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
DEEFNDANTS' REPLY TO STATE'S RESPONSE TO DEFENDANTS' INTRODUCTION OF EVIDENCE OF THE DECEASED'S MENTAL HEALTH

Introduction

The State's response on the admissibility of mental health evidence is both legally and factually wrong and for that reason, the McMichaels are compelled to file this reply to the State's Response.

A. PRIVILEGE

For page after page of its Response, the State describes the mental health privilege as "absolute." In support of its position, the State cites *Cooksey v. Landry*, 295 Ga 430 (2014), *Advantage Behavioral Health Sys. v. Cleveland,* 350 Ga. App. 511 (2019), *Mincey v. Ga. Dep't of Community Affairs,* 308 Ga. App. 740 (2011) and *Dynin v. Hall*, 207 Ga. App. 337 (1993), **all civil**

cases, in which the constitutional rights to confront witnesses and compulsory process do not apply. Not one of these civil cases addresses the issues before this Court. It took the State 14 pages before it even addressed the heart of the privilege issue – under what circumstances is an alleged victim's mental health information admissible in a **criminal case**.

In *Bobo v. State*, 256 Ga. 357 (1986), the court recognized the circumstances in which the mental health privilege is not "absolute," and where the constitutional protections afforded a criminal defendant override the privilege. According to the Georgia Supreme Court, if the "evidence in question is critical to his defense and that substantially similar evidence is otherwise unavailable to him," then the scales tip in favor of admissibility of otherwise privileged information. 256 Ga. at 357. That balancing of a defendant's constitutional rights with the policy considerations behind the privilege has been Georgia jurisprudence for the past 35 years.

The State's extensive discussions of whether the decedent waived his privilege, how the policy behind the privilege protects victims of crime, or how defense counsel received the records are red herrings, meant to distract the Court from doing what is done in case after case in which

mental health records are sought – balancing the McMichael's right to a fair trial through their constitutional protections with the decedent's privacy interest in his mental health records. Even in cases cited by the State, the courts engaged in the very type of balancing of constitutional protections versus privacy that we are asking this Court to engage in. See, *DiPietro v. State*, 356 Ga. 539 (2020)(Privilege waiver issue was moot as court engaged in *Bobo* balancing test).

In claiming that the privilege is "absolute," even in a criminal case, the State ceased taking this issue seriously, and flouted years of United States Supreme Court precedent. Whether that right is the right to confront witnesses, the right to a public trial, or the right to present a defense, time after time, the Court has held that a defendant's right to a fair trial is paramount. The "central aim of a criminal proceeding must be to try the accused fairly." *Waller v. Georgia*, 467 U.S. 39, 46 (1984). For the reasons discussed in the McMichaels' brief and below, the decedent's mental illness informed his behavior, and consequently, the McMichaels' behavior, and is critical to the McMichaels' defense.

B. RELEVANCE

The State persists in referring to their theory of the case, where they draw certain inferences from the disputed and undisputed facts, as the unquestionable truth of the case. The prime example of this error is their insistence upon the theory that on February 23, 2020, Ahmaud Arbery ventured into Satilla Shores on a run he had begun from his home in Boykin Ridge. The State draws that reasonable inference from undisputed evidence that Ahmaud Arbery was frequently seen running in Boykin Ridge and Highway 17 that separates Boykin Ridge from Satilla Shores. But given a number of other undisputed and disputed facts,[1] it is also a reasonable inference that Ahmaud Arbery had come into the Satilla Shores

[1] No friend or family member had ever known Ahmaud Arbery to run in Satilla Shores; After a canvas of the entire neighborhood of Satilla Shores, the Georgia Bureau of Investigation only identified one woman who said she believed she'd seen Ahmaud Arbery running in Satilla Shores; On three previous nights, Ahmaud Arbery entered the house under construction at 220 Satilla Drive and walked through it, down to the dock, looking into a boat and looking into a boat located inside the house; the homeowner of 220 Satilla Drive reported to the Glynn County 911 dispatcher that thousands of dollars of electronic equipment had gone missing from his boat after one of these nighttime entries; Witnesses who saw Ahmaud Arbery running on Highway 17 in 2019 and 2020 report that Ahmaud Arbery frequently walked or ran into their businesses, stole items, and ran out; On February 23, 2020, Ahmaud Arbery was on felony probation for the offense of Theft by Shoplifting; On February 23, 2020, Matthew Albenze, another Satilla Shores resident, reported that he made eye contact with Ahmaud Arbery while he was illegally inside the home under construction at 220 Satilla Drive, and that Albenze was holding his cell phone, placing a call to 911 when Ahmaud Arbery appeared to see Albenze, after which he ran from the house, into the Satilla Shores neighborhood.

neighborhood on February 23, 2020, for the sole purpose of casing the home under construction at 220 Satilla Shores Drive.

The State's theory is that Ahmaud Arbery's running from the house after Albenze called 911 is simply a coincidence and that Ahmaud Arbery just intended to continue on his recreational run. The defense draws from these facts the inference that Ahmaud Arbery believed that the police were on their way and he ran into Satilla Shores to avoid capture.

Does it require mental health evidence to help a jury understand which decision Ahmaud Arbery actually made? No. While it is consistent with the way Ahmaud Arbery handled nearly every other instance in which he'd been caught engaged in unlawful behavior[2], it does not require knowing that Ahmaud Arbery suffered from mental illness to understand which inference the evidence most strongly supports.

When the McMichaels drove up alongside Ahmaud Arbery telling him to "stop," Ahmaud Arbery had to make another decision. He could stop and wait with them until police arrived. He could stop, tell them what

[2] See 404(b) Motion.

he was doing at 220 Satilla Drive the last four times he entered it, and then run off. Or he could ignore their commands and run away from them. This is what Ahmaud Arbery chose to do.

Taking these facts, the State draws the reasonable inference that Ahmaud Arbery continued to run because he was afraid of Travis and Greg McMichael. However, the defense draws the reasonable inference from these facts that Ahmaud Arbery wanted to evade capture. Does it require mental health evidence to explain which inference is more likely? Perhaps. On December 14, 2018, Ahmaud Arbery reported to Christi Anderson, the intake nurse at Gateway Behavioral Health Services that he had been suffering from command hallucinations for approximately a year and that the voices "sometimes tell him to hurt people." He further reported that the auditory hallucinations sometimes command him to "rob and steal." And, significantly, Ahmaud Arbery reported that these delusions are often triggered when "being around people that talk down on me." This self-report is reliable and, therefore, admissible pursuant to O.C.G.A. § 24-8-803(4), as an exception to the prohibition against the admissibility of hearsay:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

803(4) is materially the same as the previous Georgia Code § 24-8-803(4). As of the adoption of the new evidence code on January 1, 2013, when a new statute is materially identical to the old code section, federal appellate precedent controls until a Georgia appellate court decides an issue under the new Code. See Preamble to the act adopting the new Evidence Code, Ga. L. 2011, p.99, 100 § 1.

The Georgia Supreme Court has created such precedent, adopting the *Renville* test "as an effective gatekeeper for the admissibility of statements under the medical diagnosis and treatment hearsay exception in Federal Rule 803(4)." *State v. Almanza*, 304 Ga. 553, 563 (2018). "The *Renville* test is a straightforward but rigorous two-step test for the admissibility of hearsay statements under Federal Rule 803(4) generally." *Id.* at 561, citing *United States v. Renville*, 779 F.2d 430, 436 (8th Cir. 1985). The two-part test is as follows:

> First, the declarant's motive in making the statement must be consistent with the purpose of promoting treatment.

> Second, the context of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis.

Almanza at 561.

"Statements made to a provider for the purposes 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." *Id.* at 561-562.

The "providers" in *Almanza,* were two physicians, examining a child for physical and emotional injuries in a sexual abuse case. *Id.* at 554. But the scope of "provider" covered by 803(4) has been extended to all sorts of medical and mental health care providers. See *Smith v. State*, 309 Ga. 240 (2020)(psychologist who was retained for the purposes of trial); *United States v. Williams*, No. 13-15345, Unpublished Opinion dated August 22, 2104 (11th Cir. 2014) (hospital nurse), and under the old Georgia evidence code, it has, likewise, been applicable to a psychologist, nurse, and a licensed professional counselor. *Allen v. State,* 247 Ga.App. 10, 13 (2000).

The statements Ahmaud Arbery made to the nurse at Gateway are admissible and 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 previously reported to be missing, those statements are relevant to the jurors having to decide between the two inferences they are being presented as reasonable.

And on February 23rd, at the corner of Holmes and Satilla Drive, upon seeing Travis McMichael hold up a shotgun, Ahmaud Arbery had another choice to make. He could continue with his right-ward movement and run down Satilla Drive and out of the subdivision. He could turn back around and run past Roddy Bryant's truck, heading East on Holmes. He could stop where he was and find out why the McMichaels were trying to detain him. Or he could take a sharp left-turn at the front of the McMichael's pickup truck and run head-on towards Travis McMichael, attempting to take the shotgun from him. This is what Ahmaud Arbery chose to do.

The State draws the reasonable inference from these facts that Ahmaud Arbery was frightened and tired and made a final last-ditch effort to save himself from the McMichaels. The defense draws the reasonable inference from these facts that Ahmaud Arbery acted out of anger by irrationally trying to attack a man with a shotgun pointed at him. Does it require mental health evidence to explain the likelihood of that inference? Absolutely. "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). What motivated the decedent to act as he did, is relevant in a self-defense case. [See citations on page 16-17 of Defendants' Brief]. 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.

The State accurately argues that the 401 standard for relevant evidence is not limitless; that if it "require[s] the jury to stack too many increasingly strained inferences to find it relevant to the issue for which it was offered," then it should not be admitted. *State v. Stephens*, 849 S.E.2d 459, 463 (2020). In other words, as set forth in *United States v. Hurn* , 368 F.3d 1359, 1366 (III) (11th Cir. 2004), "[T]here comes a point—and a [trial] court is perhaps in the best position to judge this—when the chain of inferences linking evidence and the legally relevant point to be proven is simply **too long, dubious, or attenuated** to require that the evidence be introduced." (emphasis added). The State suggests that such is the case with the mental health evidence at issue, by creating a series of nineteen steps the jury would have to take to link the evidence at issue to the legally relevant inference to be drawn. No such series of acrobatic moves would be required here. The jury merely needs to determine whether Ahmaud Arbery said the things that are written down by the mental health professional; whether the diagnosis of the incurable disease of

Schizoaffective Disorder is accurate and reliable; and whether that information helps them select which inference is more likely to be the accurate one: the State's inference that Ahmaud was afraid and tired and attacked Travis in an effort to defend himself, or the defense inference that Ahmaud Arbery meant to attack Travis because he was angry and acted upon that anger in an irrational manner.

How does all of this inform the jurors? To help them answer the central question in the case whether Ahmaud Arbery was acting in self-defense, or whether he was the aggressor, irrationally attacking Travis McMichael in the effectuation of a lawful citizen's arrest.

403 Analysis

The District Attorney pro tempore has viewed the mental health evidence and concludes that it plays no role in the decisions this jury must make or that—if it is probative—that it could "confuse" or "mislead" the jurors. The defense has more faith in the jurors' ability to separate the wheat from the chaff to make their own, **informed,** decision about whether the mental health evidence is reliable, whether it may have played any role in the decisions Ahmaud Arbery made on February 23, 2020, which would

have been revealed to the Defendants in the behavior he displayed on the afternoon of February 23, 2020.

This 9th day of July, 2021.

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Certificate of Service

I hereby certify by my signature that I have served a copy of **1.14.2 Defendants' Reply to State's Response to Defendants' Introduction of Evidence of the 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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July 9, 2021.

s/Laura D. Hogue
_____
LAURA D. HOGUE