**CLOSING ARGUMENTS - EPISODE NOTES**

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

*And I am Tain Kell.*

Tain, back in the olden days when you had to prepare to try cases as a lawyer, when you were getting ready to actually prepare, did you follow the old adage of preparing your closing argument first and then fashion the questions you were going to ask witnesses around that argument?

*No…*

Today, we are going to discuss closing arguments and talk a little about what is allowed and what is not allowed

*In the trial outline that we provide to new judges, you have a chart that includes short references to things that are allowed and not allowed. I bet our listeners would benefit from having a copy of that. Folks, we will make sure the “closing argument chart” is available at goodjudgepod.com*

**THE RULES**

1. In criminal cases, O.C.G.A. § 17-8-71 was amended in 2005 to provide that the State has the opening and concluding closing argument
	1. Prior to 2005, there was a more complicated rule that only allowed the prosecution to have the opening and concluding argument if the defendant presented evidence other than the testimony of the defendant
		1. There was a bit of a game played back then where prosecutors would attempt to bait defense lawyers into presenting evidence and then argue that the right to the “last word” argument was forfeited
		2. Thankfully, that is no longer the law. We have enough to do during a trial – not keeping up with whether an exhibit was admitted or merely referenced was a real problem when we were lawyers
2. The statute, § 17-8-71, provides that the defendant shall make his/her closing argument “prior to the concluding argument of the prosecuting attorney.”
	1. Death penalty cases have a different rule for the sentencing phase where each party has a single closing argument and defendant gets the last word.[[1]](#endnote-1)
3. Where you have multiple lawyers representing a single party, “not more than two counsel shall be permitted to argue any case for each side, except by express leave of court. Only one lawyer may be heard in conclusion.”[[2]](#endnote-2)
4. There are also time limitations (thankfully)
	1. Misd-1/2 hour in total, per side[[3]](#endnote-3)
	2. Felony (other than capital) one hour each side[[4]](#endnote-4)
	3. Felony capital offenses – 2 hours per side[[5]](#endnote-5)
		1. The parties can request an extension ***before arguments begin***[[6]](#endnote-6)
5. In a fun fact, Georgia law allows the trial court to permit the prosecution to waive the “opening” closing argument and reserve their only argument to the final argument.[[7]](#endnote-7) This is not allowed under Federal law.[[8]](#endnote-8)

**CONTENT OF CLOSING ARGUMENT - GENERALLY**

1. Lawyers are not allowed to read law to the jury. They can reference the applicable law – even quoting what the judge will charge
	1. What is prohibited is reading jury charges or other law to the jury.[[9]](#endnote-9)
	2. And misreading the law is also prohibited[[10]](#endnote-10)
		1. Particularly egregious is to argue law that is not a part of the case before the jury (i.e. arguing that what should have been charged as opposed to what was charged by reading that other law to the jury)[[11]](#endnote-11)
2. Closing argument must be based upon evidence presented at trial
	1. While that seems an obvious point, there are all sorts of arguments attempted to be made that introduce facts that were not put in front of the jury
		1. Examples:
			1. What a witness who did not testify would have said[[12]](#endnote-12)
			2. What a tattoo “meant”[[13]](#endnote-13)
3. The closing argument cannot suggest the juror decide the case based upon sympathy.[[14]](#endnote-14)
	1. Particularly when done by a prosecutor, argument relating to sympathy for the victim runs afoul of the prohibition against victim impact statements and the limitations on “the value of the victim” or the emotional impact that the crime had on the victim or family[[15]](#endnote-15)
4. A defendant cannot argue for “jury nullification”[[16]](#endnote-16)
5. Counsel is allowed to use “figurative speech” in closing arguments[[17]](#endnote-17)
	1. “It is quite natural, and by no means unusual, for an advocate, in discussing the facts of a case before a jury, to indulge to some extent in imagery and illustration. Sometimes a simile may be inapt, or the metaphor mixed, or the expression may be hyperbolical. What the law forbids is the introduction into a case, by way of argument, of facts not in the record and calculated to prejudice the accused.”[[18]](#endnote-18)
	2. “The prosecutor was entitled to impress ‘upon the jury the enormity of the offense and the solemnity of their duty in relation thereto.’”[[19]](#endnote-19)
	3. It is permissible to refer to the defendants as an “army” of robbers[[20]](#endnote-20)
6. The lawyer can refer to things within common knowledge and can even refer to “well-established historical facts” provided the argument does not inject extrinsic and prejudicial matters which have no basis in the evidence.[[21]](#endnote-21)
7. Counsel may draw deductions from the evidence, even if the deductions are unreasonable or illogical – the cure for such an argument is the argument of opposing counsel, not prohibition by the trial judge[[22]](#endnote-22)

**NAME CALLING**

1. One area where lawyers get into trouble during closing argument is when they begin the process of “name calling”
	1. Admittedly, the line between “figurative speech” and “name calling” can be a bit blurry
2. Where there were obvious conflicts between the witness’ testimony on direct and his testimony on cross-examination, the opposing lawyer was allowed to refer to that witness as a “liar.”[[23]](#endnote-23)
	1. However, as we will see in the list of taboo topics for closing arguments in a few minutes, calling witnesses or parties names can lead to real problems
	2. More importantly, I am not sure how effective such a tactic is with a jury
3. In the interest of full disclosure, (not advice), cases have allowed arguments where the prosecutor characterized the defendant as a brute, beast, animal, or mad dog.

**ARGUING THE DEFENDANT’S CREDIBILITY OR COMMENTING ON THE DEFENDANT’S ABILITY TO SUBPOENA WITNESSES**

1. Man-oh-man, do we get objections about this topic during closing arguments by prosecutors!
	1. Much of the propriety or impropriety of these arguments is based upon phrasing or word choice
2. The defense will argue that this topic for closing argument is “improper burden-shifting”[[24]](#endnote-24) The cases on this issue disagree with such an argument – assuming the argument is phrased properly
3. First, the defendant has no obligation to testify or present evidence in a criminal case
	1. Hint to prosecutors – if you want to go here in your argument, it is a good idea to start the discussion with a verbalized recognition that the defendant has no obligation to testify or present evidence.
		1. Not a bad idea to throw in a recognition that the burden of proof is on the State and it never shifts to the defendant!
4. It is absolutely permissible for the prosecutor to argue that the defendant could have called witnesses or presented evidence[[25]](#endnote-25)
	1. As an example, State can comment on defendant’s failure to produce certain witnesses when the defendant testifies to the existence of a witness with knowledge of material and relevant facts and that person does not testify at trial. In order to make such a comment the argument must be derived from evidence properly before the fact finder.[[26]](#endnote-26)
	2. The State cannot comment that the forensic witness was in the hall all week (because that was not in evidence) BUT the prosecutor CAN comment that the defendant also has subpoena power provided that the prosecutor does not imply that the defendant has any burden of proof.[[27]](#endnote-27)
		1. Similarly, where the defendant argues that his girlfriend has relevant knowledge of what happened but was not called as a witness, it is error for the DA to have the girlfriend stand up in the gallery and note to jury that she’s been here all week – he could have called her as a witness (not in evidence).[[28]](#endnote-28)

**COMMENTING ON DEFENDANT’S PRE-ARREST SILENCE**

1. In 1991, the case of *Mallory v. State* was decided which created a bright-line rule that prohibited prosecutors from commenting or introducing evidence of a defendant’s pre-arrest silence.[[29]](#endnote-29) THAT RULE HAS BEEN ABROGATED BY THE 2013 EVIDENCE CODE!
2. *State v. Orr* made a lengthy and detailed analysis of the impact of the 2013 evidence code changes and is worthy of reading for the logic behind the rule.[[30]](#endnote-30)
	1. In *Orr*, the prosecutor argued, “…he now wants to claim self-defense. I find that particularly convenient. He never told the story to the police, never once said, ‘Hey, wait. I’m the victim here. She came at me with an ashtray.’ I submit to you that this is something made up because he has an interest in the outcome of this case.”
	2. The *Orr* Court held that the pre-arrest “silence or failure to come forward” is admissible but requires “careful consideration of what specific sorts of evidence that come within the broad phrase “silence or failure to come forward.”
	3. Further, the Court held “under Rule 801 (d) (2) (B), the trial court must find that two criteria were met: first, that ‘the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond,’ and second, that ‘there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.’ ”[[31]](#endnote-31)
	4. However, the “adoptive admission” rule under 801(d)(2)(B) is not the only way such evidence can be admitted. It could be an admission by non-verbal conduct under 801(d)(2).
	5. The *Orr* court noted that there may be other ways for the defendant’s pre-arrest silence to be admitted but that the trial court may exclude the evidence under Rule 403.[[32]](#endnote-32)
	6. Ultimately, the *Orr* Court did not find whether the argument was allowable, choosing instead to remand the case to the Court of Appeals.
3. Consider the situation where a defendant is accused of having sexual relations with a child by his/her spouse. In response, the defendant makes no comment or does not deny the allegation. “Under the circumstances, an innocent person would deny such allegations” and, therefore, the evidence (and argument thereon) would be admissible as an adoptive admission.[[33]](#endnote-33)

**FLIGHT AS CONSCIOUSNESS OF GUILT**

1. To be clear, the cases say that evidence of flight can be offered (and argued) as evidence of consciousness of guilt.[[34]](#endnote-34)
	1. But there remains a prohibition against any jury charges on flight and how a jury might consider that evidence.
2. “The fact of an accused’s flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct is admissible as evidence of consciousness of guilt….”[[35]](#endnote-35)

**PAROLE, PROBATION, OR SENTENCING**

1. No party may argue anything related to the possibility of parole, probation, or discuss sentencing in any manner[[36]](#endnote-36)
	1. Of course, this prohibition does not apply to death penalty cases.

**MATHEMATICAL CERTAINITY**

1. The jury charge relating to proof beyond a reasonable doubt notes that the State is not obligated to prove their case beyond all doubt or “to a mathematical certainty”
	1. Prosecutors have used that language to get into some trouble during closing arguments
2. In *Debelbot v. State*, the prosecutor argued that proof beyond a reasonable doubt did not mean to a mathematical certainty.[[37]](#endnote-37) So far, so good. The next step was a doozy
	1. The prosecutor went on to argue that the jury did not have to be “ninety percent” or “eighty percent” or even “fifty-one percent sure.”
	2. The Supreme Court of Georgia referred to that argument as “obviously wrong”[[38]](#endnote-38)
3. On the heels of that case was the case of *Draughn v. State*.[[39]](#endnote-39)
	1. The argument was not found to create reversible error in *Draughn* where the prosecutor argued that beyond a reasonable doubt “is not beyond all doubt. It’s not 90 percent or 95 percent.”[[40]](#endnote-40)
4. In comparing those two arguments in a third decision, the Supreme Court noted that the evidence in *Debelbot* was relatively weak whereas the evidence of guilt in *Draughn* was relatively strong. Therefore, the error in BOTH arguments was reversible in one case but not the other.
5. That third case was the relatively recent decision in *Warren v. State*.[[41]](#endnote-41)
	1. In *Warren*, the prosecutor argued “…the Court will tell you again what [reasonable doubt] is. It’s not to a mathematical certainty. It’s not 95 percent, 85 percent, it’s a doubt of a fair-minded, reasonable person.”
	2. The Supreme Court held such remarks during closing argument are “at the very least inadvisable”
		1. They went on to hold “We admonish lawyers not to confuse jurors by attempting to quantify a standard of proof that is not susceptible to quantification.”
6. The one thing all of these cases had in common was that they were being considered on claims of ineffective assistance of counsel due to a failure to raise a timely objection.
	1. In short, leave this whole issue alone, prosecutors!

**JUDGE RESPONSIBILITIES WHEN IMPROPER ARGUMENTS MADE**

1. O.C.G.A. § 17-8-75 – “Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender.”

**THE CHARTS**

1. The charts that follow are from my trial outline and are quick references to law relating to what sorts of arguments are allowed and not allowed

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| **ALLOWED IN CLOSING ARGUMENTS** |
| Deductions from the evidence (Even if illogical) | *Davis v. State*, 285 Ga. 343, 347 (2009); *Harris v. State*, 296 Ga. App. 465, 469 (2009). |
| Credibility of Defendant’s testimony (If Defendant testifies) | *Wells v. State*, 200 Ga. App. 104, 106 (1991). |
| Defendant has subpoena power too (Defendant’s failure to bring evidence/witnesses to support his theory) | *Peek v. State*, 247 Ga. App. 364 (2000); *Kilgore v.* State, 300 Ga. 429, 432 (2017); *Biswas v. State*, 255 Ga. App. 339 (2002); *Ponder v. State*, 268 Ga. 544 (1997); *Morgan v. State*, 267 Ga. 203 (1996); *Duncan v. State*, 271 Ga. 16 (1999). State can comment on defendant’s failure to produce certain witnesses when the defendant testifies to the existence of a witness with knowledge of material and relevant facts and that person does not testify at trial. In order to make such a comment the argument must be derived from evidence properly before the fact finder. The State cannot comment that the forensic witness was in the hall all week (because that was not in evidence) BUT the prosecutor CAN comment that the defendant also has subpoena power provided that the prosecutor does not imply that the defendant has any burden of proof. *Campbell v. State*, 329 Ga. App. 317 (2014). Same with a girlfriend who was in court but was not called to testify—improper to have her stand up in closing and point out she could have been called if she had relevant evidence. *Mowoe v. State*, 328 Ga. App. 536 (2014). |
| Defendant has not rebutted State’s evidence | *Kilgore v. State*, 300 Ga. 429, 432 (2017). |
| Defendant is dangerous (**cannot** allude to future conduct) | *Turner v. State*, 345 Ga. App. 427, 433 (2018); *Stroud v. State*, 272 Ga. 76, 77 (2000). |
| Urge jury to convict to send a message to the community (“Speak on behalf of the community”) | *Philmore v. State*, 263 Ga. 67, 69 (1993); *Poellnitz v. State*, 296 Ga. 134, 136 (2014); *Faust v. State*, 302 Ga. 211 (2017). |
| Use of terms “Murder,” “Rape,” and “Victim” | *Clark v. State*, 300 Ga. 899, 902 (2017) (“murder”); *Nguyen v. State*, 279 Ga. App. 129, 133 (2006) (“rape”); *McCray v. State*, 301 Ga. 241, 247-248 (2017) (“victim”). |
| Defendant can argue witnesses received benefits in exchange for testimony (Potential prison time avoided) | *Palma v. State*, 280 Ga. 108 (2005). |

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| **NOT ALLOWED IN CLOSING ARGUMENTS** |
| Facts not in evidence | *Morgan v. State*, 267 Ga. 203 (1996). |
| Pre-trial silence of Defendant (Pre-Arrest or after) | The bright-line prohibition from *Mallory* has been replaced with a more fact-specific analysis. See *State v. Orr*, 305 Ga. 729 (2019); *Jackson v. State*, 306 Ga. 266 (2019) |
| Defendant’s failure to testify (Defendant did not deny or dispute the State’s evidence) | U.S.C.A. Const. Amend. 5; O.C.G.A. § 24–5-506; *Eason v. State*, 283 Ga. App. 574 (2007) citing *Smith v. State*, 279 Ga. 48 (2005); *Smith v. State*, 170 Ga. App. 673, 674 (1984). Judge Jack Goger, *Daniel’s Georgia Handbook on Criminal Evidence*, § 23:7 (West Pub. 2018 Ed.) |
| Golden Rule (put jurors in victim’s shoes) | *Braithwaite v. State*, 275 Ga. 884 (2002); *McClain v. State,* 267 Ga. 378 (1996). *McKibbins v. State*, 293 Ga. 843, 849-850 (2013). |
| Defendant’s future conduct | *Turner v. State*, 345 Ga. App. 427, 433 (2018); *Stroud v. State*, 272 Ga. 76, 77 (2000). |
| Prosecutor may not “testify” as victim | *McCray v. State*, 301 Ga. 241, 250-251 (2017). However, see *Watkins v. State*, 278 Ga. 414, 414-415 (2004) where prosecutor allowed to give a portion of his closing argument while seated in the witness chair. |
| Biblical quotes  | *Carruthers v. State*, 272 Ga. 306, 310 (2000), overruled on other grounds *Vergara v. State*, 283 Ga. 175 (2008). |
| Personal Opinions | *McKibbins v. State*, 293 Ga. 843, 850 (2013). |
| Witness was not indicted and, therefore, is not guilty. | *Caldwell v. State*, 313 Ga. 640, 647-648 (2022) (prosecutor argued that the DA under a duty to not indict innocent people and that is why witness was not indicted). |
| Reference to other notorious cases  | *Humphrey v. Lewis*, 291 Ga. 202, 216-217 (2012); *Carr v. State*, 267 Ga. 547, 555 (1997). Several older cases where comparing the defendant to the Viet Cong, the Nazi extermination of Jews, and other analogies have been upheld on appeal but the more modern rule seems to demand that any such analogy must be based upon facts in the case before the court. *Martin v. State*, 223 Ga. 649, 650 (1967); *Forehand v. State*, 235 Ga. 295 (1975). But see *Hudson v. State*, 273 Ga. 124, 127 (1998) where the prosecutor asked the jury to consider the cases involving Manson, Berkowitz, and Dahmer where those defendants were all found to be accountable for their actions even though they had claimed insanity. A deeply divided Supreme Court allowed that argument. |
| Punishment (or lenient sentence) | O.C.G.A. § 17-8-76. This rule does not apply to death penalty cases as §17-10-31(b) provides that the parties may argue and the court may charge the definitions of life without parole and life imprisonment. |

So, that’s all for our episode dealing with closing arguments

When we started, we thought we would also discuss closing arguments in civil cases – but for the sake of the length of this episode, we are going to have to discuss closing arguments in civil cases in another episode

This episode outline includes those charts that we mentioned in the opening part of this episode

The outline is full of statutory and case citations and that outline can be found at **goodjudgepod.com**.

Reach out to us on goodjudgepod@gmail.com with all of your podcast topic ideas

**I’m Wade Padgett**

*And I’m Tain Kell…you know MTV had its broadcast premiere on August 1, 1981. Ironically, the first music video ever played on MTV was the video for the song, “Video Killed the Radio Star” by the band, The Buggles. If you have ever heard that song, you are welcome for that earworm.*

1. O.C.G.A. § 17-10-2(a)(2). [↑](#endnote-ref-1)
2. O.C.G.A. § 17-8-70 and U.S.C.R. 13.3. [↑](#endnote-ref-2)
3. O.C.G.A. § 17-8-72 and U.S.C.R. 13.1. [↑](#endnote-ref-3)
4. O.C.G.A. § 17-8-73 and U.S.C.R. 13.1. [↑](#endnote-ref-4)
5. O.C.G.A. § 17-8-73 and U.S.C.R. 13.1. [↑](#endnote-ref-5)
6. U.S.C.R. 13.2 and O.C.G.A. § 17-8-74. [↑](#endnote-ref-6)
7. *Bradham v. State*, 243 Ga. 638 (1979). The trial court has the right to allow the prosecution to waive that initial closing argument but it is discretionary – the trial judge is not *required* to allow the State to make such an election. [↑](#endnote-ref-7)
8. Fed. R. Crim. P. 29.1. [↑](#endnote-ref-8)
9. *Conklin v. State*, 254 Ga. 558, 570 (1985). [↑](#endnote-ref-9)
10. *Freels v. State*, 195 Ga. App. 609, 611 (1990); *Brown v. State*, 319 Ga. App. 680, 683 (2013). [↑](#endnote-ref-10)
11. *Brown v. State*, 319 Ga. App. 680, 683 (2013)(Defendant attempted to read the jury the definition of statutory rape in a trial where the defendant was charged with rape). [↑](#endnote-ref-11)
12. *State v. Jackson*, 306 Ga. 626 (2019). [↑](#endnote-ref-12)
13. *Fleming v. State*, 306 Ga. 240 (2019)(Defendant had a tattoo “MOB” and, during trial, he testified it meant “Member of Bloods.” The prosecutor played a snippet of a song from Tupac Shakur called “MOB” which suggested the acronym meant “Money over Bitches.” But there was no evidence of that reference during trial and the prosecutor committed error by “going there.”). [↑](#endnote-ref-13)
14. *Lofton v. State*, 309 Ga. 349 (2020); *Robinson v. State*, 308 Ga. 543 (2020). [↑](#endnote-ref-14)
15. *Lofton v. State*, 309 Ga. 349, 363 (2020), citing O.C.G.A. § 17-10-1.2 and *Lucas v. State*, 274 Ga. 640, 643 (2001). [↑](#endnote-ref-15)
16. *Andrews v. State*, 222 Ga. App. 129 (1996). [↑](#endnote-ref-16)
17. *Patterson v. State*, 124 Ga. 408, 409 (1905) (“The blood of this dead man calls upon you to punish his killer….”). [↑](#endnote-ref-17)
18. *Patterson*, at 409. [↑](#endnote-ref-18)
19. *Hall v. State*, 259 Ga. 412, 414 (1989). [↑](#endnote-ref-19)
20. *Styles v. State*, 308 Ga. 624, 629 (2020). [↑](#endnote-ref-20)
21. *Robinson v. State*, 257 Ga. 194, 196 (1987). [↑](#endnote-ref-21)
22. *Morgan v. State*, 267 Ga. 203, 204 (1996); *Davis v. State*, 285 Ga. 343, 347 (2009). [↑](#endnote-ref-22)
23. *Clark v. State*, 146 Ga. App. 697 (1978). [↑](#endnote-ref-23)
24. *Johnson v. State*, 271 Ga. 375, 383 (1999). [↑](#endnote-ref-24)
25. *Peek v. State*, 247 Ga. App. 364 (2000); *Kilgore v. State*, 300 Ga. 429, 432 (2017); *Biswas v. State*, 255 Ga. App. 339 (2002); *Ponder v. State*, 268 Ga. 544 (1997); *Morgan v. State*, 267 Ga. 203 (1996); *Duncan v. State*, 271 Ga. 16 (1999). [↑](#endnote-ref-25)
26. *Campbell v. State*, 329 Ga. App. 317, 317-318 (2014). [↑](#endnote-ref-26)
27. *Campbell v. State*, 329 Ga. App. 317, 318 (2014). [↑](#endnote-ref-27)
28. *Mowoe v. State*, 328 Ga. App. 536 (2014). [↑](#endnote-ref-28)
29. *Mallory v. State*, 261 Ga. 625 (1991), abrogated by statute as noted in *State v. Orr*, 305 Ga. 729 (2019) and *Jackson v. State*, 306 Ga. 266 (2019). [↑](#endnote-ref-29)
30. *State v. Orr*, 305 Ga. 729 (2019). [↑](#endnote-ref-30)
31. *State v. Orr*, 305 Ga. 729, 740 (2019). [↑](#endnote-ref-31)
32. For example, “consciousness of guilt” may allow evidence of pre-arrest silence, flight, escape, etc. *Orr*, at 741. [↑](#endnote-ref-32)
33. *Neal v. State*, 355 Ga. App, 125, 129 (2020). [↑](#endnote-ref-33)
34. *Torres v. State*, 353 Ga. App. 470, 482-483 (2020). [↑](#endnote-ref-34)
35. *Jenkins v. State*, 313 Ga. 81, 89 (2022). [↑](#endnote-ref-35)
36. O.C.G.A. § 17-8-76. [↑](#endnote-ref-36)
37. *Debelot v. State*, 308 Ga. 165 (2020). [↑](#endnote-ref-37)
38. *Debelot v. State*, 308 Ga. 165, 168 (2020). [↑](#endnote-ref-38)
39. *Draughn v. State*, 311 Ga. 378 (2021). [↑](#endnote-ref-39)
40. *Draughn v. State*, 311 Ga. 378, 382 (2021). [↑](#endnote-ref-40)
41. *Warren v. State*, 2022 WL 4349024, S22A0466 (Ga. 9/20/2022). [↑](#endnote-ref-41)