

Russell 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. :

DEFENDANTS MCMICHAELS' RESPONSE TO
4.70 STATE'S MOTION IN LIMINE AS TO THC

Greg and Travis McMichael move this Court to deny "4.70 State's Motion in Limine as to THC" because the evidence of the THC in Ahmaud Arbery's system at the time of his death is both relevant and critical to the theory of the defense. Competent evidence exists as to the probable effects of the THC on Ahmaud Arbery's behavior on the day of this incident. Any minimal prejudice from the admission of the evidence is substantially outweighed by its probative value. In support of this Response, the McMichaels respectfully show this Court the following:

Pertinent Facts

During the autopsy of Ahmaud Arbery, the medical examiner ("ME") drew blood and sent it for a general toxicological examination, as is

standard protocol for an autopsy. According to the March 17, 2020, report of GBI forensic toxicologist Amanda Cooke, this initial blood screen came back negative for the presence of alcohol or “drugs of abuse” in Ahmaud Arbery’s system. Several months later, Special Agent Richard Dial sought a second toxicological examination of the blood drawn from Ahmaud Arbery’s blood, to search for the presence of Zyprexa (Olanzapine) because the investigator had become aware that in December 2018, Ahmaud Arbery had been diagnosed with a mental illness, and had been prescribed Zyprexa 10 mg, to be taken daily, to treat his mental health disorder.

The second blood test, dated July 14, 2020, – which was more comprehensive and powerful than the first test – came back negative for the prescription drug Zyprexa but came back positive for the presence of 3.2 ng/mL of THC in Ahmaud’s system. THC is the main psychoactive compound in marijuana.

The State will be introducing evidence at trial of the results of the first toxicology examination which came back negative for the presence of alcohol or “drugs of abuse” in Ahmaud Arbery’s system. The State’s theory of admissibility of this evidence is two-part: first, that the evidence is relevant because the blood screen was conducted as part of the autopsy

and informed the conclusions set forth by the Medical Examiner; and second, because the McMichaels have raised a justification defense, laying the groundwork for the state's presentation of evidence that no alcohol or drugs commonly associated with aggressive behavior¹ were present in Ahmaud Arbery's system on the date of this incident.

Now, the state moves this Court to exclude from evidence at trial the results of the second drug screen conducted by the same forensic toxicologist. Specifically, the State contends that the presence of 3.2 ng/mL of THC in Ahmaud Arbery's system, as detected in the second--more sensitive--blood screen, is not relevant because the toxicologist is unable to testify as to the effects of THC on Ahmaud Arbery at the time of his death. See "4.70 State's Motion in Limine as to THC." The defense agrees that the toxicologist cannot testify to the behavioral effects of THC on Ahmaud Arbery – that's not her field of expertise. The defense does, however, have an expert who possesses that specialized knowledge and skill and can testify reliably to the behavioral effects of (a) the absence of Zyprexa, and

¹ The state's theory of admissibility explicitly recognizes the relevance of evidence of alcohol and drugs when evidence of either can be linked to the victim's behavior.

(b) the presence of THC in a subject who has a diagnosis of schizoaffective disorder that is only slightly over a year old.

For the exact same reason the State intends to introduce evidence of the absence of alcohol in Ahmaud Arbery's bloodstream at the time of his death, the defense must be permitted to introduce evidence of the absence of Zyprexa and the presence of THC – as it relates to the presence or absence of substances that are linked to aggressive behavior. This Court should deny the state's Motion in Limine and permit the introduction of evidence at trial pertaining to the second blood test and its results, as well as the expert testimony concerning how the presence and absence of these substances in an individual suffering from schizoaffective disorder are known to lead to a deterioration of impulse control and confrontational and aggressive behavior.

Argument and Citations of Authority

Relevance

The first question this Court must ask is are the toxicology results from the second blood screen showing the absence of Zyprexa and the presence of THC in Ahmaud Arbery's blood system relevant for any

purpose?³³ O.C.G.A. § 24-4-401 defines "relevant evidence" as evidence having 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. O.C.G.A. § 24-4-402 provides that "all relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules."

"OCGA § 24-4-401 sets a low threshold for relevancy." *Jones v. State*, 339 Ga. App. 95 (2016). Georgia courts favor the admission of any relevant evidence, no matter how slight its probative value. "Evidence of doubtful relevance or competency should be admitted and its weight left to the jury." *Smith v. State*, 325 Ga. App. 739, 742 (2014). For the purpose of determining the relevancy of evidence, it does not matter whether the fact at issue is of consequence to the State's prosecution of the action or of consequence to the defendant's theory of defense. If the evidence at issue makes such fact more or less probable, then the evidence is relevant.

Evidence, not part of the crime charged but pertaining to the chain of

³³ The McMichaels assert that both the presence of the THC and the absence of Zyprexa in Ahmaud's system are relevant and should be admissible at trial. The State has only addressed the THC in its Motion but the McMichaels assert that both results are relevant and germane to the issue of aggressive behavior.

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).

The State cited a number of cases in its Motion for the general proposition that the presence of drugs in a deceased’s system is not relevant, *absent evidence of the effect of such drugs on the deceased’s behavior*. See 4.70 State’s Motion in Limine as to THC, ¶¶ 1, 2, 3, and 4 (citing *James v. State*, 270 Ga. 675 (1999); *Rivera v. State*, 295 Ga. 380 (2014); *Robinson v. State*, 272 Ga. 131 (2000); *Gill v. State*, 296 Ga. 351 (2014); *Daniels v. State*, 276 Ga. 632 (2003); *Dunn v. State*, 292 Ga. 359 (2013); *Mondragon v. State*, 304 Ga. 843 (2019), emphasis added). We agree and rely on those same cases to show the admissibility of this evidence. **If a defendant can produce competent evidence of a causal connection between the presence [or the absence] of drugs in the deceased’s system and the deceased’s behavior**

(such as being aggressive, combative, or confrontational), and if the victim's behavior is relevant to the defense, then the toxicology results are relevant and admissible.

In *Ivey v. State*, 305 Ga. 156, 162 (2019), the Supreme Court of Georgia held that a toxicology report containing evidence of a victim's drug or alcohol use is "relevant and admissible if the defendant also proffers evidence about how the victim's drug or alcohol use tended to affect his behavior." Likewise, in *Dunn v. State*, 292 Ga. 359, 361 (2013), the Supreme Court again stated that evidence of chemicals in a victim's system "is admissible when there is competent evidence of the effect asserted to have resulted from the chemicals found in the victim's system."

In the cases cited by the State, the defendants failed to proffer any evidence as to the potential effects of the drugs found in the victim's system on the victim's behavior. For example, in *Robinson v. State*, 272 Ga. 131, 133 (2000), the defendant sought to introduce evidence of cocaine metabolites in the victim's blood to support his assertion that he was guilty of only voluntary manslaughter, arguing that the cocaine in the victim's system caused him to act aggressively, providing the element of provocation for that crime. The Supreme Court upheld the trial court's

exclusion of the evidence on the ground that the defendant had not shown what, if any, effect the drugs might have had on the victim at the time of the homicide. Similarly, in *Gill v. State*, 296 Ga. 351 (2014), the defendant merely speculated that drugs found in the victim's system could have caused the victim to act aggressively. The Supreme Court held that the victim's toxicology report was inadmissible because the defendant was unable to show "how any drugs that were allegedly in [the victim's] system may have been affecting his behavior at the time of his fatal encounter with [the defendant]". *Gill*, 296 Ga. at 352.

Consequently, in other cases, where the defendant provided a proffer of competent evidence showing how the drugs *might have* affected the deceased's behavior, the Supreme Court has held the deceased's toxicology report to be relevant and admissible. In *McWilliams v. State*, 280 Ga. 724 (2006), the trial court prohibited the defense from introducing evidence of cocaine metabolites in the victim's blood. The Supreme Court determined that the trial court had erred by prohibiting the admission of the victim's toxicology report. The Court differentiated the facts in *McWilliams* from the facts in *Robinson*, finding as follows:

This Court upheld the trial court's exclusion of the evidence [in *Robinson*] on the ground that the defendant had not shown what, if any, effect the drugs might have had on the victim at the time of the homicide. But McWilliams did offer such evidence. Outside the jury's presence, the medical examiner testified that he had studied the literature on the subject, and stated that alcohol produces a sense of euphoria that stops the user's inhibitions, that there is an euphoria associated with cocaine, and that a compound develops from the combination of the two that, 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.

McWilliams, 280 Ga. at 726. According to the *McWilliams* Court, 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. As that connection is relevant to the issue of provocation, the evidence should have been admitted.” *Id.* at 726-27.

Thus, if a defendant produces competent evidence of possible effects of the chemicals present (or absent) in the deceased's body on the deceased's behavior, and that possible effect (such as aggressive, combative, or confrontational behavior) is relevant to the defense theory, then the toxicology results are admissible.

Travis and Greg McMichael's defense to the charges of malice and felony murder is justification – that when attempting to make a lawful

citizen's arrest, Ahmaud Arbery charged and attacked Travis. Ahmaud Arbery turned on Travis and immediately grabbed his gun and punched Travis in the face. Travis, trying to keep control of his gun and keep Ahmaud Arbery from shooting him, was in reasonable fear of serious bodily injury or death, justifying his need to shoot Arbery, who would not relent. While the video of that event reflects some of that strange combative and confrontational behavior that Ahmaud Arbery demonstrated, much of that significant few seconds can't be seen because it took place in front of Travis' truck and was, therefore, not able to be viewed in the video taken from further behind the back of Travis' truck. Additionally, the state's characterization of Ahmaud Arbery's behavior is in keeping with their narrative: Ahmaud Arbery charged Travis (instead of continuing on his escape from Satilla Shores by running back onto Satilla Drive) in a last ditch effort to save himself from being killed. The conflict between the inferences reasonably drawn from the evidence makes the admission of this second toxicology report even more necessary for the defense.

Evidence of the Effects of THC on Ahmaud Arbery

At the hearing on the State's Motion in Limine to Prohibit the Introduction of Evidence of the "Victim's Character," the defense began its presentation of the evidence of the December 8, 2018, mental health evaluation of Ahmaud Arbery by Gateway Behavioral Health, which had been ordered by the sentencing judge, sought by Ahmaud's mother following her concerns over his deteriorating mood and behavior, and scheduled by his probation officer who, likewise, was concerned that Ahmaud Arbery was displaying signs of mental illness during her regular meetings with him. The Department of Community Services turned to the same court-sanctioned, state-run agency they had turned to for all court related business: Gateway Behavioral Health. There, Ahmaud Arbery was diagnosed with 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. A prescription of Zyprexa (an anti-psychotic medication) was ordered to be taken daily and Ahmaud Arbery was to follow up with a regular schedule of therapy. Records reveal that Ahmaud Arbery reported to his probation officer that he tried the medicine but it upset his stomach so he stopped taking it.

Records further reveal that he never returned to Gateway or any other provider for the therapeutic intervention that was ordered.

The defense sought to call their expert witness, Dr. Kelly Coffman, to explain the diagnosis and how it was supported by the anecdotal behavior that had been recorded and reported by law enforcement, probation officers, and family, but the Court instead stated that it wanted to determine if Ahmaud Arbery's mental health records were protected from disclosure and/or use at trial before hearing from Dr. Coffman. Dr. Coffman was prepared to explain, scientifically, the behavioral effect of unmedicated schizoaffective disorder and the reliable data showing the exacerbating effect upon the illness of the ingestion (in any form), of marijuana. She was prepared to offer evidence to show that the probable effect of the combination of the absence of Zyprexa with the presence of THC would be to increase the likelihood and degree of Ahmaud Arbery's confrontational and combative moods, his aggressive reaction to his triggers (which he had identified as "being told what to do"), as well as his auditory hallucinations (which he had reported as voices telling him to "hurt people," and to "steal and rob"). The defense informed the Court the only way it could demonstrate relevance was to have Dr. Coffman testify,

as the subject matter is technical and scientific in nature. The Court did not allow the defense to present Dr. Coffman's testimony.

This Court has now concluded, by Order dated October 1, 2021, that Ahmaud Arbery's "mental health records" from his 2018 mental health evaluation are not admissible at trial. While we respectfully do not agree with that decision, the defense will abide by it. Nevertheless, if the autopsy is admissible, and the toxicology showing the absence of alcohol in Ahmaud Arbery's system is relevant and admissible (as part of the data upon which the Medical Examiner relied in reaching his conclusions and to show the absence of a substance normally associated with combative behavior and impaired judgment), then evidence of the rest of the toxicology data must be admissible, especially when it, too, shows the absence of a drug (Zyprexa) prescribed to quell the symptoms of impaired judgment and combative behavior, in combination with the presence of a drug (THC) that has scientifically been shown to exacerbate those same combative, confrontational, and aggressive symptoms, as well as the impairment of one's judgment.

Although the admission and exclusion of evidence generally falls within the discretion of the trial court, such discretion "does

not extend to the exclusion of crucial relevant evidence necessary to establish a valid defense.” *United States v. Williams*, 954 F.2d 668, 671 (11th Cir. 1992). A trial court’s exclusion of evidence supporting a criminal defendant’s sole defense constitutes harmful error, requiring reversal of the conviction. *Dunagan v. State*, 293 Ga. App. 600 (2008); *Johnson v. State*, 246 Ga. App. 239 (2000). The evidence the McMichaels seek to introduce at trial – as to the presence of THC in Ahmaud Arbery’s system and the potential effects of the drug on Ahmaud’s behavior that day – is crucial for the McMichaels to establish their affirmative defenses of justification and self-defense.⁴

Probative Value vs. Risk of Prejudice

Lastly, the Court must apply the balancing test of O.C.G.A. § 24-4-403 and determine whether the probative value of the evidence regarding the THC is substantially outweighed by the risk of unfair prejudice, confusion of the issues, misleading the jury, or undue delay. The exclusion of evidence under Rule 403 is an “extraordinary remedy” to be used sparingly. “The major function of Rule 403 is to exclude matters of scant or

⁴ The state, in their motion in limine to prevent evidence of THC, essentially admits the evidence would be relevant but for their toxicologist not being able to causally link the effects of the THC on Ahmaud Arbery at the time of the shooting. Their expert cannot. The defense’s expert can.

cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *Hood v. State*, 299 Ga. 95 (2016). Unfair prejudice "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. United States*, 519 U.S. 172 (1997).

The risk of unfair prejudice to the State is minimal, at best, from the admission of the THC evidence. The use of marijuana is now legal in much of the nation and is widely accepted. Evidence of marijuana use is far from the type of emotional evidence that would lead a jury to make a decision on an improper basis. The average person simply does not care. Nor is it the case in 2021 that suffering from a mental illness is some sort of attack on one's character. The television and the internet is inundated with public service announcements by athletes, political leaders, as well as movie and TV stars who acknowledge their own battles with mental illness and encourage the destigmatization of it. It is not an attack on an individual's "character;" it is a medical fact that existed at the time of this offense.⁵

⁵ After hearing only part of the evidence the defense was prepared to introduce in support of their challenge to the State's Motion in Limine to prohibit evidence of Ahmaud Arbery's Gateway records, the Court was concerned about the reliability of the diagnosis. The defense is able to show that the diagnosis was made consistent with the protocol set forth for mental health evaluations and, moreover, is supported by historical, anecdotal

Conclusion

The evidence directly supports the McMichaels' affirmative defenses and is necessary for their defense of this action. This Court should deny the State's Motion in Limine wherein they ask the Court to prohibit the defense from introducing the exact same sort of evidence (toxicology reports) that the States intend to introduce in their case-in-chief, for the exact same purpose (the presence or absence of substances associated with aggressive behavior and impaired judgment).

For these reasons, the McMichaels respectfully move this Court to deny the 4.70 State's Motion in Limine as to THC.

DATED this 11th day of October, 2021.

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information that the evaluator did not possess. The diagnosis was based on the application of proper reliable science. As the state has not moved to exclude the evidence based on *Harper v. State*, 249 Ga. 519 (1992), the diagnosis is proper. It more than meets the standards for admissibility. It is a matter for the jury to decide the weight to attribute to it.

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Certificate of Service

I hereby certify by my signature that I have served a copy of **DEFENDANT MCMICHAELS' RESPONSE TO STATE'S "4.70 STATE'S MOTION IN LIMINE AS TO THC"** on the Office of the District Attorney for the Cobb Judicial Circuit by delivering it to District Attorney Flynn Broady Jr. by emailing it to:

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This 11th day of October, 2021.

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