IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
vs.	)	Case No. CR-2000433
	)	
TRAVIS MCMICHAEL,	)	
GREG MCMICHAEL, and	)	
WILLIAM R. BRYAN.	)	
	)	
Defendants.	)	

MOTION TO QUASH OR MODIFY SUBPOENAS

Gateway Behavioral Health Services Community Service Board ("CSB") hereby moves, pursuant to O.C.G.A. §§ 9-11-7(b), to quash or modify the subpoenas served on its employee APRN Ruby Pontello, copies of which are attached hereto as **Exhibit A**. The subpoenas were served by Jason B. Sheffield, attorney for Defendant Travis McMichael and requested testimony and documents for a hearing in this Court on October 18, 2021.

The CSB is a statutorily-created public agency and instrumentality of the State of Georgia which provides to its patients or "consumers" mental health, developmental disability, and addictive disease treatment services. See O.C.G.A. Title 37, Chapter 2. It creates an immense strain on the CSB's ability to provide services to the public in accordance with its statutory purpose/mission when its clinicians are subpoenaed as non-parties in such matters, for unknown purposes.

First, the CSB seeks to quash or modify the subpoena to the extent it seeks privileged communications. Communications between a mental health professional and a patient are "absolutely" privileged in the State of Georgia. Mincey v. Ga. Dep't of Community Affairs, 308 Ga. App. 740, 745 (2011); O.C.G.A. § 24-5-501 (mental health privilege); O.C.G.A. § 43-39-16 (patient communications with licensed psychologist protected to the same extent as the attorney-

client privilege). "The privilege covers 'communications and admissions' between the patient and the mental-health professional, and any information that the professional holds which has its origins in those communications." Mincey, No. A10A2307, at *5. Georgia and Federal law specifically prohibit disclosure of such privileged matters, either by physical disclosure or any medical record or by testimony. See 42 U.S.C. § 290dd-2; 42 CFR Part 2; O.C.G.A. §§ 37-3-166 (8) and 37-7-166 (7).

Second, the CSB seeks to quash or modify the subpoena to the extent it seeks "protected health information" within the scope of the Health Insurance Portability and Accountability Act of 1996, Pub.L. No. 104-191 ("HIPAA") and more specifically, the regulations promulgated under HIPAA at 45 C.F.R. Parts 160, 162, and 164. The CSB cannot disclose such information because an authorization has not been executed, or in the alternative, "satisfactory assurances" have not been received as required by 45 C.F.R. § 164.512(e)(1)(ii). See Northlake Medical Center, LLC v. Queen, 280 Ga.App. 510, 514-515, 634 S.E.2d 486 (2006). Absent a valid written authorization or court order, HIPAA requires "a written statement and accompanying documentation that: (A) The party requesting such information has made a good faith attempt to provide written notice to the individual . . . (B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested . . . (C) The time for the individual to raise an objection to the court or administrative tribunal has elapsed." 45 C.F.R. § 164.512(e)(iii). Generally, this written statement is provided in the form of a "Statement of Compliance with HIPAA Requirements" which satisfies the above-mentioned requirements. Here, no such statement of compliance has been received nor has the requesting party indicated that such a statement of compliance will be forthcoming once the statutory period for objections has elapsed.

Third, this Court has already issued an order regarding the admissibility of the mental health records in question, a copy of the Order is attached hereto as **Exhibit B** (hereinafter the "Order"). On October 1, 2021, this Court denied Defendants' Motion to Introduce Evidence of the Victim's Mental Health. As the Order noted, on May 7, 2021, the CSB filed a Motion to Quash or Modify Subpoenas in response to a similar subpoena Defendants have filed. *See Exhibit B*. In response, the Court held "that the Defendants have failed to show that a valid waiver existed [...] they have also not shown that the Gateway records are admissible hearsay under O.C.G.A. § 24-8-803(4), [thus] Defendant's Motion to Introduce Evidence of the Victim's Mental Health is Denied. *Id*.

Finally, the CSB seeks to quash or modify the subpoena to the extent it seeks testimony containing substance abuse information because such information cannot be disclosed absent the consumer's written authorization or a court order issued pursuant to a full and fair show cause hearing. See 42 U.S.C. §§ 290dd-2 (a) through (c) (court order can only be made "after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm"); 42 C.F.R. § 2.65 (requirements for order authorizing disclosure of substance abuse records); O.C.G.A. § 37-7-166 (7) ("Except for matters privileged under the laws of this state, the record shall be produced in response to a court order of competent jurisdiction pursuant to a full and fair show cause hearing."). It should be noted, the statutory requirements for a court order which authorizes disclosure of protected health information under HIPAA or general mental health records under O.C.G.A. § 37-3-166 are less stringent and require less process than the Federal and Georgia statutory procedures that must be followed to obtain substance abuse records. See, e.g., O.C.G.A. § 37-3-166 (mental health records can be disclosed pursuant to a valid subpoena).

Specifically, with regard to substance abuse records, 42 C.F.R. § 2.64, provides, in part:

> *Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find:*
>
> *(1) Other ways of obtaining the information are not available or would not be effective; and*
>
> *(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.*

42 C.F.R. § 2.64(d). Furthermore, this regulation also requires the following specific language to appear in the order:

> *Content of order. An order authorizing a disclosure must:*
>
> *(1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;*
>
> *(2) Limit disclosure to those persons whose need for information is the basis of the order; and*
>
> *(3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.*

42 C.F.R. § § 2.64(e). Additionally, this regulation requires certain notice and hearing to occur before a court order can issue. See 42 C.F.R. § 2.65(b). Specifically, the patient and the CSB must be given adequate notice and "an opportunity to file a written response . . . or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order." 42 C.F.R. § § 2.64(b).

Georgia law and regulations expressly incorporate the requirements of 42 C.F.R., Part 2, in their regulation of community services boards such as the CSB. See Ga. Comp. R. & Regs. 290-4-9-.05(1)(a) ("Volume 42 of the Code of Federal Regulations Part 2 and O.C.G.A. 37-7-166 control the disclosure provisions for clients treated for alcohol and drug abuse"). These regulations provide that "disclosure of alcohol abuse or drug abuse client information shall be produced in response to a court order issued by a court of competent jurisdiction pursuant to *a full and fair show cause hearing*." Ga.

Comp. R. & Regs. 290-4-9-.05(1)(i) (emphasis added); see O.C.G.A. 37-7-166(7) (full and fair show cause hearing required).

It should be noted, Federal law prohibits the CSB from even acknowledging that an individual has sought, received, or been evaluated for substance abuse treatment absent satisfaction of one of the exceptions outlined above. See 42 U.S.C. § 290dd-2(a) (includes "[r]ecords of identity"). To the extent such information or testimony is sought, however, the CSB requests this Court to enter an order (a) modifying the subpoena to exclude all testimony or records within the scope of 42 C.F.R., Part 2; or in the alternative, (b) scheduling a full and fair show cause hearing to determine if statutory cause exists to warrant a court order commanding disclosure of certain information.

WHEREFORE, the CSB respectfully prays that this Court enter an order providing the following relief:

(1) modifying the subpoena to exclude all privileged communications within the scope of O.C.G.A. § 24-5-501 (mental health privilege);

(2) either (a) modifying the subpoena to exclude all "protected health information" within the scope of HIPAA and its implementing regulations; or (b) directing the CSB to disclose such information by court order;

(3) either (a) modifying the subpoena to exclude all records within the scope of 42 C.F.R., Part 2; or in the alternative, (b) scheduling a full and fair show cause hearing to determine if statutory cause exists to warrant a court order; or

(4) quashing the subpoena entirely.

Respectfully submitted this 15th day of October, 2021.

FREEMAN, MATHIS & GARY LLP

/s/ Andrew J. Kim
H. JOSEPH COLETTE
Georgia Bar No. 170045
ANDREW J. KIM
Georgia Bar No.: 488753

Counsel for Gateway Behavioral Health Services

661 Forest Parkway, Suite E
Forest Park, Georgia 30297
Tel.: (770) 818-0000
Fax: (404) 361-3223

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing MOTION TO QUASH OR MODIFY SUBPOENA using the *Odyssey eFileGA* system which will send electronic notification of said service upon all parties and/or counsel of record addressed as follows:

Robert Rubin
Jason B. Sheffield
Peters, Rubin, Sheffield & Hodges
2786 North Decatur Road, Suite 245
Decatur, Georgia 30033

Laura Hogue
Frank Hogue
341 Third Street
P.O. Box 1795
Macon, Georgia 31202

Kevin Robert Gough
Kevin Gough Firm, LLC
P.O. Box 898
Brunswick, Georgia 31521

Linda Dunikoski
Cobb County District Attorney's Office
70 Haynes Street
Marietta, Georgia 30090

This 15th day of October, 2021.

FREEMAN, MATHIS & GARY LLP

/s/ Andrew J. Kim
ANDREW J. KIM
Georgia Bar No. 488753

Counsel for Gateway Behavioral Health Services

100 Galleria Pkwy #1600
Atlanta, Georgia 30339

Tel.: (770) 818-0000
Fax: (404) 361-3223

EXHIBIT A

SUBPOENA TO APPEAR AND FOR PRODUCTION OF EVIDENCE

State of Georgia, Glynn County

TO: **Ruby Pontello, RN**
Brunswick Outpatient Services/ 30 MARKET ST.
Gateway Behaioral Health DARIEN, GA.

You are hereby commanded, that laying all other business aside, you be and appear at the Glynn County Superior Court before the Honorable Timothy R. Walmsley, Judge, in the Glynn County Courthouse, 701 H Street, Brunswick, Georgia, to be held on **October 18, 2021 at 9:00 a.m.,** in the Courtroom then and there to be sworn as a witness for the Defendant in the case **of *State of Georgia v. Travis McMichael.***

1. The following are hereby subpoenaed: **Bring any reports you wrote and/or approved, related to Ahmaud Arbery.**

HEREIN FAIL NOT, under the penalty of law by authority of the Honorable Timothy R. Walmsley, Judge of said court this 10/06/2021

Any Questions Contact:
Robert G. Rubin
Jason Sheffield
2786 N. Decatur Road, Suite 245
Decatur, GA 30033
Phone No: 404-296-5300

Ronald M. Adams,

Clerk of Superior Court
(912) 554-7250

Jason Sheffield 10/6/21
Subpoena Issued by Attorney of Record for Defendant

RETURN OF SERVICE

I served the within witness Ruby Pontello RN with this subpoena on 10/14/21 at 3:15 am/pm by: 1 delivering to him/her in person, or by ____ registered or certified mail.

Served by: _____
Name and Title

"Pursuant to OCGA 24-13-21(c-h), this subpoena form is being provided to the attorney of record and shall be completed prior to service upon the witness. If an individual misuses a subpoena, he or she shall be subject to punishment for contempt of court and shall be punished by a fine of not more than $300.00 or not more than 20 days imprisonment, or both. A witness may contact the Clerk of Court's office to verify this subpoena was issued for a valid case."

PETERS, RUBIN, SHEFFIELD & HODGES

TRIAL & APPELLATE LAWYERS

DOUGLAS N. PETERS, L.L.C.
ROBERT G. RUBIN, P.C.
JASON B. SHEFFIELD, P.C.
FOSS G. HODGES, L.L.C.
ERIN E. KING, L.L.C.

October 7, 2021

Hand Delivery

RE: State of Georgia v. Travis McMichael
Indictment No. CR-2000433

Dear Sir or Madam:

Enclosed, for service upon you, is a subpoena directing you to appear at the trial of the State of Georgia v. Travis McMichael, on **Monday, October 18, 2021, at 10:00 a.m.** The subpoena requires your presence on that date though it is quite likely that your testimony will not be reached until early November.

If you prefer to be placed **on-call,** please contact me, attorney Jason B. Sheffield, on my cellphone at 404-218-4590, so that we can speak about this process and answer all questions. I understand this may be anxiety producing. I hope to alleviate as much of that as possible when we speak. When we talk, I will ask for all of your contact information and we can discuss how much notice you will need to appear in court. Once I have that information, I have the authority to place you on-call until your testimony is required, which means you would not have to appear on October 18th, but we must talk first. Thank you.

Sincerely,

JASON B. SHEFFIELD
Attorney for Travis McMichael

2786 North Decatur Road, Suite 245, Decatur, Georgia 30033 P: (404) 296-5300 F: (404) 294-0441 www.justiceingeorgia.com

EXHIBIT B

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	§	
	§	
v.	§	Case No. CR2000433
	§	
TRAVIS MCMICHAEL,	§	
GREG MCMICHAEL, and	§	
WILLIAM R BRYAN,	§	
	§	
Defendants.	§	

ORDER ON THE ADMISSION OF THE VICTIM'S MENTAL HEALTH RECORDS

On September 29, 2020, the State of Georgia filed a "Motion in Limine Re: Character of Victim" seeking to prohibit the Defense from introducing character evidence of the victim, Ahmaud Arbery. Specifically, the State seeks to prohibit the introduction of evidence regarding Arbery's alleged bad character, his mental health status, or alleged specific instances of misconduct, including any encounters with law enforcement, arrests, convictions, or that he was on probation at the time of his death.[1] Defendants Travis and Greg McMichael ("Defendants") responded to the motion on February 1, 2021 claiming, *inter alia*, that Arbery's mental health is relevant because it is probative to issues that must be decided in a self-defense case.

The matter was heard by the Court on May 12, 2021. At the hearing the Defendants sought to tender mental health records from Gateway Behavioral Health Services ("Gateway") for review. At that time the Defendants contended that the records were relevant non-character evidence that was admissible to show that the victim was the first aggressor. The Court did not permit the tender and instead asked the parties to submit their legal arguments by brief. The Defendants filed their brief on June 14, 2021,

[1] Defendants filed a Notice of Intent to Introduce 404(b) Evidence on Dec. 31, 2020. That Notice, which discusses alleged specific instances of misconduct, including encounters with law enforcement, arrests, convictions, and probation status, was addressed under a separate order titled "Order on Defendants' Notice of Intent to Introduce 404(b) Evidence". Therefore, this Order will only address evidence regarding Mr. Arbery's mental health status.

the State responded on June 29, 2021, and then the Defendants responded to the State's response on July 9, 2021.[2] The Defendants filed an addendum on August 25, 2021 with the State filing a response thereto on August 26, 2021. The matter is now ripe in this Court.

As will be explained below, the issue presented must be addressed through an analysis of privilege, character evidence, relevance, and probative value.

I. How does the law of Privilege Affect the Admissibility of Evidence of Decedent's Mental Health?

At the May 12, 2021 hearing the Court questioned whether any privilege may attach to the medical records proffered by the Defense. Georgia has codified the mental health privilege in O.C.G.A. § 24-5-501, which provides in relevant part that:

> (a) There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following:
>
> (5) Communications between psychiatrist and patient;
> (6) Communications between licensed psychologist and patient as provided in Code Section 43-39-16;
> (7) Communications between a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor and patient;
> (8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this subsection . . .

This mental health privilege survives the death of the patient absent a valid waiver. As explained in Cooksey v. Landry, 295 Ga. 430, 435-36, 761 S.E.2d 61, 66 (2014) "[o]ur legislature . . . has determined that the public policies supporting the creation of a mental

[2] Defendant William R. Bryan did not seek to adopt the arguments of the McMichael Defendants on the issue of the admission of the mental health records. Furthermore, Defendant Bryan did not file a response, nor make oral argument opposing, or agreeing with, the State's Motion in Limine: Character of Victim. Despite Defendant Bryan's silence on this issue, this ruling will apply to all defendants.

health privilege necessitated enactment of a nearly absolute privilege, one without exception if the patient is deceased or the nature of the patient's mental condition is put at issue." Despite this durable statutory privilege, the Defendants argue (1) that their Fifth Amendment right of compulsory process and their Sixth Amendment right to confrontation under the United States Constitution "trump Georgia's psychotherapist/patient privilege",[3] and (2) Arbery's self-report to Gateway is admissible under O.C.G.A. § 24-8-803(4) (statements made for medical diagnosis or treatment are not considered hearsay).

A. Admissibility of Gateway Records Under O.C.G.A. § 24-8-803(4)

The Gateway records, which were tendered to the Court for in-camera review, show that Arbery was referred to Gateway Behavioral Health by his probation officer in December 2018. According to the Defendants, any statements that Arbery made to the intake nurse on that date are admissible under the hearsay exception in O.C.G.A. § 24-8-803(4). Said code section states that statements made for the purpose of a medical diagnosis or treatment can be an exception to the hearsay rule in that those types of statements, when made for the purpose of diagnosis or treatment, have an underlying "guarantee of trustworthiness". *See* State v. Almanza, 304 Ga. 553, 820 S.E.2d 1 (2018). However, absent a clear waiver of confidentiality from Arbery, the records are still not admissible even under O.C.G.A. § 24-8-803(4).[4] *See* Neuman v. State, 297 Ga. 501, 773 S.E.2d 716 (2015).

An "Authorization for Release of Health Information" (hereinafter "Release") was signed by Arbery on December 11, 2018. The Release specifically stated that Gateway could release "authorized" records to The Georgia Department of Community Supervision ("DCS") and that the Release expired one (1) year after it was signed. The "authorized" records were unambiguously identified, a relevant time period was created, and the

[3] McMichael Defendants' Brief in Support of Admissibility of Deceased's Mental Health, p. 5, filed June 14, 2021.

[4] In the very rare cases where the Georgia appellate courts have allowed psychiatric records to be admitted in a criminal case pursuant to O.C.G.A. § 24-8-803(4), the cases involved a minor victim. *See* Allen v. State, 247 Ga. App. 10, 543 S.E.2d 45 (2000); Gilbert v. State, 191 Ga. App. 574, 382 S.E.2d 630 (1989).

Release was specifically limited "[f]or the purpose of: continuity of care and Court ordered supervision".

Now at issue is that a portion of the Gateway records were apparently released and provided to the Defense. The Defense then issued a subpoena for the records to Gateway, which in turn filed a Motion to Quash or Modify Subpoenas dated May 7, 2021. The motion was addressed at the May 12, 2021 hearing with the records being tendered to the Court for review as described above.

Having reviewed the Release along with the Gateway documents, the Court finds that the Defendants have failed to show that a valid waiver existed. They have also not shown that the Gateway records are admissible hearsay under O.C.G.A. § 24-8-803(4). Therefore, to the extent Defendants rely on a valid waiver or the hearsay exception, the State's Motion in Limine is **GRANTED** and Defendants' Motion to Introduce Evidence of the Victim's Mental Health is **DENIED**.

B. Defendants' Fifth and Sixth Amendment Rights

The Defendants assert that their Fifth Amendment right to compulsory process and their Sixth Amendment right to confrontation outweigh any mental health privilege afforded to Arbery under O.C.G.A. § 24-5-501. "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," Bobo v. State, 256 Ga. 357, 360, 349 S.E.2d 690, 692 (1986).

As to necessity, the Defendants argue that the mental health records of Arbery are needed because they are "probative to issues that must be decided in a self-defense case", specifically who was the first aggressor.[5] They explain "[t]he fact that the decedent ... 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."[6] Their position is that the mental health records reveal

[5] Defendants' Brief in Support of Admissibility of Deceased's Mental Health, pg. 34, filed June 14, 2021.
[6] Id. at pg. 10.

a diagnosis, which when left untreated, explains why Arbery turned toward Defendant Travis McMichael. The Defendants argue that "[w]hat motivated the decedent to act as he did, is relevant ...."[7] In support of this, Defendants cite to State v. Bolaski, 95 A.3d 460 (Vt. 2014), Sturkey v. State, 271 Ga. 572, 522 S.E.2d 463 (1999), Dixon v. State, 256 Ga. 658, 352 S.E.2d 572 (1987), United States v. Greschner, 647 F.2d 740 (7th Cir. 1981), and Sanders v. State, 77 So.3d 497 (Miss. App. 2011).

Georgia and federal law hold that "a victim's violent character is not an essential element of a self-defense claim. *See* United States v. Gulley, 526 F.3d 809, 819 (5th Cir. 2008) (pointing out that 'a self defense claim may be proven regardless of whether the victim has a violent or passive character,' and collecting federal cases on this issue). *See also*, Mohamud v. State, 297 Ga. 532, 536, 773 S.E.2d 755 (2015); Ronald L. Carlson & Michael Scott Carlson, Carlson on Evidence 128 (6th ed. 2018)," Strong v. State, 309 Ga. 295, 314, 845 S.E.2d 653, 670 (2020). Despite those holdings, there are exceptions in which a defendant can present evidence of a victim's character when he claims justification and offers evidence that the deceased was the first aggressor.

In this context, the admissibility of evidence of a victim's character is governed by O.C.G.A. §§ 24-4-404 and 24-4-405. In Mohamud v. State, 297 Ga. 532, 536, 773 S.E.2d 755, 759 (2015), the Georgia Supreme Court explained that the evidence rule on a victim's character presented in Chandler[8] was superseded by the "new" evidence code, and the admissibility of evidence of a victim's character is governed by O.C.G.A. §§ 24-4-404 and 24-4-405. The Mohamud court summarized the applicable law and held that "as a general rule, character evidence of a victim is limited to reputation or opinion, *not* specific bad acts," Mohamud, 297 Ga. at 536, 773 S.E.2d at 759 (emphasis in the original). Thus, any evidence the Defense would intend to submit on the issue of character or propensity of the victim as a first aggressor is limited. The specific act

[7] Defendants' Reply to State's Response to Defendants' Introduction of Evidence of the Deceased's Mental Health, pg. 10, filed July 9, 2021.
[8] Chandler v. State, 261 Ga. 402, 405 S.E.2d 669 (1991).

evidence the Defendants seek to admit (i.e. medical diagnosis and acts allegedly related to or consistent with that diagnosis) is not admissible under the rules.

This Court also finds that Sturkey, Dixon, Greschner, and Sanders are easily distinguishable in that in those cases the defendant knew the victim, or the victim had made prior threats or provoked the defendant. The factual situation in the case *sub judice* is not analogous as the Defendants did not know the victim and had not experienced any prior provocative contact with Arbery. The closest analogous case that this Court could find, Bolaski, was discussed during the May 12, 2021 hearing. However, Bolaski, is also distinguishable.

Bolaski is a self-defense case from Vermont in which the defendant sought to introduce the mental health records of the victim under the premise that they would help explain the victim's conduct, that the records were not prohibited under Rule 404(b), and that the probative value would substantially outweigh any unfair prejudice. The facts in Bolaski revealed that the defendant was unarmed while the victim clearly possessed weapons – a taser and a splitting maul. In the initial aggression towards the defendant (and others), the victim ended up abandoning the taser, and then charged specifically toward Bolaski with the splitting maul. Bolaski, who did not know the victim, retreated to his vehicle to obtain a weapon to defend himself. Once the weapon was obtained, Bolaski shot the victim in self-defense. However, despite being shot, the victim continued to charge Bolaski with the splitting maul, causing Bolaski to shoot the victim again. Of note, the Bolaski court remarked numerous times that the jury had to consider significant conflicts in the eyewitness testimony.

The State correctly points out that the standard for self-defense differs between Georgia and Vermont law. Vermont law is *subjective*, holding that a defendant acts in self-defense when they are acting "in the just and necessary defense of his or her own life." 13 V.S.A. § 2305. This allows the jury to consider "the reasonableness of the defendant's action by 'taking into account not only the circumstances with which he is

confronted, but his individual attributes as well,'" Bolaski at 472.[9] Georgia, however, employs an *objective* standard in that it requires consideration of what a reasonable person would do when "he or she reasonably believes that such force is necessary to prevent death." O.C.G.A. § 16-3-21(a). When considering self-defense in Georgia, the jury is instructed that a defendant's belief "must be reasonable, that is, a reasonable person would also believe that the threat or use of force is necessary," Suggested Pattern Jury Instructions, Vol. II: Criminal Cases (4th ed.), § 3.10.12.

After considering the record, the applicable cases, including Bolaski and Mohamud, and the Georgia objective standard, the Court finds that the mental health records are not necessary to the Defendant's claims. Unlike the factual situation in Bolaski, there are no conflicting witness accounts of the event to balance – the event itself is on video. The video provides the jury with a direct account of the moments leading up to Arbery's death. Finally, as indicated above, a privilege attaches to the records.

In sum, there is no showing of necessity, the evidence is not admissible under Rules 404 and 405, and evidence is available to the jury documenting the moments before Arbery's death. That evidence permits the jury to make an appropriate determination under Georgia law as to the aggressor at the moment Arbery turned toward Travis McMichael. Therefore, considering the Defendants' Fifth and Sixth Amendment rights, the State's Motion in Limine is **GRANTED** and Defendants' Motion to Introduce Evidence of the Victim's Mental Health is **DENIED**.

II. How is the Evidence of Ahmaud Arbery's Mental Health Relevant?

Pretermitting the above, and assuming the Release allows the release of the records, and that Rules 404 and 405 do not govern the admission of the mental health records, the Court will address the Defendants' argument that the evidence should be considered under Rule 401 and 403. To be sure, the Defendants argue in their brief that

[9] States Response to Defendants' Motion to Introduce Evidence of the Victim's Mental Health, Appendix B, pg. 2, filed June 29, 2021.

relevance under O.C.G.A. § 24-4-401 should govern the admissibility of the Gateway records.

A. Are the medical records relevant to an issue other than the victim's character (Rule 401)?

Under Rule 401 "'relevant evidence' [is] evidence that 'ha[s] 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.' 'This is a binary question – evidence is either relevant or it is not,'" Anderson v. State, No. A21A0452, 2021 WL 2643914, at *4 (Ga. Ct. App. June 28, 2021), citing Strong v. State, 309 Ga. 295, 300 (2)(a), 845 S.E.2d 653 (2020). According to the Defendants, the factual issue for which the Defendants seek to admit the medical records is for the jury to use them in deciding whether Defendant Travis McMichael acted in self-defense.

As mentioned prior, a video documents in real time Arbery's actions when confronted on the street by Travis and Gregory McMichael. The medical records evidence proffered by the Defendants does not have "any tendency to make the existence of any fact that is of consequence to the determination for the action more probable or less probable than it would be without the evidence." O.C.G.A. § 24-4-401. The jury can watch the video, make deductions and reach conclusions.

Evidence on why Arbery did anything on February 23, 2020, as opposed to what he did, does not make it "more probable or less probable" that the Defendants committed the acts charged. The Defendants explain that, in accord with Bolaski, *supra,* what motivated Arbery to act as he did is relevant in a self-defense case. Again, Bolaski was decided in Vermont under a different standard. Here, the Defendants did not know Arbery and were not aware of any mental health condition. The mental health records at issue are from a limited visit in December 2018 and were produced to assist probation with "continuity of care and court ordered supervision". There is no evidence that the victim was suffering from any mental health issue, or had otherwise decompensated, on February 23, 2020. Instead, it appears that the Defense wants to use the records to make relevant "other acts" evidence already excluded by this Court in a prior Order. That "other

acts" evidence would then ostensibly demonstrate that he had an ongoing mental health problem that affected him at the moment he turned toward Travis McMichael. This is tenuous at best, and the Court finds that the Gateway records are not relevant to the issues to be presented at trial, and thus, the State's Motion in Limine is **GRANTED** and Defendants' Motion to Introduce Evidence of the Victim's Mental Health is **DENIED**.

B. Is the probative value of the medical records substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or by considerations of undue delay or waste of time (Rule 403)?

Even if the Court were to determine that the medical records are relevant the evidence must still must be analyzed under O.C.G.A. § 24-4-403. Rule 403 grants the trial court discretion to exclude relevant evidence "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."

The medical records that the Defendants seek to introduce are from one single visit to Gateway. The "diagnosis" contained therein was made by a registered nurse, who was not formally trained in mental health but instead had taken an "online" course that she would click through and read, and then took a short test at the end. This RN was tasked with questioning Arbery and coming up with a mental health diagnosis. A nurse practitioner with Gateway met with Arbery on that same day for a half an hour, and then confirmed the RN's diagnosis and gave him a prescription. There was no follow up, no feedback from Arbery, nor any continued treatment that would suggest this "diagnosis" was correct or that the prescription was helpful in any way.

This Court reviewed the Gateway records, in-camera, and as in DePietro v. State, 356 Ga. App. 539, 848 S.E.2d 153 (2020) cert. denied (Apr. 19, 2021), finds the records inadmissible under O.C.G.A. § 24-4-403. The Court finds that the "diagnosis" made by the RN at Gateway "lack[s] sufficient probative value . . . [and] the [C]ourt [is] troubled by

the validity of [the RN's] opinion, which amounted to 'guesswork and speculation[,]' 'because this isn't [her] field," DiPietro at 549, 848 S.E.2d at 161.[10]

i. The need for the evidence.

In Section (II)(1) of this Order, the Court has summarized the Defendants' claims of relevance and need as to the medical records evidence. It is apparent from the arguments presented that Defendants' intended use of Arbery's medical records is to engage in speculation as to why Arbery acted as he did on February 23, 2020. It is also apparent that the Defense intends to use the Gateway records to bring back "other acts" evidence already excluded under Rule 404. As referenced above, the medical records evidence appears to simply be impermissible character and propensity evidence.

ii. The probative value is substantially outweighed by other factors.

Rule 403 lists specific considerations that are relevant in this case such as "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."

a. Unfair prejudice

"Unfair prejudice" speaks to the capacity of some marginally relevant evidence to lure the factfinder into a decision on a ground different from proof specific to the offense charged. *See* Old Chief v. United States, 519 U.S. 172, 180 (1997). Again, the character of a victim is neither relevant nor admissible in a murder trial. *See* Austin v. State, 268 Ga. 602, 492 S.E.2d 212 (1997). Even with an appropriate instruction to the jury, the medical records evidence could lure the factfinder into deciding this case on the basis of Arbery's highly questionable diagnosis. A decision weighed down by an improper character examination would be of considerable risk if the medical records evidence is admitted in this case.

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[10] The RN that performed the diagnosis testified that she was "not necessarily" supervised while performing the evaluations; she kept the diagnoses "very basic...so the nurse practitioner or the doctor can upgrade them to whatever they deem necessary"; that there were "quite a few" of the patients that had schizoaffective disorder that she saw in the four years she was there.

b. Confusion of the issues

The Court finds that there is the potential for confusion of the issues if the medical records evidence was admitted. The issue for the jury is whether the Defendants committed the crimes alleged in the indictment, or whether the Defendants were engaged in a lawful citizen's arrest. The other issue, and the one Defendants want the records for, is whether Travis McMichael acted in self-defense when he shot Arbery. The introduction of the victim's medical records would tend to create confusion for the jury as to whether it is the Defendants' actions on February 23, 2020, or the victim's 2018 questionable mental health diagnosis that is to be considered.

c. Misleading the jury

The Court is concerned that even with an appropriate charge the medical records evidence may lead the jury to believe that they may consider the character of the victim in their analysis of the Defendants' affirmative defenses.

d. Undue delay, waste of time and needless presentation

As the State has pointed out, the Defendants "have already informed the Court that their expert is basing her opinion, having never met Mr. Arbery, solely on the other acts evidence" as well as the Gateway diagnosis. This will require the Defendants to put up the witnesses for the other acts evidence, as well as the Gateway witnesses. The State will then put up their experts as well. As the Court has already determined in a prior order, the "other acts" evidence is not admissible, nor are the medical records for the reasons stated above.

Considering the matter under Rule 403, the State's Motion in Limine is **GRANTED** and Defendants' Motion to Introduce Evidence of the Victim's Mental Health is **DENIED**.

CONCLUSION

For the foregoing reasons, the State's Motion in Limine is **GRANTED** and Defendants' Motion to Introduce Evidence of the Victim's Mental Health is **DENIED**.

SO ORDERED this 1ST day of OCTOBER, 2021.

Hon. Timothy R. Walmsley
Judge, Superior Court
State of Georgia

cc: All Parties