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

*And I am Tain Kell. We remain on ZOOM for this episode, much to the disappointment of my taste buds, Places likes the Taco Stand, the Mayflower Restaurant on Broad St. – man I miss Athens.*

You will be ok buddy! Just hang in there a little while longer and we will return to all of the fun and good food that Athens has to offer. But we need to work through this evidence series and we have an interesting topic to discuss today, don’t we?

*That’s right! Confessions and custodial statements. These issues frequently arise as part of criminal pretrial proceedings, usually involving a hearing under Jackson v. Denno.*

Earlier in this series, we focused on the “process” of addressing evidence objections. Today we are going to hone in on one particular type of objection and a couple of specific rules, §§24-8-823, 824 and 825.

*Let’s get started.*

**[end scripted portion]**

- PREFACE- we are going to record an entirely separate episode on *Jackson v. Denno* hearings. We may also have time to discuss confessions by juvenile suspects. Today’s episode will fit hand-in-glove with that *Jackson v. Denno* episode (as we will discuss in a few minutes) but we want these episodes to be shorter, and more to the point, allowing us to focus on the rules that impact your decisions in *Jackson v. Denno* hearings. Admittedly, a *Jackson v. Denno* hearing is the setting where these issues will arise but we will address some of the other issues associated with those hearings in that separate episode.

- I could not have told you there was a rule in the evidence code dealing with confessions – but these rules have been part of Georgia’s Code for generations – just with different numbering.

- **Rule 823** – “All admissions shall be scanned with care, and confessions of guilt shall be received with great caution. A confession alone, uncorroborated by any other evidence, shall not justify a conviction.”

- **Rule 824** specifically provides: “To make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury.”

- Remember that when prior Georgia law was substantially the same as the law under the present evidence code, the prior decisions continue to be valid precedent.

- The former O.C.G.A. § 24-3-53 now appears as §24-8-823.

- Under prior law, the exact same language that appears in Rule 824 was the statutory text of O.C.G.A. § 24-3-50. (*Carter v. State*, 302 Ga. 685, 688 (2017).

- We told you this series was going back to the basics – so in keeping with that commitment, let’s define a ”confession”

- “Back in the olden days” Georgia law differentiated between a “confession” and an “incriminating statement.” That distinction has been eliminated by case law construing Rules 823 and 824. *Carter v. State*, 302 Ga. 685, n. 6 (2017), citing *State v. Chulpayev*, 296 Ga. 764, 771 (2015).

- Rule 824 specifically provides that confessions are not admissible unless the confession was made “without being induced by another by the slightest hope of benefit or remotest fear of injury.”

- **“Slightest hope of benefit”** –

- “The term ‘slightest hope of benefit’ refers to ‘promises related to reduced criminal punishment—a shorter sentence, lesser charges, or no charges at all.’” *Budhani v. State*, 345 Ga. App. 34, 41 (2018), overruled on other grounds by *Willis v. State*, 304 Ga. 686 (2018).

- Where officer tells the defendant that if he confesses, he will receive a lighter sentence – that “promise” by the officer makes the confession inadmissible. *Canty v. State*, 286 Ga. 608 (2010); If the officer tells the defendant that if he makes a statement, the officer would drop certain charges in this case, the statement is inadmissible. *Jones v. State*, 344 Ga. App. 774 (2018). Same with any promise of immunity made by the officers. *Porter v. State*, 143 Ga. App. 640 (1977).

- By comparison (and these distinctions are VERY important – and occasionally very fine), a promise to tell the prosecutor or the judge of the defendant’s cooperation has been referred to as a “**hope of a COLLATERAL benefit.**” And any reference to a collateral benefit does NOT make the statement inadmissible. *Wilson v. State*, 285 Ga. 224 (2009); *Leigh v. State*, 223 Ga. App. 726, 727 (1996); *Lyles v. State*, 221 Ga. App. 560, 561 (1996).

- O.C.G.A. **§ 24-8-825** specifically provides that “The fact that a confession has been made under a spiritual exhortation, a promise of secrecy, or a promise of collateral benefit shall not exclude it.”

- Promises made by officers to ensure the defendant received psychiatric care while in jail were deemed collateral. (*Clark v. State*, 309 Ga. App. 749 (2011); Same with promises relating to reducing the defendant’s bond (*Pounds v. State*, 189 Ga. App. 809 (1989)); Promises relating to ensuring the defendant has a single-person jail cell are collateral (*Presnell v. State*, 241 Ga. 49 (1978); *White v. State*, 266 Ga. 134 (1996)).

- Have seen this next example numerous times – where officers tell the defendant the girlfriend/momma/cousin would be charged as a party to the crime, charged with making false statements, lose public housing, lose custody of children, etc. Those “threats” are clearly collateral benefits and do not render the confession of the suspect inadmissible. *Jackson v. State*, 280 Ga. App. 716 (2006); *Shepard v. State*, 300 Ga. 167 (2016).

- Sometimes you see references to “mere legal trueisms” in the appellate cases) See *State v. Munoz*, 324 Ga. App. 386, 392 (2013); *Hudson v. State*, 353 Ga. App. 223 (2019); *Dozier v. State*, 306 Ga. 29, 37 (2019) (officer’s statement to defendant that he would arrest defendant’s wife if she lied about defendant’s whereabouts was a “mere truism” and did not render defendant’s subsequent confession involuntary); “[A] statement by police that makes the defendant aware of potential legal consequences is in the nature of a mere truism that does not constitute a threat of injury or promise of benefit[.]” *Blackwell v. State*, 337 Ga. App. 173, 176 (2016).

- “the fact that he was told he would be arrested if he refused to talk to the police officers does not amount to coercion making his statements inadmissible. Such statements are in the nature of a mere truism [and] simply made [Brewer] aware of potential legal consequences.” *Brewer v. State*, 312 Ga. App. 397, 398-399 (2011).

- See *Boone v. State*, 293 Ga. App. 654 (2008) where officer told the defendant he would talk to the prosecutor about dismissing a warrant in an unrelated case – deemed a “collateral benefit” which would not prevent the confession from being admitted. (but you can see where a small phrase such as “in an unrelated case” makes a huge difference)

- Promising defendant he could see family or smoke a cigarette is not hope of benefit. *Sizemore v. State*, 201 Ga. App. 431 (1991); *White v. State*, 266 Ga. 134 (1996). Same with telling the defendant that he could return home, regardless of what he said in statement – that is a collateral benefit. *Brown v. State*, 290 Ga. 865 (2012).

- “Admonitions to tell the truth” will not invalidate a confession.” *State v. Munoz*, 324 Ga. App. 386, 392 (2013) (telling defendant he should tell his side of the story because the victim was claiming forcible rape), citing *Pittman v. State*, 277 Ga. 475, 478 (2004).

- Officer's statement to defendant, in response to defendant's question as to whether defendant should talk, that “That's up to you man. All you're going to do is help yourself out,” was not a “hope of benefit” that would render defendant's statement involuntary.  *Lee v. State*, 270 Ga. 798 (1999).

- The defendant’s subjective state of mind or what he thought the officer meant is not the test. *Cummings v. State*, 266 Ga. App. 799, 803-804 (2004).

- **“remotest fear of injury”** –

- “As for ‘remotest fear of injury,’ it is ‘[p]hysical or mental torture ... that prevents a confession from being admissible[.]’” *Price v. State*, 305 Ga. 608, 610 (2019).

- Officer suggesting that the defendant might be safer in police custody as opposed to being out on the street does not create fear of injury under this statute. *Mangrum v. State*, 285 Ga. 676, 678 (2009)

- Remember that the judge has to make credibility determinations and where there is conflicting testimony concerning whether the defendant was beaten, starved, refused bathroom breaks, etc. are credibility determinations for the judge unless there is clear evidence to support or refute such a claim. *Matthews v. State*, 311 Ga. 531, 729-730 (2021).

- In our episode concerning *Jackson v. Denno*, we will discuss intoxicated defendants, mentally ill defendants, police tactics such as making untrue of misleading statements, the reading of *Miranda* warnings, the request for counsel, and all sorts of other issues dealing with the judge’s decision as to whether the confession is admissible.

- One of the big takeaways that we hope you get from this episode is an understanding that whether a defendant was advised of his/her *Miranda* warnings, asked for counsel, etc. is entirely separate from the issue of whether the statement was made voluntarily. You often hear judges repeat the mantra, regardless of what was actually argued, about finding the statement was “freely and voluntarily made.” Those issues are actually separable, even though they frequently arise simultaneously.

- There is a difference between a defendant’s complaint that a statement was not voluntary and a complaint that the statement violated *Miranda*. *Reid v. State*, 306 Ga. 769 (2019). A *Jackson v. Denno* complaint is addressed to the overall voluntariness of a statement. A complaint under *Miranda* is addressed to a custodial interrogation violation. There is a difference between the two and a defendant’s objection based upon *Miranda* does not raise a requirement to conduct a hearing under *Jackson v. Denno*.*Reid v. State*, 306 Ga. 769 (2019).

- “[c]oercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment. However, the investigators’ mere failure to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. Thus, because the *Miranda* presumption does not necessarily constitute a finding that the statement was coerced, statements obtained in violation of the procedural requirements of *Miranda* may be found otherwise voluntary under due process standards.” *Reid v. State*, 306 Ga. 769, 774 (2019), citing *State v. Troutman*, 300 Ga. 616, 618 (2017).

- You will notice that we have not spent any time in this episode discussing whether the defendant was in custody or not in custody. That is intentional. *Miranda* is triggered when a defendant is in custody – even if the defendant is not in custody, if he makes a statement that is involuntary – either because of hope of benefit or fear of injury – that statement is inadmissible regardless of the reading of *Miranda* warnings and we wanted to stress the difference here.

- Admittedly, voluntariness of a statement is raised via a *Jackson v. Denno* motion to suppress. Most practitioners lump *Miranda* issues in with *Jackson v. Denno* issues. While that is not incorrect procedure, raising one without the other (voluntariness vs. failure to provide warnings) could present problems when challenged by the opposing party. Just food for thought.

- All of these decisions by the trial judge as to the admissibility of a confession or statement are based upon a totality of the circumstances analysis. If there is a borderline issue relating to voluntariness and there is also a *Miranda* violation, those facts may combine to lead the judge to find that the confession is inadmissible.

- Burden of proof on State by a preponderance of the evidence standard.

*So that’s it for our episode on the voluntariness of confessions under §24-8-823, 824 and 825.*

We hope you are enjoying this evidence series. As previously noted, we decided to dedicate ourselves to making an entire evidence series for the benefit of NJO class attendees. We simply do not have enough time during NJO to adequately discuss evidence issues – although prior class attendees have asked us to address evidence issues.

*But, merely because we decided to record this series in anticipation of our NJO Class of 2021, that does not mean that a review of these evidence issues is useless to our more seasoned judges and lawyers.*

It is good to occasionally revisit the evidence issues that you have not really wrestled with in a while. Keeps us all sharp.

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

Thanks to everyone who has reached out to us at goodjudgepod@gmail.com. We have received a bunch of great ideas for episodes and those are in the works.

*You, too, can have us 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.This particular outline has a BUNCH of case cites that you might want to include in your own criminal notebook.

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