STATE OF GEORGIA,

Respondent

CASE NO. S17D0604

UNDISCLOSED LLC,

Applicant

RESPONSE OF STATE TO

UNDISCLOSED LLC'S

APPLICATION FOR DISCRETIONARY APPEAL

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STATEMENT OF THE CASE

A Floyd County Superior Court jury, on July 12, 2001, convicted Joseph Watkins of murder, aggravated assault, possession of a weapon during the commission of a crime, and stalking in connection with the January 11, 2000 shooting and death of Isaac Dawkins. The Trial Court, on that same date, sentenced Mr. Watkins of life plus five years in prison. Mr. Watkins, following the denial of his Motion for New Trial on July 25, 2002, filed a Notice of Appeal on August 21, 2002 to the Supreme Court of Georgia. This Court unanimously affirmed the conviction of Mr. Watkins on May 19, 2003. Watkins v. State, 276 Ga. 578 (2003). A copy of the opinion is attached to this brief as Exhibit 1.

A petition for habeas corpus relief subsequently was filed on behalf of Mt. Watkins. The Superior Court of Charlton County, in Case 09-V-233, ultimately denied that petition on December 21, 2011. Mr. Watkins, on January 19, 2012, filed an Application for Discretionary Appeal with this Court asking it to review that order. This Court, on October 15, 2012, denied the Application for Discretionary Appeal. Watkins v. Martin, Warden, S12H0816 (October 15, 2012).

Undisclosed LLC, according to its brief, began airing a podcast on July 11, 2016 consisting of interviews and extensive reading from the

transcript of the Watkins trial. Several weeks after the weekly airings began, on September 16, 2006, Undisclosed filed a motion in the Superior Court of Floyd County seeking access to the court reporter's tapes from the Watkins trial.

Judge William F. Sparks, citing the plain language of Rule 21 of the Uniform Rules of Superior Court, granted Undisclosed access to the tapes it requested. The only thing Judge Sparks denied in his order was permission to make copies of those tapes. No hearing was noticed or held prior to the entry of that order. Undisclosed filed an Application for Interlocutory Appeal, which this Court converted into an Application for Discretionary Appeal.

ARGUMENT AND CITATION OF AUTHORITIES

I. The appeal by Undisclosed fails to state any grounds upon which it is entitled to an emergency hearing by this Court.

Undisclosed's sole argument to the Court concerning a request for emergency relief lies in its desire to include audio witness testimony in its broadcast. Essentially, Undisclosed has conceded to this Court that it has all of the information and all of the records from the first trial, including court rulings and a complete transcript of the Watkins trial. It merely makes the

argument that it would rather air this testimony using the tape from the trial instead of quoting verbatim from those transcripts as it has done in prior episodes.

This Court traditionally has reserved cases in which it would grant emergency relief on an appeal to those situations in which a person's rights would be lost if the appeal was handled in its normal response period. For example, this Court has on numerous occasions taken up or addressed the necessity of considering emergency appeals in cases involving rulings on whether a political candidate could or could not appear on a particular election ballot. Hilliard v. Baldwin, 289 Ga. 213 (2011); Kendall v. Dulaney, 282 Ga. 482 (2007); McCreary v. Martin, 281 Ga. 668 (2007). The State would concede that cases dealing with the imminent execution of someone on death row or those dealing with whether to continue or terminate life support for a patient would fall in that same category.

To compare this case as one justifying emergency relief to the kinds of cases outlined above stretches the bounds of credibility. First, it involves a 2016 podcast of a 2002 murder case in which a person has been convicted and his appeal unanimously affirmed by this Court based on the very testimony that Undisclosed now seeks to second guess. Second, Undisclosed, by its own admission, waited until more than two months after

it began airing episodes to even seek relief from the courts instead of doing so prior to the start of the podcast. The Applicant obviously didn't regard these tapes as essential to the podcast. Finally, it has failed to advance any reasoning other than its desire to proceed with its podcast in a particular manner as to why emergency relief is essential.

Even if the Court determines that it should grant appellate review to this order, it should do so in the normal course of business. The Court can docket the appeal with the windows permitted by the rules of this Court for briefing, scheduling of oral argument and issuance of an opinion. There is absolutely no reason to grant emergency relief.

II. The Trial Court granted Undisclosed the relief to which Georgia law entitles it.

Rule 21 of the Uniform Rules of Superior Court and its subparts are

clear and unambiguous. "All court records are public and are to be available for public inspection unless public access is limited by law or by the procedure set forth below." Id. This Court, in Green v. Drinnon, Inc., 262 Ga. 264 (1992), dealt with the issue of whether a Milledgeville newspaper was entitled to a copy of the tape of comments made by a judge in open

court in the State Court of Baldwin County. "[T]he tape or its transcript must be made available for public inspection under Rule 21." Id.at 265.

In this case, Undisclosed, by its own admission, already has access to the transcript of the underlying criminal case. Therefore, it has the exact material that this Court, in Green, said it could have. The Trial Court actually went beyond the letter of the law in permitting Undisclosed to listen to the actual tapes. Undisclosed has not even made a prima facie showing how this Order denies it access. There is no error by the Court below.

III. To the extent the Trial Court erred, the remedy by this Court is to remand the case to the Superior Court of Floyd County for a hearing on the matter.

Rule 21.1 of the Uniform Superior Court Rules provides that "[u]pon motion by any party to any **civil** action, after hearing, the court may limit access to court files respecting that action. The order of limitation shall specify the part of the file to which access is limited, the nature and duration of the limitation, and the reason for limitation." "An order limiting access shall not be granted except upon a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest." Uniform Superior Court Rule 21.2.

First, this clearly is not a civil proceeding. Undisclosed, rather than file a mandamus or some sort of action seeking civil relief against, the judge, court reporter or other action, simply filed a motion in a criminal case that has been final for more than 13 years.

Second, Undisclosed is not a party to any action ever filed in the Superior Court of Floyd County. By its plain language, Rule 21.1 restricts actions seeking access to court records to parties to the proceeding. Undisclosed waived its right to relief by failing to file a civil action.

Finally, to the extent that Undisclosed's motion before the Trial Court was appropriate, the Trial Court failed to comply with the requirements of law before it ruled on said motion. This Court, in In re Motion of the Atlanta Journal-Constitution, 271 Ga. 436 (1999), a case in which the newspaper was seeking access to sealed records in a civil proceeding, held that Rule 21.1 requires the Trial Court "to hold a hearing on the issue. The

requirement of a hearing held upon reasonable notice is indispensable to the integrity of the process mandated for limiting access to court records because justice faces its greatest threat when courts dispense it secretly." Id. at 437. This Court, in that matter, stated that reversal and remand for to the Trial Court was required.

CONCLUSION

Georgia law requires public access to court records. Here, Undisclosed LLC has been provided with access to the transcripts of the trial of this case as well as the right to listen to the court reporter tapes. Furthermore, Undisclosed is not a party to any civil action and has failed to advance any showing why emergency relief should be granted. This Court either should deny the Application for Discretionary Appeal filed by Undisclosed LLC.

RESPECTFULLY SUBMITTED this 28th day of November, 2016.

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the within and foregoing Response of The State to Undisclosed LLC's Expedited Motion to Amend Order Prohibiting Access to Court Records on Sarah Brewerton-Palmer, Attorney for Undisclosed, LLC, Caplan Cobb LP, 75 Fourteenth Street, NE, Suite 2750, Atlanta, GA 30309, and Claire Gilbert, Attorney for Joseph S. Watkins, Georgia Innocence Project, 2645 North Decatur Road, Decatur, GA 30033 by placing the same in the United States Mail with proper postage affixed.

This 28th day of November, 2016.

John F. McClellan, Jr.

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276 Ga. 578

WATKINS
v.
The STATE.

No. S03A0034.

Supreme Court of Georgia.

May 19, 2003.

[581 S.E.2d 25]

Cook & Connelly, Bobby Lee Cook, L. Branch S. Connelly, Summerville, for appellant.

Bryant G. Speed, II, Dist, Atty., Fred R. Simpson, Leigh E. Patterson, Asst. Dist. Attys., Thurbert E. Baker, Atty. Gen., Madonna M. Heinemeyer, Asst. Atty. Gen., for appellee.

[581 S.E.2d 24]

HUNSTEIN, Justice.

Joseph Samuel Watkins was convicted of felony murder in the shooting death of Isaac Dawkins. He appeals from the denial of his motion for new trial.[1] Finding no error, we affirm.

1. Viewing the evidence in the light most favorable to the verdict, the jury was authorized to find that after Brianne Scarbrough ended her relationship with appellant, he began threatening and harassing anyone who subsequently dated her. After Dawkins began seeing Scarbrough in the summer of 1999, numerous incidents occurred during which appellant made threatening comments about Dawkins, attempted to get him to fight and followed Dawkins whenever he saw **[276 Ga. 579]** him, even when Dawkins was not with Scarbrough. A friend of appellant told police that it was appellant's "main goal every day" to find Dawkins. Evidence was presented from which the jury could find that as part of this threatening behavior appellant with his friends shot Dawkins' dog between the eyes while it was chained in its pen in the victim's yard. Witness Yvonne Agan testified that in late November or December 1999 Dawkins arrived at her home, terrified, and related that while driving to his own home, appellant had chased and fired a gun at him. Agan hid the victim's white Toyota truck and allowed him to sleep on her couch. Dawkins declined to let Agan report the matter because he believed the incidents would stop since he had stopped dating Scarbrough.

Shortly after 7:00 p.m. on January 11, 2000, Dawkins was driving his truck north on Highway 27 after leaving his class at Floyd College. An occupant in a blue or green passenger car fired a shot through the truck's back window and hit Dawkins in the head. One eyewitness identified appellant as the shooter. The truck veered off the highway, crossed the median, crashed into a side rail and after rolling over came to a stop with its rear end facing north. While modifications to the front of the truck made it identifiable as belonging to Dawkins, only the rear of the vehicle was visible to traffic. An eyewitness to the crash phoned 911 and an emergency vehicle was at the scene within three minutes of the call. Appellant's cell phone records established that he was in the area at the time of the attack and when he arrived at his destination, he was overheard telling his new girlfriend that "his friend had just got killed." It required medical scans at the hospital to reveal the presence of the bullet in Dawkins' head; the victim was pronounced dead the following day.

The jury heard testimony that appellant initially asked friends to give him an alibi for the time of the shooting. Thereafter in his comments to others, appellant gave

conflicting stories regarding what direction he was heading at the time of the shooting, with appellant claiming that he saw the victim's truck on the side of the road and thought Dawkins had possibly had a flat tire. Later comments by appellant reflected the fact that emergency vehicles were promptly at the

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crash scene, although appellant had difficulty explaining how he recognized that the crashed truck was the victim's. Appellant was later overheard in the local Home Depot parking lot bragging about shooting the victim and witnesses testified to comments made by appellant's friends, who claimed to be in the car with appellant, indicating that appellant shot the victim. After the shooting, appellant told a witness who was dating Scarbrough that if the witness did not stop seeing her, "he [the witness] would end up just like Isaac [Dawkins]."

We find this evidence sufficient to enable a rational trier of fact **[276 Ga. 580]** to find appellant guilty of the crimes of which he was convicted beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

2. Appellant contends the trial court erred by admitting the hearsay testimony of Yvonne Agan pursuant to the necessity exception. Under that exception, hearsay statements are admissible when the evidence is necessary and there are particular guarantees of trustworthiness. *Chapel v. State,* 270 Ga. 151(4), 510 S.E.2d 802 (1998). Furthermore, the statement must be relevant to a material fact and more probative of that material fact than other evidence that may be procured and offered. Id. The trial court's admission of hearsay evidence under the necessity exception is evaluated under an abuse of discretion standard. *Gissendaner v. State,* 272 Ga. 704(6), 532 S.E.2d 677 (2000).

The victim's death established the first prong. *Chapel,* supra. As to trustworthiness, the test to determine whether there are sufficient indicia of reliability is whether the declarant's truthfulness is so clear from the surrounding circumstances that cross-examination of the declarant would be of marginal utility. Id. Here, the trial court heard evidence that the victim had a close, trusting and loving relationship with Agan, who loved him like he was her own son and considered him to be a part of her family and that he would come to talk to her and confided in her when he had problems. See *McCoy v. State,* 273 Ga. 568(4), 544 S.E.2d 709 (2001) (uncontradicted statements made to one in whom the deceased declarant placed great confidence and turned to for help with problems are admissible under necessity exception). The victim never disavowed his statement, see *Perkins v. State,* 269 Ga. 791(4), 505 S.E.2d 16 (1998), and there was nothing to show that the victim had any motive to lie to Agan about appellant's violent behavior. See *Slakman v. State,* 272 Ga. 662(3)(b)(3), 533 S.E.2d 383 (2000). Looking to the totality of the circumstances, see *Chapel,* supra, we find no abuse of the trial court's discretion in ruling that there were sufficient indicia of reliability to support the admission of the victim's statement to Agan.

Finally, the victim's statement to Agan was relevant to a material fact regarding appellant's hostility and threatening behavior towards the victim. Contrary to appellant's contention, our review of the transcript reveals that the trial court correctly recognized that this statement constituted the only evidence that showed appellant had previously shot at the victim in his truck. See *Campos v. State,* 273 Ga. 119(2), 538 S.E.2d 447 (2000). We find no error in the admission of Agan's testimony.

3. Assuming, arguendo, that appellant properly objected at trial, we find that the trial court did not impermissibly restrict his cross-examination of Agan. At the time of

appellant's trial, Agan had **[276 Ga. 581]** charges pending against her and had not yet been tried and acquitted on those charges.[2] Outside the presence of the jury the district attorney stated in her place that the State had negotiated no deal with Agan in exchange for her testimony. When the defense sought the court's permission to introduce the charges into evidence in order to impeach Agan, the trial court properly refused to permit the evidence on the basis that a witness cannot be impeached by instances of specific misconduct unless that misconduct has resulted in the conviction of a crime

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involving moral turpitude. See *Williams v. State,* 257 Ga. 761(4), 363 S.E.2d 535 (1988). The trial court correctly recognized that the defense was entitled to cross examine Agan about the charges in order to address any bias the witness might have as a result of the pending charges.[3] See *Hines v. State,* 249 Ga. 257, 259(2), 290 S.E.2d 911 (1982). However, while allowing defense counsel broad scope in questioning Agan, the trial court ruled that counsel could not ask Agan about the specific nature of the charges pending against her.[4]

The trial court did not abuse its discretion by so ruling. See *Brown v. State,* 276 Ga. 192(3), 576 S.E.2d 870 (2003) (2003). The transcript establishes that the trial court did not cut off all inquiry into the possible bias of Agan due to pending criminal charges. Compare *Beam v. State,* 265 Ga. 853(4), 463 S.E.2d 347 (1995); *Byrd v. State,* 262 Ga. 426(2), 420 S.E.2d 748 (1992). And given the district attorney's statement in her place that no deals had been made with Agan, this was not a situation where the nature of the pending charges was pertinent to an examination of a witness regarding her understanding of the favorable terms contained in the deal, in comparison to the potential sentence available for the pending charges. Compare *State v. Vogleson,* 275 Ga. 637(1), 571 S.E.2d 752 (2002); *Owens v. State,* 251 Ga. 313(1), 305 S.E.2d 102 (1983).

With the exception of inquiry into the specific nature of the pending charges, the trial court imposed no other limit on appellant's **[276 Ga. 582]** cross-examination of Agan. The right of cross-examination integral to the Sixth Amendment right of confrontation is not an absolute right that mandates unlimited questioning by the defense. *Hines,* supra (trial court "may exercise reasonable judgment in determining when the subject is exhausted"); *Watkins v. State,* 264 Ga. 657, 660(1), 449 S.E.2d 834 (1994) (no error where "the trial court did not preclude all inquiry on a subject with respect to which appellant was entitled to a reasonable cross examination. [Cits.]"). "The Confrontation Clause guarantees `only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Cit.]" *United States v. Oliver,* 278 F.3d 1035, 1041(II)(B) (10th Cir. 2001). Accordingly, trial courts "`retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" (Footnote omitted.) *Brown,* supra, 276 Ga. at 194, 576 S.E.2d 870. In assessing whether the limits imposed by the trial court were reasonable, "our task is to determine `"whether the jury had sufficient information to make a discriminating appraisal of the witness' motives and bias."' [Cit.]" *United States v. Oliver,* supra.

In *Brown,* supra, we found no abuse of the trial court's discretion when it precluded the defendant from asking a State witness "about the specific underlying facts of pending criminal charges." Id., 276 Ga. at 193(3), 576 S.E.2d 870. In *United States v. Oliver,* supra, the Tenth Circuit found no Confrontation Clause violation when the trial

court prevented the defendant from inquiring about the specific nature of charges pending against the State's witness because the limitation did not "significantly impede [the defendant's] ability to challenge the `believability of (the) witness and the truth of his testimony,' [cit.]" and the defense was afforded "ample opportunity to portray [the

[581 S.E.2d 28]

witness] as biased and motivated to lie." Id., 278 F.3d at 1041. See also *Coolen v. Florida,* 696 So.2d 738, 743 (Fla.1997) (finding no abuse of discretion when trial court limited cross-examination of witness by not allowing questioning about the nature of criminal charges pending against her).

In appellant's trial, the jury learned through defense counsel's cross examination that Agan had charges currently pending against her,[5] that she had been indicted by a grand jury, and the month and year when she had been indicted. The jury heard counsel's direct question to Agan whether her testimony at trial was related to the **[276 Ga. 583]** pending charges against her. Under these circumstances we find that the trial court's ruling that barred appellant from inquiring into the nature of the pending charges did not impair the defense from providing the jury with "sufficient information to make a discriminating appraisal" of Agan's motives and biases.[6] See *United States v. Oliver,* supra. Accordingly, we find no abuse of the trial court's discretion in excluding this evidence. See *Brown,* supra.

4. In assessing appellant's contention that the State violated *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) by withholding the testimony of James Hudgins, the trial court correctly analyzed the evidence to determine if appellant carried his burden of showing that (1) the State possessed information favorable to appellant; (2) appellant did not possess the evidence nor could he obtain it with due diligence; (3) the prosecution suppressed the evidence; and (4) a reasonable probability exists that the outcome of the trial would have been different had the evidence been disclosed. See *Burgeson v. State,* 267 Ga. 102(2), 475 S.E.2d 580 (1996). We find no error in the trial court's determination that appellant failed to establish the fourth element, in that a review of Hudgins' testimony at the motion for new trial supports the trial court's assessment that Hudgins' version of events was "devoid of credibility" when compared to the uncontested and objective evidence established at trial.

Judgment affirmed.

All the Justices concur.

Notes:

1. The crimes occurred on January 11, 2000. Watkins was indicted January 26, 2001 in Floyd County on charges of malice murder, felony murder predicated on aggravated assault, aggravated assault, possession of a firearm during the commission of a crime and stalking (OCGA § 16-5-90). He was acquitted of malice murder and found guilty on the remaining charges on July 2, 2001. He was sentenced the same day to life imprisonment for felony murder, five years consecutive on the possession charge and twelve months on the stalking charge. His motion for new trial, filed July 3, 2001 and amended April 5, 2002, was denied July 25, 2002. A notice of appeal was filed August 21, 2002. The appeal was docketed in this Court on September 10, 2002 and was orally argued on January 29, 2003.

2. Agan's acquittal on the charges was established at the hearing on appellant's motion for new trial.

3. The trial court ruled:

Now you can certainly go into this. You can say: how long ago were you charged? How long has your case been pending? Have you been promised anything? The State—it hasn't been disposed of and you are still waiting and hoping to get a favorable disposition. You can go into all that.

4. The trial court ruled:

You can't impeach her about what she is charged with. You can ask her about bias, and the bias will be whether she has been promised anything in return for her testimony. But you cannot impeach her or try to impeach her based on what the type of charge is because she hasn't been convicted of it.... I am going to let you go as far as I told you, but you cannot get into the [nature of the crime] because she is not convicted of any of that.

5. When questioning Agan about the pending charges, defense counsel made the point before the jury that he would not ask her about the nature of the charges in order not to "embarrass" her.

6. While the trial court's ruling prevented the jury from knowing the specific nature of the charges pending against Agan, this restriction did not necessarily harm the defense as the jury was thus left free to speculate that Agan was charged with far more serious or heinous crimes than she actually was.
