Hello Folks and welcome back to the Good Judge-Ment podcast. I am Wade Padgett.

*And I am Tain Kell. Wade, we are back in the Classic City after COVID reared its ugly head and interrupted our recording schedule.*

That’s right – we are FINALLY back in Athens with Mr. Jim Henneburger and the wonderful folks at the UGA Law School.

*We had to be our own engineers during the past 18 months or so which we know had mixed results relating to quality of the recordings. Turner Up could only do so much when we gave him some lemons… Reminds me of a song [♫Reunited, and it feels so good….]*

I was thinking more of Tin Lizzy, *Boys are Back In Town*.

*Well, anyway, it is great to get back together in Athens at the place it all began. Tell the folks what we are discussing today, Wade.*

Today, we are going to respond to one of our loyal listener requests and discuss Immunity Hearings. Let’s get started.

**[Wade] –** Tain, we have discussed all sorts of topics in this podcast. One of those topics (I think it was one of the episodes) dealt with summary judgment in civil cases. But Tain, were you aware that in limited circumstances, there is a way for the defendant to essentially ask for summary judgment in civil cases?

**[Tain]** – Now come on, Wade. We all know that the parties cannot ask for summary judgment in criminal cases. What in the world are you talking about?

**IMMUNITY HEARINGS**

**THE RELEVANT STATUTORY LAW**

Let’s start with some law (we know it is “not awesome” to read law in a podcast)

O.C.G.A. § 16-3-21 provides:

A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force; however, except as provided in Code Section 16–3–23, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily injury to himself or herself or a third person or to prevent the commission of a forcible felony.[[1]](#footnote-1)

O.C.G.A. § 16-3-23 and 24 provide that a person is justified in using force if he/she used justifiable force in defense of a habitation or to prevent trespass or entry upon non-habitation property.

Interestingly, deadly force is specifically authorized in “self-defense,” and “defense of others” under the specific language of §16-3-21 but the other statutes only reference the use of “force.” In fact, under §16-3-24 (defense of non-habitation), the statute specifically states that the use of deadly force is generally not authorized

And we have all become familiar with the “no duty to retreat” law which is codified in Georgia at O.C.G.A. § 16-3-23.1. (Some refer to this statute as the “stand your ground” law)

So where a defendant claims “justification” as a defense, he/she can seek to have a pretrial hearing to determine if he/she is “immune” from prosecution.

Although other people may refer to these hearings under other names, we are going to refer to these hearings as “immunity hearings” for the remainder of this episode.

**FILING THE MOTION**

So how, exactly, would a defendant raise a claim of immunity? First, they need to file a motion.

“Although nothing in the language of OCGA § 16-3-24.2 requires an immunity motion to be filed pretrial, such motions are generally made before trial because a grant of immunity terminates a criminal prosecution. And we have held that a trial court errs when it refuses to consider before trial an immunity motion that was filed before trial.”[[2]](#footnote-2)

So if a mistrial is granted or a motion for new trial is granted, the defendant can file (for the first time) an immunity motion.[[3]](#footnote-3)

If a motion is made for an immunity hearing, the trial court must conduct a pretrial hearing to hear evidence and decide whether the defendant is actually immune from prosecution.[[4]](#footnote-4)

If the defendant fails to request a ruling (or a hearing) on the motion, any objection to the failure to conduct the required pretrial ruling is waived.[[5]](#footnote-5)

While these motions are frequently filed in homicide cases, the statue is equally applicable to other types of crimes (i.e. domestic violence charges).[[6]](#footnote-6)

**CONDUCTING THE IMMUNITY HEARING**

The issue of immunity is one for the judge and not a jury.

The burden is on the defendant to prove by a preponderance of the evidence that he is immune from prosecution.[[7]](#footnote-7)

Because the burden is on the defendant, he/she is required to present the evidence necessary to sustain his/her burden – so the defendant goes first!

An immunity hearing seems like a mini trial and it is – only the defendant proceeds first and calls witnesses of his choosing.

If the court decides that the defendant has met his/her burden of proof, the case is over (at least as to that charge(s)).

Conflicts in the evidence are to be resolved by the trial court and there is no requirement that the evidence all point one way or the other.[[8]](#footnote-8)

If there are multiple defendants, the court must make an immunity determination individually and not collectively.[[9]](#footnote-9)

Remember, a defendant cannot lawfully use force if he/she was the aggressor.[[10]](#footnote-10)

**THE DIFFERENCE BETWEEN “IMMUNITY” AND “JUSTIFICATION”**

Although they seem to be similar if not identical concepts, there is A PROFOUND difference between “immunity from prosecution” and “justification.”

The justification statutes can be found in O.C.G.A. § 16-3-20.

Note that is a different code section from § 16-3-24.2 (immunity statute) and that difference is important to understand.

A defendant can be justified in the use of force (jury determination) but possibly not immune from prosecution as a matter of law (judge determination).

“An affirmative defense is different than a plea of immunity. If a defendant can prevail prior to trial on the basis of immunity, then that ends the case. An affirmative defense may be raised during trial but it will not prevent a trial from going to verdict.”[[11]](#footnote-11)

In essence, if there is an analysis of the “reasonableness” of a use of force, you are generally discussing justification under §16-13-20. That is a trial determination.

By comparison, in an immunity claim, the only “reasonableness” discussion deals with the reasonableness of the perception that the use of force was appropriate. NOT the reasonableness of the amount of force used.[[12]](#footnote-12) If you find yourself considering the proportionality of the force being used, a claim of immunity should be denied.[[13]](#footnote-13)

As set forth in *Copeland*, “O.C.G.A. § 24.2 requires an analysis of the threat or force needed by the [defendants] to reasonably defend against such threat or force rather than a consideration of the proportionality or reasonability of the [defendants’] conduct in the fulfillment of their duties.”

**IMPACT OF RULING ON THE IMMUNITY CLAIM**

A defendant who was unsuccessful at the immunity hearing may raise the affirmative defense of justification at trial. The burden then shifts to the State to disprove justification beyond a reasonable doubt.[[14]](#footnote-14)

The defendant may seek interlocutory review of a trial court’s denial of the justification immunity.[[15]](#footnote-15)

The trial court may reconsider the matter following trial even where the motion was initially denied.[[16]](#footnote-16)

Georgia law once held that a defendant claiming the defense of justification had to essentially admit all of the elements of the crime with the exception of intent. So if a defendant denied being present or denied having a weapon, he/she could not claim self-defense. That is no longer the law.[[17]](#footnote-17)

**UNIQUE ISSUES IN IMMUNITY CASES**

**THE “CONVICTED FELON PROBLEM”**

O.C.G.A. § 16-3-24.2 provides that a person using justifiable force is “immune from prosecution” UNLESS, that person is not authorized to carry or possess a firearm “under Part 2 of Article 4 of Chapter 11 of this title”

[*Hate it when they do not reference the “O.C.G.A. §” and, instead, use “article \_\_ of title \_\_\_” language*]

But here, that makes a HUGE difference. Because the legislature changed the statutory language to remove “Part 2 and 3” of Article 4 of Chapter 11 and replace it with only “Part 2.”[[18]](#footnote-18) [[19]](#footnote-19)

Also, if the defendant was a convicted felon, first offender, etc. when the weapon was possessed, please see O.C.G.A. § 16-11-138. “Defense of self or others, as contemplated by and provided for under Article 2 of Chapter 3 of this title, shall be an absolute defense to any violation under this part.”

That means that if a defendant is a convicted felon, he/she can raise an immunity claim to a charge under § 16-11-131 provided the weapon used was not illegal.

[*I frequently have defendants who are convicted felons claim that they had to defend themselves in an attempt to avoid a “possession of a firearm by a convicted felon” charge. That claim is absolutely allowed under the current version of the statute following the 2014 change.*]

Not to get too “in the weeds” with the convicted felon claiming immunity issue, but if a convicted felon reasonably believes that such threat or force is necessary to defend himself/herself or a 3rd person against another’s imminent use of unlawful force, that convicted felon can claim immunity under the current version of the statute.[[20]](#footnote-20)

**JURY CHARGES IN EVENTUAL TRIAL**

***Assuming the hearing was conducted and denied…***

In *Campbell v. State*, 297 Ga. App. 387 (2009), the defendant filed a motion for a pretrial immunity hearing. The trial court ruled on the motion without conducting the hearing. [*We discussed this case above when discussing a potential “waiver” of the immunity hearing*]

Instead of insisting on the hearing (which is ***absolutely*** required), defense counsel immediately changed the course of his/her arguments. In response to the ruling without a hearing, counsel told the trial judge, “the case law holds clearly that [the trial court] must tell me before the trial whether or not I'm going to be entitled to an instruction on the immunity statute,” and he did not argue that [defendant] was entitled to a hearing on his motion.”[[21]](#footnote-21)

As to *Campbell’s* requested charge on immunity, the appellate court held that immunity is a matter of law for the trial judge to consider and, therefore, it is error to charge the jury on the immunity statute. To be clear, the appellate court was NOT considering a requested justification charge (which would assumably be applicable). Instead, there was a request for a jury charge on immunity and the appellate court held the trial court correctly refused that requested charge because immunity from prosecution was not a matter for the jury to consider.

Thank you for listening to the Good Judge-Ment Podcast.

*Remember that if an immunity hearing is requested, the trial court must conduct a pretrial hearing unless the defendant waives the request, either an express waiver or a waiver through conduct. Yes, conducting the hearing will inconvenience everyone involved in the process, it may delay a trial date, it may seem to act as a duplication of effort if the trial proceeds – all of those realities are true. Regardless, the cases are all clear that if a hearing is requested, the court must conduct the hearing.*

This episode was created in response to a specific request by a listener who reached out to us at goodjudgepod@gmail.com (Thanks for the idea Woody).

*You, too, can have these two yahoos discuss an issue you want us to discuss but we cannot read your mind. So send us an e-mail at goodjudgepod@gmail.com.*

You can visit our website, goodjudgepod.com, for the episode notes from this and all other episodes.

*Again, thanks for listening to the Good Judge-Ment Podcast. And remember…*

1. *State v. Jennings*, 337 Ga. App. 164, 166-167 (2016). [↑](#footnote-ref-1)
2. *State v. Remy*, 308 Ga. 296, 297 (2020). [↑](#footnote-ref-2)
3. *State v. Remy*, 308 Ga. 296, 297-298 (2020), citing *State v. Hamilton*, 308 Ga. 116 (2020). [↑](#footnote-ref-3)
4. In *Boggs v. State*, 261 Ga. App. 104 (2003), the Court of Appeals held that whether a person is immune from prosecution must be determined by the trial court before the trial of that person commences. This decision was approved and reconfirmed by the Georgia Supreme Court in *Fair v. State*, 284 Ga. 165 (2008). The trial court must make a ruling on the motion before the trial. [↑](#footnote-ref-4)
5. *Lightning v. State*, 297 Ga. App. 54, 57-58 (2009); *Campbell v. State*, 297 Ga. App. 387, 389 (2009). [↑](#footnote-ref-5)
6. *State v. Yapo*, 296 Ga. App. 158 (2009). [↑](#footnote-ref-6)
7. *Bunn v. State*, 284 Ga. 410, 413 (2008); *Cotton v. State*, 297 Ga. 257, 258-259 (2015); *State v. Copeland*, 310 Ga. 345 (2020); *State v. Smith*, 347 Ga. App. 298, 293 (2018). [↑](#footnote-ref-7)
8. *State v. Jennings*, 337 Ga. App. 164, 166-167 (2016). [↑](#footnote-ref-8)
9. *State v. Copeland*, 310 Ga. 345, 357-358 (2020). [↑](#footnote-ref-9)
10. O.C.G.A. § 16-3-21(b)(3); *State v. Copeland*, 310 Ga. 345, 349 (2020). [↑](#footnote-ref-10)
11. Jack Goger, *Daniel’s Georgia Criminal Trial Practice*, §21-19, p. 1386 (2014-2015 ed.). [↑](#footnote-ref-11)
12. *State v. Copeland*, 310 Ga. 345, 355 (2020). [↑](#footnote-ref-12)
13. *State v. Copeland*, 310 Ga. 345, 355 (2020). [↑](#footnote-ref-13)
14. *Bunn*, at 413; *Porter v. State*, 272 Ga. 533, 534 (2000). [↑](#footnote-ref-14)
15. *Mullins v. State*, 287 Ga. 302 (2010). [↑](#footnote-ref-15)
16. *Hipp v. State*, 293 Ga. 415 (2013). [↑](#footnote-ref-16)
17. *McClure v. State*, 306 Gas. 856 (2019). [↑](#footnote-ref-17)
18. See *State v. Remy*, 308 Ga. 296, 297 (2020). [↑](#footnote-ref-18)
19. Part 2 of Article 4 of Chapter 11 deals with the type of weapon (i.e. sawed-off shotgun, machine gun, weapon with a silencer, etc.) whereas Part 3 deals with the status of the person possessing an otherwise legal weapon (i.e. convicted felon, under age 18, etc.). The statute was changed in 2014. [↑](#footnote-ref-19)
20. *Johnson v. State*, 308 Ga. 141 (2020); *State v. Remy*, 308 Ga. 296 (2020). [↑](#footnote-ref-20)
21. *Campbell v. State*, 297 Ga. App. 387, 389-390 (2009). [↑](#footnote-ref-21)