***UNDISCLOSED* SEASON 2:** **THE STATE VS. JOEY WATKINS**

EPISODE 23: **NO ERROR FOUND**
POSTED: **JANUARY 9, 2017**

Rabia Chaudry: Last week we wrapped up with Joey's conviction and sentence. In many cases, there are no appeals. Appeals are lengthy and expensive processes that rarely pay off. The bar to get a conviction overturned is incredibly high. And there are too many ways, just like at trial, that lawyers can mess up or miss things. And sometimes appeals don't work because lawyers who *do* mess up don't admit it.

Hi, and welcome to Episode 23 of *Undisclosed: The State vs. Joey Watkins*. My name is Rabia Chaudry. I'm an attorney, a fellow at the US Institute of Peace, and the author of Adnan's Story. I'm here, 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.*

[01:35] ≈

Colin Miller: As we noted last episode, Joey was convicted of murder and related crimes and sentenced to life plus five years on July 2, 2001. The next day, on July 3, 2001, Rex Abernathy filed an initial motion for a new trial. The motion claimed that a new trial was warranted on two general grounds: These grounds are both contained in the Georgia Code.

First, pursuant to Section 5-5-20 of that code:

> *In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury.*

This is basically a 'Hail Mary', in which a defendant claims there wasn't even sufficient evidence to establish all of the elements of the crime charged. Quite simply, as long as there was *some* evidence that Joey killed Isaac or was involved in the killing of Isaac, this argument would fail, even if the evidence was unreliable, contradictory, and implausible.

Second, pursuant to Section 5-5-21 of the Georgia Code:

> *The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of the evidence, even though there may appear to be some slight evidence in favor of the finding.*

This is what's known in Georgia as the '13th Juror' rule. In other words, even though the 12 jurors in the case found the defendant guilty, and even though the evidence satisfied the low threshold required for the jury to be able to find the defendant guilty beyond a reasonable doubt, the judge can overturn the defendant's conviction if *he* has doubt about the defendant's guilt.

Joey's motion for a new trial was initially scheduled to be heard on February 5th, 2002, but there was a change in counsel as that date approached.

On February 1st Bobby Lee Cook sent Joey the following letter:

Rabia Chaudry:

Dear Joseph, I am pleased to advise you that I have definitely been employed by your family to handle the appeal of your murder conviction to the State Supreme Court. My partner, Mr Connelly, will also be working with me on your appeal, and we are in the process of reviewing the trial transcript and record in order to evaluate the legal issues that may affect the outcome of the appeal.

You may be assured that we will do everything possible to assist you in this matter. From time-to-time I will keep you apprised of any developments. However, simply as an estimate we are looking at several months before the Appeal can be decided. The motion for a new trial that is pending in the lower court is set for February 5, 2002, but we will get this continued until we have had the opportunity to move forward on our review and research. Cordially, Bobby Lee Cook

Colin Miller:

With Bobby Lee Cook and Branch Connelly now on the case, Joey was able to get a continuance until May, and in the meantime, Cook and Connelly filed an Amended Motion for a new trial on April 5th, 2002. This amended motion now contained two specific grounds for a new trial, including the claim that the State had violated *Brady vs. Maryland* by failing to disclose that James Hudgins had gone to the police on multiple occasions before Joey's trial and claimed that his neighbor, Joseph Boyd, had confessed to killing Isaac Dawkins.

[04:28]

Susan Simpson:

Now, we laid out the James Hudgins story in Episode 7, but here's a refresher: In April 2000, three months after Isaac's death and fourteen months before Joey's trial, James Hudgins, a preacher, told Detective Jim Moser with the Rome Police Department that Hudgins' neighbor, Joey Boyd, had confessed to Hudgins that actually, it had been *him* that had fired the fatal shot that killed Isaac Dawkins. Hudgins said that it was because Isaac Dawkins had been dating Joey Boyd's ex-wife.

Moser took notes on this, a couple of lines scattered in his personal record of people he talked to and things he learned in his investigation. It was Moser's belief, like the rest of the RPD's and apparently the FCPD's as well, that detectives' notes were off-limits. Things that they never had to turn over, and things the defense was never entitled to see. So these notes never went to the defense.

Thirteen months later and a month before Joey's trial, Hudgins told an assistant district attorney of Floyd County, Hal Goldin, the same information he told Moser. This time time he also added on the detail that this confession from Joey Boyd that he'd killed Isaac, came after Boyd had also confessed to killing Hudgins guineas. That's guinea fowls – that is, Hudgins' birds. Which, at least, we can verify from the police blotter, that Hudgins had reported his guineas had gone missing, only a day before Isaac's death, so the timing kind of fits. But Hal Goldin, the Assistant District Attorney, did not pass the information along.

Finally, about two weeks after Joey was convicted for killing Isaac, Hudgins came forward *again*, and this time told this same information to Tami Colston and Assistant DA, Steve Cox. Cox, unlike Moser and Goldin, *did* pass this info along to the defense, and formed the basis of Joey's amended motion for a new trial on the grounds that this was a Brady violation.

Rabia Chaudry:

At the evidentiary hearing on Joey's amended motion, six witnesses testified: James Hudgins, John Harkins – the chief investigator with the Rome District Attorney's Office – Hal Goldin, Jim

Moser, and Stanley Sutton. The only witness for the defense was James Hudgins. Hudgins repeated what he had said on several prior occasions: That soon after the murder of Isaac Dawkins, his neighbor, Joseph Boyd, came to him, said he had been saved, and confessed to killing Hudgins's guinea fowls and Isaac Dawkins, who had been seeing his ex-wife. In response, the State called five witnesses. The first was John Harkins, as we mentioned, who was the chief investigator with the Rome DA's Office. According to Harkins, he helped Tami Colston in the prosecution of Joey's case, and the State had an open-file policy about the case. Further, he claimed that both Abernathy and O'Dell had come in several times to review the file in Joey's case and were never denied access.

Susan Simpson: Of course, what they *didn't* say was that that those files consisted only of the DA's materials, or a portion of them. They didn't include the investigative record, because both Rome Police Department and Floyd County Police Department considered detective's notes to be off-limits and were never available for the defense to see.

Rabia Chaudry: Obviously, the prosecution was trying to claim that the defense had access to all the information in Joey's case, meaning there *couldn't* have been a Brady violation. Bobby Lee Cook, however, was pretty quickly able to dispense with this claim on cross-examination.

Here are the two key questions and answers:

Colin Miller:

Question: *Is there anything in the file about the fact that Mr Hudgins went to Hal Goldin and reported what he has just testified to?*

Answer: *No sir.*

Question: *So if Mr Abernathy had inspected the file, that wouldn't have been in it, would it?*

Answer: *I don't remember anything that was in there about Mr Hudgins. I never saw Mr Hudgins before, until he came up here and talked to Ms Colston and Mr Cox.*

[08:03]

Rabia Chaudry: The State's second witness was Assistant DA Hal Goldin. According to Goldin, James Hudgins actually came to see him about *another* matter – the impending split of the Tallapoosa Circuit, and the possibility that there would be the election or appointment of a DA for the new circuit being formed.

Goldin testified that Hudgins said that he'd heard Goldin's name was being floated as a possible candidate and he wanted to tell him what he knew about the office. Then, according to Goldin, quote:

> *During the course of the conversation, he at some point, and I don't remember the specifics, he mentioned that he had some problems with a neighbor about some chickens or guineas... And during the course of some conversation with this neighbor, this neighbor had made a statement that he had killed a boy down on the highway and that basically was the gist.*

Now, In terms of explaining away his failure to report what Hudgins had just told him, Goldin testified that he didn't have any involvement with Joey Watkins' prosecution. And Hudgins told him that he had already reported this information to the police, anyway. But on cross-examination, Bobby Lee Cook simply hammered home not only the failure to report, but the failure to *record* this information.

Colin Miller:

Question: *Did you make any report of this to anyone?*

Answer: *No sir.*

Question: *And no report was made, either in writing or otherwise?*

Answer: *No, sir.*

Susan Simpson:

The third witness for the State was Jim Moser. Moser testified that James Hudgins had come to him and told him that "He felt that a guy named Joseph Boyd shot the boy on the highway." According to Moser, Hudgins relayed that "Mr Boyd… Well, it was not uncommon for him to be shooting up at his house and something to the effect of he believed... That Isaac Dawkins was seeing Mr Boyd's ex-wife. I believe her name is Christa."

Moser said he followed up with three people, Boyd's ex-wife, Christa, Boyd's son, and Isaac's friend, Jay Barnett. Christa denied having any relationship with Isaac, or even knowing him, Boyd's son, Stephen, acknowledged that his father had shot up at their house but denied knowing Isaac, and Jay Barnett said he'd never heard of Christa Boyd or any kind of relationship between Christa and Isaac.

Bobby Lee Cook's cross-examination was quick and to the point. He had Moser read the few lines he had written about Hudgins' statement, which didn't have any mention of the allegation that Boyd shot Isaac Dawkins.

Then, the following exchange occurred:

Colin Miller:

Question: *Well, did you write down anything where he told you that he felt that Boyd had shot Dawkins?*

Answer: *No, sir, I did not.*

Question: *Did you not consider that important?*

Answer: *Yes, sir.*

Question: *But you didn't write it down?*

Answer: *That's correct.*

Question: *And you didn't report it to anybody?*

Answer: *Well, I followed up on what I--*

Question: *My question is, you didn't report it to anybody?*

Answer: *No, sir.*

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[12:15]

Susan Simpson: The State's fourth witness was Joseph Boyd himself. Boyd testified that he'd heard about James Hudgins accusing some people of shooting his guineas, which was why he's gone over to the Hudgins' house and confessed that yeah, he'd shot his guineas. According to Boyd, he'd done so because he'd had some roosters on tie cords, and Hudgins's guineas kept attacking them. Boyd denied, however, that he knew Isaac Dawkins, or had any knowledge of Isaac dating his ex-wife. And he also denied that he'd ever confessed to Hudgins that he'd killed Isaac.

On cross-examination, Bobby Lee Cook got Boyd to admit that everything else that Hudgins had said about their conversation was correct – that he'd admitted to killing the guineas, that he confessed after telling Hudgins he had been saved, and even that his ex-wife and he had been divorced, shortly before Isaac was killed. But Boyd again denied having any knowledge whatsoever about Isaac or having any knowledge of his ex-wife dating Isaac.

Rabia Chaudry: The State's fifth and final witness was Stanley Sutton. Sutton testified that he questioned James Hudgins after Cox passed along his prior claims after the end of Joey's trial. And as seems to be par for the course when it comes to Sutton, the questions by DA Fred Simpson suggest that there were some allegations of impropriety in connection with this questioning:

Colin Miller:

Question: *Did you ever threaten him?*

Answer: *I never threatened him in one way, shape, or form I recall.*

Question: *Well, how did you act towards him?*

Answer: *I was completely showing him my utmost respect. I was nice to him, polite to him and wasn't out of the way. Wasn't rude to him or nothing and was never disrespectful.*

Question: *Did you threaten his mother?*

Answer: *No, I don't even know them. This is the first time I even had an opportunity to meet Mr Hudgins, the first time I ever met him, didn't know his mother, didn't know anything about him or his mother, or anything about Mr Hudgins at all.*

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Rabia Chaudry: A few months later, on July 25, 2002, Judge Matthews denied Joey's amended motion for a new trial. In response to Joey's general claims that the verdict was *against* the weight of the evidence and that Judge Matthews should throw out the verdict. As the '13th Juror', Judge Matthews quickly responded like this:

> *The Court finds that there was sufficient evidence for a jury to conclude that Mr Watkins was guilty of the offenses charged, beyond a reasonable doubt; the verdict is not contrary to principles of justice or equity.*

End quote.

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Colin Miller: Turning then to the specific grounds in the amended motion, the defense first claimed that Mark Free's acquittal meant that Joey's conviction was invalid. Judge Matthews rejected this argument for two reasons. First, Judge Matthews held that, quote" "the circumstantial evidence was substantially different in each case as to Mr Watkins and Mr Free."

Second, Judge Matthews concluded that "any party to a crime may be convicted, and punished although the person claimed to have directly committed the crime has been acquitted". Now we've touched upon the second conclusion by the judge before, but it bears repeating: The due process clause requires that the prosecution prove beyond a reasonable doubt, the guilt of the defendant, which means that jurors must be left in a subjective state of near certitude regarding the defendant's culpability.

And yet, even though the prosecution claimed, or at least strongly implied, at Joey's trial, that it was Joey's marksman friend Mark Free who had shot and killed Isaac Dawkins as Joey's and Isaac's vehicles sped up 27 South, Mark's acquittal did not in any way, according to Judge Matthews, call into question the validity of Joey's conviction.

Susan Simpson: In regards to the defense's second argument, which was the Brady claim based on the State's failure to disclose James Hudgins's statements about Boyd confessing to Isaac's murder, Judge Matthews ruled that:

> *To prove a Brady violation, the defense must show:*
>
> > *(1) the State possessed information favorable to Defendant,*
> >
> > *(2) the Defendant did not have 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 if the evidence had been disclosed.*

Judge Matthews then rejected the defense's claim, writing the following:

> *Defendant has failed to show (1) and (4) of the above. The Court, after review of all of the evidence on the Motion for New Trial, as amended, and at trial, finds that the evidence to be presented by Mr Hudgins was not favorable to Defendant.*
>
> *Had it been favorable to Mr Watkins, surely the same trial counsel would have found it favorable to Mr Free and used it at his trial. They did not do so, and the reason is readily apparent to the Court.*
>
> *The version of what happened, which Mr Hudgins said was told to him by Mr Boyd, is devoid of credibility when stacked up against the known, uncontested, objective evidence.*
>
> *The Court finds no reasonable probability that had Mr Hudgins' testimony been presented to the jury in this case, the result of this trial would have changed. In fact, had Defendant presented Mr Hudgins' testimony as credible, the likelihood is that a jury would have discounted the credibility of any other theory advanced by Defendant.*

Rabia Chaudry: This ruling seems questionable for at least three reasons: The first is that, as we noted just a second ago, Judge Matthews opened his opinion by saying that:

> *The circumstantial evidence was substantially different in each case as to Mr Watkins and Mr Free.*

What the judge is trying to say, is that the evidence against Mark was much weaker than the evidence against Joey. So, why would Judge Matthews think that Abernathy and O'Dell's decision *not* to call James Hudgins at Mark's trial automatically mean that they wouldn't have called him at Joey's trial?

It seems quite possible that these attorneys knew that the State had a really weak case against Mark, meaning perhaps it made sense to just forget about the possible reward of presenting evidence of an alternate suspect to avoid any possible risk of doing so. And, at the same time, it also seems quite possible these attorneys knew that the State had a stronger case against Joey, and therefore would have been willing to absorb the risk of presenting evidence of an alternate suspect, given the potential reward of such evidence.

In other words, if the Judge thought – if argument he was making – that the lawyers knew that the State had a much stronger case against Joey… Well, it makes more sense for his defense council to have called James Hudgins.

Susan Simpson: And actually, we have proof that's the case. Because, Heath Wilson, *was* presented at Joey's trial. The defense know about him and raised that argument, that *yes*, he could have been the actual shooter. But, in Mark's trial, not a word of Heath was ever brought up.

Rabia Chaudry: And the second odd thing about this ruling is that Judge Matthews didn't find that James Hudgins himself was devoid of credibility. Instead, he found that his *story* was devoid of credibility when it stacked up against the objective evidence of Joey's guilt.

But what was this evidence? Jailhouse snitches who recanted and/or had stories that didn't match the evidence? Character evidence? Wayne Benson saying that he likely saw Isaac being shot from a vehicle that the State could in *no way* connect to Joey Watkins? Barry Mullinax?

And, of course, Mullinax takes us to the *third* questionable thing about Judge Matthews's ruling: That calling a preacher to the stand to testify that Joey Boyd confessed to killing Isaac Dawkins, quote: "Would have discounted the credibility of any other theory advanced by Defendant." End quote.

Colin Miller:

> *While such a claim would seem dubious in any case, it seems even more implausible, given that the jury seemingly didn't discount the State's theory of the case at trial, despite calling witnesses such as Barry Mullinax, knowing full well that they were lying.*

[19:43] ≈

Colin Miller: Next, the defense's second-claimed ground for a new trial was Yvonne Agan changing her testimony between Joey's trial and Mark's trial. As we noted last episode, Agan testified at Joey's trial that Isaac definitely told her that Joey had shot at him, but later testified at Mark's trial that Isaac had not said *definitely* that Joey shot at him and instead said that Joey might have been throwing something at him like rocks.

The defense claimed that Agan's changed testimony was a recantation of her testimony at Joey's trial, and an admission that her testimony at Joey's trial was perjury. Judge Matthews initially responded by noting an aspect of Georgia Law that might seem surprising to listeners.

According to Judge Matthews:

Susan Simpson:

When a State's witness recants her testimony, the same is not grounds for a new trial. 'The law is settled that a post-trial declaration by a State's witness that her former testimony was false is not a ground for a new trial.'

To paraphrase the holding in Sharp... There is no error in refusing to take Ms Agan's second version of the same incident and thereby cast doubt on the correctness of the verdict.

Colin Miller:

In other words, in Georgia, even if a key, or *the* key witness for the prosecution recants, the judge can *still* deny the defendant's motion for a new trial because there is always reason to doubt a recantation. But, beyond that, was Agan a key prosecution witness? Judge Matthews concluded that she was not.

According to Judge Matthews:

Susan Simpson:

Ms Agan's testimony was only a small part of the overall picture of the relationship between this Defendant and the victim, Mr Dawkins, shown by the testimony of a number of witnesses who testified consistently as to an ongoing series of what can only be called incidents of stalking and physical confrontations between this Defendant and the victim.

These witnesses testified to these confrontations as having been initiated by the Defendant, Watkins, in an apparent effort to get back at the victim who had dated Watkins' ex-girlfriend.

Collin Miller:

Judge Matthews then concluded that:

Susan Simpson:

Agan's statement is cumulative of all of the other testimony establishing that Defendant in fact threatened to kill Mr Dawkins on several occasions, and had engaged in a repeated number of vehicular stalking incidents over a period of time leading up to this killing, including a number of occasions when the Defendant followed or chased the victim as he drove his vehicle.

The killing, observed by the sole witness, Mr Wayne Benson, precisely matched this aspect of Defendant's mode of conduct.

[22:02] ≈

Rabia Chaudry:

Next, let's fast forward three months after Judge Matthews's opinion denying Joey a new trial to Halloween, 2002. On that date, Cook & Connelly filed their direct appeal from Joey's conviction and Judge Matthews's opinion denying Joey a new trial. The first argument in this brief was that the trial court erred in admitting the hearsay testimony of witness Yvonne Agan pursuant to the 'necessity exception'.

Let's start by breaking down the law here:

Colin Miller: 'Hearsay' is a statement, other than one given by a witness at trial, offered to prove the truth of the matter asserted. So, if Yvonne Agan testified at trial that she saw Joey shoot at Isaac, that would be non-hearsay because she'd be giving a statement at trial describing what she saw. But instead, Agan testified about *Isaac's* statement about Joey shooting at him to prove the truth of the matter asserted in that statement. In other words, that Joey *did* in fact shoot at Isaac.

That's classic hearsay, and hearsay is generally inadmissible because it is unreliable for several reasons. For instance, a witness like Agan might have misheard what Isaac said, or Isaac might have been lying, mistaken, or exaggerating. That said, there are exclusions and exceptions to the rule against hearsay for statements that are thought to be reliable enough to be admissible, such as business records or statements made for purposes of medical treatment or diagnosis.

But none of these classic hearsay exclusions or exceptions applied to Isaac's statement. That left the State with the rule of last resort. At the federal level it's known as the residual or 'catch-all' hearsay exception, and, in Georgia, it's known as the necessity exception. It's rare for attorneys to cite it, and it's even rarer for courts to apply it. That's because there are four substantive requirements for admission, plus a notice requirement.

The four substantive requirements are that:

> *(1) The statement have equivalent circumstantial guarantees of trustworthiness to a statement that would be admissible under a traditional hearsay exclusion or exception;*
>
> *(2) The statement is offered as evidence of a material fact;*
>
> *(3) The statement is more probative on the point for which it is offered than any other evidence which the proponent can proponent can procure through reasonable efforts; and*
>
> *(4) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.*

Rabia Chaudry: The defense argued that the first and third requirements were not satisfied. As to the first requirement, the defense said that Agan did not come forward until the Saturday right before the trial started and that she had unresolved criminal charges pending at the time that she came forward. So, according to the defense, there weren't sufficient guarantees of trustworthiness. Instead, quote:

> *The witness offering the declarations did not come forward on a timely basis, and was herself the subject of pending criminal charges in the same DA's Office.*
>
> *Thus, it was not sufficiently clear from the surrounding circumstances that the 'test of cross-examination' would be a marginal utility, and as such the declarations should not have been admitted.*

Next, when it comes to the third requirement, the defense used Judge Matthews' own words, in which he claimed that Agan's testimony was merely cumulative of other character evidence of Joey chasing or following Isaac in his truck, meaning that Agan's testimony was not any more proof of Joey's alleged *modus operandi* other than this other evidence.

What's somewhat surprising, though, is that the defense didn't mention the notice requirement. Because the necessity exception clearly states the following:

> *A statement may not be admitted under this Code section unless the proponent of it makes it known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.*

Susan Simpson: And while the State would claim that it didn't become aware of Agan's statement until that day, so it couldn't have told the defense about it sooner, we've not been able to locate a single Georgia case where a court has excused late notice of a hearsay statement offered on a necessity exception on *any* grounds, let alone the grounds that, "Well, the State didn't know about it either."

In any event, the defense's second argument was that the trial court erred by restricting the cross-examination of Yvonne Agan concerning the nature of the criminal charges pending against her. At the time of Joey's trial, Agan faced pending charges being prosecuted by the same DA's Office. The trial court *did* allow the defense to ask Agan generalized questions about these pending charges but did *not* allow the defense to ask her about the nature of these charges, which was that Agan, who worked at the DMV, had been fraudulently issuing drivers licenses to people, who had, for instance, lost their privileges, or hadn't been able to pass a drivers test.

On this point, the defense again made an interesting choice. They *did* argue that, with pending charges, the jury could have determined that Agan was tilting her testimony in favor of the State in the hopes of getting better treatment from them on her charges, and they also argued that any limitation on the defense's ability to inquire into those charges denied Joey the right to a fair trial. But the defense *didn't* argue that the nature of the charges, which was fraudulent misuse of a government office to issue licenses to those not entitled to them, was especially relevant to her reliability as a witness.

[27:13] ≈

Colin Miller: Finally, the defense's third argument was that the State committed a Brady violation by failing to disclose James Hudgins's statements about Joseph Boyd confessing to shooting Isaac Dawkins. As you'll recall, Judge Matthews concluded that this was not a Brady violation because Hudgins's statements were lacking in credibility and the defense didn't call Hudgins at Mark Free's trial.

In its brief, the defense now contended that, quote:

> *It is not, as suggested by the trial judge in his order denying a new trial, the duty of the DA's Office to conclude what evidence is 'credible', and hence within the obligation of the prosecution to disclose.*
>
> *Nor is it an answer that Mr Hudgins was not used as a witness in the subsequent trial of co-defendant Mark Free. Mr Free was acquitted; the trial obviously developed in a manner that defense counsel desired.*
>
> *Using sound trial strategy, the defense did not feel any necessity in advancing the possibility of another shooter.*

Thereafter, on November 18th the State Attorney General filed its responsive brief on behalf of the State. With regard to the defense's first argument on Agan's testimony, the State argued that, quote: "Ms. Agan's testimony was the only evidence of Watkins chasing and shooting at Dawkins in his truck, which was exactly how he died."

Then, in a strange admission in a case that was largely built on character evidence, the State acknowledged that the other witnesses that offered other testimony of the acrimonious relationship between the two either recanted their stories, or there was contradictory evidence as to the instigator of the incidents.

Finally, in terms of the trustworthiness of Agan, the State oddly ignored the foundational requirement imposed by the necessity exception and simply asserted that, quote: "Whether Ms Agan was credible was a jury question and not a basis for excluding her testimony."

Next, the State addressed the defense's second argument, that the trial court erred by restricting the defense's cross-examination of Agan. According to the State, there was no error because Georgia case law merely requires the judge to allow the defense to inquire into the *existence* of pending charges against a witness, not the nature of those charges.

[29:18] ≈

Rabia Chaudry: Finally, the State addressed the defense's third argument: The Brady claim. The State first argued that Joey Watkins failed to prove a Brady violation because, quote, "No connection between Mr Boyd and the victim could be established." Fair enough.

Meanwhile, a second argument made by the State was that Hudgins's testimony was not material because the long history of animosity between Watkins and Dawkins further supported the trial court's findings. Again, fair enough, although, as noted, the State undercut a *lot* of the weight of this character evidence by noting that *much* of it was recanted and contradictory.

And then, we have the State's last argument: According to the State, Hudgins's statements weren't material because, quote: Mr Mullinax testified that he saw Watkins fire the shot into victim's truck. Yeah, that's right. What the State is arguing is that there's no likelihood that the testimony by a *preacher* about his neighbor confessing to Isaac's murder would have raised reasonable doubt as to Joey's guilt because of lack of corroboration, contradictory character evidence, and the testimony of a witness who, remember, prompted the prosecution to warn the jury to take his testimony, "For what it's worth."

[30:37] ≈

Susan Simpson: With both of these briefs in hand, the Supreme Court of Georgia issued its opinion in May of 2003. The court first tackled the issue of admissibility for Yvonne Agan's testimony under the 'necessity hearsay exception'.

According to the court:

Rabia Chaudry:

> *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.*
>
> *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 confide in her when he had problems.*
>
> *The victim never disavowed his statement and there was nothing to show that the victim had any motive to lie to Agan about Watkins's violent behavior.*

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Susan Simpson: And... That's it. The court's analysis with regard to Isaac is correct, but it's only one half of the equation, which seemingly creates an incorrect result. Because in a necessity exception case, the court is supposed to look at the trustworthiness of *both* the speaker and the witness – in this case, Isaac and Agan respectively. For example, in its 2005 opinion in *Williams vs. State*, the state considered the admissibility of prior difficulties between the defendant and the victim under the necessity exception by looking at the trustworthiness of both the victim *and* the three witnesses with whom he'd shared the prior difficulties.
But in Joey's case, the court didn't mention Agan at all. Not the fact that she'd waited until the eve of trial to mention the alleged shooting. Or the fact that she had charges pending against her at the time of trial. Nor the fact that those charges alleged fraudulent behavior. And, not the fact that Agan had recanted, or at least changed her testimony at Mark Free's trial. And not *just* in respect to whether or not Isaac actually said it was a shooting, or he didn't know what it was. Numerous details between the two stories changed.

And this then flows into the court's analysis of whether Agan's testimony was more probative than any other evidence at Joey's trial. The court found that it *was*, concluding that Agan's testimony constituted the only evidence that showed Watkins had previously shot at the victim in his truck. In reaching this conclusion, the court never addressed Judge Matthews's conclusion that Agan's testimony was merely cumulative of other character evidence in the case.

And you have to wonder if that's because Georgia's highest court knew that it was a tightrope it couldn't really navigate. And Judge Matthews denied Joey a new trial largely because Agan's testimony supposedly added nothing of significance to the character evidence in the case. And yet, the Supreme Court of Georgia upheld the admission of that same testimony from Agan on the grounds that it was fundamentally different, and more important than all the other character evidence introduced at trial.

In reaching this conclusion, the court made no mention of the fact that Agan again changed her testimony at Mark Free's trial, when she no longer testified that Isaac had definitively said that Joey had shot at him.

Colin Miller: Now, on the one hand, you might say that this makes sense because this took place after the hearsay ruling at Joey's trial, meaning that it's not relevant. But that takes us to the court's consideration of Joey's *second* claim, which, again, was that the trial court improperly precluded his trial counsel from cross-examining Agan about the nature of the charges pending against her at the time of his trial.

Even though the same thinking about post-trial events should apply here, the court made it clear that Agan had been found not guilty of the charges against her. Additionally, though, the court did also note that inquiry into the nature of the charges against Agan would only have been allowed under Georgia law if Agan had been convicted.

But that's not entirely true. The court was citing Section 24-6-609 of the Georgia Revised Statutes, which covers impeachment of witnesses through evidence of criminal convictions. But there was another Section of the Georgia Revised Statutes, Section 26-6-608, which covers impeachment through questions regarding acts of alleged dishonesty that have *not* yet resulted in a conviction. Moreover, as the Court of Appeals of Georgia noted in *Gaskin vs. State,* this Section clearly allows attorneys to cross-examine witnesses regarding alleged fraudulent acts that have not resulted in a conviction. In Joey's case, however, the court didn't reference this section.

The court, however, did reference Joey's *third* claim – the claim that the State committed a Brady violation by failing to disclose James Hudgins's statements about Joseph Boyd confessing to Isaac's murder. It did so in one sentence. Quote:

> *We find no error in the trial court's determination that Watkins 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*.

The court, however, never laid out exactly *what* evidence of Joey's guilt it found especially compelling.

[35:27] ≈

Rabia Chaudry: This appeal, however, wasn't the end of Joey's options for state appeals. Because this was Joey's direct appeal, and Georgia law also allows for something called a 'Collateral Appeal', which is done in the form of a state petition for writ of *habeas corpus*. This *habeas corpus* would involve a change in counsel for Joey.

About four months after the Supreme Court of Georgia denied Joey relief, he was visited in September 2003 by a lawyer named Chris Frazier, and his wife, Monique, who was Chris's paralegal. Joey and his family eventually retained Frazier to assist in his collateral appeal, and on February 27, 2004, Frazier wrote Rex Abernathy a letter, telling him that he had been retained to assist Bill O'Dell in filing the application for writ of *habeas corpus* and he asked for Joey's file, saying that "time is of the essence" in his letter.

Abernathy, however, wasn't responsive. So eventually, Frazier sent John Weeks, a former FBI agent, to Cook & Connelly on Friday, April 2nd to get Joey's files, but Abernathy responded that he had no idea anyone was coming for Joey's file and that he needed a day or two to get the file together. According to an e-mail from Weeks on Wednesday, April 7th, five days later, he had left two follow-up messages on Abernathy's office and cell phone numbers, without a response.

20 days later, and *still* with no response from Abernathy, O'Dell and Frazier went ahead and filed Joey's state *habeas* petition on April 27th, 2004. While the petition raised a number of claims, only two related claims actually ended up in the final petition. The first was, the trial counsel was ineffective in his handling of the cell tower evidence and the second was that the cell tower evidence proved Joey's actual innocence.

Three days later, on April 30th, 2004, Frazier sent a letter to Abernathy.

Colin Miller: Yeah. So, I'm not going to read the entire letter that Frazier sent to Abernathy, but we'll post it on our website. The gist of it, though, is it's detailing Frazier's repeated attempts to get Joey's files from Rex, and Abernathy, in response, not really being responsive, and not producing the files.

I'll read toward the end of the letter here, and we can see Frazier writing to Abernathy:

> *But it is this young man's fate, and not your ego or mine, which must supersede all other considerations at the moment. Every day that young Mr Watkins sits in prison for something that he did not do is a disgrace to the already severely tarnished image of the judicial system. I'm certain that you would agree with this proposition.*
>
> *In any event, I shall expect to receive the file, either directly from you, or indirectly from Mr Johnny Watkins or Mr Bill O'Dell, by the deadline I find it necessary to set. I must have adequate time in which to prepare and amend the pending Petition. I look forward to receiving all the materials on this case now in your firm's possession without any further obstacles or delays.*

> *For whatever offense you may take at the tone and content of this letter, I apologize. My intention is not to insult but to represent a client as zealously as possible.*

Susan Simpson: Meanwhile, a few days later, on May 5th of 2004, Erik Cooper contacted Chris Frazier with the goal of retaining him as co-counsel in his criminal trial on nine counts of child molestation. Cooper eventually hired Frazier, but, on March 2nd, 2005, 12 days before the trial, Frazier filed a motion to withdraw, citing "multiple disputes and irreconcilable differences" between himself and Mr Cooper, including the fact that Frazier had been withdrawn and difficult to reach after his father, Judge John Asbury Frazier, had died on November 21st, 2004.

The court scheduled a hearing on the issue on March 7th, but Frazier didn't show up, allegedly due to illness. The court therefore denied the motion to withdraw, and advised Frazier to appear at trial. Frazier asked the court to reconsider, but the court responded that it would take up any further argument on the first day of trial and Frazier needed to be prepared to go forward with the trial on March 14th.

On the night before trial, though, at 11:45 pm, Frazier's wife and paralegal sent an e-mail to Cooper's other attorney, Terry Lloyd, informing him that due to severe mental health issues, Frazier would not be able to attend the trial.

Susan Simpson: On the morning of the 14th, Terry Lloyd faxed a letter to the court indicating that Frazier had returned home and was despondent. Lloyd therefore moved for a continuance, but the court denied the motion, finding that Lloyd himself was competent as counsel and able to handle the responsibilities of Frazier.

The judge was right, because the jury acquitted Cooper of all charges. As for Frazier though, the court referred the matter to the State Bar of Georgia for investigation, and placed him on notice that he may be cited for civil contempt for his abandonment of Cooper's case, and his refusal to appear at trial.

It's unclear what happened as a direct result of that referral, but four-and-a-half years later, on October 6th, 2008, Frazier was disbarred as a result of his misconduct in *another* case. According to the Supreme Court of Georgia, quote:

> *A prisoner hired Frazier to handle his postconviction proceedings. The prisoner's mother paid Frazier $1,000 for retainer. Thereafter, Frazier failed to communicate with the prisoner, failed to provide any legal advice or services, and failed to refund the retainer after being discharged. This led to a notice of investigation being filed against Frazier, who didn't respond to the notice, leading to Frazier being suspended.*
>
> *Thereafter, Frazier filed a petition admitting to the allegations and agreeing to voluntarily surrender his license to practice law. Finding that Frazier's conduct had violated several ethical rules, the Supreme Court of Georgia accepted Frazier's voluntary surrender of his law license on October 6, 2008*.

Colin Miller: Now if we believe the website *Rip-off Report*, this conduct wasn't isolated. According to one former client, if you check out the Client Contingency Funds through the State Bar of Georgia, $94,000 has been distributed to former clients. According to another, he won a judgment of over $60,000 against Frazier for work he didn't perform, and which Frazier still hasn't paid. In Joey's case, it was a matter of Frazier doing very little work on Joey's case after filing the initial *habeas* petition.

Susan Simpson: Although, it's not just Frazier's conduct or lack of diligence in the case that led to the long delay between Joey's beginning of *habeas* proceedings and their ultimate resolution many, many years later. In fact, on several occasions, Frazier *did* file *habeas* petitions on Joey's behalf.

However, a *habeas* petition is filed against the county where the person is being held, as in literally against the warden of the prison where Joey was at the time it was filed. On numerous occasions Joey was transferred shortly after petitions were filed, which meant his petition had to be restarted again from scratch against the new warden of the new prison where he was at. At one point, Frazier wrote a letter complaining about this constant moving of Joey, and the constant resetting of his *habeas* petitions, noting that, "In the federal system, this would be called 'diesel therapy'".

At any rate, in 2009, after the disbarment of Chris Frazier, the Watkins sought new counsel for Joey, and brought on Bud Siemon, to finally carry through with Joey's *habeas* petition.

[43:52] ≈

Colin Miller: Finally, on October 29th, 2009, five-and-a-half years after Frazier filed his initial petition, an evidentiary hearing was held. Both Joey's 'ineffective assistance of counsel' and 'actual innocence' claims were based upon the argument that it was impossible for Joey to have driven from a location where his 7:15 pm call would have pinged the Kingston Tower to the location where Wayne Benson started seeing the cat-and-mouse between Isaac's truck and the 'Accord-ish' vehicle, and ultimately the location of the fatal shooting at about 7:19 pm

Siemon called two witnesses: The first was Paul Steffes, who, as we noted before, did the cell tower testing for Joey and Mark's trials. According to Steffes, after O'Dell hired him, he met with Tami Colston, who showed him cell tower exhibits from the State's cell tower expert.

Steffes now testified, quote:

Susan Simpson: *I informed Ms Colston that the evidence that she showed me from her prosecution expert, I said, was consistent with the story told by the defendant, and that she should be careful with her physical evidence because I felt it was likely that it was inconsistent with her arguments.*

Colin Miller: Furthermore, according to Steffes, after he was showed the coverage maps:

Susan Simpson: *I told both Mr. O'Dell and Mr. Abernathy, I said, 'You know, gentlemen, these records are completely consistent with what you've relayed to me as your defendant's story."*

Colin Miller: Steffes then testified that these coverage maps were based upon models and that he told O'Dell and Abernathy that, "We could go out and measure the coverage of the towers and we could definitively determine whether or not a cell phone could connect to a certain tower at the location of the 7:15 pm call." However, the response was that, quote: "There wasn't enough time and resources to put together such a measurement."

Susan Simpson: When Bud Siemon took over as Joey's habeas attorney, and got in touch with Dr Steffes, the two of them quickly remedied this past oversight, and confirmed just how impossible it would have been for Joey to make that call from where he needed to be, to commit the murder.

[45:33]

Paul Steffes: *So, I made sure, you know, that's one of the reasons we went and did measurements. So we could show every single spot along that road where he could have been when he initiated that phone call. And, you know, obviously, as we said, there is no way closer that it was any closer than Callier Springs Road. And as a result, you know, was very, very far, very inaccessible to the scene of the crime.*

Bud Siemon: *Well and that's important, because… It's important that you do the measurements because that forecloses any possibility that there may have been some – maybe there was a valley, or a gap, you know, where a signal could sneak through.*

Susan Simpson: At the *habeas* hearing, Steffes testified that he had been able to create a map, showing that the *closest* point to Floyd College at which a call could have been made on the Kingston Tower was near the intersection of 411 and Callier Springs… Also known as the LCKT, last chance-Kingston Tower.

[46:28]

Paul Steffes: *So he had an antenna that was on the-- That was working while we drove the route.*

Bud Siemon: *Mm-hmm.*

Paul Steffes: *And then we stopped at different points…*

Bud Siemon: *And made precise measurements.*

Paul Steffes: *Yeah.*

Bud Siemon: *We not only measured intensity, we measured, I think, uh polarization – we measured all sorts of different electromagnetic issues to make sure that at those locations, it was not possible to communicate with that tower.*

We did everything we could, and we even used some antennas that would have been better than the cell phone.

We verified, no. There was no way that, in these locations, you could have contacted that tower.

Susan Simpson: Steffes ended his direct examination by noting that he could have produced the same map at Joey's trial, if he had been asked by the defense.

Thereafter, a series of three questions and answers sum up the cross-examination of Steffes by the Assistant Attorney General:

Colin Miller:

Question: *The first time at trial, you conducted an experiment to determine if the State's case was viable, right?*

Answer: *No. We had no time to conduct an experiment. Essentially all I did was look at the Evidence that was presented by the prosecution, the maps of coverage of towers, and they seemed reasonable, and essentially our discussion was completely based on that evidence. It was not based on-- Because I had no time to prepare a measurement or experiment of my own.*

Question: *Well, sir, did you feel you had a proper basis for drawing the conclusions that you did at trial?*

Answer: *Sure. I had a proper basis, but it was still limited by the issue of the accuracy of the models.*

Question: *Well, so when you said that there was no way that Petitioner's phone could have connected with that particular tower at the time they said it did, did you feel you had a basis for saying that?*

Answer: *Yes, I did.*

Susan Simpson: In other words, the State was trying to claim that Steffes's testimony was nothing new under the sun, and that a *habeas* proceeding was the improper vehicle for relitigating issues already resolved at trial.

The defense, though, had been trying to claim that Steffes could have done his own testing before Joey's trial and that would have more definitively ruled out the State's theory of the case.

[48:24]

Paul Steffes: *As I was telling Bud, the thing that upset me, was that when the State ruling came out, not awarding the* habeas *ruling, their comment was, "Well, you haven't changed your opinion." It's like, well no, but I have more evidence to underwrite my opinion, which would make me more credible in front of a jury.*

Bud Siemon: *Well, and the issue was ineffective assistance of counsel, in the* habeas*. So, the argument was that the lawyers at trial should've put the time and distance evidence in, they should've gotten the measurements done, they should've put the evidence in about the road construction, and they should've put the evidence in about the synchronization.*

Paul Steffes: *Mm-hmm.*

Bud Siemon: *Without the synchronization, you're comparing apples and oranges. Without the distance, it just doesn't make any sense. And the-- What the State* habeas *judge found, and I believe the federal too, said the jury had with them, in the jury room, a map, one very similar to this, if not the same one. And so they could've done the measurements themselves.*

Well, first off, they didn't have a starting point, because they didn't know exactly where the cut-off was – where the cut-off from connecting to the Kingston Tower was. And then they didn't have the end-point of the trip south, where Wayne Benson first saw the two vehicles, which was 6.3 miles. So, that was a camping store, something like that--

Susan Simpson: *Comfort Housing.*

Bud Siemon: *Yeah, it's not even there anymore. And then they wouldn't have had the-- They didn't have the exact location on that map, of where the shooting actually took place. So even though they had a map, first off they didn't have the information, but if you look at the closing arguments, nobody told them to look at the map and do the measurements.*

Susan Simpson: *Mm-hmm.*

Bud Siemon: *I mean, that is not something that the jury would just automatically do: "Oh look we have a map, here, let's measure. Well, where do we start? Hmm, I'm not sure. Well where do we end? Hmm, I'm not sure."*

Paul Steffes: *Well, not only that, there's not even legend on these maps as to which towers are covered by which colored sector!*

They could have interpreted this yellow sector up here as being from a different tower… I mean, they didn't even have a legend. If all they had was a map, they would have been guessing at what it all meant.

Susan Simpson: Siemon's second witness was Bill O'Dell, who was now working as a Special Assistant to the Attorney General's Office. According to O'Dell, he saw the trial strategy as two-pronged: First, have Dr Steffes establish the closest point to the car chase and shooting scenes where a call could have been made at 7:15 pm on the Kingston Tower. And then have a retired state trooper who have driven the possible routes brought to the stand to testify in a way that showed, quote, "It was just impossible for Joey Watkins to have committed this murder."

Here's the gist of O'Dell's testimony and Siemon's argument at the habeas hearing:

Colin Miller: Number 1: In the best case scenario for the State, at 7:15 pm, at the time of the Kingston Tower ping, Joey was 6.3 miles away from the location where Wayne Benson first saw the cat-and-mouse game between Isaac's truck and the 'Accord-ish' vehicle. And then, it was another 1.9 miles to the location where Isaac was shot. Therefore, if we take the very best timeline for the State – the 7:15 pm ping occurring at 7:15 and one second, and the Isaac Dawkins shooting occurring at 7:19 and 30 seconds, just before the first 911 call, then Joey would have need to drive 8.2 miles in four minutes and thirty seconds.

Number 2: There were two stoplights between the best Kingston Tower ping location and the site where Wayne Benson first saw the two vehicles jockeying.

Number 3: Part of the distance between those two locations was a four-lane bridge that was narrowed down to one lane in each direction due to construction on the day of the shooting.

Number 4: Although the defense didn't present evidence of this fact at trial, the 911 time was synched with the cell phone records, meaning that a time discrepancy couldn't change things.

Number 5: Back in 2001, O'Dell and Abernathy had a former state trooper drive the route from the best Kingston Tower location at 7:15 pm to the site where Wayne Benson first saw the two vehicles jockeying, and he arrived at 7:28 pm – nine minutes after Isaac Dawkins was shot. And that's not even accounting for the 1.9 miles between Wayne Benson's first sighting of the jockeying and the location of the shooting.

And finally, *Number 6*, which came in the form of the following exchange:

Rabia Chaudry:

Question: *What happened at trial in relation to that strategy of having the trooper testify?*

Answer: *The trooper was there all week. Mr Steffes had got up, laid out all the points we needed to have laid out, and we called a couple of defense witnesses, but that was our big finish, and Rex decided not to call him. I was astonished. Well, not astonished, I was furious.*

And we got into an argument. Joey got upset. I went out in the hall. We talked about it and he said-- He said, people know in Rome how far it is from there. I mean, that-- He was there, he drove it, I drove it several times. I drove it with Joey's daddy several times. That was the theory. I mean, it was simple. And for him not to call him was just-- I didn't understand it.

Susan Simpson: On cross-examination, the Assistant Attorney General tried to minimize the former trooper's potential testimony, contending that it would have just tied together the things that Dr Steffes had already said. Which, prompting O'Dell to respond, "Now, just having the cell tower locations and coverages is meaningless unless you tie it up with the distances."

Joey's lead counsel, Rex Abernathy, was also involved in the *habeas* proceedings, though he did not appear as a witness. He did appear for a deposition a few weeks later, on November 17th, 2009. And during the deposition, Abernathy said that he thought that Mark Free was acquitted and that Joey was convicted based upon the character evidence and not based upon any ineffective assistance at Joey's trial.

In terms of why Abernathy *didn't* call the state trooper… Well, that's a bit more complicated. But Abernathy acknowledged that the cell tower evidence was *pretty good* in supporting the defense's theory of the case. He was more equivocal though about the possible testimony of the former trooper who actually drove the route.

In technical terms, what Rex Abernathy did here was to completely screw Joey over in his *habeas* proceeding. Because Abernathy claimed that his decision to only give a glancing mention to the scientific impossibility of Joey's guilt was *strategic*, and at that point, Joey's *habeas* petition was pretty much doomed.

[54:54]

Bud Siemon: *Joey should've won his habeas, too. Because there's… You can downplay-- I mean, you can make excuses, for why the trial came out the way it did. But the lawyers were ineffective for not putting up, in Joey's trial, not putting up the time-distance evidence, putting in the road construction evidence, the traffic lights, the synchronization between the 911, you know? That needed to be in there to put up the defense. All of that's critical.*

And really, if you leave out any of it, it significantly weakens the defense, and putting it in significantly strengthens the defense. So the lawyers were ineffective, in my opinion, for failing to put that evidence in.

And so we should have won the habeas *on that basis.*

Susan Simpson: *Did you ever talk to Rex and Bill about what happened, and…?*

Bud Siemon: *Oh, I've talked to Bill a bunch of times.*

Paul Steffes: *Oh yeah, Bill was very cooperative, and*

Bud Siemon: *Yeah, did you ever read Rex's deposition? For the* habeas*? He was hostile, I mean really hostile, very self-protective. It was just-- And what he said was ridiculous, too.*

Susan Simpson: *What did he say?*

Bud Siemon: *Well he said that he-- I haven't read the deposition in a while…*

Clare Gilbert: *Strategy, strategy, strategy…*

Bud Siemon: *Well, strategy, but, that he wasn't sure how strong the evidence was, that he didn't feel like the evidence would-- Actually precluded Joey being at the scene.*

Susan Simpson: Bud Siemon is misremembering *slightly* what Rex Abernathy testified to at the deposition, but he's got the gist of it right.

Abernathy actually *did* agree, more or less, that the cell phone records proved that the State's theory was impossible. It's just, Abernathy found all that unimportant.

Here's what he testified to at his deposition:

Rabia Chaudry:

Question: *What were those pitfalls in calling the trooper?*

Answer: *I remember timing with the investigator driving it and then having me to go out and drive it with him and then going out with Bill to drive it. I think the timing was too close to base our entire defense on that.*

Question: *So during that-- So let me ask you: Based on the driving and the timing that you did at the time, do you believe it would be possible to drive from the Chulio Road area down to Floyd College, turn around and drive back to the crime scene?*

Do you think that would be possible based on your…?

Answer: *In four minutes?*

Question: *Investigation. Yeah?*

Answer: *You didn't ask the question in four minutes, but you're talking about that in four minutes?*

Question: *In four-and-a-half minutes.*

Answer: *I doubt-- It doesn't sound like that would be possible. But I also would say this, Mr Siemon, that the drive that you just described is not, was not dispositive of this case, it was not the big issue in this case.*

Breaking those up to certain distances and the true evidence in the case based on the transcript, if you would look at it, those issues are what's important. Making this drive in that time was not dispositive of this case.

Question: *Okay. So you don't think the district attorney's argument, if she made this-- If the record reflects that she made the argument that he made the call from the Chulio Road area and he traveled four minutes and he got down around-- Somewhere around Floyd College and he saw Isaac Dawkins and turned around…*

You don't think that disproving that argument would have been important in this case?

Answer: *This drive would not have been important. Your argument, the Chulio Road area to the college, I think could probably be done in four minutes.*

Now, now, turning around and whatever else happened would have taken longer than four minutes, but that argument-- Just the Chulio Road area is a big area. That drive could be made to the scene of the shooting, in my opinion today, without going out there. I haven't been out there in a while.

> *I remember that we worked very diligently and very hard on it.*
>
> *But the map that you have, the argument that you're making and tying it to the district attorney's argument, I think is totally unequivocally fraudulent as laying it out as a defense for this case or an argument that the defense was not laid. That's what I think.*

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[59:21]

Colin Miller: So, if we break this down, we can see the respective positions of the defense and the State. According to the defense, the State not only included Wayne Benson in their trial timeline, but they had to include him. And, if you include Benson, Joey had to drive from the site of the 7:15 pm call to a point at least 1.9 miles south of the site of the shooting, to the first point where Wayne Benson saw the two vehicles, before driving another 1.9 miles north to the site of the shooting.

As Abernathy himself acknowledged, that would be physically impossible. And it's worth noting the premise Abernathy is starting from is wrong in itself. Chulio Road is a red herring that Tami Colston invented in this case. Despite the fact she invoked it often at Joey's trial, it has nothing to do with the actual cell phone evidence. The 7:15 pm call couldn't have been made from there, as Dr Steffes' testing proved.

Now, conversely, the State on appeal claimed that Benson could be written out of the timeline and that Joey could have driven directly to the site of the shooting, which would have been exceedingly difficult but physically possible, well, at least according to Abernathy.

It seems, though, that the defense had the better of the argument. As we just noted, Abernathy testified that he felt the character evidence was maybe the biggest difference between the prosecution of Mark and the prosecution of Joey, and the State relied heavily on the character evidence in its appeal.

But character evidence by itself is fairly weak. What makes it strong is some nexus between the character evidence and the crime at hand. And that nexus was supplied by Wayne Benson and Wayne Benson alone.

Recall again what Judge Matthews said in denying Joey's motion for a new trial based on Yvonne Agan's testimony:

Susan Simpson:

> *Agan's testimony is cumulative of all of the other testimonies, establishing that Defendant in fact threatened to kill Mr Dawkins on several occasions and had engaged in a repeated number of vehicular stalking incidents over a period of time leading up to this killing, including a number of occasions when the defendant followed or chased the victim as he drove his vehicle.*
>
> *The killing, observed by the sole witness, Mr Wayne Benson, precisely matched this aspect of defendant's mode of conduct.*

Colin Miller: In other words, Wayne Benson was the nexus between the character evidence and the shooting, and without Wayne Benson, the State had no case. The Supreme Court of Georgia disagreed. In an opinion issued on October 5, 2012, it denied Joey relief.

According to the court:

Susan Simpson:

> *Lead counsel Rex Abernathy testified via a deposition on November 17th 2009. Counsel stated that he spoke with an expert witness about the cell phone tower evidence, hired two investigators to look into the evidence, and drove the distances involved himself. Counsel believed the cell phone tower evidence was 'pretty good' in supporting the defense's theory.*
>
> *However, counsel did travel with an investigator the distances involved and concluded that the State's theory could also be supported by the cell phone tower evidence. Counsel had strategic reasons for not putting forth certain evidence at Petitioner's trial regarding the distances travelled and the cell phone tower locations. He opted not to rely upon the investigator-timed driving evidence because it was too close to base the entire defense theory upon that alone.*

Colin Miller:

The court actually got it wrong. Abernathy agreed with the defense that the State's theory could *not* be supported by the cell tower evidence. He just claimed that the State could have argued an alternate theory in which Wayne Benson was written out of the timeline, and that, under that different timeline, it was… Well, at least *theoretically* possible, *maybe*, that Joey could have committed the crime, if you discard all the other evidence in the case and assume there were some impossible driving maneuvers.

But, in any event, the court credited Abernathy with a strategic reason for not calling the retired trooper at trial and hammering home the impossibility of the cell tower evidence at trial. And that meant not only that Joey received the effective assistance of counsel, but also that he couldn't prove his claim of actual innocence.

Susan Simpson:

To make things worse, the court also twisted the testimony of Dr Steffes in an effort to make it comply with Abernathy's claims.

The court found:

> *On cross-examination, Dr Steffes admitted that a cell phone call could possibly, under certain circumstances, connect to the Kingston Tower at a point nearer the murder scene. This explains counsel's testimony that the State's theory could also be supported by the cell tower evidence*.

Which is *true*, in a sense… Dr Steffes did admit that the 7:15 pm call could possibly have been made, under certain circumstances, on the Kingston Tower at a place closer to the murder, and fit with the State's theory. But what the court's decision leaves out is what those 'certain circumstances' actually were.

[1:03:38]

Paul Steffes:

It was asked of me: "Was this physically possible?" I said, "Yes, if you had taken a fleet of helicopters and suspended a large piece of aluminum foil reflecting surface and positioned it precisely – I mean, it would cost you millions of dollars-- But if you could do that, you potentially could connect to the tower in that way."

Susan Simpson:

The following month, Joey filed a *habeas* petition for a writ of *habeas corpus*, and a few months later, the federal court denied Joey relief in an opinion that largely restated the conclusions of the Supreme Court of Georgia.

And, in most cases, that would be the very end of the post-conviction claims available to a Georgia defendant.

[1:04:28] ≈

Rabia Chaudry: It took us 23 episodes to explain to you, how this wrongful conviction took place. What actually happened in *The State vs. Joey Watkins*, what we know about the death of Isaac Dawkins, why we believe, just like the Georgia Innocence Project, that Joey is innocent of this crime. And he has spent entirely too many years in prison for something he didn't do.

The question now, of course, is what's next? Having lost all of his appeals, what can Joey now do? And what can *we* do, to help him?

Next time, on *Undisclosed*.

≈