**CRIMINAL TRIALS WITH MULTIPLE DEFENDANTS - EPISODE NOTES – PART 1**

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

*And I am Tain Kell.*

Tain, with all that’s going on in Georgia right now, one of our listeners suggested that we record an episode on criminal trials with multiple defendants

*Going on? Like is something going on in Georgia courts that has the world’s attention?*

Yeah, just a little trial…just a few defendants

*Anyway, our listener – likely motivated by considering all of the issues normally associated with a multi-defendant trial, asked if we could record an episode on the subject*

Here is our disclaimer – we are **NOT** directing any of our comments to anything we have heard about the “Trump Trial” or any of the issues that may arise in that case.

*While that trial may have been what motivated our loyal listener to request the topic, we are* ***NOT*** *addressing that trial.*

Instead, we are addressing any multi-defendant criminal trial and the unique issues posed in those types of trials. I have presided in cases involving 7 defendants and 6 defendants, respectively – multiple 2-3 defendant cases

*I have also presided over multiple defendant cases \_\_\_\_\_ (tell your records/average)*

You can find these episode notes on our webpage – goodjudgepod.com

*If you have podcast topic ideas, send them to us at* *goodjudgepod@gmail.com. With all of that being said, let’s talk multi-defendant criminal trials*

Criminal cases with multiple defendants have all of the typical issues that exist in a single defendant criminal trial

But there are some additional issues that do not apply in a single defendant trial that arise with some frequency in a multi-defendant criminal trial

There was a time in Georgia law when each defendant received a separate trial (can you imagine?)

That old practice ended in 1971-1972.[[1]](#endnote-1)

That is still the law in a death penalty case – each defendant has a separate trial

So, just a reminder that this episode has no bearing in a death penalty case

If facing a multiple-defendant criminal trial – the first place to look is O.C.G.A. § 17-8-4

Subsection (a) deals with severance/joint trials and subsection (b) deals with peremptory jury strikes in a multi-defendant trial

Given that the statute starts with a severance discussion, let’s start there also

Obviously, severance is not an issue in a single defendant case

First, it is in the discretion of the trial judge whether to sever the trial of one or more co-defendants from the trial of the other co-defendants (no obligation to do so – completely discretionary)[[2]](#endnote-2)

There are cases where the prosecutor has asked for severance – no error on appeal when granted at prosecutor’s request[[3]](#endnote-3)

The most common is a written motion filed by one or more defendant requesting to have his/her trial severed from the other co-defendants

Once a severance motion has been filed, it is the duty of the party requesting severance to establish that not granting severance will result in a denial of due process – a very high standard[[4]](#endnote-4)

If a defendant moves to sever his/her trial from that of his/her co-defendant, the trial court has been directed to hear argument on the motion with the following questions in mind:

1. Will the number of defendants create confusion of the evidence and law applicable to each individual defendant?
2. Is there a danger that evidence admissible against one defendant will be considered against another defendant despite the admonitory precautions of the court?
3. Are the defenses of the defendants antagonistic to each other or to each other’s rights?**[[5]](#endnote-5)**

The trial court’s decision on whether to grant or deny severance is discretionary.**[[6]](#endnote-6)**

These 3 questions: confusion, evidence admission and antagonism of defenses are the driving questions behind a trial judge’s decision whether to grant severance to any moving defendant

In order for a defendant to prevail on his/her motion,

“it is not enough for the defendant to show that he or she would have a better chance of acquittal at a separate trial or that the evidence against a co-defendant is stronger. Rather, the defendant must show clearly that a joint trial will prejudice his or her defense, ‘resulting in a denial of due process.’”**[[7]](#endnote-7)**

One of the Georgia cases which has been referenced involving RICO charges involved what became known as the school cheating case.

35 total defendants – I think 11 went to trial together (according to appellate records)

One of the defendants in that case appealed her conviction – including in the appeal alleged error in not granting severance[[8]](#endnote-8)

The appellate court began with noting that the defendant could not point to any evidence that was ultimately introduced, that would not have been admissible against her

Even the appellate court acknowledged that the trial was very long and involved multiple defendants – but that fact alone does not demand severance

In that case, there were also allegedly antagonistic defenses presented by different defendants

This "antagonistic defenses” argument is pretty common

The mere fact that there were antagonistic defenses presented is “not enough in itself to require severance[;] rather, [the defendant] must also demonstrate that he was harmed by the failure to sever.”**[[9]](#endnote-9)**

Consider a gang murder case – multiple defendants on trial – each of them are blaming the other for being the shooter –

One defendant requested severance which was denied. On appeal, he stressed the antagonistic defenses argument

In fact, he suggested that because the defenses of the different defendants each blamed one another – they were not only antagonistic – they were “mutually exclusive” from one another and should have demanded severance

The appellate courts said whether defenses are merely antagonistic or are “mutually exclusive” from one another, “that is a distinction without a difference” under our law – and severance was not required[[10]](#endnote-10)

We are going to discuss jury charges in a little while but the appellate courts noted that where the jury is instructed on concepts such as “mere presence,” “mere association” and “parties to a crime,” any antagonism between the defenses does not demand severance

I love how our appellate courts occasionally send out little hints that are somewhat tangential to the issue being discussed – but which give judges and lawyers insight into collateral things that should be done in the type of situation being discussed

Like, when discussing whether severance should have been granted, they list a few jury charges that were given in that case that helped support the decision made by the trial judge

Speaking on behalf of judges everywhere, we appreciate the “heads up”

There are times when a defendant seeking severance will argue that they cannot call the co-defendant as a witness

Let’s stop and analyze that statement for a minute – even if the defendant was granted a separate trial, he/she could not call the co-defendant because that co-defendant would STILL have 5th Amendment right to remain silent

a/k/a “non-starter” argument

So if we recap this issue of severance:

1. Discretionary with trial judge
2. Judge should answer the three questions (confusion of issues, evidence admissible against some but not all defendants, and whether there are antagonistic defenses) but even a “yes” answer to all three questions does not demand severance

***BRUTON***

Georgia law is replete with jargon, acronyms and shorthand references to landmark cases. Trials of co-defendants frequently involve one of those shorthand references, “a *Bruton* problem.”**[[11]](#endnote-11)** Before discussing the law in this area, it is better to understand exactly what the decision in *Bruton* addressed.

Where co-defendants are facing trial and one (or several) co-defendant made a custodial statement that implicated one or more of the co-defendants, a real legal conundrum of constitutional proportions arises.

All criminal defendants have a Sixth Amendment right to confront witnesses. Remember the *Crawford* rule we have discussed extensively in prior episodes? Is arises here also.[[12]](#endnote-12)

(It is really difficult when one shorthand reference to a case implicates another shorthand reference to a case)

If the co-defendant’s custodial statement is presented to the jury, the remaining co-defendants have no ability to force the co-defendant who made the statement to testify.

Therefore, under the decision in *Bruton*, the co-defendants who did not make the custodial statement will ask the trial court to exclude the statement as being violative of their Sixth Amendment confrontation rights.

The cases involving and interpreting *Bruton* seem inconsistent at times which makes identification of “black letter law” in this area difficult.

The Ga. Supreme Court has noted some of these inconsistent appellate decisions and recently noted that the historical solution to a *Bruton* problem was to use a limiting instruction – telling the jury that the statement is only admissible against the maker of the statement[[13]](#endnote-13)

I think we all – ummmm – “question” just how effective a limiting instruction is - here and at other times when we are asked to make limiting instructions

And the Ga. Supreme Court addressed this topic recently and said giving a limiting instruction as a “cure” to a *Bruton* problem is “not quite as easy” as suggested by the U.S. Supreme Court.[[14]](#endnote-14)

Georgia law has consistently held that *Bruton* “excludes only a statement of a non-testifying co-defendant that, standing alone, ‘directly inculpates’ the defendant, *Simpkins v. State*, 303 Ga. 752, 755 (2018) (quoting *Thomas v. State*, 300 Ga. 433, 439 (2017)), but not an out-of-court statement that does not incriminate the defendant unless ‘linked with other evidence at trial.’”**[[15]](#endnote-15)**

Stated another way, there are some basic requirements before a statement can potentially pose a Bruton problem.

The statement made by the co-defendant, standing alone, must clearly inculpate the defendant.**[[16]](#endnote-16)**

If a juror can eventually put together the evidence that the “other person” being referenced in the co-defendant’s statement is “Defendant #2,” that is NOT a *Bruton* problem.

It is a problem for Defendant #2, but not for admissibility of the statement

So redacting the statement of the co-defendant to remove any reference to another co-defendant by name, nickname, etc. “cures” a *Bruton* problem

But the redaction must remove any reference to another co-defendant by name, nickname, or in any manner other than “another individual” or a similar non-identifying pronoun, the statement can be admitted without violating Bruton.[[17]](#endnote-17)

It is blatantly insufficient for the redaction to replace the name of co-defendants with blank spaces**[[18]](#endnote-18)**

The U.S. Supreme Court found that replacing the name of the co-defendant with a blank space or the word “deleted” or similar attempts at redaction do not cure a *Bruton* violation.**[[19]](#endnote-19)**

If the statement cannot be redacted in a manner that removes any identifying references to a co-defendant, it cannot be admitted.

We all realize that an underlying premise of *Bruton* is that the defendant who made the statement does not testify – thereby creating the 6th Amendment problem

So at a pretrial hearing, the defendant who made the statement assures the court that he/she will be testifying at trial – no *Bruton* problem, right? **WRONG!**

That “promise” or “guarantee” that the maker will testify at trial CANNOT be relied upon here

The defendant can change his/her mind up until the time comes for him/her to testify

So in dealing with a *Bruton* issue, the trial judge MUST assume that the maker of the statement will ***not*** testify

If, at trial, the maker of the statement actually testifies, then most of the problems created by *Bruton* are cured – but the trial judge cannot operate under a presumption that the maker of the statement will testify

There are times that the redaction effort leaves the underlying statement non-sensical or worthless – under that scenario, the judge can exclude the resulting statement

Remember when we promised to revisit the issue of a limiting instruction? Well here we go…

It is of VITAL importance that the statement be redacted AND that the jury receive a limiting instruction when dealing with a *Bruton* problem

The limiting instruction must tell the jury that the pretrial custodial statement can be considered only against the maker of the statement

Failure to give a limiting instruction is likely reversible error[[20]](#endnote-20)

**Co-Conspirator Statement “exclusion” from definition of hearsay**

Loyal listeners will recall that we have talked about evidence a lot during prior episodes

One of the places we have spent a great deal of time – here on the Good Judge-Ment Podcast and when we teach in other scenarios – is hearsay

Tain’s quote – “If you learn the hearsay rule, you will be far ahead of most other lawyers and judges” is really very true

The hearsay rule defines hearsay, defines a few types of statements that would normally be hearsay but which are excluded from the definition (all Rule 801) and then provides for exceptions to the hearsay rule (Rules 803 and 804)

In this episode we are not going to delve too deeply into the nuts and bolts of hearsay but understand that there is one topic within the larger umbrella of hearsay that bears discussion – the co-conspirator statement

O.C.G.A. § 24-8-801(d)(2)(E) is the co-conspirator “exception” to the hearsay rule

In fact, it is not an exception – it is an exclusion from the definition of hearsay (but everyone else calls it an exception and we do not want anyone to be confused)

The biggest point you need to know about the co-conspirator exclusion/exception is that the statement of a co-conspirator must be made “in furtherance of the conspiracy”

While the rule specifically notes that such statements may be admissible even during the concealment phase of the conspiracy, the underlying premise is that each co-conspirator is liable for the statements of the other co-conspirators ***provided*** the speaking co-conspirator is making the statement in furtherance of their joint venture.

It is not of any importance whether the parties were charged with a conspiracy crime**[[21]](#endnote-21)** – only that the statement was made during the existence of the conspiracy and in furtherance of the conspiracy

In what must be considered one of the classic terms rooted in Georgia law, the appellate cases have held that to qualify as a co-conspirator statement, the statement must not merely be one where the speaker “spilled the beans” of their criminal activity[[22]](#endnote-22)

So how does this hearsay issue fit into *Bruton* and *Crawford*?

The only way to answer the question is “the long way” so bear with us

Let’s use two examples:

1. **Co-defendant makes statement to girlfriend that he and co-defendant “hit a lick” last night, robbing a man and when the man resisted, that co-defendant shot the man and they fled.**
2. **Co-defendant makes the exact same statement to a law enforcement officer during a custodial interrogation.**

Under the first example – the girlfriend scenario – except under strange facts, the statement is really a “spilling of the beans” and is not furthering the conspiracy.[[23]](#endnote-23) So it is hearsay and there is no exception that would allow it. It also poses a *Crawford* problem because the maker of the statement (co-defendant) cannot be compelled to testify.

Under the second example (statement to law enforcement), the statement “gets around” hearsay because it is a confession of the co-defendant – but his “confession” also implicates the other co-defendant. While you do not have a hearsay problem, you do have a *Bruton* and *Crawford* problem

The second statement could be admitted in the joint trial of the two if 1) the statement is redacted to remove any reference to the co-defendant other than “another individual” and 2) a limiting instruction is given to ensure the jury understands that the statement shall only be considered against the maker of the statement and not against any other co-defendant

So let’s stop here for the first part of this episode and we will discuss other issues dealing with multi-defendant cases in the companion episode – specifically including logistics relating to a multi-defendant trial and issues with jury selection, closing argument and jury charges

*We know that, with a teaser like that, you will not be able to avoid the companion episode*

Remember, nothing we have said today is designed to address any particular pending case anywhere on the planet

Send us your thoughts and ideas at [goodjudgepod@gmail.com](mailto:goodjudgepod@gmail.com)

*This episode outline is available on goodjudgepod.com*

*Music trivia for today – let’s step back in time to the man, the myth, the legend, Elvis Presley. Elvis Aaron Presley was born in 1935 in Tupelo, Mississippi. His first single released was a song called “That’s All Right.” Do you know which of his monster hits was his first #1 on the Billboard Charts? Give up? “Heartbreak Hotel.” Now, Elvis made is film debut in 1956. Do you know the name of the film? (Hint, it was NOT the same name as his first #1 – but it is the same name as one of his famous songs) Give up? “Love me Tender” But Elvis’ highest grossing film was Viva Las Vegas. Maybe that is because of who his co-star was in that film. Do you recall who co-starred with Elvis in Viva Las Vegas? Ann Margaret. We are just full of useless information here at the Good Judge-Ment Podcast.*

1. According to Judge Goger, the law changed in 1971 and 1972 to promote judicial economy. Jack Goger, *Daniel’s Georgia Criminal Trial Practice*, §14:72, (West Pub. 2016-2017 Ed.). [↑](#endnote-ref-1)
2. O.C.G.A. § 17-8-4(a). [↑](#endnote-ref-2)
3. *Adams v. State*, 231 Ga.App. 279 (1998). [↑](#endnote-ref-3)
4. *Brinson v. State*, 288 Ga. 435, 435-436 (2011), citing *Krause v. State*, 286 Ga. 745, 749 (2010); *Morris v. State*, 204 Ga. App. 437 (1992); *Colbert v. State*, 345 Ga. App. 554, 557 (2018). See also *Evans v. State*, 360 Ga.App. 596, 601-602 (2021). [↑](#endnote-ref-4)
5. *Brinson v. State*, 288 Ga. 435, 435-436 (2011); *Smith v. State*, 308 Ga. 81, 85 (2020). [↑](#endnote-ref-5)
6. O.C.G.A. § 17-8-4(a); *Smith v. State*, 308 Ga. 81, 85 (2020). [↑](#endnote-ref-6)
7. *Brinson v. State*, 288 Ga. 435, 435-436 (2011), citing *Krause v. State*, 286 Ga. 745, 749 (2010); *Morris v. State*, 204 Ga. App. 437 (1992); *Colbert v. State*, 345 Ga. App. 554, 557 (2018). See also *Evans v. State*, 360 Ga.App. 596, 601-602 (2021). [↑](#endnote-ref-7)
8. *Evans v. State*, 360 Ga.App. 596, 602-603 (2021), citing another RICO case, *Martin v. State*, 189 Ga.App. 483, 488 (1988). [↑](#endnote-ref-8)
9. *Evans v. State*, 360 Ga.App. 596, 603 (2021); *Smith v. State*, 308 Ga. 81, 85 (2020), citing *Palmer v. State*, 303 Ga. 810, 814-815 (2018). [↑](#endnote-ref-9)
10. *Smith v. State*, 308 Ga. 81, 85-86 (2020). [↑](#endnote-ref-10)
11. *Bruton v. U.S.*, 391 U.S. 123 (1968). [↑](#endnote-ref-11)
12. *Crawford v. Washington*, 541 U.S. 36 (2004). Just as a reminder, *Crawford* stands for the proposition that, under the 6th Amendment, a defendant is entitled to confront his/her accusers and any ***testimonial*** evidence requires a “live” witness unless the defendant had a previous opportunity to cross-examine the maker of the statement. See *Colton v. State*, 292 Ga. 509, 512 (2013); *Williams v. Illinois*, 567 U.S. 50, 64-65 (2012). [↑](#endnote-ref-12)
13. *Henderson v. State*, 2023 WL 5338772, S23A0559, S23A0720 (Ga. 8/21/2023). [↑](#endnote-ref-13)
14. *Henderson*, at page 7 of slip opinion. [↑](#endnote-ref-14)
15. *Henderson*, at page 8 of slip opinion. [↑](#endnote-ref-15)
16. *State v. Smith*, 302 Ga. 837, 838-839 (2018); *Sutton v. State*, 295 Ga. 350, 353 (2014). [↑](#endnote-ref-16)
17. *Henderson*, at page 8 of slip opinion, citing *Hanifa v. State*, 269 Ga. 797, 804 (1988), disapproved on other grounds by *Clark v. State*, 315 Ga. 423 (2023). Honestly, there are a variety of ways to have the statement redacted to remove references to any particular defendant by name or nickname but the trial court must be careful to ensure that the manner in which the statement is redacted does not inevitably point to any co-defendant (i.e. removing all name references except the defendant’s). See the example of a permissible redaction in *Henderson*, supra. [↑](#endnote-ref-17)
18. *Bennett v. State*, 266 Ga. App. 502, 505 (2004). [↑](#endnote-ref-18)
19. *Gray v. Maryland*, 523 U.S. 185 (1988); See *McDonald v. State*, 210 Ga. App. 689, 690 (1993). [↑](#endnote-ref-19)
20. *Smith v. State*, 302 Ga. 837, 840 (2018). [↑](#endnote-ref-20)
21. O.C.G.A. § 24-8-801(d)(2)(E). The court determines if the preliminary foundation has been proven, not the jury. §24-1-104(a). [↑](#endnote-ref-21)
22. See *Stafford v. State*, 312 Ga. 811, 823 (2021), citing *Allen v. State*, 310 Ga. 411, 413 (2020). See also *Mosley v. State*, 307 Ga. 711, 716-717 (2020) for an interesting “twist” on a statement that seemingly was merely a “spilling the beans” statement made during an ongoing crime spree. [↑](#endnote-ref-22)
23. *Mosley v. State*, 307 Ga. 711, 716-717 (2020) for an interesting “twist” on a statement that seemingly was merely a “spilling the beans” statement made during an ongoing crime spree. – this case in highly unique on the facts and I think it would be rarely repeated – but you need to know about it. [↑](#endnote-ref-23)