

IN THE SUPERIOR COURT OF GLYNN COUNTY

CLERK SUPERIOR COURT

STATE OF GEORGIA

STATE OF GEORGIA

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CR-2000433

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V.

\*

Judge Walmsley

\*

WILLIAM RODERICK BRYAN

**STATE'S RESPONSE TO DEFENDANT'S MOTION  
TO STRIKE APPOINTMENT OF JOYETTE HOLMES  
AS DISTRICT ATTORNEY PRO TEMPORE**

COMES NOW THE STATE OF GEORGIA, by and through the undersigned Assistant District Attorney, and moves this Court to dismiss Defendant's "Motion to Strike Appointment of Joyette Holmes as District Attorney Pro Tempore," as there is no legal basis for this Court to provide such relief, and shows as follows:

1. Background and Timeline

On February 23, 2020, the District Attorney for the Brunswick Judicial Circuit, Ms. Jackie Johnson, recused herself from the investigation into the death of Ahmaud Arbery. That same day Ms. Johnson contacted Mr. George Barnhill, District Attorney of the Waycross Judicial Circuit, who agreed to accept the case. Mr. Barnhill met with Glynn County police investigators the next day, February 24, 2020.

It is the responsibility of the Attorney General, under O.C.G.A. § 15-18-5, to appoint a prosecutor when a district attorney's office is disqualified from a prosecution. Ms. Johnson sent her notice of disqualification and recusal to the Attorney General four days later, on February 27, 2020, and also informed the Attorney General that day that Mr. Barnhill had agreed to accept the case. The

Attorney General's office confirmed this with Mr. Barnhill and his office was appointed to prosecute the matter of the death of Ahmaud Arbery.

On April 7, 2020, the Attorney General received correspondence from Mr. Barnhill giving notice of his recusal from the case and requesting the appointment of another prosecutor. On April 13, 2020 the Attorney General appointed Mr. Tom Durden, District Attorney of the Atlantic Judicial Circuit to this case.

On April 29, 2020, the Georgia Bureau of Investigation began investigating threats being made against Glynn County police officers investigating this case. On May 5, 2020, Mr. Durden issued a press release stating that the matter of the death of Ahmaud Arbery should be presented to the Glynn County Grand Jury. That same day the Georgia Bureau of Investigation was formally asked to investigate the matter of the death of Ahmaud Arbery. Co-defendants Travis McMichael and Gregory McMichael were then arrested by the Georgia Bureau of Investigation on Thursday, May 7, 2020.

On Monday May 11, 2020 Mr. Durden recused his office from the matter under O.C.G.A. § 15-18-5(a), GRPC R. 1.1 ("a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence") and GRPC R. 1.7(a) ("the lawyer's own interests . . . will materially and adversely affect the representation of the client"). Later that day, the Attorney General appointed Ms. Joyette Holmes, District Attorney of the Cobb Judicial Circuit to the matter of the death of Ahmaud Arbery. Defendant Bryan was then arrested by the Georgia Bureau of Investigation on May 21, 2020. Defendant then filed this motion on June 4, 2020.

Defendant was indicted on June 24, 2020 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 for the killing of Ahmaud Arbery on February 23, 2020.

## 2. Defendant Has No Standing

The defendant is seeking to vacate the appointment of Ms. Joyette Holmes and have this Court re-appoint Mr. Tom Durden as District Attorney Pro Tempore. A defendant does not have standing to challenge either the voluntary recusal of a District Attorney from a case, nor the selection and appointment of a District Attorney Pro Tempore by the Attorney General. Thus, this Court does not have the power nor the authority to provide the relief requested and therefore, the motion should be dismissed.

A criminal defendant has no standing to object to a prosecuting attorney's voluntary recusal and defendant Bryan has provided no legal authority supporting that position. *State v. Mantooth*, 337 Ga. App. 698, 701 (2016). The Court of Appeals has held that there is no obligation for a District Attorney to even provide a criminal defendant with the basis for his or her voluntary recusal from a matter. *Nel v. State*, 252 Ga. App. 761, 762 (2001). And the higher courts will not second guess an attorney's voluntary recusal, since the attorney is in the best position to make that decision. *Mantooth* at 701.

In this case Mr. Durden made an informed, independent decision that he had a conflict in interest in the case, and that interest, based on the language in the Georgia Rules of Professional Conduct 1.1 and 1.7, included his determination that proceeding with the Ahmaud Arbery matter would adversely affect his ability to represent the State in the Atlantic Judicial Circuit and the State in this matter. A District Attorney's office that is unable to reasonably and thoroughly prepare a case, and carry on its duties in the circuit, would violate Rule 1.1. Rule 1.7 required Mr. Durden to recuse himself if he determined that there was "a significant risk that the lawyer's own interests or the lawyer's duties to another client [in this case the Atlantic Judicial Circuit], ... will materially and adversely affect the representation of the

client [in this case the State of Georgia in the matter of the death of Ahmaud Arbery].”

A criminal defendant has no standing to dictate the manner in which an elected District Attorney determines his or her conflict of interest, nor the manner in which he or she resolves that conflict.

A criminal defendant “does not have a substantive right to have his case tried by a specific prosecutor.” *Nel* at 762. The State is unaware of any jurisdiction that permits a criminal defendant to choose his or her prosecutor. (See *Gonzales v. Rapelje*, No. 06-CV-10191, 2015 U.S. Dist. LEXIS 44524 at \*14-15 (E.D. Mich. April 6, 2015) (“Court is aware of no Supreme Court (or, for that matter, any) precedent establishing that a defendant's right to counsel of choice extends to the right to choose a prosecutor.”)).

The defendant has not shown how he is harmed, or that his defense has suffered prejudice, by the voluntary recusal of Mr. Durden, during the ongoing investigation of this case, and the appointment of Ms. Holmes, prior to the grand jury returning this indictment. Simply hoping that he will have a better chance at acquittal during a prosecution by Mr. Durden, due to the limited resources of the Atlantic Judicial Circuit, may be a reason to file this motion, but it does not qualify as harm or prejudice.

### 3. Court Lacks Authority

A trial court lacks legal authority to vacate an Attorney General's administrative appointment of a District Attorney Pro Tempore following the voluntary recusal of a prosecutor's office. *Mantooth* at 701.

In addition, defendant provides no legal authority supporting the position that the Attorney General overstepped his legal authority under Georgia law. In fact the opposite is true. Under O.C.G.A. § 15-18-5, the Attorney General is to appoint a

prosecutor when he is notified that a District Attorney is disqualifying themselves from a specific matter. The Attorney General did that in this case.

#### 4. Conclusion

WHEREFORE, the State moves this Court to dismiss Defendant's "Motion to Strike Appointment of Joyette Holmes as District Attorney Pro Tempore," as the defendant has no legal standing to challenge the appointment of Ms. Holmes and this Honorable Court has no legal authority to vacate an administrative appointment by the Attorney General.

This the 13th day of July, 2020.

/s/ Linda J. Dunikoski  
Linda J. Dunikoski  
Senior Assistant District Attorney  
State Bar # 233887  
Office of the District Attorney, Cobb Judicial Circuit  
70 Haynes Street  
Marietta, GA 30090  
Tel. (770) 528-3080  
Linda.Dunikoski@CobbCounty.org

Exhibits:  
GRPC Rule 1.1  
GRPC Rule 1.7  
AG Request Letter to GBI  
Letter from Mr. Durden  
Appointment Notification

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this day served opposing counsel with a true and correct copy of the above STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE by emailing a copy of the same to:

Mr. Kevin Robert Gough  
Kevin Gough Firm LLC  
PO Box 898  
Brunswick, GA 31521  
kevingough.firm@gmail.com  
(912) 242-5114

This the 13th day of July, 2020.

*/S/ Linda J. Dunikoski*  
Linda J. Dunikoski  
Senior Assistant District Attorney  
State Bar # 233887  
Office of the District Attorney, Cobb Judicial Circuit  
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Marietta, GA 30090  
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## Georgia Rules of Professional Conduct

### RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

- a. A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).
- b. If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent, confirmed in writing, to the representation after:
  1. consultation with the lawyer, pursuant to Rule 1.0 (c);
  2. having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation, and
  3. having been given the opportunity to consult with independent counsel.
- c. Client informed consent is not permissible if the representation:
  1. is prohibited by law or these rules;
  2. includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or
  3. involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.
- d. Though otherwise subject to the provisions of this rule, a part-time prosecutor who engages in the private practice of law may represent a private client adverse to the state or other political subdivision that the lawyer represents as a part-time prosecutor, except with regard to matters for which the part-time prosecutor had or has prosecutorial authority or responsibility.

The maximum penalty for a violation of this rule is disbarment.

## Comment

### Loyalty to a Client

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. If an impermissible conflict of interest exists before representation is undertaken the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] Loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (a) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

[3] If an impermissible conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment 4 to Rule 1.3 and Scope.

[4] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. Paragraph (d) states



an exception to that general rule. A part-time prosecutor does not automatically have a conflict of interest in representing a private client who is adverse to the state or other political subdivision (such as a city or county) that the lawyer represents as a part-time prosecutor, although it is possible that in a particular case, the part-time prosecutor could have a conflict of interest under paragraph (a).

Simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require informed consent of the respective clients.

### Consultation and Informed Consent

[5] A client may give informed consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's informed consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to give informed consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to give informed consent. If informed consent is withdrawn, the lawyer should consult Rule 1.9 and Rule 1.16.

[5A] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0 (b). See also Rule 1.0 (s) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0 (b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable

opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

### Lawyer's Interests

[6] The lawyer's personal or economic interests should not be permitted to have an adverse effect on representation of a client. See Rules 1.1 and 1.5. If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client objective advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

### Conflicts in Litigation

[7] Paragraph (c) (2) prohibits representation of opposing parties in the same or a similar proceeding including simultaneous representation of parties whose interests may conflict, such as co-plaintiffs or co-defendants. An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal, the requirements of paragraph (b) are met, and consent is not prohibited by paragraph (c).

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the

enterprise or conduct of the suit and if both clients give informed consent as required by paragraph (b). By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government entity is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases while they are pending in different trial courts, but it may be improper to do so should one or more of the cases reach the appellate court.

#### Interest of Person Paying for a Lawyer's Service

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and gives informed consent and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8 (f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients give informed consent and the arrangement ensures the lawyer's professional independence.

#### Non-litigation Conflicts

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for material and adverse effect include the duration and extent of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to

the client from the conflict if it does arise.

[12] In a negotiation common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

#### Conflict Charged by an Opposing Party

[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

[16] For the purposes of 1.7 (d), part-time prosecutors include but are not limited to part-time solicitors-general, part-time assistant solicitors-general, part-time probate court prosecutors, part-time magistrate court prosecutors, part-time municipal court prosecutors, special assistant attorneys general, part-time juvenile court prosecutors and prosecutors pro tem.

[17] Pragmatic considerations require that the rules treat a lawyer serving as a part-time prosecutor differently. See *Thompson v. State*, 254 Ga. 393, 396-397 (1985).

### Special Considerations in Common Representation

[18] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

## **Georgia Rules of Professional Conduct**

### **RULE 1.1 COMPETENCE**

A lawyer shall provide competent representation to a client. Competent representation as used in this rule means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**The maximum penalty for a violation of this rule is disbarment.**

### **Comment**

#### *Legal Knowledge and Skill*

[1A] The purpose of these rules is not to give rise to a cause of action nor to create a presumption that a legal duty has been breached. These rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

[1B] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence



and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person subject to Rule 6.2: Accepting Appointments.

#### *Thoroughness and Preparation*

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

#### *Maintaining Competence*

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.



## GEORGIA DEPARTMENT OF LAW

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May 11, 2020

Director D. Victor Reynolds  
Georgia Bureau of Investigation

Sent via email to Deputy Director Scott Dutton: [scott.dutton@gbi.ga.gov](mailto:scott.dutton@gbi.ga.gov)

Re: Request for investigation of the prosecutorial response to the investigation of the death of Ahmaud Arbery

Dear Director Reynolds:

I am writing to request that the GBI open an investigation into a case involving possible prosecutorial misconduct by the offices of the District Attorneys of the Brunswick and Waycross Judicial Circuits. The Attorney General is concerned that the actions of these offices in possibly misrepresenting or failing to disclose information during the process of appointing a conflict prosecutor to investigate the death of Ahmaud Arbery may have constituted unprofessional conduct under O.C.G.A. § 45-11-4 or other crimes.

It is the responsibility of the Attorney General under O.C.G.A. § 15-18-5 to appoint a prosecutor when a district attorney's office is disqualified from a prosecution. The law provides that the Attorney General can only perform that function when notified of a conflict by either a district attorney or the presiding judge. For these appointments to be made appropriately, however, it is crucial that the Attorney General be provided with correct and sufficient information.

In this case, Mr. Arbery was shot and killed in Glynn County, in the Brunswick Judicial Circuit, on February 23, 2020. Four days later, on February 27, 2020, the Attorney General's Office received a letter from Jackie Johnson, the District Attorney of the Brunswick Judicial Circuit, advising that she had a conflict and that she was requesting the appointment of another prosecutor. Ms. Johnson wrote that the reason for the conflict was because the investigation into Mr. Arbery's death involved Greg McMichael, a former investigator with her office. Shortly after receipt of Ms. Johnson's letter, this office was made aware that Ms. Johnson had contacted George Barnhill, District Attorney of the Waycross Judicial Circuit, and that he had agreed to accept the case. This office confirmed with Mr. Barnhill and, pursuant to O.C.G.A. § 15-18-5, this office appointed Mr. Barnhill to prosecute the case on the same date Ms. Johnson's letter was received.



Director D. Victor Reynolds  
May 11, 2020  
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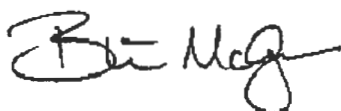
Not long after Mr. Barnhill's appointment, he and Ms. Johnson learned that Mr. Barnhill's son, an assistant district attorney in Ms. Johnson's office, had worked with Mr. McMichael on a prosecution involving Mr. Arbery. Mr. Barnhill, however, held onto the case for several more weeks after making this discovery. On April 7, 2020, the Attorney General received correspondence from Mr. Barnhill advising of a conflict and requesting the appointment of another prosecutor. Mr. Barnhill cited his son's involvement with Mr. McMichael and Mr. Arbery as a reason for his request.

Mr. Barnhill's letter failed to disclose his involvement in this case prior to his appointment. In her conflict letter of February 27, 2020, Ms. Johnson had advised that the Glynn County Police Department was "currently investigating" the shooting death of Mr. Arbery, and that she was requesting new counsel to advise the police. Unknown and undisclosed to the Attorney General, however, Mr. Barnhill had already provided an opinion to the Glynn County Police Department on February 24, 2020, that he did not see grounds for the arrest of any of the individuals involved in Mr. Arbery's death. He additionally stated his opinion to the Glynn County Police Department in writing that there was insufficient probable cause to make any arrests in the case and that he would be asking the Attorney General to appoint another prosecutor.

After receipt of Mr. Barnhill's conflict letter, the Attorney General then appointed District Attorney Tom Durden of the Atlantic Judicial Circuit to this case on April 13, 2020. On May 5, 2020, Mr. Durden requested that your agency conduct an investigation into Mr. Arbery's death. Two days later your agency arrested Mr. McMichael and his son for aggravated assault and felony murder for Mr. Arbery's death.

We will be glad to provide any information or assistance that you may need in furtherance of this investigation. As always, thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Blair McGowan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Blair L. McGowan  
Deputy Attorney General

Enclosures



**Jackie L. Johnson**  
DISTRICT ATTORNEY  
BRUNSWICK JUDICIAL CIRCUIT

GLYNN COUNTY OFFICE • 701 H Street, Box 301 • Brunswick, Georgia 31520 • (912) 554-7200 • FAX: (912) 267-5360

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February 27, 2020

Blair McGowan  
Assistant Attorney General  
Attorney General's Office  
40 Capitol Square SW  
Atlanta, Georgia 30334

RE: Death investigation of Ahmaud Arbery

Dear Assistant Attorney General:

The Glynn County Police Department is currently investigating the shooting death of Ahmaud Arbery which occurred on February 23, 2020 in Glynn County. The investigation involves Greg McMichael, a former investigator with my office.

I am requesting the Attorney General to assign counsel to advise the police in the above referenced matter, as I am recusing my office. Please let me know if you have any questions or require additional information. I can be reached at (912) 554-7204.

Sincerely,

Jackie L. Johnson  
District Attorney  
Brunswick Judicial Circuit

cc: Karen Crittendon



## GEORGIA DEPARTMENT OF LAW

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CHRISTOPHER M. CARR  
ATTORNEY GENERAL

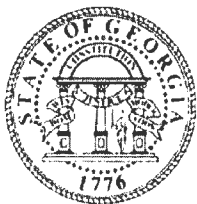
### ADMINISTRATIVE ORDER

BY THE ATTORNEY GENERAL:

ORDERED: That under the authority contained in O.C.G.A. § 15-18-5, George Barnhill, District Attorney, Waycross Judicial Circuit or his designee, is hereby appointed to act as District Attorney Pro Tempore, Brunswick Judicial Circuit, to prosecute in the name of the State the following case, to wit: Death Investigation of Ahmaud Arbery, Glynn County and pursuant to O.C.G.A. § 15-18-5 (c) shall receive no additional compensation for such services except that actual expenses incurred shall be reimbursed by Glynn County at the same rate as provided for district attorneys in O.C.G.A. § 15-18-12.

This 27<sup>th</sup> day of February, 2020.

  
CHRISTOPHER M. CARR, ATTORNEY GENERAL



**OFFICE OF THE DISTRICT ATTORNEY  
WAYCROSS JUDICIAL CIRCUIT**

George E. Barnhill  
District Attorney

306 Albany Avenue  
Waycross, Georgia 31501

(912) 287-4395  
FAX (912) 287-4399

Captain Tom Jump  
Glynn County Police Department  
Investigation Division  
157 Public Safety Blvd.  
Brunswick, GA 31525

Email: [tjump@glynncounty-ga.gov](mailto:tjump@glynncounty-ga.gov)

Ref: Glynn County, The Shooting death of Ahmaud Arbery, Feb 23rd, 2020

Dear Captain Jump:

My office received the Arbery autopsy report [dated 4/1/2020] yesterday and have reviewed it yesterday and this morning. We were waiting on this important evidentiary article before finalizing our opinions.

However, since we were initially requested to handle the case the victim's mother has clearly expressed she wants myself and my office off the case. She sees a conflict in that my son works in the Brunswick District Attorney's Office where Greg McMichael retired some time ago. She believes there are kinships between the parties [there are not] and has made other unfounded allegations of bias[es]. As such, I believe it is better for my office to step out and am going to recuse myself and the Assistants working for me from handling the case. I am contacting the Georgia Attorney General Office and seeking their assistance in finding another District Attorney in the State to handle the further 'evaluation for prosecution' in this case. That is, to determine whether there is sufficient evidence on which to make a Grand Jury presentation or not.

Given the Governor's current shelter in place order and Justice Melton's Judicial Emergency Order; I can not venture a guess as to when they will move on this request, and once another is found; when that District Attorney will have the staff available to review this casefile. I hope for all involved it will move along as quickly as possible.

After talking by telephone with you yesterday, I appreciate there is immediate pressure on your department as to the issue of "Arrest" . Since I have already given you an initial opinion the day after the shooting, I feel I can still comment on this limited issue.

First,

I am the current elected District Attorney for the Waycross Circuit, I have worked as a criminal prosecutor for some 36 years. As an Assistant District Attorney in Waycross and Brunswick, as Chief Assistant in Waycross for 20 years and served as the District Attorney the last 5 years; I have been actively involved in over 100 murder cases and assisted other prosecutors with at least 100 more. I have no idea how many Aggravated Assault cases involving gunshots and wounds of all types; Plus I have attended countless schools, classes and seminars on criminal prosecution and criminal acts and evidence. Myself and one of my Senior Trial Attorneys have reviewed the evidence extensively and concur on all points.

Second,

As to the case at hand: It is my professional belief the autopsy confirms what we had already viewed as shown in the video tape, with the photographs & from the witness statements taken immediately at the scene. The autopsy supports the initial opinion we gave you on February 24th, 2020 at the briefing room in the Glynn County Police Department after reviewing the evidence you had at that time. We do not see grounds for an arrest of any of the three parties.

Third,

It appears Travis McMichael, Greg McMichael, and Bryan William were following, in 'hot pursuit', a burglary suspect, with solid first hand probable cause, in their neighborhood, and asking/ telling him to stop. It appears their intent was to stop and hold this criminal suspect until law enforcement arrived. Under Georgia Law this is perfectly legal.

OCGA 17-4-60 "A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion."

Fourth,

It clearly appears Travis McMichael and Greg McMichael had firearms being carried in an open fashion. The investigation shows neither of them to be convicted felons or under felony supervision, they were in a motor vehicle owned by Travis McMichael. Under Georgia Law this is legal open carry.

OCGA 16-11-126

"a) Any person who is not prohibited by law from possessing a handgun or long gun may have or carry on his or her person a weapon or long gun on his or her property or inside his or her home, motor vehicle, or place of business without a valid weapons carry license.

(b) Any person who is not prohibited by law from possessing a handgun or long gun may have or carry on his or her person a long gun without a valid weapons carry license, provided that if the long gun is loaded, it shall only be carried in an open and fully exposed manner."

Fifth,

The video made by William Bryan clearly shows the shooting in real time. From said video it appears Ahmaud Arbery was running along the right side of the McMichael truck then abruptly turns 90 degrees to the left and attacks Travis McMichael who was standing at the front left corner of the truck. A brief skirmish ensues in which it appears Arbery strikes McMichael and appears to grab the shotgun and pull it from McMichael. The 1st shot is through Arbery's right hand palm which is consistent with him grabbing and pulling the shotgun at the barrel tip, the 2nd and 3rd wounds are consistent with the struggle for the shotgun as depicted in the video, the angle of the 2nd shot with the rear of the buttstock being pushed away and down from the fight are also consistent with the upward angle of blood plume shown in the video and that McMichael was attempting to push the gun away from Arbery while Arbery was pulling it toward himself. The 3rd shot too appears to be in a struggle over the gun. The angle of the shots and the video show this was from the beginning or almost immediately became-- a fight over the shotgun. Given the fact Arbery initiated the fight, at the point Arbery grabbed the shotgun, under Georgia Law, McMichael was allowed to use deadly force to protect himself. Just as importantly, while we know McMichael had his finger on the trigger, we do not know who caused the firings. Arbery would only had to pull the shotgun approximately 1/16th to 1/8th of one inch to fire the weapon himself and in the height of an altercation this is entirely possible. Arbery's mental health records & prior convictions help explain his apparent aggressive nature and his possible thought pattern to attack an armed man.

OCGA 16-3-21 Use of Force in Defense, once confronted with a deadly force situation an individual is allowed to use deadly force to defend themselves or others OCGA 16-3-23.1 Georgia's No Duty to Retreat Law, an individual is not required to back away from or submit to an attack; OCGA 16-3-24 [b] The use of force which is intended or likely to cause death or great bodily harm to prevent trespass on or other tortious or criminal interference with real property other than a habitation or personal property is not justified unless the person using such force reasonably believes that it is necessary to prevent the commission of a forcible felony.  
OCGA 16-3-24.2 A person properly and legally defending themselves is immune from prosecution

For the above and foregoing reasons, it is our conclusion there is insufficient probable cause to issue arrest warrants at this time.

As to any further issues on whether to present this to a Glynn County Grand jury, that will have to wait for the next District Attorney's review. **Please consider this an OPEN file until that decision is made and restrict the release of any information under Georgia Open Records Act requests.**

Sincerely,

George E. Barnhill  
District Attorney  
Waycross Judicial Circuit

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**From:** George E Barnhill <gebarnhill@pacga.org>  
**Sent:** Tuesday, April 07, 2020 8:42 PM  
**To:** Blair McGowan; Karen Crittendon  
**Cc:** Tom Jump; Alexander Markowich; Michelle McIntire; Jackie Johnson  
**Subject:** Glynn County Shooting, Greg and Travis McMichael

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Ref: Feb 23rd 2020 Shooting in Glynn County  
Involving: Greg McMichael, Travis McMichael, and Ahmuad Arbery

Requesting Appointment of a 2nd Conflict District Attorney

Dear Ms Crittendon and McGowan:

Thank you again for emailing back. This is a case without any law enforcement warrants. I agreed to take the file from Jackie Johnson, the District Attorney in Glynn County, for review to see if it justified and arrest and/or presentation to a Glynn County Grand Jury.

Greg McMichael, a party/ witness in the matter, retired from law enforcement then worked at her office as an investigator for several years up until re-retiring about 10 months ago. His son, whom I have never met and do not know, is the shooter in this case. Ahmaud Arbery was shot and died in this confrontation.

Upon taking the case, my office began gathering the array of materials one normally gathers. My Chief Victim Assistant, Tammy Horlock, talked several times with Mr Arbery's family; I spoke to the mother once; Senior ADA Michelle McIntire was monitoring the collection of information through Capt. Tom Jump GPD. We had told the family it would take a month to 6 weeks to get the autopsy report. They apparently did not believe us. Note: Ms McIntire in my office received the autopsy April 2nd. I know they called the Attorney General Office sometime during this time .

My son works as an Assistant District Attorney for Jackie Johnson. Unknown to Jackie and me until about 3-4 weeks ago, he had handled a previous felony probation revocation and pleading Ahmaud Arbery to a felony in her Glynn County Office.

A local 'rabble rouser' has taken up this cause and begun publishing wild and factually incorrect and legally wrong accusations on Facebook and other social media formats calling for marches and physical affronts be made against the McMichaels at their homes, and my son's home in Brunswick etc.. . To date I have seen no direct connection between the 'rouser' and the family other than their increased calls for my office to be removed, that I must be biased.

This family are not strangers to the local criminal justice system. From best we can tell, Ahmauds older brother has gone to prison in the past and is currently in the Glynn jail, without bond, awaiting new felony prosecution. It also appears a cousin has been prosecuted by DA Johnson's office. Ahmaud, the deceased, had a juvenile and adult felony record.

In that regard, given the connection between myself and my son, and my son having worked with Greg McMichael for several years, and now known that he and Greg McMichael both helped with the previous prosecution of Arbery; I believe it is in the best interest of justice to recuse both myself and my office from this particular investigation.

In doing so I request another District Attorney be appointed to review the file and give advice to the Glynn County Police Department and determine whether there is anything justifying a presentation to a Glynn County Grand Jury.

I believe we have the majority of the information at our office. There is a decent cell phone video of the entire shooting incident, also video of Arbery burglarizing a home immediately preceding the chase and confrontation. We have a witness list and have done research we would include with the file to be available for the new prosecutor's use if desired.

Thank you for your help in this matter

George E Barnhill  
District Attorney  
Waycross Judicial Circuit

306 Albany Avenue  
Waycross GA 31501

office ph 912 287-4395  
office FAX 912 287 4399  
my email [gebarnhill@gapac.org](mailto:gebarnhill@gapac.org)

if I am not available ask for Michelle





**TOM DURDEN**  
DISTRICT ATTORNEY

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STEVE RUSH  
TAMI DUFRESNE  
INVESTIGATORS

TIFFANY SMITH  
ADMINISTRATIVE ASSISTANT

Honorable Christopher M. Carr  
Attorney General of Georgia  
40 Capitol Square, SW  
Atlanta, Georgia 30334

Re: Investigation of the death of Ahmaud Arbery

Dear Chris,

I write to confirm our conversation of last evening. As you will recall, I was appointed District Attorney Pro Tempore on April 13, 2020 to handle this case in the Brunswick Circuit. I received the case file a few days later from Glynn County and my Chief Investigator Jim Gray and I began a review of the matter. My conclusion, as I stated in my press release of May 5, 2020, was that the case was certainly one that needed to be presented to a Grand Jury for consideration of criminal charges once a Grand Jury were available. Almost concurrently with my press release, certain events were put out to the public, not by the State, but by the defense. I believed these actions to be highly improper and began considering criminal charges for the releases and well as the murder charges. After meeting with the GBI, it was my opinion that to protect the integrity of the prosecution, arrests should be made immediately. In a meeting with the GBI last Thursday, May 7, 2020, it was clear that the Bureau was of the same opinion, and I authorized the arrests of Greg and Travis McMichael pursuant to my authority of OCGA 15-18-6.

In the few days since the arrests, I have been made aware that other agencies and offices will be investigating other matters concerning the incident. In other words, the case and surrounding investigations has greatly increased and with that the need for increased resources, technology, and personnel, which are not available in my office to sufficiently to handle the continued workload of the Atlantic Judicial Circuit while, attempting to handle the ever growing case in Brunswick.

I trust that my representation of the State has been a solid contribution to the case in leading to the arrests and preparing the case for Grand Jury. On the other hand, it would be totally inconsistent with my commitment to the goal of effective prosecution of cases in Georgia, to be a drawback due to an issue of resources. To that end, I recuse my office from the above matter, so that the case may continue to be fully and adequately prosecuted.

Of course, our thoughts and prayers continue to be with Mr. Arbery's family along with our steadfast belief that justice will be obtained for them. I believe that my decision today will accelerate the case toward that goal.

In closing, thank you again for allowing me to contribute towards this prosecution and I stand ready to assist your office in the future as we have in the past, when we can help on this or other cases.

Tom Durden  
District Attorney  
Atlantic Judicial Circuit



**GEORGIA DEPARTMENT OF LAW**

40 Capitol Square SW  
Atlanta, Georgia 30334-1300

CHRISTOPHER M. CARR  
ATTORNEY GENERAL

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(404) 656-3300

**ADMINISTRATIVE ORDER**

BY THE ATTORNEY GENERAL:

ORDERED: That under the authority contained in O.C.G.A. § 15-18-5, Joyette M. Holmes, District Attorney, Cobb Judicial Circuit or her designee, is hereby appointed to act as District Attorney Pro Tempore, Brunswick Judicial Circuit, to prosecute in the name of the State the following case, to wit: Death Investigation of Ahmaud Arbery, Glynn County and pursuant to O.C.G.A. § 15-18-5 (c) shall receive no additional compensation for such services except that actual expenses incurred shall be reimbursed by Glynn County at the same rate as provided for district attorneys in O.C.G.A. § 15-18-12.

This 11 day of May, 2020.

CHRISTOPHER M. CARR, ATTORNEY GENERAL

FILED  
CLERK OF SUPERIOR COURT  
2020 JUN -8 P 1:32  
Gerald M. Adams