**THOUGHTS ON CRIMINAL SENTENCING - EPISODE NOTES**

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

*And I am Tain Kell.*

We are just coming off another NJO (New Judge Orientation) session with 9 new Superior Court Judges.

*It was a great time had by all. Shout out to our new judges!*

As part of the NJO process, we provide new judges with trial outlines, sentencing outlines, probation revocation outlines, etc.

*That’s right. Some of those are essentially “scripts” which contain the actual words a judge should say during certain portions of those proceedings and some are more like outlines or bullet points for the judge to consider.*

We realized that we have not discussed sentencing in a while on the podcast and it may be a good time to have just a general discussion about sentencing – separate and apart from other types of hearings in criminal cases.

*Just a reminder – we did publish an entire series on how to try a criminal case back in the early days of the podcast – I think they published back in 2019 – hard to believe it has been that long*

That’s true – we have been blessed to continue this podcast for a very long time. Tain, tell the folks where they can find the episode outlines from those older episodes.

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And if you have topic ideas, share those with us via e-mail at goodjudgepod@gmail.com

*With all of that being said, let’s talk sentencing*

Sentencing might occur as a result of a guilty verdict or as a result of a guilty plea being entered

Could be in connection with a *nolo contendere* plea or an *Alford* plea

We are hoping everyone knows what a *nolo contendere* plea involves**[[1]](#endnote-1)** but let’s quickly touch on a plea under *North Carolina v. Alford****[[2]](#endnote-2)***

an *Alford* plea allows the defendant to remove the risk of a trial without actually admitting guilt. It is treated as a guilty plea for all reasons relevant to the court (i.e. prior conviction, 404(b), probation revocation) but it allows some defendants to enter a plea without having to actually admit guilt (which could impact a civil case or “personal pride” of defendant).

Do we generally accept *Alford* pleas as a rule? Why or why not?

Let’s start with sentencing scheduled because of a plea agreement – this is going to be a longer event in terms of the Court’s interaction with the defendant

If there was a trial, the court does not discuss with the defendant his/her waiver of rights, etc. The defendant exercised all rights and resulted in a guilt determination

There are different kinds of plea agreements – “charge bargaining” (without recommendation as to sentence); an “open” plea (a/k/a blind plea) (pleading to all charges in the indictment/accusation without “protection” of any agreement as to charges or sentence to be imposed); and a true “negotiated sentence plea agreement” where the parties negotiate the charges ***and*** the sentence to be imposed.

I guess there is one other type of plea agreement which is frequently referred to as a “cap” agreement – where the parties agree to “no more than” “X” years in confinement, if any.

Allows parties free to argue the case but have the protection of a cap.

The reason we are discussing all of these different types of agreements is that there is an over-arching principle that we want to ensure that everyone is aware of – particularly our judges

If you (judge) are not going to follow the plea agreement, the judge is under an affirmative obligation to notify the defendant of the judge’s intent not to accept or follow the agreement – and allow the defendant to withdraw the plea. U.S.C.R. 33.10**[[3]](#endnote-3)**

“But that requirement only applies when the defendant enters a negotiated plea, which the trial court intends to reject.”**[[4]](#endnote-4)**

So, as to an “open plea,” there is no negotiation – so there is no agreed-upon recommendation – as long as the sentence is within the parameters of the relevant statute, the defendant has no right to withdraw based upon the judge’s sentencing decision

With a “charge bargain” agreement, the State is recommending that charges be dismissed or that pleas to lesser-included offenses be accepted. There is no negotiated agreement as to sentence so any lawful sentence is within the judge’s discretion

The right to withdraw if the judge intends to not follow the agreement only applies to what we referred to as a “negotiated sentence agreement” a few minutes ago – (and it would apply to cap agreement as well)

In the sentencing outlines I use and that we provide to new judges, we suggest that the hearing begin with the calling of the case, putting on the record who is present, and then getting the following issues “on the record”

1. Factual basis for the plea
2. Announce the sentence recommendation (if any)
3. Clarify whether there is recidivist notice or whether it is being waived by the prosecutor
4. Any “lesser included offenses” are really “lesser included offenses” as recognized by law and, if not, whether there is a waiver by the defendant of having an indictment/accusation redrawn
5. Whether any of the offenses merge

Lets’ break each of those preliminary matters down a bit more:

**FACTUAL BASIS[[5]](#endnote-5)**

Wade asks for stipulation (just to ensure that any “essential element” )such as venue) that is not recited does not come back to be a problem)

But even with stipulation, I ask the prosecutor to “tell me something about the case and the defendant’s criminal history”

**SENTENCE RECOMMENDATION**

For the reasons we discussed earlier, make sure the judge knows the terms of the agreement, if any. Allows the judge to determine if this is an “open plea”

It took me a little while (and a few rejected plea agreements) to help my lawyers understand that I was not interested in whether the community service was to be performed at the landfill or merely that community service was to be imposed

**RECIDIVIST NOTICE**[[6]](#endnote-6)

If the state intends to “not waive” any pretrial recidivist notice, the judge needs that fact to be on the record and to ensure the defendant acknowledges that it not being waived

Not going off the rails to discuss Recidivist Notice here – only that it dictates that the max sentence must be imposed (subsection (a) of the statute); that the court does/does not have the option to suspend or probate any portion of the max sentence (depends on whether (a) or (c)); and that any confinement time must be without parole (subsection (c))

If counsel does not clarify with the defendant that recidivism notice is not being waived as part of the agreement, it is per se ineffective assistance of counsel and you are going to have the plea and sentence reversed on appeal.**[[7]](#endnote-7)** Just go ahead and handle it on the front end.

Of course, if the state intends to not waive recidivist notice, the record needs to reflect the prior convictions, if they have not previously been filed into the record

**LESSER INCLUDED OFFENSES**

There are times when the parties reach a plea agreement to lesser charges that they will refer to as charges that are “lesser included offenses” to those that appear in the indictment/accusation

But, in reality, they are not actually “lesser included offenses”

For example, Reckless Driving is ***not*** a lesser included offense of DUI.**[[8]](#endnote-8)**

If the defendant is pleading to an offense that is not specifically within the indictment/accusation, get the parties to waive any defect in the charging instrument as part of the agreement – it just cuts off that entire line of argument

Note-court has no authority to allow defendant to enter plea to uncharged, lesser included without consent of state.**[[9]](#endnote-9)**

**MERGER**

Merger applies to guilty pleas

But we are NOT opening that can of worms on this episode. We have prior episodes dealing with Merger that you can consult as needed. Just not doing it again here!

Do not forget to put on the record whether there is a victim who wishes to be heard

It may be obvious when there is not another person in the courtroom, just make sure the prosecutor is made aware that if the victim wishes to be heard, that now is the time

So, we finally have the preliminary “stuff” out of the way – time to get into a dialogue with the defendant

You are going to notice throughout this episode (if it is not already clearly apparent) that we are attempting to close off issues on appeal/habeas

1. We (both) administer an oath
2. Ask defendant if he/she is satisfied with counsel
   1. This question (partially) eliminates issue of ineffective assistance of counsel on appeal/habeas corpus
3. Admission of guilt
4. Dialogue that does not simply involve “yes” or “no” responses
   1. i.e. What sort of work do you do? Where did you attend school? Just to prevent any claim that you only asked “yes” or “no” questions
5. Ability to understand English
6. Prior mental health diagnosis
7. Present impairment under alcohol or drugs
8. Confirm decision to plead guilty is not product of threats, coercion or promises
9. Minimum and maximum sentences that are possible
10. Whether defendant is requesting first offender treatment**[[10]](#endnote-10)**
    1. Remember, merely because the defendant requests first offender or you ask whether he/she is requesting first offender does NOT mean that the judge has to grant it – only a statutory obligation that you ask and determine eligibility**[[11]](#endnote-11)**
    2. And you cannot impose a first offender statute over the defendant’s objection**[[12]](#endnote-12)**
11. Citizen of the United States
    1. Allows entry into how this plea may impact the defendant’s immigration status
    2. Remember, it is NOT sufficient if the defendant acknowledges that the plea “may” impact his/her immigration status if the offense to which he/she is pleading is a deportation offense**[[13]](#endnote-13)**
12. Whether the defendant has a Weapons Carry License**[[14]](#endnote-14)**
13. Go through the rights being waived**[[15]](#endnote-15)**
    1. Rt to speedy and public trial by jury
    2. Presumption of innocence
    3. Right to confront witnesses
    4. Right to subpoena and present evidence
    5. Right to assistance of lawyer
    6. Right to testify
    7. Right to remain silent and not testify
14. Discuss any written plea forms and have defendant acknowledge signatures and consideration of same
    1. Understand that some courts intend to rely solely upon forms
       1. Georgia law says that is insufficient – forms can be a part of the waiver process but there should be a colloquy between the judge and the defendant as well
    2. “[a]n insufficient pretrial waiver form may be supplemented by showing that a defendant has been advised individually and in detail of the dangers of proceeding pro se”**[[16]](#endnote-16)**
    3. ***“We believe that the best way to ensure that a defendant fully appreciates the right he has chosen to relinquish, and that trial judges fully understand their duty in this process, is for the trial court to address each factor, individually, and on the record. By so doing, a trial court can likely avoid the time and expense of another trial***.”**[[17]](#endnote-17)**
15. If the defendant is pleading to a sex offense, put on record the defendant will be required to register as a sex offender**[[18]](#endnote-18)**

Then turn to counsel and ask

1. if he/she is aware of any reason I should not accept the plea
2. Confirm the announced plea agreement is the same as agreed upon
3. Ask if there is anything further counsel wishes to tell me
   1. This is where any family member, etc. of the defendant would be heard, if any

Then, ask defendant if there is anything he/she wishes to say before sentence is imposed

I usually make it clear that there is nothing the defendant *has to* say, but is there anything he/she *wants* to say

Then find on the record that

1. You intend to reject the plea agreement, giving the defendant the opportunity to withdraw; or
2. there is a factual basis for the plea (as stipulated), that the defendant understands the nature of the crime and the consequences of the plea and that the defendant has knowingly, intelligently and voluntarily decided to enter the plea. The Court intends to accept and follow the plea agreement

**START HERE IF THE SENTENCE IS BEING IMPOSED AFTER A GUILTY VERDICT**

Following a guilty verdict:

Deal with merger, if applicable

Verify maximum sentence that could be imposed on all counts

Determine if recidivism notice is an issue

Determine if victim wishes to be heard

Allow introduction of evidence relating to prior criminal history

Allow defense counsel to be heard on sentencing

Allow for presentation of any defense witnesses relevant to sentencing

Allow Defendant to speak, if desired

Finally, we get off of the script and move to personal preferences

I do not usually give a dramatic speech to the defendant about his/her crime unless I think it would make a difference (explain)

Might make different decision following a trial – particularly if there are bad facts

Any other observations/remarks

Finally, impose the sentence but be aware of a couple of potential pitfalls

If the agreement is for a 5 in/5 out sentence but the maximum sentence on Count 1 is only 3 years, try to figure that out in advance (better yet, have the lawyers figure it out)

Any sentence for a sex offense (not a life sentence) must be “split”**[[19]](#endnote-19)**

Ensure you make the sentence for each offense concurrent or consecutive to another count in the sentence

Any fines have required surcharges – order a fine in the amount of “X” “with mandated surcharges”

Consider whether a BID (Behavioral Incentive Date) is relevant**[[20]](#endnote-20)**

If there is a count (or mote than one count) that must be ordered to be consecutive, do not forget that requirement

When I impose a sentence that includes probation, I literally call out the numbers of the paragraphs for the sentencing addendum form

(i.e.” #25-DNA Testing,” or “#15-The records release”)

4th Amendment Waiver must be acknowledged by defendant.**[[21]](#endnote-21)** We have a form but I also get counsel to acknowledge that the defendant signed the 4th Amend. Waiver while on the record

Judge is under a requirement to identify any “special” conditions of probation specifically on the record (and in the written sentencing form)**[[22]](#endnote-22)**

I frequently order, as a special condition, that the defendant “not knowingly be in the presence of any illegal drugs or drug paraphernalia)

There are very specialized requirements if the case involves:

1. Family Violence (#14) (Family Violence Intervention Program completion)
   1. Also consider how you are going to address no contact provisions
2. Sex Offender Conditions for sex offenses (#26 and 27)
   1. Please save yourself headache and get someone to hand you the form so you can recite all of the conditions as you complete the form)
3. DUI[[23]](#endnote-23)
   1. If you have never sentenced a DUI, you are not going to believe all of the conditions you must consider – license suspensions, driving schools, mandated community service, etc.
4. Stalking/Aggravated Stalking (#28)
   1. Must consider permanent restraining order and/or psychological treatment
5. Street Gang Probation (#29)

There is one more thing that I always do that has saved me from a bunch of problems in the past. I ask – in every sentencing:

Anything further from the state?

Defense?

Clerk?

Probation?

If you made a mistake or overlooked something, it may be a while before you recognize it. Then you have to get the defendant back in front of you to re-sentence or clarify the sentence.

Taking 5 seconds to ask each of those “players” if they have anything else before you conclude saves a bunch of headache

Finally, notify the defendant of his/her habeas corpus statute of limitations**[[24]](#endnote-24)**

If following a conviction, also advise the defendant of his/or appeal rights[[25]](#endnote-25)

That’s all for out episode on our thoughts relating to sentencing in a criminal case

*You will note that we really addressed the process and procedure more than our respective philosophies on sentencing*

I am not really sure how we could share our “philosophies” without prejudging cases

*This episode note (with tons of citations to authority) will be loaded onto our website at goodjudgepod.com*

Reach out to us with some more ideas for episode topics at [goodjudgepod@gmail.com](mailto:goodjudgepod@gmail.com)

*Music trivia time –We have been pleasantly surprised that some of you have let us know that you actually listen to the music trivia section of this podcast – we appreciate it. One disclaimer – these segments are as accurate as the internet is ever accurate.*

*Ok here we go with today’s music trivia. We usually focus on a single artist or genre. Not today.*

*If I asked you to list the 6 highest selling albums in the United States, what would your best guess look like? Now remember, it is albums, not singles or CD’s, and only in the United States. Pause this episode for a minute and write down your list of the 6 best selling albums of all time and then come back and check out how accurate you were. Is there a Beetles album on the list? How about the Lynyrd Skynyrd, Journey or Garth Brooks? Madonna and Frank Sinatra were pretty popular…take your guesses and then we will tell you once you resume the playing of this silliness.*

*You’re back already? Wow, that was fast. Here is the list, starting from the 6th to the First.*

*6- Fleetwood Mac – Rumors (Released 1977)*

*5- Led Zeppelin – Led Zeppelin IV (Released 1971)*

*4- AC/DC – Back in Black (Released 1980)*

*3- Eagles – Hotel California (Released 1976)*

*So we are down to two. I am willing to bet most of you guessed wrong on which is number 1.*

*2- Michael Jackson – Thriller (Released 1982)*

*Bet you thought that was No. 1, huh?*

*DRUMROLL, PLEASE…*

1. *Eagles – Their Greatest Hits (1971-1975) (Released 1976)*

*So there you go. The Eagles with 2 on the list. And none for Taylor Swift. Who knew?*

1. A *nolo contendere* plea is a slightly different matter. It is not an admission of guilt and cannot be used as a prior admission of guilt (i.e. under 404(b)). The judge sentences the case just as if a guilty plea was entered and can revoke probation. But it is not an “admission.” This frequently arises when the plea would cause a revocation of a driver’s license. I usually make a much more detailed inquiry of the State before accepting such a plea, even if it “blows up” the plea agreement. [↑](#endnote-ref-1)
2. *North Carolina v. Alford,* 400 U.S. 25 (1970). [↑](#endnote-ref-2)
3. “If the trial court intends to reject the plea agreement, the trial court shall, on the record, inform the defendant personally that (1) the trial court is not bound by any plea agreement; (2) the trial court intends to reject the plea agreement presently before it; (3) the disposition of the present case may be less favorable to the defendant than that contemplated by the plea agreement; and (4) that the defendant may then withdraw his or her guilty plea as a matter of right. If the plea is not then withdrawn, sentence may be pronounced.” [↑](#endnote-ref-3)
4. *Jackson v. State*, 361 Ga.App. 178, 180 (2021). [↑](#endnote-ref-4)
5. U.S.C.R. 33.9. [↑](#endnote-ref-5)
6. O.C.G.A. § 17-10-7(a) and (c). [↑](#endnote-ref-6)
7. *Alexander v. State*, 297 Ga. 59 (2015). [↑](#endnote-ref-7)
8. *Shockley v. State*, 256 Ga. App. 892, 895 (2002). [↑](#endnote-ref-8)
9. *State v. Bankston*, 337 Ga. App. 601 (2016); *State v, Kelley*, 298 Ga. 527 (2016). [↑](#endnote-ref-9)
10. OCGA §42-8-61 REQUIRES that judge ask if Defendant wants a First Offender sentence. There is no requirement that the judge grant the request, but judge must ask if it is being requested. [↑](#endnote-ref-10)
11. .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). Also, defendant can only be sentenced as first offender **if he consents** thereto. OCGA §42-8-60 (a). [↑](#endnote-ref-11)
12. OCGA §42-8-60 (a). [↑](#endnote-ref-12)
13. *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Encarnacion v. State*, 295 Ga. 660 (2014). The deportation statute can be found at 8 USCA §1227. [↑](#endnote-ref-13)
14. .OCGA §16-11-129(e)(2). Given recent developments in Georgia law, not sure how much this matters but it remains a statutory requirement. [↑](#endnote-ref-14)
15. People call these *Boykin* rights but Georgia law requires more than *Boykin*. USCR 33.8(B). However in *Boykin v. Alabama*, 395 U.S. 238, 242-43 (89 S. Ct. 1709) (1969), U. S. Supreme Court held that guilty plea must be set aside unless record of plea colloquy or extrinsic evidence affirmatively shows that defendant knowingly, intelligently, and voluntarily waived***right****:* (1) to be tried by a ***jury*;** (2) to ***confront*** ***accusers***; and (3) ***against self-incrimination*.** The failure of State to carry this burden can result in habeas relief. *Bazemore v. State*, 273 Ga. 160 (1) (535 S.E.2d 760) (2000); *Arnold v. Howerton*, 282 Ga. 66 (646 S.E.2d 75) (2007). Trial Court should be **especially attentive** on **waiver** of these **three *Boykin* rights**. **Other failures** to follow USCR, which are not deemed constitutional violations, may be grounds for motion to withdraw guilty pleas but not habeas relief. *Britt v. Smith*, 274 Ga. 611 (2001); *State v. Cooper*, 281 Ga. 63 (1) (636 S.E.2d 493) (2006). *Wilson v. Kemp*, 288 Ga. 779 (2011). [↑](#endnote-ref-15)
16. *Williams v. State*, 336 Ga. App. 442, 445 (2016), citing *Cook v. State*, 297 Ga. App. 701, 703 (2009). [↑](#endnote-ref-16)
17. *Williams v. State*, 336 Ga. App. 442, 445 (2016), citing *Cook v. State*, 297 Ga. App. 701, 703 (2009). [↑](#endnote-ref-17)
18. *Taylor v. State*, 304 Ga. App. 878 (2010). [↑](#endnote-ref-18)
19. § 17-10-6.2; *Watkins v. State*, 336 Ga. App. 145 (2016). *Watkins v. State*, 336 Ga. App. 145, n.4 (2016) (statutory definition does not apply to aggravated child molestation or rape). See *Jones v. State*, 354 Ga.App. 568, 572 (2020)(“ The legislature later amended OCGA § 17-10-6.2 (b), effective July 1, 2017, to provide that in the case of consecutive sentences for multiple sexual offenses, ‘the requirement that the court impose a probated sentence of at least one year shall only apply to the final consecutive sentence imposed.’”) [↑](#endnote-ref-19)
20. O.C.G.A. § 17-10-1(a)(1)(B) – Court required to set BID no more than 3 years from sentencing date if: 1) First Offender or Conditional Discharge or 2) no prior felony convictions AND A) straight probation imposed OR B) split sentence with no more than 1 year in confinement imposed. Prior first offender or conditional discharge sentences do not count for BID purposes. [↑](#endnote-ref-20)
21. *Fox v. State*, 272 Ga. 163 (1) (559 S.E.2d 155) (2000)(Court held ***invalid*** ***special condition of probation*** in which ***Δ waived Fourth Amendment rights*** because ***not properly obtained as part of plea bargaining process.*** Court then considered whether reasonable grounds existed to justify search despite invalidly imposed condition of probation and found “when a probationer has not consented to a search, a warrantless search of probationer’s home must be based upon reasonable grounds to believe that the probationer has contraband in the home or is engaged, in some criminal activity there.”); *Harrell v. State*, 253 Ga. App. 440 (559 S.E.2d 155) (2002); *Brooks v. State*, 285 Ga. 424, 425 (677 S.E.2d 68) (2009). After *Fox*, *United States v. Knights,* 534 U.S. 112 (122 S. Ct. 587) (2001), upheld under Fourth Amendment warrantless search of probationer’s apartment by officer for investigatory (v. probationary) purposes that was (1) ***authorized*** by ***probation condition*** in sentence of which probationer had received proper unambiguous ***notice*** and (2) ***supported*** by ***reasonable suspicion***. See *Samson v. California*, 547 U.S. 843 (126 S. Ct. 2193) (2006); *United States v. Neely*, 217 Fed. Appx. 849 (11th Cir. Ga. 2007), *United States v. Yuknavich*, 419 F.3d 1302 (11th Cir. Ga. 2005), and *Padgett v. Donald,* 401 F.3d 1273 (11th Cir. Ga. 2005); *Jones v. State*, 282 Ga. 784 (1) (653 S.E.2d 456) (2007). [↑](#endnote-ref-21)
22. OCGA § 42-8-34.1(a). *Singleton v. State*, 332 Ga. App. 484 (2015). [↑](#endnote-ref-22)
23. See O.C.G.A. § 40-6-391(c). [↑](#endnote-ref-23)
24. OCGA § 9-14-42 (c) and (d). [↑](#endnote-ref-24)
25. Although not technically required, a defendant seeking to file an out-of-time appeal will have a difficult time arguing that he/she did not know he/she had a right of appeal that was time sensitive if the court so advises the defendant on the record. See *Ingram v. State*, 300 Ga. App. 834, 836 (2009). [↑](#endnote-ref-25)