**THE CONTINUING WITNESS RULE - EPISODE NOTES**

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

*And I am still Tain Kell.*

Tain, sometimes we record episodes based upon a statute or a case

*Ok. I agree. Are we doing that today?*

Nope. Today, we are discussing a topic that judges and lawyers who try cases before a jury struggle with from time to time

*But this topic will not be found in any statute – that’s for sure*

That’s right. Today we are going to discuss the “Continuing Witness Rule” which is a Rule that was formed from case law over many years

*I am excited to report that the Continuing Witness rule applies to both criminal and civil cases. Man, I miss trying civil cases…*

We have developed a chart that we have incorporated into the trial outlines that we provide to judges and that we will append to our episode notes. 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 about the Continuing Witness Rule*

Before we get into the weeds of what the Continuing Witness Rule allows to go out with the jury, we need to spend a moment discussing exactly what the rule is and what evil it was designed to protect against

Jurors are told that they are to consider all of the evidence presented during the trial when making their verdict

The witness testimony, any exhibits, and any other “evidence” that might be admitted

We specifically instruct the jury to consider all of the evidence and not to jump to conclusions until they have heard all of the evidence

That means they should consider not only the surveillance video from the convenience store, they should consider the witness testimony and everything else that was presented

Back in the jury room, the jurors are not going to be able to replay the testimony of a witness – they may have notes about what a witness said that they took during the testimony – but they do not get to replay the testimony again and again

We do not want the jurors doing that because they must consider non-verbal things like demeanor and other factors that determine credibility of the witness’ testimony

That includes cross-examination and what the witness said during cross-examination

Then we turn to the exhibits that were admitted. The photographs, documents, the ax handle or the firearm

As a general rule, the exhibits admitted during the trial go out with the jurors into the jury room during their deliberations

Jurors can do anything they want with the evidence that goes out into the jury room – whether they place undue importance on one piece of evidence or one witness’ testimony is within their purview.

We tell them not do place undue emphasis on any single piece of evidence but we allow them to reach their verdict in whatever manner they choose

As an aside – to our judge listeners – if you have a firearm and you also have ammo – let’s not send out live ammo that fits that weapon with the jury please – have you seen *12 Angry Men*?

Back to the Continuing Witness Rule

We said that *most* of the exhibits go out with the jury. There is an important exception that we call the Continuing Witness Rule

If an exhibit is admitted that will “continue to testify” in the jury room, that exhibit does not go out with the jury

The idea is that all evidence should be considered and no single piece of evidence should predominate the deliberations

If the exhibit can “continue to testify” in the jury room, it over-emphasizes that exhibit over all of the other testimony, etc. that was heard only once

Understand that we are not discussing an evidence rule and the Continuing Witness Rule has absolutely no impact on whether any exhibit will be admitted during the trial

That may seem to be an obvious point but there are appellate cases in Georgia where a party argued that evidence should not have been ***admitted*** because of the Continuing Witness Rule – that is not a thing and do not argue that – ever

The Continuing Witness Rule applies to exhibits that were admitted during the trial

It only comes into play when the court is considering which of the exhibits go out with the jury

As we mentioned at the beginning of this episode, the Continuing Witness Rule applies to both criminal and civil cases

The oldest reference I can find to the Continuing Witness Rule dates back to 1905.[[1]](#endnote-1)

I cannot find any statute which lays out the parameters of the Continuing Witness Rule – there are plenty of cases which attempt to define the Rule but there is no statutory authority for this Rule

The case law defines the Continuing Witness Rule as:

“the continuing witness objection is based on the notion that written testimony is heard by the jury when read from the witness stand just as oral testimony is heard when given from the witness stand. But, it is unfair and places undue emphasis on written testimony for the writing to go out with the jury to be read again during deliberations, while oral testimony is received but once.”[[2]](#endnote-2)

So we understand that the goal of the Rule is to prevent any exhibit from continuing to testify in the jury room

Now, we know that exhibits are generally inanimate objects and they do not literally “testify”

The thing we are tying to prevent is the ability of an exhibit to provide what amounts to testimony – a description of what happened or a recitation of a witness’ live testimony – those are the types of exhibits that do not go out with the jury under the Continuing Witness Rule

As we go through some examples of evidence that does and does not go out with the jury, we recognize that some of these will seem to be “close calls” as to whether those types of exhibits have a testimonial quality

And that is why we decided to record this episode – we want judges and lawyers who try jury trials to consider the Continuing Witness Rule ***before*** trial and not during the hustle and bustle of submitting the case to the jury

As we mentioned at the beginning of the episode, we have charts that are embedded in the trial outlines that we provide to new Superior Court judges. Those charts contain examples (with case citations) of exhibits that do and do not go out with the jury under the Rule

Because we love our listeners, we have copied those charts and you can find them in the episode notes for this episode – you find that on our website, goodjudgepod.com.

Shout out to my staff attorney, John “JB” Bryant for keeping the site updated. We do our best to provide the episode notes to him for uploading but we are occasionally a little late getting them to JB. That’s our fault and not his.

Ok let’s get to some examples which we hope will make the Rule a little easier to understand and apply

But in all candor, some of the things that are allowed and those that are not allowed to go out can, occasionally, be a little hard to distinguish

In both criminal and civil cases, any exhibit that is “recorded testimony” of a person does not go out with the jury.

That would include any affidavit, deposition, answers to interrogatories, written or recorded confessions or statements

We hope those types of statements that have been recorded – whether merely written or via audio or video recording – which do not go out with the jury under the Continuing Witness Rule is pretty obvious

You can easily see how those “recorded statements” continue to “testify” in the jury room

Once again, that does ***not*** mean that such exhibits cannot be admitted in the trial and even read to the jury – they clearly can be admitted and read – it is just that they do not go out with the jury during deliberations

Let’s keep going with the types of things that ***do not*** go out with the jury

Narrative portions of a police report and any search warrants or search warrant affidavits do not go out with the jury

You can see how those sorts of documents “testify” in the jury room

Reports of experts do not go out with the jury

Again, it is pretty clear how that would be a “testimonial” exhibit

Now, for our evidence nerds (“our people”)

Let’s assume you used a document to refresh the witness’ recollection under § 24-8-803(5) or § 24-6-612. The witness claimed a lack of memory and you showed them something to refresh his/her recollection. Under 803(5), that document can be admitted – under 612, it can be admitted by the opposing party

But under the Continuing Witness Rule, none of those documents go out with the jury – regardless of whether it was a prior consistent statement, a prior inconsistent statement or was merely past recollection recorded

They may be able to be ***admitted*** but they do not go out with the jury

Those documents can be discussed during the trial, under some circumstances can be admitted, but they do not go out with the jury.

We have discussed the things that do not go out with the jury and we have reiterated that it is pretty clear why they would not go out – they “continue to testify” in the jury room

We told you earlier that there are some head scratchers or close calls and we have not given you any thus far – they have all been pretty obvious.

As we pivot now to the types of documents that ***are allowed*** to go out with the jury under the Rule, I think you may see some that seem to be a close call

A death certificate which is redacted to exclude the manner of death can go out with the jury

A photo lineup can go out with the jury but the degree of certainty of the person who viewed the lineup must be redacted

As you can see, the redactions that are required are eliminating the “testimonial” part of the exhibits

Photographs can go out with the jury

The jury can receive a copy of the implied consent card that the officer used to inform the defendant of his/her rights in a DUI case

The print out of the Intoxilyzer can go out with the jury

Remember that machines cannot “testify”

An officer’s certifications to conduct field sobriety testing can go out with the jury

A police artist’s sketch of the alleged offender as described by the victim can go out with the jury

I can see how it could be argued that is a “recording” of the “testimony” of the victim – but the cases say that sketches do not offend the Continuing Witness Rule

You know, as an aside, what happened to the sketch artist? I always thought that those were cool. Especially on TV cop shows – they drew a portrait of the defendant with a stocking hat on or with sunglasses – anyway, just another skilled artisan out of work

Did you ever see the artist’s sketch of the Unabomber?



I wouldn’t call it a *portrait* when compared with his booking photo but I can see the resemblance – I guess

Medical records go out with the jury under the Continuing Witness Rule

I have looked over hundreds of medical records in my career and those records are ***filled*** with testimony of nurses, doctors, reports of the patient, etc. But they go out with the jury under the Continuing Witness Rule

A Crime Lab Report can go out with the jury unless the report is “merely conclusions”

Note – this is one of the tougher exhibits to reconcile with the Rule – the conclusions of the scientist do not have to be redacted but if the report is ***only conclusions***, it does not go out with the jury

Certified copies of prior convictions of the defendant introduced for impeachment can go out with the jury but they must be redacted to exclude the sentence imposed

Where a letter ***is the crime***, it is not error for the letter to be allowed to go out with the jury

In the case I am specifically referencing, the defendant was charged with intimidating witnesses. The defendant wrote a letter to the witness that threatened the witness with physical harm if he testified at the upcoming trial[[3]](#endnote-3)

Where the exhibit ***is the crime***, the letter can go out with the jury. However, in other situations where the parties wrote one another – letters, e-mails, text messages, etc. – the communications can be admitted if they are relevant to something in the trial but they cannot go out with the jury

The next example of an exhibit that can go out with the jury may need some explanation.

A surveillance video, without narration, can go out with the jury.[[4]](#endnote-4) There, we said it. And we know it seems to contradict all that we have said about undue emphasis on one piece of evidence over all others.

Well, there is another aspect of the Continuing Witness Rule that we have been saving until now for the big reveal

In a recent decision, the Ga. Supreme Court held that a surveillance tape of the “crime” can go out with the jury to be reviewed in the jury room because the video recordings:

“were not the reduction to writing of an oral statement, nor a written statement provided in lieu of testimony”

And

The surveillance videos were “original documentary evidence” that “did not derive their evidentiary value solely from the credibility of their makers”[[5]](#endnote-5)

So, as you can see, there is another factor that courts must consider when deciding whether a particular exhibit is to go out with the jury during deliberations

Whether the exhibit has evidentiary value (or not) based upon the credibility of the maker of the exhibit. If no, it can go out. If yes, it cannot.

Having discussed the law and the rationale behind the continuing witness rule, I think it is appropriate to discuss some practical considerations – and to make a bit of a confession

I do not allow surveillance videos to go out with the jury.

I do think it places undue influence on that piece of evidence to the exclusion of all other evidence

We have all heard about sensational things that were caught on video – do you listen for what the witnesses said or do you watch the video like a football official trying to decide if the receiver made the catch or had two feet inbounds? You back that thing up and go frame by frame, don’t you? I do and I freely admit it.

Second – and more importantly – I do not know how you send a surveillance video out with the jury without also sending a computer or some other device that allows them to play the video

You may recall from prior episodes that I do not allow the jurors to keep their own cell phones during their jury service – it seems preposterous to me that I would allow a laptop computer to go out with them!

Now, there is another reality that we need to share with you. If the jurors asked to view the video after they retired to deliberate, I would ***absolutely*** allow them to return to the courtroom – in the presence of the parties – and view the video as often as they would like.

I have even allowed the jurors to leave the jury box and gather around the monitors when they asked to do so

So I do not believe that it is the viewing of the exhibit that is prohibited – it is facilitating that viewing that I have a problem with.

One more practice point on the topic of the Continuing Witness Rule.

At the trial, I charge the jury and allow them to return to the jury room. Then, outside of the presence of the jury, I ask the lawyers whether they have any objection to the jury charge as given. Once I complete that task, I then address the Continuing Witness Rule

Again, the jury is out but all parties are present. This procedure it applicable in both criminal and civil trials.

I ask the parties on the record whether there are any exhibits that should not go out with the jury under the Continuing Witness Rule. I have them identify by exhibit number which exhibits are going out with the jury and hear any arguments on that point. Then, after ruling, I put on the record that I am sending out the indictment (criminal case), written jury charges, a verdict form and then I list the exhibits that are being delivered to the jury.

Occasionally, I just list the exhibits that are ***not*** going to be delivered to the jury if that list is shorter – I am not trying to list dozens of exhibits that are going out to the jury

There is one additional positive byproduct of this procedure – I make sure that my court reporter has possession of all of the exhibits that were introduced.

You know how lawyers are – sometimes they use the exhibits in closing argument and forget to return them to the court reporter

So that’s all for today’s discussion of the Continuing Witness Rule

*Remember, this Rule has* ***no bearing*** *on the admissibility of any exhibit – it only is a rule that dictates which of the admitted exhibits are delivered to the jury for their use in the jury room*

The episode notes include the charts of exhibits that can and cannot go out with the jury and they can be found at goodjudgepod.com

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

The time has come for music trivia and I have a quick story to tell before Tain launches into what has become a wildly popular portion of our episodes. I received a text message from the man who we have always recognized as our primary listener, a man who is an FOP and who has made a guest appearance on the podcast. He knows who he is and we know who he is. I need to read the text message I received from him verbatim. “When are we going to get some Taylor Swift music trivia? I’m sick of 70’s rock stuff.”

Two responses – You could have knocked me over with a feather when I learned that this particular man was a Swiftie. (He told me he has attended her last 3 concerts in Atlanta and, to prove it, he sent me photos of Taylor from the concert). Second, we are nothing if not devoted to our listeners here on the Good Judge-ment Podcast. With that preamble, here’s Tain with today’s Taylor Swift music trivia.

*Wow – I am truly astonished that he is a Swiftie. Anyway, we have done a small dose of Taylor Swift trivia a few episodes ago but we will try to find some trivia that does not involve Taylor’s current love life. Shout out Travis Kelce.*

*You probably know that Taylor Swift began her career as a country music star. And we have covered the fact that her first name, Taylor, was an homage to the great James Tayor. Do you know her middle name? It is Alison, named for her aunt. Taylor is legendary for writing songs about boyfriends or former boyfriends. In her incredibly popular song “We are Never Ever Getting Back Together,” who was the man she was referencing in that song? Give up? Jake Gyllenhaal. I told you that the song was incredibly popular. Did you know that it earned her a Guinness World Record? That song reached #1 on the iTunes singles chart just 50 minutes after it was released. 50 minutes! Wow.*

*In what became a rather famous, or infamous, moment of live television, Taylor was receiving an award at the Video Music Awards when she was interrupted by a famous rapper. This incident spawned meme’s all over the internet. The rapper who interrupted her was Kanye West who was offended that his wife, Beyonce, did not receive the award. Here’s the question – what year did that even occur? If you are like me, time flies and while is seems recent, it really was not all that recent. Give up? 2009.*

*In October 2006, Taylor made her first broadcast performance of a song on network television. 2 questions – 1) what TV show did she perform on and 2) what song did she perform? Remember, it was 2006. Here’s a hint: it was the lead single off of her debut album. Give up? The TV show was Good Morning America and the song was “Tim McGraw.” She wrote that song as a freshman in high school and even that song was about a boyfriend – her high school boyfriend. Final Taylor Swift trivia question for today. Taylor moved to Nashville, TN when she was 14 years old to facilitate her career. Where was she born and raised prior to age 14? I would not have guessed it but she was born and raised in Reading, Pennsylvania. On a Christmas Tree farm no less. Who knew? I bet our primary listener knew all of those answers – still cannot believe he is a Swiftie. Remember, haters gonna’ hate – have a great day!*

CRIMINAL CHARTS

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| **EVIDENCE WHICH IS ALLOWED UNDER CONTINUING WITNESS RULE** | |
| Death certificate (redacted to exclude manner of death) | *Bryant v. State*, 270 Ga. 266 (1998) |
| Letters (where the letter *IS* the crime) (i.e. intimidating witnesses via letter) | *Bollinger v. State*, 272 Ga. App. 688, 692 (2005); *Vinyard v. State*, 177 Ga. App. 188, 190 (1985); *Johnson v. State*, 234 Ga. App. 58, 60 (1998) |
| Photo lineup (even where the witness initialed selection) However, degree of certainty information should be redacted | *Kenney v. State*, 196 Ga. App. 776, 777 (1990); *Dockery v. State*, 287 Ga. 275, 276-277 (2010) (addresses required redactions) |
| Photographs | *Davis v. State*, 285 Ga. 343, 348 (2009) |
| Drawings on anatomically correct diagram | *Banks v. State*, 279 Ga. App. 57, 58-59 (2006), disapproved on other grounds *Patel v. State*, 282 Ga. 412 (2007) (child drawings); *Ruffin v. State*, 333 Ga. App. 793, 794-795 (2015) (nurse drawings); *James v. State*, 270 Ga. 675, 678 (1999) (medical examiner drawings); *Abernathy v. State*, 278 Ga. App. 574, 586-587 (2006) (child drawings); *Griffin v. State*, 243 Ga. App. 282, 286 (2000) (nurse drawings) |
| Surveillance tape (w/o audio) | *Matthews v. State*, 258 Ga. App. 29 (2002); *Muse v. State*, 316 Ga. 639, 659-660 (2023) |
| Copy of implied consent card | *Sagenich v. State*, 255 Ga. App. 663, 664 (2002) |
| Print out of Intoxilyzer test result | *Whiteley v. State*, 188 Ga. App. 129, 132 (1988) |
| Officer’s Certifications for DUI training | *Rijal v. State*, 367 Ga.App. 703, 714 (2023). |
| Police artist sketch | *Sims v. State*, 275 Ga. App. 836, 840 (2005) |
| GBI crime lab report (but not if merely conclusions) | *Ogburn v. State*, 196 Ga. App. 254, 257 (2009); *Tanner v. State*, 259 Ga. App. 94, 97-98 (2003); *Starks v. State*, 240 Ga. App. 346 (1999) |
| Medical records | *Hodson v. Mawson*, 227 Ga. App. 490 (1997) |
| Copy of municipal ordinance | *Davis v. State*, 172 Ga. App. 193, 194 (1984) |
| Certified copies of prior convictions introduced for impeachment (REDACTED)**[[6]](#endnote-6)** | *Relaford v. State*, 306 Ga. App. 549, 557 (2010) |
| PowerPoint presentation prepared by officer to show defendant’s cell data | *Moore v. State*, 311 Ga. 506, 511-512 (2021). |

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| **EVIDENCE WHICH IS NOT ALLOWED UNDER CONTINUING WITNESS RULE** | |
| Affidavits and depositions | *Tibbs v. Tibbs*, 257 Ga. 370, 371 (1987) |
| Answers to written interrogatories | *Shedden v. Stiles*, 121 Ga. 637 (1905) |
| Written confessions | *Davis v. State*, 285 Ga. 343, 348 (2009) |
| Dying declarations | *Davis v. State*, 285 Ga. 343, 348 (2009); *Strickland v. State*, 167 Ga. 452, 460 (1928) |
| Videotaped recording of interview or transcript of testimony | *Summage v. State*, 248 Ga. App. 559, 561 (2001); *Hinton v. State*, 233 Ga. App. 213 (1998) |
| Video or audio recording of statement of defendant | *Fields v. State*, 266 Ga. 241, 243 (1996); *Ross v. State*, 344 Ga. App. 477, 479-480 (2018) |
| Narrative portions of police report | *Hopkins v. State*, 283 Ga. App. 654, 659 (2007) |
| Search warrants or arrest warrants | *Nelson v. State*, 197 Ga. App. 898, 899-900 (1990); *Cain v. State*, 113 Ga. App. 477, 481 (1996) |
| Report of document examiner that included only conclusions (no evidence of type of testing, how testing conducted) | *Roberts v. State*, 282 Ga. 548, 552-553 (2007) |
| Written or recorded statement of victim | *Kent v. State*, 245 Ga. App. 531 (2000); *Clark v. State*, 284 Ga. 354, 353-355 (2008) |
| Report of polygraph examiner that simply reiterates his sworn testimony | *Harris v. State*, 168 Ga. App. 458, 460-461 (1983) |
| Written prior consistent or inconsistent statements | *Buchanan v. State*, 282 Ga. App. 298, 300-301 (2006); *Broadnax-Woodland v. State*, 265 Ga. App. 669, 670 (2004); *Gough v. State*, 236 Ga. App. 669 (2004) |
| Past recollection recorded | *Platt v. National General Ins. Co.*, 205 Ga. App. 705 (1992) |

CIVIL CHARTS

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| Death certificate (redacted to exclude manner of death) | *Bryant v. State*, 270 Ga. 266 (1998) |
| Letters (where the letter *IS* the crime) (i.e. intimidating witnesses via letter) | *Bollinger v. State*, 272 Ga. App. 688, 692 (2005); *Vinyard v. State*, 177 Ga. App. 188, 190 (1985); *Johnson v. State*, 234 Ga. App. 58, 60 (1998) |
| Photo lineup (even where the witness initialed selection) However, degree of certainty information should be redacted | *Kenney v. State*, 196 Ga. App. 776, 777 (1990); *Dockery v. State*, 287 Ga. 275, 276-277 (2010) (addresses required redactions) |
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| Copy of municipal ordinance | *Davis v. State*, 172 Ga. App. 193, 194 (1984) |
| Certified copies of prior convictions introduced for impeachment (REDACTED)**[[7]](#endnote-7)** | *Relaford v. State*, 306 Ga. App. 549, 557 (2010) |
| Rule 24.2 affidavits in domestic relations cases | *McAlpine v. Leveille*, 258 Ga. 422, 423 (1988) |

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| Past recollection recorded | *Platt v. National General Ins. Co.*, 205 Ga. App. 705 (1992) |

1. *Shedden v. Stiles*, 121 Ga. 637 (1905). [↑](#endnote-ref-1)
2. *Rijal v. State*, 367 Ga.App. 703, 714 (2023). [↑](#endnote-ref-2)
3. *Bollinger v. State*, 272 Ga. App. 688, 692 (2005); *Vinyard v. State*, 177 Ga. App. 188, 190 (1985); *Johnson v. State*, 234 Ga. App. 58, 60 (1998). But see recent case of *Hong v. State*, 366 Ga.App. 476, 482-483 (2023) where a photo of the TPO application filed by the victim was allowed to go out with the jury – held to be error that was not reversible error. [↑](#endnote-ref-3)
4. *Muse v. State*, 316 Ga. 639, 659-660 (2023); *Matthews v. State*, 258 Ga.App. 29 (2002); *Windhom v. State*, 326 Ga.App. 212, 214-215 (2014). [↑](#endnote-ref-4)
5. *Muse*, at 659-660. [↑](#endnote-ref-5)
6. Prior convictions (particularly any convictions of the defendant) should be redacted to remove sentencing information relating to the length of the sentence or other matters that go beyond the fact that the crime was a felony and the witness/defendant was convicted of that offense. [↑](#endnote-ref-6)
7. Prior convictions (particularly any convictions of the defendant) should be redacted to remove sentencing information relating to the length of the sentence or other matters that go beyond the fact that the crime was a felony and the witness/defendant was convicted of that offense. [↑](#endnote-ref-7)