**VERDICT FORMS 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. Every once is a great while, Wade and I actually call each other for advice during a jury trial. This episode is a product of one of those calls. Today’s episode also has a couple of other distinct features that make it unique.*

**Wade: First, it is going to be far shorter than some of our recent episodes.**

*Tain: The other unique thing about this episode is that it is the product of several different “911” calls we made to each other during trials to ensure we had not caused a larger problem when attempting to address a relatively simple concept.*

**Wade: That’s right. Tain. Today we are going to discuss how you can avoid making a big boo-boo during a trial by ensuring you create or approve an appropriate verdict form.**

*Tain: Once again, your word choices occasionally blows my mind. What he meant to say was that today, we are going to discuss verdict forms and just how important they can be to a successful jury trial. Never mind, let’s just get to it.*

Verdict forms – the document that the jury will use to render their judgment in the case.

Some judges leave this whole task to the lawyers and only get involved if there is a disagreement. We are of the opinion that while that approach is absolutely allowed, there are times when the judge should take this bull by the horns and create the verdict form himself/herself.

There are times when a verdict form can be very complicated – for example, in civil cases, it is not uncommon for verdict forms to contain special interrogatories or questions for the jury to answer. Their answers to those questions can then lead to additional deliberations or even additional evidence presentation.

By comparison, some verdict forms can be incredibly simple. “We, the jury, find the defendant: \_\_\_\_ Guilty or \_\_\_ Not Guilty.” Date, signature line for foreman, Done.

Today we want to provide you a couple of examples of occasions when the judge may want to consider creating the verdict form for the lawyers to consider before allowing the back and forth arguments between counsel to flame out of control and create a mess.

Civil cases where lawyers argue about whether the first party the jury can find for on the verdict form is the Plaintiff or the Defendant.

We have all had cases when a jury is expected to choose between two possible alternatives and the lawyers want to argue about which option should be listed first on the verdict form.

Normally, the law simply requires that the two options be made equally available on the form – in other words, provided the verdict form does not suggest a “correct” answer or somehow favor one party over the other, when there are two choices, one of them necessarily has to be listed first and the other option has to be listed second.

See *Van v. State*, 294 Ga. 464, 467 (2014) (“We conclude that the use of a jury verdict form preprinted with the words “Guilty” and “Not Guilty” does not constitute error unless the form would mislead jurors of reasonable understanding, or the trial court erroneously instructed the jury on the presumption of innocence, the State's burden of proof, the possible verdicts that could be returned, or how the verdict should be entered on the printed form. In and of itself, merely listing the possible guilty verdict option(s) before the “Not Guilty” option does not render the verdict form misleading so as to constitute reversible error.”); *Rowland v. State*, 306 Ga. 59 (2019).

But there are situations where the order in which things are considered by the jury are ***vitally*** important

Verdict forms are considered to be a part of the jury charge. *Cheddersingh v. State*, 290 Ga. 680 (2012), citing *Brown v. State*, 283 Ga. 327, 330 (2008). Therefore, errors on the verdict form can render an otherwise valid jury charge improper.

Some judges pay little attention to verdict forms and, as you will see in this episode, failing to pay attention to the phrasing of the verdict form can be a big problem for the trial judge.

***Edge* Problem**

We have discussed this 1992 case ad nauseum on this podcast and you may be tired of hearing about it. But it is important and it does happen with some frequency. *Edge v. State*, 261 Ga. 865 (1992). The issue in *Edge* arises when a defendant is charged with murder and there is a request for a lesser included charge of voluntary manslaughter. That happens quite often!

*Edge* noted that it is error for the jury to be told that they should consider the charge of murder (felony. malice, or both) and ***then*** consider the lesser included offense of voluntary manslaughter. To paraphrase the holding in that case, if a jury is not “allowed” to consider whether there was sufficient provocation to justify a finding of voluntary manslaughter until after they have determined whether the defendant is guilty of murder, such a rule would essentially eliminate voluntary manslaughter as a lesser included of murder. This reality is particularly true when the charged homicide is a count of felony murder. (felony murder is relatively easy to prove – felony? CHECK. Death? CHECK. Sort of done).

Now, you may be asking yourself how does a verdict form somehow become involved with an *Edge* problem? You not only have the two options (guilty or not guilty of murder), you have a third choice to make – voluntary manslaughter. If you do not phrase your verdict form correctly, despite your best efforts in your jury charge, you may create the sequential charge problem via the verdict form. And that is what *Edge* forbids – the sequential jury charge. Think of it this way – if you find yourself suggesting that the word “then” should be involved in any way as you explain how the jury should address the charged homicide offense and the lesser included, you probably have an *Edge* problem.

We have attached a verdict form for just such a case within the episode notes but we will do our best to verbally describe it to you.

Underneath the style of the case, the words “Count One” appear as a subtitle. Then, down the left side, there are three blanks. The top blank is for the phrase, “We, the Jury, find the Defendant GUILTY of MALICE MURDER.” But then you come to the most important word on the form.

Centered on the page is the word “**OR**”

 It’s a short word but it is vitally important

The next blank (remember, we are still under the heading “Count One”) is for the phrase, “We, the Jury, find the Defendant GUILTY of VOLUNTARY MANSLAUGHTER.”

After that, there is a second “OR” in the middle of the page.

The last blank is for the phrase “We, the Jury, find the Defendant NOT GUILTY.”

Then, there is another section header for “Count Two”

The form goes on from there and is attached to the end of the episode notes for this episode that you can find on goodjudgepod.com.

Couple of points – to make this form work, you must tell the jury during the charge conference that there should only be one box checked for each count of the indictment

Therefore, the jury finds the defendant guilty of murder OR guilty of voluntary manslaughter OR not guilty as to each applicable count. (BTW, on the counts that do not involve a lesser included offense, the same premise is true – there is only one box checked between the options “guilty of possession of a firearm during commission of a felony" OR not guilty of that offense.

Second, this may initially sound a little silly but it does happen sometimes - do not forget to give the jury the option to find the defendant not guilty. (That’s easy to overlook when you are spending so much time dealing with the murder vs. voluntary manslaughter issue).

**Avoid restating anything unnecessary in the verdict form**

Moving away from *Edge* for a moment, there are a couple of other words of advice concerning verdict forms.

The first is to avoid putting unnecessary words in your verdict form.

For example, you have extensively charged the jury on a whole host of topics to include the relevant burden of proof. Avoid the temptation to phrase the choice on the verdict form, “We, the jury, find, beyond a reasonable doubt, the defendant guilty of X crime.” If you want to see a case which was reversed because, during the cut and paste process of creating the form, the verdict form suggested the jury had to find the defendant ***not guilty*** beyond a reasonable doubt, see *Cheddersingh v. State*, 290 Ga. 680 (2012).

I am sure it was a typo but when the verdict form suggested the defendant could only be found not guilty if it was proven not guilty beyond a reasonable doubt, that’s the case. (And this was a plain error case – which means nobody caught it at trial and no objection was raised – but it was so egregious that it was overturned on appeal even without an objection being made at trial).

There is no judge, lawyer or 5th grade student in America who believes that the law requires the defendant to prove he/she was not guilty. Much less by a beyond a reasonable doubt standard. But that pesky cut and paste feature available in most word processing programs has another victim.

Discuss whether the use blanks:

\_\_\_\_\_ Guilty

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

vs.

We find the jury \_\_\_\_ guilty of the charge.

Alternatively. discuss having the jurors “write in” information and why checkboxes, blanks, etc. might be a better choice.

**Pre-publishing conference**

We discussed this topic in a previous episode but it bears repeating here.

The judge has crafted the best jury charge possible and the same with the verdict form itself. The jury retires and then announces that a verdict has been reached. Everyone is seated in the courtroom.

The judge should ask the foreperson a couple of questions just to make sure everyone is on the same page.

(I usually start by telling the foreperson that I need to ask some questions of him/her but to not worry, I am not going to ask you to read the verdict aloud)

1) Have you reached a verdict?

2) Was it unanimous?

3) Has the verdict form been completely filled in, signed and dated by you?

4) Please hand the verdict form to the bailiff and you can be seated. Thank you.

Now, I am not 100% certain you will find those questions in Georgia’s statutes or rules. However, it ensures that the foreperson (and not merely the bailiff) is telling you that a verdict has been reached.

You are confirming that the verdict was unanimous and that the verdict form has been completed, signed and dated.

**BUT – AND THIS IS VERY IMPORTANT**

There is another vital step in this process of receiving the verdict that must be handled before the verdict is published.

As early as 1994, the Georgia Supreme Court has held that before the verdict is published, the trial court and counsel should review the verdict form, in open court, prior to it being published. *State v. Freeman*, 264 Ga. 276, 278 (1994).

From *Freeman*:

We hold, therefore, that the proper procedure henceforth is for the trial court and counsel to review the verdict prior to its publication in open court, and if the verdict is not proper in that it finds the defendant guilty of an offense with regard to which the trial court did not instruct the jury, the trial court should return the jury for further deliberation with direction to return a verdict within the range of the instructions originally given to it.

The point is that despite your best efforts as the judge to explain the law and how the verdict form works, there are times when what is written on the form creates a legal issue that must be resolved – and it must be resolved before the verdict is published.

*Washington v. State*, 333 Ga. App. 236, 247-249 (2015) – we will not completely address the facts of *Washington* again in this podcast. We talked about this case at some length in a prior episode (the how to try a criminal case series).

[*I really do not want to embarrass anyone by going through this case* *again*]

The *Washington* case is one you may want to read up on to see just how important it is to have a pre-publishing conference before the verdict is published in open court. At the very least, ensure that the judge looks over the form before having it published (that’s not sufficient under *Freeman* but it is a far cry better than not having anyone look over the form)

I literally call the lawyers to the bench and allow them to see the verdict form as it was handed to me. As they return to their seats, I ask (on the record) if there are any objections to the form of the verdict by either lawyer. (Yes, this is kind of a bench conference but I ensure that no words are exchanged – only reading occurs at the bench)

If none, I allow the Clerk to publish the verdict. (everyone publishes verdicts differently)

If there are issues, we excuse the jury and take them up on the record.

This procedure is required and has been since at least 1994. If we took a poll of sitting judges, I would bet less than 10% of judges conduct the pre-publication conference. But, it saves a great deal of headache and heartache if the judge looks over what has been written on the form and allows the lawyers to do the same.

Admittedly, it messes up the drama associated with the act of publishing the verdict – like they do on TV. But that is not really the point of a jury trial, is it?

**We promised this episode was a little shorter than some of our prior episodes but this topic was requested by a listener. And Tain and I had discussed this exact issue in one of our infamous “SOS” calls during a jury trial. If you ask for an episode, we try our best to find a way to address that topic. We cannot do it instantaneously, but we do try.**

*That is why we ask you to do a couple of things for us. First, if your podcast platform allows you to rate and review the podcast, please do that for us. We have no idea whether you like what we are doing, whether you think we are nuts, or anything in between.*

**I am confident they think we are nuts. Do you remember the Elmo episode?**

*Some of my best work. Anyway – and more seriously – please give us some feedback. Send us an e-mail with suggested topics. Rate and review the podcast. You can e-mail us at goodjudgepod@gmail.com and you can find all of our outlines (and a list of prior episodes) at goodjudgepod.com* .

**Well let’s recap what we’ve learned today. Verdict forms can be your friend but they can also be a real problem if poorly drafted and not reviewed before they are published.**

*We mentioned in a prior episode that there are times when the judge needs to slow down and mechanically or methodically go through certain steps. Preparation of the verdict form and receiving the verdict form are two of those places.*

**Tain and I frequently will draft a verdict form and you can see an example of just such a form in the episode notes from this episode. You can find those notes at goodjudgepod.com. That wraps up today’s episode. Thanks to every single listener – whether you are a long time listener or this is your first episode, thank you for listening. I’m Wade Padgett**

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

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| **IN THE SUPERIOR COURT OF RICHMOND COUNTY** |
| **STATE OF GEORGIA** |
| **STATE OF GEORGIA,** | **\*** |  |
| **\*** | **INDICTMENT NUMBER:** |
| **v.** | **\*** | **2018-RCCR-XXXXX** |
| **NIGEL CORDARIOUS XXXXXXX,** | **\*** |  |
| **\*** |  |
| **\*** |  |
| **DEFENDANT.**  | **\*** |  |

**VERDICT FORM**

**COUNT ONE**

\_\_\_\_\_\_\_\_ We, the Jury, find the Defendant GUILTY of MALICE MURDER.

**OR**

\_\_\_\_\_\_\_\_ We, the Jury, find the Defendant GUILTY of VOLUNTARY MANSLAUGHTER.

**OR**

\_\_\_\_\_\_\_\_ We, the Jury, find the Defendant NOT GUILTY.

**COUNT TWO**

\_\_\_\_\_\_\_\_ We, the Jury, find the Defendant GUILTY of FELONY MURDER.

**OR**

\_\_\_\_\_\_\_\_ We, the Jury, find the Defendant GUILTY of VOLUNTARY MANSLAUGHTER.

**OR**

\_\_\_\_\_\_\_\_ We, the Jury, find the Defendant NOT GUILTY.

**COUNT THREE**

\_\_\_\_\_\_\_\_ We, the Jury, find the Defendant GUILTY of POSSESSION OF FIREARM DURING COMMISSION OF A FELONY.

**OR**

\_\_\_\_\_\_\_\_ We, the Jury, find the Defendant NOT GUILTY.

**This \_\_\_\_\_\_\_ day of May, 20XXX.**

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 Foreperson (Print Name)

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 Foreperson Signature