**CHARGE CONFERENCES EPISODE NOTES**

**Wade: Hello folks, and welcome to another edition of The Good Judge-ment Podcast. I am Wade Padgett**

*Tain: And I’m Tain Kell. What seems like a long time ago, we recorded a series dealing with jury trials in criminal cases. One of those episodes dealt with charge conferences and closing arguments.*

**Wade: That’s right. We recommend the series that we affectionately refer to as “Trial of a Criminal Case – From Beginning to End.” But Tain, we had a listener recently request that we address the topic of charge conferences in a bit more detail so – here we are.**

*Tain: One of the things we have not done is a corresponding series on the trial of a civil case. The two are similar but there are some important differences. Today, we are going to touch on charge conferences in general and not solely focus on criminal cases. Thanks to the listener who requested this episode. It really helps getting feedback from you – learning what you like to have us chat about.*

**Wade: You too can have a topic discussed by Thing 1 and Thing 2 here on the Good Judge-ment Podcast. Just send us an e-mail with your ideas or thoughts. Send it to goodjudgepod@gmail.com. We have received a number of great ideas for episode topics from several of you out there in listener land. Hey Tain, speaking of that…**

*Tain: Speaking of what? You mentioned Dr. Seuss, e-mails and wherever “listener land” is in that last comment.*

**Wade: Yeah, Listener Land – Land where listeners are located. Anyway, we had a listener, Carlie from South Carolina, write us with some great ideas. Who knew this little podcast that Doug Ashworth helped us dream up would reach folks in a whole other state?**

*Tain: You act like we are on an AM radio station or something. Look, the Good Judge-Ment Podcast is on all of the major podcast platforms. I doubt they care but people could listen in Nebraska – or Sicily. Seriously, we are incredibly grateful to our loyal audience. Here in Georgia, in other states – and even in other countries.*

**Wade: Ok, thanks Carlie and everyone else who listens to us, wherever you might be – out there in listener land. Let’s get to charge conferences in criminal and civil cases.**

Jury charges – the bain of a trial judge’s existence. Trials are weird from the judge’s standpoint. The judge is pretty involved at the beginning of the trial and at the end of the trial. But should strive to be almost invisible during the trial itself.

There are a couple of preliminary, procedural issues to address regarding jury charges and charge conferences:

In a criminal case, remember that the charge conference must be conducted in the presence of the defendant. *Payne v. State*, 290 Ga. App. 589 (2008); *Peterson v. State*, 284 Ga. 275 (2008).

We may sound like a broken record but there are enough cases reversed on appeal that somebody is missing this message in criminal cases – everything that happens during a trial needs to happen in the presence of the defendant

That’s why I do not have bench conferences – I do not want the defendant that close to the bench – do not want the court reporter to have to figure out a way to take down the conversation – there are just all sorts of logistical, security and other reasons to avoid that.

But if you do conduct bench conferences during a trial, you had best have the defendant at the bench also or somehow make a record that what was discussed was merely a collateral matter and have the lawyers confirm that was what was discussed

But back to charge conferences, it is 100% clear that the defendant has nothing to add to the conversation – but as to every aspect of the charge conference, the defendant must be present

Do not allow the brief delay or inconvenience of having the bailiffs get the defendant who is in custody back in the courtroom for a quick clarification about the charges you will be giving – don’t allow that inconvenience create an appellate issue

Ok, another procedural issue – **U.S.C.R. 10.3:** all requests to charge shall be numbered consecutively on separate sheets of paper and submitted to court in duplicate by counsel for all parties at commencement of trial – unless otherwise provided in a pretrial order; provided, however, additional requests may be submitted to cover unanticipated points which arise thereafter.

This can be a real problem – particularly in a civil case. *Parkside Center, Ltd. v. Chicagoland Vending, Inc.*, 250 Ga. App. 607 (2001) (charge on attorney fees was not presented until close of evidence and it was an anticipated issue in the pretrial order. Trial court did not allow charge and was affirmed on appeal)

Some of the same decisions in criminal cases – but with criminal cases we are always guarding against a claim of **ineffective assistance of counsel**. But the appellate cases are there, if this becomes an issue. *Smith v. State*, 222 Ga. App. 366 (1996) (request for cautionary instruction dealing with accomplice testimony that was not submitted until just before closing arguments – trial court refused to give charge and was upheld on appeal because the testimony of an accomplice was not “unanticipated.”); *Temple v. State*, 238 Ga. App. 146 (1999) (lesser included charge not given because it was submitted just before closing arguments – and the issues were addressed in the discovery provided prior to trial)

By comparison, look at the decision in *Murphy v. State*, 270 Ga. 880 (1999) which dealt with a charge concerning the defendant’s choice not to testify. That is a tactical decision which could not have been anticipated until the defendant made his election. That refusal to give the requested charge was upheld by the Court of Appeals but reversed by the Supreme Court of Ga.

It is not error for the trial court to charge a lesser included offense (or any other charge, for that matter) without a pretrial request being made – it just may not be ***required***. U.S.C.R. 10.3 ”carries no express penalties.” *Gagnon v. State*, 240 Ga. App. 754, 755 (1999). (There are literally 10 cases, both Ct. of App. and Supreme Ct., which continue to cite this point of *Gagnon* with approval).

If we are being candid, there are a couple of reasons for this rule – some obvious and some more subtle

1) Judge needs to prepare the charges and organize them in a manner that makes sense

2) The parties need a sense of where all of this is headed – what the claim or defense is all about –

3) Some lawyers got sold that concept of “theme” when they started mock trials in law school. Some want to phrase questions and answers so they can quote witnesses during their arguments

While we appreciate the Rules requirement of separate sheets of paper, etc., we both use written charges that go out with the jury and we are going to discuss both why and how in a moment.

We both have colleagues who are old school and insert the piece of paper containing a particular requested charge in a big, dusty jury charge binder – but that is becoming the exception rather than the rule (I cannot imagine how I would keep up with where I am when reading the charge that way)

(Lawyers, if you want to do me a favor, send me your charges in a Word document so I can cut and paste. That’s more helpful than separate sheets of paper.)

Let’s pause and talk about why and how Tain and Wade use written charges that go out with jury

 **The why question:**

 1) I get fewer jury questions than many of my colleagues

 2) If I misstate something in my verbal reading of the document, I may well “save” the case on appeal if the correct statement (or the full statement) is contained within the charge that went out with the jury

Authority for written charges: *Anderson v. State*, 262 Ga. 26 (1992); *Fletcher v. State*, 277 Ga. 795 (2004). Remember, written charges are ***required*** in a death penalty case. O.C.G.A. § 17-10-30(c).

 **The how question:**

I spent the time to develop a core group of jury charges that are arguably relevant in most criminal cases. (Tough to do in civil – because the issues are all over the place). I made a set for a single male defender, single female defendant and multiple defendants. Lawyers know they do not have to request charges on issues such as burden of proof, right to remain silent, credibility of witnesses, circumstantial evidence, etc. because I am going to have all of those as part of my “core” charges.

Then I take all of the requested charges and my staff attorney plugs them in (with “Defendant’s Req. 3” or “State’s Req. 6” in the header of each charge). My staff attorney is going to do his/her best to place them where they make sense within my core charges. All of that becomes Court’s Exhibit 1 and we make copies for everyone (include the court reporter, btw). Then I can go page by page, instead of charge by charge, asking for objections, comments, etc.

I mark up that first exhibit with any corrections, etc. and then I strip away all of the information that suggests which party made the request. I leave the short title, such as “Credibility of Witnesses” or “Burden of Proof.” The corrected document is then reprinted, with copies for all. I read that final document to the jury and attach a sheet that says “The attached document is the charge actually read to the jury and sent out with them during their deliberations” This \_\_ day of \_\_, 2022. Signed by me. That way there is no confusion as to what actually went out with the jury.

BUT, word of warning (need sound effect for this phrase):

1) I once did this exact process that has worked flawlessly for many years – but in the editing process, my staff attorney accidently deleted “beyond a reasonable doubt” charge. I did not catch it – the lawyers did not catch it. So I ended up having to grant a new trial – there were other issues but that was the clincher. So be aware.

2) Make sure the folks helping with the editing understand that you cannot have any of the language in italics, bolded, larger font, etc. Just make sure that whomever is helping you with the charges is aware that we are not trying to stress or minimize anything within the charges.

Let’s get to the actual charge conference itself – happens after evidence is closed but before closing arguments.

You all know there are hundreds of different points we could discuss here – but let’s talk about some of the more common or misunderstood points that arise during a charge conference

We will revisit some of our old friends here – things like “plain error” and issues on appeal.

The reason we cannot go into depth about jury charge conferences in civil cases is because you might be trying a tort case, followed by a contract case, followed by a condemnation case. There are a few basic charges that I suppose you could included as part of core charges, but they would be the minority of potential charges – by a long shot. But the procedure is the same (pretrial requests, conduct charge conference after evidence is closed but before closing arguments).

**Lesser included offenses**:

BIG issue. Both the prosecution and defendant can request lesser included charges. Court can charge lesser included on its own motion if supported by evidence. *Gagnon v. State*, 240 Ga. App. 754 (1999).

We know you would love for us to provide you a hard and fast rule which makes these determinations easier. That law does not exist. It is usually a very fact-dependent analysis.

Now, if the charge being requested is not actually a lesser-included crime of the one charged in the indictment, that’s a whole other story. There is a great chart in one of the appendices to *Daniel’s Georgia Criminal Trial Practice*. I had the 2020-2021 edition near me as I wrote this outline and the chart I am referencing is Appendix A to that edition. The chart shows authority for certain crimes that have been held to be lesser included offenses of other crimes. Unfortunately, there is no chart for all of the other imaginative claims that a lawyer might make during a trial.

As a general rule, “a trial court is required to give a charge on a lesser included offense if requested and if there is any evidence, however slight, to support such a charge.” *Johnson v. State*, 297 Ga. 839, 842-843 (2015). (This is a good case to read dealing with murder vs. voluntary manslaughter). See also *Heyward v. State*, 308 Ga. 570 (2020). See also *Hamlette v. State*, 353 Ga. App. 640 (2020).

But where the evidence supports either the crime charged or no crime at all, the court is not required to charge on the lesser included offense.

“[W]ith regard to giving a defendant's requested charge on a **lesser** **included** offense[,]. ...where the state's evidence establishes all of the elements of an offense and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense. Where a case contains some evidence, no matter how slight, that shows that the defendant committed a lesser offense, then the court should charge the jury on that offense.” *Turner v.* State, 342 Ga. App. 882, 885 (2017).

“A trial judge never errs in failing to instruct the jury on a **lesser** **included** offense where there is no written request to so charge. [And,] [a]n oral request to charge does not alter this mandate.” *McMurtry v. State*, 338 Ga. App. 622, 625 (2016).

It is error for a trial court to refuse to give a requested charge on **accomplice corroboration** where evidence includes testimony from accomplice (and probably plain error if only evidence that connects defendant to crime is testimony of accomplice) *Ross v. State*, 343 Ga. App. 810 (2017).

***Edge v. State*** (sequential charge on manslaughter vs. murder)

We discussed this exhaustively in other episodes so we are not going to dig deep in this episode. But the issue is that if you tell the jury to first consider murder (felony or malice) and ***then*** consider manslaughter, the case is going to get reversed. If anything, do the opposite – instruct the jury to consider the “heat of passion” associated with manslaughter before considering murder. *Edge v. State*, 261 Ga. 865 (1992)

**Charge aggravated assault just as it is charged in indictment**

The crime of aggravated assault can be committed in many different ways. If I point a deadly weapon at you, I have probably committed the offense of aggravated assault. If I shoot you, I have committed aggravated assault. There are any number of objects, when used offensively against another, can be considered deadly weapons.

We love our pattern charge committee and they do an amazing job – but, the only charge you might find in the pattern includes that language “no injury need be shown.” But if the indictment charges the defendant with aggravated assault “by shooting [victim],” then the language from the pattern charge about “no injury need be shown” is actually an incorrect statement of law.

*Talton v. State*, 254 Ga. App. 111 (2002) but see *Flournoy v. State*, 294 Ga. 741, 743-745 (2014) which held that while the holding in *Talton* remains good law, any error was cured when the court sent the indictment out with the jury and instructed the jury that they must find defendant guilty beyond a reasonable doubt “as alleged in the indictment.”

**Multiple defendants**

Make sure you include a charge that directs the jury to consider each charge separately as to each defendant.

**Limiting instructions**

Repeat any **limiting instruction** in multiple defendant cases and in cases where a limiting instruction was given at the time the evidence was presented (i.e. 404(b) evidence). *Overstreet v. State*, 250 Ga. App. 336, 339 (2001); *Nicholson v. State*, 265 Ga. 711 (1995); *Nunez v. State*, 237 Ga. App. 808, 810 (1999); *Griffin v. State*, 292 Ga. 321, 326 (2013).

**What you do not have to charge**

This topic makes my heart happy. If you have ever attempted to assemble jury charges, you will know that the charge(s) dealing with the voluntariness of a custodial statement are numerous and long.

There is no legal necessity to give a jury charge on the **voluntariness of a confession** unless there is a specific request for one. *Meddings v. State*, 346 Ga. App. 294, 299 (2018) citing *Thorpe v. State*, 285 Ga. 604, 611 (2009).

Where possibility of misidentification of defendant is not raised by evidence, not error to refuse to charge on **identity.** *Brown v. State*, 268 Ga. App. 24, 27 (2004); *Jones v. State*, 188 Ga. App. 240 (1988); *Williams v. State*, 171 Ga. App. 34, 35 (1984). A defense of alibi does not raise the issue of reliability of identification. *Brown*, supra.

If evidence does not support **justification** charge, not required to give such a charge. *Rammage v. State*, 307 Ga. 763, 767-768 (2020)(“There must be at least slight evidence produced at trial to authorize a jury instruction, and whether the evidence presented is sufficient to authorize a charge is a question of law.” *Wilson v. State*, 279 Ga. 104, 105, 610 S.E.2d 66 (2005)).

**No requirement to admit facts – inconsistent defenses are allowed and should be charged**

There are cases out there that suggest that if the defendant testifies that he was not present that he cannot ask for a charge such as mere presence or self-defense. Or that if the defendant claims accident, he cannot simultaneously request a charge on self-defense. That is no longer the law and a criminal defendant can offer evidence and argument of inconsistent defenses - just as parties can in civil cases.

See *McClure v. State*, 306 Ga. 856 (2019) (“In summary, in order to raise an affirmative defense, a criminal defendant need not ‘admit’ anything, in the sense of acknowledging that any facts alleged in the indictment or accusation are true.”) See Nahmias’ concurring opinion in *McClure* which begins, “I concur fully in the Court's opinion, which clarifies when a defendant may obtain a jury instruction on an affirmative defense and reaffirms that the law allows a defendant to present **inconsistent** **defenses** so long as each defense is supported by at least slight evidence. It is important to recognize, however, that what the law *allows* may be bad *strategy* for a defendant. Presenting **inconsistent** **defenses** to the jury, particularly when the evidentiary support for one defense is considerably weaker than for others or where a defense is contradicted by the defendant's own account of events, risks losing credibility for *all* of the defenses.”

To receive a **justification** charge, the defendant IS NOT REQUIRED to admit all of the elements of the crime other than intent. *Henry v. State*, 307 Ga. 140, 144-145 (2019), citing *McClure v. State*, 306 Ga. 856, 857 (2019).

Charges on **self-defense and voluntary manslaughter** are **NOT** mutually exclusive. *Wright v. State*, 300 Ga. 185, 189 (2016); *Walker v. State*, 281 Ga. 521, 524 (2007).

**Sole Defense**

Generally, “[t]he trial court must charge the jury on the defendant's **sole defense**, even without a written request, if there is some evidence to support the charge.” But there must be some evidence to support that defense. *Escamilla v. State*, 344 Ga. App. 654, 656 (2018), citing *Tarvestad v. State*, 261 Ga. 605, 606 (1991).

**But - Good character is not a “defense;”** *Edwards v. State*, 255 Ga. 149, 150 (1985) (“While evidence of good character is a substantive fact, which should be considered by the jury along with other facts tending to bear on the question of guilt or innocence, evidence of good character is not a substantive defense.”); *Williams v. State*, 207 Ga. App. 418, 420 (1993); *Coop v. State*, 186 Ga. App. 578, 580 (1988).

**Objections to the charge (do it twice)**

This is not directly relevant to the charge conference but it is related and can easily be overlooked.

After we have gone through all of the proposed charges during the charge conference, I ask the lawyers if they have any objections to the charge I plan to give.

AFTER I read the charge to the jury, I again ask the lawyers if they have any objections. For those of you old heads whose child or grandchild taught you how to even listen to a podcast, you may recall that there was a time in our not-so-distant past when lawyers were allowed to “reserve objections” to the charge. That is no longer the law. (At some point, they have a duty to voice an objection to allow you to correct obvious errors or oversights)

But OCGA § 17-8-58 requires that “[a]ny party who objects to any portion of the charge to the jury or the failure to charge the jury shall inform the court of the specific objection and the grounds for such objection before the jury retires to deliberate.” *Hamlette v. State*, 353 Ga. App. 640, 642 (2020). (This case was a joint trial where the defendants were charged with felony murder. One defendant requested a charge on voluntary manslaughter and the other did not want it – but did not object. Both defendants convicted of voluntary manslaughter.)

Be aware that there remains the issue of “plain error” which does not necessitate a contemporaneous objection. But at least you can force the lawyers to tell you if they see a glaring error.

**Well let’s recap what we’ve learned today. Jury charge conferences are incredibly important but they are just as much fun for the judge as they are for the lawyers and parties.**

*This is one of times you should slow down and methodically go through what you plan to read to the jury (and write, if giving written charges). It allows you to read the charge freely during the actual charge itself without having to think too much.*

**I talked about my “core charges.” If anyone wants a copy for them to tinker with, please let me know by sending an e-mail to goodjudgepod@gmail.com. I am happy to save you a weekend or two – I already wasted it for you.**

*And if you forget that incredibly difficult e-mail address, you can find it on our website, goodjudgepod.com (But if you can remember that address, you can probably remember to add the word “gmail” and the @ symbol. Anyway, visit our website for this outline with a zillion case citations. The outline will be posted there.*

**Well, with all of those deep thoughts on jury charge conferences, that wraps up today’s episode. Thanks to everybody in Listener Land for bearing with our stupidity. I’m Wade Padgett**

*And I’m Tain Kell… [insert funny thing]*