

*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 4.71 STATE'S  
MOTION IN LIMINE REGARDING  
AHMAUD ARBERY'S PROBATION STATUS**

Travis and Greg McMichael, through counsel, move this Court to deny the "State's Motion in Limine Regarding Probation" because the evidence of Ahmaud Arbery's probationary status on the date of this incident is intrinsic to and intertwined with the events on February 23, 2020, is not being offered for an impermissible character purpose because the evidence is relevant to the McMichaels' theory of the defense, and because the probative value of the evidence outweighs any minimal prejudice from the admission of the evidence. In support of this Response, the McMichaels respectfully show this Court the following:

## **Pertinent Facts and Procedural History**

On February 6, 2018, Ahmaud Arbery entered a guilty plea to the offense of felony shoplifting in Glynn County Superior Court, Accusation No. CR18-00095, in connection with his attempt to shoplift a television from Walmart. The conviction resulted in the revocation of his first offender probation for the prior felony offense of carrying a gun on school property and three counts of felony obstruction of an officer. The Court sentenced him to five years in prison but allowed him to serve his sentence on probation. Ahmaud Arbery was still on probation for his shoplifting conviction and his gun and obstruction charges on the very date of the incident that is the subject of this prosecution.

The McMichaels previously filed in this case a Notice of Intent to Introduce 404(b) Evidence, notifying the State of their intent to introduce at trial evidence of certain prior acts committed by Ahmaud Arbery, including the 2013 gun and obstruction offense as well as the shoplifting. By Order entered August 30, 2021, this Court denied the McMichaels' request to introduce any of the 404(b) acts of Ahmaud Arbery set out in the Notice of Intent, including these offenses for which he was on probation.

The State has now moved this Court to prohibit the McMichaels from introducing at trial any evidence that Ahmaud Arbery was on probation at the time of this incident on February 23, 2020. The State contends that the evidence of Ahmaud's probationary status on the date of this incident constitutes impermissible character evidence and that the defendants should be prohibited from introducing such other act evidence under O.C.G.A. § 24-4-404(b). *See* "4.71 State's Motion in Limine Regarding Probation." The McMichaels show that Ahmaud Arbery's probationary status on the date of this incident is intrinsic to and intertwined with the events that took place on February 23, 2020, and is not being offered for an impermissible character purpose because the evidence is relevant to the theory of the defense, and the probative value of the evidence outweighs any minimal prejudice from the admission of the evidence. For such reasons, this Court should deny the State's Motion in Limine and permit the introduction of evidence at trial pertaining to Ahmaud Arbery's probationary status on February 23, 2020.

## Argument and Citations of Authority

### **Evidence is Intrinsic to Events in Issue**

The McMichaels intend to introduce evidence of the fact that Ahmaud Arbery was on active felony probation on February 23, 2020. Contrary to the State's assertion, the McMichaels would not be offering the evidence pursuant to O.C.G.A. § 24-4-404(b). Instead, the McMichaels show that Ahmaud's probationary status on February 23, 2020, is admissible because it is intrinsic to and inextricably intertwined with the events that took place on that day.

Prior to the enactment of the 2013 Evidence Code, all acts and circumstances surrounding and constituting the res gestae of the offense were admissible, even if they reflected negatively on a person's character. "Surrounding circumstances constituting part of the res gestae may always be shown to the jury along with the principal fact, and their admissibility is within the discretion of the trial court." *Brooks v. State*, 199 Ga. App. 525 (1991). Res gestae evidence was deemed admissible for the purpose of explaining the circumstances surrounding the crime, even if the evidence incidentally put a person's character in issue. *McKenzie v. State*, 248 Ga. 294, 296 (1981).

As Professor Paul S. Milich has explained, while the 2013 Evidence Code does not use the term *res gestae*, “the essence of the doctrine in the context of the character rule remains the same with new terminology. Facts that are ‘intrinsic’ to or ‘inextricably intertwined’ with the events at issue at trial are generally admissible to give the factfinder a truer, contextual view of the material facts in the case.” Paul S. Milich, *Georgia Rules of Evidence*, § 11-3 at 246 (citing *Brooks v. State*, 298 Ga. 722, n. 11 (2016); *United States v. Edouard*, 485 F.3d 1324 (11th Cir. 2007)). Intrinsic evidence “completes the story” of the events surrounding a charged offense. *White v. State*, 838 S.E.2d 828 (Ga. 2020). Intrinsic evidence is sometimes called “background” because the evidence provides context in a case. Ronald L. Carlson, *Carlson on Evidence* at 134 (citing *United States v. Campbell*, 64 F.3d 880 (8th Cir. 2014)).

Evidence that the defendant was on probation at the time of the offense is admissible, despite any incidental reflection it may have on the defendant’s character. In *Mills v. State*, 273 Ga. App. 699 (2005), the Court of Appeals held that the trial court did not err in admitting evidence that the defendant was on probation at the time of the offense because the evidence was relevant to show the defendant’s motive for fleeing from the officer,

even though the evidence may have reflected negatively on the defendant's character.

Similarly, in *Thomas v. State*, 270 Ga. App. 181, 183 (2004), the court upheld the admission of evidence that the defendant was on probation when he ran from the police. As the Court of Appeals noted, "if he, indeed, ran from the police because he was on probation, that showed his motive for obstructing an officer." See also, *Greer v. State*, 199 Ga. App. 106 (1991) (upholding admission of custodial statement in which defendant admitted he was on probation even though the evidence incidentally placed the defendant's character in issue).

This sort of intrinsic evidence is not subject to Rule 404(b) restrictions or analysis. *United States v. Diaz*, 285 Fed. Appx. 709 (11th Cir. 2008). Facts that are admissible as "intrinsic to" or "inextricably intertwined with" the events surrounding the charged offense are treated separately from independent crimes, wrongs or acts, which are admissible under O.C.G.A. § 24-4-404(b). *Peoples v. State*, 295 Ga. 44 (2014).

It is undisputed that Ahmaud Arbery was on felony probation on February 23, 2020. This means that any violation of law, from the felony offense of burglary to the misdemeanor offense of criminal trespass,

subjects the probationer to revocation of his probation, resulting in the offender's being sentenced to jail or prison time.<sup>1</sup>

The evidence will show that, on February 23, 2020, for the fifth time since October 2019, Ahmaud Arbery unlawfully entered 220 Satilla Drive (the home under construction), without the owner's authority. The evidence will also show that Ahmaud Arbery suddenly sprinted away from the English property at the time surveillance video shows a neighbor who had seen Arbery entering the home, standing across the street from it, was on the phone calling the police.

There are two competing "narratives" surrounding this case, where "narrative" just means the story told by way of undisputed facts, disputed facts, and all the inferences made from those facts that fit a story of what happened and why it happened. The State perpetuates the national narrative that characterizes Ahmaud Arbery as a young man who was only in Satilla Shores for an afternoon jog and that the McMichaels only chased after him because they were violent racists who did not want a Black man jogging in their mostly-white neighborhood. The State's narrative

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<sup>1</sup> Records from the Probation Office show that Ahmaud Arbery would be well aware of this consequence as he had been sanctioned with thirty, and later, sixty days in the Glynn County Detention Center for failing to report to his probation officer as directed, and for committing the new offense of felony shoplifting, respectively.

concludes with Ahmaud Arbery, after believing he is hemmed in by the McMichael and Bryant trucks, and physically exhausted by the chase, making the last ditch effort to save himself from being shot in the back by Travis McMichael by bravely charging him in an attempt to remove the shotgun from his hands and thereby save his life.

It is the job of the defense to show the jury all the facts that demonstrate that this narrative is not supported by the evidence. Instead, the defense will show, Ahmaud Arbery was repeatedly seen in Satilla Shores only when he appeared on Larry English's nighttime security cameras on the five occasions he unlawfully entered the home under construction. Further, the only time Ahmaud Arbery is seen "running" in Satilla Shores, is when he is attempting to get away from the people who are trying to stop and detain him for the police. And, finally, the only time Travis McMichael fires his shotgun is after Ahmaud Arbery attacked him, grabbing the shotgun with one hand while punching Travis with the other.

Given the traction of the State's narrative in the current media maelstrom, and the reality that almost all potential jurors have, at the least, heard this story perpetuated in the media (though, obviously, each juror impaneled will have to have stated under oath that in spite of this media

exposure the juror has not formed an opinion about the guilt of the defendants), it is essential to due process and the pursuit of the truth that the defense not be prohibited from presenting all the facts that defeat that narrative of the “guilty racist killers.” While a person not on probation may not have been so concerned over answering questions about repeated nighttime intrusions into a home under construction, a person on active felony probation, who had waived his Fourth Amendment rights to search of his person and his home, and who can be imprisoned simply for having violated curfew, would be incredibly fearful of the ramifications of police interaction after such an unlawful entry.

For this reason, the evidence is “intrinsic to” and “intertwined with” the events of February 23, 2020, and falls outside of the parameters of O.C.G.A. § 24-4-404(b).

### **Relevance**

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 in 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 in issue makes such fact more or less probable, then the evidence is relevant.

The McMichaels show that evidence of Ahmaud Arbery’s probationary status is relevant to their defense for the reasons set forth above. Preventing the admission of that evidence will result in depriving Greg and Travis McMichael of the ability to present all essential facts necessary to their defense. It provides background and puts the events of that day in context, relative to the theory of the defense.

## **Probative Value vs. Risk of Prejudice**

Next, 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 Ahmaud Arbery's probationary status 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 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 McMichaels show that any risk of prejudice stemming from the admission of Ahmaud Arbery's probationary status would be minimized by the Court's exclusion of any other evidence surrounding the underlying convictions themselves, including the nature of the offenses, by redacting the name of the offenses from the certified copies of these convictions. The risk of unfair prejudice to the State is minimal. The mere fact that a person is on probation is not the type of emotional evidence that would lead a jury

to make a decision on an improper basis, as contemplated by *Old Chief*.

Any potential resulting prejudice does not substantially outweigh the probative value of the evidence to the defense.

For all of the reasons set out above, the McMichaels respectfully move this Court to deny the 4.71 State's Motion in Limine Regarding Evidence of Ahmaud Arbery's Status as a Probationer.

DATED this 11th day of October, 2021.

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**Certificate of Service**

I hereby certify by my signature that I have served a copy of **DEFENDANTS MCMICHAELS' RESPONSE TO STATE'S "4.71 STATE'S MOTION IN LIMINE REGARDING AHMAUD ARBERY'S PROBATION STATUS"** 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 11<sup>th</sup> day of October, 2021.

s/Laura D. Hogue  
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