**CRIMINAL TRIALS WITH MULTIPLE DEFENDANTS - EPISODE NOTES – PART 2**

Welcome back to the Good Judge-Ment Podcast, I am Wade Padgett

*And, as always, I am Tain Kell*

In part one of this mini-series, we discussed criminal jury trials with multiple defendants

*We are back with part 2 – but remember that this series was requested by a loyal listener and is not intended to address any particular trial that may be pending in Georgia*

But given that there are two monster multi-defendant jury trials pending in Fulton County, our judicial hearts go out to our colleagues on that bench

*Let’s get to it – part 2 of our mini-series on multi-defendant jury trials.*

**HOW TO MANAGE CONFLICTS/LAWYER CONFLICTS**

Not sure this subtopic is limited to multiple defendant cases – judges routinely have significant issues managing lawyer conflicts – with scheduling, competing trial dates, etc.

U.S.C.R. 17.1 discusses conflicts and how they are to be resolved

Special Set Trial – working with other judges with whom lawyers claim conflicts – I am not sure that under Rule 17.1 that a specially set trial receives any greater weight than does a trial calendar but I think it helps everyone understand that setting a trial on a date certain helps move your trial over “court appearances” in other cases

Under U.S.C.R. 17.1, criminal (felony) takes precedence over civil actions

And jury trials control over non-jury matters

Then, the rules say the older case prevails (except where a speedy trial demand under O.C.G.A. §§ 17-7-170 and 17-7-171 has been filed).

Even though the rule seems straightforward, there are countless scenarios presented by lawyers which seem to stretch or confound the rules

I have had great success when I have reached out to the other judge involved in a conflict and we have clarified which court needs the lawyer to appear most urgently

And when a judge has taken the time and effort to specially set a jury trial, most other judges seem to recognize that as important in attempting to work through a conflict

When specially setting a trial, we suggest that you impose deadlines for certain events to occur

For example, the discovery rules in criminal cases have default deadlines “unless otherwise set by the court.”

I know that several judges have struggled with situations where lawyers ignored the deadlines – does the judge exclude evidence when it was not disclosed according to the deadlines set?

Excluding evidence should be a LAST RESORT move by the judge – we would suggest that you consider contempt actions against lawyers before you exclude evidence - and we are NOT fans of holding lawyers in contempt!

Early in this podcast series, we interviewed Judge Lamar Sizemore and related his 3 rules for judges – the first rule was remember that you were once a lawyer – so taking that into consideration here, just remember what it was like to be a lawyer and set deadlines that are reasonable. If a lawyer has a reasonable excuse for missing the deadline, take that into consideration.

ON THE OTHER HAND, if you get the perception that the lawyer is intentionally ignoring the deadlines set by the court, deal with the lawyer, not the evidence.

**LOGISTICS**

Learned a lot during COVID – including how to conduct jury selection in the James Brown Arena

In a long trial, I have known judges to establish a 4 day work-week for the jury

And I have known others to work all week and on Saturday and Sunday

I have done both – [Tain?]

Judges should remember the collateral impacts of starting before 9 or going past 5 (bailiffs, clerks, court reporters, etc.)

Which raises the issues of court reporters – do you expect them to take down 8-10 hours of testimony each day? What if he/she gets sick or has family emergency?

Better have a back-up or two on line

During voir dire, important to have jurors identify themselves by a juror number

You have going to have to develop a juror questionnaire -but need to consider how to keep the jurors names/addresses/etc private

And you (judge) are going to need to communicate that privacy issue with parties

What about sick jurors?

Do you “take care” of jurors like providing them lunch or paying to have deputies take them to lunch and the court picking up the bill?

Given the high profile nature of some of these trials, there are people unconnected with the trial that might try to reach out to jurors

I strongly advise against sequestering a jury (and I think that most defense lawyers have realized the error in seeking to sequester a jury)

Early in the process, get with your local court administrator and/or DCA. During that meeting, discuss:

1. Courtroom space for the expected length of the trial
2. Security (for all involved)
3. Parking issues
4. Having court reporter(s) (discussed previously)
5. Media attention (Rule 22)
6. All issues relating to a jury – both selection process and during the trial itself (discussed previously)
7. How to maintain an open courtroom (potentially live stream into another courtroom or on line)
8. Any and all other issues that may be relevant to your case
   1. For example, if we had a multiple defendant trial, we do not really have seating in the courtroom for more than 2 or 3 defendants – we may be required to move furniture, etc.)
   2. If defendants are in custody, you may need to separate them – that will require coordination with security
   3. Make sure your evidence presentation system is operational or choose to tell the lawyers to all bring their own equipment – if using the system installed in the courtroom, schedule an “education day” for the lawyers to learn the system

Probably best to develop an instruction sheet for jurors that bailiffs can distribute

Reminding them of things like:

1. Where to park
2. How to contact court if sick, etc.
3. Where to assemble – do you have bailiffs meet them somewhere and bring them into and away from the building to avoid “public?”
4. Deal with lunch hours/trial schedule
5. Get them some snacks and soft drinks or coffee (they will appreciate it)

Consider what you will do if you have a defendant that “acts out” in court

We know we cannot generally use video conferencing in a criminal jury trial due to 6th Amendment concerns**[[1]](#endnote-1)**

We have scheduled a future episode with a judge who has handled these sorts of large, high profile cases so we will be updating this list of issues with him – stay tuned

**How to handle situation where co-defendant pleads guilty and “flips”**

Different schools of thought – whether you should delay sentencing to ensure cooperation or go ahead and sentence so the “flipper” cannot backtrack and request a trial

Under Georgia law, until sentence is pronounced, a defendant has the absolute right to withdraw plea**[[2]](#endnote-2)**

So if the defendant has been sentenced and then becomes “forgetful” at trial, the state can move to set aside the agreement/sentence if the trial court finds that the defendant lied at trial of the co-defendant – assuming the case was already sentenced.**[[3]](#endnote-3)**

On the other hand, the court could take the plea and withhold sentencing (again, with the knowledge that the defendant can withdraw the plea after seeing how the trial went for the co-defendant he/she is “flipping on”)

All of this presupposes that the defendant made a proffer at the time the plea was entered – on the record and under oath – and that the trial judge finds that the defendant was not truthful when he/she testified at trial

As an aside, it is important that any offer/plea made by a testifying co-defendant be made known to the other co-defendants under *Brady/Gigglio*.**[[4]](#endnote-4)**

**JURY STRIKES IN MULTI-DEFENDANT CASES**

Georgia law is clear that in any felony trial in which the death penalty is not at issue, the defendants are to jointly exercise the nine preemptory strikes.[[5]](#endnote-5)

However, the trial court is also authorized to apportion the strikes among the defendants.[[6]](#endnote-6)

If there are two defendants on trial and the trial court elects to apportion jury strikes between the defendants, the court has the authority to apportion the strikes “in the manner the court shall direct.”

If the defendants are afforded nine strikes between them, it is conceivable that the court could give one defendant 5 strikes and give the other defendant 4 strikes.**[[7]](#endnote-7)**

The court also has the discretion to award up to five additional strikes to the defense where there are multiple defendants.**[[8]](#endnote-8)**

Specifically, the statute provides where two or more defendants are tried jointly, “the court, upon request of the defendants, ***shall*** allow an equal number of additional strikes to the defendants, not to exceed five each, as the court shall deem necessary, to the ends that justice may prevail. The court ***may*** allow the state additional strikes not to exceed the number of additional strikes as are allowed to the defendants,”**[[9]](#endnote-9)** (emphasis supplied).

The plain reading of the statute reveals that, if requested, the court must grant additional strikes to the defendants being tried jointly but has discretion as to whether to give the state additional strikes to mirror the number of strikes afforded to the defendants.

Every judge must do whatever they think is best here – but I typically:

1. Ensure that the state has as many peremptory challenges as the defense; and
2. Apportion strikes in a manner that gives each defendant the same number of strikes

For example, we know that a single defendant gets 9 strikes (felony). Assume a 2 defendant trial. To avoid one defendant having 4 strikes and the other having 5, I will typically grant each side one additional strike – allowing each defendant to have 5 and the State to have 10

If you have a 10 defendant trial, you could add one additional strike per side, giving each defendant one strike and the State 10

The possibilities are endless – limited only by your imagination as the judge and the logistics of how many jurors you want to qualify (and how long you want to spend in jury selection)

Alternate jurors are another question entirely

Alternate jurors are governed by the provisions of O.C.G.A. § 15-12-169.1. That Code section specifically allows the trial judge to determine the number of alternate jurors.

“When there are multiple co-defendants, the number and manner of exercising preemptory challenges is determined as set forth in §17-8-4.”**[[10]](#endnote-10)**

Wade presided over a trial with 6 co-defendants – when we got to the subject of alternate jurors, lead counsel for the defendants advised that the defense must share one strike per alternate juror to be selected.

I cannot find any law that says that is a requirement but I was happy with the answer

In candor, § 17-8-4 says that strikes are to be shared unless otherwise ordered by the Court and I announced my discretionary decision to apportion strikes for the main jury but have the defendant share one strike per alternate

**CLOSING ARGUMENTS – TIME AND RULES**

See prior episode on closing arguments (may actually be released after this one – but was recorded first)

Just as a quick reference,

There are **time limitations** for closing argument (that judges and juries hope never become relevant)

Unless an extension is granted by the judge BEFORE arguments begin:**[[11]](#endnote-11)**

(A) **Felony** cases punishable by the **death penalty** or **life** in prison - **2 hours** each side.

(B) **Any other felony** case - **1 hour** each side.

(C) **Misdemeanor** case - **30 minutes** each side.**[[12]](#endnote-12)**

In this context, each “side” means each defendant.

We will not spend time here discussing the nightmare that would result in a 5-10 co-defendant jury trial where each lawyer for each defendant gets 1-2 hours for closing arguments

Or the nightmare being the 4th or 8th lawyer arguing your client’s case

Just know that there are time limitations and the judge has the discretion to extend the time limits provided the request is made before arguments begin

**JURY INSTRUCTIONS/VERDICT FORMS**

We cannot imagine a case where a properly crafted verdict form could be more important than in a multi-defendant criminal trial

Frankly, some of the appellate decisions have placed great weight in the fact that each defendant had a separate verdict form – thereby ensuring the jury considered the evidence against each defendant separately and independently

This is particularly true where the defendants are not all charged with the same offenses

For example, assume all of the defendants are charged with the offense of conspiracy to commit murder but only one defendant is charged with the actual murder, possession of firearm, etc. but other defendants were charged with false statements or perjury or possession of cocaine.

In that context, it would be vitally important for each defendant to have a well crafted and independent verdict form – where that defendant’s name appears in the style of the case

And then if there were lesser included offenses requested for any of the charges, you prepare a verdict form that says, for example:

**Count 5:**

**We the jury find defendant John Doe:**

**\_\_\_\_ Guilty of Trafficking in Meth**

**OR**

**\_\_\_\_ Guilty of Possession of Meth with Intent to Distribute**

**OR**

**\_\_\_\_ Not Guilty**

This is but one example but it removes possibilities of incorrect verdicts and it ensures that 1) the jury considers the charges against each defendant separately, and 2) that the jury does not find a defendant guilty of two offenses which cause a nightmare for the judge

As to jury charges, you will have all of the normal jury charges that would be applicable in any felony trial but pay close attention and consider giving the following charges in a multi-defendant case

1. Limiting instruction for “confessions” of one defendant or any 404(b) evidence
2. Jury to consider each charge against each charged defendant separately and make an independent verdict for each charge as to each defendant
   1. Consider telling the jury that a finding of guilt as to any defendant does not mandate a similar finding as to any other defendant
3. Consider mere association, mere presence charges carefully and give them if requested (maybe even if not requested)
4. Charge on party to a crime (even if not requested)

That’s all for our episodes dealing with multi-defendant criminal trials

*Look out for future episodes where we will be dealing with how to handle high profile trials and other fascinating topics. We are getting our expert guests lined up to bring you topics that we think you will find interesting.*

But we need to leave you with a couple of things:

Send us e-mails at goodjudgepod.com

*Look for this episode outline at goodjudgepod.com*

I am Wade Padgett

*And I am Tain Kell*

*Finally, our music trivia for the day- I love Athens, Ga for lots of reasons. But the Classic City is well known in the music world, largely for spawning 2 bands, the B-52’s and REM. Today’s music trivia is based on those two iconic bands that formed in Athens but went on to world-wide acclaim. The B-52’s had a couple of monster hits – “Love Shack” and “Rock Lobster.” Which of those 2 songs appeared on their debut album? Give up? “Rock Lobster”. So which year did “Love Shack” get released? Give up again? So Soon? 1989. So for the crossover question – which member of the B-52’s sang on REM’s monster hit, “Shiny Happy People?” That would be Kate Pierson. Now to REM trivia – Michael Stipe is the godfather to another famous musician’s child. Who was the father of that child for whom Michael Stipe was the godfather? Kurt Cobain. REM was not the original name for the band. Do you know what was? Twisted Kites. I cannot imagine feeling the same way I do about REM’s music if their name had been “Twisted Kites.” There is so much more to know about these monster bands – we might have to revisit this topic again on a future episode.*

1. *US v. Yates*, 438 F.3d 1307 (2006). [↑](#endnote-ref-1)
2. O.C.G.A. § 17-7-93(b). [↑](#endnote-ref-2)
3. *Brown v. State*, 261 Ga.App. 115, 115-116 (2003); *Simmons v. State*, 292 Ga. 265, 267 (2013); *State v. Lewis*, 298 Ga. 126 (2015). [↑](#endnote-ref-3)
4. *Brady v. Maryland*, [373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) ] and *Giglio v. United States*, [405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). [↑](#endnote-ref-4)
5. O.C.G.A. § 17-8-4(b). [↑](#endnote-ref-5)
6. O.C.G.A. § 17-8-4(b). [↑](#endnote-ref-6)
7. *Brunetti v. State*, 176 Ga. App. 184, 186 (1985). [↑](#endnote-ref-7)
8. O.C.G.A. § 17-8-4(b). [↑](#endnote-ref-8)
9. O.C.G.A. § 17-8-4(b). [↑](#endnote-ref-9)
10. O.C.G.A. § 15-12-169.1. [↑](#endnote-ref-10)
11. U.S.C.R. 13.2 [↑](#endnote-ref-11)
12. See O.C.G.A. §§ 17-8-72 (misd); 17-8-3 (felony); 17-8-74 and U.S.C.R. 13.1 and 13.2 (extensions). [↑](#endnote-ref-12)