**FIRST OFFENDER AND CONDITIONAL DISCHARGE - EPISODE NOTES**

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

*And I am still Tain Kell.*

Tain, it is great to be back in the Classic City, recording in the awesome podcast studio located within the University of Georgia College of Law.

*We have really been blessed with the cooperation and assistance of lots of people but we honestly could not have even gotten this podcast off the ground without the assistance of the UGA College of Law. Thanks again to the wonderful staff and leadership of the Law School for helping us launch and continue this podcast. Specifically, shout out to Jim Henneberger and the folks that work with him at the law school for their unwavering help and support.*

This is a great podcast studio and huge shout out to the UGA Law School. Tain, I was looking through our old e-mails and came across a great podcast topic idea from FOP Judge Warren Davis

*Our friend from Gwinnett County? He must have sent an e-mail to goodjudgepod@gmail.com*

He did! And it was a while ago so I apologize for not teeing this topic up sooner.

*So, Judge Davis suggested that we might want to discuss the First Offender Act and the Conditional Discharge statute. We really appreciate him looking out for us and giving us this idea (psst, Wade – Did he send an outline and do the research also? That would have been awesome!)*

No – but he did send us some cases! He planted the seed and it is our job to water it and make it grow.

*Wow, a gardening metaphor. That may be a first on the podcast.*

Yeah, probably is. Anyhoo, if you have an idea for an episode topic, send it to us at goodjudgepod@gmail.com

*This episode will be full of statutory and case law citations and you can find the outline at goodjudgepod.com. So let’s start watering and pruning First Offender and Conditional Discharge. I am really not sure this gardening metaphor works…*

I guess we need to start our conversation today by letting some angels get their wings – for folks new to the podcast, whenever we cite a statute, an angel gets his/her wings [SOUND DROP – ANGEL WINGS]

Our regular listeners know just how often these episodes contain citations to statutes – and how many angels get their wings – we will try to cut that down a bit today – just know that wings are being distributed when we cite statutes, even if we don’t play the sound

Because First Offender and Conditional Discharge are both purely statutory creations, there will be a bunch of statutory citations during today’s episode. We will leave it to the magic of Stephen Turner at Turner Up Media to decide where to strategically place the sound effects

We do not want to make our listeners crazy by overdoing the sound effects

 Us, overdo something? No….

Anyway, First Offender and Conditional Discharge are very similar and, at the same time, very different “things” under Georgia law

Although many of our listeners probably have some familiarity with FO in general, we are going to adhere to our usual plan of discussing legal topics in a way that Wade’s mom – who is not a lawyer – can understand

**WHAT IS FIRST OFFENDER?**

As a general rule, when a judge imposes a criminal sentence, either as a result of a guilty plea or a jury’s verdict, that defendant is “convicted” of the crime involved

There is an exception to that rule for defendants who have not previously been convicted of a felony – giving the defendant a second chance to avoid having the conviction on his/her record – assuming they meet the qualifications of one of the “second chance” statutes

To be clear, a defendant only has one opportunity to request a FO sentence – and he/she can use it on a misdemeanor – usually a bad idea but it happens far more than you might imagine

You cannot have a “second chance” a third time – that would be a “third chance”

There are a couple of different “second chance” statutes and today we are going to focus on First Offender and Conditional Discharge

Let’s start with First Offender. O.C.G.A. § 42-8-60 [SOUND DROP-ANGEL GETS WINGS]

First Offender (“FO”) creates a situation where the court is not adjudicating the defendant as being guilty – instead the judge is “withholding adjudication” pending the defendant’s successful/unsuccessful completion of the sentence imposed

As we will discuss in a moment in the section of this episode dealing with practice points, phrasing by the judge during the sentencing hearing may prove vitally important as to whether the defendant initially received a FO sentence or was simply “sentenced” for the offenses – stay tuned for that and why it matters

As judges are prone to tell defendants, FO has an “up side” and a “down side.” If the defendant completes the sentence, he/she can honestly say that they have not been convicted of a crime. That is the “up side” – the defendant gets a second chance to avoid becoming a convicted person

And the “down side” is that if the defendant does not successfully complete the terms of the sentence, the judge can choose to revoke the FO status, adjudicate the defendant guilty and impose sentence – usually in connection with a revocation hearing

While judges typically have the ability to conduct a revocation hearing on any criminal sentence – whether it involves FO or not, a FO sentence is a little different and has potentially significant consequences for the defendant.

First Offender has a special provision that allows the court, upon a revocation, to revoke First Offender status and impose up to the maximum sentence that could have been imposed, minus any credit the defendant has earned prior to the revocation

This allows the judge to have greater “leverage” over the defendant than the court would have under a “typical” criminal sentence

As we will discuss in a moment, Cond. Discharge is a little different in terms of “credit for time” but we will get there

It might be easier to give an example to appreciate how the potential revocation of a First Offender sentence is different than a potential revocation of a normal criminal sentence

**EXAMPLE**

Defendant is charged with burglary in the 1st degree – sentence range 1-20 years

In an non-FO sentence, assume the judge sentenced the defendant to 10 years on probation

Further assume that, in year 3, the defendant committed another burglary in the 1st degree which triggered a revocation hearing on the initial case. After the hearing, the defendant was revoked. The maximum amount of time that could be revoked is 7 years - the balance of the sentence that was initially imposed.

Assume now that the same 10 year probated sentence was initially imposed under the First Offender Act.

Again, in year 3, the defendant commits another burglary in the 1st degree. Because that sentence was imposed under the FO Act, the judge could revoke the FO sentence, adjudicate him/her guilty on the initial offense and potentially impose a sentence of 17 years (20y – 3y “credit”)

Under both scenarios, the defendant would still face whatever potential punishment for the “new” offense

That is the “down side” of FO. The Court retains the ability to resentence for the maximum sentence that could have initially been imposed – minus credit that the defendant was under supervision without incident

So what are the qualifications to receive a FO sentence?

**NO PRIOR FELONY CONVICTIONS - ANYWHERE**

The statute begins by defining which defendants are eligible to receive a First Offender sentence

“When a defendant has not been previously convicted of a felony, the court may, upon a guilty verdict or plea of guilty or nolo contendere and before an adjudication of guilt, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and:

(1) Place the defendant on probation; or

(2) Sentence the defendant to a term of confinement.”

[SOUND DROP-READING LAW NOT AWESOME]

So to break this down a bit, it is confusing when lawyers and judges refer to First Offender as “First Offender *Probation*”

As the statute points out, under FO, a defendant can be sentenced to straight probation, time in confinement or a split sentence that includes both probation and confinement[[1]](#endnote-1)

The first “qualification” is that the defendant has never previously been convicted of a felony – anywhere on the planet

Yes, a prior conviction for a felony in another state does ***disqualify*** a defendant from receiving a First Offender sentence in Georgia

 Or a prior federal felony – or a felony in another country

And The Court may not “suspend” a sentence under the First Offender Act.**[[2]](#endnote-2)**

**NEVER USED FIRST OFFENDER BEFORE**

The second qualification is that the Defendant cannot have previously been sentenced under the First Offender Act – even for a misdemeanor[[3]](#endnote-3)

It is becoming more and more common for lawyers to request a first offender sentence for a defendant being sentenced for a misdemeanor

[Discuss]

So the 2nd qualification is that the defendant has never previously used FO for any type of case.

**DISQUALIFYING OFFENSES**

This is a part of the First Offender “puzzle” that I find myself having to review from time to time – the third qualification piece

 The sentence being imposed cannot be for certain offenses

The disqualifying offenses can be found un subsection (j) of the statute[[4]](#endnote-4)

The statute provides that no defendant who is charged with certain crimes may be sentenced under the First Offender Act.

Then the statute references a dozen other statutes which is not awesome for podcasting

We will not detail all of the “disqualifying offenses” here, but will refer to them generally and point out a few notable points

You cannot receive a First Offender sentence for: (READ **BOLD only**)

1. **A serious violent felony** as such term is defined in Code Section 17-10-6.1;
2. **A sexual offense** as such term is defined in Code Section 17-10-6.2;
3. **Trafficking of persons for labor or sexual servitude** as prohibited by Code Section 16-5-46;
4. **Neglecting disabled adults, elder persons, or residents** as prohibited by Code Section 16-5-101;
5. **Exploitation and intimidation of disabled adults, elder persons, and residents** as prohibited by Code Section 16-5-102;
6. **Sexual exploitation of a minor** as prohibited by Code Section 16-12-100;
7. **Electronically furnishing obscene material to a minor** as prohibited by Code Section 16-12-100.1;
8. **Computer pornography and child exploitation** as prohibited by Code Section 16-12-100.2;
9. (A) Any of the following offenses when such offense is committed **against a law enforcement officer while such officer is engaged in the performance of his or her official duties**:
	1. **Aggravated assault** in violation of Code Section 16-5-21;
	2. **Aggravated battery** in violation of Code Section 16-5-24; or
	3. **Obstruction of a law enforcement** officer in violation of subsection (b) of Code Section 16-10-24, if such violation results in **serious physical harm or injury to such officer** (the statute defines who is a law enforcement officer under this scenario)
10. **DUI**[[5]](#endnote-5)

**DISCUSSION OF DISQUALIFYING OFFENSES**

It would be mind-numbing for us to reference all the statutes that define the terms “serious violent felony”[[6]](#endnote-6) or “sexual offense”[[7]](#endnote-7) so we will not subject you to that torture

If you think of the disqualifying statutes as being “serious felonies,” “sex offenses,” “human trafficking,” “exploitation of elderly or children,” “child porn” and “serious obstruction of officer” cases, you are on the right track

But we promised to hit the highlights – maybe some “unexpected” types of cases where First Offender can and cannot be used

No FO for DUI – I have had sentences where the defendant was charged with multiple offenses and received a FO sentence on all of them EXCEPT DUI. The clerk who helps write the sentences shows that FO was applied on Count 1, 2 and 4 but not on Count 3 where Count 3 was a DUI.

Be aware that some of the sexual offenses you might imagine would be included in the “sexual offenses” statute are actually listed under the statute dealing with serious violent felonies (i.e. Rape, Agg. Child Molestation, etc.)

A person being sentenced for Arson or Aggravated Assault is eligible for FO – unless the Agg Assault is charged with an attempt to rape or against a law enforcement officer

**CONDITIONAL DISCHARGE**

Earlier, we discussed the fact that there is another “second chance” statute that is utilized with some frequency – that is the Conditional Discharge statute

 O.C.G.A. § 16-13-2 [SOUND DROP – ANGEL WINGS] is addressed primarily to drug offenses or non-violent drug-related offenses

Without reading the statute to you in its entirety, understand that the statute only applies to ***possession*** of illegal drugs or marijuana. It ***does not*** apply to possession with intent to distribute, sale, manufacture or any other drug crime beyond ***possession***.[[8]](#endnote-8)

Cond. Discharge also is available to defendants “charged for the first time with nonviolent property crimes which, in the judgment of the court exercising jurisdiction over such offenses, were related to the accused's addiction to a controlled substance or alcohol”[[9]](#endnote-9)

The maximum time a defendant can be sentenced under §16-13-2 for a drug offense is 3 years and for a property crime related to a drug offense is 5 years

Any restitution must be paid as a condition of receiving a discharge under the statute – usually only related to the “non-violent property crime” aspect of the statute

**SIMILARITIES/DIFFERENCES WITH FIRST OFFENDER**

Just like with a First Offender sentence, the court is withholding adjudication and placing conditions on the defendant that should include court approved drug treatment (could be drug court or even a private treatment program)

Also like a FO sentence, the defendant must consent and cannot have previously been convicted of “an offense under Article 2 or Article 3 of this Chapter” (essentially, no prior “drug offenses”)

However, there is an important difference between FO and Cond Discharge that may spark some raised eyebrows among our listeners

The defendant ***does not*** get credit for time under sentence if a revocation occurs[[10]](#endnote-10)

If there is a revocation of a Cond Discharge sentence, the Court essentially goes back to the date of sentencing and can impose any sentence allowed for the initial offense(s)

The Cond Discharge statute does not anticipate any incarceration period as being a part of such a sentence – different than with FO

**ISSUES RELATING TO REVOCATION OF FO OR COND. DISCHARGE SENTENCES**

A revocation hearing is simply a probation revocation hearing where the sentence initially imposed was under the FO Act or Cond Discharge statute

We recently recorded a whole episode dealing with probation revocation hearings so we will not completely rehash that process here

Judge is not required to revoke FO status if it is determined that the defendant has violated the terms of probation – but the judge clearly is authorized to revoke the FO status

Upon proof that the defendant has violated the conditions of the sentence, the judge may elect to 1) return the defendant to probation, leaving FO or Cond Discharge in place; 2) revoke some portion of the existing sentence and leave FO in place; or 3) revoke FO status and sentence the defendant with the maximum sentence being what could have been initially imposed at the time of the original sentencing

The caveat is that under FO, the defendant must be credited with any time he/she was under the sentence “without issue”

Not so with Cond Discharge – no credit given – the Court can simply sentence up to the maximum that could have been initially imposed

We gave the example earlier concerning how to “give credit” for the time the FO defendant has been under sentence

One of the key phrases that judges need to include in their sentence is “above and beyond.”

Let’s discuss a specific example.

At the initial sentencing under FO, the defendant was sentenced to 5 years on probation. He/she messes up in year two – resulting in a revocation.

If the maximum sentence that could have been imposed was 10 years and it is the judge’s goal to have the defendant serve time in confinement for 2 years and then have an additional 5 years on probation (assuming the judge also intends to revoke FO), the judge would impose the sentence of 2 years in confinement followed by 5 years on probation “above and beyond” any time the defendant had previously served under FO.
 That sentence would give the defendant credit for time served as required under the FO statute and would still be less than the maximum sentence that could have initially been imposed.

 10 max –

2 years “credit” + 2 years conf. + 5 years probation=9 years – less than max

It is important to remember that while the judge has the authority to revoke – that authority ends when the term of the sentence initially imposed ends. That may seem obvious but there are cases out there where it became confused

**BID**

These FO and Cond Discharge cases frequently involve a relatively new feature that we have discussed in prior episodes, the BID[[11]](#endnote-11)

We have discussed the BID often on the podcast – and will do it again here - because we are not confident that judges and lawyers really understand it well

If imposing sentence for a FO or Cond Discharge and the sentence is either straight probation or a split sentence with no more than 1 year in confinement and the defendant has no prior felony conviction, the Court is ***required*** to set a BID of not more than 3 years

Have I set a 3 year BID when the max sentence is 3 years? Yes, I have - I confess

Within 60 days of the BID expiring (assuming no recent revocation, no restitution owed and no subsequent convictions for anything more than nonserious traffic offense), Community Supervision must notify Court and prosecutor.

Community Supervision then provides judge an order to terminate probation unless there is an objection by prosecutor, the judge SHALL execute the order terminating probation

This is NOT discretionary – neither the inclusion of the BID in the sentence nor the signing of the termination order (unless there is an objection by the prosecutor)

As judges, we do not have the authority to pick and choose which laws we follow – and I think that some judges do not impose a BID because they do not like that statute

 Not our option as judges. Please impose the BID when required.

**PRACTICE POINTS FOR JUDGES**

It is of ***vital importance*** for the judge, in imposing the sentence, not make a finding of guilt – as judges who have our sentencing outline already know, there is specific language that the judge should use when imposing a FO sentence that avoids the judge verbally stating that he/she is adjudicating the defendant “guilty”

Consider any “voluntariness order” form that you enter which includes findings that the defendant is making a knowing and intelligent waiver of rights.

If that form includes a finding of guilt or some similar language, it may be time to either 1) update the form; or 2) have a separate form for FO cases

There is case law which held that where the judge verbally pronounced a defendant guilty (and maybe included the same in his/her written documents associated with a plea) that the judge did not place the defendant on a FO sentence – even if that is what the judge intended and all the parties thought was happening[[12]](#endnote-12)

O.C.G.A. § 42-8-61 ***requires*** the judge to inquire whether the defendant is requesting a First Offender sentence when the judge is imposing sentence

No similar requirement for Cond. Discharge – no requirement that the judge ask if the defendant is requesting such a sentence during sentencing colloquy

To be clear, there is no requirement for the judge to impose a FO sentence, even where it is requested[[13]](#endnote-13) just a requirement to ask if it is being requested (and if the defendant qualifies)

Also, a defendant must consent to a FO sentence – the judge cannot impose a FO sentence against the will of the defendant[[14]](#endnote-14) Same with Cond Discharge[[15]](#endnote-15)

We mentioned that whether to impose a FO sentence is discretionary with the trial judge – and as we have discussed in prior episodes, the refusal to exercise discretion is an abuse of discretion

There are several cases in the FO arena where a judge has indicated on the record that he/she would not impose a FO sentence for the type of crime being sentenced – the cases say that is an abuse of discretion[[16]](#endnote-16)

 And, more importantly, it is reversible error

Just because a statute allows for the judge to depart from mandatory minimums with the consent of the parties, that does NOT mean that the judge can choose to impose a FO sentence as part of that deviation if FO is not allowed for that type of offense[[17]](#endnote-17)

Judge Davis, when he sent in the topic idea, asked a question that he thought it might be good for us to answer here – if you imposed conditions as part of the initial sentence and end up revoking FO, which of the conditions “survive” to the new sentence imposed

As he suggested, it is the better practice for judges who are revoking a FO sentence and imposing a sentence that involves some probation to restate the conditions as part of the new sentence – even if the judge announces (and signs the sentencing order) that the previous conditions shall remain in full force and effect

One last practice point – the defendant is required to be informed in a FO case that he is entitled to credit if he ultimately is revoked and adjudicated guilty.

I am aware that many courts have a form that is made a part of the sentencing “packet” where the defendant acknowledges all of the “down side” issues associated with FO, to include the credit for time issue

Probably a very good idea – saves time during sentencing colloquy and ensures judge does not accidently forget to mention it

So that’s all for today’s discussion of the First Offender Act and Conditional Discharge Statute. There is a ton of law on these topics and I hope we addressed the highlights.

*Shout out to Judge Warren Davis for the idea and the case citations.*

While FO and Cond Discharge are similar – they are also very different. And the differences are important to understand

*Don’t announce that you will not ever, under any circumstances, impose a FO sentence on a particular type of case. That will get reversed on appeal.*

Also, take a minute and look over your forms. Make sure you are not regularly making findings that contradict what you and everyone else in the courtroom think you were trying to accomplish.

*Look for the episode outline on goodjudgepod.com and send us your thoughts and ideas at* *goodjudgepod@gmail.com*

The time has come for the hotly anticipated music trivia section of the podcast. Tain, take it away.

*I think it is interesting that we are getting as many music trivia requests as we are episode topic requests. Anyway, we have not spent much time in the area of country music so today, let’s talk about 90’s – 20’s country music. More specifically, let’s talk about Mr. Toby Keith. Toby is struggling with some health problems currently as he fights stomach cancer (prayers up), but in the 1990’s and 2000’s, he was a hit making machine in the world of country music. He holds the distinction of having put out the song that has been referred to as the most played country song in the 1990’s. It was Toby’s first single. Any idea which song that was? I am going to be honest, I would have missed this one. “I Should Have Been a Cowboy” was the song. Toby had 20 #1 country songs and another 22 reached the top 10 on the country charts. He had 2 different songs that each spent 6 weeks as the number one single on the country charts. One was “Beer for my Horses.” Can you name the other? This song was #1 in 2006. Give up? “As Good As I Once Was.” Kind of an anthem for us older guys.*

*Toby’s real name is Toby Keith Covel. He was born and raised in Oklahoma and he has always been known for his patriotism. Following 9/11, he released the song “Courtesy of the Red, White and Blue.” In that song, someone is shaking a fist. Who was it? Sing along in your head – this one is easier. Give up? The Statute of Liberty. Toby had another popular patriotic song that followed “Courtesy of the Red, White and Blue.” It was released as part of his “Shock’n Y’all” album in 2003. Remember the name of that song? “American Soldier” – also a #1 hit for Toby. One final Toby question – in “As Good As I Once Was,” complete these lyrics. “I used to be hell on wheels, Back when I was a younger man, Now my body says ‘You can’t do this boy,’ But my pride says, \_\_\_\_\_\_\_” This one is easy – it just makes me smile a little. Give up? “Oh, yes you can!” is the line.*

*He accepted a county music icon award in September 2023 and after the roaring applause died down, his first line was classic Toby Keith. He stood at the microphone, towering over in with his 6’3” frame but a little more lean because of the cancer. He grinned at the crowd and said, “I bet you never thought you’d see me in skinny jeans.” What a guy! Have a great day everyone and thanks for listening.*

1. *Hendrix v. State*, 351 Ga.App. 584, 587 (2019). [↑](#endnote-ref-1)
2. *Hendrix v. State*, 351 Ga.App. 584, 588 (2019). [↑](#endnote-ref-2)
3. O.C.G.A. § 42-8-60(l); *Stafford v. State*, 251 Ga.App. 203 (2001). [↑](#endnote-ref-3)
4. O.C.G.A. § 42-8-60(j). [↑](#endnote-ref-4)
5. O.C.G.A. § 42-8-60(j). [↑](#endnote-ref-5)
6. O.C.G.A. § 17-10-6.1. [↑](#endnote-ref-6)
7. O.C.G.A. § 17-10-6.2. [↑](#endnote-ref-7)
8. *State v. Barrow*, 332 Ga.App. 353 (2015). [↑](#endnote-ref-8)
9. O.C.G.A. § 16-13-2(c). [↑](#endnote-ref-9)
10. *Stinson v. State*, 279 Ga.App. 107 (2006). [↑](#endnote-ref-10)
11. O.C.G.A. § 17-10-1(a)(1)(B). [↑](#endnote-ref-11)
12. *Hoosline v. State*, 328 Ga.App. 175 (2014). [↑](#endnote-ref-12)
13. Granting **first offender status** is **discretionary** and is **not required** just because it was **requested** – even if no previous offense is shown. *Welborn v. State*, 166 Ga. App. 214 (303 S.E.2d 755) (1983); *Collins v. State*, 281 Ga. App. 240 (2) (636 S.E.2d 32) (2006). [↑](#endnote-ref-13)
14. O.C.G.A. § 42-8-60(a). [↑](#endnote-ref-14)
15. O.C.G.A. § 16-12-2(a). Consent is in the language of the statute. [↑](#endnote-ref-15)
16. *Threlkeld v. State*, 250 Ga.App. 44 (2001); *McCullough v. State*, 317 Ga.App. 853 (2012). [↑](#endnote-ref-16)
17. Where statute dealing with particular sexual offenses or serious violent felonies (O.C.G.A. § 17-10-6.1 and 17-10-6.2) allows the trial court to deviate from mandatory minimum sentence under certain circumstances, that authority does not give the trial court the authority to sentence under the First Offender Act if the plain terms of the act prevent imposition of a first offender sentence for that offense. *Tew v. State*, 320 Ga. App. 127 (2013). [↑](#endnote-ref-17)