

Russell M Adams
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

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vs.

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INDICTMENT NUMBER

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CR-2100168

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JACQUELYN LEE JOHNSON,
Defendant.

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**STATE OF GEORGIA'S OMNIBUS RESPONSE TO DEFENDANT'S MOTIONS TO
DISMISS**

COMES NOW the State of Georgia and files this Omnibus Response to Defendant's Motions to Dismiss. The Defendant filed two Motions to Dismiss, and the State combines its response to both motions into one omnibus response for the purpose of judicial economy. For the reasons set forth below, the State respectfully requests the Court deny the Defendant's motions.

STATEMENT OF PROCEEDINGS

On September 2, 2021, a Glynn County grand jury returned a true bill of indictment charging the Defendant with one count of violation of oath of public officer in violation of O.C.G.A. § 16-10-1 and one count of obstruction and hindering of a law enforcement officer in violation of O.C.G.A. § 16-10-24. In considering the bill of indictment, the grand jury heard sworn testimony from witnesses and, pursuant to O.C.G.A. § 15-12-83(a), the prosecuting attorney¹ requested that a court reporter be present to take and transcribe the testimony of certain witnesses.

The Defendant filed two motions to dismiss the indictment on various claims.

The Defendant has not been arraigned.

¹ The statute uses the term "district attorney," but this Response will use the term "prosecuting attorney" to avoid confusion.

FACTUAL BACKGROUND

On February 23, 2020, an unarmed Ahmaud Arbery was shot and killed by Travis McMichael while jogging down a street in Glynn County, Georgia. Travis' father, Greg McMichael, and family friend William "Roddie" Bryan assisted in Arbery's murder by pursuing him and boxing him in so that Travis was able to shoot Arbery. In a now-infamous video, Bryan videotaped Arbery's murder and shared it with police on the day of the shooting. An investigation of the murder was conducted by the Glynn County Police Department, and no arrests were made by the police department. After the investigation by the Glynn County Police Department, Ahmaud's murder slowly gained notoriety, and it exploded into the public sphere when the video of Ahmaud's murder was leaked to the public on May 5, 2020.

The release of the video of Arbery's death immediately drew public scrutiny on questions of why no one had been arrested. One of the particular areas of focus involved Greg McMichael's law enforcement background as a police officer and former DA Investigator and whether he had received beneficial treatment because of his connections to law enforcement. In particular, McMichael's recent employment was with the person who would potentially make the charging decision regarding the case: District Attorney Jackie Johnson. As a result, questions arose as to whether District Attorney Johnson and her Assistants should be making any of the decisions regarding Arbery's shooting death.

A factual overview into the weeks after the shooting reveal DA Johnson's initial handling of the case, how the case got to George Barnhill before Johnson claimed a conflict, Barnhill's actions after receiving the case, and Johnson's communications with now-convicted murderer Greg McMichael during the investigation. These help provide background on how this case initiated.

Ahmaud Arbery was shot and killed in the afternoon hours of February 23, 2020.

According to cellphone records, nearly immediately after the shooting, Greg McMichael placed two phone calls: (1) McMichael's first call was to his wife, and it went unanswered. (2)

McMichael's second call was at 2:14pm, and it lasted 39 seconds. This call was placed to District Attorney Jackie Johnson. It also went unanswered, but McMichael left a voicemail for Johnson asking for advice:

“Jackie, this is Greg. Could you call me as soon as you possibly can? Um...we're um...my son and I have been involved in a shooting and I need some advice right away. Could you please call me as soon as you possibly can? Thank you. Bye.”

After becoming aware that Greg McMichael had shot and killed someone, Johnson later called Waycross Circuit District Attorney George E. Barnhill at 5:42pm. Barnhill did not answer his phone. However, in an effort to contact DA Barnhill, at 6:11pm, Johnson called Waycross DA Barnhill's son, Glynn County ADA George F. Barnhill. They spoke for over four minutes, and according to evidence uncovered by the GBI, Johnson told Glynn County ADA Barnhill that she was trying to reach Waycross DA Barnhill. Glynn County ADA Barnhill reached DA Barnhill, and DA Barnhill was told that Johnson was trying to reach him. At 6:13pm, Waycross DA Barnhill called Johnson, and they spoke for nearly 22 minutes on the phone. According to GBI evidence, Johnson asked DA Barnhill to review the Arbery shooting and advise the Glynn County Police Department on his findings. Barnhill said that he was busy and that he could look at the case later in the week. According to evidence, Johnson insisted that it was urgent, Barnhill relented, and Barnhill agreed to review and advise on the case the following afternoon of February 24th.²

² The Attorney General's Office was unaware of Johnson's conflict until Thursday, February 27th. Additionally, none of the suspects were under arrest. As such, Johnson's insistence of urgency on the matter is a question of motive.

On February 24th, the day after the shooting, Johnson spoke to Arbery lead investigator Tom Jump in the late morning for several minutes. In the afternoon and without an AG conflict appointment, DA George Barnhill, a Waycross ADA, and the Glynn County Police Department met to review the evidence in the Arbery shooting. The video of the shooting was reviewed along with other evidence, and according to the Glynn County Police officers in the room, DA George Barnhill concluded that the shooting was justified.³

At no point during this time did District Attorney Jackie Johnson use the lawful conflict procedure outlined at O.C.G.A. § 15-18-5. While Johnson did not use the lawful conflict procedure in the Arbery shooting, Johnson was extremely familiar with the procedure. Indeed, Johnson successfully used the conflict procedure over 25 times during her tenure as District Attorney. A review of her previous conflicts demonstrate that Johnson believed that conflicts arise when DA Investigators were witnesses. Additionally, previous conflicts also demonstrated that Johnson believed that a conflict existed when former courthouse employees were witnesses. However, despite having knowledge that Greg McMichael's case should have been conflicted to the Attorney General's Office because he was her former Chief DA Investigator, employee, and now a murder suspect, Johnson did not use the lawful conflict procedure.

Rather, instead of using the lawful conflict procedure and immediately notifying the Attorney General's Office, DA Johnson allowed DA Barnhill to render a decision on the case – a decision that she classified as urgent. Nevertheless, despite this urgency to reach a conclusion to the case, and hours after DA Barnhill had decided that the shooting was justified, Johnson found time to call murder suspect Greg McMichael at 7:39pm instead of the Attorney General's Office.

³ Some evidence suggests that Barnhill wanted to see the autopsy before he formalized his conclusion, but witnesses also indicated that Barnhill had made up his mind, and they did not think that the autopsy would have made a difference. This is corroborated by the letter that Barnhill would later send to Investigator Tom Jump.

They talked on the phone for 9 minutes and 15 seconds. This all occurs while District Attorney Jackie Johnson is still the presiding District Attorney over the case.

The above referenced phone call was not a singular instance. Rather, the evidence shows that Johnson showed favor and affection for McMichael throughout the pendency of the case – including when she was making decisions as the DA over his case. Indeed, the evidence shows that this is not the only contact that Johnson would have with Greg McMichael during the investigation and before McMichael’s arrest. Below is a summary of phone calls between Johnson and McMichael from the day of the shooting until McMichael’s arrest:

<u>Date</u>	<u>Time</u>	<u>Caller</u>	<u>Call Receiver</u>	<u>Duration</u>
2/23	2:14pm	Greg McMichael	Jackie Johnson	39 s
2/24	7:39pm	Jackie Johnson	Greg McMichael	9 min 15 s
3/8	7:15pm	McMichael	Johnson	12 min 59 s
4/3	6:52pm	Johnson	McMichael	6 s
4/3	7:15pm	McMichael	Johnson	2 min 56 s
4/6	11:05am	Johnson	McMichael	8 min 56 s
4/18	10:25pm	McMichael	Johnson	46 s
4/19	12:25am	McMichael	Johnson	41 s
4/19	11:13am	Johnson	McMichael	9 min 51 s
4/24	6:56pm	McMichael	Johnson	35 s
4/26	8:40pm	McMichael	Johnson	27 s
4/27	7:21pm	Johnson	McMichael	11 min 35 s
4/27	10:27pm	McMichael	Johnson	17 s
4/30	6:30pm	Johnson	McMichael	21 min 4 s
5/1	10:49pm	McMichael	Johnson	60 s
5/5	11:51pm	McMichael	Johnson	17 s

Meanwhile, several days pass after the shooting and Barnhill’s decision, and Johnson attempts to contact the Attorney General’s Office via email on February 26th, but she sends the email to the wrong address. On February 27th, Johnson sends a conflict letter to the correct email address at the Attorney General’s Office. Additionally, Johnson contacted the paralegal in charge

of conflicts and told the paralegal that DA Barnhill had already agreed to accept the case.⁴

Johnson failed to disclose, however, that Barnhill had already reviewed the case and declared the case to be self-defense. Thus, Johnson effectively chose the outcome of the case despite having a conflict under O.C.G.A. § 15-18-5.

The day after DA Barnhill was officially appointed to prosecute the case, Johnson calls a District Attorney employee named Mark Spaulding at 1:37pm. The following series of phone calls occurs:

<u>Time</u>	<u>Caller</u>	<u>Call Receiver</u>	<u>Duration</u>
1:37pm	Jackie Johnson	Brunswick DA Office Manager Mark Spaulding	4 min 14 s
1:49pm	Mark Spaulding	Greg McMichael	4 min 38 s
2:15pm	Jackie Johnson	Brunswick DA Office Manager Mark Spaulding	No Answer
2:16pm	Jackie Johnson	Brunswick DA Office Manager Mark Spaulding	No Answer
2:30pm	Jackie Johnson	Brunswick DA Office Manager Mark Spaulding	5 min 48 s

Though it is unclear what the topic of conversation was in these phone calls, circumstantial evidence suggests that it involved the appointment of George Barnhill as the prosecutor over the Arbery investigation. Indeed, this would not be the only time that a series of phone calls would occur about who the appointed prosecutor is.

On April 3, 2020, Glynn County ADA George Barnhill spoke with his father, Waycross DA George Barnhill, prior to the Waycross DA recusing from the matter. According to GBI evidence, Waycross DA Barnhill told his son, Glynn County ADA Barnhill, that he was going to recuse from the case due to publicity. Notably, after being told this information, Glynn County ADA Barnhill immediately spoke to DA Jackie Johnson on the phone, and Johnson subsequently spoke to Greg McMichael on the phone. Greg McMichael then called Travis McMichael, whom

⁴ Johnson has claimed in a public radio interview that she did not suggest any prosecutor to the Attorney General's Office. The evidence strongly suggests that this is untrue.

called him back and they spoke for 2 minutes and 30 seconds. All of this occurred in under 90 minutes. The timing calls are as follows:

<u>Time</u>	<u>Caller</u>	<u>Call Receiver</u>	<u>Duration</u>
6:11pm	DA George Barnhill	Glynn ADA George Barnhill	10 min 34 s
6:26pm	Glynn ADA George Barnhill	Jackie Johnson	4 min 20 s
6:52pm	Jackie Johnson	Greg McMichael	No Answer
7:15pm	Greg McMichael	Jackie Johnson	2 min 56 s
7:20pm	Greg McMichael	Travis McMichael	No Answer
7:30pm	Travis McMichael	Greg McMichael	2 min 30 s

Corroborating the belief that Johnson was willing to help McMichael is another voicemail from Greg McMichael to Mark Spaulding.⁵ On April 26th at 9:46pm, Mark Spaulding receives a voicemail from Greg McMichael. McMichael's voice is shaking, claiming that something is "urgent" about "this situation." Less than an hour later, Spaulding and Johnson speak for 21 minutes on the phone, and at 7:58am the next day, Spaulding calls McMichael and they have a conversation that lasts almost 5 minutes.

On May 5, 2020, McMichael leaves a voicemail for Johnson, thanking her for a referral because, "he's gonna run interference for me right now, and that's damn good advice, and I appreciate that very much." Two days later, the Georgia Bureau of Investigation arrests Greg McMichael, Travis McMichael, and Roddie Bryan on murder charges. The trio would later be convicted of murder in the death of Ahmaud Arbery.

⁵ The State is in possession of other voicemails.

ARGUMENT AND CITATION OF AUTHORITY

i. The Defendant's motions should be dismissed as untimely.

O.C.G.A. § 17-7-110 states clearly that all pretrial motions, including special demurrers, must be filed within ten days after arraignment. O.C.G.A. § 17-7-110; *Palmer v. State*, 282 Ga. 466-467 (2007). The time for filing these motions, however, may be extended by the Court. *Id.* Here, the Defendant has never been arraigned and her motions are filed before arraignment. A plain reading of Georgia Criminal Procedure provides that the Defendant's motions are untimely unless the time to file motions was extended. *Id.* Additionally, the Court has not granted the Defendant any sort of leave or permission to violate the Georgia Rules of Criminal Procedure, and thus her motions should be dismissed.

Moreover, the Defendant's own cited caselaw agree that their motions should be dismissed. Indeed, the cases cited by the Defendant reach the conclusion that her motions must be dismissed as untimely. Citing to O.C.G.A. § 17-7-110, *Palmer*, and *Miller*, the Defendant's own citations paint a clear picture that the State's position is correct and firmly rooted in Georgia law. That position is that the Defendant's motions are untimely, and they must be dismissed.

ii. The Defendant's Motion to Dismiss for Lack of Evidence should be denied because it has no basis in Georgia law.

The Defendant's assertion that the indictment against her should be dismissed because there is no evidence supporting the charge is entirely without merit because Georgia law does not have a mechanism that allows for dismissal in this manner. Indeed, Georgia law holds that an indictment is sufficient and an examination of Grand Jury evidence is improper.

“It is the settled rule in Georgia that where "a competent witness or witnesses were sworn and examined before the grand jury by whom the indictment was preferred, . . . no inquiry into the sufficiency or legality of the evidence is indulged. The sufficiency of the evidence introduced before the grand jury is a question for determination by the grand jury, and not by the court." *Summers v. State*, 63 Ga. App. 445 (11 SE2d 409) (1940); *Welch v. State*, 130 Ga. App. 18 (202 SE2d 223) (1973); *Traylor v. State*, Ga. App. 226 (1983).

Indeed, current Georgia Supreme Court law holds the same. “[W]here . . . it appears that a competent witness or witnesses were sworn and examined before the grand jury by whom the indictment was preferred, a plea in abatement on the ground that it was found on insufficient evidence, or illegal evidence, or no evidence, will not be sustained, because it comes under the rule that no inquiry into the sufficiency or legality of the evidence is indulged. *Ward v. State*, 288 Ga. 641 (2011).

Here, the Defendant wants this Court to disregard Georgia Supreme Court and Court of Appeals authority and examine the evidence against the Defendant and make a ruling that it is insufficient. While the State is confident that the evidence is sufficient against the Defendant, this examination exceeds the Court’s authority and is not permitted. *Summers v. State*, 63 Ga. App. 445 (11 SE2d 409) (1940); *Welch v. State*, 130 Ga. App. 18 (202 SE2d 223) (1973); *Traylor v. State*, Ga. App. 226 (1983). Should the Defendant wish for the Court to examine the facts against her and determine whether it is sufficient, she may waive her right to a jury trial and request a bench trial. Otherwise, the Court is without authority to make this determination, and the Defendant’s motion should be denied.

iii. The oath given to Grand Jury witnesses was sufficient.

O.C.G.A. § 15-12-68 provides the following:

(a) The following oath shall be administered to all witnesses in criminal cases before the grand jury:

“Do you solemnly swear or affirm that the evidence you shall give the grand jury on this bill of indictment or presentment shall be the truth, the whole truth, and nothing but the truth? So help you God.”

(b) Any oath given that substantially complies with the language in this Code section shall subject the witness to the provisions of Code Section 16-10-70. O.C.G.A. § 15-12-68

An indictment is not “void because, as alleged, the oath administered to the witnesses before the grand jury, under whose evidence the indictment was found, was not in the language of the statute. *White v. State*, 93 Ga. 47 (19 S.E. 49); *Womble v. State*, 107 Ga. 666 (33 S.E. 630); *Sanders v. State*, 118 Ga. 329 (2) (45 S.E. 365); *Boswell v. State*, 114 Ga. 40 (39 S.E. 897); *Moses v. State*, 123 Ga. 504 (51 S.E. 503); *Scandrett v. State*, 124 Ga. 141 (2) (52 S.E. 160); *Lumpkin v. State*, 152 Ga. 229 (7) (109 S.E. 664); *Gossitt v. State*, 182 Ga. 535, 535-536. Indeed, the Court of Appeals has held that a trial court’s quashing of an indictment because the statutory oath was not properly administered is reversible error. *Robinson v. State*, 221 Ga. App. 865.

In contrast, the Defendant relies on an outdated statute as her authority. She acknowledges that O.C.G.A. § 15-12-68 has been modified since the cases she relies on, but she fails to acknowledge the change that occurred. Not only does the Defendant cite to law with a different oath, but the Defendant also fails to address that the law permits substantial compliance with the statute. Here, not only did the State substantially comply with the statute as permitted, but the law does not allow an indictment to be voided based upon the oath given in Grand Jury. As such, given the Defendant’s reliance on the outdated *Williams* case and that Georgia law that does not

permit the Defendant's requested relief, the State requests that the Defendant's Motion be denied.

iv. A court reporter requested by the prosecuting attorney to attend grand jury proceedings is only required to take and transcribe what the prosecuting attorney requests.

There is no statute requiring court reporters to attend, take, or transcribe all grand jury proceedings. There are, however, two scenarios in which a court reporter is authorized to be present and attend grand jury proceedings: (1) upon the request of the prosecuting attorney, or (2) when the grand jury proceedings are in accordance with O.C.G.A. § 17-7-52 (present or former peace officer charged with a crime alleged to have occurred in the performance of his or her duties). O.C.G.A. § 15-12-83(a). There is no evidence or allegation the proceedings at issue were required to be conducted in accordance with O.C.G.A. § 17-7-52, so this Response will be limited to the procedure surrounding a prosecuting attorney's request for a court reporter to be present.

There is only one instance in which a grand jury witness's testimony is required to be transcribed: when a witness testifies pursuant to a grant of immunity as provided in O.C.G.A. § 24-5-507. *See* O.C.G.A. § 15-12-83(d). Otherwise, a court reporter only attends grand jury proceedings at the request of the prosecuting attorney and therefore only takes and transcribes the testimony and argument or legal advice as requested. *See* O.C.G.A. §§ 15-12-83 (a) and (c). There is no requirement that the entirety of evidence and argument or legal advice to be taken and transcribed when not requested. *Id.* Therefore, only that testimony, argument, or legal advice that the prosecuting attorney requests shall be taken and transcribed. *Id.*

Defendant's argument that the court reporter was excluded from taking down and transcribing certain witness testimony and argument or legal advice is misplaced. The correct

evaluation is whether the court reporter took down and transcribed witness testimony and argument or legal advice as requested by the prosecuting attorney. There is no allegation that the court reporter acted outside the scope of the prosecuting attorney's request meaning there is no violation of O.C.G.A. § 15-12-83.

v. The remedy for any alleged violation of O.C.G.A. § 15-12-83(c) is not dismissal of the indictment.

Dismissal of an indictment is an extreme sanction and, unless expressly authorized by statute, a dismissal cannot be imposed unless there is a violation of a constitutional right or a rare case in which the State's action has compromised the structural protections of the grand jury rendering the proceedings fundamentally unfair. *State v. Lampl*, 296 Ga. 892, 896 (2015); *see also State v. Brown*, 293 Ga. 493 (2013) (dismissal warranted where indictment not returned in "open court") and *Colon v. State*, 275 Ga. App. 73 (2005) (dismissal would be warranted if the prosecutor remained present during the grand jury's deliberations). In deciding whether to overturn an indictment for alleged prosecutorial misconduct, the United States Supreme Court has required a showing of prejudice. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988).

If the Defendant demands a dismissal of her indictment, she needs to show that a statute authorizes that relief or that she was prejudiced by the proceedings. She cannot make such a showing. Generally, grand jury proceedings are conducted without the presence of a court reporter and there is no resulting harm or prejudice to a defendant thereby. The Defendant cannot demonstrate to this Court that she is prejudiced through her allegation that some, but not all, testimony and argument were taken by a court reporter when, in fact, there is no requirement that any testimony (outside of that given pursuant to a grant of immunity) or argument be taken by a court reporter.

CONCLUSION

Court reporters are generally not required to attend grand jury proceedings. However, when requested by a prosecuting attorney, a court reporter can take and transcribe testimony and argument before a grand jury. There is no requirement that a court reporter take or transcribe all testimony and argument, only that which is requested. Any alleged failure of a court reporter to take or transcribe the entirety of the proceeding prejudiced the Defendant in no way, shape, or form. Defendant's requested relief for the dismissal of the indictment and an order from this Court to be a "watch dog" on any future grand jury proceedings are wholly without merit. The State respectfully requests this Court deny the Defendant's motion.

RESPECTFULLY SUBMITTED, this 4th day of May, 2022.

/s/ John Fowler

John Fowler
Deputy Attorney General
Special Prosecution Division
Georgia Bar #157158

/s/ Blair McGowan

Blair McGowan
Senior Assistant Attorney General
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JACQUELYN LEE JOHNSON,
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CERTIFICATE OF SERVICE

I, John Fowler, do hereby certify that the **STATE OF GEORGIA'S OMNIBUS RESPONSE TO DEFENDANT'S MOTIONS TO DISMISS** is served on counsel for the Defendant via email:

Brian Steel, Esq.
thesteellawfirm@msn.com

This 4th day of May, 2022,

/s/ John Fowler

John Fowler
Deputy Attorney General
Special Prosecution Division
Georgia Bar #157158