

Russell M Adams
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

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

**DEFENDANTS' MOTION FOR THE ADMISSION OF EVIDENCE
PERTAINING TO AHMAUD ARBERY IF THE STATE OPENS THE
DOOR AT TRIAL TO THE ADMISSION OF SUCH EVIDENCE**

Travis and Greg McMichael, through counsel, move this Court to permit the Defendants to introduce certain evidence at trial pertaining to Ahmaud Arbery if the State opens the door to the admission of such evidence through arguments or testimony at trial. In support of this Motion, the McMichaels respectfully show this Court the following:

This Court has previously ruled that the McMichaels may not introduce at trial evidence pertaining to certain prior bad acts committed by Ahmaud Arbery, which acts are set out in the Defendants' Notice of Intent to Introduce Evidence Pursuant to O.C.G.A. § 24-4-404(b).¹ The Court has also ruled that the McMichaels may not introduce at trial any

¹ See Order on Defendants' Notice of Intent to Introduce 404(b) Evidence, entered on August 30, 2021.

evidence pertaining to Ahmaud Arbery's mental health diagnosis, including Ahmaud's mental health records.² The State has filed two motions in limine asking the Court to prohibit the Defendants from introducing at trial evidence that Ahmaud Arbery was on felony probation on the date of the incident and from introducing evidence that trace amounts of THC were found in Ahmaud's system during a blood test taken in connection with his autopsy.³ The State contends that evidence of Ahmaud's probationary status or of the presence of THC in his blood system would constitute impermissible character evidence. The McMichaels have filed responses to both of the State's motions in limine, showing that such evidence is intrinsic to and intertwined with the events that took place on February 23, 2020, that the evidence is not being offered for an impermissible character purpose, and that the probative value of the evidence outweighs any minimal prejudice from its admission.⁴ The Court has not yet ruled on the two motions in limine.

² See Order on the Admission of the Victim's Mental Health Records, entered on October 1, 2021.

³ See "4.70 State's Motion in Limine as to THC" and "4.71 State's Motion in Limine Regarding Probation."

⁴ See "Defendants McMichaels' Response to 4.70 State's Motion in Limine as to THC" and "Defendants McMichael's Response to 4.71 State's Motion in Limine Regarding Probation."

In previous pleadings and in statements to the Court, the State has alleged that Ahmaud Arbery was simply jogging in Satilla Shores on February 23, 2020, as it was his regular habit or routine to jog in or around his neighborhood as a means of exercise. The State has now filed in this matter a “4.72 Brief on Character Witnesses and ‘Opening the Door’ to Character Evidence.” In its 4.72 Brief, the State says that it intends to introduce testimony at trial from several lay witnesses who knew Ahmaud Arbery personally or had seen him running or jogging in his neighborhood or in the surrounding neighborhoods. According to the State, these witnesses will be offered as fact witnesses about Ahmaud Arbery being an avid runner who enjoys jogging for his health and exercise. The State contends that these witnesses are not being offered as character witnesses and will not testify to Ahmaud Arbery’s general good character. Therefore, the State argues that any testimony that Ahmaud Arbery regularly jogs for health and exercise will not open to the door to the admission of Ahmaud’s prior bad acts or his mental health diagnosis.⁵

⁵ Should this Court grant the State’s two pending motions in limine, the State would no doubt also contend that the introduction of lay testimony pertaining to Ahmaud’s habit of running for exercise would similarly not open the door to the admission of testimony at to Ahmaud’s probationary status or the presence of THC in his system.

The McMichaels agree that mere testimony from State’s witnesses that Ahmaud Arbery was an avid jogger who regularly ran for his health and exercise would not constitute evidence of Ahmaud’s “good character,” such that it would open the door to “bad character” evidence. The McMichaels also recognize that character of the victim, whether it is good or bad, is generally irrelevant and inadmissible at trial. *Austin v. State*, 268 Ga. 602 (1997). However, the McMichaels do not intend to introduce any evidence pertaining to Ahmaud’s **character** at trial, pursuant to O.C.G.A. §§ 24-4-404(a), 24-4-404(b), or 24-4-405. Instead, the McMichaels show as follows: If the State presents testimony (and ultimately argument) that Ahmaud Arbery was simply jogging in Satilla Shores for his health and exercise on the date of this incident, as it was his regular routine to do, then such testimony would open the door to evidence that there were other factors present that day that could provide alternative explanations for Ahmaud’s running in Satilla Shores on February 23, 2020.

A party may “open the door” to the opponent’s use of otherwise irrelevant or inadmissible evidence at trial. *Smith v. State*, 299 Ga. 424 (2016). “Opening the door” is a metaphor used for a variety of situations that arise in criminal and civil trials involving conduct by one party that

allows the other party to introduce evidence that otherwise would not be allowed. *Smith, supra*, (citing 21 Kenneth W. Graham, Jr., *Federal Practice & Procedure Evidence* § 5039.1 (2d ed. Apr. 2016 update)). If the Court grants the State's two pending motions in limine pertaining to the presence of THC in Ahmaud's system and Ahmaud's probationary status, then the McMichaels show that the State could open the door to the admission of such evidence by choosing to introduce evidence at trial that Ahmaud was simply out for an innocent Sunday jog on February 23, 2020, just as he routinely did for his health and exercise.

The State will have opened the door and placed in issue a fact that is now very much in dispute. Was Ahmaud Arbery out for an innocent Sunday jog when men in pickup trucks with guns chased, trapped, and executed him, as the State has framed the events? Or was Ahmaud attempting to escape capture after he had been spotted again inside a house he had no permission to enter, knowing that Matt Albenze, who was standing across the street and talking on his cell phone, was most likely calling law enforcement on him, knowing that he was on active probation, knowing that he had two prior probation revocations, knowing that an arrest for trespassing could result in another probation revocation,

knowing that he had THC in his system that day, and knowing that his use of marijuana was another violation that could result in his probation revocation? These other factors (Ahmaud's probationary status, his prior probation revocations, and the presence of THC in his system), which were intrinsic to the events of February 23, 2020⁶, would not be offered by the defense for any character purpose, but simply to rebut the State's explanation for why Ahmaud was running that day in Satilla Shores, after the State opened that door.

Additionally, if the State presents evidence that Ahmaud routinely jogged for both his physical health and his mental health, this evidence could open the door to the admission of Ahmaud's mental health diagnosis of schizoaffective disorder, which mental health disorder Ahmaud was suffering from on the day of the incident, which disorder was known to make persons suffering from it act aggressively and combatively, behaviors which are intensified by the ingestion of marijuana, for which disorder

⁶ The McMichaels have set out in their responses to the State's two motions in limine why evidence of the presence of THC in Ahmaud Arbery's system and of Ahmaud's probationary status was intrinsic to the events of February 23, 2020. As set out in *White v. State*, 838 S.E.2d 828 (Ga. 2020), "[E]vidence of other acts is inextricably intertwined with the evidence regarding the charged offense if it forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted. And this sort of intrinsic evidence remains admissible even if it incidentally places [a person's] character at issue."

Ahmaud was not taking his prescribed medication on February 23, 2020, and which disorder included auditory hallucinations in which voices told him that when confronted by an authority figure, to run, escape, and if unable to escape, to fight. Finally, if the State introduces any evidence inferring that Ahmaud Arbery **only** runs for health reasons, then such evidence opens the door to the admission of certain prior acts set out in the Defendants' 404(b) Notice indicating that Ahmaud **also had been known to run** when confronted by law enforcement, his probation officer, or citizens who were accusing him of criminal behavior.

The Defendants move this Court to provide the parties with a preliminary ruling prior to opening statements at trial as to whether the State's anticipated evidence and argument that Ahmaud Arbery was simply running for health reasons in Satilla Shores on February 23, 2020, as was his normal habit and routine, would open the door, not to character evidence, but to the admission of other explanations for Ahmaud's running that day as set forth herein. Refusing to allow a reasonable alternative explanation for the motives that the State is merely speculating propelled Ahmaud Arbery to run after having been spotted inside the

English house for the fifth time will deny to the defendants their right to a fair trial pursuant to the U.S. and Georgia Constitutions.

Signatures next page

This 4th day of November, 2021.

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Certificate of Service

I hereby certify by my signature that I have served a copy of the foregoing upon 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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November 4, 2021.

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