

November 3, 2021

TO: Distribution List

FROM: Stanford Center for Racial Justice

SUBJECT: Background briefing on McMichaels trial for killing Ahmaud Arbery

**EXECUTIVE SUMMARY**

We have prepared this background memo to provide information and context about the trial of Gregory and Travis McMichael and William “Roddie” Bryan for the killing of Ahmaud Arbery. This incident, and the seeming endless stream of racial violence we have experienced over recent years, causes stress, fear and trauma in our Stanford community and across the nation for those who sometimes feel that they or the people they care about are unsafe and at risk of harm arising out of a culture of racism and violence rooted in our nation’s history. This memo is intended to be a comprehensive resource for better understanding the events leading up to the trial, the trial proceedings, and the deeply entrenched intersections of race, bias, and inequality throughout.

On Sunday, February 23, 2020, Ahmaud Arbery—a 25-year-old Black man—laced up his shoes and went for a run in Satilla Shores, Georgia, a predominantly white community in Glynn County just two miles away from his home in Brunswick. A former high school football standout, friends and family said he liked to stay in shape and was an avid jogger who was often seen running in and around his neighborhood.

During Arbery’s run, he was chased in a pickup truck by two white men, Gregory and Travis McMichael, cutting him off and forcing him to turn around and run back the way he came. As Arbery tried to run away from the McMichaels, a neighbor, William Bryan also cut him off in his pickup truck, turning Arbery around again back toward the McMichaels, who claimed he looked like a burglary suspect. In a video filmed by Bryan, Gregory McMichael is seen on the bed of his pickup truck with a handgun while his son, Travis, is standing outside of the driver door with a shotgun. Arbery disappears briefly in front of the truck and emerges in a struggle with Travis McMichael, when three shots are heard, killing Arbery. He was unarmed.

On June 24, 2020, all three men were indicted on nine charges, including one count of malice murder, four counts of felony murder, two counts of aggravated assault, one count of false imprisonment, and one count of criminal attempt to commit a felony.

The case has drawn national attention. It evokes reminders of the long and tragic history of mob and individualized violence against unarmed Black people, often being chased down and killed by whites under claims of vigilantism or self-defense. Arbery's killing has drawn comparisons to the killing of Trayvon Martin in 2012. Trayvon's killer, George Zimmerman, claimed self-defense—the McMichaels and Bryan are expected to do the same. The community in Brunswick and our nation are on edge about the outcome of this case for numerous reasons.

If history is any indication, there is a chance that neither the McMichaels nor Bryan will be held accountable for the killing of Ahmaud Arbery. First, the defendants will rely on the citizen's arrest law in existence at the time of the incident. Historically, citizen's arrest laws were implemented to aid in the capturing of slaves and can be successfully invoked so long as the defendant can show they had a reasonable suspicion that the individual was committing a felony. If the defendants can successfully establish a valid citizen's arrest, they will then likely argue that killing Arbery was valid under Georgia's self-defense doctrine, requiring them to show that Arbery was the initial aggressor. Although he has since recused himself from the case, the second prosecutor in charge had written in a letter, without evidence, that Arbery "initiated the fight" and had an "apparent aggressive nature." Historically, Black people have been cast as "aggressive" to justify not just over-policing and incarceration, but enslavement and lynching.

Another concern is the jury pool. While Brunswick is predominantly Black, the trial is taking place in Glynn County, where only 16 percent of the residents are Black, 4 percent Latino and 78 percent white. Previously in the U.S., Black people were entirely excluded from serving on juries. Prior to 1986, peremptory challenges—striking a juror without cause—could be used solely to exclude a juror based on their race. Even today, a predominately white jury pool raises concerns about the risk of bias and sympathy for the defendants. While some view Bryan's video recording of the shooting as conclusive evidence of murder, a local predominately white jury may not have the same opinion—and it only takes one of them to prevent a conviction of the three men.

The remaining question that our nation anxiously awaits is: will justice be served?

Eugene Robinson, a Washington Post columnist, recently wrote: "If I were one of the prosecutors, I'd ask the jury to do a thought experiment. I'd have them imagine Travis McMichael jogging through one of Brunswick's majority-Black neighborhoods and being physically detained by three Black men, two of whom are brandishing firearms and one of whom ultimately kills him. Would they call that a legal arrest? Or would they call it murder?"

## INTRODUCTION

On October 18, 2021, jury selection began in the state murder trial of Gregory and Travis McMichael (the McMichaels), and William “Roddie” Bryan for the killing of Ahmaud Arbery, setting off a wave of media coverage regarding the difficulties of selecting jurors in the case.<sup>1</sup> The Associated Press reported that Glynn County, Georgia, where the killing took place, is home to 85,000 people—making it “increasingly likely that some of the jurors who are ultimately chosen will have preconceived opinions and personal ties to the case.”<sup>2</sup> Two weeks into jury selection, the murder trial for the killing of an unarmed Black man jogging through the small, predominately white neighborhood of Satilla Shores in coastal Georgia has been labeled as a test case for racial justice.<sup>3</sup>

The McMichaels and Bryan trial has gained national attention for several reasons. Among the most gripping is that Ahmaud Arbery was killed by a civilian, while a significant number of high-profile killings of unarmed Black people that have received national attention were committed by police officers. Advocates have called the killing a “modern-day lynching,” and consider the trial one which will signify “the importance of African American life in this country.”<sup>4</sup> We have prepared this background memo to support a common and comprehensive understanding of the trial in light of the importance of this case concerning our country’s history of racial violence and the increasing media coverage and difficulty of following new developments.

We present below the essential legal and factual context of the case, with additional attention to the intersection of race and history across all the discussion. First, we provide the factual background of the case and significant events to date. Next, we discuss the substantive and procedural legal issues likely to play a major role in the trial’s outcome. Then, we identify additional relevant racial bias issues, including a brief history of lynchings in Georgia. Finally, we note other pending lawsuits related to Ahmaud Arbery’s killing.

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<sup>1</sup> Russ Bynum, *No ‘blank slate’ jurors in county shaken by Arbery slaying*, ASSOCIATED PRESS (Oct. 23, 2021), <https://apnews.com/article/ahmaud-arbery-georgia-brunswick-ab7cfc4c3a139b92e026c307ce2787c0>.

<sup>2</sup> *Id.*

<sup>3</sup> Nicquel Terry Ellis, *What we know about community where Ahmaud Arbery was shot: 911 caller reported ‘black guy’ on property*, USA TODAY (May 8, 2020), <https://www.usatoday.com/story/news/2020/05/08/ahmaud-arbery-shooting-what-we-know-satilla-shores-community/3096389001/>; Debbite Elliott and Russell Lewis, *The trial in the killing of Ahmaud Arbery is seen as a test case for racial justice*, NATIONAL PUBLIC RADIO (Oct. 17, 2021), <https://www.npr.org/2021/10/17/1046100934/georgia-murder-trial-in-killing-of-ahmaud-arbery-seen-as-test-case-for-racial-ju>.

<sup>4</sup> Margaret Coker and Hannah Knowles, *Ahmaud Arbery’s killing changed his Georgia community. Now three men will stand trial for murder.*, WASHINGTON POST (Oct. 17, 2021), <https://www.washingtonpost.com/nation/2021/10/17/ahmaud-arbery-trial-brunswick/>.

## **BACKGROUND**

Ahmaud Arbery's killing has presented several unique issues, from the moments leading up to his death to the start of jury selection. This section captures the most pertinent issues to provide a better understanding of the case, beginning with a factual background of the incident. Then, controversies with law enforcement, the release of video footage and the state indictment charges, and the start of the trial are discussed. For a full timeline of events offering further perspective and context regarding the case, see Appendix A. For a list of resources to track ongoing developments in the trial, see Appendix B.

### **I. The Incident**

#### **A. Facts as Originally Presented to Police**

On February 23, 2020, Ahmaud Arbery was running for exercise in the Satilla Shores neighborhood near Brunswick, Georgia when, according to the police report, Gregory McMichael saw him go by and thought Arbery looked like a man suspected in several break-ins in the area, prompting him to tell his son Travis McMichael.<sup>5</sup> Police have indicated there were no reports filed regarding these alleged break-ins.<sup>6</sup> The police report then stated that the McMichaels grabbed a handgun and shotgun, got into their truck and chased after Arbery, unsuccessfully cutting him off.<sup>7</sup> A third man—the McMichaels' neighbor—William “Roddie” Bryan joined the pursuit in his own truck and unsuccessfully tried to block Arbery's path when he ran in the opposite direction of the McMichaels.<sup>8</sup> Gregory McMichael's account in the police report suggests that the McMichaels yelled, “Stop, stop, we want to talk to you” at Arbery.<sup>9</sup> Gregory McMichael stated that “the unidentified male began to violently attack Travis and the two men then started fighting over the shotgun at which point Travis fired a shot and then a second later there was a second shot.”<sup>10</sup> Arbery was unarmed.

#### **B. Additional Facts from the Video Release**

About 10 weeks later, a video filmed by Bryan of the incident was released online, sparking a national outcry. The video shows Arbery running along a two-lane residential road when he comes upon a white truck, with Travis McMichael standing next to its open driver's

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<sup>5</sup> Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, NEW YORK TIMES (Oct. 16, 2021), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>.

<sup>6</sup> BBC News, *Ahmaud Arbery: What do we know about the case?* (Oct. 18, 2021), <https://www.bbc.com/news/world-us-canada-52623151>.

<sup>7</sup> Fausset, *supra* note 5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

side door with a shotgun and Gregory McMichael in the bed of the truck with a handgun.<sup>11</sup> The video shows Arbery running around the truck, briefly disappearing and then shouting is heard when Arbery emerges, engaged in a struggle with Travis McMichael when three shotgun shots are heard.<sup>12</sup> In December 2020, police body-camera footage was released showing Bryan admitting to following Arbery, blocking him in and filming the incident.<sup>13</sup>

### C. Additional Facts Implicating Racial Bias

It was reported that Ahmaud Arbery stopped on his run to look at a house under construction owned by Larry English, and was caught on surveillance camera as a number of men, women, and children had been before him.<sup>14</sup> According to the New York Times, a theory that emerged for why he stopped at the house was to get water before continuing his jog.<sup>15</sup> Arbery's lawyers have said there were frequently people on the construction site of the home, both day and night, but that Arbery "seems to be the only one who was presumed to be a criminal and ultimately the only one murdered based on that assumption."<sup>16</sup> English's lawyer eventually proposed that the man caught on surveillance camera who returned to the house did so to drink water, since there is a water source behind the house as well as one near the front and the man in the video moves to and from those locations.<sup>17</sup>

To report entrances on his property to police, Larry English has said he usually used non-emergency numbers, but the day Ahmaud Arbery was killed, 911 received multiple calls about a Black man near the house who was also running through the neighborhood.<sup>18</sup> While these calls were being made, Gregory McMichael saw Arbery running down his street, and later told police he believed Arbery was the person behind burglaries in the neighborhood, including one committed against his son, Travis.<sup>19</sup> Gregory McMichael also told police he connected Arbery to the thefts based on a description of the person who burglarized his son—an assessment Vox columnist Sean Collins said is "difficult to imagine not including ethnicity," leading lawyers for Arbery's family and others to suggest a series of 911 calls gives the actual reasons for why the McMichaels made their decision to chase after Arbery.<sup>20</sup> In a telling 911 call, the caller does not

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Ivan Pereira, *New body camera video shows events immediately following Ahmaud Arbery shooting*, ABC NEWS (Dec. 15, 2020), <https://abcnews.go.com/US/body-camera-video-shows-events-immediately-ahmaud-arbery/story?id=74742905>.

<sup>14</sup> Sean Collins, *Ahmaud Arbery was lynched*, VOX (May 21, 2020), <https://www.vox.com/21263899/ahmaud-arbery-lynched-video-mcmichael-glynn-county-georgia>.

<sup>15</sup> Richard Fausset and Rick Rojas, *Where Ahmaud Arbery Ran, Neighbors Cast Wary Eyes*, NEW YORK TIMES (May 22, 2020), <https://www.nytimes.com/article/satilla-shores-ahmaud-arbery-killing.html>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Collins, *supra* note 14.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

explain why they have called 911 but notes, “There’s a Black male running down the street.”<sup>21</sup> The New York Times obtained a recording of that 911 call and observed: “Sounding slightly breathless, [the caller] appeared to shout ‘stop!’ and ‘Travis!’ before going silent for the rest of the four-minute call. Gunshots could be heard in the background.”<sup>22</sup>

Although Gregory McMichael has claimed he “never would have gone after someone for their color,” he also said Arbery matched the thief’s description.<sup>23</sup> It is not clear if Arbery was the same height or weight as the alleged burglar, but as Sean Collins analyzed, “he was very clearly a Black man, [and] there was something about his appearance—[including] the color of his skin—that led the elder McMichael to assume Arbery was the burglary suspect.”<sup>24</sup>

#### **D. Further Insight from the Indictment**

According to the state indictment against the McMichaels and Bryan, all three are charged with aggravated assault for making an “assault upon the person of Ahmaud Arbery with a Ford F-150 pickup truck and a Chevy Silverado pickup truck, an object, device and instrument which when used offensively against a person are likely to result in serious bodily injury.”<sup>25</sup> The initial police report did not make any mention of contact between the McMichaels’ or Bryan’s truck with Arbery. The state indictment also charged all three defendants for false imprisonment, specifically by using their trucks to “confine and detain Ahmaud Arbery.”<sup>26</sup> While these facts were not present in the original police report, it sheds light on the events leading up to the killing of Ahmaud Arbery.

## **II. Law Enforcement Controversies and Ex-Prosecutor Indictment**

Following the shooting of Ahmaud Arbery, the police arrived within minutes but did not make any arrests. In the December 2020 police body-camera footage, one of the responding police officers is seen acknowledging Gregory McMichael’s law enforcement history—as a former police officer and investigator for the district attorney’s office—while speaking with another officer.<sup>27</sup> Additionally, Gregory McMichael can be heard talking to a police officer at the scene asking, “Y’all ain’t gonna put me in cuffs are you?” and the officer responds, “No, no, no, why would we put you in cuffs?”<sup>28</sup> This footage further sparked outrage and criticism over

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<sup>21</sup> *Id.*

<sup>22</sup> Fausset and Rojas, *supra* note 15.

<sup>23</sup> Collins, *supra* note 14.

<sup>24</sup> *Id.*

<sup>25</sup> Glynn Superior Court, *General Bill of Indictment: The State of Georgia v. Travis McMichael, Greg McMichael, and William R. Bryan* (June 24, 2020), <https://www.glynncounty.org/DocumentCenter/View/66861/Indictment>.

<sup>26</sup> *Id.*

<sup>27</sup> Pereira, *supra* note 13.

<sup>28</sup> Graham Cawthon, *The killing of Ahmaud Arbery: Timeline details every event leading up to murder trial*, KETV (Oct. 18, 2021), <https://www.ketv.com/article/ahmaud-arbery-timeline-murder-trial/37990866>.

disparities in how police treat white people after acts of violence against Black victims compared to how Black people are treated in the opposite circumstance.<sup>29</sup>

Furthermore, many questioned why criminal charges against the McMichaels and Bryan took 74 days to bring. According to BBC News, two local district attorneys had to recuse themselves due to professional connections to Gregory McMichael, and officials have publicly disagreed over whether there were orders to not arrest the McMichaels.<sup>30</sup> The former Brunswick District Attorney, Jackie Johnson, recused herself from the case because Gregory McMichael was a former investigator for her office.<sup>31</sup>

The second district attorney in charge, Waycross Circuit District Attorney George Barnhill, told police he believed the McMichaels acted legally under the state's citizen's arrest law.<sup>32</sup> Barnhill suggested in a letter that Arbery had mental health issues, highlighted his past interactions with law enforcement, and claimed the McMichaels were in their legal rights to kill Arbery based on Georgia's open carry and stand-your-ground laws.<sup>33</sup> In the same letter, Barnhill, without evidence, claimed that Arbery "initiated the fight" and had an "apparent aggressive nature."<sup>34</sup> As Sean Collins analyzes, the handling of this case reveals the "limits of a justice system often willing to give some (the McMichaels) the benefit of the doubt . . . particularly considering Barnhill's attempt to cast a Black man out for a jog as 'aggressive.'"<sup>35</sup> Barnhill later recused himself because his son worked with Gregory McMichael on an earlier prosecution of Arbery when they were at the Brunswick Judicial Circuit District Attorney's Office.<sup>36</sup>

In September 2021, Jackie Johnson was charged with violating her oath of office and obstructing the arrest of the McMichaels and Bryan for the killing of Ahmaud Arbery.<sup>37</sup> She is accused of directing police to not arrest Travis McMichael and showing "favour and affection" to Gregory McMichael.<sup>38</sup> The indictment further alleges that Johnson failed to treat Arbery and

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<sup>29</sup> Bert Roughton and Hannah Knowles, *Body cam video in Ahmaud Arbery shooting raises familiar concerns about unequal police treatment*, WASHINGTON POST (Dec. 17, 2020), [https://www.washingtonpost.com/national/newly-released-video-shows-police-did-not-immediately-help-ahmaud-arbery-as-he-lay-dying/2020/12/17/82fba128-4094-11eb-a402-fba110db3b42\\_story.html](https://www.washingtonpost.com/national/newly-released-video-shows-police-did-not-immediately-help-ahmaud-arbery-as-he-lay-dying/2020/12/17/82fba128-4094-11eb-a402-fba110db3b42_story.html).

<sup>30</sup> BBC News, *supra* note 6.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Collins, *supra* note 14.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Dakin Andone, Angela Barajas, and Jason Morris, *A suspect in the killing of Ahmaud Arbery was involved in a previous investigation of him, recused prosecutor says*, CNN (May 9, 2020), <https://www.cnn.com/2020/05/08/us/ahmaud-arbery-mcmichael-arrests-friday/index.html>.

<sup>37</sup> BBC News, *Ahmaud Arbery: Ex-prosecutor charged with mishandling case* (Sept. 3, 2020), <https://www.bbc.com/news/world-us-canada-58439984>.

<sup>38</sup> *Id.*

his family “fairly and with dignity” by not disclosing she had sought the help of another district attorney, Barnhill.<sup>39</sup>

It is also of note that Superior Court Judge Timothy R. Walmsley, who is based in Savannah, Georgia, a city about 70 miles north of Brunswick, was appointed to preside over the case after all five judges in the legal circuit where Ahmaud Arbery was killed recused themselves.<sup>40</sup>

### III. Video Release, Fourth Prosecutor Appointment and State Indictment

In April 2020, District Attorney Tom Durden of the Atlantic Judicial Circuit was named the third prosecutor of the case, but requested the case go to someone else, citing a need for an office with more resources to handle it.<sup>41</sup>

On May 5, 2020, a radio station in Brunswick released the video footage of Ahmaud Arbery’s shooting, which was filmed by Bryan. The video release led to the involvement of the Georgia Bureau of Investigation (GBI), a request made by Durden.<sup>42</sup> Following the GBI’s involvement in the case, on May 7, 2020, the McMichaels were arrested and charged with murder and aggravated assault for Arbery’s death.<sup>43</sup> Shortly thereafter, Georgia’s attorney general announced that Joyette M. Holmes of the Cobb County Judicial Circuit would serve as the fourth prosecutor to take the case.<sup>44</sup> On May 21, 2020, Bryan was arrested after authorities said he aided the McMichaels in chasing down Arbery.

On June 24, 2020, all three defendants were indicted on nine charges, including one count of malice murder, four counts of felony murder, two counts of aggravated assault, one count of false imprisonment, and one count of criminal attempt to commit a felony.<sup>45</sup> These charges are discussed below.

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<sup>39</sup> *Id.*

<sup>40</sup> Russ Bynum, *Outside judge named to preside over cases in Arbery slaying*, ASSOCIATED PRESS (May 18, 2020), <https://apnews.com/article/shootings-us-news-ap-top-news-savannah-gregory-mcmichael-88f2bb09fdaaa255478ec2c4361d17f4>.

<sup>41</sup> Michael Brice-Saddler and Cleve R. Wootson Jr., *Georgia attorney general assigns fourth prosecutor in killing of Ahmaud Arbery*, WASHINGTON POST (May 11, 2020), <https://www.washingtonpost.com/nation/2020/05/11/ahmaud-arbery-new-prosecutor/>.

<sup>42</sup> Audrey McNamara, *Probable cause “clear” in Ahmaud Arbery case, Georgia Bureau of Investigation says*, CBS NEWS (May 8, 2020), <https://www.cbsnews.com/news/ahmaud-arbery-probable-cause-murder-case-georgia-bureau-investigations/>.

<sup>43</sup> Georgia Bureau of Investigation, *Ahmaud Arbery Murder Investigation* (May 21, 2020), <https://gbi.georgia.gov/press-releases/2020-05-21/ahmaud-arbery-murder-investigation>.

<sup>44</sup> Brice-Saddler and Wootson Jr., *supra* note 41.

<sup>45</sup> Glynn Superior Court Indictment, *supra* note 25.



## **IV. Start of the McMichaels and Bryan Murder Trial**

On October 12, 2021, court officials confirmed that 1,000 jury duty notices were sent out for trial, with a total of 600 people reporting on October 18 and the remaining 400 on standby for October 25.<sup>46</sup> October 18, 2021 marked the start of jury selection, which is the current status of the case. It is expected to take two weeks or longer for the judge to seat a final jury of 12 people and four alternate jurors.<sup>47</sup>

### **LEGAL ISSUES**

The legal issues presented in the McMichaels and Bryan murder trial can be broken down into two categories: (1) substantive issues; and (2) procedural issues.

#### **I. Substantive Issues**

Primary substantive issues in the McMichaels and Bryan trial will turn on the charges the three defendants are facing and the defenses they are likely to make in response to those charges. According to the state indictment on June 24, 2020, all three defendants are charged with one count of malice murder, four counts of felony murder, two counts of aggravated assault, one count of false imprisonment, and one count of criminal attempt to commit a felony.<sup>48</sup> These charges and applicable defenses are described below.

#### **A. Indictment Charges**

##### **1. Murder**

Travis McMichael, Gregory McMichael, and William Bryan are all charged with malice murder and felony murder. Both types of murder have different elements. For a jury to convict the defendants of either malice murder or felony murder, the prosecution will have to convince the jury beyond a reasonable doubt that the conduct of the three defendants met the elements for the respective murder charges.

##### **a. Malice Murder**

Under Georgia law, murder is committed when the offender unlawfully and with malice aforethought, either express or implied, causes the death of another human being.<sup>49</sup> Express

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<sup>46</sup> Russ Bynum, *1,000 summoned as possible jurors in Arbery slaying trial*, ASSOCIATED PRESS (Oct. 12, 2021), <https://apnews.com/article/ahmaud-arbery-georgia-savannah-trials-e5732428859451618ebd54841028e073>.

<sup>47</sup> *Id.*

<sup>48</sup> Glynn Superior Court Indictment, *supra* note 25.

<sup>49</sup> Official Code of Georgia Annotated § 16-5-1.

malice is defined as a deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof.<sup>50</sup> Malice is implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.<sup>51</sup>

While Travis McMichael shot and killed Ahmaud Arbery, Gregory McMichael and William Bryan are also charged with malice murder under Georgia's law because they are accused of being a party to the crime. Georgia law states that every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime if they either intentionally aid or abet in the commission of the crime or intentionally advises, encourages, hires, counsels or procures another to commit the crime.<sup>52</sup>

### **b. Felony Murder**

Generally, even when a defendant does not directly commit a murder, if a jurisdiction follows the felony murder rule, the defendant can be held liable for the murder if the death was caused by the defendant during their commission of a felony. Georgia law follows this general rule, where a person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being irrespective of malice.<sup>53</sup>

The McMichaels and Bryan are charged with four counts of felony murder, each felony being one allegedly committed during the killing of Ahmaud Arbery. The first count is for the felony of aggravated assault with a deadly weapon; the second is for the felony of aggravated assault with an object—pickup trucks—likely to result in serious bodily injury; the third is for the felony of false imprisonment; and the fourth is for the felony of criminal attempt to commit false imprisonment.<sup>54</sup> Under the felony murder rule, if a jury finds the defendants guilty of any of these underlying felonies and also find that the defendants caused the death of Ahmaud Arbery in the commission of one of these felonies, then the jury can find the defendants guilty of felony murder. Although these are the felonies the McMichaels and Bryan are accused of committing to support the four felony murder charges, the defendants are also charged with each individual felony, discussed below.

## **2. Aggravated Assault**

Under Georgia law, an assault occurs when a person attempts to commit a violent injury to the person of another or commits an act which places another in reasonable apprehension of

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Official Code of Georgia Annotated § 16-2-20.

<sup>53</sup> Official Code of Georgia Annotated § 16-5-1.

<sup>54</sup> Glynn Superior Court Indictment, *supra* note 25.

immediately receiving a violent injury.<sup>55</sup> An individual can be charged with aggravated assault when he or she assaults another person with a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.<sup>56</sup>

Here, the three defendants are faced with two aggravated assault charges. First, the defendants are charged with aggravated assault for Travis McMichael's alleged assault upon the person of Ahmaud Arbery with a deadly weapon: a 12-gauge shotgun. Second, the defendants are charged with aggravated assault for the use of their pickup trucks—what the indictment suggests is an object, device, and instrument which when used offensively against a person are likely to result in serious bodily injury—in attempting to stop Ahmaud Arbery.<sup>57</sup>

### **3. False Imprisonment**

Georgia law defines false imprisonment as a crime committed when, in violation of the personal liberty of another, an individual arrests, confines, or detains such person without legal authority.<sup>58</sup> In the state indictment, the three defendants are accused of violating the personal liberty of Ahmaud Arbery, unlawfully confining and detaining Ahmaud Arbery without legal authority; chasing him with their pickup trucks through the public roadways of the Satilla Shores neighborhood and confining and detaining him on Holmes Drive using the pickup trucks.<sup>59</sup>

### **4. Criminal Attempt to Commit a Felony**

A criminal attempt is defined under Georgia law as when, with intent to commit a specific crime, the person performs any act which constitutes a substantial step toward the commission of the crime.<sup>60</sup> Here, the McMichaels and Bryan are charged with criminal attempt to commit the felony of false imprisonment based on their initial and unsuccessful attempt to stop Ahmaud Arbery on Burford Drive using their pickup trucks.<sup>61</sup> Because they did not successfully confine and detain Ahmaud Arbery, but allegedly knowingly and intentionally attempted to do so by chasing him through the public roadways of the Satilla Shores neighborhood without legal authority, these acts, according to the indictment, constituted a substantial step toward the commission of false imprisonment.<sup>62</sup>

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<sup>55</sup> Official Code of Georgia Annotated § 16-5-20.

<sup>56</sup> Official Code of Georgia Annotated § 16-5-21.

<sup>57</sup> Glynn Superior Court Indictment, *supra* note 25.

<sup>58</sup> Official Code of Georgia Annotated § 16-5-41.

<sup>59</sup> Glynn Superior Court Indictment, *supra* note 25.

<sup>60</sup> Official Code of Georgia Annotated § 16-4-1.

<sup>61</sup> Glynn Superior Court Indictment, *supra* note 25.

<sup>62</sup> *Id.*

## B. Defenses

According to the Washington Post, the three defendants will defend the indictment charges by arguing they attempted a legitimate citizen's arrest and then acted in self-defense.<sup>63</sup> Below is a brief overview of both defenses, including the impact of Georgia repealing its citizen's arrest law prior to the start of trial.

### 1. Citizen's Arrest Defense

Citizen's arrest laws historically allowed citizens to detain someone they had seen commit a crime, designed for an environment in which police were not widely present.<sup>64</sup> Georgia expanded their citizen's arrest law to allow citizens to arrest someone they reasonably suspected of trying to escape from a felony.<sup>65</sup> According to Robert Weisberg, a criminal law expert, Stanford Law School professor and Faculty Co-Director of the Stanford Criminal Justice Center:

Citizen's arrest laws date back to times before the advent of modern police forces. They continue to apply in many states and often allow private citizens to seize and detain someone they believe has just committed a crime—especially a felony. The power of the private citizen is often restricted compared to the power of real police: some states declare a citizen's arrest illegal if it turns out in retrospect that no crime has occurred—even if the citizen's mistaken perception may have seemed reasonable at the time. Georgia had a broad citizen's arrest law dating back to 1863, when it was unquestionably aimed at enabling private parties to seize runaway slaves.

15 months after Ahmaud Arbery was killed, Georgia repealed their citizen's arrest law.<sup>66</sup> However, because the law was repealed after he was killed, the three defendants will still be tried under the old version of the law that applied at the time of Arbery's death.<sup>67</sup> Under the old citizen's arrest law, in order to mount a successful defense the McMichaels and Bryan will have to show they reasonably suspected Arbery was responsible for burglaries in the area, had committed a felony and was trying to escape, justifying their detainment of him.<sup>68</sup> Ultimately,

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<sup>63</sup> Hannah Knowles, *The murder trial for Ahmaud Arbery's killing is starting. Here's what you need to know.*, WASHINGTON POST (Oct. 19, 2021), <https://www.washingtonpost.com/nation/2021/10/18/ahmaud-arbery-murder-trial/>.

<sup>64</sup> Ashish Valentine, *What is the citizen's arrest law at the heart of the trial over Ahmaud Arbery's death?*, NATIONAL PUBLIC RADIO (Oct. 26, 2021), <https://www.npr.org/2021/10/26/1048398618/what-is-the-citizens-arrest-law-in-the-trial-over-ahmaud-arberys-death>.

<sup>65</sup> *Id.*

<sup>66</sup> Emma Hurt, *In Ahmaud Arbery's Name, Georgia Repeals Citizen's Arrest Law*, NATIONAL PUBLIC RADIO (May 11, 2021), <https://www.npr.org/2021/05/11/995835333/in-ahmaud-arberys-name-georgia-repeals-citizens-arrest-law>.

<sup>67</sup> Valentine, *supra* note 64.

<sup>68</sup> *Id.*

the jury must decide whether the three defendants reasonably believed that Arbery committed a felony and was trying to escape, even if he did not commit any actual felonies.<sup>69</sup>

## 2. Self-Defense

Under Georgia's stand-your-ground law, people who believe their life or property is being threatened do not have to retreat and can use deadly force if they think it is necessary to prevent either: their own death; great bodily injury to themselves or other people; or to prevent a forcible felony, such as rape.<sup>70</sup> However, some exceptions will be particularly important to the McMichaels' and Bryan's defense. Specifically, under the law, lethal force is not justified if the person who used deadly force either: was the aggressor and did not try to withdraw from the situation; initially provoked the other person intending to use force as an excuse to inflict harm; or was engaged in criminal activity at the same time.<sup>71</sup> Key issues to determine in their self-defense claim will be whether the three defendants can establish a valid citizen's arrest defense, which would justify their detainment of Ahmaud Arbery and challenge a prosecutor's argument that the McMichaels and Bryan were the initial aggressors.

## II. Procedural Issues

There are two primary procedural issues currently emerging in the McMichaels and Bryan trial: (1) jury selection; and (2) evidentiary issues.

### A. Jury Selection<sup>72</sup>

Jury selection begins with summoning a fair cross-section of the community in which the trial is to take place to participate in voir dire—the questioning of potential jurors to determine any biases, particularities, prior experiences, etc. held by a prospective juror which may render the juror unfit to serve on the jury. Voir dire determines whether a juror will be selected for the final jury. Either party, the prosecution or defense, may challenge an individual juror or certain group of jurors without cause or for cause.

A challenge without cause, called a peremptory challenge, may be exercised for any reason one wishes, except to remove a prospective juror based on race, gender, or ethnic origin.

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<sup>69</sup> *Id.*

<sup>70</sup> Erik Ortiz, *Were pursuit and killing of Ahmaud Arbery 'perfectly legal'? It's not that simple.*, NBC NEWS (May 13, 2020), <https://www.nbcnews.com/news/us-news/was-pursuit-killing-ahmaud-arbery-perfectly-legal-it-s-not-n1205581>.

<sup>71</sup> *Id.*

<sup>72</sup> 1 LexisNexis Practice Guide, *Georgia Criminal Law Chapter 9: Voir Dire* (2021).

In the McMichaels and Bryan trial, the judge has granted 12 peremptory strikes to the prosecution and 24 total to the defense.<sup>73</sup>

For cause challenges are potentially unlimited in number and are classified as either principal cause or favor. Principal cause is a provable fact that would disqualify an individual from serving on the jury, such as the juror being a convicted felon and his or her civil rights have not been restored. The more pertinent challenge in the Arbery case is favor challenges. Favor is an established actual bias in the mind of the individual for or against a party, such as the individual has a prior relationship with the party and cannot set aside his or her personal relationship to consider the facts fairly and impartially in the accused's case. Here, given the trial is held in the county where the killing occurred, jurors are more likely to already have an opinion about the case, as discussed in the introduction. Such knowledge has made jury selection difficult because a juror must be able to decide the case fairly based only on the trial evidence. If they cannot, the juror can be struck for cause.

Counsel from both sides will strike potential jurors from the panel until there is a final jury of 12 sitting jurors and four alternates. After two weeks, jury selection is still ongoing, with reports that of the first batch of 600 people summoned, only 283 showed up.<sup>74</sup> The judge and attorneys in the case are seeking to narrow the number of potential jurors down to 64 before selecting the final 12 and four alternates: as of October 29, they had 47 deemed qualified to serve.<sup>75</sup>

## 1. Implications of Race on Jury Selection

As reported by NBC News, the possibility that the McMichaels and Bryan may be acquitted is leaving residents tense and anxious, including John Perry, a mayoral candidate who said, "The trial will let us know as Black and brown people if we have a justice system that we can trust to be fair for all people."<sup>76</sup> The jury pool is of major concern for the predominately Black community in Brunswick because the trial is taking place in Glynn County, where 78 percent of the population is white.<sup>77</sup> Mario Williams, a civil rights lawyer from Atlanta, said the video of Arbery's shooting may not be enough to sway a jury he thinks will likely be composed

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<sup>73</sup> Russ Bynum, *EXPLAINER: How jury selection works in Arbery slaying trial*, ASSOCIATED PRESS (Oct. 20, 2021), <https://apnews.com/article/ahmaud-arbery-social-media-georgia-media-racial-injustice-bafd1ce62feddc6879dd54b972c1cb3f>.

<sup>74</sup> Martin Savidge, Mallika Kallingal, Angela Barajas and Eric Fiegel, *A thousand people were summoned for jury duty in the trial for Ahmaud Arbery's killing. Less than half showed up*, CNN (Oct. 29, 2021), <https://www.cnn.com/2021/10/29/us/ahmaud-arbery-jury-selection-low-turnout/index.html>.

<sup>75</sup> *Id.*

<sup>76</sup> Curtis Bunn, *Black residents feel tension in Georgia town where Ahmaud Arbery was killed*, NBC NEWS (Oct. 20, 2021), <https://www.nbcnews.com/news/nbcblk/black-residents-feel-tension-georgia-town-ahmaud-arbery-was-killed-rcna3291>.

<sup>77</sup> *Id.*

of mostly white members.<sup>78</sup> According to Williams, “You’re in southern Georgia, which does not have a stellar history of dealing with prejudice and racism against Blacks.”<sup>79</sup>

Professor Weisberg commented that for more than two centuries, jury selection in the U.S. has been tainted by racism, and noted that while several constitutional doctrines have been deployed to address the problem, these solutions have not been perfect:

Obviously, no jurisdiction can flatly forbid non-white people to serve on juries, and nonunanimous criminal juries (that pose a risk of silencing non-white jurors) are now officially illegal. Lawyers can use the voir dire mechanism to identify prejudiced potential jurors and take steps to keep them off the jury—but no doubt prejudiced jurors still get through. The “Fair Cross Section” requirement of the Sixth Amendment supposedly ensures that the set of people called to the courthouse for final jury selection reasonably represents the racial and ethnic proportions of residents of the jurisdiction. We often see the term “community” used here, but that’s a dangerously vague term. At the state level where 90 percent of trials occur, the jurisdiction is the county—an artificial geographical construct that rarely coincides with anyone’s comfortable notion of a “community.”

Additionally, although exercising a peremptory challenge of a juror because of their race violates Equal Protection for either side, especially the prosecution, Professor Weisberg said that this doctrine is not always effective in practice.

## **B. Evidentiary Issues**

Several evidentiary issues have arisen in this case and will likely play a major role in the jury’s decision.

### **1. Video of the Shooting**

The video of the shooting recorded by Bryan will likely shape a significant part of the arguments for both sides. No evidentiary challenges have been successfully made yet to exclude the video at trial.

### **2. Racist Motivations**

A second evidentiary issue deals with what has been described as racist motivations by the prosecution. On September 30, 2021, the defense attorneys sought the court to ban photo

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

evidence of a vanity license plate that includes a Confederate emblem, which was on the pickup truck that the McMichaels used to pursue Arbery.<sup>80</sup> This evidence is significant because it could support the prosecution if they were to make an argument that the killing of Ahmaud Arbery was motivated by racism as opposed to what the defense will likely argue, a reasonable belief that Arbery was committing a burglary. The judge has yet to rule on this motion.

### 3. Ahmaud Arbery's Mental Health and Criminal Records

While the judge has not ruled on the motion to exclude the Confederate license plate, the judge has ruled on two other significant evidentiary motions: one preventing discussions of Ahmaud Arbery's mental health records because it would violate Arbery's right to medical privacy, and another preventing the defense from bringing up Arbery's past criminal record to prove any of his motives the day he was killed.<sup>81</sup>

It is worth noting that although the judge ruled to exclude details of Arbery's mental health records, it was later discovered that officials left this information on the court system website.<sup>82</sup> Despite the fact that court officials have said it was an accident, Black residents worry it is just another example of white people in power attempting to tarnish Arbery's character—particularly white people who have supported Jackie Johnson, the previous district attorney.<sup>83</sup>

### RACIAL BIAS ISSUES

In addition to what has been mentioned above, there are multiple racial bias issues concerning the events leading up to and those following Ahmaud Arbery's killing. Evidence has emerged that Travis McMichael previously used racial slurs in a text message and on social media.<sup>84</sup> Prior to the state indictment, a Georgia investigator also testified that Bryan told the investigator he heard Travis McMichael call Arbery a “f\*\*\*\*\* n\*\*\*\*\*” as he lay in the street dying after the shooting.<sup>85</sup> This evidence may suggest there was explicit racial bias involved when the McMichaels and Bryan decided to chase Arbery.

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<sup>80</sup> Daniella Silva, *Ahmaud Arbery shooting: A timeline of the case*, NBC NEWS (Oct. 16, 2021), <https://www.nbcnews.com/news/us-news/ahmaud-arbery-shooting-timeline-case-jury-selection-begins-murder-trial-rcna3032>.

<sup>81</sup> Richard Fausset, *In the Trial of Ahmaud Arbery's Accused Killers, Unsettling Video Will Have a Starring Role*, NEW YORK TIMES (Oct. 17, 2021), <https://www.nytimes.com/2021/10/17/us/ahmaud-arbery-shooting-trial.html>.

<sup>82</sup> Tariro Mzezewa, *As the Trial in Ahmaud Arbery's Killing Nears, a Community Is on Edge*, NEW YORK TIMES (Oct. 29, 2021), <https://www.nytimes.com/2021/10/29/us/ahmaud-arbery-killing-trial.html>.

<sup>83</sup> *Id.*

<sup>84</sup> Russ Bynum and Aaron Morrison, *In trial over Ahmaud Arbery killing, racial reckoning looms large*, NEW YORK DAILY NEWS (Oct. 15, 2021), <https://www.nydailynews.com/news/ny-ahmaud-arbery-trial-georgia-20211015-ws52bqa4vhh3ejt7bssteatxe-story.html>.

<sup>85</sup> Trone Dowd, *Ahmaud Arbery's Murder Is Putting Racism on Trial*, VICE NEWS (Oct. 18, 2021), <https://www.vice.com/en/article/n7b8az/ahmaud-arbery-killers-mcmichaels-on-trial>.



Federal prosecutors have also argued that Arbery’s killing was racially motivated, that he was profiled as a Black man running through a predominantly white neighborhood.<sup>86</sup> According to the New York Daily News, Ahmaud Arbery’s family has long said that he was targeted because of his race and refer to his killing as a “modern-day lynching.”<sup>87</sup>

Georgia has a particularly grim history of lynching. Between 1880 and 1940, Georgia was only second to Mississippi in the number of lynchings committed—three of which occurred in Glynn County.<sup>88</sup> In 1891, Henry Jackson and Wesley Lewis, two Black men accused of killing a shopkeeper, were lynched by a group of 300 men after being taken from police custody.<sup>89</sup> Robert Evarts, a Black man accused of rape, was lynched by 100 men in 1894.<sup>90</sup> As explained by Sean Collins, these cases underscore the terror lynchings happening at that time which normalized the persecution of Black people for existing, and “[created] an atmosphere of terror for Black people just trying to go about their daily lives.”<sup>91</sup> It is this backdrop of Georgia’s lynching history that has drawn comparisons to Arbery’s killing, including the failure, powerlessness, or even apathy, of police officers at that time to control lynch mobs.<sup>92</sup>

### **OTHER PENDING LAWSUITS**

Although the state murder trial of the McMichaels and Bryan have begun, there are two other looming lawsuits related to Ahmaud Arbery’s killing: (1) a civil lawsuit filed by Arbery’s mother; and (2) a federal indictment against the McMichaels and Bryan on hate crime charges and attempted kidnapping.

#### **I. Civil Lawsuit**

On the anniversary of Ahmaud Arbery’s killing, his mother, Wanda Cooper, filed a federal civil lawsuit in the U.S. District Court for the Southern District of Georgia.<sup>93</sup> The suit names Gregory McMichael, Travis McMichael, and William Bryan as well as law enforcement officials and local prosecutors, claiming they were closely involved with an alleged cover-up in the investigation.<sup>94</sup> According to NPR News, the complaint says the defendants “were motivated

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<sup>86</sup> Elliott and Lewis, *supra* note 3.

<sup>87</sup> Bynum and Morrison, *supra* note 84.

<sup>88</sup> Collins, *supra* note 14.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Braktkon Booker, *Mother Of Ahmaud Arbery Files Civil Lawsuit On Anniversary Of Son's Killing*, NATIONAL PUBLIC RADIO (Feb. 23, 2021), <https://www.npr.org/2021/02/23/970598539/mother-of-ahmaud-arbery-files-civil-lawsuit-on-anniversary-of-sons-death>.

<sup>94</sup> *Id.*

to deprive Ahmaud Arbery of equal protection of the law and his rights by racial bias, animus, and discrimination.”<sup>95</sup> A trial date has yet to be set for the civil lawsuit.

## **II. Federal Indictment**

On April 28, 2021, the McMichaels and Bryan were indicted on federal hate crime charges in connection with the death of Ahmaud Arbery. Each of the three were charged with one count of interference with Arbery’s right to use a public street because of his race, and all three were also charged with attempted kidnapping.<sup>96</sup> The McMichaels were also charged with one count each of using, carrying and brandishing a firearm.<sup>97</sup> According to the indictment, the three men intimidated Arbery “because of Arbery’s race and color.”<sup>98</sup> The federal criminal trial is scheduled to begin in February 2022.

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<sup>95</sup> *Id.*

<sup>96</sup> Katie Benner and Will Wright, *3 Indicted on Federal Hate Crime Charges in Ahmaud Arbery Shooting*, New York Times (Apr. 28, 2021), <https://www.nytimes.com/2021/04/28/us/politics/ahmaud-arbery-shooting.html>.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

**APPENDIX A: Timeline of Events Related to Ahmaud Arbery Killing**<sup>99</sup>

February 23, 2020	Ahmaud Arbery is shot dead.
February 27, 2020	The first prosecutor, Jackie Johnson, recuses herself.
April 1, 2020	A local newspaper publishes details of the police investigation, which was based almost entirely on the responding officer’s interview with Gregory McMichael.
April 3, 2020	A second prosecutor, George Barnhill, finds no reason to charge Travis and Gregory McMichael, then rescues himself.
April 13, 2020	A third prosecutor, Thomas Durden, takes over the case.
May 5, 2020	The video of Ahmaud Arbery’s killing, recorded by William Bryan, is released online.
May 7, 2020	Travis and Gregory McMichael are arrested.
May 10, 2020	Georgia’s attorney general seeks Justice Department review of the case. Justice Department officials later said it would assess whether federal hate crime charges should be pursued.
May 11, 2020	A fourth prosecutor, Joyette Holmes of the Cobb County Judicial Circuit, takes over the case.
May 12, 2020	Georgia Bureau of Investigation receives request from the state attorney general to investigate the handling of the case.
May 12, 2020	Autopsy results are released, showing Arbery was shot twice in the chest and had a third wound on a wrist. He had no drugs or alcohol in his system and the manner of death was homicide.
May 21, 2020	William Bryan is charged with murder.
June 4, 2020	An investigator with the Georgia Bureau of Investigation testifies that Travis McMichael used a racial slur after the shooting.
December 2020	Body-camera footage is released showing the police response to

<sup>99</sup> New York Times, *Ahmaud Arbery Shooting: A Timeline of the Case* (Oct. 20, 2021), <https://www.nytimes.com/article/ahmaud-arbery-timeline.html>; Daniella Silva, *Ahmaud Arbery shooting: A timeline of the case*, NBC NEWS (Oct. 16, 2021), <https://www.nbcnews.com/news/us-news/ahmaud-arbery-shooting-timeline-case-jury-selection-begins-murder-trial-rcna3032>; Graham Cawthon, *The killing of Ahmaud Arbery: Timeline details every event leading up to murder trial*, KETV (Oct. 18, 2021), <https://www.ketv.com/article/ahmaud-arbery-timeline-murder-trial/37990866#>; N’dea Yancey-Bragg and Grace Hauck, *Jury selection is slow, tangled process in trial over Ahmaud Arbery’s death: What we know*, USA TODAY (Oct. 25, 2021), <https://www.usatoday.com/story/news/nation/2021/10/25/ahmaud-arbery-trial-what-we-know-jury-selection-week-2/6136654001/>.

	Arbery's death and interactions with all three suspects at the scene.
February 23, 2021	Ahmaud Arbery's mother, Wanda Cooper, files a civil lawsuit against the three men charged with murder and more than a dozen law enforcement officials and officers.
March 31, 2021	Georgia's citizen's arrest law from 1863 is repealed.
April 28, 2021	The McMichaels and Bryan are indicted on federal hate crime charges.
September 2, 2021	The former prosecutor, Jackie Johnson, faces criminal charges of violation of oath of a public officer and obstruction and hindering a law enforcement officer.
September 30, 2021	Defense attorneys seek to ban the Confederate flag license plate on the pickup truck used by the McMichaels to pursue Arbery from evidence.
October 1, 2021	A judge rules that Ahmaud Arbery's mental health records cannot be used at trial.
October 18, 2021	Jury selection for the trial begins.
October 25, 2021	Cobb County Senior Assistant District Attorney Linda Dunikosk told prospective jurors the trial could run through November 19.

### **APPENDIX B: Resources for Tracking the Trial**

- [Court Filings](#): Glynn County Superior Court, *State of Georgia v. Gregory McMichael, Travis McMichael, and William "Roddie" Bryan* (updated daily).
- [Live Updates](#): First Coast News, *Death of Ahmaud Arbery Trial* (updated daily).
- [Associated Press](#): *Ahmaud Arbery*
- [New York Times](#): *The Trial Over the Ahmaud Arbery Shooting*
- [The Atlanta Journal-Constitution](#): *Ahmaud Arbery shooting*