UNDISCLOSED, Season 1, Update -
Adnan Syed Petitions the Supreme Court
August 29th, 2019

[0:53] Rabia Chaudry: On Monday, August 19th, Adnan's defense team filed a petition for writ of certiorari with the United States Supreme Court. So, what does that mean, and what can we expect going forward in his case**?**

Hi, and welcome to this special update episode of Undisclosed. This is Rabia Chaudry. I'm an attorney and author and as always, I'm joined by my co-hosts, Susan Simpson and Colin Miller.

Susan Simpson: Hi, this is Susan Simpson. I'm an attorney in Washington, D.C, and I blog at TheViewFromLL2.

Colin Miller: Hi, this is Colin Miller. I'm an Associate Dean and Professor at the University of South Carolina School of Law, and I blog at EvidenceProfBlog.

Rabia Chaudry: Let's start by taking you back to March 8th, 2019. On that day, the Court of Appeals of Maryland reversed two lower courts and denied Adnan a new trial. First, in a 4-3 ruling, Maryland's highest court held that Adnan had failed to prove ineffective assistance of counsel based on his trial attorney, Cristina Gutierrez, failing to contact alibi witness Asia McClain. As you may recall, the State claimed at trial that Adnan had killed Hae Min Lee in a Best Buy parking lot shortly before making a 2:36pm call from a payphone at the Best Buy. And Asia McClain would later testify at Adnan's postconviction proceeding that she was with Adnan at the library next to their high school until 2:40pm on the day of the murder.

Six of the seven justices of the Court of Appeals agreed with Adnan that Gutierrez rendered *deficient performance* by failing to contact Asia McClain despite Adnan showing her the letters that Asia had written him in prison. And yet, the four judges in the majority found that the failure to contact Asia wasn't *prejudicial,* or didn't undermine their confidence in the jury's verdict.

Susan Simpson: Meanwhile, back at the trial court level, in granting Adnan a new trial Judge Welch had found that Gutierrez was ineffective in failing to cross-examine the State's cell tower expert at trial with the AT&T disclaimer stating that incoming calls are

not reliable for determining location status. Neither the Court of Special Appeals nor the Court of Appeals disputed Judge Welch's factual findings there, but both found that Adnan had waived this issue under Maryland law by not including it in his initial PCR petition back in 2010.

So, all of this takes us to Adnan's petition filed last week with the United States Supreme Court on August 19th. The first thing to note is that the petition does *NOT* raise the cell tower issue. Why? Well, the Supreme Court only reviews issues that solely involve *federal* law. If there are what are known as "Adequate and Independent State Grounds" for a state court's decision, the Supreme Court won't review it.

And, in this case, that's what we have the cell tower issue. Did Adnan waive this claim? Maybe, and maybe not, but that's an issue of Maryland *state* law, not federal law, so the Supreme Court won't review it.

But the alibi claim? A claim of ineffective assistance of counsel is a claim that a defendant was denied his Sixth Amendment right to counsel, which is a federal right, under the U.S. Constitution. And, unlike with the cell tower claim, there is no argument that this claim was waived under Maryland state law. And so, the alibi claim is one that the Supreme Court *could* consider. However there is a lot of emphasis on the word "could" there.

Colin Miller: This takes us back to 1921. William Taft was the country's 27th President from 1909 to 1913. Later, he became the 10th Chief Justice of the Supreme Court in 1921. Upon becoming Chief Justice, Taft immediately saw the huge backlog of cases, and so he created a committee that eventually led to the passage of the Judiciary Act of 1925, which is also known as the Judge's Bill, or the Certiorari Act.

This last phrasing explains one of the key effects of the Act. Whereas, the Supreme Court used to have to hear nearly every appeal brought to it, the Certiorari Act gave the Court discretion to hear appeals. And so, when a losing party wants the Supreme Court to hear its appeal, it files what's known as a petition for writ of certiorari, or cert petition, with the Supreme Court. In effect, the petition is asking the Supreme Court to pick a case like a needle out of a haystack and agree to hear it. And, no, that's not an exaggeration.

According to the U.S. Courts website, "[t]he Supreme Court agrees to hear about 100-150 of the more than 7,000 cases that it is asked to review each year." Doing a little math, that means that the Supreme Court agrees to hear between 1.5 and 2% of the

cases presented to it. Now, this probably understates Adnan's chances because a decent number of cert petitions are *pro se*, or written by parties without lawyers. These are often poorly written and rarely granted. And then, there are the petitions written by lawyers without much or any experience in the Supreme Court, who often don't know how to write cert petitions that will pique the Justices' interest.

Rabia Chaudry: Adnan's case is the opposite. In addition to being represented by Justin Brown, Adnan is also represented by a team at Hogan Lovells, including Cate Stetson, who argued his case before the Court of Appeals of Maryland. Stetson used to work at a law firm next to Chief Justice John Roberts, and has made 100 arguments before the U.S. Supreme Court and other appellate and district courts across the nation. In other words, she knows how to frame issues for the Supreme Court, and she increases the chances of the Supreme Court taking Adnan's case from "none" to "slim."

So, how did Cate Stetson, Justin Brown, and the rest of Adnan's team frame the issue in the Adnan Syed case? It's right there are the start of the brief, under the heading "Question Presented".

[6:13] Colin Miller: And that question presented is:

> *Whether a court evaluating prejudice under Strickland v. Washington...must take the State's case as it was presented to the jury, as ten state and federal courts have held, or whether the court may instead hypothesize that the jury may have disbelieved the State's case, as the Maryland Court of Appeals held below.*

Rabia Chaudry: There are generally three categories of cert petitions. In the first, the petition claims that a court opinion was the first interpreting a newish law and that the court's interpretation violates some federal law or right. In the second, the petition claims that there is a split among courts, with some courts reaching one conclusion and other courts reaching a different conclusion. And, in the third, the petition claims that **every** court to address an issue has reached one conclusion and that the opinion at issue is the **first** opinion to reach the opposite, and incorrect conclusion.

Susan Simpson: Adnan's petition falls into this *third* category. It claims that the reasoning used by the Court of Appeals of Maryland to deny him a new trial is contrary to the reasoning used by every other court presented with the same issue. To illustrate this, let's look at one of the cases cited by the cert petition. In Stewart v. Wolfenbarger, Joseph Stewart was charged with first-degree murder, and defense counsel had failed

to investigate one alibi witness and failed to provide an alibi notice for another alibi witness.

In finding these failures of counsel to be prejudicial, the United States Court of Appeals for the Sixth Circuit used the same reasoning as nine other courts: It looked at "[t]he difference between the case that was and the case that should have been." In other words, it looked at the difference between the State's theory of the case at trial, including the alleged time of the murder, and how much that theory would have been hurt by the testimony of two alibi witness that the defendant was with them at the alleged time of the murder. And, finding this difference to be significant, the court granted Stewart a new trial.

To further understand the alternative approach that's been rejected by every court before the Court of Appeals of Maryland reached its decision in the Syed case, we can look at another case cited in the cert petition: First, there is Hardy v. Chappell. In that case, the United States Court of Appeals for the Ninth Circuit cited to the Supreme Court's opinion in Strickland v. Washington, which is *the* key case on the ineffective assistance of counsel claims:

> **Rabia Chaudry reads:**
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> *Strickland does not permit the court to reimagine the entire trial. We must leave undisturbed the prosecution's case. We only envision what [defense counsel] should have presented in [the defendant's] defense and determine how that would have altered the trial. In doing so, we may not invent arguments the prosecution could have made if it had known its theory of the case would be disproved.*

[11:05] Susan Simpson: This takes us back to Adnan's case. So, let's do the analysis from the Stewart case and start with "the case that was". Here's from the states closing arguments that were made ad Adnan's trial:

> **Colin Miller reads:**
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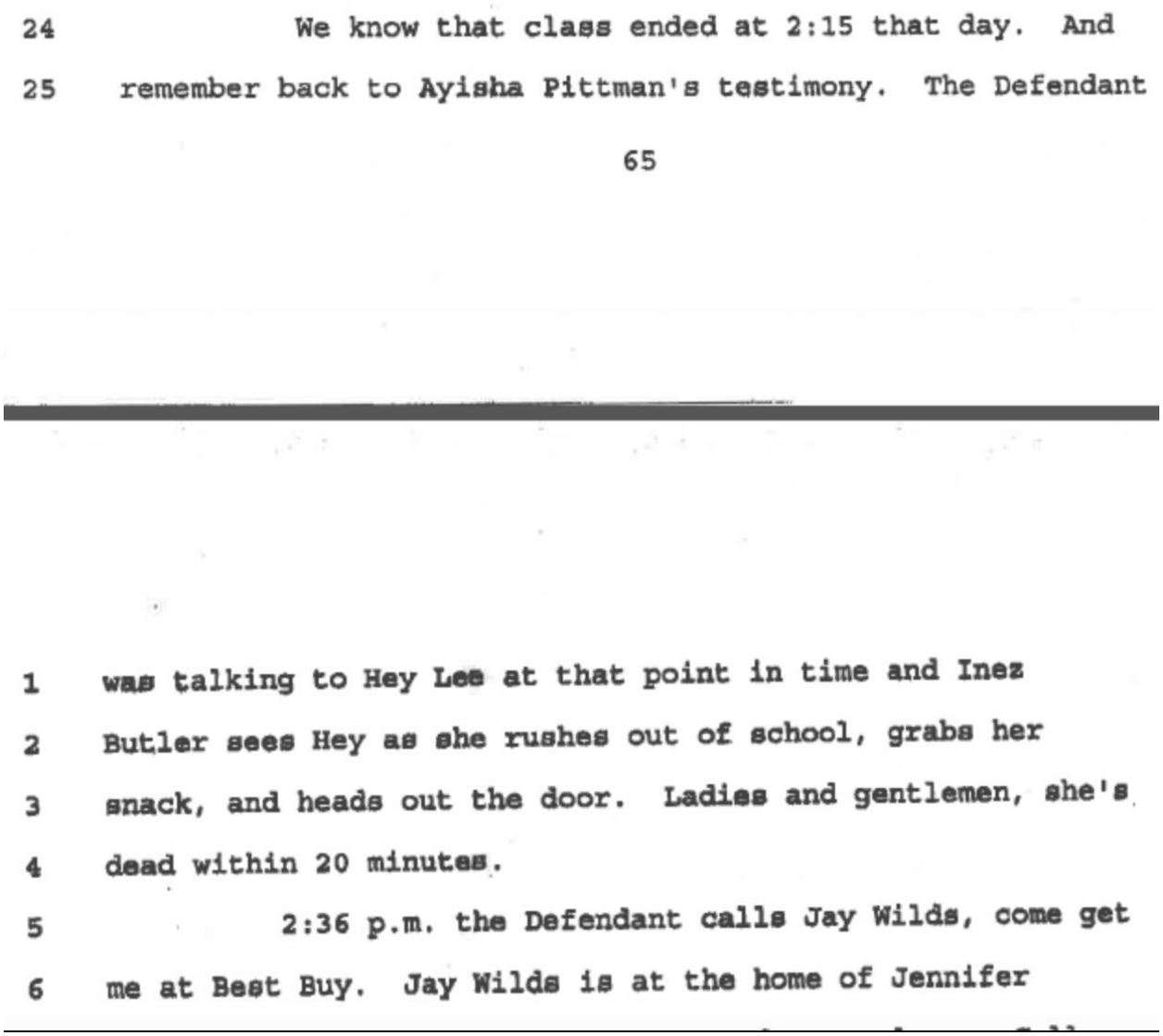
> *We know that class ended 2:15 that day. And remember back to Ayisha Pittman's testimony. The Defendant was talking to Hae Lee at that point in time and Inez Butler sees Hae as she rushes out of school, grabs her snack, and heads out the door. Ladies and Gentlemen, she's dead within 20 minutes.*

2:36pm, the Defendant calls Jay Wilds, come get me at Best Buy.



24 We know that class ended at 2:15 that day. And
25 remember back to Ayisha Pittman's testimony. The Defendant

1 was talking to Hey Lee at that point in time and Inez
2 Butler sees Hey as she rushes out of school, grabs her
3 snack, and heads out the door. Ladies and gentlemen, she's
4 dead within 20 minutes.
5 2:36 p.m. the Defendant calls Jay Wilds, come get
6 me at Best Buy. Jay Wilds is at the home of Jennifer

Susan Simpson: In other words, the State claimed that Adnan killed Hae between 2:15 and 2:35pm, whereupon he called Jay Wilds at 2:36pm, which is the 2:36pm that shows up on his call log.

Colin Miller: Next, let's look at "the case that should have been." This takes us back to Asia McClain's testimony at the postconviction proceeding that she saw Adnan at the Woodlawn Public Library until 2:40pm on the day of the murder. Doing simple math, the prejudice is evident: If Adnan was at the Woodlawn Public Library until 2:40pm, there's no way that he's at Best Buy, committing the murder and making the "come and get me" call at 2:36pm.

And the State knew this. That's why, on appeal, it made the argument that it could have changed its theory of the case. According to the State in appeal,

> **Susan Simpson reads:**
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> *The problem with this logic is that the State could have worked off the (also tenable) assumption that it was the 20-second 3:15 p.m. call, not the earlier 2:36 pm. entry, that corresponded to Syed's call to Wilds to come meet him. In other words, had McClain testified that she and Syed were sending emails or talking to one another at the Woodlawn Library until 2:40 p.m., that would have presented a relevant alibi on only one of two possible timelines that the State could have argued to the jury. Both calls were short and originated from an unspecified number; either of them could have been presented by the state as the key communication from Syed to Wilds, and neither timeline was more or less consistent with the remainder of the state's case. Te be clear, the point is not that the State's asserted timeline was flawed, but only that Syed overstates the significance of Asia McClain.*

Susan Simpson: Now, to recap, if you remember back in 2014 when *Serial* came out, this has been suggested before, I think actually *Serial* had its own blog about it. The 3:15 call is not some alternative that just could be seamlessly interchanged with the 2:36 call. The 3:15 call for numerous reasons is not tenable. So the Court's assumption here that it could simply a substitution that was made isn't based on fact, and this is why the previous two courts that looked at the issue have gone the other way, because the Court of Appeals is not in a position to make this judgement about how easy it is, or easy it would have been, for the prosecution to just change its mind and put new facts in.

Colin Miller: Yeah, and what we see from the State's argument is, the State was asking the Maryland courts to employ the exact reasoning that was rejected by the Sixth Circuit, the Ninth Circuit, and eight other courts. Simply put, the State *didn't* want the Maryland courts to consider "[t]he difference between the case that was and the case that should have been." Instead, it wanted Maryland's courts to consider the case it would have presented had Asia McClain testified

Rabia Chaudry: But Judge Welch, the PCR judge, rejected the State's hypothetical, holding that the State's case was inconsistent with a 3:15pm "come and get me" call. Simply put, as Judge Welch correctly noted, Jay Wilds's testimony contained at least

20+ minutes of events between the “come and get me” call and the 3:21pm call from Jennifer Pusateri’s call on Adnan’s call log, which Jay said he answered. And that makes a 3:15pm “come and get” me call impossible.

And so, Judge Welch refused to entertain the State’s hypothetical timeline. That said, Judge Welch ultimately found that failure to contact Asia McClain was not prejudicial because she did not undermine the “crux” of the State’s case, which was evidence connected to the so-called “Leakin Park pings” at 7:09 and 7:16pm.

Now, you might agree or disagree with this conclusion, and obviously we disagree with it. But what Judge Welch did NOT do was to create a hypothetical timeline under which the jury could have found Adnan guilty even if Asia was with him at the library. Instead, Judge Welch found that any weakness in the State’s case based on Asia’s alibi was made up for the evidence connecting Adnan to the burial.

Using this same framework, the Court of Special Appeals granted Adnan a new trial on the Asia issue. According to that court, the “crux” of the State’s case was the murder, and Asia’s testimony undermined their confidence in the jury’s verdict.

[16:40] Susan Simpson: Then, we have the Court of Appeals of Maryland. And what they did is what ten courts have rejected. According to the Maryland Court of Appeals, Asia didn’t move the needle because “the jury could have disbelieved that Mr. Syed killed Ms. Lee by 2:36 p.m., as the State’s timeline suggested, yet still believed that Mr. Syed had the opportunity to kill Ms. Lee after 2:40 p.m.”

This, of course, is hypothetical-thinking, which is exactly what 10 courts have rejected. As the cert petition notes:

> **Colin Miller reads:**
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> *In the decision below, the Maryland Court of Appeals rejected the majority approach of ten state and federal courts. It did not take “the State’s evidence of guilt” as the “jury heard” it...or base its analysis on “the theory the state advanced at trial.”...Nor did it consider “[t]he difference between the case that was and the case that should have been.”...And it plainly did not “leave undisturbed the prosecution’s case” and then “analyz[e] the evidence that would have been presented had counsel not performed deficiently.”...*

The court instead performed a completely different analysis: It assumed that the "jury could have disbelieved that Mr. Syed killed Ms. Lee by 2:36 p.m., as the State's timeline suggested."...In other words, the Maryland Court of Appeals rejected the theory of the case presented by the State, and the evidence that the State introduced to support its theory, in favor of a hypothetical case in which Syed killed Lee at a different time of day (and possibly in a different place). The Maryland Court of Appeals did not cite any record evidence to support its hypothetical case; the time of death was undisputed by both the State and Syed at trial.

The difference between the majority rule and the approach adopted by the Maryland Court of Appeals is outcome-determinative in this case: If the Maryland Court of Appeals had compared the case that the State actually presented to the jury (which pinned the time of death to a 20-minute window) with the case that Syed would have presented to the jury (which placed him elsewhere during that time), the Maryland Court of Appeals would have found prejudice. Instead, the court compared a case that the State did not present (where the murder was committed at a different time) with the case that Syed should have presented to the jury (which addressed his whereabouts at a time when, in this hypothetical case, the murder was not committed).

Susan Simpson: The cert petition explains *why* this hypothetical-thinking by the Court of Appeals is problematic and dangerous. And the reason is that it makes the State's case a moving target.

Colin Miller reads:

It is no wonder, then, that the Maryland Court of Appeals found no prejudice….If a court evaluating prejudice is permitted to hypothesize theories never presented to the jury in response to the defendant's "case that should have been,"...counsel's incompetence could in all of the above cases have been found to be non-prejudicial.

And, by the above cases, the cert petition is referring to the ten alibi cases where the courts rejected the same type of hypothetical-thinking employed by the Court of Appeals of Maryland. And the petition makes sense: Alibi witnesses cover discrete periods of time. If a court is allowed to reimagine a different timeline than the one presented by the State at court, and hypothesizes that the jury might have adopted this alternate timeline

to find guilt beyond a reasonable doubt...well, that could render most alibi witnesses irrelevant.

And that's the point of the cert petition. It argues that the opinion of the Court of Appeals of Maryland opens a can of worms that the Supreme Court should want to close. Because, if the Supreme Court doesn't, it could make it really hard for innocent defendants to win ineffective assistance of counsel claims when their attorneys fail to contact alibi witnesses.

Now the Supreme Court is going to either take up this case or not based upon how important it feels this issue is as a matter of federal law. It's not out of caring for Adnan's case, or not personally. It's about whether this issue is deemed so important by the court that they should use their limited and precious time to try and fix it. But in this case in particular, it's worth remembering, as we all probably do, that the facts here involving the timeline and the phone calls is pretty significant for the state's version of events. And if we're allowed to just say here that 'OK, the state could have gone for 3:15', well that means that the state now has two problems. Well, many problems, but two major ones. The first has to do with Nisha. Remember all that time we spent worrying about the Nisha call, and whether it was a butt dial, or what? Well, the Nisha call can't be reconciled with a 3:15 timeline, so it turns out that was a waste of time. It also means that the testimony of Jenn Pusateri, the only witness who really comes close to corroborating what Jay says at trial, she is now rendered problematic, because guess what, right after the 3:15 call there's a call made to Jenn Pusateri. So the State would have a new problem on its hands if it tried to move the timeline, namely why is the first call after the murder, after Jay learns of the murder, to his friend Jenn Pusateri?

Colin Miller: Yeah, it's also not unprecedented for the Supreme Court to take an ineffective assistance of counsel claim from the Court of Appeals of Maryland. As we've mentioned on the podcast before, in relation to the cell tower evidence that there actually was a claim of ineffective assistance of counsel, the Klobucky case, decided by the Court of Appeals of Maryland, there was actually a case finding that there was ineffective assistance of counsel based upon failure to find a report about comparative bullet lead analysis, and the Supreme Court decided this was an important enough case back in 2015 to hear that and actually reverse the Court of Appeals of Maryland. So if you're sort of thinking, would this ever the sort of case the Court would take, in fact in the past four years they've taken a very similar case.

Susan Simpson: Yes, the reason the odds are against the court taking this case here, are because for any case, ever, not involving something like national security or the

president and other pressing issues, for the Supreme Court the odds are *always* low. But in terms of the general universe of defendants raising these sort of post-conviction claims this is a strong case. It has as much a chance as any, and probably more than most, to be accepted. Which again, is a very small chance.

Colin Miller: And this is something too where we saw in the Maryland courts, and I fully expect it here in the Supreme Court, people can file what are known as amicus briefs, which are friend of the court briefs. We saw amicus briefs to the Court of Appeals of Maryland, both before their initial decision and the motion to reconsider, so I would expect a few groups to file amicus briefs here which again increase the odds of the Supreme Court granting cert.

[24:27] Rabia Chaudry: So, what happens next? As we noted, Adnan's cert petition was filed on **August 19th**. That means that the State has until **September 20th** to file a response to the cert petition. Does the State have to file a response? No. Can the State file for an extension of time to file a response? Yes.

But let's assume that the State doesn't file for an extension. If the State expressly waives its right to file a response or simply doesn't file a response, Adnan's cert petition will immediately be circulated to the Justices for consideration. If the State files a response, the cert petition and response will be circulated to the Justices within 14 days. Then, usually about two-and-a-half weeks later, the Justices will consider the cert petition and possible response at a conference, with conferences usually being held on Fridays.

But we use the term consider loosely. One estimate is that the Justices only talk about 20-25% of cert petitions, with the other 75-80% automatically being denied. So, the goal here is to have your cert petition in that 20-25%, and it takes four Justices to "grant cert" or agree to hear the appeal. Usually, the Supreme Court will report which cases it has accepted and which cases it has rejected at 9:30am on the Monday following the conference. So, we should know soon after the conference whether the Supreme Court is taking Adnan's case.

Now, there's one last thing to note: Assume that the State doesn't file a response. Another possible outcome of the conference is that the Justices issue an order asking the State of Maryland to file a response. This would take the chances of a cert grant from slim to moderate. It would mean that the Justices think there might be something to Adnan's cert petition, which is why they would be asking for a response.

In that event, the State would have about a month to respond. But it could and probably would ask for an extension of a month. And then another month. In the end, we might be waiting until 2020 before finding out whether the Supreme Court will hear Adnan's appeal.

So we have explained why and how chances are very slim at the Supreme Court, and I have always said it's a long shot here, but of course we have had a lot of long shots come through for us in the last five years. But having said that you hope for the best and plan for the worst. And assuming that Andan's cert petition is denied, we are already planning for what's next. This is not the end of the road, and a lot of people ask us if the US Supreme Court is in fact the end of the road. We actually can go back to state court, we can file another post-conviction, we can go to federal court, there are other avenues for relief for Adnan. They will however take time, effort and money, all the resources that have gotten us this far. But at the end of the day we don't want people to think that this is our absolute last shot. It really is not.

All right, before we sign off I just want to let you guys know that we have a new series that's going to begin airing on Sep. 9th. It's going to be our long series for this year, It's going to be an interesting case, a double homicide out of Tennessee, and you don't want to miss it.

[27:47] Colin Miller: Thanks so much for listening to this special episode of *Undisclosed.* I'd like to thank the following people for today's episode: Hannah McCarthy for audio production, Christie Williams and Nina Muster for website management, Baluki for our logo, Patrick Cortez and Ramiro Marques for our music, and Mital Telhan our executive producer.