

*Ronald M Adams*  
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF GLYNN COUNTY  
STATE OF GEORGIA

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

**3.1**  
**FIRST SPECIAL DEMURRER TO THE INDICTMENT**  
**(COUNT 1)**

Defendants GREG MCMICHAEL and TRAVIS MCMICHAEL now file this First Special Demurrer to the Indictment (Count 1), which charges the McMichaels and William R. Bryan with malice murder. The McMichaels ask this court to quash Count 1 because it fails to be perfect in form and substance<sup>1</sup> in that it charges two crimes in one count, making it duplicitous. It does so by trading on a vague and uncertain allegation regarding “unlawfully chasing” in pickup trucks, which inserts an unspecified separate crime from malice murder, namely, “unlawfully chasing [Ahmaud Arbery] through the public roadways of the Satilla

<sup>1</sup> An indictment must be “perfect in form as well as substance” in order to withstand a special demurrer. *King v. State*, 176 Ga.App. 137, 139(2), 335 S.E.2d 439 (1985).

Shores neighborhood in pickup trucks . . . .” As such, the Indictment not only fails to comport with Georgia case law<sup>2</sup>, it fails to insure due process guaranteed by the Georgia and United States Constitutions.<sup>3</sup> “[A] special demurrer challenges ‘the sufficiency of the form of the indictment,’ and in such a demurrer, the defendant claims that the indictment is ‘imperfect as to form or that the accused is entitled to more information.’” (citations omitted) *Morris v. State*, 340 Ga.App. 295, 797 S.E.2d 207 (2017).

### **Introduction: Summary of the Argument**

This phrase—“unlawfully chasing”—is vague and uncertain in this malice murder charge because, while it purports to put the defendants on notice that the proximate cause of Arbery’s fatal injuries was chasing him in pickup trucks, the grand jury has modified “chasing” with the word “unlawfully.” This word, “unlawfully,” appears twice in Count 1, the first time 14 words earlier, where, by contrast to its second appearance, it properly modifies the phrase “cause the death,” which is the way the word appears in the statute as an essential element of the crime of malice murder. OCGA § 16-5-1(a). “Unlawful” modifies “cause” in both the malice

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<sup>2</sup> *State v. Shepherd Construction col*, 248 Ga. 1, 281 S.E.2d 151 (1981), *cert. denied*, 454 U.S. 1074, 102 S.Ct. 626, 70 L.E.2d 609 (1981).

<sup>3</sup> Ga. Const., Art. I, Sec. I, Pars. I and XVIII; U.S. Const., Amends. V and XIV.

murder statute and in its first appearance in Count 1. But, this second use of “unlawfully,” which modifies “chasing,” creates a duplicitous count—more than one crime charged in a single count—that renders this count unable to withstand a special demurrer.

### **I. The Elements of Malice Murder in OCGA § 16-5-1(a)**

Count 1 alleges as follows:

The Grand Jurors, aforesaid, in the name and behalf of the citizens of Georgia, charge and accuse **TRAVIS MCMICHAEL, GREG MCMICHAEL, and WILLIAM R BRYAN, individually** and as parties concerned in the commission of a crime, with the offense of **MALICE MURDER, O.C.G.A. 16-5-1**, for that the said accused person, in the County of Glynn and the State of Georgia, on or about the 23<sup>rd</sup> day of February, 2020, did unlawfully, with malice aforethought, cause the death of Ahmaud Arbery, a human being, by unlawfully chasing him through the public roadways of the Satilla Shores neighborhood in pickup trucks and shooting him with a shotgun, contrary to the laws of said State, the good order, peace and dignity thereof.

This count purports to put the defendants on notice to defend against malice murder as defined in OCGA § 16-5-1(a). The elements of malice murder include the following:

1. A person
2. Unlawfully, and
3. With malice aforethought
  - a. Express or
  - b. Implied

#### 4. Causes the death of another human being

The act element in malice murder – the *actus reus* – is the causing of the death of another human being. The intent element – the *mens rea* – includes both “unlawfully” and “with malice aforethought.” The first question to resolve, therefore, is what the word “unlawfully” means in OCGA § 16-5-1(a), which term appears in Count 1 when the grand jury alleges that the “the said accused person . . . did unlawfully, with malice aforethought, cause the death of Ahmaud Arbery, a human being . . . .” This phrase in quotes from Count 1 captures every element set out in the malice murder statute. It’s what follows this phrase that renders the count subject to granting this Special Demurrer because it charges a separate unspecified crime altogether.

#### II. The Meaning of “Unlawfully” in OCGA § 16-5-1(a)

In order to determine the meaning of the second use of “unlawfully” in Count 1, we must start by analyzing its first use, where “unlawfully” properly modifies “cause the death.” One can cause the death of a human being *lawfully*. The act of killing another when combined with a lawful intent removes the killing from the definition of murder. Thus, in order to define “malice murder,” and thereby differentiate it from other forms of

homicide, some legal, some illegal, we must look to those statutes that declare the act of deliberately intending to take the life of another human being to be *lawful homicide*. If a killing does not fit one of the lawful forms of homicide, then, it follows, it is unlawful.<sup>4</sup>

Deliberate intention *lawfully* to take the life of another human being requires evidence of one of the justifications provided in Chapter 3 of Article 2 of Title 16 – evidence, moreover, that the State must overcome beyond a reasonable doubt.<sup>5</sup> Those justifications include (1) use of deadly force in defense of self or others when one possesses a reasonable belief that such force is necessary to prevent death or great bodily injury or to prevent the commission of a forcible felony (O.C.G.A. § 16-3-21); (2) rendering assistance to a law enforcement officer whose life is being endangered (O.C.G.A. § 16-3-22); (3) defending habitation under specified conditions (O.C.G.A. § 16-3-23); and (4) defending property to prevent the

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<sup>4</sup> An “unlawful” homicide is not yet malice murder, however. The additional intent element is “malice aforethought,” either express or implied. “Malice aforethought” denotes a specific intent to cause a person’s death.<sup>4</sup> The “malice” in malice murder simply means that one acted to cause the death of a person and the death was the desired result.<sup>4</sup> Other unlawful homicides that do not require malice aforethought are felony murder, voluntary manslaughter, vehicular homicide, involuntary manslaughter, and feticide. These are general intent crimes, where a person intends to commit the criminal act without intending any specific result.

<sup>5</sup> Each of the justifications to the crime is called an “affirmative defense” and if the evidence supports it, then the State must disprove it beyond a reasonable doubt. OCGA. § 16-3-28; *Moore v. State*, 137 Ga.App. 735, 224 S.E.2d 856 (1976).

commission of a forcible felony (O.C.G.A. § 16-3-24). Thus, where one of these justifying intentions exists in combination with the deliberate act of killing another person, then the killing is lawful and cannot constitute malice murder.

It follows, therefore, that the first use of “unlawful” in Count 1 necessarily means that the State is alleging, and must prove beyond a reasonable doubt in order to convict for malice murder, that the defendants *were not justified in any lawful way* when they caused the death of Ahmaud Arbery. The State must also prove beyond a reasonable doubt the specific intent element called “malice aforethought.”

### **III. Count 1 Alleges a Separate Crime from Malice Murder**

Count 1 violates OCGA § 16-1-7(a)(2).

(a) When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if:

...

(2) The crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

In *State v. Corhen*, 306 Ga. App. 495, 700 S.E.2d 912 (2010), the Court of Appeals wrote:

OCCA § 16-1-7(a)(2) prohibits multiple prosecutions, including the defect of duplicity. An accusation is duplicitous if it joins separate and distinct offenses in one and the same count. Duplicity is the technical fault in pleading of uniting two or more offenses in the same count of an indictment. If an indictment is duplicitous, it is subject to demurrer. (Citations and punctuation omitted.) *Hall v. State*, 241 Ga.App. 454, 459(1), 525 S.E.2d 759 (1999).

In Count 1, right after the phrase “a human being,” the final essential statutory element of malice murder, the means of causation is indicated by the adverb “by.” The phrase reads as follows: “. . . *by unlawfully* chasing him through the public roadways of the Satilla Shores neighborhood in pickup trucks and shooting him with a shotgun . . .” (emphasis added). The grand jury alleges, therefore, two acts, one which appears to constitute the requisite proximate cause of Arbery’s death – “shooting him with a shotgun” – the other a separate unspecified crime altogether – “unlawfully chasing him . . . in pickup trucks.”

The adverb “unlawfully” has already been used in alleging the essential elements of malice murder when the grand jury charged that the accused persons “did unlawfully, with malice aforethought, cause the death of Ahmaud Arbery, a human being . . .” “Unlawfully,” in this first

instance, modifies “cause” in the phrase “cause the death,” just as the statute requires.

This second use of “unlawfully,” however, modifies “chasing.” It serves to distinguish between lawful chasings and unlawful chasings in pickup trucks, since both are possible. Since we cannot add facts to a demurrer when attacking an indictment,<sup>6</sup> we are left to guess at what it is that makes the pickup truck chasing charged in this count “unlawful.” It could consist in every possibility, and more, from an unregistered pickup truck, an invalid driver’s license, reckless driving, speeding, failing to stop at a stop sign, no seatbelts – all misdemeanors – to the use of the pickup truck as a weapon likely to result in serious bodily injury or death.<sup>7</sup> Some of these possibilities may seem fanciful, but that is only so when we look outside the four corners of the Indictment, which we cannot do in a special demurrer, to what we know, or think we know, about how the evidence in the case may come out.<sup>8</sup> By sticking with the Indictment only, as the law

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<sup>6</sup> *State v. Givens*, 211 Ga. App. 71, 72, 438 S.E.2d 387 (1993).

<sup>7</sup> It is worth noting that in many indictments alleging the use of a deadly weapon as the instrument by which the victim died, the grand jury will say of that weapon that it was “likely to *and did* result in the serious bodily injury or death” of the victim. No such words appear anywhere in this Indictment with respect to the pickup trucks and their use as weapons.

<sup>8</sup> The video of Ahmaud Arbery’s final minutes has been displayed far and wide. Millions of people, from LeBron James to President Trump, have concluded, on the basis of that video alone, that the defendants are guilty racist murderers. Many characterize the event as a modern day



requires us to do in a special demurrer, all of these unlawful pickup truck chasings, plus some, are legally and factually possible.

The last example – using a pickup truck as a weapon likely to cause serious injury or death – constitutes the felony of aggravated assault. In fact, the grand jury alleges this very crime in Count 7 by saying that the defendants “did make an assault upon the person of Ahmaud Arbery with a Ford F-150 pickup truck and a Chevy Silverado pickup truck, an object, device and instrument which when used offensively against a person are likely to result in serious bodily injury . . . .” This charge of aggravated assault with pickup trucks is then used to support the charge of felony murder in Count 3.

Likewise, Count 8 charges the defendants with the crime of false imprisonment in that they “did unlawfully confine and detain Ahmaud Arbery without legal authority, to wit: said accused did chase Ahmaud Arbery with a Ford F-150 pickup truck and a Chevy Silverado pickup truck through the public roadways of the Satilla Shores neighborhood . . . .”

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lynching by white supremacist vigilantes. But, here, where the defendants are presumed to be innocent—still a fundamental sacrosanct feature of American criminal law, fortunately—we must evaluate the constitutionality of this Indictment based only upon what it alleges and not what was displayed in a 30-second video on the Internet.

Count 9 charges, similarly, that the accused did “unlawfully chase Ahmaud Arbery through the public roadways of the Satilla Shores neighborhood in pickup trucks . . .” while engaged in the criminal attempt to commit false imprisonment. Both of these counts also serve as the underlying felonies for felony murder charges in Counts 4 and 5.

Thus, pickup truck chasing appears as an allegation in both malice murder and in three felony murder counts, as well as in three other counts of underlying felonies to support the three felony murder counts. In the malice murder count, unlike the other counts involving pickup truck chasing, the defendants are left to guess at what particular “unlawful” chasing the grand jury accuses, since the specific unlawfulness of the chasing set out in Counts 3, 4, 5, 7, 8, and 9 all constitute general intent felonies irrespective of malice and no specific intent to kill. Thus, none of the unlawful chasings set forth in those counts can be the same as whatever it is that makes the chasing unlawful as charged in Count 1.


Since the unlawful pickup truck chasing constitutes some unspecified crime, Count 1 is duplicitous.

## Conclusion

Count 1 alleges some other unspecified crime, either a misdemeanor or a felony, involving “unlawful” pickup truck chasing, which specific crime the defendants are not put on notice at all. Thus, since unlawful pickup truck chasing purports to allege some separate and distinct crime, the count is duplicitous.

For all these reasons, Count 1 in this Indictment is fatally defective in that it fails to comport with the requirements of due process that the defendants be put on notice as to what they are to defend against and fails to protect them against double jeopardy. Count 1 should be quashed.

August 6, 2020.



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