**RECALCITRANT WITNESSES - EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am still Tain Kell.*

Tain-during NJO, we tell new judges that if they ever have an emergency need for assistance while on the bench that they can reach out to us for help.

*Yep. Now that I am retired, I cannot really do that as much anymore – but we do make that “phone a friend” option available to our new judges.*

I have received a few calls lately about a subject that can often “pop up” with little warning – and it has come up with enough frequency that I thought we should discuss it here*.*

*I am glad we are talking about something that happens “IRL” (In Real Life). I am so hip to all the cool acronyms - So what are we discussing today?*

Recalcitrant Witnesses.

*Wow- so proud of your thesaurus work over the holidays. But have we not already discussed this topic in prior episodes?*

Not directly – we have a whole series on how to try a criminal case and other topics dealing with impeachment and similar topics – but nothing solely on dealing with witnesses who do not want to testify.

*This episode will be full of statutory and case law citations and you can find the outline at goodjudgepod.com. So let’s dive into how to deal with a recalcitrant witness*

Let’s begin with a scenario:

Defendant on trial in a criminal case. Witness is under subpoena and tells court personnel that he does not intend to answer any questions. Nothing more than that for now – merely a rumor around the courtroom that the witness (not the defendant on trial) does not intend to answer questions.

As you can see, a slight variation in these facts may lead to an entirely different outcome

For example, if the “witness” is a defendant or co-defendant, there is an entirely different outcome (and procedure)

If the witness speaks another language or is deaf, there is an entirely different outcome (and procedure)

For now, let’s focus simply on the “rumor” that makes it back to the judge – the witness has not taken the stand and said anything directly on the topic

Which brings us to the first – and maybe most important point – when a rumor of potential trouble makes its way to the judge, the judge has the luxury of time – the judge can call time out and prepare for this scenario

We remind new judges that this job is not a pop quiz – it is open notes.

The key is understanding that you (the judge) have the ability to call time out and get prepared. The key is that you need notes/memos/outlines from podcasts/ etc. handy so that when you take that time out, you are not opening a book on the subject for the first time.

Unfortunately, you do not always know what is coming in any given trial – so having a trial notebook (whether it is paper, electronic, or simply a bunch of cases in a file folder) is of vital importance.

The next key point in our original scenario is that the witness has not refused to answer any questions during the actual trial just yet – the judge may have heard the rumor from the lawyers, the bailiffs, or from whatever source – but for now it is simply a rumor

And we are calling it a “rumor.” We are not implying that the judge is engaging in ex parte communications with anyone – only that it is something that has not happened yet but could be coming up during the trial – it might have been raised in pretrial motions or elsewhere – we are calling it a “rumor” as a shorthand way of describing any number of scenarios – with the important point being that the witness has not said anything formal just yet

Let us assume that this recalcitrant witness is the next person the party plans to call to the stand – and the judge has some inkling that the witness is going to refuse to answer questions while on the stand

1) **SEND THE JURY OUT!** We cannot stress this enough – send the jury out when you, as the judge, have an inkling that there is a problem with a witness.

2) OUTSIDE THE PRESENCE OF THE JURY, have the oath administered to the witness and then make a determination whether the witness is:

 a) Attempting to raise his right against self-incrimination; or

 b) Simply refusing to speak; or

 c) There is some other problem.

**PRIVILEGE AGAINST SELF-INCRIMINATION**

O.C.G.A § 24-5-505 provides the statutory basis of the privilege against self-incrimination. The Georgia Constitution also includes the privilege as a Constitutional provision.[[1]](#endnote-1)

The privilege belongs to the witness and the defendant on trial has no standing to raise the privilege on behalf of the witness.**[[2]](#endnote-2)**

The defendant lacks standing to assert another person’s privilege against self-incrimination and also lacks standing to object to a statement taken from another person in violation of that other person’s *Miranda* rights.**[[3]](#endnote-3)**

The privilege remains available to the witness “through sentencing.”**[[4]](#endnote-4)**

Where a co-defendant has entered a guilty plea and has not appealed, the witness cannot refuse to testify based upon 5th Amendment grounds.**[[5]](#endnote-5)**

The State can comment on a witness’ silence or failure to come forward after the crime.**[[6]](#endnote-6)**

A criminal defendant may assert the privilege on his own behalf, and the defendant can be issued a “blanket assertion of the privilege,” meaning that the defendant does not have to answer any questions. However, the same is not true for a witness.

The trial court is not required to allow the witness to assert a blanket privilege, and a witness must appear pursuant to a valid subpoena and assert the privilege in response to specific questions posed to the witness.**[[7]](#endnote-7)**

However, if it appears that the witness intends to raise the privilege to essentially all questions, the trial court has the discretion to refuse to allow the witness to take the witness stand.**[[8]](#endnote-8)**

“If it appears that a witness intends to claim the privilege [against self-incrimination] as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand. Neither side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him.” [Cit.] . . . [O]ne reason for this rule is that reliable inferences do not ordinarily follow from a witness' invocation of the Fifth Amendment.”**[[9]](#endnote-9)**

The trial court also has the discretion to have the witness take the stand and assert the privilege in the presence of the jury.**[[10]](#endnote-10)**

But the defendant has no right to call a witness who has indicated outside of the presence of the jury that the witness intends to raise the privilege.**[[11]](#endnote-11)**

**SELF-INCRIMINATION – PROCEDURE**

(Would you provide counsel to the witness – or attempt to have his/her prior lawyer summoned to speak privately with the witness?)

When the witness attempts to raise the privilege, the trial court **should excuse the jury** and determine, outside the presence of the jury, whether the answer to the question could potentially incriminate the witness.**[[12]](#endnote-12)**

However, if there is any possibility that the answer ***could*** incriminate the witness, the court should allow the witness to raise the privilege.

This process should not be so detailed that the witness has to incriminate himself in order to raise the privilege. The trial court’s questioning should be limited to prevent that possibility.**[[13]](#endnote-13)**

While many cases suggest that the trial court’s advisement to the jury that a witness was called to the stand, raised a privilege, and refused to testify is not harmful error, the cases repeatedly question the propriety of such a comment to the jury.**[[14]](#endnote-14)** “The better practice here would have been for the trial court not to have informed the jury of the witnesses’ refusal to testify.”**[[15]](#endnote-15)**

O.C.G.A. § 24-5-507 allows a prosecutor to seek an order from a Superior Court judge granting immunity from a witness where the prosecutor believes that the testimony is “necessary to the public interest.”

The trial court must determine if the testimony is necessary to the public interest.**[[16]](#endnote-16)**

If the immunity order is signed by the Superior Court judge, the witness cannot utilize a privilege against self-incrimination found at §24-5-505.

The immunity granted under §24-5-507 is a “use” and “derivative use” immunity meaning that no part of the testimony given by the witness can be used against the witness, including any direct or indirect use. However, it is not “transactional immunity” which would prevent any prosecution of the witness for any acts relating to the event about which he/she testifies.**[[17]](#endnote-17)** Even as to the “use or derivative use” afforded by the statute, the witness can still be prosecuted for perjury committed while testifying or refusing to testify.

If the witness fails or refuses to testify after the immunity is granted, the witness can be adjudged in contempt and jailed until he/she provides the testimony.

The defendant has no right to request that a witness be granted immunity under §24-5-507.**[[18]](#endnote-18)**

“We now squarely hold that Georgia law does not authorize a trial court to grant use immunity to a witness at the request of a defendant.”**[[19]](#endnote-19)**

There is no requirement that the trial court conduct an evidentiary hearing before granting the immunity requested by the prosecutor.**[[20]](#endnote-20)**

The trial court is also not required to advise a ***witness*** of his/her own rights against self-incrimination before that witness testifies.**[[21]](#endnote-21)**

The defendant has no standing to object to the grant of immunity to a witness, and the issue of privilege and immunity belongs to the witness and not the defendant.**[[22]](#endnote-22)**

**THE ‘FORGETFUL” WITNESS**

Where the witness is not a co-defendant and becomes “forgetful” or fails to testify in a manner consistent with a prior statement, the prior inconsistent statement can be used as substantive evidence.**[[23]](#endnote-23)**

A prior statement of the witness is admissible as a prior inconsistent statement even when the witness denies that he/she made the prior statement.**[[24]](#endnote-24)**

“[T]he prior inconsistent statement of a witness suffering from memory loss is admissible where Sixth Amendment concerns are met by the defendant's having the opportunity to cross-examine a forgetful witness about his bias, lack of care, and attentiveness, and even the fact he has a bad memory.”**[[25]](#endnote-25)**

A prior statement qualifies as a prior inconsistent statement and is admissible even when the witness admits making the prior statement but claims it was made under duress or was forced by law enforcement officers.**[[26]](#endnote-26)**

The fact that a witness admits making the prior statement does not render that prior statement inadmissible as a prior inconsistent statement. So where a witness admits making the prior statement to law enforcement officials but claims at trial that the prior statement was a lie, the prior statement is admissible.**[[27]](#endnote-27)**

**DIFFERENCE BETWEEN “FORGETFUL” AND “REFUSAL”**

There is a different result where the witness refuses to testify at trial.

It is improper to allow a prior statement to be admitted as a prior inconsistent statement where the witness refuses to testify at trial.

This is because the prior statement is not inconsistent, and there are also Confrontation Clause issues which cannot be satisfied if the witness is not subject to cross-examination at trial.**[[28]](#endnote-28)**

 If a witness answers some questions and then refuses to answer any additional questions, the proper remedy is to strike pertinent portions of the witness’ testimony.**[[29]](#endnote-29)**

Although this issue arises with less frequency, the new evidence code specifically authorizes a party to impeach their own witness, even the in absence of a claim of surprise.**[[30]](#endnote-30)**

When a witness with no self-incrimination concerns simply refuses to testify at trial, the judge has the right to hold that person in contempt of court until that witness testifies (within reason).

If we are being candid, some “witnesses” are actually defendants serving a sentence in some other case – the threat of contempt is not very compelling to that witness

As a practical matter, are you going to hold the jury and the entire trial for days, weeks, months?

**UNANTICIPATED DEVELOPMENT**

So we started this episode with the judge having some insight into what might be coming – what if the judge has no warning and the witness takes the stand and refuses to testify without warning?

 **SEND THE JURY OUT….**

**Once the jury is out,** the judge needs to make inquiries of the witness whether he is refusing to testify or is attempting to raise a privilege

If it is a refusal without justification, consider contempt (listen to our episode on contempt - direct vs. indirect, right to be heard before punishment is imposed, etc.)

If it is determined that the witness is attempting to raise a privilege, see prior sections of this outline

 Allow the parties to provide their respective thoughts on a potential solution

Remember that the defendant has a Constitutional right to confront witnesses and if the witness begins to testify but then stops, the cases say that there is a *Crawford* problem that the judge needs to address

We know that you would like for us to give you a step-by-step “playbook” for what to do if this happens – but we can’t. There are too many variables that could impact the “correct” decision

Couple of principles to remember:

1. The defendant must have the ability to cross-examine – witness’ refusal to testify effectively thwarts the defendant’s right to cross-examine.[[31]](#endnote-31)
2. It is absolutely improper to allow the prosecutor to ask a series of leading questions to a witness who refuses to testify – even if those questions track the witness’ pretrial statement.[[32]](#endnote-32)
	1. The prior statement made outside of court is neither consistent nor inconsistent with the witness’ testimony if the witness refuses to testify.
3. If a witness seeks to raise his/her right against self-incrimination, the grant of immunity discussed previously eliminates the authority of the witness to raise the privilege.

So that’s all for today’s discussion of the ever-dreaded Recalcitrant Witness.

*We have summarized the discussion already – but know that if you want this outline, it is available on goodjudgepod.com. Shout out to J.B. Bryant for keeping the website up to date!*

As always, we want to discuss topics that are relevant to you, our listener(s). Shoot us your thoughts at our e-mail address, goodjudgepod@gmail.com

The time has come for the hotly anticipated music trivia section of the podcast. Tain, take it away.

 *Back in our day, a brand new technology broke onto the scene that were called music videos. Some upstart cable station called MTV played little movies that tracked popular songs. It really blew our minds. Remember, young un’s, that there was no YouTube – heck, there was no internet or a personal computer to speak of.*

 *So today’s trivia deals with iconic music videos. You may have your own list of the top 5 music videos of all time but we are using one we found on the internet. In all honesty, this one tracked a “Top 100 of all time” list made by VH1 but don’t get lost in the details.*

*#5 – Guns and Roses had a video for a song that tells the story of a rock star (Axl Rose) getting married to a woman who later dies. I will be honest, this song from the catalog of G&R hits did not jump to mind. Wanna’ guess the name of the song? HINT – 2 words. Give up? November Rain.*

*#4 Nirvana holds the #4 slot. Merely saying “Nirvana” probably gives away the answer – but let’s play along. The video features the band playing in a bit of a mosh pit – the mosh pit is made up of cheerleaders, zombies and all sorts of incongruent people. What’s the name of the song? Give up? “Smells like Teen Spirit.”
#3 There once was a great rock band called Genesis but the members of the band eventually broke off and performed as individual acts. The front man of Genesis WAS NOT Phil Collins – it was Peter Gabriel. His video landed at #3 on this chart of all time great music videos. This video had Claymation and won 9 video awards in 1987. There were people featured morphing into construction tools, dancing chickens and all sorts of other mayhem featured in this video. For what song was this video made? Give Up/ “Sledgehammer”*

*#2 Madonna raised all sorts of controversy with almost everyone on the planet for this video. It was released in 1989 and featured images of burning crosses, a criminal depicted as a saint and a knife cutting into Madonna’s hands. What was the song? Give up? “Like a Prayer”*

*#1 There are very few things in this world where almost everyone agrees that something or someone was the GOAT – greatest of all time. Just ask someone their opinion of who is the GOAT in basketball or football. Well, this video is the greatest of all time and it is almost without dissention. I am only going to tell you that Vincent Price made $7mil for his part in the song and video and that was in 1983 dollars. Enough info? The artist was Michael Jackson. I know that is enough information. The song? “Thriller”*

*Have a great day everyone and thanks for listening.*

1. Art. I, §1, ¶ XVI. [↑](#endnote-ref-1)
2. *Thomas v. State*, 245 Ga. 688, 691 (1980); *Lawton v. State*, 259 Ga. 855, 856 (1990); *Wilson v. State*, 286 Ga. 141, 142 (2009). [↑](#endnote-ref-2)
3. *Romer v. State*, 293 Ga. 339, 342 (2013). [↑](#endnote-ref-3)
4. *Victrum v. State*, 203 Ga. App. 377 (1992); see *Anderson v. Southern Guar. Ins. Co.*, 235 Ga. App. 306 (1998) where the witness was allowed to raise the privilege while the conviction had a pending motion for new trial. [↑](#endnote-ref-4)
5. *Gober v. State*, 300 Ga. App. 202, 204 (2009). [↑](#endnote-ref-5)
6. *Romer v. State*, 293 Ga. 339, 343 (2013). [↑](#endnote-ref-6)
7. *Dempsey v. Kaminski Jewelry, Inc.*, 278 Ga. App. 814 (2006). See *Brown v. State*, 295 Ga. 804, 810 (2014) which found that the trial court did not abuse its discretion by refusing to allow the defendant to call a former co-defendant to the stand and, in the presence of the jury, ask questions of the witness and have the court determine on a question-by-question basis whether the former co-defendant had a valid reason to raise the witness’ Fifth Amendment privilege. [↑](#endnote-ref-7)
8. *Billings v. State*, 278 Ga. 833 (2005). [↑](#endnote-ref-8)
9. *Billings v. State*, 278 Ga. 833, 834 (2005), citing *Davis v. State*, 255 Ga. 598, 604 (1986); *Anderson v. State*, 338 Ga. App. 171, 174 (2016). [↑](#endnote-ref-9)
10. *McIntyre v. State*, 266 Ga. 7, 11 (1995) (“[A] witness' in-court invocation of his Fifth Amendment rights is not necessarily harmful. [Cits.] What is harmful is for the trial court to allow the State, once a witness has invoked his Fifth Amendment rights, “in effect, to testify for the witness and circumvent meaningful cross-examination as to obvious inferences....” [Cit.] If a witness' mere in-court assertion of his Fifth Amendment rights is not necessarily harmful, then a passing reference to [his] mere out-of-court assertion of [his] rights, although irrelevant, is not prejudicial.”) [↑](#endnote-ref-10)
11. *Sillah v.* State, 291 Ga. App. 848, 850-851 (2008); *Hendricks v. State*, 283 Ga. 470, 473 (2008); *Davis v. State*, 255 Ga. 598, 604 (1986); *King v. State*, 202 Ga. App. 817 (1992); *Sweat v. State*, 261 Ga. App. 88 (1997). [↑](#endnote-ref-11)
12. *Lawrence v. State*, 257 Ga. 423 (1987); *In re Victorine*, 230 Ga. Ap. 209 (1998). [↑](#endnote-ref-12)
13. *Hoffman v. US*, 341 U.S. 479 (1951). [↑](#endnote-ref-13)
14. *Hendricks v. State*, 283 Ga. 470, 472-473 (2008); *Wallace v. State*, 303 Ga. 34, 40 (2018). [↑](#endnote-ref-14)
15. *Wallace v. State*, 303 Ga. 34, 40 (2018). [↑](#endnote-ref-15)
16. *In re Long*, 276 Ga. App. 306 (2005); citing *King v. State*, 273 Ga. 258, 264-265 (2000) and *State v. Mosher*, 265 Ga. 666, 667 (1995). These cases are all based upon the language of the immunity statute under Georgia’s old rules of evidence. See *Brown v. State*, 295 Ga. 804, n.4 (2014) which held that the principles found in the former evidence code relating to immunity has been carried forward to the new evidence code and can be found at §24-5-507(a). [↑](#endnote-ref-16)
17. *In re Long*, 276 Ga. App. 306 (2005) construing the prior immunity statute under Georgia’s old rules of evidence. [↑](#endnote-ref-17)
18. *Brown v. State*, 295 Ga. 804, 811 (2014). [↑](#endnote-ref-18)
19. *Brown v. State*, 295 Ga. 804, 811 (2011), citing *Dennard v. State*, 313 Ga. App. 419, 421 (2011). [↑](#endnote-ref-19)
20. *In re S.U.*, 269 Ga. App. 306 (2004). [↑](#endnote-ref-20)
21. *Carlson v. Carlson*, 324 Ga. App. 214 (2013). [↑](#endnote-ref-21)
22. *Rashid v. State*, 292 Ga. 414, 417-418 (2013). [↑](#endnote-ref-22)
23. O.C.G.A. §24-8-801(d)(1)(A); §24-6-613; *Gibbons v. State*, 248 Ga. 858 (1982); *Andrews v. State*, 275 Ga. App. 426 (2005); *Meeks v. State*, 281 Ga. App. 334, 336 (2006); *Robbins v. State*, 300 Ga. 387, 391 (2016). [↑](#endnote-ref-23)
24. *Johnson v. State*, 289 Ga. 106, 108 (2011), citing *Cummings v. State*, 280 Ga. 831, 833 (2006); *Gober v. State*, 300 Ga. App. 202, 203-204 (2009). [↑](#endnote-ref-24)
25. *Spann v. State*, 248 Ga. App. 419, 421 (2001). [↑](#endnote-ref-25)
26. *Wilson v. State*, 286 Ga. 141, 142-143 (2009). [↑](#endnote-ref-26)
27. *Johnson v. State*, 289 Ga. 106, 108 (2011). [↑](#endnote-ref-27)
28. *Barksdale v. State*, 265 Ga. 9, 11 (1995); *Soto v. State*, 285 Ga. 367, 370 (2009); *Crawford v. Washington*, 541 U.S. 36, (2004); *Jackson v. State*, 291 Ga. 22, 24 (2012). [↑](#endnote-ref-28)
29. *Soto v. State*, 285 Ga. 367, 368 (2009); citing *Smith v. State*, 225 Ga. 328, 331 (1969); *Johnson v. State*, 287 Ga. 767, 769 (2010). [↑](#endnote-ref-29)
30. O.C.G.A. § 24-6-607. [↑](#endnote-ref-30)
31. *Horne v. State*, 281 Ga. 799, 808 (2007). [↑](#endnote-ref-31)
32. *Horne*, at 807-808. [↑](#endnote-ref-32)