

CARLSONS' corner

Winter 2007



Professor Ronald L. Carlson
Callaway Professor of Law
University of Georgia



Michael S. Carlson
Senior Assistant District Attorney
Atlanta Judicial Circuit

Don't Ask and Don't Tell the Jury: The Georgia Law of Pre-Arrest Silence, Evasion and Flight

By Ronald L. Carlson and Michael S. Carlson¹

Neophyte prosecutor Elwood roared through the office door upon his return from court.

"Another go 'round with Judge Barnstable?" the more experienced Earl inquired.

"This was the worst yet," confided Elwood, "I wanted to get into evidence the fact that the defendant avoided the authorities for months."

"Did he know that he was a suspect?" questioned Earl.

"That's when it got hot in there," Elwood went on, "The defense lawyer said that because his client *knew* the cops were after him, the evidence should *not* come in. Judge Barnstable agreed."

"How did you get him boiling?" asked Earl.

"It started when I pointed out that it made no sense for flight to be admissible, but for evidence of evasion not to be." Elwood replied.

"And then what?" Earl responded.

"Barnstable really got steamed when I got a little sarcastic and told him that the defense did not provide me with the name of their expert mind reader pre-trial," confided Elwood.

"Why on earth did you say that?" Earl asked, now expecting to have to go to court himself.

Elwood was out of sorts, "It's like I told the judge, a psychic would be about the only one qualified to testify about what the defendant was thinking while he was on the lamb."

"Fire started?" Earl gulped and began to grab his coat.

"Yeah," Elwood replied, "Barnstable shouted something about how they do things at that big city law school of mine versus the way it is going to work in his courtroom. That's when he stormed off the bench."

Confronting the Confounding

To modify a cliché, actions--and inactions--often speak volumes, do so loudly and frequently say more than words. Because of this, a criminal

defendant's pre-arrest silence is a potentially devastating weapon in a prosecutor's arsenal.

When it comes to a criminal defendant's pre-arrest silence, failure to turn oneself in to custody and flight, Georgia appellate decisions draw dividing lines that sometimes create more questions than answers. This article is aimed at assisting trial counsel in navigating a labyrinth of case law that even Daedalus himself would have been proud of designing.¹

Many Georgia lawyers are unaware that the United States Supreme Court has established clear guideposts and bright line points of demarcation for introduction of a defendant's pre-trial silence. If the accused stood silent in the face of an incriminating accusation before he received his *Miranda* warnings, his silence is admissible. He is stuck with it. These rules for federal tribunals might provide an apt model for clarifying the uncertainty often present in modern Georgia jurisprudence.

The problem areas break down into two distinct categories.

- Someone, often a third person, accuses the defendant of committing a crime. He remains silent in the face of the accusation. Then, the state wants to introduce this as an admission of the allegation's content.

- A defendant knows law enforcement is looking for him and he remains out of sight and does not come forward. Later, a prosecutor comments on this fact.

Federal courts deal primarily with the former of these scenarios. Georgia courts have addressed both issues, sometimes with conflicting results.

¹ The authors want to thank Fulton County District Attorney Paul L. Howard, Jr., Deputy District Attorney Deborah W. Espy and Chief Senior Assistant District Attorney Phyllis Clerk for their support and encouragement during the course of this project. Valuable case checking for citation accuracy was accomplished by Katie Bates and Carla Riner, UGA law students.

Constitutional Concerns

Even before the adoption of the Federal Rules of Evidence, impeaching a criminal defendant with his pre-arrest silence had long been authorized by the United States Supreme Court. The Supreme Court's rationale is that once a criminal defendant takes the stand in his own defense, he has voluntarily waived his Fifth Amendment privilege and may be cross-examined like any other witness.²

Federal Rule of Evidence 801(d) (2) (B) codified what is often referred to as the "adoptive admission rule." Under that enactment, "a statement of which the party has manifested an adoption or belief in its truth" is admissible as an admission.³ In criminal cases, this manifestation is marked by a failure to respond to or deny an accusation or comment indicating involvement in a criminal activity.⁴

Since the enactment of the Federal Rules of Evidence, United States Supreme Court decisions have approved of the use of pre-arrest silence for impeachment. In *Jenkins v. Anderson*, the court compared this mode of cross-examination with statements taken in violation of *Miranda* and explained: "[I]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of pre-arrest silence to impeach a criminal defendant's credibility."⁵

The U.S. Supreme Court has extended impeachment of a criminal defendant to include his post-arrest silence. In *Fletcher v. Weir* the court opined that: "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post arrest silence when a defendant chooses to take the stand."⁶

Where does the Supreme Court draw the line? Post-*Miranda* silence cannot be used to impeach a defendant. This is because *Miranda* provides assurances to the defendant that his silence cannot be used against him.⁷

Can pre-arrest and pre-*Miranda* silence be used as substantive, rather than impeaching, evidence? The court in *Jenkins* specifically declined to reach the issue.⁸ In an expansive footnote, a recent Northern District of Georgia opinion notes that federal circuits appear to be split on this issue.⁹

Mallory Steers Georgia On A Different Course

O.C.G.A. § 24-3-36 commendably states that "[a]cquiescence or silence, when the circumstances require an answer, a denial, or other conduct, may amount to an admission."¹⁰ Given the laudable wording of this statute, one might speculate that pre-*Miranda* silence would be handled in a manner which tracks the details of established federal precedent.

"Not so," said the Georgia Supreme Court. In a 1991 decision the Georgia high court set its own course, notwithstanding O.C.G.A. § 24-3-36 as well as time-honored federal authority. *Mallory v. State* provided the vehicle by which the court took this turn. In *Mallory*, the Georgia Supreme Court disallowed a report of questions put to the accused by authorities about why the defendant had not come forward to explain his innocence when he knew that he was under investigation.¹¹

While acknowledging that the United States Supreme Court in *Jenkins* permitted impeachment with pre-arrest silence, the court in *Mallory* posited that, "[*Jenkins*] did not force any state to allow impeachment [via pre-arrest silence]." The *Mallory* court went on to establish a Georgia rule precluding introduction of evidence of pre-arrest silence or evasion of authorities in criminal cases: "We take this opportunity to hold that in criminal cases, a comment upon a defendant's silence or failure to come forward is far more prejudicial than probative."¹² By this statement, the court seemed to introduce a distinction between active, vigorous flight or running away (admissible) versus simple failure to come forward (inadmissible).

In the wake of *Mallory*, numerous Georgia appellate decisions have foreclosed the admission of evidence related to pre-arrest silence or a defendant's failure to turn himself in to authorities. In *Jarrett v. State*, evidence of a defendant's failure to deny his nephew's accusation made at the scene of his arrest was deemed to violate *Mallory*.¹³ Akin to this is *Wallace v. State*, which held testimony from witnesses that the defendant simply swallowed hard, wrung his hands, breathed, sighed deeply, and shuffled his arms and legs in response to police inquiries was error.¹⁴ Despite the fact that the defense raised the issue of an "insufficient investigation," it was error to admit evidence of the defendant's failure to respond to a detective's efforts to contact him in *Bruce v. State*.¹⁵

What Did the Defendant Know and When Did He Know it?

The course of circumstances forced the Georgia Court of Appeals to limit and restrict *Mallory*. An excellent example came in *Morrison v. State*. An armed robbery defendant took the stand and testified that he was coerced into participating in the offense. The prosecutor stressed the opportunities the accused had for seeking help that were passed up and his failure to seek police protection. Referencing *Mallory* specifically, the *Morrison* court limited the application of that case to the defendant's silence in the face of questions by an *agent of the State*, as opposed to accusatory questions posed by third persons. Silence in the face of non-official accusations became admissible.

The law continued to exclude defendant's failure to come forward when the accused knew that he was the target of a criminal investigation.¹⁶

Limiting the *Mallory* exclusionary rule to situations in which an agent of the state is propounding the questions has arisen in other cases. *Roebuck v. State* approved testimony coming from a victim's mother in a child molestation case concerning the defendant's failure to deny the allegations when she confronted him with them.¹⁷

A defendant's knowledge of whether he is the subject of police suspicions appears to matter. In *Glidwell v. State*, the court found no error in allowing the prosecution to comment in its opening statement that the defendant never called the police about the victim because he had killed her. The *Glidwell* court opined that because these references were to conduct around the time of the victim's disappearance, rather than once the defendant became the target of a police investigation, *Mallory* was not offended.¹⁸

What about timing? In another case, the state cross-examined the defendant in a sex crime trial about why he did not tell authorities about the victim's supposedly provocative conduct. This fell outside of *Mallory* as pertaining to the defendant's interpretations of the victim's

actions prior to the time of the offenses in question and “not at the situs of the crimes.”¹⁹

A particularly curious decision is *Edwards v. State*. Federal precedent is clear in authorizing the use of pre-arrest silence for impeachment purposes. The only split in federal circuits appears on the issue of the potential substantive effect of the silence when proof of that silence comes in during the prosecution’s case-in-chief. The issue of substantive effect does not appear much in the many federal cases where pre-arrest silence is used for impeachment of the accused. *Edwards* states the counter-positive. It expresses confidence in evidence of silence for Georgia courts so long as no prosecutor uses it to impeach a defendant. In *Edwards*, comment on pre-arrest silence did not require reversal where the prosecutor brought it up, but did not use the silence to directly impeach or confront the accused with it.²⁰

The Enigmatic Case of Maynard

A recent appellate decision illustrates the difficulty in applying these varied Georgia doctrines. In *Maynard v. State* a former police officer’s conviction for child molestation was reversed due to the introduction of his pre-arrest silence. Central to the opinion was a telephone call made to Maynard by a close friend. This occurred after the victim made her allegations. The conversation was precipitated by Maynard’s wife, who contacted this friend, a fellow law enforcement officer, concerned about the defendant’s whereabouts.²¹

At trial, the state in *Maynard* introduced testimony from the friend, who maintained that the call was made in a personal and unofficial capacity. Critically, the friend testified that Maynard never denied the allegations during their dialogue. When Maynard took the stand, he was cross-examined about his failure to deny the accusations to his friend. The defendant was convicted.²²

In reversing, the *Maynard* court appears to have bypassed numerous post-*Mallory* Georgia Court of Appeals cases. While doing so, the *Maynard* opinion does not contain any analysis or guidance as to the telephone call itself. Maynard’s friend was not calling as part of an investigation and the communication was initiated by Maynard’s wife. Given these facts, could such a call actually constitute “questioning by an agent of the state?” If not, *Roebuck* authorizes admission of the testimony. *Maynard* sheds little light on the vital distinction between official interrogation versus a call from a friend and *Roebuck* is not mentioned in the opinion.

If the defendant in *Maynard* is retried, the superior court may be confronted with these factors as well as the *Edwards* decision. If so, the issue of whether the defendant’s pre-arrest silence might be admissible as long as the defendant himself is not directly confronted with it, and the corollary question of comment upon pre-arrest silence, might well arise. *Edwards* is not cited in the appellate decision in *Maynard*.

Evasion Versus Flight: You Say Tomato, I Say...

Considering *Mallory* and its progeny, a cautious lawyer might believe that introducing evidence of a defendant’s flight would violate Georgia’s appellate pronouncements. After all, flight, like failing to turn oneself in, would represent a defendant’s willful avoidance of legal consequences.

The difference is more than semantic for Georgia’s appellate courts. In *Renner v. State* the Georgia Supreme Court held that evidence of a criminal defendant’s flight from the scene of an offense may be introduced as evidence of guilt. A significant nuance of *Renner* is that, although evidence of flight may be admitted and argued, it is error for the trial court to charge the jury on the issue.²³ The theory here is that providing the jury with instructions on flight will risk causing that evidence to be treated “in a different manner from other evidence in the case.”²⁴

So when does mere avoidance become flight? Flight evidence is readily received. In *Denson v. State*, for example, evidence of guilt was properly imputed from the actions of an arson defendant who fled from a detective seeking to pick him up as a suspect, even though the defendant’s actions did not appear to be a pell-mell retreat from the scene of the offense.²⁵ Presumably, then, it helps a defendant if he is aware of charges and simply lays low.

Underscoring the need for a defendant to be aware of charges against him in order for the defense argument to prevail is the decision in *Moore v. State*. In that case, a murder suspect’s “lack of interaction with [the victim’s] family after the shooting did not bear in any way on [the defendant’s] pre-arrest silence, but . . . the fact he left town immediately after the killing and was not present to interact with [the victim’s] family.” The court, therefore, classified his departure as flight.²⁶

Cases like *Denson* and *Moore* force counsel to consider where, exactly, the line between avoidance and flight truly exists. There is a need to sharply distinguish opinions involving flight from a scene or from an officer (admissible) versus opposing decisions which disallow proof of an accused’s reticence to volunteer himself (inadmissible). *Pearson v. State*, where the Georgia Supreme Court attempted to differentiate between admissible flight “from the scene” and inadmissible “failure to come forward voluntarily,” provides a restatement of the seemingly antipodal holdings of these two lines of cases.²⁷

Actions by an accused beyond flight can sometimes be appropriately classed as an admission of guilt by conduct. Attempts to threaten a witness fall into this category.²⁸ So does an attempt to escape custody. For example, in *Smith v. State*, the court authorized the admission of the defendant’s escape from jail three months after his arrest on the charges.²⁹

The Federal Approach

Most federal cases have dealt with face-to-face accusations of crime against a suspect. Federal courts adopt a two-step test for introduction of adoptive admissions. First, the statement by an accusing person must be such that an innocent defendant would normally be induced to respond. Secondly, there must be sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced to the statement.³⁰

Generally speaking, federal practice involves a jury instruction if evidence of an adoptive admission is introduced.³¹ In fact, one federal opinion indicates that “normal procedure would dictate issuance of instructions to the jury.”³² As stated in our section, “Constitutional Concerns,” *supra*, there is a split in federal authority as to the evidentiary force of pre-arrest silence proof in criminal cases, with some circuits allowing its introduction for impeachment only and others also providing for its presentation as substantive evidence.³³

Federal courts approve of the introduction against a defendant of evidence of his resistance of arrest or flight “to demonstrate consciousness of guilt and thereby guilt.”³⁴ Apparently absent from the federal analysis is the Georgia distinction between flight and avoidance. Exemplary is *U.S. v. Kennard*, in which detailed evidence of the defendant’s “evading authorities” after his indictment was held to be admissible as proof of his guilt.³⁵

Another salient difference between Georgia and federal practice is the federal court’s utilization of a jury instruction on the issue of flight.³⁶ This, in part, would seem to emanate from the overarching federal judicial policy that the trial court “has the duty to instruct the jury on all issues raised during trial.”³⁷ With regard to flight, one court specifically commented that providing the flight instruction “correctly cautioned the jury that it was up to them to determine whether the evidence proved flight and the significance, if any, to be accorded such a determination.”³⁸

Conclusions And a Length of Twine

A cynical observer might pose questions akin to those of the hapless Elwood where it comes to some of Georgia’s appellate decisions. If the officer’s presence is critical to the analysis—that is, if no adoptive admission can be manufactured against a defendant when an officer is present during the time some bystander accuses a defendant—does it matter how many feet he or she is from a defendant at the time the accusation is leveled?³⁹ What if the deputy’s back is turned? How about a defendant who is under police suspicion, but does not know it? Does that render his departure from the county where a crime occurred “flight,” making the departure admissible evidence against him? And what about jury charges? Is there an implicit assumption in Georgia that federal juries can comprehend instructions on these issues while Georgia state juries cannot?

Some Georgia decisions seem to invite, rather than discourage these sorts of inquiries. Perhaps the state legislature and our courts will reexamine the issue and develop a more functional rule that will allow pre-*Miranda* silence in the face of accusations to be admitted. Consideration might also be given to treating evasion as tantamount to flight. Such rule changes would pass constitutional muster and would be far more functional than the current regime. Providing reasonable jury instructions on these issues would ensure, rather than discourage, their appropriate consideration and application.

In order to successfully negotiate the mythological labyrinth and slay the powerful monster which it housed, the fabled hero Theseus utilized a ball of thread that was given to him by princess Adriane, the daughter of its curator, King Minos. In this article, the authors have attempted to assist Georgia lawyers in plotting a course through a maze of case law that while perhaps not as dire as Daedalus’s creation could, intellectually at least, prove just as daunting.

Endnotes

¹ In Greek Mythology, Daedalus was the designer of the elaborate maze which housed the feared, homicidal creature, the Minotaur.

² *Raffel v. United States*, 271 U.S. 494, 496, 46 S. Ct. 566, 70 L.Ed 1054 (1926).

³ Federal Rule of Evidence 801(d) (2) (B).

⁴ See *United States v. Jenkins*, 779 F.2d 606, 612-3 (11th Cir. 1986).

⁵ *Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).

⁶ *Fletcher v. Weir*, 455 U.S. 603, 607, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982).

⁷ *Doyle v. Ohio*, 426 U.S. 610, 619-20, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976). See also *Anderson v. Charles*, 447 U.S. 404, 407-408, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980), *rehearing denied* (approving of *Doyle*, but holding that it does not apply to impeachment via inquiries into inconsistent statement).

⁸ *Jenkins v. Anderson*, 447 U.S. at 236, n.2.

⁹ *Prevatte v. French*, 459 F. Supp. 2d 1305, 1372, n.33 (N.D. Ga. 2006).

¹⁰ O.C.G.A. § 24-3-36.

¹¹ *Mallory v. State*, 261 Ga. 625, 629-30, 409 S.E.2d 839 (1991).

¹² *Mallory*, 261 Ga. at 630.

¹³ *Jarrett v. State*, 265 Ga. 28, 28-9, 453 S.E.2d 461 (1995).

¹⁴ *Wallace v. State*, 272 Ga. 501, 683-4, 530 S.E.2d 721 (2000), *reconsideration denied*.

¹⁵ *Bruce v. State*, 268 Ga. App. 677, 682-3, 603 S.E.2d 33 (2004), *cert. denied*.

¹⁶ *Morrison v. State*, 251 Ga. App. 161, 163-5, 554 S.E.2d 190 (2001).

¹⁷ *Roebuck v. State*, 261 Ga. App. 679, 683-4, 583 S.E.2d 523 (2003), *cert. denied*.

¹⁸ *Glidewell v. State*, 279 Ga. App. 114, 123-4, 630 S.E.2d 621 (2006), *cert. denied*.

¹⁹ *Miller v. State*, 228 Ga. App. 754, 755-6, 492 S.E.2d 734 (1997).

²⁰ *Edwards v. State*, 219 Ga. App. 239, 241-2, 464 S.E.2d 851 (1995), *cert. dismissed*.

²¹ *Maynard v. State*, 2006 Ga. App. LEXIS 1483 (2006).

²² *Maynard v. State*, 2006 Ga. App. LEXIS 1483 (2006).

²³ *Renner v. State*, 260 Ga. 515, 517-8, 397 S.E.2d 683 (1990).

²⁴ *Hall v. State*, 261 Ga. App. 64, 68, n.12, 581 S.E.2d 695 (2003), *cert. denied*.

²⁵ *Denson v. State*, 259 Ga. App. 342, 344-5, 577 S.E.2d 29 (2003). See also *Parker v. State*, 232 Ga. App. 609, 611, 502 S.E.2d 310 (1998).

²⁶ *Moore v. State*, 278 Ga. 397, 399, 603 S.E.2d 228 (2004).

²⁷ *Pearson v. State*, 277 Ga. 813, 817, 596 S.E.2d 582 (2004).

²⁸ *McCoy v. State*, 273 Ga. 568, 570-1, 544 S.E.2d 709 (2001).

²⁹ *Smith v. State*, 277 Ga. 508, 591 S.E.2d 805 (2004).

³⁰ *U.S. v. Joshi*, 896 F.2d 1303, 1311-2 (11th Cir. 1990), *cert. denied*.

³¹ *U.S. v. Carter*, 760 F.2d 1568, 1579-80 (11th Cir. 1985).

³² *U.S. v. Lemonakis*, 485 F.2d 941, 949 (D.C. Cir. 1973), *cert. denied*.

³³ *U.S. v. Frazier*, 394 F.3d 612, 619-20 (8th Cir. 2004), *cert. denied*.

³⁴ *Ventura v. Atty. Gen.*, 419 F.3d 1269, 1290 (11th Cir. 2005); *U.S. v. Blakey*, 960 F.2d 996, 1001 (11th Cir. 1992).

³⁵ *U.S. v. Kennard*, 472 F.3d 851 (11th Cir. 2006) (“People, including jurors realize that “[t]he wicked flee when no man pursueth,” Proverbs 28:1 (KJV), they really flee when law enforcement is looking for them.”).

³⁶ *U.S. v. Blakey*, 960 F.2d 996, 1001 (11th Cir. 1992); *U.S. v. Wright*, 392 F.3d 1269, 1277-8 (11th Cir. 2004), *cert. denied*. See also *U.S. v. Simmerer*, 156 Fed. Appx. 124, 127 (11th Cir. 2005), *cert. denied*, quoting *U.S. v. Borders*, 693 F.2d 1318, 1327 (11th Cir. 1982), *cert. denied* (“[W]e have consistently approved the inclusion of a jury instruction on flight”).

³⁷ See *United States v. Blackburn*, 165 Fed. Appx. 721, 725 (11th Cir. 2006) quoting *Walker v. U.S.*, 301 F.2d 94, 98 (5th Cir. 1962).

³⁸ *U.S. v. Borders*, 693 F.2d 1318, 1328 (11th Cir. 1982), *cert. denied*.

³⁹ Significantly, *Jarrett* held that if a bystander’s accusatory statement is made in the presence of a law enforcement officer, the adoption by silence of the statement is inadmissible. This would seem to conflict with *Morrison*, which restricts the Georgia exclusionary rule to official inquiries. *Jarrett* disallowed proof of accusations by a defendant’s nephew at the scene. However, *Morrison* only excludes pre-arrest silence “in the face of accusations by an agent of the State” (emphasis added).