019	Appeal Docketed
07/15/2019	Brief of Appellant
08/19/2019	Brief of the Attorney General
08/26/2019	Brief of the District Attorney
02/28/2020	Judgment and Opinion

Appendix A

RELEVANT DOCKET ENTRIES FROM THE SUPREME COURT OF GEORGIA,
Damian McElrath v. The State of Georgia
Case No. S22A0605

Date Filed	Docket Description
1/27/2022	Appeal Docketed
02/16/2022	Appellant's Brief
03/08/2022	Appellee Brief of the District Attorney
03/15/2022	Appellee Brief of the Attorney General
03/18/2022	Appellant's Reply Brief
11/02/2022	Judgment and Opinion

APPENDIX B — GENERAL BILL OF INDICTMENT, COBB COUNTY SUPERIOR COURT, FILED OCTOBER 4, 2012

JUDGE BODIFORD

GENERAL BILL OF INDICTMENT

NO. 123972
COBB SUPERIOR COURT

RE: Warrant(s)
12-W-6739

WITNESSES:
J.M. Dawes
CCPD

SEPTEMBER/OCTOBER TERM 2012

THE STATE OF GEORGIA

V.

DAMIAN CORNELL MCELRATH

Appendix B

TRUE BILL /s/ Grand Jury Foreperson	Date OCTOBER 4, 2012 Delivered in open Court by: /s/ Grand Jury Bailiff

JAY C. STEPHENSON, Clerk, S. C.

PATRICK H. HEAD,
District Attorney, Cobb Judicial Circuit

The Defendant herein waives copy of indictment, list of witnesses, formal arraignment and pleads ___ Guilty.

_____
Defendant

_____
Attorney for Defendant

_____
Assistant District Attorney

Appendix B

STATE OF GEORGIA, COUNTY OF COBB

IN THE SUPERIOR COURT OF SAID COUNTY

THE GRAND JURORS selected, chosen and sworn for the County of Cobb, to wit:

Carvin L. Bryant	**Penny Piper Miltiades**
Sutham Cobkit	**Matthew Gordon Mong**
Karen Hope DeGasperis	**Pamela Elizabeth Morales**
Stephen Linn Duckworth	~~**Jeffrey Paul Perry**~~
Dana Renee Edwards	**Carmella A. Poelke**
~~**Leigh Anne Gagnon - Alt #1**~~	**Michael Louis Roberts**
Phillip Dameron Howard - Asst. Foreperson	**Horace C. Robinson, Jr.**
Ruth Colleen Hunt	**Nadia Konstantinovna Semenov**
William C. Jordan - Foreperson	**Jennifer Susko**
~~**Jeffrey Edward Larimer - Alt #2**~~	**Christine Nicole Talley**
Joycelyn Alexsandria Lee	**Charrise A. Taylor-Smith - Clerk**
Paul D. Macon	**Mary Frances Trostel**
Marcellus Ivan McGlathery	

in the name and behalf of the citizens of Georgia, charge and accuse **DAMIAN CORNELL MCELRATH** with the offense of **MURDER** for that the said accused, in the County of Cobb and State of Georgia, on and about the **16th** day of **July, 2012, did unlawfully and with malice aforethought, cause the death of Diane McElrath by stabbing Diane McElrath;** contrary to the laws of said state, the good order, peace and dignity thereof.

COUNT TWO

and the Grand Jurors, aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse **DAMIAN CORNELL MCELRATH** with the offense of **FELONY MURDER** for that the said accused, in the County of Cobb and State of Georgia, on and about the **16th** day of **July, 2012, did, while in the commission of the felony offense of Aggravated Assault, cause the death of Diane McElrath by stabbing Diane McElrath;** contrary to the laws of said state, the good order, peace and dignity thereof.

COUNT THREE

and the Grand Jurors, aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse **DAMIAN CORNELL MCELRATH** with the offense of **AGGRAVATED ASSAULT** for that the said accused, in the County of Cobb and State of Georgia, on and about the **16th** day of **July, 2012, did assault Diane McElrath with a knife, a deadly weapon;** contrary to the laws of said state, the good order, peace and dignity thereof.

PATRICK H. HEAD, District Attorney

APPENDIX C — VERDICT FORM, FILED DECEMBER 11, 2017

IN THE SUPERIOR COURT OF COBB COUNTY STATE OF GEORGIA

Indictment 12-9-3972

[Judge Green]

STATE OF GEORGIA,

v.

DAMIAN MCELRATH,

Defendant.

VERDICT FORM

COUNT ONE – MURDER

__ We the jury, find the Defendant NOT GUILTY.

✓ We the jury, find the Defendant NOT GUILTY BY REASON OF INSANITY.

__ We the jury, find the Defendant GUILTY BUT MENTALLY ILL.

__ We the jury, find the GUILTY BEYOND A REASONABLE DOUBT.

Appendix C

COUNT TWO – FELONY MURDER

__ We the jury, find the Defendant NOT GUILTY.

__ We the jury, find the Defendant NOT GUILTY BY REASON OF INSANITY.

✓ We the jury, find the Defendant GUILTY BUT MENTALLY ILL.

__ We the jury, find the GUILTY BEYOND A REASONABLE DOUBT.

COUNT THREE – AGGRAVATED ASSAULT

__ We the jury, find the Defendant NOT GUILTY.

__ We the jury, find the Defendant NOT GUILTY BY REASON OF INSANITY.

✓ We the jury, find the Defendant GUILTY BUT MENTALLY ILL.

__ We the jury, find the GUILTY BEYOND A REASONABLE DOUBT.

This 11th day of December, 2017.

/s/_____
FOREPERSON (Signature)

/s/_____
FOREPERSON (Print name)

APPENDIX D — EXCERPT OF TRANSCRIPT OF THE SUPERIOR COURT OF COBB COUNTY, STATE OF GEORGIA, DATED DECEMBER 11, 2017

[1294]IN THE SUPERIOR COURT
OF COBB COUNTY
STATE OF GEORGIA

Case Number: 12-9-3972-51

STATE OF GEORGIA

v.

DAMIAN CORNELL MCELRATH,

Defendant.

JURY TRIAL
(VOLUME VI OF VIII)

The transcript of the proceedings heard before the **HONORABLE REUBEN M. GREEN** and the **HONORABLE GREG POOLE**, with the intervention of a jury, on the 11th day of December, 2017, commencing at 8:30 a.m., at the Cobb County Courthouse, Mariette, Cobb County, Georgia.

***

[1322]some of it was nice too, so I hope anyways.

We're ready to resume with the case. The attorneys are going to make their closing arguments. I'm then going to charge you and then you all will begin your deliberations. That will all take place today.

So the State has the opportunity to make an opening and closing closing argument if they choose So Mr. Evans, you can proceed.

MR. EVANS: On July the 16th of 2012, the defendant, armed with a knife, approached his unsuspecting mother from behind and he assaulted her. This was a sustained attack. He continued to stab her more than fifty times as she fled from him down a stairwell in their own home.

This case, ladies and gentlemen, is about malice; it's about choice. It's about the decisions that the defendant made and it was those choices that brings us here together for the trial of this case.

If those words that I just spoke to you sound familiar, they're the words that I spoke to you last Tuesday when we started the trial of this case and I gave you my opening remarks and I told you exactly and precisely what the State would be proving during the course of the trial of this case. And where we are now is that you have all of that evidence to support all of the charges in this indictment as I articulated for you [1323]in our opening statement.

We told you that we would prove that this case was about malice, it was about the defendant's choice, and we've shown exactly that during the course of the trial of this case.

The defendant in this case is very guilty of the charged crimes. The defendant also happens to be mentally ill. We have term for that in the law; it's called guilty but mentally ill. And we're going to be asking you, based on the uncontroverted evidence that's been presented to you, to find the defendant accountable for his choices, admittedly impacted by a mental illness. But he is guilty, he just happens to be mentally ill and that's precisely what the evidence has shown in the course of the trial of this case.

So where we are now in the State of Georgia versus Damian McElrath is that I need to talk to you about the law. And basically the way this works is that we're going to go first, the State is, because we bear the burden of proof as to the charged offenses. This is a little bit different as I'm about to explain, in that the defense actually bears the burden of proving insanity. Okay. It's one of the rare instances where a burden falls on the defendant in a criminal case. We'll talk about that in a moment.

[1324]But I first want to talk to you about the indictment. I want to talk to you about the charges in this case and I want to talk to you about the evidence that supports this three count indictment. You will have a copy of the indictment with you. So as a threshold matter, I told you in opening there's kind of an order to things in the criminal process. The order of things is the State

presents its case as to the facts first, then the defense. They have a burden in this case that they have failed to carry regarding insanity and we'll talk about that and a little bit more as we discuss the law in this. Okay?

But as a threshold matter, we have to start with facts and law and we're going to start with this indictment. This indictment includes three counts, malice murder, felony murder and aggravated assault and the evidence has unquestionably shown that the defendant committed these offenses.

When we talk about elements of offenses in the. state of Georgia, what we do is we break it up by parts, by parts. So the Judge is about to read the law to you. The good news for you is you'll actually have the indictment which has got the language of the law as well. Like it'll have Count One, Count Two, and Count Three for you. But I think it will be helpful as we [1325]talk about the charges in this indictment, to look at the elements so that you can see, oh, this is why we have two counts of murder when you only have one person that's dead. Right? You might have wondered well why are there two counts? Because a person sometimes can commit offenses in different ways, the same kind of title, same kind of name, but you can do it factually in different ways and that's what we're going to discuss now.

So let's start from the top. Let's start from the top and talk a little bit about the law that the Judge is going to give you and we start with malice murder. Okay. We start with malice murder, Count One of the indictment.

Two elements, two very simple elements. Only two. With malice aforethought. Okay, that's element number one, malice aforethought and you're about to see two sub parts that are going to now be presented to you. You can either have express malice or you can have implied malice and we'll talk about what those two terms mean in a minute. So element one, malice aforethought with subparts. Okay. Because it can either be expressed or it can be implied, but malice aforethought, did cause the death of Diane McElrath, that's it. That is it. Okay. Two elements met unquestionably in this case with malice aforethought [1326]cause the death of Diane McElrath. That's Count One. That's Count One.

All right. Now, to understand this a little bit, I gave you two terms. We should talk about what express malice is versus implied malice. Express malice is the deliberate intention to take another's life. And remember there's an order here. We can either have express malice or you can have implied. Remember, we just talked about that and the Judge is going to tell you you can have either or for malice murder. We only need one of them. We got both, okay. Hey, we know this was a deliberate intentional act because he said so. Okay. He said so in his letter didn't he? He said so in his statement, I intended to take her life. That is express malice.

We also have implied malice because it may be implied and it's an or situation. Malice is implied where there's no considerable provocation. There's no provocation here. And the facts show the killing was done with what we call, quote, an abandoned and malignant heart. Okay. That's

a legal term. What does that really mean? Cold blooded. Just senseless. Have you ever heard cold blooded murder on TV and stuff? Senseless. Senseless. Where the killing appears senseless and there's no provocation, that's what we [1327]call implied malice. We have both here. The State has actually brought you more proof as to Count One than is required by law, because we only needed to show that it was done one way, and we showed it was done both, didn't we? And when you show that it's done both ways, you have malice murder, Count One of this indictment.

Count Two is just a little bit different. It's called felony murder. So think about it this way, if you ever watch -- we've talked a lot about TV law and how TV law is very different from what really goes on in the courtroom. You guys have seen that now, right? Have you ever watched TV law and said oh well, he's charged with murder in the second degree. Right? Murder in the first versus murder in the second degree. Well, up until recently in Georgia law, we didn't have different titles, different labels for degrees. So you might think of malice versus felony murder as being like the equivalent of murder in the first versus murder in the second that you might find in another state. Does that make sense? That's up until recently. They've now added a murder in the second degree which only applies to kids, so it's now, that doesn't even -- we're not going to be talking about that because it wouldn't apply in this case. Okay.

So felony murder is different in that it has [1328] different elements, different parts to it. Okay? While in the commission of a felony, okay, choosing to commit a felony, here aggravated assault, did cause the death of Diane

McElrath. Okay. That's it, two elements. Committed a felony, aggravated assault is a felony, you're about to hear. Did cause the death of Diane McElrath. Okay. Only two elements for felony murder, only two elements for malice murder and we've shown both of those elements here.

Felony murder continued. What's the big distinction between malice murder and felony murder? We need not show any malice for a conviction on felony murder. The law says when you choose to commit a felony and somebody dies, whether it was malicious or not, felony murder applies. Felony murder applies. And check this out, whether intended or not. Felony murder doesn't require any intention to cause the death. The law says when you commit a felony and somebody dies, we call that felony murder. That's what happens when you choose to commit a felony, and the defendant chose to commit an aggravated assault here. He is guilty of both malice murder and felony murder and we've shown both and you should convict of both because that's what the uncontroverted evidence has shown in this particular case.

[1329]Now, I tried to be very careful with my words during the trial of the case and I think I've done so during this closing argument because there are two terms during that you haven't heard me talk about so far. You might be sitting there thinking, I bet you one, I bet if I could get inside your mind, one of you is thinking about one of these terms and one of you is thinking about the other term and I haven't said it. Premeditation and motive. I know I'm right because I see a smile over here. Somebody was thinking well was it premeditated or was there motive, right? I

see the smiles. Guess what? I'm giving the elements of murder; the Judge is going to give you the elements of murder. Premeditation is absolutely not required. Motive is absolutely not required in the state of Georgia. So you'll go home now and you'll watch TV, your significant other will be there or your spouse or whatever and say you'll be watching CSI, I wonder what the motive is? And you'll go, no, honey, they don't have to show motive in state. It's true. You don't have to show motive in the state of Georgia; it's not required, it's TV law. That's Hollywood law.

Think about it this way, this is the simplest example I can give you, I've done this a few times before. Heaven forbid some murderer walked in the back [1330]of the courtroom and shot me dead in front of you, some total stranger to me and then dropped the firearm right there in front of you. Could they turn around to you a jury of his peers and say oh, you can't find me guilty of murder, I didn't know Mr. Evans. I didn't wake up this morning premeditating that I was going to take his life, right? I had no motive to take his life. You would hold him -- you better hold him accountable if that happened, right, because that would be murder. And the law says that sometimes people are just mean. Sometimes people just do things like that, they make that choice. And when they do that, it's not going to be a defense to come in and say well I didn't premeditate to it, I didn't have a motive to do it. Hey, guess what? We've shown you more than the law requires, right?

We've shown you evidence that the defendant thought about this before he did it, at least an hour beforehand. Do

you remember hearing that? At least an hour beforehand. And then for years beforehand he had been talking about these kind of crazy things, and we'll get to that in a minute. That's evidence of premeditation and motive and we're not required to show it, we've given it to you anyway. We've brought you more, more than the law requires, and that's proof [1331]beyond a reasonable doubt. Quite frankly, it's proof almost beyond all doubt.

Okay. Aggravated assault. We're now at the last count in the indictment, Count Three. Pretty simple, did make an assault. An assault is an offense so it's got sub parts, okay? There's two ways to do this, you attempt to cause a violent injury or you do an act that causes reasonable fear. Okay.

So if you throw something at somebody intending to cause an injury, that would be an act, right? Intending to cause a violent injury versus if you -- reasonable fear, like if you threaten, if I threaten somebody, right? The threat alone is going to be an assault.

So what makes it aggravated? It's not aggravated in that you're, you know, I'm aggravated when I do it, aggravating means an aggravating fact. Okay. What changes it from just an assault, a mere assault to an aggravated is this, deadly weapon.

So the difference between an assault versus an aggravated assault is there's an aggravating fact that you chose to make that assault and you did it with a knife; you did it with a deadly weapon. And we know that it was

a deadly weapon; you've seen it. Hard to unsee it. I bet some of you were still seeing it this weekend. You know that this is a deadly weapon. And [1332]when somebody does an aggravated assault, pop quiz, okay, pop quiz, when somebody does an aggravated assault, whether they intend death or not, whether they have malice in their heart and mind or not, and if somebody dies, what do we call that? Felony murder. We call it felony murder.

So the reason we have malice murder and felony murder is because the defendant chose to commit an aggravated assault and whether he intended his mom's death or not, clearly he did, whether he had malice or not, did that felony; somebody died; felony murder.

Ladies and gentlemen, those are the elements of the three count indictment. It's pretty simple. It's pretty simple now that we've discussed it and the Judge is going to tell you what that law is.

There are some other important legal principles that obviously I need to talk to you about, right? But we start with what's the law for the offenses charged in the indictment.

So burden of proof and reasonable doubt. I wouldn't be doing my job as the prosecutor if I didn't talk about this. Guess what, you don't need to know the charge of the Court to know that the burden of proof rests on the State, generally rests on the State.

Appendix D

Generally. The burden for us of proving the offenses [1333]that we just talked about is beyond a reasonable doubt. Now, let me tell you that that does not mean beyond all doubt. Beyond a shadow of a doubt, fiction, TV. Okay. To a mathematical certainty, the Judge is going to tell you no, that's not reasonable doubt. Reasonable doubt is a doubt for which you can give a reason. And really the key standard there is reasonable, reasonable, right? And honest jurors seeking the truth, reasonable is really the key there. It's not doubt. That's what the defense would want it to be. It's a reasonable doubt and it will be unreasonable, unreasonable to have any doubt that the defendant committed these three offenses listed in the indictment that we just explained to you based on the overwhelming facts and evidence that's been presented to you.

Guess what? We know what the burden is, we know where the burden rests. We, the State, carry this with us happily every time we walk into a courtroom like this, we know what we've got to do. We're not afraid of the burden being on us, generally speaking. And we're not afraid of the reasonable doubt standard either. We know what we have to do when we bring a case such as this to the jury and we've met those standards in this particular case and you should find the defendant guilty of all three counts of this indictment.

[1334]He is very guilty of all the counts in the indictment. He also happens to be mentally ill. We have a term for that and it's called guilty but mentally ill. It is not insanity. Why? Because insanity, the burden rests on

the defendant. Insanity is one of the rare instances where the burden rests on the defendant. It's got to prove that he's insane, legally insane, by a preponderance of the evidence. Okay? So the burden actually here is one of the rare instances where the defense must carry a burden.

Here's why they have not carried the burden to prove insanity, legally. So you come to court and you watch TV again and stuff, we've really been over this TV stuff a lot because we need to, because people have so many misconceptions about what the reality of the criminal justice system is. And y'all promised me, you promised us that you would look at the real law, that you weren't going to carry with you whatever fictionalized things you might hear about what you think insanity is. Look, hey, people with mental illnesses commit crimes all the time and juries hold them accountable, and rightfully so. You all should be no different. Just because you happen to have a mental illness does not mean that you are also legally insane. Those are two different legal concepts. You all must [1335]judge this case on the facts and the law.

So there are two tests, two standards in the state of Georgia and I want to get into even more detail when I come up and talk to you a second time in just a few moments after the defense presents its case. But I need to tell you what the two tests are.

The first one is the right/wrong test. We can go ahead and put a strike through that. Remember the defense in opening statement said, okay, he knew right from wrong. But by the way, pause here, this is capacity to understand

right and wrong, okay, not whether you thought that your actions were right but whether you have the ability to understand right from wrong. Do you see the distinction there? Because

that's a big one. It's not that you say the words magically, oh, I thought I was right to do it. No, no, no. What this means is that you understand or have the ability to know that murder is wrong. And even their own expert said well the defendant told me that murdering people is wrong, right? That's why we're not here for the right/wrong test. That's why the defense had to concede in opening, concede in opening that this is not what we're going to be talking about. Okay? And we're going to hold them to that.

Really what we're going to be talking about when I [1336]get back up here and what the defense is going to be talking about is another test for insanity. Delusional compulsion test, okay. Delusion compulsion test has got three parts. Here are the three parts. Defendant actually, in fact, suffered from a delusion, okay.

Two, it compelled him to do an act. We're going to talk about that. Compelled him. It overmastered his will, overpowered his will. These are terms that we use legally for part number two. Right? Compelled him to do an act.

Number three, where the defendant absolutely cannot succeed, the delusion, if true, would justify the act. That's what we're really going to be talking about a great deal when we get back up.

Appendix D

What does justification mean? Self defense. Remember when I stood up in opening statements and said when you pay attention to this case, the two things you need to pay attention to are right/wrong and self defense. Remember that? We talked about that in opening statement last week? I hope you remember that.

So listen to the facts and listen to, quote, unquote, self defense. Suffered from a delusion, overmastered his will and the delusion, if true, you almost have to be a hypothetical here, hypothetically, if that delusion were true, would the person be [1337]justified in doing the act? And the burden falls on the defense for all three.

We talked about when you have an or like implied or express malice, this is an and. This is an and. And failure on any one of those prongs, as the defendant has failed here, means that the defendant is guilty. He also happens to be mentally ill. We have a term for that; it's called guilty but mentally ill. We're asking you to find the defendant guilty but mentally ill, because the overwhelming evidence has shown he is guilty but mentally ill.

The Judge is going to give you a verdict form and it's going to give you your four choices. Why do we have four? Guilty, not guilty, right? Not guilty by reason of insanity and here, here's the term we were just talking about, guilty with an asterisk, he happened to be mentally ill.

We have that in our law because it's an understanding that sometimes mentally ill people do things and say crazy things, but when they choose to commit crimes like

malice murder, felony murder and aggravated assault, jurors such as yourself must hold them accountable. Not all mentally ill people kill people.

This defendant murdered Diane McElrath. He also [1338]happens to be mentally ill. And the term for that that we use under the law is guilty but mentally ill.

Ladies and gentlemen, I'm going to sit down now. Part of the reason I'm going to sit down is because the burden falls on the State so we have a right to respond to the defense and I'm going to do so. I expect that what's going to happen is the defense is going to give you a closing argument. They're going to suggest to you that the evidence that you've seen here shows that he was justified. He was justified in doing what he did, right? You can substitute justify for delusional compulsion and the evidence has shown absolutely not. There was absolutely no justification for what happened in that home, absolutely none. And because it could never justified, it's never going to be a delusional compulsion death. It's never going to meet that third prong. And we'll talk a little bit about that delusion overmastering his will, too, when I get back up before you.

So I hope you'll pay attention to the principles that we've just discussed with you. I'm now going to sit down and give the defense the opportunity to speak to you about what they believe the evidence is. Remember that they bear the burden. They bear the burden of proving insanity and they absolutely have [1339]failed to carry it here. We're going to ask you to find the defendant guilty

but mentally ill because that's what the evidence and the law has shown.

THE COURT: Mr. Kilgore, are you going to need just a minute or so to set up?

(Brief pause in proceedings)

MR. KILGORE: Good morning. In both opening statements and this morning, Mr. Evans has used the word choices. Choices. He suggested that's what this is about. But I want you to consider when you're thinking about choices, I want you to consider the fact that Damian didn't choose to have schizophrenia or schizoaffective disorder. It's not something that he chose. And he didn't make a choice to have bizarre delusions like he has. That's not something that anybody would choose. It is a nightmare that not only Damian lived through but his mom had to live through as well. He didn't choose that. The only choice that he made was to act when he believed he had no choice, when he believed that his life was in danger. The only reason why he ever had to make that choice was because of his paranoid delusion. That's the only reason why that choice was ever upon him.

Mr. Evans talked to you a little bit about insanity in Georgia, so I'm going to go over this again because [1340]it is significant that you can understand what we're talking about. The law recognizes two ways that insanity can be established in Georgia. The first way is without the capacity to distinguish right from wrong. And, of course, we heard a lot during the trial that went specifically to

that. Oh, well, he knew right from wrong or he knew -- he knew it was wrong to kill. You have to understand that's not at all what we're dealing with in this case. That's not his illness. Okay. So when you hear the Judge giving you the law about that, the inability or incapacity to understand right from wrong, quite frankly, I'd prefer you just not even listen because that doesn't have anything at all to do with what we're talking about. Because, you see, in Georgia, there's another way that insanity can be established and proven and that is if the accused suffered from a delusion which overpowered his will and which was connected to the offense, an offense which if true would have justified the offense. That's what we're dealing with; that's what we're talking about and that's what you heard evidence about in the trial of this case. It does not involve the first one, okay, just the second one that we're talking about because he suffered from delusional compulsion which overmastered as well. All right.

[1341]So Mr. Evans went over the elements with you so we're going to talk about those elements again because they are significant. At the time of the act was the accused suffering from a mental disease, acted because of a delusional compulsion which overpowered the person's will, a criminal act connected to the delusion and if true justified the act.

Well, I think Dr. Richards sort of explained it, the delusion, I think the best when he agreed that it was really a multifaceted sort of delusion. This is not just one thing that's going on in Damian's mind. He believes that his life is in danger. Why? Because his mother is poisoning

him. Both past, it's been going on for years, and present. And he tried to tell people. You heard lots of evidence; he tried to tell people, nobody would listen and he knows she's going to get away with it. In his mind, he knows she's going to get away with it or he's going to be shipped off to a mental hospital again which, of course, further feeds that paranoia and sense of helplessness.

We heard it was an ongoing delusion, possibly for several years. Let's just get right to it, we're clearly not talking about something that was concocted or contrived after he was arrested. There's no question about it. There's no question about it. The evidence [1342]was overwhelming that this was a delusion that he was dealing with possibly for years.

Mr. Evans talked to you about -- briefly about the burden of proof is on the accused; it's on Damian to establish insanity. But what's the measure? What's the standard by which he's got to prove it? It's by a preponderance of evidence. That's the lowest burden.

Preponderance of evidence. That is evidence sufficient to incline a reasonable mind, an impartial mind to one side of an issue rather than the other. That's it. That's it. That's the burden that the law requires us to demonstrate to you that, yeah, this is definitely insanity. It's the lowest burden of the law. Evidence sufficient to incline a reasonable mind, an impartial mind to one side of an issue rather than the other.

I want you to think about this, let's say that if there was an election and one candidate got a million votes and the other candidate got a million and one votes, that's a preponderance. The one with the million and one votes has ever so slightly more, ever so slightly more to incline toward that side. That's how low -- that's how low the burden is that we're talking about.

I'm going to give you a visual example of this. I [1343] want you to imagine that this is a scale and on it we have evidence. Now, right now it's completely even, okay. The scale is not leaning or inclined toward one side or another. It's completely even. What's our burden? What's our burden to prove to you that Damian was insane at the time, it's this slight. It is this slight. Now there is more on this side than that side, even by the slightest weight of a feather. That's all the burden is, it's that slight.

So Mr. Evans asked you about questions that you may have in your minds, things that you may have thought about. Let's deal with the eight hundred pound gorilla in the room. If you follow the law and find Damian not guilty by reason of insanity because he has clearly met his burden, is he going to be released today? I mean, hasn't everybody -- hasn't everybody asked yourself that? Absolutely not. Absolutely not. Because here's what the law is: Should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, that the Court is satisfied that he should be released pursuant to law. That's the law.

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So what's going to happen? Committed to a state mental hospital until such time, if ever. That's what [1344] the Court's going to tell you, if ever. If ever what? The Judge, the Court says he can be released. A state mental hospital until such time, if ever, the Judge says it will be appropriate.

Mr. Evans talked to you about guilty but mentally ill. Now, I want you to pay extremely close attention to what the Judge is actually going to tell you. This is what he's going to read to you. If and only if you do not find the defendant not guilty by reason of insanity, then you may consider whether or not the defendant was mentally ill. If and only if. If and only if you do not find the defendant not guilty. Only then, only at that point.

So what this charge is telling you what the law is is the guilty but mentally ill, you can't even consider it until, unless and until you completely reject not guilty by reason of insanity. It's not an either or; it's not. You'd have to first completely reject not guilty by reason of insanity before you then would consider guilty but mentally ill. And the truth of the matter is, if you were to get to that point in your deliberations, then I have failed miserably for Damian and I have failed you as well.

I've got a little bit different take on what guilty but mentally ill means than Mr. Evans suggested to you. [1345]I suggest to you it's pretty clear that it's where the mental illness doesn't have anything to do with what it is we're talking about, where it doesn't have anything to do with the charged offense, or where the delusion doesn't have anything to do with the charged offense.

Let me give you an example. Let's say a man has schizophrenia and he believes, he really believes that he can time travel, go back and forth in time. He robs a liquor store for the money; he shoots the owner. His delusion is in no way connected to the act. His belief that he can time travel, I mean, he's a sick guy, no doubt, but his belief that he can time travel, that doesn't have anything in the world to do with robbing a liquor store or shooting the owner and it certainly wouldn't justify robbing a liquor store or shooting the owner. That's what guilty but mentally ill is for. That's what that charge is about, after if, only if you completely reject not guilty by reason of insanity. That's not going to work here. Only then could you consider guilty but mentally ill. That's not at all, not at all what you've heard about in the trial of this case.

By contrast, if my delusion is that my wife is an eminent danger as my care giver, the person who gives me my meds, who gives me my food, who has the power to have [1346]me committed to a mental hospital, if that person is trying to kill me with poison and she's admitted it to me, deadly force would be warranted.

Guilty but mentally ill is the same thing as guilty. They're the same. Same culpability; same punishment. Guilty is guilty is guilty is guilty is guilty. Tacking the words mentally ill on there doesn't change a thing. That means prison, plain and simple. It means guilty.

Not guilty by reason of insanity, the Judge is going to tell you that means a state mental hospital. But not guilty by reason of insanity, which is the appropriate verdict in

this case, what it really does is it empowers the Judge. It empowers Judge Green to commit Damian to the state mental hospital. At the end of the day, that's why we're here. I mean, that's really, that's why we're here.

So the question is, about this burden that we're talking about, slight burden of preponderance, have we established, have we established that Damian has met that criteria for insanity? Have you -- have we heard enough, have we seen enough to incline our minds, even ever so slightly, incline our minds to recognize this really is one of those instances. This really is one of those instances why we have these laws.

[1347]Let's see what's on the scale that demonstrates insanity. Well, Dr. Hindash in January of 2012, more than six months before Diane was killed, within six months before, Dr. Hindash diagnosed Damian with schizophrenia, schizoaffective disorder. He was treated for five years with antipsychotic medications. Doctors observed symptoms such as extreme disorganized thinking, responding to internal stimuli, evidence of hallucinations and delusions. It's classified at the jail as SPMI, severely persistently mentally ill. Dr. Hindash, he's not hired by the defense; he's not hired by Damian. He works for the Sheriff, the Cobb County Sheriff. That's law enforcement. And it's clear from his testimony that he understands Damian is very, very sick. And I think it was also clear from his testimony because he expressed to you, they do the best they can at the jail. They are doing the best that they can to treat somebody like Damian with the symptoms that he's got, treating him with medication. But you heard him

explain that the nurses and counselors there at the jail can really only deal with the day in and day out sort of issues that come up for somebody like Damian. That's all they can do at the jail.

What else have we got? We carry that burden by a preponderance. We heard about Peachford Hospital. What [1348]about Peachford? You heard evidence that Damian was committed to Peachford Mental Hospital for two weeks where he was diagnosed with schizophrenia. It was reported that Damian claimed he was in the Secret Service and had -- who implanted bugs in his head to communicate with him. He reported he was working for the FBI; took regular trips to Russia; that he had killed lots of people. You heard that he was treated there with antipsychotic medication. And I think what was very clear that you heard was that he was floridly psychotic, floridly psychotic, just eight days before the killing. Just eight days before when he was released from Peachford. But when his two weeks at Peachford were up, mom came to get him. And I told you in opening, it was a mistake and it was. It was a mistake. He should've never been released.

Damian's got a documented history of experiencing delusions in the days and weeks before this killing. And I can't stress enough, I don't know what preconceived notions you came into this trial with when you here insanity defense, but this dang sure ain't something that was concocted up after he was arrested. This is a substantial documented history.

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Have we carried the burden by a preponderance? I want you to consider the testimony of Dr. Richards. PhD [1349]and Board Certified forensic psychologist, performed hundreds of evaluations including years as a forensic psychologist for the state of Georgia. He diagnosed Damian with schizophrenia, observed all kind of symptoms of the disease, including disorganized thought, behavior consistent with someone suffering from delusional thinking. So what does Damian tell him? The same thing, that he believed his mother had been poisoning him for years, that he had sex with her, that he confronted her about poison, that she admitted it, that nobody would believe him, that he saw it as life or death and that he killed her she was poisoning his ice chips and his food and his drink. Those bizarre explanations are clearly consistent with someone suffering from a delusion.

Have we carried the burden by a preponderance to just incline, ever so slightly incline, to believe that my God, we really are talking about somebody who's criminally insane. My God, is this really one of those cases.

Have we carried the burden? I want you to think about Dr. Julie Dorney. Medical doctor, psychiatrist, professor at Emory School of Medicine, retained by the Cobb County District Attorney's Office. Retained by the Cobb County District Attorney's Office, but witness for [1350] Damian. Diagnosed Damian with schizoaffective disorder, concurred with the diagnoses and findings from Peachford and Dr. Richards. Observed the same symptomology as Dr. Hindash and Dr. Richards. Extreme disorganized thought, paranoid thinking. Damian also reported to her

believed his mother had been poisoning him for years, that he had sex with her. He confronted her about the poison; she admitted it. Nobody would believe him; he saw it as life or death; that he killed her because she was poisoning his ice chips and his food and his drink. Completely consistent with what he told 911 and Detective Dawes and what he wrote in his note.

So I want you to ask yourself this, I want you to please consider this when you're thinking about the credibility of Dr. Dorney and how much weight to put on her testimony. What does it say about her, that she's hired as an expert by the government but instead testifies for Damian? What does that say? You're the finder of fact. Does it say that perhaps the truth is important to her? Does it say that perhaps she wasn't just going to be a part of prosecuting someone as patently insane as Damian?

What does it say -- what does it say about what the District Attorney's Office thinks about Dr. Dorney? Well, they certainly wouldn't have hired her unless they [1351] trust and value her opinion. But in this case her opinions, apparently didn't fit with their prosecution. And consider this, in all of the country, the State didn't bring us one psychologist. Of all the psychologists in the country, the State didn't -- they couldn't scrounge up one hack with a degree to come in here and rebut the findings and conclusions and testimony of Dr. Dorney, Dr. Richards, the others? What does that tell you? It's right there. Have we carried the burden by a preponderance, slight inclination to the side?

Dr. Wright and Dr. Perri. These are PhDs who work for the state of Georgia. They're not hired by me, they're not hired by Damian. They work for the state of Georgia. These doctors who have evaluated Damian did so at the request of the Court. They're Court's experts and it was obvious that they concluded that Damian is very, very sick. They agreed with the conclusions of Dr. Dorney and Dr. Richards. Evidence consistent with a person who is severely mentally ill and exhibiting symptoms such as delusions. And both agree that delusions, like the kind that Damian is suffering from which include a belief that your life is in eminent danger, those are the kind of delusions which can affect a person's ability to conform their conduct. Both [1352]agreed to that, it's unrebutted.

Have we carried that burden by a preponderance, by that slightest little bit, to incline our mind toward insanity? Let's think about some things from the State's evidence.

Damian complained to his brother Chris that mom was poisoning him with pesticides, particularly in his ice chips and his food. Even when Chris is eating the same food and drinking the same drink, Damian still believed he was being poisoned. Remember when Chris testified to that? I was eating the same food, still believed it. And when Chris would try to rationalize with his little brother, Man, mom's -- that doesn't make any sense, mom loves you. She's just trying to help you. She's not poisoning you. He wasn't having any of it. He believed that this person that he relied on for everything, who doled out his meds, who prepared his food was secretly trying to take his life.

Told Detective Dawes she always called me an evil child. He's paranoid. And despite all the objective evidence to the contrary, he still believes it.

There's no evidence that she's poisoning him, none. There's no evidence that his life is in danger. All the objective evidence is completely to the contrary, that it's crap, but he still believes it. That's a delusion. [1353]And a delusion that someone is trying to take your life, that's a pretty powerful delusion.

Let me show you something in here in the State's evidence. Some letters, some letters that Damian wrote, February of 2014. February of 2014, this is eighteen months later, eighteen months later he's writing to his dad back here. You helped poison me and it was your idea. I don't care; I don't want to see you ever again. You lie and I hope you drink that poison in the coffee and die.

Eighteen months later, he still believes that he's been poisoned. And now he's expanded the delusion to include his dad who wasn't even living here.

Damian complained to the neighborhood friend, Eddy Coleman that mom's poisoning me. And I know y'all remember Eddy Coleman. He was a very flamboyant looking fellow. He had the dreadlocks, colorfully dressed. Remember what he said? Oh, yeah, oh, yeah; he'd tell me and the guys in the neighborhood that she was poisoning him. Oh, yeah, but we didn't make much of it. You know, that's not exactly the kind of chit chat and topic of conversation that young teenage men have on the

basketball court or playing their video games. But I guess if you believe that your mother is trying to kill you, that might be the kind of thing that would occupy [1354]your mind even in the oddest times like hanging out with the guys.

Damian tells the 911 operator, I killed her because she was poisoning me. He tells Officer Holewinski in March of 2012, mom's poisoning his oatmeal. He tells Officer Reifert who took him into custody, mom was poisoning him so he killed her. He tells Detective Dawes over and over and over, I killed my mom because she was poisoning me. She poisoned the Kool-Aid; it was like life or death. Why would she do that? He's asking Detective Dawes, why would she do that. I get to live, that's the best part.

You saw the video, he's almost just blank. There's no expression when asked why he did it, I get to live, that's the best part. Over and over and over he was telling Detective Dawes, evidence of a psychotic and paranoid delusion.

And Damian's note, you know, I think it's clear from the evidence you heard over a couple of days that we heard that Damian knew that nobody was going to believe him, nobody was going to believe him. And that's why he keeps repeating it over and over to 911 and to Detective Dawes and in the note he leaves. And when we want people to believe us, isn't that what we do? You know, we just keep saying it; we just keep [1355]saying it. Maybe somebody will listen. What if nobody listens? Well, maybe they'll read it.

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Think about this, when we memorialize something in writing, when we write it down, doesn't it have the feel of permanence to it? When we write something down, there's something about that that feels concrete, that feels permanent. If I don't get my words out right, if I don't get my words out right, I've got it written down. If they're not going to listen to me, if I can't explain it, I've got it written down. So he wrote the note.

You heard that Damian told Detective Dawes and Dr. Dorney that he wrote that note the day before. I want you to recall all four experts testified that they had reviewed Damian's note and they had reviewed Damian's statement to Detective Dawes. So all four knew that at some point in time, Damian had claimed that he wrote the note the day before. But think about this, Mr. Evans did not confront a single expert, not a single doctor with that note. He didn't take that note and ask a single expert, hey, what do you think of this. Was he mixed up on his time line because of his disorganized thinking here? Or is he writing down something that he was planning to do tomorrow or the next day? And I suggest to you this, he didn't ask because it doesn't [1356]matter. It doesn't matter. A delusion is the same. His motivation is what we're talking about. His motivation is based on his delusion that his life's in danger.

I'll suggest to you that it is far, far more likely that he scribbled that note out after he killed his mother. He folded it up and put it in his pocket and he went and smoked and ultimately decided he was going to lay it out on that table and call the police. But it doesn't matter. If he'd wrote it that day or the day before or a week before, if he wrote it

a week before what does it show? It shows that his mind is consumed, it's consumed with this threat. It's consumed with what he's got to do, what he has got to do to protect himself, what he's got to do to make sure that everybody understands why he had to do it.

Have we carried that burden by a preponderance ever so slightly to incline a reasonable mind, a reasonable mind to believe? I'd say there's a lot of evidence that he was insane, a heck of a lot of evidence that he was delusional and that in that specific delusion, he was justified. My God, this is one of those times. Have we carried that burden?

Let me tell you what the law is in this regard. So the Judge is going to tell you that a person shall not [1357]be found guilty of a crime, that's not the right -- that's not the right slide. Here's what the Judge is going to tell you. A person shall not be found guilty of a crime when? At the time of the act that person, because of mental disease, schizophrenia, acted because of a delusional compulsion that overpowered the person's will to resist committing the crime. The alleged criminal act itself was connected with a particular delusion under which the accused was laboring and that the delusion was to a fact, if true, would have justified the alleged act by the accused.

Mr. Evans already argued a little bit, but when he stands back up, he's definitely going to argue, well, even if the delusion was true that she was poisoning him, that can't be justified. Killing her can't be justified. He could've just walked right out the door; he could've just left. Or maybe he just didn't eat the food. But that would not take

into account what the Judge is going to tell you you have to consider. That wouldn't take into account Damian's psychological characteristics and the circumstances of what were going on.

So the delusion, his life was in danger. He was going to be dead for a very specific reason, his mother was poisoning him. Imagine that. If that was true, and [1358] it was a life or death situation as he believed, if it was a life or death situation as he believed and nobody would listen and nobody would believe him, there is no more clear and obvious justification for using deadly force. If he was delusional and that delusion in any way encompassed this belief that he was going to be killed, that's justification for deadly force.

When we contemplate the reasonableness of that, the reasonableness of his belief that deadly force was necessary, I want you to listen so carefully to what the Judge is going to tell you. We've got to consider his psychological characteristics and circumstances. This is what the Judge is going to tell you: I charge you that if you find from the evidence the defendant suffered from a delusional compulsion at the time of the events, you may consider that evidence in connection with the defendant's claim of insanity. Such evidence relates to the issue of reasonableness of the defendant's belief that the use of force was immediately necessary, even though no use of force against the defendant may have been, in fact, eminent.

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The standard is whether the circumstances were such that they would excite the fears of a reasonable person possessing the same or similar psychological and physical characteristics as the defendant and faced with [1359] the same circumstances surrounding the defendant at the time.

We'll look at this one more time. I charge you that if you find from the evidence that the defendant suffered from a delusional compulsion at the time of the offense, that's hardly going to be in question, you may consider that evidence in connection with the defendant's claim of insanity. Such evidence relates to the issue of reasonableness of the defendant's belief. The reasonableness of his belief that the use of force was immediately necessary even though, even though it may not have actually been eminent. The standard, when you see that standard, that means you. That means this is what you have to apply, what you have to consider. The standard is whether the circumstances were such that they would excite the fears of a reasonable person possessing the same or similar psychological and physical characteristics. So when you consider the reasonableness of his belief that he had to use deadly force, the Judge is going to tell you that you've basically got to step in right there, step into his shoes because you've got the same -- consider the same psychological characteristics and the same circumstances. You've got to look at it like he looked at it to determine his belief that deadly force was [1360]necessary and was reasonable.

So what are his same circumstances? What are his same circumstances that the Judge is going to tell you that you've got to address? Well, a person tried to kill me, hasn't gotten caught in three years. She has absolute control over me. She provides the food and drink; it's her house. She has the power to put me in a mental hospital; there is no threat but in my mind it's life or death. Under Damian's psychological characteristics, under his circumstances, deadly force was the only option.

Mr. Evans is going to ask you to -- is going to suggest that this was somehow a revenge killing, revenge for a prior wrong. Of course, that argument just ignores the absolutely overwhelming evidence in this case that his delusion was talking about a present danger.

All the experts agreed that Damian was expressing his belief that the danger was present and eminent, not something just in the past.

Mr. Evans touched on the fact that motive is not required to be proven by the State when it brings a case, but it is absolutely something that you've got to consider when determining his defense. You've got to consider that. Why? What's the motive? What's the [1361]motive? There is no other motive other than his delusion.

He and his mom are not in a fight. We heard from Chris that everything was normal that day. There was nothing unusual; they weren't arguing. He wasn't stealing anything from her. There certainly wasn't a sexual assault as has been suggested. If that was the case, if there was

a sexual assault, that medical examiner that testified, we would've heard another hour worth of testimony and seen pictures from the autopsy demonstrating the sexual assault.

He's got nothing to gain. What's his gain? What's his gain? He can't take care of himself. His dad's not around. He relies on his mother. When you're back there in the room, I want you to ask that. What's his motivation? And if the answer is the only motivation, the only, only explanation is exactly what everybody has told you during the trial of this case, that he was delusional at the time. If that's the answer that that's the only motivation there is, I think that's pretty powerful evidence that your mind should be inclined to agree that he was insane at the time. There's no other explanation.

So we have -- we've decided as a society that we're not going to just imprison the mentally ill. We're not [1362]just going to lock them up, who commit even the most heinous of crimes like this one, if the crime is directly resulting from the mental disease just like we've gone through the evidence and law that I've talked about, it's directly the result of the delusion.

And from the instructions that the Judge is going to give you and some of those that I've talked about, it's very clear that we have a state mental hospital system that can humanely treat and take care of the truly insane. There's a reason why we have those hospitals. If the State mental hospital is not for a person like Damian, who in the heck is it for, I mean, really? I mean if State hospital is not for that guy, are you kidding me, what are they for?

I submit to you that the evidence in this case isn't just slight inclination, it is absolutely, unequivocally overwhelming, overwhelming that he was insane at the time. This is not a close case. It is not. It is overwhelming that he was insane. We try a lot of cases in this county and a lot of them are close. This ain't one of them. It's not. But I'm not -- I'm not blind to what we -- what anybody would worry about, what anybody would naturally -- the kind of things that go through your mind, and so I'm just going to very plainly, very plainly ask you please don't condemn him [1363]because it feels like that he's getting away with it. Please don't do that. Please.

What's he getting away with? You've heard he's been locked up for five years already and the Judge is going to tell you the law. If you follow the law, return a verdict of not guilty by reason of insanity, he's going to the state mental hospital until such time, if ever, if ever, the Judge is satisfied, the Judge is satisfied that he should be released. And maybe not this Judge, maybe the Judge that comes after him or comes after him or comes after him. If ever. He's not going anywhere. He's not going anywhere.

I told you in opening that Diane was truly innocent and, of course, that's exactly what we heard during the trial of this case. All she wanted was help for Damian. She was desperate. And some of the evidence that you're going to have in the case is going to include this. This is a letter that Diane wrote to Judge Bodiford, a Superior Court Judge here in Cobb County. This is from May of 2012. (Reading) Honorable Judge Bodiford, I am writing regarding my son, Damian Cornell McElrath, Case Number 12-9-

0590-33, who is currently in the Cobb County Detention Center for violation of probation. Damian was previously in your courtroom on March 15, 2012, charged with theft and shoplifting. At that time Damian was [1364]released under the first offender program. Damian was in a Cobb Detention Center previously on December the 2nd, 2011, until his release on March 15, 2012. He was housed in the mental health unit and was seen in the infirmary several times due to his bizarre behavior. Damian is diagnosed ADHD and bipolar. I informed them of his diagnosis and that he was prescribed a medication by his psychiatrist, Depakote and Risperidone. He was offered meds, Depakote and Risperidone, while at the detention center. I do not know if he was taking them. I'm a single mother who adopted Damian when he was two years-old. He was diagnosed ADHD at age six and bipolar at nine years of age. He was previously under the care of a psychiatrist until he refused to continuous visits and refused to take his medication for his illness. Damian has been noncompliant in taking his medication for his illness for the last two or three years. I have attempted to get him involved in many inpatient programs but he has not been cooperative. I know if he doesn't get treatment, he will continue his unpredictable, uncontrollable and destructive behavior. I pray, I pray the Court will consider adjudicating Damian to a facility that can treat him for his mental illness since he doesn't have the insight, control or mental ability to know what's in his best interest. [1365]Damian is in the jail. He's being prescribed medication and she's reaching out and she's asking the Judge to do exactly what I'm about to ask you to do.

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The easy thing for you to do here would be to find Damian guilty but mentally ill. Nobody is going to question you about that. But rather than do the easy thing, I'm going to ask you to do the right thing. And sometimes the right thing is a little more difficult.

So what I'm going to ask you to do is acknowledge, just acknowledge that Damian easily, easily meets the criteria for not guilty by reason of insanity. And in doing that, I want you to empower, I want you to empower the Judge to commit him to a state mental hospital where he ought to be. You see the Judge can't do it unless you give him that power. I'm begging you, begging you to give him that power. Please, please give him the power. I've done all I can do.

THE COURT: Ladies and gentlemen, we're going to take about a fifteen minute restroom break and also we're going to give you all menus so that you can order what you would like to have for lunch so we can go ahead and get those orders placed, and then that way when the State's done doing their closing argument then I'll give you the charge, and then you guys will go back, eat lunch while you deliberate and that'll allow you to keep [1366]going.

So if you would take them back? Do you have menus already, Ms. Hicks?

MS. HICKS: No, sir.

THE COURT: All right. We'll get some menus brought back.

(Whereupon, the jury exits courtroom for morning recess)

THE COURT: All right. We're going to take a fifteen minute break. Everybody use the restroom and then come on back, and Mr. Evans, you can proceed when we get back.

MR. EVANS: Yes, sir. I'll get setup.

(Whereupon, recess is taken at 10:30 a.m. until 10:45 a.m.)

THE COURT: Are we ready for the jury? State?

MR. EVANS: Yes.

THE COURT: Defense?

MR. KILGORE: Yes.

THE COURT: All right. Let's bring them in.

(Whereupon, the jury returns to the courtroom.)

THE COURT: All right. Mr. Evans, you can proceed.

MR. EVANS: Ladies and gentlemen, I told you I would address you one more time. This is my last opportunity to speak to you before you get to your [1367]responsibility as the jurors in this case.

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So I want to talk to you my final moments a little bit about this case. I want to break it up into three parts. So this is what we're going to be discussing. First, I feel obligated to respond just to the defense and some of the things they just asserted to you during the trial of this case in closing argument.

Second, I need to briefly go through some of the important points of the State's case. We need to talk about some of those points, some things that I hope you will think about as you go into the factual deliberation of the case.

And finally, I want to close by giving you some final thoughts about the jury process and this thing that we've been going through called a jury trial. So those are the three parts that we're going to break into and that's what I'm going to handle during my last opportunity to speak to you in this case.

But I first want to start by addressing some of the things that the defense has said, and we'll start with opening statement. The defense said in opening statement that the defendant was very sick. You remember that. Okay. You've now heard from multiple experts that have come in and given you the opinion that he suffered from a mental illness. All right. That's [1368]really not the big issue here. Nobody denies that the defendant suffers from a mental illness. That would include Dr. Dorney, who was admittedly hired by the State. But that's not the point here. That's not the point here. This isn't about whether the defendant might've happened to have suffered from a mental illness. Your obligation is to dig deeper than

that to look at the law and look at the facts. Those are the things that you swore to do as a juror in this case. Do you remember that? You swore that you would do those two things and your obligation is nothing more than that.

The experts agree that he was delusional. My response? Okay, so what? Okay, so what? What if there were fifty experts that came in and said he's delusional. You've still got to go to the next step and say was he legally justified.

See the problem with this brick example, the problem with what the defense has argued is that there is not a foundation. There's a poor foundation. They conceded the defendant knew right from wrong. That's an important point here. That's an important point here because now we shift focus to where we really need to be discussing and that's the delusional compulsion test. They just argued to you the defendant didn't choose to [1369]have a mental illness. Nobody suggested otherwise. Nobody suggested otherwise. He certainly had the capacity to know right from wrong and make certain decisions the date of this crime. He had the capacity to do so, and you are bound to judge him on those decisions and on his choices.

Lowest burden of proof the defense was suggesting, bring in bricks for a catchy little demonstration for you. Here's the problem with bricks, this courthouse is made of bricks. If the foundation for this courthouse is not solid, guess what the courthouse does? It tumbles; it collapses. You can take all those bricks with writing on them and just toss them out the door because the foundation of this

case wasn't always lacking. When you start talking about the law and the facts, there aren't enough bricks and demonstrations in the world to get you over the burden that falls on their shoulders for this case of proving insanity. Their burden.

Defense says, I will have failed miserably. Look, I heard my name brought up a lot, I'm not going to call anyone by name. This is not the defense's fault. You know, you don't need to feel bad for one side or the other about what has happened here, right? There were never facts and never law that would allow them to [1370]succeed as if getting somebody off by not guilty by reason of insanity is a success when those facts don't exist, when the law doesn't support you. You would hope that the system gets it correct and they fail miserably. It's not a failure, it's a success of the system when the facts don't support the charge and the law doesn't support the proposition either.

That the State hired a doctor, too, that's remarkable. Of course. When you have mental defenses, yeah. The Court had some doctors, the State called doctors. We agree, we've got mental illness. All right. Let's get down to business now. Let's get down to business because that doesn't answer our question does it, about whether he had a legal insanity defense. That's a different standard.

And I'm not going to apologize to you for not calling a witness that doesn't have any light to shed on the facts of this case and whether the defendant was legally responsible for this or not. If they want to call them, sure. We weren't going to waste your time any more than it

needed to be wasted with those experts. In fact, that's probably the shortest cross-examine ever on Friday morning, wasn't it, of two experts because they didn't add anything. They didn't add anything. Some of you might have said, wow, boy, Mr. Evans really [1371]flubbed that one. I'm not flubbing it; there's nothing to add; there are no more questions to ask of them. We get it. We get it.

Everybody says he's got a mental illness. Boy, and he was so quick to say it, too, wasn't he? Title of the letter, my antisocial life. There is nobody in this world that wanted to share as quickly as possible just how mentally ill he is than that man over there in the hopes that it will distract you from the truth. Your obligation is to get to the truth.

Dr. Dorney couldn't support their case. She didn't have anything to offer one way or another, ladies and gentlemen. Yes, she was hired by the State; yes, she said just like everybody else that he is mentally ill. Got it. Check. I'm not going to call that doctor when it's already clear to you and I said in opening statement, right, the defendant suffers from a mental illness. You don't need twenty doctors to say that. Four was plenty enough. And this case needs to get to your hands now, we need to ABC, always be closing, getting you the case.

So I want to talk now about the insanity defense. Here we go, here's the law on that. Here's some general principles you should know. Generally the State bears the burden of proving defendant's guilt beyond a [1372] reasonable doubt. B-R-D, beyond a reasonable doubt, right? We talked about that just a moment ago when I was

first up here. And we did, we showed you the facts beyond a reasonable doubt.

Then the burden is on the defendant, okay. Burdens are important and we'll talk more about burdens in a little bit, but burdens are important. Bricks don't show anything about a burden. They actually have to produce evidence in support of their not guilty by reason of insanity defense. If the defendant isn't not guilty by reason of insanity but he's proved to be mentally ill beyond a reasonable doubt, you'd find him guilty but mentally ill. That is where we are. Guilty but mentally ill. Why? Because they have failed, failed considering the evidence as the whole. You're required to look at evidence as a whole. They have failed to meet their burden. They can't. They can't. It's not possible to meet their burden under this fact scenario that I'm about to show you.

So here it is, the delusional compulsion test. It's three prongs, right? I've got elements of an offense that I've got to prove for malice murder, felony murder, two elements for each one of those. Remember that? We talked about that. They have a burden here too. Three prongs, laboring under a delusion at the [1373]time of the crime, defendant's delusion overpowered his will. Hey, here's the failure on part two, okay. For from back as early as 2010, we'll talk about it in just a minute, Diane McElrath was complaining that her son hated her and wanted her dead. That fact alone that the defendant could control his will shows that his will was not overmastered in 2012. You get it? The fact that he may have been suffering from this delusion for three years but didn't act on it means that his will was

not overmastered or overpowered. Does that make sense? This is not an overpowering sudden onset of something. This is proof that his will was not overmastered. And the biggest point, the biggest point of all, the delusion was as to a fact that, if true, would have justified the act. You determine whether it's justified or not. Justified. Justify is a key word; it's a legal word. Justified the act.

Compare. When one is mentally ill means that you're suffering from a disorder of thought or mood, it impairs your judgment, your capacity to recognize reality, the ability to cope with ordinary demands of life. Mentally ill does not include repeated antisocial behavior like shoplifting and things like that. Okay?

Again, you are the finder of the fact. Being mentally ill never, never excuses criminal conduct. [1374]That's a legal term, being mentally ill never excuses it. You can't turn on the news and see that some mentally ill person has done something crazy like shooting up in Los Angeles and doing stuff. Guess what that person is guilty --

MR. KILGORE: Judge, I'm going to object to that. I don't think that's appropriate to bring something like that into the trial of this case. That's prejudicial.

MR. EVANS: It's closing argument. I think it's perfectly appropriate for me to make reasonable inferences.

THE COURT: It's overruled.

MR. EVANS: You can't turn on the news and see horrible things like that. Guess what that person is guilty of? Murder. Murder. Because the insanity question is very --

MR. KILGORE: I'm going to object to that, Judge. Again, he's going -- even going a step further now and trying to make some sort of a comparison and indicating that person who I don't know anything about that, if they had a trial or what, but that's completely inappropriate.

THE COURT: I'll allow it over the objection.

MR. EVANS: The insanity question is a very different question, okay. That's a very different [1375]question. So being mentally ill never excuses criminal conduct and you should know that from the outset which is why the Judge is going to talk to you about the distinction between the two and what the potential consequences of those are.

So justification law. All right. So we've got -- this is a very odd situation for a jury because you're now being asked to think a little bit differently because that third prong says, well the justification, right, the delusion, if true, were to justify the actions. Remember we just talked about that? Okay. So you almost hypothetically need to say now, okay, what is the delusion, hypothetically? If by some stretch of the imagination that happened to have been true, would it have authorized him to do what he did? Got it? That's basically what that third prong says. And this is where they've always, always failed in this case.

Why? Because the justification element means self-defense. Remember I told you in opening to focus on self-defense? This is what we're talking about. If this was not self-defense, it can never be delusional compulsion insanity. That's putting it in the simplest terms. But subject to the belief of the accused that he may have been justified does not alone matter because it's a reasonable person standard. Reasonable person [1376]-standard. Whether a reasonable person in the defendant's situation feels okay to do this, and would that be lawful? Would it be lawful?

So there's both what we call a subjective and objective component. The subjective is did he actually believe it and then was it reasonable. Was what he did reasonable?

So here we go, our law makes a distinction between deadly versus non deadly force. So here's a quick tutorial on justification for you, okay? You cannot always use deadly force in the state of Georgia. Hopefully that's not a surprise to anyone here. If somebody is using force against you, you can use only enough force to reasonably defend yourself. Okay? Let's do just regular force. One may only use force when he reasonably believes it's necessary to defend himself.

What about deadly force? Very, very different. One may only, notice the emphasis here, only use deadly force if he reasonably believes it is necessary to prevent death or great bodily injury to yourself. All right? You can only use deadly force if you believe it's him or me, if you're in that him or me situation.

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Here is where the problems start coming in. Eminent harm and necessity is by definition a component [1377]of justification. So here's the doctrine. Eminent threat can be wrong, if an alleged threat is ended, past tense, it's no longer necessary to use deadly force. All right. No matter how bad whatever happened to you was, you can't retaliate if the problem has ended. Does that make sense? It's part of the definition here. His whatever delusional thought that he wants to assert and justify is that in the past she had something to me, so I killed her. You are never justified in doing that no matter how horrible the thing may have been that was perpetrated on you. You are not authorized to do that because it's not an eminent threat. All right. So that's problem one.

Justification law added to it, defendant cannot be justified because he committed an aggravated assault. Here's the law on that. During the crime portion of it, a person is never justified in using force if he's committing or attempting to commit a felony. You already heard that aggravated assault is a felony, right? Because he was choosing to commit that felony, you don't get to turn around and say, well, it was self-defense. It doesn't work that way. Your choice in committing that felony means you don't get the benefit of self defense, of justification.

Hey, let's add to it; we'll keep going. Primary [1378] aggressor doctrine. Defendant cannot be justified if he was the primary aggressor, if he started it. No evidence from his mouth or anywhere else that Diane McElrath started this. She didn't push him first; she didn't punch him; she didn't hit him. Who is the primary aggressor?

Who is the primary aggressor? That man over there. You do not get the benefit of justification defense when you're the primary aggressor. That's the law and I expect the Judge will tell you that.

Their house of cards is now falling apart. It's not built on bricks; it's built on a house of cards that's falling apart.

Reasonable beliefs doctrine. The test is never solely subjective nor is an act done in the spirit of revenge lawful.

Words alone. There's another way. It's crumbling before your eyes, this whole defense of the insanity is crumbling because justification is crumbling.

Threats and menaces. Provocation by threats or words alone will in no case justify the homicide or be sufficient to free the accused, free the accused from the crime of murder when the killing is done in resentment of provoking words. So you can do the hypothetical. If what she -- what he believed was that [1379]she said she did something horrible to him, those are words alone. Those are words alone. And you do not get to kill somebody, you don't get to off somebody, you don't get to free yourself from the crime of murder because somebody may have used words alone. And that's all that he ever asserted is that words alone were the reason that he picked up a knife and chose to kill her.

Excessive force. Have you ever heard that term? I bet you have. I bet you have. This is not going to be a surprise to you. Our law says that you cannot use more force than

is necessary to defeat the threat. You can never stab a person fifty times to defeat a threat. You may never do that because that is always excessive. It is always excessive if the force used exceeded what was reasonably necessary. The murder is never, never justified.

And revenge for prior wrong. Here's what the law is regarding revenge for a prior wrong. A person is never justified in using force in revenge for some prior wrong. It doesn't matter how serious the prior wrong was. We call that retaliation; that's not legal justification. You don't get to kill somebody because you perceive that you were somehow wronged. You don't get a pass on that because your perception is somebody wronged you. We call that revenge.

[1380]Now, listen, the defendant may have not sat down with Detective Dawes and said, I believe I was acting in revenge for a prior wrong. Right? Nobody ever said that, but his statement shows us that that's precisely what happened, doesn't it? It shows us precisely that that's what happened. His assertion to you through that interview is that because I was wronged in the past, I took her life. And if the force used was based on a prior wrong after an episode has ended, there is no legal justification for the use of force. You cannot, you cannot get the benefit of justification.

Ladies and gentlemen, why was the delusional compulsion test never applied to the facts of this case? I just gave you nine reasons. Defendant used deadly force; he wasn't authorized to do so. There was no eminent harm.

Three, this was not out of necessity. Four, the defendant was committing a felony. Five, defendant was the primary aggressor. Six, defendant's acts were not reasonable. Seven, threats or menaces principle. You don't get the benefit of justification if it's merely words that are spoken. Eight, he used excessive force. Nine was revenge for a prior wrong.

Any one of those, any single one of those legally defeats justification and therefore defeats what, delusional compulsion. Any single one of them. Any [1381]single one. You can say I think it's a revenge for prior wrong, I think it was words alone. If any one of them, you don't even have to come up to a consensus. We've given you nine, nine specific legal reasons why this defense always failed based on the facts of this case. Only one, you can just say excessive force alone and you're not there, you're not there.

Ladies and gentlemen, compare. I'm delusional. Oh my gosh, she's Satan; she's got a gun right now, eminently it's her or me at this moment. Man, that's a lot closer if true, right, if true. That's a lot closer than, boy, I feel like I've been wronged so I went downstairs away from the threat and came up behind her and executed her. Executed her.

Do you see the distinction, the comparison? Hey, even if the delusion was, I thought she was a home invader or I heard something upstairs so I acted. Well, that's an eminent harm, that's a closer call. That's a closer call if that were true, right? His delusion is very different than that, and his delusion, articulated to the police, does not ever make him justified in doing what he did.

So I'll say this, there's a tendency to sometimes let the law get in the way of facts, so let's block it out for a minute, block it out for a minute. You don't [1382]need the badges that we carry, okay, you don't need to go to law school, you don't need to be a police officer like Detective Dawes to answer these simple questions I'm about to pose to you. Let's just dumb it down for a second and just stop and just have a conversation for a second. Your first day on the job as a police officer, you're now POST certified, State's 104, and you're called to this crime scene. What happened? What happened to Diane McElrath? She's stabbed fifty times. What happened to her? The answer unquestionably is murder. She was brutally murdered. Does anyone not see that? She is brutally murdered here. What happened to this woman? What did the person who did this do? He murdered her. He murdered her.

Let me ask it maybe a different way. No matter what -- when you identify the perpetrator, fast forward, okay. What words, what words could he say that could ever justify State's 15. You get it? There are none. No words have been invented that turn this murder into justification. And if it can't be justification, it can't be what, insanity. It would be insane to think otherwise. And you don't need a law degree, you don't need to be a prosecutor, you don't need to be a police officer with crime scene and forensics training to look at it for what it is. Don't over think it, call it what [1383]it is. And if you call it murder that was not justified, right? That was not justified, it is never delusional compulsion. But there weren't any magic words that the defendant could ever say that would change that from a murder to a justified act, that would ever say that he didn't exceed the force necessary. There are no words.

And don't take my word for it. Never talking about this murder ever again, never talking about this capital M murder ever again, 262. The defendant correctly labeled what this is. The defendant correctly labeled it. That's his word; that's his choice. He knows what this is.

So we get to the State's case. Part two of what I told you I told you I'd talk to you about. Defendant had a history of mental illness and antisocial behavior. Nevertheless, he could live and function in society. Did you hear that? He could be go and smoke and do things. He could even live on his own for a short period of time. You'll see the Efficiency Lodge records here that show he was capable of living on his own, maybe not very well. He was capable of making choices, some were poor, like shoplifting, right? So some were poor choices, but he could do it. He's not so out of his gourd that he's incapable of making decisions and [1384]things like that. To the contrary, he knows right from wrong, said as much to the detectives. By the way, interesting, he knew how to seek help, too. Like if your delusion was true, what do you do? What do you do if you believe somebody is poisoning you or you're taking poison? You call 911, right? And he demonstrated that he knew how to do it twice now. Twice.

Prior history is important, juvenile court September 10th. You'll see the document that's in there.

Words from the grave. He has continuously told me he wishes I was dead and he hates me. The poor woman's words from the grave in 2010. I've had to physically restrain him in the past. I called the police in the past.

Why? Because he continuously tells me that he wishes I was dead and that he hates me.

This was not some eminent threat, eminent harm. This sadly, was brewing for literally years and there are no words that can come from the defendant's mouth to make this justified or anything other than murder.

Officer Brittian had a runaway report. You know what that shows? That he could leave. He could even walk right out the door when he wanted to, and did. Right. Perfectly capable of doing that.

Domestic call from 2011. He can make choices; he [1385]could do his things. Shoplifting and the obstruction. The obstruction here, by the way, right. Remember the threat? There was no justification in threatening to kill a police officer and using an expletive, dropping the f bomb, right? What delusion justified that? There's none. There's none.

You'll see in the documents that there's actually a contract and an eviction notice too. Mom said, I'm putting you out. March 15th of 2012, in order to continue living here you need to comply with court orders; go to see a psychiatrist; do your chores at home; be respectful. Be respectful. This poor woman. Look for a job. If these conditions aren't met, you can no longer live here. You can no longer live here followed by an eviction notice. An eviction notice.

And we know that he knows what to do when you're, quote, unquote, a victim. If you're, quote, unquote, a victim, you call 911.

He even talked about Ombudsman altercation and you'll see letters here. State's 262, postdating this tell them I was paranoid, kill you, too, kill you, too.

It's a regular day; sent a text to his dad, I want out of here. I want out of here. He could choose not to eat the food. This was a regular day and not acting any differently than any other day. He was home; he was [1386]acting normal, normal for him. Told his mama, I want some spice, some synthetic marijuana, right? She said no. Got to wonder whether he's upset about that.

We know that he was on his meds. Toxicology proves it; he admitted it. He had already written that note and then he waited, waited for Chris to leave and decided an hour before the murder that he was going to do it. That is never justification under our law. Do you see that, do you see the law now? That is never justification and it is always murder. Because if it's not justification, it can never be delusional compulsion.

And then he turned this house into a house of horror. There are multiple exits. There's a reason we put in all these photographs to show you the three different exits. Note the phone on the wall, had one in his backpack, too, right? Every out you wanted. If you do the hypothetical mental gymnastics for part three of the delusional compulsion test, right. Okay. He just learned that he had

been poisoned, what does a reasonable person do? Leave the house or call 911, just like you'd done before. That's what you do.

This is what you don't do, go for the blade. This is what you cannot legally do, come up behind this poor woman. She's upstairs. The knives are downstairs; [1387]she's upstairs. You believe there's this eminent threat so you go after it? No, no, no. When people are faced with eminent threat, you flee from it. You go get help; you call 911.

It's not justification to come up behind some woman, come up behind Diane and begin stabbing, throwing blood all over this crime scene. She was wounded, badly so. And he pursued her as she fled. He pursued her. This is not the act of somebody who is justified, this is not the act of somebody who is legally insane, because this act is never ever justified under the law.

He probably touched her, too. By the way, by him murdering her, we'll never know to what degree or why. Interesting fact there that he included in the note and he can talk about it to the detective. He made for sure -- you know, the defense has suggested, well, they didn't charge him with a sex assault. You can't do that now because the person who is sexually assaulted has been murdered. Okay? The person that's been sexually assaulted has been murdered. He's made sure that if there was something going on, and there probably was. She's got male DNA, right? Her panties are off her. Again, you don't need any law school prosecutor, police training to know that, hey, we're going to check for DNA, there's something hinky

here, right? Something [1388]hinky here. Why are her panties off on the landing and she's dead at the bottom?

You can see the arterial spray as she's trying to flee from her murderer, the defendant. Tried her to best to get out of the door, even broke off the key. You can see that she was standing there by that door as he pursued her because you have the ninety degree blood drops that are down and the blood at the top part of the door. She struggled to flee from her murderer. And instead, the defendant turned Diane into this.

The medical examiner only confirms what we already know, that there were more than fifty wounds here, that this was excessive. Head and neck, chest, extremities, defensive injuries as well and bruising. She is struggling for her life, struggling for her life. He had one minor injury that he even told the detective, well, I inflicted that myself when I was trying to straighten the blade of the knife.

This murder forensically has been confirmed by the medical examiner's office as being not justified and therefore the defendant cannot be not guilty by reason of insanity.

He is very guilty. He also happens to be mentally ill. He is not legally justified; he is not legally insane. He is guilty. He also happens to be mentally [1389]ill.

And then he left the letter. Look how quickly he wants somebody to know, very top, my antisocial life. Hey, look, just did something here. Boy, I'm going to throw it out

there quickly, right, in the hopes that at some future court date five years later, a jury buys this fake defense. And in the note he even says, look, this has been going on for three years. Boy, I've been poisoning you for three years. Wow. Boy, if you execute somebody because of that, you know what we call that legally? A revenge for prior wrong, that's what we call that. We call that murder.

And there's part of the note talking about Kool-Aid. She poisoned -- poisoned me. Past tense. Then cleaned up, smoked, called 911. Before sitting down with the detectives, cleaned up now, smoked, called 911.

And you heard his statement here, did that sound like somebody that was completely out of his gourd? It was pretty chilly to hear that statement, was it not? Pretty chill; he was pretty calm and collected. Sure, he talked about a history of mental illness, but this is not somebody that was totally out of his mind when he was talking to the detective. You heard it.

He admitted he was on his meds. Toxicology proved it and then look what he said, I wrote it the day she [1390] told me, referring to the note at the crime scene. She told me poisoned me yesterday, that's why I killed her today.

You see what we legally call that now? That's called revenge for a prior wrong. You're not justified in doing that.

Can't take it here, I tented him. That's why PJ Coalson came in, Pam Coalson, we put in the evidence that the text

was sent to his dad. He could make other choices. He could get out. Yeah, stayed at the Efficiency Lodge for a period of time, Cobb Parkway. How long did you stay there? Just two weeks. Two weeks is a long time, that's a long time.

Don't eat the poison. Hey, there's a choice that you can make. So you're at the Efficiency Lodge in Kennesaw for two weeks. You were living by yourself, you had your own room? Yeah. You were pretty much dependant on yourself? Yeah, I was depending on her to like bring me stuff and I had a food card and food stamps. He can make other choices here.

Could've called 911. In fact, he talks about calling 911 on a prior occasion as well. Did you call 911? Yeah. Somebody come out? Yeah, they came out and checked me out then went back into service; he was fine.

And then the evidence that he was lying in wait. I [1391]was just smoking a cigarette as I waited for Chris to leave. He knows she poisoned me. Why did you wait for Chris to leave? What did you think would happen had Chris got home before you completed it? He would've called police, right? That's why you've got to wait for Chris to leave because he's telling the detectives Chris would've called the police.

He even says the threat, right? In his mind he's telling the detectives the threat. Where was she? She was upstairs. So you were downstairs? Yeah. You got a kitchen knife. Yeah. And then you went upstairs after her, went up after her. Premeditation or response to an eminent threat?

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Okay. So you're in the house, right? You wrote that note yesterday. What'd you do? I just stabbed her. I said, you poisoned me. Where were you when you first came up to her? Upstairs, like walking in the hallway. Right? He is pursuing her. That's never justified.

She had her back turned. So you're walking up behind her? Yeah. She's facing away from you? Yeah. So the first stab is in the back, back of her neck. She's in the hallway, you're approaching her. Sounds like you weren't sitting in the room or anything. You came upstairs with a knife? Yeah. Yeah. That's what I [1392]did. And you said what to her? Did you poison me, bitch?

This is not what somebody says when they're genuinely acting in justification. This is what you say when you're mad at somebody, when you're acting in the spirit of revenge. This is never justified. And the detectives confirm it. So, you know, the first stab is in the back, back of her neck. Yes. You said before you stabbed her, you poisoned me, you bitch. Yes. Where did you stab her first? Like in the neck; holding it in my right hand. How was she situated? She was like pointed the other way, so I like stabbed her in the neck. You were walking up behind her? Yeah. Yeah.

Ladies and gentlemen, there are no words that can make this justified, and that certainly does not. She was no threat. Were you saying anything to her? She was saying, do you need money, do you need money? He's not telling the detectives that she's saying any threat to him. She said you need money? The money you asked for, do you want the money?

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She made it fully downstairs, that landing right there, and then she slipped. What were you doing? Look at the bottom here. Following her down the stairs. Following that poor woman down the stairs.

She fled and he pursued. How did you hurt your [1393] finger? Fixing the knife; it was bent. She fled; he pursued, and continued to use excessive force. Where was she at? Did you stab her again after she was down there? Yeah. Yeah. Where did you stab her then? On the right side. She's already down on the ground. Call that excessive force, legally. Stabbed her in the

throat. She falls down. Did you stab her again when she was down there? Yeah. So she fell down the stairs after you cut her throat? Yeah. And he continues to talk about the excessive force. Are you leaned over her? Like yeah, yeah, I leaned over her.

He even admitted that he stabbed her in the mouth. There's no legal or factual reason that you can ever be justified in stabbing somebody in the mouth like that. Called 911; said, hey, got to throw it out there quick right, my best defense, antisocial, stabbed my mom because she, past tense, poisoned me. So you thought she was trying to poison you for three years and it hadn't worked? Yeah. Yeah. Okay. That's called a revenge for a prior wrong and she was not an eminent threat at all.

I confronted her one day and she put me in the mental hospital. How long ago was that? A week ago. A week ago Sunday. Yeah. This is not something that was eminent.

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[1394]And they questioned him why, why did you do this. You mad at her about something? No, I'm mad that she poisoned me. We call that revenge for a prior wrong. If you're angry about some perceived thing that happened, a mistaken belief that something bad had happened to you, you're not legally justified in acting upon it.

When did you write the note? Like the day she told me. She told me she poisoned me yesterday, that's why I killed her today. Then you smoked a cigarette and called 911 after you cleaned up? Yeah. That's what he did. Hey, Damian, what do you think happens from here? I go to jail, get sentenced for murder and like twenty-five to life.

Folks, call it what it is; you don't have to over think this one. His own words, twice now, label it exactly what it is, not a justified homicide but an intentional murder.

He even wants to know when he goes to court. When do I go to court? When do I face the music, so to speak? When do I face my charges?

He wanted to lie about the Target thing at first, remember? Oh, yeah, I forgot about that, forgot about that. How long ago was that? I don't know. Did you think it was okay to do that? No, I didn't. I thought [1395]it was wrong. You knew you were going to get in trouble for that? Yeah. Yeah. That wasn't a product of some delusion and don't take my word for it. Again, the defendant labels his actions exactly what they are, murder. Murder.

And we know that he lashes out justified and violently. He even talks about the Ombudsman, getting in a fight there. Tells Chris, love you, but I've got to kill you too. That threat is not the result of some delusional thinking. Wants you to believe this one is but the other ones are not.

Folks, the defendant is guilty. The overwhelming evidence has shown you precisely that. He also happens to be mentally ill. You should find him guilty but mentally ill. That's what the evidence has shown and now that you know the law, now that you know the law and understand what we're talking about, can you see how this fact pattern can never meet the insanity defense under the delusional compulsion test? It's not that you merely suffer from a delusion and that you are saying that you were compelled to act, right? That's not it.

There's something else very important there. First of all, it's got to be true that you felt compelled to act and it would have to be justified if it were true. This is never, ever, ever justified.

[1396]So let's talk about the importance of your verdict. I'm glad Mr. Kilgore brought it up. If you find the defendant not guilty by reason of insanity, the Court will commit him and the Court can release him. Okay. Can release him. Why? Because the two key words to not guilty by reason of insanity are what? First two, not guilty. A verdict of not guilty by reason of insanity means not accountable and at some future date, a Court could release him because he's not guilty. With the benefit of defense counsel, they can say look, they got him cured.

In other words, he is eligible to be released if you excuse his conduct versus the defendant being found guilty but mentally ill.

By chance if one of you might be feeling sorry for him because he happens to suffer from a mental illness, here's the good news. He's going to be evaluated by law and he's going to get treated, including hospitalization. This is going to happen in the Department of Corrections. You see the big distinction here?

Look, the Judge is going to tell you, you are not to consider sentencing. That's not for you; that's not your job. The Judge is going to absolutely tell you that. But he's also going to tell you that these are the consequences. On a not guilty by reason of insanity [1397]means not accountable, excused, perhaps subject to future release versus guilty but mentally ill. He is absolutely going to be evaluated and treated, potentially hospitalized.

So I'm about to stop talking, you guys are ready. I'm about to stop talking. But I want to give you some final thoughts before you go into your deliberations.

So I was thinking about this case the Sunday before we started this trial, and I'll tell you just a personal anecdote. I went to an event; the event was a charity event that I've been involved in for years. I take my kids, too. It's a good way to -- this is the time of year we need to teach, right, about doing good things, buying Christmas presents for needy kids or whatever. We got back in the car, me and my kids and I'm driving off and I couldn't help but think

about Diane McElrath. And this is the time of year when maybe our hearts are opened just a little bit more, right? Even with the snow storm and things that happened, you can't help but feel a little bit different around this time of year. In fact, they even say, this is true, they say this is a tricky time to have a jury trial for prosecutors because sometimes jurors might be inclined to make a wrong decision, the wrong decision because their hearts are open.

[1398]I was thinking about this burden and I stopped, I stopped myself. I said, you know what, I'm not going to be selfish about this. We're going to try our case like we know we should. We're going to give this future jury all of the tools that they need to make a right decision. We're going to trust that Judge Green in his experience is going to give them the appropriate law. We're going to give that to them and know that the system works when they find the defendant guilty but mentally ill. That's the mental state that I was going through on the Sunday before we started jury selection.

And then I started thinking about you all, but I didn't even know you yet. I was thinking about you all as perspective jurors and blank faces that I hadn't seen yet. And I started thinking about the burden a little bit differently than what we've been talking about, like burdens of proof and things like that. I'm going to talk about a burden for you that started probably about, I guess, sixty days ago at your mailbox. Remember? You go to the mailbox and you open it up. What is this from the State, right? And there it is, jury summons, right? And probably immediately you had this feeling of, oh, I can't

believe it. I've got to go to jury service, right? It was a little bit of a burden then, no more than probably a scheduling burden than anything else at [1399]that point, right? You're thinking about this is going to be a burden. You probably thought, okay, I'm going to come to court; we'll go through this. Maybe I'll be here a day or two, right? But probably not really actually have to serve on a jury, right? Probably excuse me after a couple of days or so.

Then as they line up jury panel whatever, you had a different panel number down there and you thought all right, this is getting real now. I'm about to go to a courtroom. I bet the burden that you were feeling felt a little bit tighter then. We can acknowledge this and talk about it.

But Judge Green read that indictment and you heard the words malice murder. I bet some of you all started to feel a little different as this burden, this weight was being thrust upon you. And then after jury selection was over, your names get called. You realize I'm going to the jury box, this has just happened.

I wonder how many of you thought this thought, not me. Surely not me. This isn't really happening.

Then you heard the opening statement and you started looking at those photographs. I acknowledge that that's a real burden for anyone to deal with. It's a burden that the State felt before the trial of this case. The burden creeps out of your mind sometimes. I [1400]bet you this weekend probably, even with the Judge's instructions, you kind of

get it out of your mind. It's probably hard to get some of those images out of your mind. It will probably be a long time, a long time, if ever, before that dissipates for me.

Ladies and gentlemen, know this, do not confuse that feeling that you may have been feeling, the feeling that you might be feeling now as something that it is not. That feeling, that burden, that weight that you're feeling is your compassion. It's the part of you that says, I've seen something really horrible here.

Do you know what it is not? It's not doubt. It's not. Y'all know the facts of this case now better than anyone else in the world. And you know the law now as I've explained it to you, as the Judge will give you.

We try to help you with this burden, we, the State, by giving you all the tools that you need to make this easier for you. And don't confuse any weight that you might be feeling as doubt because it is not.

I want to flip it because I know I've just talked to you about a lot of negative things and I'm a positive person. This is my nature. You have to be to do this type of job. To be the major crimes prosecutor and handle these kind of cases, you've got to find some positive. I'm going to give it to you now.

[1401]With great burdens, come great opportunities. With great burdens, come great opportunities. A burden may have been placed on you in the fact that you are now the jurors that are about to try the State of Georgia

versus Damian McElrath. With great burdens come great opportunities and you have the greatest of these. You see, as powerful as Judge Green is, as powerful as we think we may be with our badges and working with law, as proud as we may be to do all of these things, we can only do so much. Bring justice to this woman and to her family. With great burdens come great opportunities. You have the greatest.

You have suddenly become the most powerful people in the courtroom because only you, not me, not the Judge, not anyone else, only you can hold this woman's murderer accountable for what he did. Only you, ladies and gentlemen, are powerful enough to do that.

The defense talked about empowerment. With great burdens come great opportunities and you have the largest of these here today.

And so to make this easier on you as you think about this, and we acknowledge that there is a burden that's been placed here. We're not talking about burdens of proof now, right? We're talking about something else.

[1402]I want to remind you of something. I want to remind you that you took an oath and the State would ask only that you follow your oath. That's all that we're asking. We're not asking anything more than that. So really for us, jury selection began -- a closing argument began in jury selection, okay. Let's think about it this way. The last general question that I asked you, do each of you agree and you were given an oath, you would listen to the facts and you would apply the law? Do you remember that? Did

you know that every single person on this panel promised me under oath that you would do that? Every single one of you.

And then the Judge gave you another oath on Tuesday when you were actually seated as a juror. You shall well and truly try this case based on the facts and the law and a true verdict render, so help you God.

Ladies and gentlemen, you have the tools. We've carried our burden. We ask only one more responsibility of you; do your duty and follow your oath. It's as easy as that. And inescapably, looking at the overwhelming evidence that we have here, and the Judge's law that he's about to give you, you cannot come to any other conclusion than the defendant is guilty of murder but mentally ill.

With that, the form of your verdict should be as [1403] follows, as to each count of the indictment, convict that man, he is guilty. He also happens to be mentally ill. Find him guilty but mentally ill. It's what the facts show. It's what the law requires. It is what justice demands.

THE COURT: All right. Ladies and gentlemen, the next step would be for me to charge you all on what the law is that you must apply in this case. That takes probably about fifteen to twenty minutes. Can everybody make it for another fifteen or twenty and then what we'll do is we'll let you take a break or eat lunch or be in your deliberations, whatever you all decide.

So is everybody good to go for another fifteen or twenty minutes? Is there anybody that needs an emergency break?

(No response.)

THE COURT: Excellent. Okay. Just stand up for me real quick to stretch your legs and then I'll go ahead and charge you.

(Whereupon, jury complies with request.)

THE COURT: All right. Ladies and gentlemen, if y'all are good to go we'll get started.

Folks out in the gallery, I'm going to charge the jury now. I would prefer there not to be any interruptions while I charge the jury. So if you want [1404]to stay, please stay for the whole charge. If you don't want to stay, if you'd leave now, I'd appreciate it.

Also, ladies and gentlemen, you're not going to have a copy of the law with you back there. I'm going to charge you on the law now. So whatever works best for you to remember the law as I charge you right now, please make every effort to listen carefully and do that now.

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[1405]CHARGE OF THE COURT

THE COURT: You're considering the case of the State of Georgia versus Damian Cornell McElrath. The Grand Jury has indicted the defendant with the offenses of murder, felony murder, and aggravated assault. I previously read the indictment to you and you'll have a copy back in the jury room with you during deliberations.

The defendant has entered a plea of not guilty to this indictment. The indictment and the plea form the issue that you are to decide. Neither the indictment nor the plea of not guilty should be considered as evidence.

The defendant is presumed to be innocent until proven guilty. The defendant enters upon the trial of the case with a presumption of innocence in his favor.

This presumption remains with the defendant 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 offense 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 [1406]essential element of the crime charged beyond a reasonable doubt.

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There is no burden of proof upon the defendant whatsoever and the burden never shifts to the defendant to introduce evidence or to prove innocense. However, the state is not required to prove the guilt of the accused beyond all doubt or to a mathematical certainty.

A reasonable doubt means just what it says. A reasonable doubt is a doubt of a fair-minded impartial juror honestly seeking the truth. A reasonable doubt is a doubt based upon common sense and reason. It does not mean a vague or arbitrary doubt but is a doubt for which a reason can be given arising from a consideration of the evidence, a lack of evidence or a conflict in the evidence.

After giving consideration to all of the facts and circumstances of this case, if your minds or wavering, unsettled or unsatisfied then that is the doubt of the law and you must acquit the defendant. But if that doubt does not exist in your minds as to the guilt of the accused then you would 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.

Members of the jury, it is my duty and responsi-[1407] bility to determine the law that applies to this case and to instruct you on the law. You are bound by these instructions. It is your responsibility to determine the facts of the case from all of the evidence presented. Then you must apply the law I give you in this charge to the facts as you find them to be.

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Your oath requires that you will decide this case based on the evidence. Evidence is the means by which any fact that is put in issue is established or disproved. Evidence includes all of the testimony of the witnesses and any exhibits admitted during the trial. Stipulations of the attorneys, that is, any facts to which the attorneys have agreed with the approval by the Court. Evidence does not include the indictment, the plea of not guilty, opening or closing remarks of the attorneys or questions asked by the attorneys.

Evidence may be either direct or circumstantial or both. In considering the evidence, you may use reasoning and common sense to make deductions and reach conclusions. You should not be concerned about whether the evidence is direct or circumstantial.

Direct evidence is the testimony of a person who asserts that he or she has actual knowledge of a fact such as by personally observing or otherwise witnessing [1407] that fact.

Circumstantial evidence is proof of a set of facts and circumstances that tend to prove or disprove another fact by inference, that is, by consistency with such fact or elimination of other facts. There is no legal difference in the weight you may give to either direct or circumstantial evidence.

The jury must determine the credibility of witnesses. In deciding this you may consider all of the facts and circumstances of the case, including the witness's manner

of testifying, their means and opportunity of knowing the facts about which they testify, the nature of the facts about which they testify, the probability or improbability of their testimony, their interest, or lack of interest in the outcome of the case and their personal credibility as you observe it.

Testimony has been given in this case by certain witnesses who are termed experts. Expert witnesses are those, because of their training and experience, possess knowledge in a particular field that is not common knowledge or known to the average citizen. The law permits expert witnesses to give their opinions based upon that training and that experience. You are not required to accept the testimony of any witnesses, [1409] expert or otherwise. Testimony of an expert, like that of all witnesses, is to be given only such weight and credit as you think it is properly entitled to receive.

The credibility of a witness may be attacked by disproving the facts to which the witness testified. Your assessment of a trial witness's credibility may be affected by comparing or contrasting that testimony to statements or testimony of that same witness before the trial started. It is for you to decide whether there is a reasonable explanation for any inconsistency in a witness's pretrial statements and testimony when compared to the same witness's trial testimony.

As with all issues of witness credibility you, the jury, must apply your common sense and reason to decide what testimony you believe or do not believe.

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The defendant in a criminal case may take the stand and testify and be examined and cross-examined as any other witness. You would evaluate such testimony as you would that of any other witness. However, the defendant does not have to present any evidence, nor testify. If the defendant chooses not to testify, you may not consider that in any way in making your decision.

Sometimes evidence is admitted for a limited purpose. Such evidence may be considered by the jury for the sole issue or purpose for which the evidence is [1410]limited and not for any other purpose. In order to prove it's case, the State must show intent, must negate or disprove the insanity defense and the justification defense and may show motive. To do so, the State has offered evidence of other crimes, wrongs, acts allegedly committed by the accused. You are permitted to consider that evidence only insofar as it may relate to those issues and not for any other purpose. You may not infer from such evidence that the defendant is of a character that would commit such crimes. The evidence may be considered only to the extent that it may show the elements and issues that the State is required or authorized to prove in the crimes charged in the case now on trial. Such evidence, if any, may not be considered by you for any other purpose.

The defendant is on trial for the offenses charged in this bill of indictment only and not for any other acts, even though such acts may incidently be criminal or may have resulted in a conviction.

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Before you may consider any other alleged acts for this limited purpose or these purposes, you must first determine whether it is more likely than not that the accused committed the other alleged acts. If so, you must then determine whether the act sheds any light on the elements of the offense or issues for which the acts [1411] were admitted in the crimes charged in the indictment in this trial. Remember to keep in mind the limited use and the prohibited use of this evidence about other acts of the defendant. By giving this instruction the Court in no way suggests to you that the defendant has or has not committed any other acts, nor whether such acts, if committed, prove anything. This is solely a matter for your determination.

Evidence of prior difficulties between the defendant and the alleged victim and/or a witness have been admitted for the sole purpose of illustrating, if they do, the state of feelings between the defendant and the alleged victim or witness. Whether this evidence illustrates such matters is a matter solely for you, the jury, to determine, but you're not to consider such evidence for any other purpose.

This defendant is charged with a crime against the laws of this state. A crime is a violation of a statute of this state in which there is a joint operation of an act and intention.

Intent is an essential element of any crime and must be proved by the state beyond a reasonable doubt. Intent may be shown in many ways provided you, the jury, believe that it existed from the proven facts before you. It may

be inferred from the proven circumstances [1412]or by acts and conduct or it may be, in your discretion, inferred when it is the natural and necessary consequence of the act. Whether or not you draw such an inference is a matter solely within your discretion.

Criminal intent does not mean an intention to violate the law or to violate a penal statute, but means simply the intention to commit the act that is prohibited by a statute.

This defendant will not be presumed to have acted with criminal intent, but you may find such intention or the absence of it upon a consideration of words, conduct, demeanor, motive, and other circumstances connected with the act for which the accused is being prosecuted.

Every person is presumed to be of sound mind and discretion, but this presumption may be rebutted. You may infer if you wish to do so, that the acts of a person of sound mind and discretion are the product of that person's will and a person of sound mind and discretion intends the natural and probable consequences of those acts. Whether you make such an inference or inferences is a matter solely within your discretion.

The law provides that criminal actions shall be indicted and tried in the county in which the crime was committed. Venue, that is the crime was committed in [1413]Cobb County, is a jurisdictional fact that must be proved by the state beyond a reasonable doubt as to each crime charged in the indictment just as any element of the offenses.

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Malice murder. A person commits murder when that person unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of another human being which is shown by external circumstances capable of proof. Malice may, but need not be implied when no considerable provocation appears and when all of the circumstances of the killing show an abandoned and malignant heart.

It is for the jury to decide whether or not the facts and circumstances of this case show malice. To constitute murder, the homicide must have been committed with malice. Legal malice is not necessarily ill will or hatred, but it is the unlawful intention to kill without justification, excuse, or mitigation.

If a killing is done with malice, no matter how short a time the malicious intent may have existed, such killing constitutes murder. Georgia law does not require premeditation and no particular length of time is required for malice to be generated in the mind of a [1414]person. It may be formed in a moment and instantly a mortal would may be inflicted. Yet if malice is in the mind of the accused at the time of the doing of the act or killing and moves the accused to do it, such is sufficient to constitute the homicide as murder.

Proof of a particular motive is not essential to constitute the crime of murder. Evidence of motive, if any, is admitted for your determination as to whether or not it establishes the state of the defendant's mind at the time of the alleged homicide.

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Felony murder. A person also commits the crime of murder when, in the commission of a felony, that person causes the death of another human being with or without malice. Under the laws of Georgia, aggravated assault is a felony and will be defined by the Court momentarily.

If you find and believe beyond a reasonable doubt that the defendant committed the homicide alleged in this bill of indictment at the time the defendant was engaged in the commission of the felony of aggravated assault, then you would be authorized to find the defendant guilty of felony murder, whether the homicide was intended or not.

In order for a homicide to have been done in the commission of this particular felony, there must be some [1415]connection between the felony and the homicide. The homicide must have been done in carrying out the unlawful act and not collateral to it. It is not enough that the homicide occurred soon or presently after the felony was attempted or committed. There must be such a legal relationship between the homicide and the felony so as to cause you to find that the homicide occurred before the felony was at an end or before any attempt to avoid conviction or arrest for the felony. The felony must have a legal relationship to the homicide, be at least concurrent with it in part and be a part of it in an actual and material sense.

A homicide is committed in the carrying out of a felony when it is committed by the accused while engaged in the performance of any act required for the full execution of the felony.

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Aggravated assault. A person commits the offense of aggravated assault when that person assaults another person with a deadly weapon. To constitute such an assault, actual injury to the alleged victim need not be shown. It is only necessary that the evidence show beyond a reasonable doubt that the defendant attempted to cause a violent injury to the alleged victim or intentionally committed an act that placed the alleged victim in reasonable fear of immediately receiving a [1416]violent injury.

The state must also prove as a material element of aggravated assault as alleged in this case that the assault was made with a deadly weapon. A knife, if and when used in making an assault upon another person, is not a deadly weapon per se, but may or may not be a deadly weapon, depending on the manner in which it is used and the circumstances of the case. You may infer the lethal and/or serious injury producing character of the instrument in question from the nature and extent of the injury inflicted upon the person attacked. Whether under all of the facts and circumstances of this case the knife alleged in this bill of indictment to have been used in making an assault upon the alleged victim did, in fact, constitute a deadly weapon, likely to cause serious bodily injury, is a matter to be decided by the jury from the evidence in this case.

In deciding whether the alleged instrument was a weapon capable of causing death or serious bodily injury, you may consider direct proof of the character of the weapon and the exhibition of it to the jury, evidence of the nature of any wound or absence of wound or other evidence of the capabilities of the instrument.

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Every person is presumed to be of sound mind and discretion however, this presumption may be rebutted. If [1417]you find at the time of the alleged criminal act the defendant was suffering from insanity or mental illness, then you shall determine whether the defendant is not guilty, not guilty by reason of insanity, guilty beyond a reasonable doubt but mentally ill, or guilty beyond a reasonable doubt. The law makes a distinction between being insane at the time of the commission of the alleged criminal act and being mentally ill at the time of the alleged act. Therefore, it is necessary that you understand this distinction.

A person shall not be found guilty of a crime if at the time of the act constituting the crime that person did not have the mental capacity to distinguish between right and wrong in relation to the act.

In regard to the question of sanity or insanity at the time of the alleged criminal act, there is a test to determine whether the person is suffering such a degree of insanity that the person is not capable of committing a crime. The test is whether the insanity was such that it deprived that person of the mental capacity to distinguish between right and wrong in relation to the act that the person allegedly committed.

The perpetrator may be what is commonly referred to as insane in a loose and general sense, yet in the eyes of the law, he may be sane and responsible so far as the [1418]act in question is concerned if at the time of the commission of the alleged act the accused had sufficient capacity to

distinguish between the right and wrong of the particular act. This is a question of fact to be determined by you.

Mere weak mindedness, mental abnormality or mental state shown only by repeated unlawful, or antisocial conduct which does not amount to insanity is not a defense to a crime if the person had the mental capacity to distinguish between right and wrong in relation to the alleged offense when the alleged offense was committed.

Insanity may be only a temporary malady and if the accused did not have sufficient mental capacity to distinguish between right and wrong with reference to the act alleged in the indictment at the time that the act was committed, then the accused would not be criminally responsible. The test of criminal responsibility is the condition of the mind of the accused at the time of the commission of the alleged act.

If a person of unsound mind has intervals of understanding during which that person can distinguish between the right and wrong of a particular act, then that person shall answer for that act if it was [1419]committed during those periods of understanding.

If due to an infliction of the mind a person's mind is so impaired that the person is incapable of forming the intent to commit the act with which he is charged or to understand that a certain consequence would likely result from that act, then that person would not be criminally responsible for the act.

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The defendant has the burden of proving insanity by a preponderance of the evidence. If you believe beyond a reasonable doubt that the defendant committed the act charged in this bill of indictment, but also believe by a preponderance of the evidence that at the time of the commission of this act the defendant was mentally incapable of distinguishing between right and wrong regarding this particular act, then it would be your duty to acquit the defendant because of insanity.

I've already defined what beyond a reasonable doubt means, now let me tell you what preponderance of the evidence means. It means evidence on the issues involved that while not enough to free the mind 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.

If you find the defendant not guilty by reason of insanity, then you must specify this in your verdict and [1420]your deliberations cease. In that event, the form of your verdict would be we, the jury, find the defendant not guilty by reason of insanity.

There is an exception to the rule that I have just given you. If a person has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, but because of some mental delusion the person's will was overpowered so that there was no criminal intent to commit the act in question, that person cannot be held criminally responsible for that act. In that regard, a person shall not be found guilty of the crime when at the time of the act constituting the crime that

person, because of mental disease, injury, or congenital deficiency, acted because of a delusional compulsion that over powered the person's will to resist committing the crime.

However, a person who suffers from periodic mental delusions may not intentionally and voluntarily induce delusion or mental disorder and then be excused from the commission of a criminal act committed during the delusional episode. If such a person intentionally and voluntarily induces the delusion with the intent and expectation that the conduct during the delusional episode will be excused because of the delusion and while under the influence of the induced delusion, that [1421]person commits a criminal act, then the person is criminally responsible for the criminal act.

In order for mental delusion or delusional compulsion to constitute a defense, it must appear not only that the accused was actually laboring under delusion at the time of the commission of the alleged criminal act, but that the alleged criminal act itself was connected with the particular delusion under which the accused was then laboring and that the delusion was as to a fact that if true would have justified the alleged act by the accused. This is a question of fact to be determined by you.

The fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct. The defense of justification can be claimed when the person's conduct is justified in self-defense.

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A person is justified in threatening or using force against another person when and to the extent that he reasonably believes that such threat or force is necessary to defend himself against the other's eminent use of unlawful force.

A person is justified in using force that is intended or likely to cause death or great bodily harm only if that person reasonably believes that such force is necessary to prevent death or great bodily injury to [1422]himself or to prevent the commission of a forcible felony.

The state has the burden of proving beyond a reasonable doubt that the defendant was not justified. A person is not justified in using force if that person is attempting to commit or is committing an aggravated assault, as I previously defined, or was the aggressor.

To justify a homicide, it is not essential that there be an actual assault made upon the defendant. Threats accompanied by menaces, though the menaces do not amount to an actual assault may in some instances be sufficient to arouse a reasonable belief that one's life is in eminent danger or that one is in eminent danger of great bodily injury or that a forcible felony is about to be committed upon one's person.

Provocation by threats or words alone will in no case justify the homicide or be sufficient to free the accused from the crime of murder when the killing is done solely in resentment of the provoking words.

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Whether the killing was done under circumstances that would be justified or was done solely as a result of and in resentment of threats or provoking words alone is a matter for you, the jury, to determine. If you believe that the defendant was justified then it would be your duty to acquit the defendant.

[1423]The use of excessive or unlawful force while acting in self defense is not justifiable and the defendant's conduct in this case would not be justified if you find that the force used exceeded that which the defendant reasonably believed was necessary to defend against the victim's use of unlawful force, if any.

A person has the right to defend himself, but a person is not justified in deliberately assaulting another person solely in revenge for a past or previous wrong regardless of how serious the past or previous wrong might've been when the episode involving the previous wrong has ended. Such person is not justified in acting out of revenge by deliberately seeking out and assaulting the alleged wrongdoer.

If you find from the evidence in this case that the defendant used force against the alleged victim named in this indictment in order to prevent an impending wrong that the defendant reasonably believed was about to be committed by such other person and that the defendant reasonably believed that such force was necessary in order to prevent such impending wrong, death, or great bodily injury to the defendant or to prevent the commission of a forcible felony, then that use of force would be justified

and it would be your duty to find the defendant not guilty by reason of insanity.

[1424]On the other hand, if you believe beyond a reasonable doubt from the evidence in this case that the defendant used force against the alleged victim named in the indictment in the manner alleged in the indictment for the sole purpose of avenging a past or previous wrong regardless of how serious such previous wrong may have been and not for the purpose of preventing death or great bodily injury to the defendant, then you would be authorized to convict the defendant.

In applying the law of self-defense, a defendant is justified to kill or use force against another person in defense of self. The standard is whether the circumstances were such that they would excite not merely the fears of the defendant, but the fears of a reasonable person. For the killing or use of force to be justified under the law, the accused must truly have acted under the influence of these fears and not in a spirit of revenge.

What the facts are in this case is a matter solely for you, the jury, to determine given all of the circumstances of this case.

I charge you that if you find from the evidence that the defendant suffered from a delusional compulsion at the time of the offense, you may consider that evidence in connection with the defendant's claim of [1425]insanity. Such evidence relates to the issue of the reasonableness of the defendant's belief that the use of force was immediately

necessary even though no use of force against the defendant may have been, in fact, eminent. The standard is whether the circumstances were such that they would excite the fears of a reasonable person possessing the same or similar psychological and physical characteristics as the defendant and faced with the same circumstances surrounding the defendant at the time the defendant used force.

If you believe this defendant committed the act charged in this bill of indictment but at the time the defendant was actually laboring under a mental delusion and that the act was connected with that delusion and that the delusion was as to a fact that if true would have justified the alleged act by the accused, then you should find the defendant not guilty by reason of insanity. In this event, your deliberations will cease and the form of your verdict would be we, the jury, find the defendant not guilty by reason of insanity.

The defendant has the burden of proving insanity by a preponderance of the evidence. Again, the preponderance of evidence means evidence on the issues involved that while not enough to free the mind from a reasonable doubt, is yet sufficient to incline a [1426]reasonable and impartial mind to one side of the issue rather than to the other.

I charge you that should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, that the Court is satisfied that he should be released pursuant to law.

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If and only if you do not find the defendant not guilty by reason of insanity, then you may consider whether or not the defendant was mentally ill. As to being mentally ill at the time of the act alleged in the indictment, the term mentally ill means having a disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality or ability to cope with the ordinary demands of life. The term mentally ill does not include a mental state shown only by repeated unlawful or antisocial conduct.

Under the evidence and the Court's instructions, if you believe beyond a reasonable doubt that the defendant is guilty and was mentally ill at the time of the commission of the offense, then you would be authorized to find the defendant guilty but mentally ill at the time of the crime.

If this is your finding then you must specify it in your verdict and the form of your verdict in that event [1427] would be, we, the jury, find the defendant guilty but mentally ill at the time of the crime.

I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be placed in the custody of the Department of Corrections which will have responsibility for the evaluation and treatment of the mental health needs of the defendant which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental Disabilities.

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Any evidence as to the sanity, insanity, or mental illness of the defendant is to be considered by you, along with all of the other evidence in this case. If the evidence as a whole raises a reasonable doubt as to the defendant's guilty, the doubt must be resolved in favor of the accused.

You will have a verdict form with you in the jury room. It contains four options for each of the three charges. You will place a check next to the one that you unanimously find for each of the three counts.

Now, please write in ink, whoever the foreperson is; write in ink so that it's very clear and make sure to check only one for each of the different crimes [1428]charged in the indictment.

By no ruling or comment that the Court has made during the progress of the trial has the Court intended to express any opinion upon the facts of this case, upon the credibility of the witnesses, upon the evidence or upon the guilt or innocence of the defendant.

Your verdict should be a true verdict based upon you opinion of the evidence according to the laws given you in this charge.

You are not to show favor or sympathy to one party or the other. It is your duty to consider the facts objectively without favor, affection, or sympathy to either party. In deciding this case, you should not be influenced by sympathy or prejudice.

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You are only concerned with the guilt or innocence of the defendant. You are not to concern yourselves with punishment.

One of your first duties in the jury room will be to select one of your number to act as foreperson who will preside over your deliberations and who will sign the verdict to which all twelve of you freely and voluntarily agree.

You should start your deliberations with an open mind. Consult with one another and consider each others views. Each of you must decide this case for yourself, [1429]but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if you are convinced that it is wrong. However, you should never surrender an honest opinion in order to be congenial or to reach a verdict solely because of the opinions of the other jurors.

Whatever your verdict is, it must be unanimous, that is, agreed to by all. The verdict must be in writing and signed by one of your members as foreperson, dated and returned to be published in open court.

Again, I've provided a verdict form that you'll have back there. Please be sure to sign the verdict form in ink and fill it out in ink.

Two of your number have been designated as alternate jurors for these proceedings. That's Shanice Franks and David MCCullough; you are the alternate

jurors in the case. This means that you will be required to remain sequestered away from the other jurors during deliberations.

If at any time one of the other jurors should become incapacitated, disqualified, or otherwise unable to fulfill his or her duties, then Ms. Franks or Mr. McCullough, you will be substituted in that juror's place. In such circumstances, you all would begin your [1430]deliberations over allowing the alternate juror the opportunity to deliberate from the beginning.

Ms. Franks and Mr. McCullough, while you are sequestered, do not discuss the case with anyone. Don't look anything up. All the same instructions apply.

In just a second you're going to retire to the jury room, but do not begin your deliberations until you receive the indictment, verdict form, and any evidence that's been admitted in the case to go back there with you.

Like I said, we've ordered lunches. I think I told them 12:30. It's 12:30 now, so the lunches may arrive. I know there's at least one smoker and there's one mom that needs time. So if you all need to take a fifteen minute break and go use restrooms, and go have a cigarette, stretch your legs, whatever, before you start, that's fine. If you want to jump right into deliberations, eat your lunch while you're doing deliberations, that's fine. You all decide that, okay? You're in charge now. We've all done our part, now it's up for you all to make those decisions and do those things.

So we're going to take you back there. The two jurors will be sequestered away from the other jurors. Again, don't start until we give you all the things to [1431]start with.

(Whereupon, jury exits courtroom at 12:30 p.m.)

THE COURT: All right. Any objections to the charge that have not already been covered at the precharge conference?

MR. KILGORE: I'm going to renew my objections from the charge conference in total, but I'd like to specifically point out one or two things real quickly, if I could, Judge.

THE COURT: Okay.

MR. KILGORE: Definitely, I'm objecting that the Court gave 3.80.20 and that is the right and wrong affirmative defense. Based on the Court now giving that charge, I'm going to ask for a mistrial and this is why. The Court has now charged the jury on an affirmative defense which was not raised, proffered, and argued by the defense. And the problem is that within that charge it tells the jury, and I'm looking on page eleven. It says the defendant has the burden of proving insanity by a preponderance of evidence. That is embedded within the right/wrong affirmative defense. So that is essentially placing right before them a burden on the defense which we should not have and do not have and that is to prove an affirmative defense which we have not raised, which we

have not argued. And so I would -- [1432]it's completely misleading, so I would object to that one and move for a mistrial now that the Court has given that charge.

As to revenge for a prior wrong, excessive force, we objected during jury selection of those. I'm definitely going to object to those again at this point. And I'm objecting to the Court's declining to give our defense number seven which was verdict, guilty but mentally ill is substantially indistinguishable from any other guilty verdict with respect to the convicted person's culpability and the punishment to be imposed.

MR. EVANS: I don't have anything further to argue.

THE COURT: All right. The motion for a mistrial is denied.

Would you all look at all the evidence up here and tell me if there's anything that's missing? Make sure that you agree on what goes out and if not, bring it to my attention.

(Whereupon, attorneys review evidence)

THE COURT: All right. State's 184 and 185 are the knife, one of the knives collected behind the sink and then the butcher block. The State agrees that that doesn't need to go out?

MR. EVANS: No. I think it should go back to the jury.

[1433]THE COURT: You think it should?

MR. EVANS: Yes, sir.

THE COURT: Okay. We need those.

MR. EVANS: We are removing the two 911 disks. That'll be State's 1 and 2.

State's 20, it's the phone examination, the electronic version of that. The defense has asked that I remove a text exchange from July the 12th where the defendant was asking for spice. It's two pages. At their request, I'm removing that.

263, unredacted, 264A.

194 is the custodial interview and then 195 is the transcript of that interview. Those are the items that are not going to go out.

I'll label the text exchanges 20, with a parenthetical A.

THE COURT: Mr. Kilgore, you agree on behalf of the defense those items should not go out?

MR. KILGORE: Yes, sir.

THE COURT: All right. The rest of the items, everybody agrees, they should go out?

MR. EVANS: Yes.

MR. KILGORE: Yes, sir.

THE COURT: All right.

MR. EVANS: Ms. Corbitt is here from the Clerk's [1434]Office with the knives.

THE COURT: Bring those on over, if you would please.

THE CLERK: And then we have the verdict form and the indictment.

THE COURT: Do y'all want to look again at the verdict form and the indictment?

(Whereupon, attorneys comply with request)

THE COURT: On behalf of the State, do you agree the verdict form and the indictment are the right ones?

MR. EVANS: Yes.

THE COURT: And the defense?

MR. KILGORE: Yes, sir.

THE COURT: Okay. All right. We're going to send all that out with them. We just gave them food, so my guess is you've got -- it's not going to be the usual quick question. You probably have a good thirty minutes to go eat if you want to go grab some food and then we'll just call you if they come back with a question.

Judge Poole is going to take over for me in thirty minutes. So Judge Poole will handle whatever questions come and take the verdict if there is one today.

MR. KILGORE: Have a nice trip, Judge.

THE COURT: Thank you.

MR. EVANS: Enjoy your trip.

[1435](Whereupon, the Court stands in recess as the jury deliberates at 1:00 p.m. until they return a question at 2:20 p.m.)

THE COURT: All right. The record can reflect that the defendant is in the courtroom. I'm Judge Poole. I've come down to assist with the trial.

We have a note. Open quote, can we have a copy of the terms of the insanity law? close quote.

So I assume that they were charged on insanity?

MR. EVANS: That's correct. The defense has raised an insanity defense based on the delusional compulsion test.

THE COURT: Okay. All right. So they've been fully charged. It's my understanding Judge Green does not send the charge out?

MR. RODRIGUEZ: That's correct.

MR. EVANS: Correct.

THE COURT: All right. What's the State's suggestion in response?

MR. EVANS: I don't want to put the Court in a position where you're doing something at odds with what Judge Green has already told us that he would not provide them with a written copy of the law, so my recommendation would be to respond back with a note saying that we're not going to -- at present we're not [1436]going to provide you with a copy of the charges but we can bring you in the courtroom and re-read the insanity law. And then I can point the Court to the appropriate portions of law at that point.

MR. KILGORE: I think the difficulty is going to come with the parties agreeing on what would have to be read. What we would contend would be responsive to that question, which is the insanity law, but I don't think it's going to be perhaps a little more restrictive than what the State's going to suggest that question might encompass.

THE COURT: Well, I mean, I could always tell them that you can't have a copy of the law and Judge Green already instructed you on the law, see what happens.

MR. EVANS: I do think that they need to have the option to consider whether they want to further inquire, can we come back in the courtroom and hear it. That's the only addition I would have.

THE COURT: Offer them the possibility of a recharge and then I would just have to determine what to charge?

MR. EVANS: Right. So step B, which Mr. Kilgore is pointing to is all right, now we need to discuss what the appropriate law to charge is.

MR. KILGORE: Could I see the note Judge?

[1437]THE COURT: Yes. We'll enter it as Court's Exhibit 1, I guess.

THE CLERK: It's eight.

(Court's Exhibit Number 8 Identified for the record)

THE COURT: Court's whatever number it is. I'm looking at the charges as we sit here.

Does Judge Green normally respond to a note with a note?

THE CLERK: He does. He just writes his answer on the bottom of the note.

THE COURT: Oh, does he?

THE CLERK: Yes.

THE COURT: I usually call them out, read the note out loud and answer it. We'll do it the way Judge Green does it.

(Brief pause in proceedings)

THE COURT: This is just something I roughed out, if I send them a note. You were given the law on the topic of insanity. You may not receive a copy of the law, however, I can recharge you on the law on that issue if you would like.

MR. EVANS: I'm satisfied with that.

THE COURT: Mr. Kilgore?

MR. KILGORE: Yes, sir.

[1438]THE COURT: So I'm going to write this myself at the bottom of their note.

MR. KILGORE: Judge, would you mind if we just looked at it?

THE COURT: No.

(Whereupon, attorneys review note.)

THE COURT: Is that okay with both of you?

MR. EVANS: Yes, sir.

MR. KILGORE: Yes.

(Whereupon, Bailiff returns note to the jury)

MR. EVANS: Judge, while they're doing that, I'm presently in motions down in Judge Ingram's courtroom.

THE COURT: Okay.

MR. EVANS: So I'll just wait for a minute and see if there's a prompt response, if not, then I'll be right down the hall.

THE COURT: That's fine. That's fine.

(Brief pause in proceedings; Bailiff returns with note from jury)

THE COURT: It says, open quote, yes, please.

Thank you.

So we'll take five minutes and I'll come -- well, let's talk about what to charge. I've got a copy, I presume, of the charge up here. Beginning at the bottom of page nine.

[1439]MR. EVANS: Yes.

THE COURT: Where it starts talking about insanity. It goes all the way through ten, through eleven, through twelve. Well, down to justification, I would think.

MR. EVANS: Judge, actually, in my opinion it includes that and doesn't wrap up until page seventeen at the top. You'll see that the pattern charge prompts you to give the justification definition which is why all of those are there.

And then you'll see that page fifteen includes, we start getting back into the actual insanity defense again. So I believe it's nine through seventeen.

MR. KILGORE: I'm going to object. I oppose that. I think that if they wanted -- as much as Mr. Evans argued about justification, I think if they wanted to be charged on justification, I think they would've asked for that.

I think you give them less and if they want more they'll ask for more, but I think it goes from the bottom of nine to the bottom of twelve. Those are the insanity charges. And then sort of the corollaries thereafter, some are better for the State, some may be better for the Defense, but I would suggest the Court not charge on those at this time because that's not what they asked for.

[1440]MR. EVANS: I disagree. If you look at page twelve, Judge, this is really, I know you're at kind of a bit of a disadvantage here. The defendant's insanity defense is based essentially on delusional compulsion. He claimed that he thought his mom had been poisoning him, so he stabbed her to death.

On the bottom of page twelve, just above justification, you'll see the last two sentences and is says, accused was then laboring and the delusion was to a fact that if true would have justified the alleged act of the accused. This is a question of fact to be determined by you, which is why the pattern charge thereafter prompts you as part of the insanity charge. This is imbedded in the insanity charge to also give the charge on justification which immediately follows that.

And then you'll see page fifteen is where you spill back out, so to speak, back into the insanity principles, through page seventeen. And of note, on page seventeen, and I was going to recommend this to the Court regardless, the last sentence on the top of page seventeen, actually there's a portion of the charge that says you must consider the evidence as a whole and I was going to urge the Court to also tell the jury that while you're specifically answering a question, you should consider the charge as a whole as well.

[1441]By the way Judge, to be fair, this was the position of the State during our charge conference as we discussed what law should be given and what law would not be given, and essentially over the defense's objection, the principles of justification we've just discussed are what Judge Green had decided to give.

MR. KILGORE: Well, I understand those portions were given, but what that's doing is that's pulling out one component and charging for pages, essentially, on self-defense.

They've asked for terms of insanity and Mr. Evans is asking that you recharge on excessive force, that you recharge on revenge for a prior wrong? That's -- I mean, we're getting way, way outside of what insanity is.

The terms are very clearly laid out in 3.80.10, 3.80.20, 3.80.30, and if they want more they can ask for more. But I think if you start getting into every -- well, let's charge on every little component, that's outside of what they're asking.

THE COURT: I'm not going to do that. I'm going to just charge them on the insanity. I'm going to go from the bottom of page nine to the bottom of page twelve, when they're ready.

Can I have some water up here?

[1442]THE BAILIFF: Yes, sir.

MR. EVANS: Judge, on page sixteen, there's an additional charge at the very bottom that says consider the evidence as a whole and actually right above that there's another insanity charge. You'll see it's entitled sanity, semicolon, mentally ill at the time of the alleged act. So I just didn't want the Court to omit portions of the insanity law.

THE COURT: So I would read 3.80.40?

MR. EVANS: Yes.

THE COURT: And 3.80.60?

MR. EVANS: Yes, sir.

And I understand the Court's ruling. Can I make another suggestion to the Court?

THE COURT: Yes.

MR. EVANS: The bottom of page twelve after you go through the insanity delusional.

THE COURT: Yes.

MR. EVANS: The State would ask that the jury be informed that if you need to question, one consider the law as a whole, two, if you have questions about justification, you would need to ask.

MR. KILGORE: I oppose you pinpointing the very thing that the State spent an hour arguing in closing argument. I think that --

[1443]THE COURT: I'm just going to give the charge on insanity. If they want something else, they've already shown that they know how to write a question out and they can ask for it.

MR. EVANS: Understood.

THE COURT: If they want it on justification, I'll charge them on justification.

MR. EVANS: Sounds good, sir.

MR. KILGORE: And Judge, not to nitpick, but if I could point out something on the top of page sixteen. If I understand what that letter says, it is asking for the terms of insanity.

THE COURT: That's what it says. It says the terms of the insanity law.

MR. KILGORE: Okay. The terms of the insanity law. Well, if you'll look at 3.80.40, what the Judge read to them was, if, and only if, you do not find the defendant not guilty by reason of insanity, then you may consider whether defendant was guilty but mentally ill. So our position would be that that charge deals with guilty but mentally ill. It does not deal with insanity. They are not the same thing.

See, they have to reject the insanity before they can even consider guilty but mentally ill. They didn't ask about that. They asked only about insanity.

[1444]Now, my guess is if they want -- if there's something specifically they're looking for and they don't hear it, they're going to ask us to re-read it. But we would oppose going outside of what they've requested.

THE COURT: I'll just stick to insanity. I won't read 3.80.40, but I will 3.80.60.

Do they know about me?

MR. EVANS: No, sir.

(Whereupon, jury enters the courtroom at 2:45 p.m.)

THE COURT: We've not met. I'm Judge Poole. Judge Green is on to something else that he's having to deal with right now. I'm waiting on a jury upstairs, so I told him that I would come down here and help you guys.

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You sent a note that says, open quote, can we have a copy of the terms of the insanity law, close quote. And I sent you back a note that said, no, but if you want to be recharged on that area, I can do it.

You've already been charged but oftentimes we'll come back and recharge just on a specific area of the law. So I think maybe that would help you? You're shaking your head up and down.

Before I do this, let me caution you, you've been given the entire charge. You are to consider the entire charge and not place any more emphasis on one part than [1445] the next. But I'll go ahead and go through this with you; hopefully it will help you.

Every person is presumed to be of sound mind and discretion. However, this presumption may be rebutted. If you find that at the time of the alleged criminal act the defendant was suffering from insanity or mental illness, then you shall determine whether the defendant is a) not guilty; b) not guilty by reason of insanity; c) guilty beyond a reasonable doubt but mentally ill; or d) guilty beyond a reasonable doubt.

The law makes a distinction between being insane at the time of the commission of the alleged criminal act and being mentally ill at the time of the alleged act, therefore, it is necessary that you understand this distinction.

A person shall not be found guilty of a crime if at the time of the act constituting the crime that person did not

have the mental capacity to distinguish between right and wrong in relation to that act.

In regard to the question of sanity or insanity at the time of the alleged criminal act, there is a test to determine whether the person is suffering such a degree of insanity that the person is not capable of committing a crime. The test is whether the insanity was such that it deprived that person of the mental capacity to [1446] distinguish between right and wrong in relation to the act that the person allegedly committed.

The perpetrator may be what is commonly referred to as insane in a loose and general sense, yet in the eyes of the law, he may be sane and responsible so far as the act in question is concerned if at the time of the commission of the alleged act the accused had sufficient capacity to distinguish between right and wrong of this particular act. This is a question of fact for you to determine.

Mere weak mindedness, mental abnormality, or mental state shown only by repeated, unlawful, and antisocial conduct which does not amount to insanity is not a defense to a crime if the person had the mental capacity to distinguish between right and wrong in relation to the alleged offense when the alleged offense was committed. Insanity may be only a temporary malady and if the accused did not have sufficient mental capacity to distinguish between right and wrong with reference to the act alleged in this indictment at the time the act was committed, then the accused would not be criminally responsible. The test of criminal responsibility is the

condition of the mind of the accused at the time of the commission of the alleged act.

If a person of unsound mind has intervals of [1447] understanding during which that person can distinguish between right and wrong of a particular act, then that person shall answer for that act as if it was committed during those periods of understanding. Excuse me. If it was committed during those periods of understanding.

If due to an affliction of the mind a person's mind is so impaired that the person is incapable of forming the intent to commit the act with which he is charged or to understand that a certain consequence would likely result from that act, then that person would not be criminally responsible for the act.

The defendant has the burden of proving insanity by a preponderance of the evidence. If you believe beyond a reasonable doubt that the defendant committed the act charged in this bill of indictment, but also believe by a preponderance of the evidence that at the time of the commission of this act the defendant was mentally incapable of distinguishing between right and wrong regarding this particular act, then it would be your duty to acquit the defendant because of insanity.

I have already defined what beyond a reasonable doubt means. Now let me tell you what preponderance of the evidence means. It means evidence on the issues involved that while not enough to free the mind from a reasonable doubt, is yet sufficient to incline a [1448]reasonable and impartial mind to one side of the issue or the other.

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If you find that the defendant -- excuse me. If you find the defendant not guilty by reason of insanity then you must specify this in your verdict and your deliberations would cease. In that event, the form of your verdict would be we, the jury, find the defendant not guilty by reason of insanity.

There is an exception to the rule that I have just given you. If a person has a reason sufficient to distinguish between right and wrong as to a particular act about to be committed, but because of some mental delusion the person's will was overpowered so that there was no criminal intent to commit the act in question, that person cannot be held criminally responsible for that act. In that regard, a person shall not be found guilty of a crime when at the time of the alleged act constituting the crime that person, because of mental disease, injury, or congenital deficiency acted because of a delusional compulsion that overpowered the person's will to resist committing the crime. However, a person who suffers, from periodic mental delusions may not intentionally and voluntarily induce delusion or mental disorder and then be excused from the commission of the criminal act committed during the delusional episode.

[1449]If such a person intentionally and voluntarily induces the delusion with the intent and expectation that the conduct during the delusional episode will be excused because of the delusion, and while under the influence of the induced delusion that person commits a criminal act, then the person is criminally responsible for the criminal act.

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In order for mental delusion or delusional compulsion to constitute a defense, it must appear not only that the accused was actually laboring under a delusion at the time of the commission of the alleged criminal act, but that the alleged criminal act itself was connected with the particular delusion under which the accused was then laboring and that a delusion was as to a fact that, if true, would have justified the alleged act by the accused. This is a question of fact for you to determine.

Any evidence as to the sanity, insanity, or mental illness of the defendant is to be considered by you along with all of the other evidence entered in the case. If the evidence as a whole raises a reasonable doubt as to the defendant's guilt, the doubt must be resolved in favor of the accused.

That would constitute my recharge on what you called the topic or issue of insanity. I'd ask that you [1450]return to the jury room and continue your deliberations.

If you have further questions, you did the right thing, write them down so we can read them.

(Whereupon, jury exits the courtroom to continue deliberations.)

THE COURT: Any objections by the State?

MR. EVANS: Nothing other than what --

THE COURT: Other than what you noted earlier?

MR. EVANS: Yes.

THE COURT: By the defense?

MR. KILGORE: Judge, I just want to make sure that it's clear that the defense is not acquiescing to any of the charges which we had originally objected to. And the reason why I bring that out, you weren't here as we had quite a bit of argument about the Judge charging on the right/wrong test --

THE COURT: Okay.

MR. KILGORE: -- because that wasn't raised. It's not an issue in this case. And so based on how that question came to us, I think you responded appropriately to the question that was asked. But we're not acquiescing or waiving our prior objections on that charge.

THE COURT: I understand completely.

MR. KILGORE: Just for the record. Thank you, [1451] Judge.

THE COURT: All right.

MR. KILGORE: But other than that, I don't have any other objections.

THE COURT: All right. Well, we'll stand down.

You can do what you need to do with Judge Ingram or whatever. They know how to get me; I'll be up in my chambers.

MR. EVANS: Thank you, sir.

(Whereupon, the Court stands in recess as the jury deliberates 2:55 p.m., until 5:15 p.m.)

THE COURT: All right. We're back on the record. The defendant is back in the courtroom. It's about almost fifteen after five. The record can reflect this is Monday, so I don't know why we'd stay here till midnight on a Monday.

What I would usually do in my courtroom, I would call them out here, let them know that it's 5:15 and give them two options. Option A would be y'all go home, get a good night's rest, you know, come back in the morning at 9:00 o'clock and as soon as all twelve of you are in the room, deliberate. And Option B is that if you think that you've made substantial progress and it would do any good to stay a little while longer, we could stay a little while longer.

[1452]But what's the State's position?

MR. EVANS: That seems like a good course of action, Judge.

THE COURT: You know, I mean, if they look over here and say, no, we want to say, we're close, then I'd let them do that.

MR. EVANS: Yes, sir.

THE COURT: And if they jump on the idea of going home, I'd let them do that.

What do you think?

MR. KILGORE: To be honest with you, rather than shuffling them back and forth, I don't care if you send a note in there that says that.

THE COURT: I don't do notes. I don't mind doing a note like I did earlier with Judge Green, but I like to look them in the eyes when I give them the choice. Because sometimes I'll even say, y'all just talk among yourselves and come up with a decision, you know, just let them talk it out. But if they're close enough, and I don't know anything about your case, obviously, but if they're close enough to where they think in an hour they can get this thing done, then I'll invest an hour of my time.

Just bring them on in here and let's talk.

THE BAILIFF: I have to go get the alternates.

[1453]THE COURT: After you get the alternates, bring them in.

(Whereupon, jury returns to the courtroom at approximately 5:15 p.m.)

THE COURT: All right. Let me go over the options that we have. There are basically two options. It's about 5:17. I know you've been working at it most of the day. I can do one of two things. If you think you've made substantial progress and you're close and you think you could stay a little while and reach a verdict, then we'll stay a little while. If not, then it's time to go home, have a good night's sleep, try to rest your minds a little bit, come back at 9:00 o'clock in the morning and start from then. I don't mind investing a little bit more time this evening, but not unless it makes sense. So you know whether it does or not; we don't.

Do you think it would do any good to stay a little while longer, or do you need to go home? What do you think? Go home?

A JUROR: Stay.

THE COURT: One wants to stay. Who's the foreperson? Just raise your hand.

(Whereupon, foreperson complies with request)

THE COURT: Do you have the sense, Madam [1454]Foreperson, that staying a little while longer might be beneficial?

FOREPERSON: I would say that I think we're at a point where we were getting somewhere and it would certainly be beneficial for us to at least finish where we were at.

THE COURT: What if I called you back in here at six o'clock, would that make sense? We already fed you lunch; we're not going to have time to feed you again, I don't think. If it were a Friday, I would. I'll call you back in at six o'clock.

Continue your deliberations.

THE COURT: Is there someone that can't stay till 6:00?

FOREPERSON: I think it's one of the alternates that can't stay until 6:00. I mean, if there is going to be an issue then --

THE COURT: But you guys on the trial jury, you're good to stay till 6:00 and I'll bring you back in and talk to you? Okay. Thank you.

(Whereupon, jury exits the courtroom at approximately 5:20 p.m.)

THE COURT: If there's an alternate with some sort of issue, I don't know that I would mind just letting the alternate go a little early. You've got two [1455]alternates?

MR. EVANS: We do.

THE COURT: I wonder if it's the first alternate or the second alternate?

THE CLERK: I think she's the first.

THE COURT: You think it's the first?

THE CLERK: She's the first alternate.

THE COURT: She is?

THE CLERK: Yes, sir.

THE COURT: Well, I mean, they were all in the courtroom just now and I laid it out there. Anybody who wanted to could've raised their hand to say, Judge, I can't stay till 6:00.

MR. EVANS: Right.

THE COURT: So we'll cross that bridge at six o'clock.

MR. EVANS: Sounds good, Judge.

THE COURT: All right. Thank you.

(Whereupon, Court stands in recess as the jury continues to deliberate at approximately 5:20 p.m.)

THE COURT: All right. We're back on the record. The defendant's in the courtroom. It's two minutes till 6:00. I guess Judge Green's clock is two minutes fast. No. I've got six o'clock, that clock's two minutes slow. I'm inclined to just bring them in and release [1456] them.

If they start pushing back and acting like they want a few more minutes, then I'll ask the foreperson, where are

you. But other than that, I'm not going to give them an option now, I'm just going to say I'm inclined to dismiss you and send you home.

MR. KILGORE: Bring them back at 9:00?

THE COURT: 9:00 o'clock. And I know with me, I instruct my bailiffs that as soon as the twelve are in that jury assembly room, just bring them straight up, let them deliberate. I don't need to take the bench and do anything; they just continue.

Wasn't there a problem with an alternate, someone told me? An alternate said she couldn't be here tomorrow, maybe or? Is that this case?

THE BAILIFF: I think what she was saying was that she couldn't stay after 6:00.

THE COURT: Okay.

THE BAILIFF: I believe that's what she was saying.

THE COURT: Okay.

MR. KILGORE: Are you going to give them some admonition not to look anything up?

THE COURT: I'll do my normal thing. Any problem with the Clerk leaving the evidence in the jury room as long as -- I mean, the door to the hallway will be [1457] locked; the courtroom will be locked.

THE CLERK: And the jury room will be locked.

THE COURT: Does it have a lock?

THE CLERK: It does.

THE COURT: Any problem as long as the jury room itself is locked?

MR. EVANS: Not at all.

MR. KILGORE: I've never encountered this request before. What would happen, would Marsha come up and unlock the jury room in the morning before they --

THE CLERK: The deputy will.

MR. EVANS: You've got the knives.

THE CLERK: I mean, the Bailiff will.

THE COURT: I don't see any problem with it, as long as it's locked.

MR. EVANS: The only thing I'd like the Sheriff's office to do is just check -

THE DEPUTY: She's going to call downstairs and talk to the supervisor and check.

MR. EVANS: There's a block of knives that are back there.

THE COURT: Oh.

THE CLERK: And a separate knife in a different envelope.

THE COURT: Well, what if you collected the knives?

[1458]THE CLERK: Okay.

THE COURT: Or let the -- would the Sheriff keep those or the Clerk?

MR. EVANS: The clerk.

THE COURT: Yes, so that's fine.

THE CLERK: Okay.

THE COURT: Do we have them?

(Brief pause in proceedings)

THE COURT: The Bailiff said he just opened the door to summon the jury and the Foreperson said we need ten or fifteen more minutes. Any problem with me having the Bailiff tell them that I'll call them back in at 6:20?

MR. EVANS: No, sir.

THE COURT: Mr. Kilgore?

MR. KILGORE: Yes.

THE COURT: Just tell them that the Judge said he's going to call you in at 6:20.

THE BAILIFF: 6:20.

THE COURT: 6:20. And tell them, and see where you are.

MR. EVANS: Yes.

THE COURT: All right.

(Whereupon, the Court stands in recess as the jury deliberates until 6:20 p.m., at which time the jury [1459] returns to the courtroom.)

THE COURT: Madam Foreperson, have you reached a verdict?

FOREPERSON: Yes, Your Honor, we have.

THE COURT: Hand it to the Bailiff, please.

(Whereupon, foreperson complies with request)

THE COURT: (Reviews verdict)

The Clerk will publish the verdict.

THE CLERK: Superior Court of Cobb County, State of Georgia, State of Georgia versus Damian McElrath, Indictment 12-3-72, Judge Green. Verdict form, Count

One, Murder. We, the jury, find the defendant not guilty by reason of insanity.

Count Two, felony murder. We, the jury, find the defendant guilty but mentally ill.

Count Three, aggravated assault. We, the jury, find the defendant guilty but mentally ill.

This 11th day of December, 2017. Danielle Mecum, foreperson.

THE COURT: I'd ask counsel to come forward and inspect the verdict as to form.

(Whereupon, attorneys comply with request.)

THE COURT: Any objection by the State as to form?

MR. EVANS: No.

THE COURT: Mr. Kilgore?

[1460]MR. KILGORE: No, sir.

THE COURT: All right. Anyone wish me to poll the jury?

MR. EVANS: No.

THE COURT: Mr. Kilgore?

MR. KILGORE: We'll ask.

THE COURT: You want me to? I'm going to do what's called polling the jury. I'm going to ask each of the twelve people on the trial jury the same three questions.

Let's see, Mr. Brooks. Who's Mr. Brooks. Sir, is this your verdict?

JUROR BROOKS: Yes, sir.

THE COURT: Was it your verdict in the jury room?

JUROR BROOKS: Yes, sir.

THE COURT: Is it still your verdict?

JUROR BROOKS: Yes, sir.

THE COURT: Thank you.

Roman Jimenez. Sir, is this your verdict?

JUROR JIMENEZ: Yes, sir.

THE COURT: Was it your verdict in the jury room?

JUROR JIMENEZ: Yes, sir.

THE COURT: Is it still your verdict?

JUROR JIMENEZ: Yes, sir.

THE COURT: Okay.

[1461]Kathy Kube, Kube. Ma'am, is this your verdict?

JUROR KUBE: Yes, sir.

THE COURT: Was it your verdict in the jury room?

JUROR KUBE: Yes, sir.

THE COURT: Is it still your verdict?

JUROR KUBE: Yes.

THE COURT: Thank you.

Eason Duncan.

JUROR DUNCAN: Yes, sir.

THE COURT: Sir, is this your verdict?

JUROR DUNCAN: Yes, sir.

THE COURT: Was it your verdict in the jury room?

JUROR DUNCAN: Yes, sir.

THE COURT: Is it still your verdict?

JUROR DUNCAN: Yes, sir.

THE COURT: Thank you.

Ms. Mecum. Ma'am, is this your verdict?

JUROR MECUM: Yes, sir.

THE COURT: Was it your verdict in the jury room?

JUROR MECUM: Yes, sir.

THE COURT: Is it still your verdict?

JUROR MECUM: Yes, sir.

THE COURT: Thank you.

Ms. Kelly. Ma'am, is this your verdict?

JUROR KELLY: Yes, sir.

[1462]THE COURT: Was it your verdict in the jury room?

JUROR KELLY: Yes.

THE COURT: And is it still your verdict?

JUROR KELLY: Yes.

THE COURT: Thank you.

Ms. Johnson. Ma'am, is this your verdict?

JUROR JOHNSON: Yes.

THE COURT: Was it your verdict in the jury room?

JUROR JOHNSON: Yes, sir.

THE COURT: Is it still your verdict?

JUROR JOHNSON: Yes, sir.

THE COURT: Thank you.

Ms. Williams. Ma'am, is this your verdict?

JUROR WILLIAMS: Yes, sir.

THE COURT: Was it your verdict in the jury room?

JUROR WILLIAMS: Yes.

THE COURT: Is it still your verdict?

JUROR WILLIAMS: Yes.

THE COURT: Thank you.

Ms. Ryan. Ma'am, is this your verdict?

JUROR RYAN: Yes, sir.

THE COURT: Was it your verdict in the jury room?

JUROR RYAN: Yes, sir.

THE COURT: Is it still your verdict?

JUROR RYAN: Yes, sir.

[1463]THE COURT: Thank you.

Mr. Neitzer.

JUROR NEITZER: Yes, sir.

THE COURT: Sir, is this your verdict?

JUROR NEITZER: Yes, sir.

THE COURT: Was it your verdict in the jury room?

JUROR NEITZER: Yes, sir.

THE COURT: Is it still your verdict?

JUROR NEITZER: Yes, sir.

THE COURT: Pierre-Louis.

JUROR PIERRE-LOUIS: Yes, sir.

THE COURT: Sir, is this your verdict?

JUROR PIERRE-LOUIS: Yes.

THE COURT: Was it your verdict in the jury room?

JUROR PIERRE-LOUIS: Yes, sir.

THE COURT: Is it still your verdict?

JUROR PIERRE-LOUIS: Yes, sir.

THE COURT: Thank you.

And Ms. Robinson.

JUROR ROBINSON: Yes, sir.

THE COURT: Ma'am, was this your verdict?

JUROR ROBINSON: Yes, sir.

THE COURT: Was it your verdict in the jury room?

JUROR ROBINSON: Yes, sir.

THE COURT: Is it still your verdict?

[1464]JUROR ROBINSON: Yes, sir.

THE COURT: Anything else to take up with this jury before I discharge them?

MR. EVANS: No, sir.

THE COURT: Ladies and gentlemen, I discharge you of your official duties as jurors and you are just private citizens at this point in time.

I'm going to let the Bailiffs take you to the jury room. I'll be in there like in thirty seconds and give you your certificates and your checks. So you can go to the jury room. I'll be right there and then we'll get you out of here.

(Whereupon, jury exits the courtroom.)

THE COURT: Anything else to take up this evening?

MR. EVANS: No, sir.

MR. KILGORE: No, sir.

THE COURT: All right. You just want to get in touch with Judge Green as far as wrapping it up and sentencing and all that?

MR. EVANS: Yes, sir.

THE COURT: All right. We'll be in recess. Thank you very much.

(Proceedings conclude at 6:30 p.m.)

***

APPENDIX E — FINAL DISPOSITION OF THE SUPERIOR COURT OF COBB COUNTY, STATE OF GEORGIA, FILED DECEMBER 14, 2017

IN THE SUPERIOR COURT OF COBB COUNTY,
STATE OF GEORGIA

STATE OF GEORGIA versus
DAMIAN CORNELL MCELRATH
CRIMINAL ACTION #:
12-9-3972-51
November Term of 2017
Warrant# 12W6739

OTN(s): 88385937544
DOB: 9-21-93
GA. ID#: 3980256K

Final Disposition:
FELONY CONFINEMENT

PLEA:	**VERDICT:**
☐Negotiated ☐Non-negotiated	☒Jury ☐Non-jury

☐Probation Cond. ☐Sex Off. Cond. ☐Fines/Fees

Appendix E

The Court enters the following judgment:

Count	Charge (as indicted or accused)	Disposition (Guilty, Not Guilty, Guilty-Alford, Guilty-Lesser Incl. Nolo. Nol Pros. Dead Docket)	Sentence	Fine	Concurrent/ Consecutive, Merged, Suspended
1	**MURDER**	**NOT GUILTY BY REASON OF INSANITY**		$	
2	**FELONY MURDER**	**GUILTY BUT MENTALLY ILL**	**LIFE**	$	
3	**AGGRAVATED ASSAULT**	**GUILTY BUT MENTALLY ILL**	**MERGES INTO COUNT 2**	$	

Appendix E

The Defendant is ☒ adjudged guilty * * * for the above-stated offense(s); the Court sentences the Defendant to confinement in such institution as the Commissioner of the State Department of Corrections/County Jail may direct, with the period of confinement to be computed as provided by law.

Sentence Summary: The Defendant is sentenced for a total of **LIFE**.

☐ The above sentence may be served on probation provided the Defendant shall comply with the Conditions of Probation imposed by the Court as part of this sentence.

☐The above sentence includes a behavioral incentive date of _____ in accordance with O.C.G.A. §17-10-1.

☐Other _____.

☐Upon service of ____, the remainder of the sentence may be served on probation; PROVIDED, that the Defendant shall comply with the Conditions of Probation imposed by the Court as part of this sentence.

☐The Defendant is recommended for Cobb Sheriff's Work Release Program.

☒The Defendant is to receive credit for time served in custody: ☐released on time served, ☒from **7-16-2012**; ☐as determined by the custodian; or ☐pursuant to OCGA § 17-10-9 through § 17-10-12.

Appendix E

☐The Court sentences the Defendant as a recidivist under O.C.G.A.:
☐§ 17-10-7(a);
☐§ 17-10-7(b);
☐§ 17-10-7(c);
☐§16-7-1(b);
☐§16-8-14(b);or _____
☐§ _____

Appendix E

The Hon. **Maddox Kilgore and Carlos Rodriguez**, Attorney at Law, represented the Defendant by: ☐ employment; or ☒ appointment.

The Hon. **Jesse Evans**, Attorney at Law, represented the State of Georgia in this proceeding.

Cindy Heckler, certified court reporter, transcribed these proceedings.

SO ORDERED this 14th day of December, 2017

/s/
Reuben M. Green
Superior Court Judge
Cobb Judicial Circuit

FIREARMS – If you are convicted of a crime punishable by imprisonment for a term exceeding one year, or of a misdemeanor crime of domestic violence where you are or were a spouse, intimate partner, parent, or guardian of the victim, or are or were involved in another similar relationship with the victim, it is unlawful for you to possess or purchase a firearm including a rifle, pistol, or revolver, or ammunition, pursuant to federal law under 18 U.S.C. § 922(g)(9) and/or applicable state law.

Acknowledgment: I have read the terms of this sentence or had them read and explained to me. If all or any part of this sentence is probated I certify that I understand the meaning of the order of probation and the conditions of probation. I understand that violation of a

special condition of probation could result in revocation of all time remaining on the period of probation.

/s/_____	/s/_____
Defendant	Assistant District Attorney

/s/_____
Defendant's Attorney

APPENDIX F — PLEA OF THE SUPERIOR COURT OF COBB COUNTY STATE OF GEORGIA, DATED MARCH 19, 2021

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

Indictment 12-9-3972

STATE OF GEORGIA,

v.

DAMIAN MCELRATH,

Defendant.

[Judge Brown]

DOUBLE JEOPARDY PLEA IN BAR

COMES NOW Defendant, Damian McElrath, by and through counsel and petitions this Court to bar any further criminal prosecution for the crimes alleged in the instant indictment, a jury having previously returned a verdict of NOT GUILTY BY REASON OF INSANITY as to count 1 (malice murder) and thereby finding that Defendant did not act with criminal intent as to the identical conduct alleged in count 2 (felony murder) and count 3 (aggravated assault).

Appendix F

1.

The indictment charges Defendant with three counts alleging a single act: count one alleges that Defendant committed the offense of malice murder *"by stabbing Diane McElrath"*; count two alleges that Defendant committed felony murder *"by stabbing Diane McElrath"*; and count three alleges that Defendant committed aggravated assault in that he *"did assault Diane McElrath with a knife."* "In McElrath's indictment, there was no real differentiation between the three counts regarding McElrath's alleged conduct." *McElrath v. State,* 308 Ga. 104 (fn. 15) (2020).

2.

On December 11, 2017, a jury returned a special verdict of NOT GUILTY BY REASON OF INSANITY on count one, the offense of malice murder. Accordingly, the jury found as a matter of law and fact that Defendant carried his burden of proving insanity as to the act of stabbing Diane McElrath.

3.

On the same verdict form, the jury returned verdicts of GUILTY BUT MENTALLY ILL as to counts 2 and 3, the offenses of felony murder and aggravated assault.

4.

The jury's finding of insanity constitutes a complete defense to the charged conduct of "stabbing Diane McElrath", as a finding of insanity is a finding that the accused acted without criminal intent or criminal negligence. The jury's finding of insanity (no criminal intent) as to the malice murder count must apply to the felony murder charge and aggravated assault charge based on the identical conduct alleged in the indictment.

5.

The trial court accepted and announced the verdicts in open court.

6.

Prior to the imposition of judgment, Defendant filed a motion to vacate the verdicts on counts two and three as repugnant verdicts under *Turner v. State,* 283 Ga. 17 (2008) . The trial court denied Defendant's motion and imposed a sentence of life imprisonment on count two.

7.

On February 28, 2020, the Supreme Court of Georgia concluded that the verdicts were repugnant, vacated both verdicts, and remanded the case to the trial court. *McElrath v. State,* 308 Ga. 104 (2020). A remittitur has been transmitted to the Clerk of the Superior Court of Cobb County.

Appendix F

8.

In vacating all three verdicts, including the acquittal on count one, the Court relied on a single case, namely *Dumas v. State,* 266 Ga . 797 (1996):

> **Though they do not involve two guilty convictions,** repugnant verdicts suffer from a similar infirmity as mutually exclusive verdicts; they occur when, **in order to find the defendant not guilty on one count and guilty on another,** the jury must make *affirmative* findings shown on the record that cannot logically or legally exist at the same time.
>
> Where a jury renders repugnant verdicts, both verdicts must be vacated and a new trial ordered for the same reasons applicable to mutually exclusive verdicts. See *Dumas,* supra.

McElrath, 308 Ga. at 111.

9.

But in *Dumas,* the inconsistent and mutually exclusive verdicts at issue were **two guilty verdicts** for malice murder and vehicular homicide. *Dumas,* 266 Ga. at 798. Because *Dumas* did not even involve inconsistent verdicts of guilty and not guilty- the facts of that case did not even fall within the repugnant verdict exception to inconsistent verdicts explained years later in *Turner v. State,* 283 Ga. 17 (2008):

> We have, however, recognized an exception to the abolition of the inconsistent verdict rule: when instead of being left to speculate about the unknown motivations of the jury the appellate record makes transparent the jury's reasoning **why if found the defendant not guilty of one of the charges ...**

10.

And even more problematic, *Dumas* in no way involved the vacating of verdicts - certainly not the vacating of a judgment of acquittal following a jury verdict of not guilty by reason of insanity. Rather, *Dumas* involved the appeal of a trial judge's refusal to accept inconsistent and mutually exclusive guilty verdicts. *Dumas v. State,* 266 Ga. 797 (1996). Here, the repugnant GBMI and NGRI verdicts were accepted and made the judgment of the court.

11.

The Court's reliance on *Dumas,* supra, to vacate the jury's verdict of NGRI and the subsequent judgment of acquittal on the malice murder count cannot be reconciled with the state and federal constitutional protections against a second prosecution for the same offense after acquittal. Simply put, nothing whatsoever in *Dumas* would mandate or warrant that a legitimately returned verdict of NGRI be vacated.

Appendix F

12.

> The United States and Georgia Constitutions both prohibit the government from placing a defendant "in jeopardy" more than once for the same offense. See U.S. Const. Amend. V ("No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb[.]"); Ga. Const. Art. I, Sec. I, Par. XVIII ("No person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in the case of a mistrial.").

Medina v. State, 844 S.E.2d 767, 771 (2020).

Count 1- Malice Murder

The law precludes a second prosecution after acquittal.

13.

> Jury verdicts are serious things. In this murder case, the jury reached a verdict as to the malice murder.
>
> …
>
> When the jury reported its not guilty verdict on the malice murder count and the judge read it in open court, all of the requirements for formally returning a verdict on that count were fulfilled and the verdict became effective.

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…

> Double jeopardy thus precludes retrial on that count ...

Medina v. State, 844 S.E.2d 767 (2020).

14.

The jury's December 11, 2017, verdict of Not Guilty by Reason of Insanity was valid and effective. It was signed by a foreman and returned in open court. And unlike the facts in *Medina,* a written judgment of acquittal was signed by a Superior Court judge and filed with the clerk of court in the Superior Court of Cobb County. Compare *Medina v. State,* 844 S.E.2d 767, 771 (2020) ("The jury's verdict was valid. It was unanimous, in writing, signed by the foreperson, and delivered in open court, where it was read by the judge directly.").[1]

15.

"The jury's return of a verdict of not guilty [by reason of insanity] as to that count therefore bars the State from trying [McElrath] for malice murder." *Medina v. State,* 844 S.E.2d 767, 772 (2020). Nothing in *Dumas,* supra, or *Turner,* supra, suggests otherwise.

---

1. Notably, the existence of repugnant verdicts was brought to the trial court's attention in a written pleading and argued in open court prior to the filing of a written disposition including the judgment of acquittal on Count 1.

Appendix F

Count 2 - Felony Murder

Count 3 - Aggravated Assault

The jury's finding that Defendant carried his burden of establishing insanity (no criminal intent) as to the malice murder count applies to the felony murder and aggravated assault charges based on the same conduct. Accordingly, a judgment of acquittal as to malice murder precludes a second prosecution for the same conduct alleged in other counts.

16.

In concluding that the verdicts of Not Guilty by Reason of Insanity and Guilty But Mentally Ill for the same alleged conduct were repugnant, the Court reasoned as follows:

> This case falls into the category of repugnant verdicts, as the guilty and not guilty verdicts reflect affirmative findings by the jury that are not legally and logically possible of existing simultaneously. This is because the not guilty by reason of insanity verdict on malice murder and the guilty but mentally ill verdict on felony murder based on aggravated assault required affirmative findings of different mental states that could not exist at the same time during the commission of those crimes as they were indicted, proved, and charged to the jury. Put simply, it is not legally possible for an individual

> to simultaneously be insane and not insane during a single criminal episode against a single victim, even if the episode gives rise to more than one crime.
>
> In this case, the jury must have determined that McElrath was legally insane at the same time that he stabbed Diane in order to support the finding that he was not guilty of malice murder by reason of insanity.

McElrath, 308. Ga. at 112.

17.

Applying the Court's reasoning to repugnant verdicts as explained in *Turner,* supra, "the jury's finding [as to Defendant's mental state, namely, insanity] as to the malice murder count applies to the felony murder and aggravated assault charge based on the same conduct." *Turner v. State,* 283 Ga. 17 (2008). And "in light of the jury's express finding of [insanity], it was error for the trial court to enter judgment on the jury verdicts finding appellant guilty [but mentally ill] of felony murder and aggravated assault." *Turner v. State,* 283 Ga. 17 (2008).

18.

Accordingly, a jury having specifically concluded that Defendant was insane and therefore without criminal intent at the time of the offense ... a second prosecution for the same conduct alleged in other counts is prohibited by the constitutional protections against double jeopardy.

Appendix F

CONCLUSION

WHEREFORE, for all the above and forgoing reasons, Defendant petitions this Court (1) to schedule a hearing on the instant motion for the State to show cause why Defendant's Plea in Bar should not be granted; (2) to rule as a matter of law that further prosecution of this case constitutes double jeopardy; (3) enter an order barring further prosecution; and (4) enter an order remanding Defendant to the Department of Behavioral Health consistent with the law in regards to the verdict of NGRI on Count 1.

RESPECTFULLY SUBMITTED, this 19th day of March, 2021.

/s/ H. Maddox Kilgore
H. Maddox Kilgore
GA BAR 417548

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