**IN THE SUPERIOR COURT OF GLYNN COUNTY**
**STATE OF GEORGIA**

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

**3.2**
**SECOND SPECIAL DEMURRER TO THE INDICTMENT (COUNT 9)**

Defendants GREG MCMICHAEL and TRAVIS MCMICHAEL now file this Second Special Demurrer to the Indictment (Count 9), which charges the McMichaels and William R. Bryan with criminal attempt to commit a felony, in violation of OCGA § 16-4-1. The specific felony named in this count is false imprisonment (OCGA § 16-5-41). This count as drafted, however, fails to be "perfect in form as well as substance" and, therefore, must be quashed.[1]

[1] An indictment must be "perfect in form as well as substance" in order to withstand a special demurrer. *King v. State*, 176 Ga.App. 137, 139(2), 335 S.E.2d 439 (1985). *State v. Shepherd Construction col,* 248 Ga. 1, 281 S.E.2d 151 (1981), *cert. denied*, 454 U.S. 1074, 102 S.Ct. 626, 70 L.E.2d 609 (1981). Ga. Const., Art. I, Sec. I, Pars. I and XVIII; U.S. Const., Amends. V and XIV.

> [D]ue process of law requires that an indictment 'put the defendant on notice of the crimes with which he is charged and against which he must defend.' (citation omitted) An indictment apprises a defendant that he may be convicted of the crime named in the indictment, of a crime included as a matter of law in the crime named, and of a crime established by the facts alleged in the indictment regarding how the crime named was committed.

*Stinson v. State*, 279 Ga. 177, 611 S.E.2d 52 (2005).

In particular, the count is duplicitous in that it alleges both a completed crime—"unlawfully chase Ahmaud Arbery . . . in pickup trucks"—and an attempted crime—"attempt to confine and detain Ahmaud Arbery without legal authority on Burford Road using a Ford F-150 pickup truck and a Chevy Silverado pickup truck."

**I. The Elements of the Crime Charged in Count 9**

The elements of criminal attempt to commit a felony include:

1. A person who
2. With intent to commit a specific crime
3. Performs any act
4. Which [act] constitutes a substantial step toward the commission of that crime.

OCGA § 16-4-1.

The specific crime the grand jury alleges in Count 9 that the defendants attempted to commit is false imprisonment. The elements of

false imprisonment include:

1. A person
2. Arrests, confines, or detains
3. Another person
4. In violation of that other's personal liberty.

OCGA § 16-5-41.

**II. Count 9 Alleges Two Crimes, Thus Making it Duplicitous**

> OCGA § 16-1-7(a)(2) prohibits multiple prosecutions, including the defect of duplicity. An accusation is duplicitous if it joins separate and distinct offenses in one and the same count. Duplicity is the technical fault in pleading of uniting two or more offenses in the same count of an indictment. If an indictment is duplicitous, it is subject to demurrer.
>
> *State v. Corhen*, 306 Ga. App. 495, 700 S.E.2d 912 (2010), citing *Hall v. State*, 241 Ga.App. 454, 459(1), 525 S.E.2d 759 (1999).

In attempting to identify the act the defendants performed, which act allegedly constitutes a substantial step toward the commission of false imprisonment, the grand jury chose to allege two acts, introducing them with the phrase "to wit." The first act alleged is that the accused persons "did . . . unlawfully chase Ahmaud Arbery . . . in pickup trucks." The second act alleged is that the accused persons "did attempt to confine and detain Ahmaud Arbery on Burford Drive using a Ford F-150 pickup truck and a Chevy Silverado pickup truck."

These two acts—"chasing" in pickup trucks and "attempting to confine and detain using" pickup trucks—are joined by the conjunction "and," indicating that either one or both of them is sufficient, allegedly, for a jury to conclude that the defendants attempted to commit the specific crime of false imprisonment by taking one or both of these purported "substantial steps."

> [W]hen a defendant is charged, as in this case, with the violation of a criminal statute containing disjunctively several ways or methods a crime may be committed, proof of any one of which is sufficient to constitute the crime, the indictment, in order to be good as against a special demurrer, must charge such ways or methods conjunctively if it charges more than one of them.

*Cotman v. Williamson*, 804 S.E.2d 672, 681 (Ga. App. 2017), *quoting Cash v. State*, 297 Ga. 859, 862, 778 S.E.2d 785 (2015).

But, modifying "chasing" with the adverb "unlawfully," as the grand jury did in Count 1,[2] means, necessarily, that the "chasing" is not just a "substantial step" towards the commission of a crime; it means that this act itself violates an unspecified statute in some unspecified way. In other words, "unlawfully chasing" is a stand-alone crime, not some substantial

[2] See motion 3.1, First Special Demurrer to the Indictment (Count 1).

step integral to an attempted crime. That is the effect of the word "unlawfully" when modifying "chasing" but not modifying "using."

In what way is the "chasing" unlawful? It cannot be that the "chasing" constitutes the "knowing[] and intentional[] attempt" to "confine and detain Ahmaud Arbery without legal authority on Burford Road using" pickup trucks. That is precisely what the grand jury alleges in the second half of the conjunction as a substantial step toward false imprisonment. The grand jury alleges that the defendants attempted to confine and detain Arbery by "using" their pickup trucks, a "using" that, while unspecified, differs from the "chasing." So, "chasing" him in those same pickup trucks must mean something different than the "using" of those pickup trucks in order to have any meaning at all in this count.

What meaning could "chasing" have that makes it "unlawful?" As in Count 1, the grand jury fails to specify whatever makes the "chasing" unlawful. We are left to guess. Suppose the defendants had chased Arbery on foot, or on bicycles. Inserting either of those conveyances in place of "pickup trucks" highlights the uncertainties and infirmities caused by the inclusion of this language in the Indictment. If the grand jury had alleged that the defendants had unlawfully chased Arbery on foot in an attempt to

detain and confine him, we would be left to wonder what it is about the foot-chasing that makes it unlawful. The same question would arise with bicycle-chasing. Or, would it have been *lawful* to have chased Arbery on foot or on bicycles, but using a pickup truck somehow makes the chase itself *unlawful*? Again, we are left to guess.

It is noteworthy in support of this reading of the Indictment in Count 9 that the grand jury charged, in Count 8, the completed crime of false imprisonment, which it then alleges as the underlying felony in the felony murder charged in Count 4. In Count 8, the grand jury alleged that the accused persons "did unlawfully confine and detain Ahmaud Arbery without legal authority, to wit: said accused did chase Ahmaud Arbery" with pickup trucks "and did confine and detain" him by "using" those pickup trucks. The difference in the charging language regarding the chasing is illuminating: In Count 8, the chasing itself is not modified by "unlawfully" at all, but the confining and detaining is modified by "unlawfully." The crime alleged in Count 8, therefore, is *not* the chasing, but the "confining and detaining," two of the essential elements of the completed crime of false imprisonment.

The chasing in pickup trucks, moreover, is not some benign surplusage, or a colorful and inflammatory injection of commentary into an indictment, better reserved for closing argument. It is pernicious in its effect of eviscerating due process in this case by appearing to charge a separate and distinct crime in a count that already alleges an attempt to detain and confine Arbery by "using" pickup trucks.

Most important in our consideration of the defect in this count, it does not matter that the grand jury failed to specify what makes the chasing unlawful, because, whatever it is, it would be a completed crime, distinct from the attempted crime, separate from the substantial step of attempting to "use" pickup trucks to "confine and detain" Arbery in some way other than "chasing" him in those pickup trucks. Thus, as a completed crime, it is a wholly separate crime charged in the same count as the attempt to commit false imprisonment when the accused did "attempt to confine and detain Ahmaud Arbery without legal authority on Burford Drive using " pickup trucks. The "chasing" is not itself a "substantial step" toward an attempted false imprisonment—that attempt has already been described in the phrase "using" those pickup trucks—it is some other unspecified crime altogether.

**Conclusion**

For all these reasons, Count 9 is duplicitous. It fails, therefore, to be perfect in form and substance and, thus, fails to comport with state and federal law regarding due process. This count must be quashed.

August 6, 2020.


FRANKLIN J. HOGUE
Attorney for Defendant
State Bar Number 360030
Hogue Hogue Fitzgerald & Griffin, LLP
341 Third Street
P.O. Box 1795
Macon, GA 31202-1795
478-750-8040
frank@hogueandhogue.com

LAURA D. HOGUE
Attorney for Defendant
State Bar Number 786090
Hogue Hogue Fitzgerald & Griffin, LLP
341 Third Street
P.O. Box 1795
Macon, GA 31202-1795
478-750-8040
laura@hogueandhogue.com

ROBERT G. RUBIN
Attorney for Defendant
State Bar Number 618635
Peters, Rubin, Sheffield & Hodges
2786 North Decatur Road
Suite 245
Decatur, GA 30033
404-296-5300
robertrubin@justiceingeorgia.com

JASON B. SHEFFIELD
Attorney for Defendant
State Bar Number 639719
Peters, Rubin, Sheffield & Hodges
2786 North Decatur Road
Suite 245
Decatur, GA 30033
404-296-5300
jasonsheffieldattorney@gmail.com

**Certificate of Service**

I hereby certify by my signature that I have served a copy of 3.2, Second Special Demurrer to the Indictment (Count 9) on the Office of the District Attorney for the Cobb Judicial Circuit by delivering it to District Attorney Joyette Holmes by emailing it to:

Jesse Evans
Cobb County District Attorney's Office
70 Haynes Street
Marietta, GA 30090
Jesse.evans@cobbcounty.org

Linda Dunikoski
Cobb County District Attorney's Office
70 Haynes Street
Marietta, GA 30090
Linda.dunikoski@cobbcounty.org

Courtesy copy:

Kevin Gough
Attorney for William R. Bryan
501 Gloucester Street, Suite 121
P.O. Box 898
Brunswick, GA 31521
Kevingough.firm@gmail.com

August 6, 2020.

FRANKLIN J. HOGUE