IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

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

1.14.2
BRIEF IN SUPPORT OF ADMISSIBILITY OF DECEASED'S MENTAL HEALTH

Following motion hearings, the Court asked the parties to address two questions:

A. HOW DOES THE LAW OF PRIVILEGE AFFECT THE ADMISSIBILITY OF EVIDENCE OF DECEDENT'S MENTAL HEALTH?

B. HOW IS EVIDENCE OF AHMAUD ARBERY'S MENTAL HEALTH RELEVANT?

What the Defense seeks to admit:

As set forth on pages 2 – 4 of Defendants' Response to State's 4.2: Motion in Limine regarding Character of the Victim, Defendants Travis and Greg McMichael seek to introduce the following evidence at trial:

a. Evidence of Ahmaud Arbery's deteriorating mental health as witnessed by family members, neighbors, and his probation officer, leading to the probation officer's directive that Ahmaud Arbery get a mental health evaluation at Gateway Behavioral Health ("Gateway") on December 18, 2018.

b. The information Ahmaud Arbery provided to the mental health evaluator concerning his auditory delusions sometimes commanding him "to rob and steal" and sometimes telling him "to hurt people," his combative tendencies, his anger, and his difficulty in situations inside and outside his home. [1]

c. Evidence from Ahmaud Arbery's mental health evaluators, who on December 18, 2018, diagnosed him with Schizoaffective

[1] O.C.G.A. § 24-8-803(4). "[S]tatements made to a provider for the purpose of diagnosis or treatment may be admissible because the self-interested motivation of the declarant in wanting effective diagnosis or treatment (for themselves or others about whose health they care) makes it more likely that the statements made for that purpose are true." *State v. Almanza*, 304 Ga. 553, 561 (2018); McCormick on Evidence, § 277 (6th ed.); *United States v. Pacheco*, 154 F.3d 1236, 1240 (5th Cir. 1998)("The rationale behind the Rule 804(4) exception is that because a patient's medical care depends on the accuracy of the information she provides, the patient has a selfish motive to be truthful; consequently, a patient's statements to her physician are likely to be particularly reliable.")

Disorder and established a treatment plan, which included prescription medication.

d. Evidence that Ahmaud Arbery did not return for mental health treatment and that he only took the medication for a few days, which means that on February 23, 2020, he was not taking his mental health medication.

e. Expert testimony to explain the features and traits particular to Ahmaud Arbery's form of Schizoaffective Disorder, which includes hallucinations, delusions, distorted reality, disorganized thinking, poor judgment, irritability, impulsivity, and aggressiveness, as witnessed over time, up to and including on February 23, 2020. Additionally, the expert will testify that Ahmaud Arbery's decisions and behaviors, including when attacking Travis McMichael and trying to take his gun, are consistent with Mr. Arbery's form of Schizoaffective Disorder.

f. Expert testimony to explain the effect of not taking prescribed medications nor participating in recommended therapy for this serious mental health disorder, and the fact that the disorder is

incurable, meaning that he would still be suffering from the features and traits of Schizoaffective Disorder on February 23, 2020.

g. Expert testimony to explain how marijuana ingestion can worsen the features and traits associated with Schizoaffective Disorder and lead to increased irritability, impulsivity, and aggression.[2]

A. HOW DOES THE LAW OF PRIVILEGE AFFECT THE ADMISSIBILITY OF EVIDENCE OF DECEDENT'S MENTAL HEALTH?

The short answer is that the Psychotherapist/Patient privilege does not prevent the admission of mental health records or testimony regarding the deceased's mental illness.

At the motions hearing in this case, counsel for Travis McMichael sought to admit a certified copy of Ahmaud Arbery's mental health evaluation at Gateway. These records, which were provided by Gateway, memorialize the decedent's statements to the mental health evaluator and his diagnosis of a serious mental illness. According to the records, the

[2] The State's forensic chemist who tested blood drawn from Ahmaud Arbery will testify that the scientific analysis revealed the presence of tetrahydrocannabinol ("THC"), the main psychoactive compound in marijuana at the time he was shot.

decedent was prescribed Zyprexa, an anti-psychotic medication, but failed to return for treatment, and was discharged in April 2019. At the time of his death, the decedent did not have Zyprexa or any other prescribed medication in his blood.

At the hearing, the prosecution objected to the admission of the Gateway records, citing the psychotherapist-patient privilege as a bar to their admission. However, regardless of whether the communications between the decedent and Gateway personnel and subsequent diagnosis are privileged, the McMichaels' Fifth Amendment rights to compulsory process and a fair trial and Sixth Amendment right to confrontation under the United States Constitution trump Georgia's psychotherapist/patient privilege.

> OCGA § 24-5-501(a) provides: There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following:
>
> > (7) Communications between licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage family therapist, or licensed professional counselor and patient…

While there are important public policy considerations that serve as the basis for the privileges enumerated in OCGA § 24-5-501, rules of

privilege do not facilitate the ascertainment of the truth, but rather act to prevent the disclosure of information. *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. (1987); Hadden, Green's Ga. Law of Evidence (2019-2020) § 5:1. For that reason, they are to be construed as narrowly as is consistent with [the privilege's] purpose. *Suarez* at 1160. "Broad-brushed assertions of the societal interest in protecting the confidentiality of such information cannot justify the denial of these defendants' right to examine and use this psychiatric information…" *United States v. Lindstrom*, 698 F.2d 1154, 1167 (11th Cir. 1983)

In *Bobo v. State*, 256 Ga. 357 (1986), the Georgia Supreme Court set the standard for when a defendant in a criminal case may attain access to a witness or victim's mental health records. The Court recognized that there are cases in which a Defendant's right to confront witnesses overrides a witness's statutory privilege.

In *Bobo*, *supra*, the defendant was charged with shooting two police officers, but claimed he was not the shooter. *Id.* at 357-358. In order to assist in his cross-examination and impeachment of an eyewitness police officer, the defendant moved for disclosure of her psychiatric history and records. *Id.* at 358. It was established, independent of these records, that the officer in

question suffered from post-traumatic stress syndrome. *Id.* at 361 n.5. The trial court ruled that the communications at issue were privileged and denied defendant access to them. On appeal, the defendant contended "that the statutory privilege must yield to his right of confrontation." *Id.* at 358. A plurality of the Court agreed:

> While the privilege should be given the utmost deference, when the privilege of a witness stands in the way of the defendant's right to confront the witnesses against him, then, upon a proper showing by the defendant, the balance must be tipped in favor of his constitutional rights and the search for the truth.
>
> * * *
>
> Thus, we must also conclude that *in a proper case* a witness' statutory privilege must give way where countervailing interests in the truth-seeking process demand such a result.

Id. at 359-60 (emphasis in original). Evidently, in an effort to delineate the contours of a "proper case" for piercing the privilege, the Court went on to elaborate:

> In order to abrogate the psychiatrist-patient privilege, the defendant must make a showing of necessity, that is, that the evidence in question is *critical to his defense* and that *substantially similar evidence is otherwise unavailable to him*.

Id. at 360 (emphasis added).

The holding in *Bobo* is consistent in many respects with the holding in *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983). In *Lindstrom*, a

crucial witness in the government's mail fraud case against the defendants was a former employee of the defendants who initiated the investigation by approaching authorities. *Id.* at 1157. The Eleventh Circuit described the theory of defense as follows:

> At trial the defense sought to show that *the key witness for the government was not credible*, arguing that her motive for *initiating and pursuing* the investigation of Bay Therapy was based on hatred of the appellants. [Appellants] … argued to the district court that this witness was carrying out a vendetta against them because she had not received a promised percentage of Bay Therapy when the business was sold. Appellants further sought to impeach the witness' credibility by demonstrating that her alleged vendetta *resulted from a continuing mental illness, for which she had been periodically treated and confined.*

Id. at 1161 (emphasis added; footnote omitted). The court found this theory of defense compelling.

Before trial, *Lindstrom* issued subpoenas for records of the key witness' psychiatric treatment. *Id.* After it conducted an *in camera* review of the subpoenaed records, the district court allowed the defense to view some of the records. *Id.* The defense was able to piece together "[f]rom public records and from psychiatric records which the district court permitted defense counsel to review," *Id.*, a picture of the witness as one who had attempted suicide, been hospitalized, and been diagnosed as a schizophrenic suffering

from hallucinations and delusions. *Id.* However, the court did not permit the defense to review four other sets of mental health records. *Id.* at 1164.

On appeal, the defendants argued that the district court had improperly restricted their cross-examination of the key witness by denying them access to important mental health records. *Id.* The government "contend[ed] that psychiatric evidence merely raises a collateral issue." *Id.* at 1161. The Eleventh Circuit did not agree: "But such labels cannot substitute for analysis. Whether called 'collateral' or not, the issue of a witness' credibility is committed to the providence of the jury." *Id.* Indeed, the Eleventh Circuit tellingly noted that "[c]ertain forms of mental disorder have high probative value on the issue of credibility." *Id.* at 1160.

The court further articulated the basic principle upon which the subpoenas at issue in *Lindstrom* were premised: "Although a trial court should seek to prevent the disclosure of embarrassing, irrelevant information concerning a witness, it is an abuse of discretion to preclude defense counsel from obtaining relevant information, and the witness' privacy must yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case." *Id.* at 1167. In conclusion, the court said:

> We hold that the jury was denied evidence necessary for it to make an informed determination of whether the witness' testimony was based on historical facts as she perceived them or whether it was the product of a psychotic hallucination. The jury was denied any evidence on whether this key witness was a schizophrenic, what schizophrenia means and whether it affects one's perceptions of external reality. The jury was denied any evidence of whether the witness was capable of distinguishing reality from hallucinations. Such denial was reversible error.

Id. at 1168.

The holding in *Lindstrom*, like that in *Bobo*, underscores that the trial court must allow a defendant in a criminal case to use information about a witness's mental illness, even if protected by a privilege, when relevant to an issue before the jury. The fact that the decedent in this case had a mental illness that could affect his ability to perceive events accurately, act impulsively, act aggressively, and misinterpret words and actions of others justifies abrogating the statutory privilege in favor of the McMichaels' right to present their defense, including evidence of the decedent's serious mental illness.

B. HOW IS EVIDENCE OF AHMAUD ARBERY'S MENTAL HEALTH RELEVANT?

1. Under what statute is the admissibility of this evidence reviewed?

The evidence of Ahmaud Arbery's deteriorating mental condition, his directive for a mental health evaluation, the information he shared during that evaluation, the diagnosis and treatment plan, the characteristics of the diagnosis of schizoaffective disorder, evidence of his failure to follow the treatment plan, and evidence of the presence of THC in his bloodstream at the time of his death which exacerbates the symptoms of this mental illness are all to be evaluated pursuant to the relevancy definition of OCGA § 24-4-401. Ahmaud Arbery's mental health status is not subject to 404(b) analysis because it is not "an act," or a "crime," or "wrongful conduct." It's not his fault; no different than if he suffered from diabetes or had a broken leg. "In general, a medical condition, including a mental health condition, has not been viewed as a character trait for purposes of the evidence rules." *State v. Bolaski*, 95 A.3d 460, 475 (Vt. 2014). Holding that a diagnosed mental condition is not a "character trait;" "Rules 404 and 405 do not govern admissibility." *Id.*

The *Bolaski* Opinion relied upon the holdings in Louisiana and New Mexico, addressing this issue. *Bell v. Whitten*, 722 So.2d 1057, 1061 (La. App. 1998) ("insanity or other medically diagnosed ailments are not generally thought of as character traits"), noting Charles A. Wright and

Kenneth W. Graham Jr., Federal Practice and Procedure § 5233 (1978 & Supp.1998); *State v. Stanley*, 37 P.3d 85 (N.M. 2001)(reversed murder conviction for trial court's error in prohibiting the defense from presenting evidence of the deceased's mental illness). The New Mexico court held that "evidence of suicidal tendencies of a deceased should not be considered character evidence for purposes of Rule 11-404. Suicidal dispositions typically stem from mental illness, not from a person's 'bad character' or trait of character..." *Id.* at 92. Evidence of Ahmaud Arbery's mental status requires no notice or analysis pursuant to OCGA § 24-4-404(b) as the evidence is inextricably intertwined with the events at issue.

> Evidence, not part of the crime charged but pertaining to the chain of events explaining the context ... is properly admitted if linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime . . . to complete the story of the crime for the jury.

United States v. Wright, 392 F.3d 1269 (11th Cir. 2004) (the district court properly admitted evidence of the Defendant's uncharged resistance to arrest as being "inextricably intertwined" with the offense and instructed the jury that such evidence could be considered as consciousness of guilt).

So the Court's evaluation should rest upon the analysis of 401 relevancy and safeguarded by the balancing test of 403.

2. How is Ahmaud Arbery's mental health evidence relevant?

Relevant evidence is evidence that has "any tendency to make the existence of **any fact that is of consequence to the determination of the action** more probable or less probable than it would be without the evidence." OCGA § 24-4-401. The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The fact to be proved may be "ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." Notes of Advisory Committee on Federal Rule 401, summarized by Milich, Georgia Rules of Evidence, § 6:1.

Professor Milich further analyzed the scope of what constitutes a fact that is "of consequence" to the determination of the action:

> The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue

> prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. **Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding.**

Milich, Georgia Rules of Evidence, §6:1 (emphasis added).

a. What fact or facts **that are of consequence to the determination of the action** are more or less probable with the admission of this evidence?

(i) State of Mind of the Deceased

This is a self-defense case, meaning, the McMichaels will assert that they were engaged in a lawful citizen's arrest when Ahmaud Arbery unlawfully attacked Travis McMichael while Travis was wielding a shotgun, forcing Travis—who reasonably feared for his life and the life of his father—to fatally shoot Ahmaud Arbery. Travis' actions will be examined in light of O.C.G.A. § 16-3-21(a), Georgia's justification statute. The question the jury will have to decide is whether Travis reasonably believed that such force was necessary to prevent death or great bodily injury to himself or another, or to prevent the commission of a forcible felony. In order to make this determination, the jury will need to assess all of the facts and circumstances that Travis sensed at the moment he was

attacked by Ahmaud Arbery. While there is a video that captures Ahmaud Arbery making a split-second decision to charge Travis (who was holding a shotgun), and the video captures some of the struggle over the shotgun and some of the punches that Ahmaud Arbery threw, the rest of the activity is either hidden by the truck or takes place off-camera. And, of course, Travis' senses and emotions, which must be assessed, can never be captured on video.

Actions are motivated by thoughts. Behavior is controlled by the mind; whether a sound mind or one that is infirm. "If the victim's state of mind is . . . relevant to the victim's conduct, irrespective of whether that state of mind is known to defendant, it meets the relevancy requirement of Rule 401." *State v. Bolaski*, 95 A.3d 460, 474 (Vt. 2014)[3]. While not a Georgia opinion, the *Bolaski* holding is a natural offshoot of Georgia's line of cases that permit evidence of threats of violence made by the deceased against the defendant, even if those threats were never communicated to the defendant. Georgia courts allow "evidence of threats made by a victim

[3] The *Bolaski* Court notes that "[e]very federal court and 45 of 48 states hold that, in a self-defense case, evidence of the victim's reputation for violence **is relevant**, even if it was unknown to the defendant at the time of the killing, citing *Commonwealth v. Adjutant*, 443 Mass. 649, 824 N.E.2d 1, 6-7 (2005). Georgia is cited by referencing the *Chandler* opinion, so the authority may be outdated.

against the defendant, even when they have not been communicated to the defendant, to show **the victim's state of mind** at the time of the shooting." *Sturkey v. State*, 271 Ga. 572 (1999) (trial court erred in prohibiting evidence of a threat made by decedent to defendant but harmless error because evidence was cumulative of other evidence of threats and violence by decedent). Likewise, in *Dixon v. State*, 256 Ga. 658 (1987), the Georgia Supreme Court found error in excluding evidence of uncommunicated threats made by the deceased:

> The general rule is that evidence of threats previously made by one who is killed by another but uncommunicated to the latter, are not admissible on the question of whether the defendant was justified in killing the victim. However, such evidence is admissible where there is a conflict in the evidence as to **who started the fight,** to corroborate evidence of threats which in fact were communicated, **and to establish the attitude of the deceased**.

Id. at 660.

The deceased's "motive" or (as the *Bolaski* case noted), perhaps a better way to say it is **what motivated the decedent to act as he did**, is relevant in a self-defense case. Other courts have held that in self-defense cases, the victim's motive or intent is relevant and admissible. The Seventh Circuit Court of Appeals has held that the victim's motive in attacking the

defendant was relevant to self- defense. *United States. v. Greschner,* 647 F.2d 740, 743 (7th Cir. 1981). In reversing this assault conviction, the *Greschner* court held that exclusion of evidence that the one who was stabbed had a motive to attack the defendant deprived the defendant of relevant evidence relating specifically to the self-defense theory and should have been admitted. *Id.* Similarly, a Mississippi court reversed a murder conviction based in part upon the exclusion of evidence as to the deceased's threats and motive, holding that in self-defense cases, the victim's intent or motive is properly admissible and prohibiting the admission of that evidence is "plain error," seriously affecting the "fairness, integrity or public reputation of judicial proceedings." *Sanders v. State,* 77 So.3d 497, 505-506 (Miss. App. 2011).

Of course, statements made by the deceased evidencing a desire to harm the defendants are not at issue here. The deceased and the defendants did not know each other, except so far as the McMichaels had seen Ahmaud Arbery on video and in person in the house under construction several nights in the past. But the reason behind the rule remains the same: whether the McMichaels knew it or not, the fact that

Ahmaud Arbery suffered from Schizoaffective Disorder, a serious and incurable mental illness that affects thoughts and behavior which, left untreated, can lead the sufferer to act irrationally, impulsively, and aggressively—such as unlawfully attacking a man wielding a shotgun--is relevant and, therefore, admissible. It is admissible not as an attack on Ahmaud Arbery's character but to evidence his state of mind when he attacked Travis McMichael, which is a fact of consequence to the determination of the reasonable fears of the defendants.

(ii) Corroboration of the defendants' description of Ahmaud Arbery's behavior.

Because the deceased's conduct prior to the killing is the primary source of information upon which Travis McMichael was relying to assess his own danger, he can explain what he saw and heard and felt in the moments leading up to the encounter. The McMichaels voluntarily spoke with Glynn County Police officers immediately after the shooting and Travis McMichael described Ahmaud Arbery as "acting funny," "not right," unpredictable, aggressive towards William Roddy Bryan, and aggressive towards him, behaviors that are symptomatic of Ahmaud Arbery's mental illness. With Dr. Coffman's testimony about the

decendent's diagnosis of Schizoaffective Disorder and how it would likely impact Ahmaud Arbery's thoughts, conduct, and behavior, the jury will have critical evidence necessary to corroborate the behaviors that Travis and his father described; behaviors that might otherwise be dismissed or not appreciated but directly impact Travis McMichael's reasonable belief that he needed to use deadly force. As the Court in *Bolaski* held, "If the [evidence of deceased's mental illness] would make it more probable to the jury that the victim was an aggressor when he was shot, it is relevant," because relevant evidence "assists the jury in determining the "circumstances with which [defendant] is confronted. Id. at 473.

Applying the same analysis to a use-of-force case, the Seventh Circuit affirmed the district court's admission of a psychological assessment of the decedent, expressly noting that "evidence unknown to officers at the time force was used is also admissible to add credibility to an officer's claim that a suspect acted in the manner described by the officer." *Estate of Escobedo v. Martin,* 702 F.3d 388, 400 (7th Cir. 2012).

(iii) Evidence necessary to overcome the rebuttable presumption of reasonableness.

The Georgia Code sets forth two legal presumptions:

§ 16-2-3. Presumption of sound mind and discretion

> Every person is presumed to be of sound mind and discretion but the presumption may be rebutted.

§ 16-2-5. Presumption that sound person intends natural and probable consequences of acts

> A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.

These legal presumptions appear, as well, in the Pattern Jury Instructions; specifically, 1.41.12: Presumptions and Inferences

> Every person is presumed to be of sound mind and discretion, but this presumption may be rebutted. O.C.G.A. § 16-2-3 *Patterson v. New York*, 432 U.S. 197 (1977)
>
> You may infer, if you wish to do so, that
> 1) the acts of a person of sound mind and discretion are the product of that person's will (O.C.G.A. § 16-2-4), and
>
> 2) a person of sound mind and discretion intends the natural and probable consequences of those acts (O.C.G.A. § 16-2-5). Whether or not you make any such inference or inferences is a matter solely within the discretion of the jury.

Sandstrom v. Montana, 442 U.S. 510 (1979) *Pollard v. State*, 249 Ga. 21(2) (1982) *Lawrence v. State*, 165 Ga. App. 151 (1983).

These presumptions are the legal equivalent of the directive often heard in Closing Arguments to "use your common sense," or an argument we can expect, given the facts presented in the case-at-bar, "no one in their right mind would charge a man holding a shotgun unless he felt his own life was in danger!"[4] These statutes and jury instructions expressly provide for rebuttal to the legal presumption that every person is of sound mind and that he or she can appreciate and, therefore, necessarily intend the natural consequences of his/her acts. What is the rebuttal to that presumption, contemplated by the Georgia Legislature? It must be evidence that an individual is not of sound mind; suffers from an illness that impacts his judgment and discretion; and cannot or does not necessarily appreciate the natural consequences of his actions.

Here, Dr. Coffman will explain, based upon the totality of the evidence of Ahmaud Arbery's form of Schizoaffective Disorder, that he demonstrated long standing patterns of thought and behavior disorders

[4] Of course, the presentation of the State's argument and evidence is likely to draw factual inferences from circumstantial evidence that will, necessarily, open the door to the admissibility of this mental health evidence to rebut those factual presumptions.

that would necessary rebut the legal presumption of reasonableness jury instruction.

(iv) To explain the significance of the toxicology report and its impact on Ahmaud Arbery's behavior.

Ahmaud Arbery's blood was drawn at autopsy and sent to the State Crime Lab. The report showed, first, the absence of the medication prescribed to treat his diagnosis of schizoaffective disorder, and, second, the presence of THC (the main psychoactive compound found in marijuana). The manifestations of Ahmaud Arbery's mental illness, including irritability, impulsivity, and aggression, would have been significantly exacerbated by his ingestion of THC and his failure to treat with Zyprexa.

It is well-settled in Georgia that evidence of drugs (or the absence of them) in a decedent's blood is admissible, so long as there is expert testimony explaining the effect of the toxicology on the decedent's behavior. *McWilliams v. State*, 280 Ga. 724 (2006). In *McWilliams*, the Medical Examiner was prepared to testify about the causal connection between the cocaine and alcohol found in the decedent's blood and the defendant's claim of self-defense. Id. at 726. The doctor was prepared to

testify that the combination of the two (cocaine and alcohol) in some people, "produces strange behavior, including aggression. He also testified that a person under the influence of these substances could be combative or confrontational." Id. Finding that the defendant "produced proper evidence of a causal connection between the presence of cocaine and alcohol in the victim's body and the victim's potential behavior," the evidence should have been admitted. Id. at 726-727. The flip side is also true; the prosecution can seek to admit evidence showing the absence of drugs in the decedent's system in order to prove that the victim was not the aggressor. *Harris v. State*, 278 Ga. 596, 597 (2004)(The evidence [testimony about the absence of cocaine], however, was arguably relevant to Harris's contention that the victim was the aggressor, and the trial court did not abuse its discretion in admitting the testimony.")

As demonstrated above, there are numerous ways in which this mental health evidence is probative and, therefore, relevant to the sole defense of the defendants. The Court then must conduct the 403 balancing test to determine its admissibility.

3. O.C.G.A. § 24-4-403 sets forth the balancing test of the admissibility of relevant evidence.

> Relevant evidence may be excluded if its probative value is **substantially outweighed** by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

By the language of this statute, the Georgia Legislature expressly mandated that 403 be used sparingly, as the balancing test requires that any of the possible dangers of admitting it **substantially** outweigh the probative value of the relevant evidence. *Williams v. State*, 328 Ga.App. 876 (2014). The exclusion of relevant evidence under Rule 403, therefore, is often referred to as an "extraordinary remedy which should be used only sparingly." *Hood v. State*, 299 Ga. 95, 102 (2016). Georgia favors the admission of any evidence no matter how slight its probative value. See McCormick on Evidence, §§ 184, 185, 212 (6th ed.). The Georgia Supreme Court holds that the major function of 403 "is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of is prejudicial effect." *State v. Jackson*, 351 Ga.App. 675, 677 (2019). Georgia Courts adopted the federal rationale and reasoning behind the applicability of Rule 403, wherein it is held that excluding relevant evidence pursuant to 403 "is an extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly

probative evidence." *Bradshaw v. State*, 296 Ga. 650 (2015) (prior conviction for murder admissible in murder case); quoting *United States v. Terzado–Madruga*, 897 F.2d 1099, 1119 (11th Cir.1990) (holding that in close cases, the balance under Rule 403 should be struck in favor of admissibility).

Even prior to the adoption of the federal rules in 2013, Georgia law disfavored the exclusion of relevant evidence. Often-cited to illuminate Georgia's long-standing commitment to the admissibility of relevant evidence is former Chief Justice Lumpkin:

> This Court stands pledged by its past history, for the abolition, to the extent of its power, of all *exclusionary* rules, which shut out facts from the Jury which may serve, directly or remotely, to reflect light upon the transaction upon which they are called upon to pass. For one case gained by improper proof, ninety-nine have been lost or improperly found, on account of the parties being precluded, by artificial rules, from submitting *all* the facts to the tribunal to which is committed the decision of the cause. *Verdicts,* notwithstanding their etymological meaning, *(vere dico)* will never speak the truth, because Juries can never measure the power and influence of motives upon the actions of men, until the door is thrown wide open to all facts calculated to assist, in the slightest manner, in arriving at a correct conclusion in the pending controversy.

Haynes v. State, 17 Ga. 465, 484-485 (1855) (trial court erred in limiting the admissibility of evidence concerning a violent

altercation between the decedent and the defendant on the day before decedent was killed). This quote is found at least ten times in Georgia Court of Appeals and Georgia Supreme Court opinions, as well as numerous treatises on evidence, spanning more than the last 150 years. In one of those Opinions, *Lolly v. State*, 259 Ga. 605, 608 (1989), Justice Weltner notes that in many murder cases, the character of the deceased is irrelevant because, "[t]here is, of course, no exception in the murder statute that would excuse the slaying of persons of bad character." *Id.* But Justice Weltner notes how the character of the deceased can become relevant, significantly in cases where self-defense is asserted:

> Here the principal question is the credibility of the defendant. Did it happen the way he related it? And why would the decedent make an unprovoked advance upon the defendant?

Id. at 609.

We agree with Justice Weltner, just as we vigorously disagree with the State's unfounded assertion that the defense only seeks to introduce evidence of the decedent's mental health

to negatively impact the value of Ahmaud Arbery's life. Ahmaud Arbery's mental illness in no way "justified" his death. But, as Justice Weltner notes, "evidence of the violent nature of a victim"—especially one whose violence is likely a manifestation of a condition for which he has no control—"can be critically important to the discovery of truth." Id.

We will address each of the possible statutory "dangers" of admitting the relevant evidence of Ahmaud Arbery's mental illness, below:

1. Unfair Prejudice

"Relevant evidence is inherently prejudicial; but it is only unfair prejudice substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *U.S. v. Thevis*, 665 F.2d 616, 633 (5th Cir. 1982)(superseded on other grounds). The danger set forth in 403 is expressly limited to "unfair" prejudice, defined as evidence having the likelihood of suggesting a decision upon an improper basis; ordinarily an "emotional" one. *Pierce v. State*, 302 Ga. 389 (2017), *See also* Notes of Advisory Committee on Federal Rule 403.

This is a self-defense case. The jury will have to decide whether the McMichaels acted lawfully in their attempt to effectuate a citizen's arrest and, correspondingly, who was the primary aggressor. Ahmaud Arbery's deteriorating mental health, manifesting itself in the commission of crimes and his aggressive response to those who confronted him about those crimes led to his mother and probation officer's very real concerns, prompting a mental health evaluation. Ahmaud Arbery's self-reports to the evaluator that he "heard voices telling him to hurt people;" leading to a diagnosis of schizoaffective disorder, the symptoms of which were exacerbated when "people try to tell [him] what to do," is relevant in a case where Travis and Greg McMichael were telling Ahmaud Arbery to "stop" and urging him to answer their questions concerning his repeated nighttime entry into the home under construction, where expensive items were later reported to be missing.

Additionally, it was discovered by the GBI Crime Lab that not only was Ahmaud Arbery not taking the medication that had been prescribed, but that he had also been consuming marijuana, leading to a finding of THC in his blood. The lack of prescribed medication coupled with THC

further exacerbates the erratic and violent symptoms of schizoaffective disorder and certainly constitutes another set of facts that the jury must be able to consider in answering the critical questions necessary to render a verdict.

There is nothing "unfair" about the effect that this evidence will have on the State's case. The 403 balancing test does not assume prejudice simply because the evidence sought to be introduced relates to the mental illness of the decedent. "While the trial court believed the evidence of the decedent's prior suicide attempts to be at least minimally relevant, it appears its balancing test under Rule 11-403 went awry, in that it erroneously gave inordinate weight to the **possible** prejudice from such evidence." *State v. Stanley*, 37 P.3d 85, 90 (N.M. 2001)(reversed murder conviction for trial court's error in prohibiting the mental health evidence of the deceased)(emphasis added). A clear majority of jurisdictions hold that evidence of the decedent's mental illness, manifesting as suicidal tendencies and attempts, is admissible in a homicide case as **tending to show the decedent's state of mind,** passing the 403 balancing test, even if

the probative value is minimal.[5]

Here, where the probative value of evidence of Ahmaud Arbery's mental illness goes to the heart of the McMichaels' sole defense theory of self-defense, evidence of the decedent's state of mind is highly probative and not outweighed by any danger of unfair prejudice.

2. Confusion of the issues/Misleading the Jury

The evidence of Ahmaud Arbery's mental illness has no risk of confusing or misleading the jury. The issues will be clear and the relevance of the mental health evidence inextricably intertwined with the defense case that will be presented. "Evidence that a victim suffered from mental illness and had attempted suicide in the past is not the type of evidence

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Ott v. State, 160 Ala. 29, 49 So. 810 (1909); *State v. Kelly*, 77 Conn. 266, 58 A. 705 (1904); *Nordgren v. People*, 211 Ill. 425, 71 N.E. 1042 (1904); *Hall v. State*, 132 Ind. 317, 31 N.E. 536 (1892); *State v. Meyer*, 180 Iowa 210, 163 N.W. 244 (1917); *State v. Beeson*, 155 Iowa, 355, 136 N.W. 317 (1912); *State v. Cater*, 100 Iowa, 501, 69 N.W. 880 (1897); *Epperson v. Commonwealth*, 227 Ky. 404, 13 S.W.2d 247 (1929); *State v. Ilgenfritz*, 263 Mo. 615, 173 S.W. 1041 (1915); *Sharp v. State*, 115 Neb. 737, 214 N.W. 643 (1927); *People v. Gehmele*, 1 Sheld. 251 (N.Y. 1871); *State v. Prytle*, 191 N.C. 698, 132 S.E. 785 (1926); *Blackburn v. State*, 23 Ohio St. 146 (1872); *Crow v. State*, 89 Tex. Crim. 149, 230 S.W. 148 (1921). *State v. Drach*, 1 P.3d 864, 268 Kan. 636 (Kan. 2000)

that has the unusual propensity to prejudice, confuse, inflame, or mislead the fact finder." *State v. Buelow*, 941 N.W.2d 594 (Iowa 2019) aff'd 951 N.W.2d 879 (Iowa 2020) (murder conviction reversed for court's exclusion of defense's evidence of the decedent's mental illness).

3. Undue delay/Waste of Time/Needless Presentation of Cumulative Evidence.

Self defense is the sole defense. Given the State's opposition to the admissibility of this mental health evidence, it can be assumed that they will not be presenting it in their case-in-chief so there is no danger of it being "cumulative." As for "undue delay" and "waste of time," when two men, with no criminal history, who honorably served their countries and their communities, are facing a conviction for which the State is seeking a sentence of life with no possibility of parole, it is hard to conceive of any piece of relevant evidence bearing directly upon the sole defense, being considered a "waste of time" or causing "undue delay" in this trial.

This Court raised the question of "mini-trials," as it pertained to a 403 review of the admissibility of this relevant evidence. Turning again to the *Buelow* Opinion, wherein the Iowa murder conviction was reversed for the Court's exclusion of evidence of the decedent's mental illness, manifesting

as suicidal tendencies, the appellate court explained the 403 analysis on this prong, as follows:

> Second, we acknowledge the prospect of "mini- trials" can present valid *rule 5.403* concerns, such as confusion of the issues or a waste of time. These concerns arise when the admission of disputed evidence could open new inquiries into ***peripheral*** issues.

Buelow, at HN4 (emphasis in the original). The Court noted that *Buelow's* sole defense in this murder case was that the decedent committed suicide. Finding that *Buelow* must be allowed to present his "full suicide **defense** "to the jury (emphasis in the original), it cannot be said to be a waste of time.

The matter of Ahmaud Arbery's mental health is not a matter "peripheral" to the McMichael's sole defense. Nor would the presentation of this mental health evidence result in a "mini-trial" over the diagnosis and manifestations of schizoaffective disorder. The State is not likely to attack the reasons for Ahmaud Arbery being ordered to undergo a mental health evaluation, given that the concerns that prompted the evaluation were presented by his mother and his probation officer. The State is not likely to challenge the fact that Ahmaud Arbery did undergo the

evaluation and that the facility (Gateway) reached a diagnosis and created a treatment plan. Nor is the State likely to contest the toxicology showing that Ahmaud Arbery was not taking his prescribed medication but was engaged in the use of marijuana.

The State may, however, contest the reliability of the diagnosis and the defense expert's conclusions regarding the ways in which Ahmaud Arbery's mental illness would have manifested itself in the behaviors described by Travis and Greg McMichael on February 23, 2020. But these challenges do not have the potential to turn into "mini-trials," as they would entail cross-examination of the Gateway evaluator and physician, cross-examination of the defense expert, and possibly an expert to rebut the diagnosis and/or testimony of the defense expert. This would add one additional witness to the trial, hardly running the risk of "undue delay."

As the Supreme Court of Maine noted, "When relevant evidence is excluded from the trial process for some purpose other than enhancing the truth-seeking function, the danger of convicting the innocent increases." *State v. Olah*, 184 A.3d 360, 370 (Me. 2018) (remanding child molestation conviction for trial court's refusal to provide the defense access to the

victim's mental health records).

Conclusion

Evidence of Ahmaud Arbery's mental health is relevant because it is probative to issues the jury will be asked to evaluate that are consequential to the issues that must be decided in a self-defense case. As relevant evidence in a murder case, the Defendants' right to due process and full presentation of their defense overrides any issues of privilege. And, likewise, the probative value of this evidence is not substantially outweighed by any of the 403 factors; therefore, this Court must find that it is admissible in the trial of Travis and Greg McMichael.

This 14th day of June, 2021.

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Certificate of Service

I hereby certify by my signature that I have served a copy **of 1.14.2 Brief in Support of Admissibility of Deceased's Mental Health** on the Office of the District Attorney for the Cobb Judicial Circuit by delivering it by email to:

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