**MERGER PODCAST NOTES**

1. The applicable Code section for merger is O.C.G.A. §16-1-7 which provides:
   1. When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if : (1) One crime is included in the other; or (2) The crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.
2. The appellate courts have attempted to simplify the provisions of the statute by developing the **“required evidence test”** which became law in 2006.
   * 1. *Drinkard v. Walker*, 281 Ga. 211, 215 (2006).
   1. The “required evidence” test has been set forth as follows:
   2. “...the applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”
      1. *Culbreath v. State*, 328 Ga. App. 153, 156 (2014).
   3. “Under the required evidence test, neither offense is included in the other if each statutory provision requires proof of a fact which the other does not. Consequently, when each of two statutes requires proof of an additional fact which the other does not, an acquittal or conviction under one statute does not exempt the defendant from prosecution and punishment under the other, even though the charges are based on a single act.”
      1. *Gipson v. State*, 332 Ga. App. 309, 318-319 (2015), citing *Petro v. State*, 327 Ga. App. 254, 259 (2014).
3. It is important to remember that the doctrine of **merger even applies to a case where the defendant enters a guilty or *nolo contendre* plea**. A defendant does not waive issues of merger merely because he/she enters a guilty plea.
   1. *Andrews v. State*, 328 Ga. App. 344 (2014); *Nazario v. State*, 293 Ga. 480 (2013).
4. **It is ridiculous for us to get these FOLLOWING examples wrong (Just too obvious)**
   1. If there is only one murder victim, there can only be one conviction for murder. **SO:**
      1. **If there is only one dead person, there can only be a conviction for one form of homicide**
         1. **Remember that a “conviction” is a verdict and a written sentence. If there is only one deceased person, only one form of homicide can be sentenced!**
5. If indictment charges both malice murder and felony murder, the felony murder is **“vacated by operation of law”** 
   1. **[***Lucky v. State*, 286 Ga. 478 (2010)]
6. **Felony murder requires proof of the underlying felony to even be a crime!** Therefore, if the indictment charges felony murder and the underlying felony is aggravated assault, you cannot enter a conviction for **that** aggravated assault.
   1. [*Donaldson v. State*, 302 Ga. 671, n. 3 (2017), citing *Carter v. State*, 285 Ga. 394, 399 (2009).]
7. **In that same vein, a defendant charged with Vehicular Homicide 1st Degree cannot be convicted of both the Vehicular Homicide AND the DUI/Reckless Driving/Passing School Bus, etc. underlying traffic offense**
   1. In order to prove Vehicular Homicide 1st Degree, the State must prove that the death occurred while the defendant was DUI, etc. so no conviction can arise out of that underlying misdemeanor
8. **DUI (less safe) and DUI (excessive blood alcohol). Merge or no?**
   1. They merge. Under most normal scenarios, only one conviction for DUI can be had on a single event.
   2. The two offenses merge into the Excessive Blood Alcohol offense: “Because [the defendant’s] ‘conviction based on conduct violating OCGA § 40-6-391(a) [ (5)], as driving with a prohibited blood-alcohol level poses the more serious risk of injury to property or the public,’ we affirm that conviction and reverse [[the defendant’s] conviction under OCGA § 40-6-391(a)(1).”
      1. [*Partridge v. State*, 266 Ga. App. 305 (2004); *Canelas v. State*, 345 Ga. App. 487 (2018)]
   3. **Not applicable to DUI (child endangerment)**—By statute, does not merge with the underlying DUI (§40-6-391(l))
9. As a class of judges, we have routinely gotten merger wrong. For some reason it just does not compute.
10. I want to suggest looking at merger in a different way
    1. The appellate courts have routinely told us that we were not “getting” the ‘required evidence test’ as it has been explained (and explained) in the appellate decisions.
    2. So allow me to try to get you to look at the topic of merger in a different way.
11. The very **definition of merger** begins with the following phrase: **“When the same conduct of an accused…”** (§16-1-7)
    1. So, begin your analysis of a merger issue with the “time” question—were the acts we are examining committed in a single act or transaction **OR** do the facts suggest that more than one act or transaction was involved
       1. If there are two different acts, the offenses do not merge; but
       2. If there was a single act or transaction, you have to look at **the required evidence test** that we will discuss in more detail in a moment
    2. Before you ask the question of how you decide whether it was one transaction or two, let me answer it for you
12. In order to answer the question whether there was a single act or transaction or whether there were separate transactions requires you to answer the question:
    1. **Was there a “deliberate interval” between one crime and the other?**
13. **Examples:**
    1. **If I point a gun at victim and say “give me your wallet” and I take the wallet and flee, that is a single act or transaction** 
       1. **[*Wilson v. State*,** 344 Ga. App. 285, 290 (2018)]
       2. There was continuous action and you cannot honestly say that there was a break in the action. So **no “deliberate interval”** between the aggravated assault and the armed robbery and you have to go forward to the required evidence test. Spoiler alert before we even discuss the required evidence test, **THEY MERGE** 
          1. [***Colbert v. State*,** 345 Ga. App. 554, 558-559 (2018) (“[T]here having been no additional violence used against the victim, it follows that the evidentiary basis for the aggravated assault conviction [in count 16] was ‘used up’ in proving the armed robbery. Merger was required.”)]
    2. **Same scenario—except I take the victim’s wallet, cell phone and his car. How many armed robberies?**
       1. **One.**  If charged in 3 separate armed robbery counts, they would **MERGE**
          1. [*Jernigan v. State*, 333 Ga. App. 339, 342 (2015); *Stephens v. State*, 346 Ga. App. 686 (2018)]
    3. **Same scenario—except after I take the wallet and begin to flee, I look over my shoulder and shoot at victim**
       1. Do you see how the shooting of the weapon could constitute a separate aggravated assault from the one I committed when I first pointed the weapon at victim with intent to rob?
       2. There was a “deliberate interval” between the armed robbery and the shooting that we call aggravated assault. **THOSE OFFENSES WOULD NOT MERGE**
    4. **If I shoot at the victim and miss and then shoot a second time and the victim is shot, that is one aggravated assault.** 
       1. No “deliberate interval” between the two shots. So I have to go to the required evidence test. It is the exact same crime so **MERGER.**
          1. Admittedly, there is a fraction of a second between pulling the trigger the first time and the second time. But that is not a “deliberate interval.”
             1. [*Donaldson v. State*, 302 Ga. 671, 674-675 (2017).]
    5. In ***Williams v. State***, 332 Ga. App. 805, 807 (2015) the defendant pointed a handgun at the victim which the victim pushed away (Aggravated Assault). The defendant struck the victim with the gun and they eventually tussled over the gun. The defendant then shot the victim with that same gun, causing the victim to have a bullet lodged in his spine (Aggravated Battery). Under these facts, the aggravated assault was completed when the gun was pointed at the victim. A new factual scenario then occurred moments later when the gun was used to shoot the victim.
       1. There was a deliberate interval between pointing the gun at the victim’s head and the eventual shooting of the victim.
14. **Where multiple injuries inflicted in a single attack, the facts really matter:**
    1. “When multiple injuries are inflicted on a single victim in quick succession and the defendant is convicted of both aggravated assault and murder, deciding whether there was aggravated assault independent of the fatal assault requires the court to consider “both the order and timing of the assaults.”
       * 1. ***Sears v. State***, 292 Ga. 64, 73 n. 7 (2012).
       1. ***Edwards v. State***, 301 Ga. 822, 828 (2017) (“’[W]here a victim suffers a series of injuries inflicted by a single assailant in rapid succession, each injury does not constitute a separate assault.’ [cits] Separate convictions for the malice murder and aggravated assault of a single victim are authorized, however, where the evidence shows that the defendant committed an aggravated assault independent of the act that caused the victim’s death. [cits] To authorize a separate conviction, there must be a ‘deliberate interval’ separating the infliction of an initial non-fatal injury from the infliction of a subsequent fatal injury. [cit] In the absence of some evidence of a deliberate interval, the aggravated assault conviction must be vacated.”); *Wade v. State*, 304 Ga. 5 (2018).
    2. ***Coleman v. State*,** 286 Ga. 291 (2009) (medical examiner could not say which gunshot wound was fatal or in what order inflicted. **Merger**);
    3. ***White v. State*,** 297 Ga. 218 (2015) (evidence that it took victim a “long time” to fall after being shot before being beaten to death. **NO MERGER**);
    4. ***Drane v. State***, 265 Ga. 255, 260 (1995) (murder and aggravated battery were independent acts and those convictions did not merge where Drane's accomplice fatally shot the victim and moments later, either Drane or the accomplice slashed the victim's throat. **NO MERGER**)
    5. ***Outz v. State*,** 344 Ga. App. 616, 617 (2018) (where defendant struck the victim and knocked out two teeth of the victim and then hit the victim with a wire hanger and doused her with lighter fluid and set her on fire, the aggravated battery **did not merge** with the aggravated assault as the first crime was completed before the second began).
15. **If the defendant points a weapon at the victim in the garage and then forces the victim upstairs at gunpoint, searching for a floor safe. Returned to the garage and then took the victim’s wallet**
    1. the first aggravated assault was committed in the garage, kidnapping in the middle and then armed robbery at the end. **Deliberate intervals**
    2. They would **not merge**! You don’t even reach the required evidence test
       1. [*Thompson v. State*, 314 Ga. App. 469 (2012).]
16. **Consider a case where the victim is killed by receiving 25 stab wounds.**
    1. If all of the stab wounds were inflicted in a single attack, no aggravated assault would survive separately from the felony murder count (or malice murder count)
    2. **BUT**, if the evidence showed that that the defendant inflicted some stab wounds, walked around the apartment stealing things and then came back and stabbed the victim some more, at least one aggravated assault count could be pled and a conviction entered if there was a “deliberate interval” between the first series of stab wounds and the second series of stab wounds
17. **SO WHAT IF NO “DELIBERATE INTERVAL?”**
    1. If there was no “deliberate interval” between the commission of one act and the other, you have necessarily found that a crime was committed during a single act or transaction. Now you proceed with the remainder of §16-1-7.
       1. **Therefore, you refer to the “required evidence test”**
    2. **If the statute which makes one act illegal requires proof of a fact that the other does not, the offenses do not merge—even if the acts are all committed in a single act or transaction**
       1. **Stated another way, if the facts of one are “used up” in the proof of the other, the offenses merge**
18. By the way, this has been the law **since 2006:** 
    1. ***Drinkard v. Walker*, 281 Ga. 211, 215 (2006).**
    2. And this “required evidence test” is our appellate courts trying to help trial courts identify and apply merger
19. **Examples:**
    1. **Armed robbery where the defendant shoots and kills the victim during the convenience store robbery**.
       1. Malice murder has an element that must be proven (death of the victim) that armed robbery does not, and armed robbery has an element (taking of property) that malice murder does not.
          1. [ *Dixon v. State*, 302 Ga. 691, 698 (2017), citing *Culpepper v. State*, 289 Ga. 736, 739 (2011).]
       2. Even If you find that these acts occurred in a single transaction or occurrence, these offenses **DO NOT MERGE** because, under “required evidence test,” each crime requires proof of at least one element that the other does not
          1. **Ensure you compare the crimes “both ways” under the required evidence test.**
    2. **If defendant points weapon at victim and takes his cell phone**
       1. All of the elements of aggravated assault are “used up” in proving the armed robbery.
          1. If this was all one act or transaction, the offenses merge under the “required evidence test”
       2. **Compare: Defendant uses weapon, shoots the victim and takes his wallet. He flees and then comes back and shoots victim again because victim was still living.**
          1. **No merger** because there was a “deliberate interval” between the completion of the armed robbery and the “second” aggravated assault. We really do not ever reach the required evidence test because the crimes were not committed in a “single act or transaction”
20. **VARIOUS CRIME-SPECIFIC EXAMPLES:**
    1. If the defendant is charged with aggravated assault and attempted kidnapping in a single transaction, the offenses do not merge.
       1. “[T]o prove the aggravated assault charge as indicted, the State was required to show that Carpenter used a deadly weapon to place the victim in reasonable apprehension of receiving a violent injury. [cits] To prove the attempted kidnapping charge, the State was required to show that Carpenter took a substantial step toward abducting the victim without lawful authority and holding her against her will. [cits] ‘Because each of these crimes was established by proof of an additional fact not at issue in the other crime, they do not merge.’”
          1. ***Carpenter v. State*, 343 Ga. App. 355, 358-359 (2017).**
    2. The offenses of child molestation and cruelty to children which occurred at the same time and location **do not merge** because the offense of child molestation requires proof that the defendant committed sexual acts with the intent to arouse his sexual desires but the offense of cruelty to children in the first degree requires proof that the defendant maliciously caused the child cruel or excessive physical or mental pain. Each crime requires proof of elements that the other does not require. Therefore, they do not merge.
       1. ***Womac v. State*, 302 Ga. 681, 685 (2017)**
    3. The offenses of aggravated assault and terroristic threats **do not merge**.
       1. “To prove the two counts of aggravated assault, the State had to show that Petro committed an assault upon his girlfriend and her ex-boyfriend with the knife, an object, which when used offensively against another, is likely to result in serious bodily injury...To prove the two counts of terroristic threats, the State had to show that Petro threatened to murder his girlfriend and her ex-boyfriend, with the purpose of terrorizing them. As such, the crimes of aggravated assault and terroristic threats required the State to prove as least one fact different from the other and no merger occurred.”
          1. [*Petro v. State*, 327 Ga. App. 254 (2014)]
       2. The offenses of rape, incest and child molestation do not merge even it they all occurred within a single incident.
          1. [*Dew v. State*, 292 Ga. App. 631, 635 (2008); *Drinkard v. Walker*, 281 Ga. 211, 213 (2006); *Jones v. State*, 333 Ga. App. 786, 800-801 (2015); *Castenda v. State*, 315 Ga. App. 723 (2012)]
21. CONSIDER CASE OF ***Oliphant v. State***, 295 Ga. 597 (2014). (THIS WOULD BE A GREAT LAW SCHOOL EXAM QUESTION FOR THE TOPIC OF MERGER) (But you need to follow the facts for it to make sense)
    1. In *Oliphant,* the defendant was with a group of men and approached one victim named Pedro in a trailer park. They grabbed him and demanded his money while some of the group beat him and others held a gun to his temple and took his cell phone. Then one of the group thrust a gun in Pedro’s mouth, demanding his money. Eventually, Pedro’s brother, Jorge, heard the commotion and opened the door to see what was happening. He immediately closed the door but the assailants then shot Pedro and stople and then shot into the trailer where Jorge was standing, hitting Jorge. A bullet fired into the trailer killed Jorge’s wife. His child was also shot but survived. The assailants ran away, but at least one subsequently returned and shot Pedro again. At trial, Oliphant was convicted on all counts by the jury.

Oliphant had been charged with malice murder and felony murder as to Jorge’s wife.

* 1. “When jury returns guilty verdicts on malice and felony murder as to same victim, felony murder conviction is “surplusage” and stands vacated by operation of law.”
     1. *Womac v. State*, 302 Ga. 681, 685 (2017)
  2. Likewise, Oliphant was charged with aggravated assault for shooting at Jorge’s wife and he was also charged with her murder. **When a shooting results in the death of the victim of the aggravated assault, the aggravated assault merges into the murder count.**7 This is also a hard and fast rule that we discussed under the “softball” examples we should never get wrong.
  3. Oliphant was charged with armed robbery of Pedro and three counts of aggravated assault in which Pedro was the listed victim.
     1. The aggravated assault that alleged that the defendant was guilty of the offense by assaulting Pedro with a handgun while having the intent to rob him clearly merged with the armed robbery count. It was a single transaction and all of the facts associated with the aggravated assault were “used up” by the armed robbery count.
     2. One of the other aggravated assault counts alleged that the defendant was guilty of aggravated assault by putting the handgun in Pedro’s mouth. A second aggravated assault count alleged that the defendant was guilty of aggravated assault by shooting Pedro.
     3. The aggravated assault charged because the defendant put a gun in Pedro’s mouth also merged with the armed robbery of Pedro.. Those counts merged because it was an assault with a handgun with intent to rob Pedro–placing the gun in someone’s mouth is not a distinct offense from using a handgun and pointing it at another body part of the victim if the underlying intent is to rob the victim.
     4. However, the same is not true with the charge of aggravated assault alleging that the defendants were guilty of aggravated assault by shooting Pedro.
        1. The facts showed that after the armed robbery was completed, the defendant fled but then returned to shoot Pedro again. The armed robbery was completed at that point in time and shooting the victim again was a distinct act, separate and apart from the armed robbery. Under these facts, the last aggravated assault was a separate and distinct crime from the armed robbery. It was a separate act or occurrence because there was a deliberate interval between the armed robbery and the shooting of Pedro.

1. Consider the cases of ***Liddy v. State***, 335 Ga. App. 517, 520-521 (2016) and ***Mobley v. State***, 345 Ga. App. 393, 394 (2018).
   1. In *Liddy*, a defendant is being escorted by two police officers, with one officer on each of the defendant’s arms. The defendant violently attempts to jerk away from the officers, injuring one of the officers. One count of obstruction or two counts?
      1. The Court of Appeals found that the defendant could not be sentenced for two counts of felony obstruction of an officer. They reasoned that the single act of jerking away from the custody of the two officers constituted a single criminal act.
   2. In *Mobley*, following a car chase in which the defendant’s vehicle was overturned, the defendant fired a handgun at one officer approaching the overturned vehicle from the shoulder of the road and then fired the gun a second time through the back window of the car at a second officer approaching from the middle of the roadway.
      1. Under those facts, the Court of Appeals found that those offenses did not merge. “[The defendant’s] decision to shoot his gun at two different officers, in two different moments in time, and from two different vantage points, does not amount to a single act.”
2. In ***Coates v. State***, 304 Ga. 349 (2018), a defendant was charged with a drug offense and was also found guilty of 4 counts of possession of firearm by a convicted felon. The Court of Appeals affirmed but the Supreme Court reversed and found that the number of weapons that a convicted felon has in his possession is irrelevant. Our friend, Judge Kelly Brooks, in Coffee County was reversed in that decision.
3. In ***Donaldson v. State***, 302 Ga. 671, 675 (2017), the defendant was charged with possession of a firearm during commission of a crime during a crime spree involving one victim. If the crimes were committed “during the course of one continuous crime spree, a defendant may only be convicted once for possession of a firearm during the commission of a crime as to each individual victim.” The offense of possession of a firearm during commission of a crime is governed by the number of victims, not the number of crimes charged as part of the transaction.
   1. *Donaldson v. State*, 302 Ga. 671, 675 (2017), citing *Abdullah v. State*, 284 Ga. 399, 401 (2008) and *Stovall v. State*, 287 Ga. 415, 421 (2010); *Carpenter v. State*, 343 Ga. App. 355, 359 (2017).
4. **WRAP UP ON MERGER**
   1. Start with determination whether single act or transaction.
      1. Was there a “deliberate interval” between acts?
         1. If yes, no merger. Do not even initiate the “required evidence test”
         2. If no, refer to “required evidence test”
   2. “Required evidence test:” If single act or transaction, does proof of one crime require proof of an element not contained within the other crime?
      1. If yes, no merger
      2. If no, merger
5. **REMEMBER—GUILTY PLEA DOES NOT ELIMINATE ISSUE OF MERGER.**
   1. *Andrews v. State*, 328 Ga. App. 344 (2014)
6. **MERGER CANNOT BE WAIVED** 
   1. [***Nazario v. State*,** 293 Ga. 480 (2013)]