
UNDISCLOSED SEASON 2: THE STATE VS. JOEY WATKINS

EPISODE 18: STANDBY COUNSEL
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Rabia Chaudry: You have all often heard me say that for a wrongful conviction to take place, *everything* has to go wrong for a defendant. The police had to have gotten it wrong, the prosecution presented a false story to the jury, and the defense counsel failed, well, in providing an actual defense.

Now many of you have wondered about Joey's attorney – or in this case, *attorneys*. So today, we explore the saga behind who represented him and how it all went down.

Hi, and welcome to Episode 18 of *Undisclosed, the State vs. Joey Watkins*. My name is Rabia Chaudry. I'm an attorney and a fellow at the US Institute of Peace, and I'm joined, as always, with my colleagues Susan Simpson and Colin Miller.

Susan Simpson: I'm Susan Simpson. I'm an attorney with the Volkov Law Group, and I blog at *View from LL2.com*.

Colin Miller: I'm Colin Miller. I'm an associate Dean and professor at the University of South Carolina School of Law, and I blog at Evidence Prof blog.

[03:10]

Man: *Stop snooping. Tell me about the walking.*

Woman: *Okay. We have a potential wrongful death action. Sounds fun, huh?*

Man: *Potential? Is he dead or not?*

Woman: *There is also this.*

Man: *Mabel Howard.*

Woman: *She was a school bus driver until the private school, they just let her go.*

Man: *Wrongful termination of a school bus driver. That's our case?*

Woman: *Can you please just trust me?*

[03:31]

Colin Miller: That's a clip from the unaired pilot for the TV show *Rex Is Not Your Lawyer*. The plot of this series was that an attorney who was once a top litigator becomes so crippled by panic attacks that he can no longer appear in the courtroom, and starts coaching his clients to represent themselves. In the pilot episode, less than a week before the trial on Mabel Howard's wrongful termination lawsuit, her attorney, Rex, asked her to sign an agreement with terms such as, "Rex is not your lawyer. You are your lawyer. And in a situation where you feel malpractice has occurred, you will have no one to sue but yourself." Of course, Mabel signs the agreement. And in typical Hollywood fashion, represents herself all the way to \$500,000 in punitive damages.

In reality, there's almost no way that a person without legal training could get up to speed on the eve of trial and represent herself so successfully. Indeed, even an experienced lawyer would have difficulty being given primary responsibility on a complex case just weeks before trial.

And yet, in the murder prosecution of Joey Watkins, that's exactly what happened. Except that in *his* case, the chain resulted in a man named Rex becoming his attorney.

Rabia Chaudry: To understand what happened, we need to start with another television attorney.

[*Matlock* theme plays]

Rabia Chaudry: That's from the opening theme to the TV show *Matlock*. The show aired from 1986 to 1995, featured Andy Griffith as the renowned, folksy, and popular – though cantankerous – Georgia attorney Ben Matlock.

Matlock primarily represented clients charged with murder, and almost always won, with cases typically ending with Matlock revealing the *real* murderer while questioning him on the witness stand. Popular wisdom has long held that Ben Matlock was based upon real-life lawyer Bobby Lee Cook.

Cook's office is Summerville, just north of Rome, and with his courtroom reputation and Seersucker suits, he is an iconic figure in northwest Georgia. He's also a big name in the southern legal community, and is known as the dean of Georgia criminal defense attorneys. It's thus unsurprising that soon after Joey was arrested, his family turned to Bobby Lee Cook for assistance. Specifically, Joey's grandparents first contacted Cook, leading to a meeting where Joey's family paid the firm a \$30,000 retainer, with the understanding that Cook would represent Joey at trial.

Susan Simpson: You've heard us mention another attorney before – Bill O'Dell. He *was* at Joey's trial and was Joey's attorney at one point, but he wasn't with Cook's firm. The Watkins had used Bill O'Dell before, and in fact, he was one of the first attorneys they went to when fingers started getting pointed at Joey after Isaac's murder.

O'Dell is the attorney that was with Joey during his interview back in February of 2000, when Mike Key from the Rome Police talked to him. But at trial, O'Dell was actually *Mark's* lead counsel. Joey's lead attorney was Rex Abernathy, from the Cook & Connolly law firm. Both Abernathy and O'Dell were present at both trials, but Abernathy was the lead counsel for Joey while O'Dell ended up taking the lead on Mark. Here's Clare explaining how that situation arose:

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Clare Gilbert: *So I think that when it became clear that this was really the real deal, and they were going after Joey, the family hired the best lawyer they could find, 'Matlock,' who didn't end up taking the case. I mean, his firm took the case but passed it off first to his partner, and then to Rex Abernathy. I don't know that he passed it off, but that's who took the case. Let's assign the case in the firm, and... O'Dell was to-- Was, as a special favor to the local judge, was acting as a public defender.*

Susan Simpson: *Oh!*

Clare Gilbert: *He had-- Was taking public defender cases, and Free was a public defender client. So, that is how O'Dell got Free's case rather than Watkins.*

[07:26]

Colin Miller:

Yeah, so let's start with some history on Bobby Lee Cook:

He was born in 1927, up in Lyerly, in the northwest corner of Georgia. Cook went to college at the University of Alabama, and then graduated from Vanderbilt University Law School in 1949. That same year, Cook was defending a Dade County client who was charged with killing a man who had called him a, quote: "Goddamn son of a bitch". In his opening statement, Cook asked the jury, what would you have done if someone called you a 'goddamn son of a bitch'? In response, an older mountain man at the back of the jury whispered just loud enough for the other jurors to hear, "Why, I would have killed the son of a bitch". Cook looked at the other jurors, nodded, and sat down. The next day, the jury acquitted his client.

This was the start of a long, successful career for Cook that continues to this day. In the beginning, Cook gained trial experience through representing bootleggers and moonshiners in northwest Georgia, and over the decades he has tried all kinds of murder cases. In one Rome case, his client had gone to the house of a rival and killed him with a shot through the back of the head, which would seem like a clear case of murder and probably a life sentence, but the jury returned a manslaughter verdict that resulted in the defendant being released in under two years.

Rabia Chaudry:

Bobby Lee Cook estimates that he has an 80% acquittal rate in murder trials, and a 90% acquittal rate overall. Much of his success has come as the head of a law firm that he co-founded with Arnold Palmer back in 1959. His clientele has been diverse. In 1982, he represented Jim Williams, who was charged with murder in connection with a 1981 shooting death of his assistant, Danny Lewis Hansford, in his Savannah home. You might be familiar with this case from the book *Midnight In The Garden Of Good And Evil*, or Clint Eastwood's movie of the same name.

At the trial, Cook presented a theory of self-defense, claiming that Hansford had rampaged through Williams' house a month before his death, firing a bullet into the floor of an upper bedroom. District Attorney Spencer Lawton countered that the bullet hole was an old one and that Williams had faked the prior incident to lay the groundwork for a claim of self-defense. As support, Lawton called arresting officer Corporal John Anderson and had him testify, quote: "I couldn't determine if that was a fresh bullet hole or an old one."

As a result, Williams was convicted. Later, however, an anonymous source at the DA's office sent Cook an envelope containing Corporal Anderson's police report. In pertinent part it stated, "We did find a fresh bullet hole in the floor." This, of course, led not only to a new trial, but a *series* of new trials that finally ended with an acquittal almost a *decade* later.

Here is Jan Skutch, a senior reporter of the *Savannah Morning News* describing his impressions of Williams' trials and tribulations:

[09:58]

Jan Skutch:

My name is Jan Skutch. I covered the Jim Williams saga, from the morning he killed the Hansford victim until the day he died of pneumonia, reported the coroner. It took us through four trials, two murder convictions, which were reversed by the Georgia Supreme Court, one mistrial. All three of those were in Savannah, and then a trial in Augusta with Judge Jim Head, where a jury acquitted him.

Over almost ten-year period. I was a court order back then, and exposed me to some of the best lawyering I've seen in my entire career, including John Ray Jones, who was then one of the best lawyers in Savannah, and Bobby Lee Cook, who of course is a legend in Georgia legal circles. Through Sonny Soliver, and some additional lawyers out of Atlanta.

Jim was a complex sort of guy. He'd be very affable as could be, but he had a bit of a short fuse. The boy had a temper. And occasionally, or on at least three occasions, he called from

the jail to begin chewing me out for something I'd written or not written. And I'd have to say, "Well Jim, you can't talk to me like that. 'Cause I don't get paid for that." And he was fine.

I always thought the case was overcharged, it was no more than voluntary manslaughter. And in effect the time he spent in jail would have been probably what it would have spent had he been convicted when it-- Voluntary manslaughter. It exposed-- It exposed some of the best and the worst of the court system, at times it was a mini soap opera. Evidence kept changing when Sonny Soliver and Mr Samuel from Atlanta got into the case. I think the second trial on, witnesses kept showing up that had not been there the trial before. Probably it ended just about the way it should have.

[13:41]

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Susan Simpson:

Cook is well known for having a talent for subverting the expectations of a case, and having a jury eating out of the palm of his hand. In 1979, the government seized costal property owned by the Rockefellers and Carnegies, as part of a land compensation procedure, and offered them only nickels on the dollar. The expectation, of course, was that a Georgia jury wouldn't take too much of a shining to what we'd call the 1% these days. Cook, however, reframed the case for the jurors, and asked them, "If the government can do this to the rich and powerful, imagine what they could do to *you*." In the end, the jury awarded \$5.5 million to the families, which was much more than what the government had offered.

Sometimes, Bobby Lee Cook's clients weren't northerners, but hometown heroes. Back in the '50s, Bobby Hop was a star running back for Chattanooga Central High School. And he went on to help head Auburn into the national championship, and later had a brief career in the NFL. Decades later, in 1988, he was arrested for the 1957 murder of Don Hudson, a Chattanooga bootlegger, and it led to one of the first cold case trials in the country. Even in the days before court TV, this case received a *lot* of national attention.

Here's Cook explaining his take on the case in the documentary, *A Matter of Conscience: Redemption of a Hometown Hero*, Bobby Hop:

[15:01]

Bobby Lee Cook:

I was fascinated by your revelation as to how it happened. And I was intrigued by the proposition that here is a case that has existed for roughly 30 years. And how it came to light, with this fella, Godwin. I had never, in my career at that time, nor in my career now, have I ever heard of or dealt with a case that lingered in obscurity for that long, you know? That's a quaint proposition.

Colin Miller:

Back in 1957, the death of Don Hudson looked a lot like the death of Isaac Dawkins. An eyewitness, Thomas Smith, said he saw a black car driving real slow down Bell Street. Then, according to Smith,

Hudson's car came up behind the black car, then alongside of him, you know? Real slow. And then all of a sudden, Hudson's car accelerated. Just as it got up in my view, I heard a gunshot.

Smith, thereafter, heard a crash and eventually came upon Hudson's car, crashed into a tree. Hudson had a fatal bullet wound on the right side of his head. According to a 1957 story in the *Chattanooga Times*, evidence has been raised that the shooting could have been over a woman.

Despite this evidence, though, no arrest was made for 31 years. Then, however, in 1988, a preacher named Joseph Godwin came forward and said that Hop confessed to him two days after Hudson's death, that he had killed him.

Hop was later arrested and prosecuted for murder, and Cook decided to proffer a claim of self-defense and betrayed the conventional wisdom by having Hop testify in his own defense.

Now, on paper, Hop's claim of self-defense doesn't sound great. He claimed he was innocently driving when Hudson drove up next to him and pointed a pistol at him, prompting Hop to grab a shotgun from inside his car and fatally shooting Hudson. Nonetheless, the defense worked. The jury deadlocked, with ten jurors in favor of acquittal, and two in favor of conviction. And thereafter, Hop was never retried.

[17:14]

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Rabia Chaudry:

Bobby Lee Cook also trail-blazed the 'battered wife defense', *before* the battered wife defense was even a thing. In 1954, he defended a woman who killed her husband in his sleep. Here's the *Rome News Tribune* article from after the trial:

An all-male jury today acquitted a 25-year-old Walker County housewife, mother of four children, of a murder charge in the October 29th shotgun slaying of her husband. The jury deliberated 33 minutes before returning its verdict of innocence, freeing Mrs Rosie Louise Brown, who was charged with having shot her husband, William Dial Brown, 30, to death as he slept on a pallet at the farm home. Mrs Brown had spent 50 minutes on the stand yesterday as the only defense witness testified that after praying to the Lord for guidance, she loaded a shotgun and killed her husband. Her two-year-old daughter played in her lap as she testified.

But Cook wasn't *always* successful. From the summer of 1979 to the spring of 1981, at least 28 African-American children, adolescents, and adults in Atlanta were killed. Many have dubbed these killings the 'Atlanta Child Murders'. Eventually, Wayne Williams, a 23-year-old Atlanta native, was arrested and charged in connection with these murders.

Cook wasn't Williams' trial counsel but, like Cook in the Hop case, defense counsel made the controversial decision to call his client to the witness stand. In this case, the decision backfired. Here's Don Lemon of CNN talking to the prosecutor of the case:

[18:39]

Don Lemon:

There was a part, during cross-examination, where he had an outburst. And you believe that that was one of the things that convicted him, was this outburst. He talked about it in our interview, and I want to show you how he characterized it and then we'll talk about it.

Wayne Williams:

Right. I was probably my own worst enemy. I was a arrogant bus-headed idiot at the time, and I played right into these people's hands. I could see almost the shock in the jurors' faces if they say my God, is this the same Wayne that was up here yesterday? I could see that.

Colin Miller:

Williams was eventually convicted and given two life sentences. Bobby Lee Cook then came into the picture later when he and Alan Dershowitz formed a group in the early 1990s to look into Williams' conviction.

That investigation led to the discovery of what Cook believed to be many Brady violations in the case, connected to a man named Charles Sanders, who was a member of the Ku Klux Klan. And this evidence included 1) a police memo that referred to Sanders as quote: "The main suspect in the slayings," 2) an alleged wiretap recording of a member of the Sanders family saying, quote, "Let's go out an kill another black kid tonight," and 3) a police report by a University of Georgia veterinarian concluding that dog hairs found on the victim's bodies could only have come from a Siberian Husky or an Alaskan Malamute.

Sanders owned a Siberian Husky, while Williams owned a German Shepherd. At Williams' trial, prosecutors had told jurors that the dog hairs were consistent with those of German Shepherd. But despite these alleged Brady violations, it wasn't enough. The Georgia courts upheld Williams' convictions.

But even on the appellate front, Cook had more wins than losses. His most famous win on appeal came in 1975 when he represented seven men convicted of murdering two Atlanta pathologists. The one witness against his defendants was a woman by the name of Deborah Kid, who testifies that she was with the men, and saw them brutally kill the victims.

At a federal *habeas* proceeding, however, Cook confronted Kid with a check she had written in South Carolina the same day she claimed to be with the men in Atlanta for the murder. Kid claimed the check was a forgery, but Cook responded with handwriting experts. Kid claimed she had backdated the checks. Cook then responded with South Carolina witnesses who said Kid *gave* her the check on the day of the murder. He also presented evidence that Kid was sleeping with the lead detective on the case. Faced with this overwhelming evidence of her deceit, Kid finally broke down on the witness stand and admitted to lying. The police had framed the seven men and Kid had helped seal their fate.

After winning the appeal, Cook gave his most famous statement: "If you can railroad a bad man to prison," says Cook, "You can railroad a good man. That's why we should always vigorously fight for the constitutional rights of even those who are the most despised in our communities."

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Susan Simpson:

Sometimes, the fight was literal. Early in his career, Cook represented a man arrested for moonshining. And when Cook came in with cash to bail out his client, the sheriff refused it, and threatened to kill Cook if he tried to get the man released. Cook put his money on the table, grabbed the jail cell keys, and started walking towards his client when he heard the sheriff cock the pistol. Then a shot rang out, and struck the doorway just above Cook's head.

Later, at trial, Cook asked the sheriff why he hadn't arrested his client's neighbors for moonshining, too. And the sheriff refused to answer. And Cook responded that it was because they had made secret payments to the sheriff. The sheriff then launched a Coke bottle at Cook, and again, narrowly missing. Cook responded by grabbing the sheriff by the collar and throwing him to the ground. According to Cook, "The judge was on the bench and the jury was in the box, watching me whip up on him for several minutes. They *all* knew the sheriff was a tyrant. After a few minutes, the judge cleared his throat and said, "Mr Cook, I think he's had enough." Cook then, allegedly, finished his cross-examination and rested his case. The jury acquitted after deliberating for only a few minutes.

So yeah. That's the man that the Watkins sought out to represent Joey in the fight for his life.

Rabia Chaudry:

But for whatever reason, things didn't work out that way. After Joey's arrest on November 13th 2001, his family reached out to the law firm of Cook & Connolly. Now, as we noted before, Bobby Lee Cook founded his law firm with Arnold Palmer, but by 2001, there had been a change in leadership. The other name partner was now Branch Connolly, who had initially joined the law firm in 1978, around the same time as his wife, Christina Cook Connolly. As you might have guessed, based upon her name, Christina is Bobby Lee Cook's daughter. In one trial, from 1987, Christina Cook Connolly became a topic on cross-examination when Bobby Lee Cook was questioning *Stanley Sutton* in a trial. As the *Rome News Tribune* reported:

There was a humorous moment in the murder and arson trial. After court Wednesday, Cook told his daughter, Chris Cook Connolly, an attorney in the defense team, he was going to 'stick it' to Sutton for calling Mrs Mullins 'hon' and 'darling' during the interview. Thursday, Cook asked Sutton if he always calls women he barely knows 'hon' and 'darling.' 'It's just a habit of mine,' Sutton replied, adding he jokingly calls his male colleagues 'hon' and 'darling.'

Afterward, Cook and Sutton called each other 'hon' and 'darling' several times during court recesses, drawing laughter from courtroom observers. The defense cross-examination of Sutton is scheduled to resume Monday.

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Rabia Chaudry:

As for Branch Connolly, Bobby Lee Cook's business partner and son-in-law, he was born in Dallas, Texas in 1950, and went on to college at Vanderbilt University, and law school at the University of Tennessee. In addition to his work at the firm that became Cook & Connolly, Branch Connolly was an attorney for the Chattanooga Board of Public Education from 1985 to 1989. And city attorney for Summerville Georgia from 1989 to 1999.

Given this experience, you might understand why Cook would have been comfortable having Connolly take the lead on Joey's case. According to an article in *Northwest Georgia News*, Cook described his relationship with Connolly as a close one, with Connolly being, quote, "Like a son to me." Cook considered Connolly to be a very fine lawyer and a fine gentleman.

In the 1980s, they co-represented C H Butcher against bank fraud in a 45-count indictment. The case involved one of the biggest federal banking fraud cases in history. And Butcher's brother had already pleaded guilty for his role in the alleged crime. That crime consisted of the Butcher brother lying to investors and covering up insider loans that led to the bankruptcy of Southern Industrial Banking Corporation, and cost 5,000 uninsured investors more than \$25 million.

Cook, of course, was a showman in the courtroom. The prosecution's expert was a senior executive from a national accounting firm. On cross-examination, Cook asked him whether he had personally reviewed the allegedly fraudulent documents signed by Butcher. The expert answered that he hadn't, but that his team of accountants had, and that quote, "I know each and every one of them and they are the best." Cook then turned to the four accountants at the prosecution table, had them stand up, and asked the expert to introduce each of them to the jury. The expert had to admit that he didn't know *any* of their names. When the four accountants started to sit down, Cook told them to remain standing and instructed the expert, "If you at any point during my cross-examination ever remember any of their names, you stop me and let me know." Then, every few minutes, after a series of questions, Cook paused dramatically and returned attention to the standing accountants. "Have you remembered any of their names yet?"

Colin Miller:

It was another acquittal with Cook as the lead and Connolly as the right-hand man, setting the groundwork for the courtroom theatrics. About 15 years later, the Joey Watkins case was seemingly Connolly's chance to step out of the shadows and into the spotlight.

Branch Connolly was a counsel of record for Joey Watkins shortly after his arrest, and we know he was involved with a case, at least at some level, from documents in the defense file, showing his involvement in pre-trial preparation. Like the notes from Abernathy or O'Dell stating, "I like Branch's suggestion". Or a cover sheet and a fax sent by a secretary at Cook and Connolly to Bill O'Dell saying, "Mr Connolly asked me to fax this draft motion to you".

He is listed under the appearance of counsel for the deposition of Josh Flemister that occurred on January 22nd, 2001, and in fact, Connolly conducted the deposition of Josh, along with Bobby Lee Cook himself. And by way, there's one exchange from that deposition, when Cook was questioning Josh, that suggests that Cook had a longstanding familiarity with Sutton's work as an investigator:

Rabia Chaudry:

Question: And what do you remember the conversation was then?

Answer: Really wasn't much conversation. They changed the subject to the shirt I had on and started taking pictures and stuff.

Question: They took pictures of you?

Answer: They kind of make like, little jokes and stuff, because I had like a crazy shirt on that said something, and they wanted Stanley Sutton to put it on so they could get pictures with him in the shirt.

Question: What did the shirt say?

Answer: From what I remember it said, "I'd rather be masturbating". It's a shirt I bought in the town center.

Question: Well, that would fit Mr Sutton pretty well, wouldn't it?

Answer: I don't know.

Colin Miller:

But Connolly was active in the deposition too, so we know he had learned some things about the case. Connolly was also listed as the attorney for Joey on the pretrial motion for disclosure of electronic surveillance, which was dated February 28th, 2001. And in fact, as late as March of 2001, he was still co-signing on court filings in Joey's case, along with Rex Abernathy.

And then finally, on June 5th, 2001, Connolly received the notice of Joey's trial from the clerk of the Floyd County Superior Court. We used the word 'finally' for a reason: This notice sent 20 days before Joey's trial, was scheduled to start on June 25th, 2001, is the last appearance of Connolly in the case file until Joey's appeal. We're not 100% sure what happened, but at some point between 20 days before Joey's trial and the start of that trial, Connolly stopped handling Joey's case.

[28:42]

Clare Gilbert:

So I think that when it became clear that this was really the real deal, and they were going after Joey, the family hired the best lawyer they could find – Matlock. Who didn't end up taking the case, I mean his firm took the case. He passed it off first to his partner, and then to Rex Abernathy. I don't know that he passed it off, but that's who took the case.

Susan Simpson:

As you can probably tell from Clare's comments, it's not entirely clear what happened, beyond the Watkins hiring Bobby Lee Cook, and then Cook handing the case off to Connolly, and then the case going from Connolly to Rex Abernathy before trial. Although whether it was dumped on Rex Abernathy's lap on the eve of trial, like Abernathy has suggested, or whether it was handed off to him months in advance, as some of the court correspondence might indicate, isn't really clear.

It definitely appears, though, that there was *some* kind of drama associated with this handoff. According to an email written by Joey's father Johnny during the early months of 2001, he had been unsuccessfully trying to get in touch with Cook & Connolly in the run-up to Joey's trial.

This is where Bill O'Dell comes into play. Like we mentioned, O'Dell had been the attorney for the Watkins family on a few prior occasions and, although in 2001 he was appointed a public defender for Joey's co-defendant, Mark Free, even *before* their arrest, O'Dell was talking to both Mark and Joey. After Sutton took over the case and the heat really got turned on Mark and Joey with regular harassment and questioning by the police, O'Dell had convinced Joey and Mark that they could make a lot of money suing the Floyd County Police Department for their harassment. Although things ultimately didn't work out that way. In any event, O'Dell reassured Johnny that Cook and/or Connolly were gearing up for trial, and that there wouldn't be any issues.

Today, Joey doesn't actually remember Connolly being on the case, or doesn't remember talking to him in the lead-up to trial. If the official accounting of events is true, that's pretty disturbing though, because after all, if Connolly *was* the lead attorney on the case until 20 days before trial, and if Joey doesn't even remember Connolly being *on* the case, how much and how good of a job could Connolly have really been doing?

Apparently not a very good one, or at least not a very responsive attorney, because from an email that Joey's father, Johnny, had written a couple years after the conviction, he talked about what he referred to as an 'appeasal' appointment with Branch Connolly in the run-up to Joey's trial.

While Johnny apparently left the meeting appeased, something happened after that on Connolly's end. O'Dell puts it this way: "Branch stepped out of the case about three weeks prior to trial." And at that point, Joey's hot-potato case became Rex Abernathy's responsibility. Although Abernathy had clearly been assisting on the case and was the only attorney to date that had shown up from the Cook & Connolly firm at the pre-trial hearings, he now found himself as the position of lead attorney on Joey's case just a few weeks before trial... Well, apparently.

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Rabia Chaudry:

Abernathy got his college degree from Covenant College, and his law degree from Atlanta's John Marshall Law School in 1996. Obviously that means he only had five years' experience, as opposed to the decades of experience that Cook & Connolly had.

It appears that this was one of the first significant cases where Abernathy was first chair, or in charge of the defense, and he was overwhelmed. Part of this had to do with the fact that his mother was apparently in the hospital and dying as Joey's trial geared up.

But the main factor simply seems to be that the case was dropped into his lap at the last minute. As a result, Abernathy apparently did two things: First, according to Abernathy, he asked for continuance, delaying the start of the trial. Pursuant to Section 17-8-22 of the Georgia Code Annotated:

All applications for continuances are addressed as sound legal discretion of the court. And if not expressly provided for, shall be granted or refused as the ends of justice may require. In all cases, the presiding judges may, in their discretion, admit a counter-showing to a motion for continuance, and after a hearing, may decide whether the motion shall prevail.

Specifically, the Supreme Court of Georgia has held that there's no fixed rule as to the number of days that should, of right, be allowed counsel in a criminal case to prepare the case for trial. But the trial judge in the exercise of his discretion to grant or refuse a continuance, has to consider the facts and circumstances of each case to determine what the ends of justice require.

Now in this case, Judge Matthews found that the facts and circumstances of Joey's case did *not* require a continuance. At least, that's what we've been told. Or Judge Matthews issuing a ruling on a motion. So there's no way for us to assess the arguments that might have been made in this motion, or the conclusions reached by Judge Matthews.

Assuming, though, that there was a proper motion before the judge, did he properly deny it?

Colin Miller:

Unfortunately, there's not a Georgia case that's exactly on point. In both *Cunningham vs. State*, and *Gild vs. State*, the Court of Appeals of Georgia found that trial judges properly exercised their discretion in denying motions for continuances, despite trial counsel only having two weeks to prepare for trial.

But both of those cases were robbery cases and the Court of Appeals specifically noted that each denial was based in large part on the fact that the defendant himself had voluntarily fired his initial counsel and decided on his own to retain new counsel on the eve of trial. By way of contrast, Joey's murder case was much more serious and complicated, and he didn't fire Connolly. In fact, he apparently wasn't even aware that Connolly was working on this case, as Susan noted before.

That said, a 2016 opinion by the Supreme Court of Georgia makes it seem likely that Judge Matthews could have justifiably denied any motion for a continuance. In *Adams vs. State* earlier this year, Carl

Adams was charged with murdering his roommate, and wasn't appointed counsel until 10-14 days before trial. Appointed counsel did not move for a continuance, and Adams was convicted. He later then appealed, claiming he received ineffective assistance of counsel, based upon his trial counsel not requesting a continuance, and here's the court's discussion of the claim:

Susan Simpson:

Adams first argues that lead counsel, who was appointed approximated 10-14 days before trial, should have requested a continuance of trial because two weeks or less is clearly insufficient time for an attorney to properly prepare for a murder trial. Aside from vaguely asserting that trial counsel needed additional time to get up to speed, Adams offers no specifics regarding how counsel's performance at trial would have been enhanced by having more time to prepare.

In light of Adams' failure to identify any particular need for continuance, and the fact that any such request would have been left to the sound discretion of the trial court, Adams cannot establish ineffective assistance of counsel, in counsel's failure to make such a request.

Colin Miller:

Yes, that's nothing conclusive. But it does seem to broadly support the idea that a judge and jury can deny a motion for a continuance even when an attorney takes over a murder case a mere 10-14 days before trial. And if that's true, that seems kind of disturbing to me, because that is a pretty short window to prepare for a murder trial. But even if we're speaking generally in the nature of Georgia Law, I would say there's reason to believe in *this* case, where special circumstances that might have necessitated a continuance, and those circumstances consist of an important new witness materializing on the weekend before trial, and we'll discuss that in more detail in a future episode.

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Susan Simpson:

The second thing Abernathy did was to ask for Bill O'Dell's help at Joey's trial. Even though technically, O'Dell was *Mark's* attorney, not Joey's. According to both Abernathy *and* O'Dell, they envisioned this being sort of a co-counsel case, with Abernathy as the first chair, and O'Dell being the second chair. As with the continuance motion, O'Dell and Abernathy say they asked Judge Matthews to add O'Dell to the case, but we don't actually have any documentation showing the request or the result.

But O'Dell and Abernathy say that the result was an odd one. According to them, Judge Matthews allowed O'Dell to assist Abernathy, but would *not* allow him to make an entry as an attorney of record – meaning that O'Dell couldn't question witnesses, argue motions, or things like that.

Here's O'Dell describing the situation:

Bill O'Dell:

I say, it's because this really wasn't my case.

Clare Gilbert:

Right.

Bill O'Dell:

Mine was the other boy.

Susan Simpson:

And here's Clare's take on what happened:

Clare Gilbert:

Anyway, Branch Connolly was supposed to do the trial. Three weeks before trial, he decided he would take an extended trip to France, and they turned around and dropped the file in Rex Abernathy's lap. So he had this huge case, with 101 named State's witnesses, and three weeks to prepare for it. And according to O'Dell, the judge would not grant a continuance for Rex Abernathy to get up to speed.

So basically, Rex then approached Bill O'Dell and said, "Look, I need your help. I need you to be an assistant on this case with me, because I'm not ready, I can't get up to speed on this." And so they pitched that to the court, and the court initially rejected the idea that O'Dell sit at counsel table, and not be co-counsel.

But ultimately, the court came around, allowed O'Dell to sit at counsel table, and instructed O'Dell that he was not co-counsel, that he was an assistant, and that Abernathy was in charge of the case. And it was Abernathy who made uh, all – pretty much all – of the strategic decisions in Joey Watkins' case.

Susan Simpson:

So if this was the case, was this a proper result? It's tough to say. There's only one circumstance in which a court *has* to allow attorneys to represent a defendant. That's when a defendant is charged with a federal capital offense. Under 18 USC Section 3005, in *that* case, upon a defendant's request, the court must appoint two attorneys, quote: "At least *one* of whom is learned in the law applicable to capital cases."

Rabia Chaudry:

But Joey's case wasn't a federal case. And it wasn't a capital case. Therefore, Judge Matthews would have assessed it on 'sixth amendment right to counsel,' and specifically, choice of counsel grounds. The key case here is *Cole vs. State*, in which Albert Cole sought to switch counsel five days before trial. The court allowed Cole to switch counsel, but denied his original counsel's motion to withdraw from the case.

Cole eventually pleaded guilty, but later sought to withdraw his plea, claiming that his original counsel pressured his new counsel into forcing him to plead guilty. The key US Supreme Court case here is *US vs. Gonzalez-Lopez*, which held that,

Where the right to be assisted by counsel of one of choice is wrongly denied, it is unnecessary to conduct an ineffective or prejudiced inquiry to establish a sixth amendment violation.

So was there such a denial in Joey's case? Again, we have no real way to know without a copy of the motion or the ruling. Today, Abernathy and O'Dell have very different takes on what transpired at Joey and Mark's Trial, and what explains the different results.

In 2009, as part of an ineffective assistance claim Joey was raising, Rex Abernathy was deposed. Here's how he described his defense strategy at Joey's trial:

[41:22]

Colin Miller:

Question: Okay. Regarding your discovery and investigation of this matter, were you able to formulate any particular defense on Mr Watkins' behalf to the charges against him in the case?

Answer: Yes. We formed a defense in the case. It's been quite some time. I don't recall all the issues regarding the case and the defense, but we formulated what I thought at the time was the best defense from Mr Watkins.

Question: Okay. And what was that defense, if you can just identify it in particular, please?

Answer: That he didn't do it. Or at least, there was reasonable doubt that he didn't do it.

Rabia Chaudry:

One thing we do know is that Abernathy was first chair in Joey's case, and O'Dell was first chair in Mark's case. But according to O'Dell, they approached their trials very differently, and got different results.

Here's O'Dell explaining the difference:

[42:10]

Bill O'Dell: *I won't say I was actually co-counsel, but I was assisting. They allowed me to assist, because he came in late in the game, and felt like-- Rex Abernathy felt like he didn't know enough about all of it. And the judge was insisting that this case was going to trial. So, it was explained at that time pretty much that we didn't think there was a conflict between those two co-defendants. Which there really wasn't. But my trial was tried a whole lot differently.*

Clare Gilbert: *Mm-hmm.*

Bill O'Dell: *'Cause I went at the 'impossibility aspect'. I didn't go after trying to prove who did it. I went after, you know, "This is impossible. This is why." And just stuck to that. Made it simple.*

Susan Simpson: Of course, the idea that the fact that two trials had two different outcomes means that different things had to have happened, well, that doesn't necessarily hold up. In fact, despite the fact that Abernathy was lead counsel at Joey's trial, a lot of the questioning was done by O'Dell. So he was involved, and he was a major part of the defense.

Now, they definitely *learned* things at Joey's trial, but whether it was different approaches from Rex Abernathy and Bill O'Dell that explains the different result, I'm not confident about that.

Colin Miller: Yeah, so as you said, it's tough to draw any definitive conclusions about *exactly* what happened with this hot-potato case, or why it was handed from one attorney to another. But there's one thing that's never sat well with Joey's family regarding the representation of their son in this case. And we can see the broad strokes of that in a letter from Johnny Watkins, Joey's father, written a couple of years after Joey's conviction.

In it, he states:

Rabia Chaudry: *I spoke with Rex on Saturday before trial on Monday and learned that he and Bill were in it, no Branch or Bobby Lee. During our chat, the subject of who was going to be appointed the Fourth Superior Court judge, Rex told me that Bobby Lee had already spoken with Governor Barnes, and that he wanted Tami Colston to be awarded the bench.*

I said, "The hell, you say. The Cook firm is representing my son in a murder trial next week, and they are advocating that the prosecuting DA become the next Superior Court judge?" Rex calmly answered, "Don't worry about anything, Johnny. If anything were to go south next week, I will retry this case for free."

I almost dropped my beer when he said that. I called Dad and Sybil with this, and they really didn't know what to think of this either. The one thing that I was still relying on was that innocent people did not get convicted. I thought things like that only happened in the movies or dime store novels.

Colin Miller: Yeah, so to the Watkins, this fact just never sat well, but a defense attorney supporting a particular prosecutor for an appointment to the bench isn't anything unusual or improper in itself. That said, in a later petition for writ of *habeas corpus* that was filed but dropped by Joey's later post-conviction counselor Chris Frasier, Chris Frasier argued:

Susan Simpson: *Prior to and during the trial of petitioner, the lead prosecutor and elected district attorney of the Rome judicial circuit, Tamber Colston, was lobbying then-Governor Roy*

Barnes, members of the Floyd County legislative delegation, and others for an appointment to the newly created judgeship in the said circuit.

Ms Colston, who was subsequently appointed to the judgeship, was being actively supported in her lobbying efforts with then-Governor Roy Barnes by Bobby Lee Cook, a founding member of the law firm of Cook & Connolly, which employs both the petitioner's lead trial and appellate counsel.

Under these circumstances, the acceptance of employment in the petitioner's case, at the very least, raised the appearance of impropriety and constituted a conflict of interest.

As a result of this conduct, the petitioner was denied due process of law and the effective assistance of counsel, as guaranteed by the fifth, sixth, and fourteenth amendments to the US Constitution, as well as paragraphs one and eleven of the Bill of Rights of the Georgia Constitution.

[46:16]

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Colin Miller:

Yeah, and it really makes me wonder if this is the reason why it wasn't Bobby Lee Cook who handled the case himself. I mean, certainly that was the expectation of Joey's family. And you know, obviously this claim never went forward and probably wouldn't have been successful in court.

But I think the bigger picture here is, you wonder if in fact this whole judgeship and the recommendation by Bobby Lee Cook weren't here, whether Bobby Lee Cook would have taken the case, and Joey would have gained from that wealth of experience and the trial showmanship. As opposed to having Rex Abernathy stuck with one of his first big cases just a few weeks before trial.

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Rabia Chaudry:

But as you could probably tell from this episode, there's still uncertainty about what went on with Joey's defense. About who was responsible for what and when and why things played out the way they did at trial. And *that's* in part because the GIP has struggled at times in working with Rex Abernathy in particular.

Although they were able to obtain the parts of Joey's case file that were with Bill O'Dell, Abernathy was Joey's lead counsel at trial, and access to the files in *his* possession was vital. But for months, Clare was unable to get them. It's not that Abernathy said "No", she couldn't see them, but he just wouldn't schedule anything. She didn't get them until she finally set a deadline and told him that bar counsel would be called if he didn't schedule a meeting.

This isn't the first time someone representing Joey has struggled with this, though. In 2004, Joey had an investigator that was trying to turn up information that could lead to a post-conviction claim. And he wrote this email to Joey's attorney, dated Wednesday, April 7th, 2004:

Chris, on Friday I arrived at Cook & Connolly around 3:00 pm. I met with Rex Abernathy and asked about obtaining the Watkins file. Rex stated he had no idea anyone was coming to get the file, and he had not heard from Bill O'Dell in a couple of weeks. Rex advised he needed a day or two to get the file and make it available. Rex advised he had to have some type of documents signed by Johnny Watkins and Bill O'Dell in order to release the file.

I requested that he make whatever documents he needed available and call me as soon as they were available so I could have them signed and returned in order to pick up the file. Two messages have been left on both Rex Abernathy's

office and cell phones. No return calls have been received by investigator John Weeks.

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Rabia Chaudry:

So, now that you have some background about Joey's legal counsel, it will help you understand what actually happened at trial, which we have yet to get to.

Now, next week we're taking a little break from Joey's case for Thanksgiving. We'll have a bonus holiday episode, but it won't be about this case. And when we return, we won't actually be getting right into the trial. Instead, we'll be telling you all about the man who shot at a moving vehicle from a little blue car, in the same town, and on the same night, that Isaac was killed: Heath Wilson.

When we return from Thanksgiving break, on *Undisclosed*.

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