

**SUPREME COURT
STATE OF GEORGIA**

STATE OF GEORGIA,

Plaintiff,

v.

JOSEPH WATKINS,

Defendant.

Supreme Court

Case No. _____

Superior Court

Case No. 01-CR-16707

UNDISCLOSED LLC’S REQUEST FOR EXPEDITED TREATMENT

Non-party Undisclosed LLC hereby respectfully requests that this Court grant expedited treatment to its Motion to Amend Order Prohibiting Access to Court Records or, in the Alternative, Application for Leave to Appeal.

Undisclosed submits the Affidavit of Susan Simpson as Exhibit A in support of this request.

BACKGROUND

Non-party Undisclosed LLC is a Delaware corporation that produces the well-known podcast, “Undisclosed,” which investigates criminal convictions. Season one of Undisclosed focused on the case of Adnan Syed, bringing a unique legal perspective to the case covered by the popular podcast “Serial.” *See* Ex. A,

Aff. of Susan Simpson ¶ 2. Since the podcast's debut, Undisclosed has received over 120 million listens.

Season two of Undisclosed, which debuted on July 11, 2016, focuses on the Joey Watkins case. *Id.* ¶ 3. In 2001, Joseph Watkins was convicted of the murder of Isaac Dawkins following a trial in 2001 in the Floyd County Superior Court. As a part of that investigation, Undisclosed has sought access to court-recorded audio tapes of pre-trial proceedings and Mr. Watkins's criminal trial. The Floyd County court rejected Undisclosed's motion to gain access to and copy those recordings on October 28, 2016. Undisclosed received notice of that order on November 2, 2016 and has requested relief from this Court.

ARGUMENT

If this Court grants Undisclosed's application for appeal, this Court should handle the appeal on an expedited basis. The Undisclosed podcast is currently in the middle of its second season. So far, Undisclosed has released sixteen episodes about Mr. Watkins' case, and the weekly podcast is scheduled to run through early January 2017. *Id.* ¶ 10. Currently, the podcast is focused on the final stages of the police investigation that led to Mr. Watkins' arrest and conviction. In the next three weeks, the podcast will begin to cover events that occurred in the pre-trial phase of the case, for which audio from the bond hearing and preliminary hearing will be critical. *Id.* ¶ 11. Episodes focused on the trial are scheduled to begin in

early December 2016 and will continue through early January 2017. Audio from the trial will be critical for these episodes. *Id.*

The audio recordings, both of the pre-trial proceedings and of the trial itself, contain a great amount of information that is lost in the transcripts of those proceedings. *Id.* ¶ 12. For example, from an audio recording, the listener can discern the emotion and demeanor of the speaker, pauses between words or sentences, emphasis on specific words or phrases, inflection, and overall tone. None of this information is captured in a written transcript. *Id.*

As the podcast begins to focus more on the pre-trial proceedings and the trial over the course of the coming weeks, the audio recordings will become even more crucial. Indeed, Undisclosed has already identified areas where an audio recording would be beneficial to its reporting on Mr. Watkins's trial. *Id.* ¶ 15. For example, during Mr. Watkins's preliminary hearing, defense counsel questioned lead investigator Stanley Sutton of the Floyd County Police Department about the existence of any recorded telephone conversations that were made outside of the court-ordered wiretaps on the phone lines of Joey Watkins and witness David Brown. *Id.* After acknowledging the existence of one such recording, Mr. Sutton stated that he would "take the Fifth" in response to defense counsel's follow-up questions. Prosecutor Tammy Colston later informed defense counsel that Sutton had been joking when he pled the Fifth and had not intended his statement to be

interpreted literally. The audio of Mr. Sutton's exchange with defense counsel could very well shed light on whether Sutton was being serious or was joking. *Id.*

If Undisclosed does not gain access to the recordings within the coming weeks, it will be unable to produce a podcast that comprehensively and accurately depicts the legal proceedings that led to Mr. Watkins's conviction. Because of the current production schedule, it is critical for Undisclosed to obtain the recordings as soon as possible in order to have a chance to access and utilize those tapes before Season Two concludes. *Id.* ¶ 17.

A denial of Undisclosed's request to expedite this appeal will cause irreparable harm to its ability to accurately report about Mr. Watkins's case. In the coming weeks, Undisclosed will report on Mr. Watkins's pre-trial hearings and trial. *Id.* ¶ 18. The podcast needs access to the trial audio before producing these episodes so that it can accurately portray the trial to its audience and so that it can investigate any issues illuminated by the recordings. The value of the recordings will significantly diminish after season two concludes because Undisclosed's regular audience will no longer be tuning in for weekly episodes about Mr. Watkins's case. *Id.*

For the reasons described above and in the attached affidavit, Undisclosed respectfully requests that this Court handle Undisclosed's appeal on an expedited basis.

Respectfully submitted this 14th day of November, 2016.

/s/ Michael A. Caplan

Michael A. Caplan

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CERTIFICATE OF SERVICE

This is to certify that I have caused a true and correct copy of the foregoing **UNDISCLOSED LLC'S REQUEST FOR EXPEDITED TREATMENT** to be served on all counsel of record by U.S. mail as follows:

Office of the Floyd County District Attorney
3 Government Plaza #108
Rome, Georgia 30161

Clare Gilbert
Georgia Innocence Project
2645 North Decatur Road
Decatur, Georgia 30033

This 14th day of November, 2016.

/s/ Michael A. Caplan

Michael A. Caplan

Exhibit A

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AFFIDAVIT OF SUSAN SIMPSON

Personally appeared before me, an officer duly authorized by law to administer oaths, Susan Simpson, who after being sworn and under penalty, states as follows:

1.

I am over 18 years of age, and I am giving this Affidavit based upon my personal knowledge, observations, and beliefs.

2.

I am a member of Undisclosed LLC, a Delaware company that produces the popular podcast “Undisclosed.” The first season of the Undisclosed podcast covered the case of Adnan Syed, a Maryland teenager convicted of murder in 2000. Syed’s case had previously been covered on the hit podcast “Serial,” and Undisclosed continued the coverage of the case from a legal perspective. The use of audio recordings from Syed’s trial was critical to the success of Undisclosed’s

first season, as the recordings provided crucial information about the demeanor of the trial witnesses and the performance of Syed's attorney that was not demonstrated by the transcripts of the proceeding.

3.

Since December 2015, the Undisclosed team has been extensively investigating the case of Joey Watkins for the second season of Undisclosed's podcast. Mr. Watkins was convicted of murder in 2001 in the Superior Court of Floyd County. We have worked extensively with both Mr. Watkins and his attorney at the Georgia Innocence Project.

4.

During the investigation, Undisclosed has sought access to, and copies of, the court-recorded audio of the following legal proceedings: the December 14, 2000 preliminary hearing for Mr. Watkins and his co-defendant Mark Free; the January 2, 2001 bond hearing for both Mr. Watkins and Mr. Free; and the trial of Mr. Watkins, which took place from June 25, 2001 through July 2, 2001. These proceedings were recorded by 4-track audio cassette. Copies of the audio recordings are currently in the possession of the Floyd County Superior Court clerk.¹

¹ In its October 28, 2016 Order, the Floyd County Superior Court stated that "the court reporter has not yet determined if she has possession of the back-up tapes/recordings of the Preliminary Hearing and Bond Hearing sought by Movant"

5.

Prior to the filing of the instant motion, Mr. Watkins's attorney Clare Gilbert made arrangements with the court clerk to copy the audio tapes of the above-listed proceedings so that the copies could be used on Undisclosed's podcast. When she began to copy the tapes, Ms. Gilbert realized that she did not have the proper equipment to copy a 4-track tape without creating severe distortion that rendered the copy unusable.

6.

Ms. Gilbert later returned to the Floyd County Superior Court with the proper equipment to copy a 4-track tape. However, at that point, the Court informed her that she could no longer copy the tapes because the copies were not for her personal use but instead were being used for the Undisclosed podcast.

7.

Ms. Gilbert later obtained copies of the audio recordings in the trial of Mark Free, Mr. Watkins's co-defendant. These recordings have been used in the Undisclosed podcast, to the extent that witness testimony in Mr. Free's trial mirrored the testimony in Mr. Watkins's trial.

and "there is an ongoing effort by the court reporter to determine if she can locate those missing recordings." Order at 2. I have since been informed that these recordings are currently in the court clerk's possession.

8.

In June 2016, Undisclosed filed an open records request seeking access to copy the recordings of proceedings in the Watkins case. The request was denied, and the Court instructed Undisclosed to file a motion seeking access to the tapes.

9.

In August 2016, Undisclosed retained Caplan Cobb LLP to represent it in filing a motion with the Floyd County Superior Court seeking access to copy the recordings. Undisclosed filed its motion in September, and in November, the Court ruled that Undisclosed could “inspect” the recordings but could not copy them in any way.

10.

The Undisclosed podcast is currently in the middle of its second season. The first episode of this season was released on July 11, 2016.² So far, Undisclosed has released sixteen episodes about Mr. Watkins’ case, and the weekly podcast is scheduled to run through early January 2017.³ In total,

² Undisclosed also produces an addendum show hosted by Emmy-award winning actor Jon Cryer. The addendum features a panel discussion of the issues raised—either in Mr. Watkins’s case or on the topic of criminal justice more broadly—by that week’s main show. The first episode of season two of the addendum was released on July 14, 2016, and there have been sixteen episodes of the addendum released so far.

³ Undisclosed will continue to follow and report on Mr. Watkins’s case after the second season concludes, as we have done with Adnan Syed’s case. For

Undisclosed has over 120 million listens since season one premiered in April 2015. To date, episodes covering Mr. Watkins's case have received 35 million listens, and Undisclosed typically has between 1 and 2 million listens per episode.

11.

Currently, the podcast is focused on the final stages of the police investigation that led to Mr. Watkins' arrest and conviction. In the next three weeks, the podcast will begin to cover events that occurred in the pre-trial phase of the case, for which audio from the bond hearing and preliminary hearing will be critical. Episodes focused on the trial are scheduled to begin in early December 2016 and will continue through early January 2017. Audio from the trial will be critical for these episodes.

12.

The audio recordings, both of the pre-trial proceedings and of the trial itself, contain a great amount of information that is lost in the transcripts of those proceedings. For example, from an audio recording, the listener can discern the emotion and demeanor of the speaker, pauses between words or sentences, emphasis on specific words or phrases, inflection, and overall tone. None of this information is captured in a written transcript.

example, on October 24, 2016, Mr. Syed's attorney filed a motion for release pending the appeal of a trial court's grant of a new trial. Undisclosed released a full episode discussing this motion on October 31, 2016.

13.

Thus far, Undisclosed has attempted to compensate for the lack of audio recordings from Mr. Watkins's case in two ways. First, we have used audio recordings of Mark Free's trial, which the Georgia Innocence Project obtained from the Floyd County Superior Court. Several of the same witnesses testified at Mr. Watkins's and Mr. Free's trials, and some of their testimony was similar enough that the recording from Mark's trial is useful to our listeners. This is not an adequate substitute for use of the audio from the Watkins trial, however, because not all witnesses gave similar testimony at both trials, and the prosecutors made different arguments. In fact, the many differences between the testimony given by witnesses in the Watkins trial as compared to their testimony at the Free trial is one of the topics covered by the second season of Undisclosed. Having audio of both proceedings would allow for more accurate and fair comparisons between them and would provide listeners with a much better understanding of Mr. Watkins's trial.

14.

Second, we have attempted to compensate for the lack of audio by reading from portions of the written transcripts. This is also not an adequate substitute because we are undoubtedly bringing our own inflection, tone, demeanor, and emphasis to the words, which does not accurately reflect how the witnesses and

attorneys actually spoke at trial. Being able to play an audio recording of these proceedings would avoid the unintentional misinterpretations of tone that are inherent in the act of reading from a written transcript.

15.

As the podcast begins to focus more on the pre-trial proceedings and the trial over the course of the coming weeks, the audio recordings will become even more crucial. Indeed, Undisclosed has already identified areas where an audio recording would be beneficial to our reporting on Mr. Watkins's trial.

16.

For example, during Mr. Watkins's preliminary hearing, defense counsel questioned lead investigator Stanley Sutton of the Floyd County Police Department about the existence of any recorded telephone conversations that were made outside of the court-ordered wiretaps on the phone lines of Joey Watkins and witness David Brown. After acknowledging the existence of one such recording, Mr. Sutton stated that he would "take the Fifth" in response to defense counsel's follow-up questions. As recorded by defense counsel's notes of a later conversation with Prosecutor Tammy Colston, Colston informed defense counsel that Sutton had been "just kidding" when he pled the Fifth. The audio of Mr. Sutton's exchange with defense counsel could very well shed light on whether Sutton was being serious or was joking.

17.

Without access to the trial audio, Undisclosed will be unable to produce a podcast that comprehensively and accurately depicts the events that led to Mr. Watkins's conviction for the murder of Isaac Dawkins. Because of Undisclosed's production schedule, it is critical that Undisclosed obtain access to the relevant audio recordings as soon as possible so that we have a chance to access and utilize the tapes before season two concludes.

18.

A denial of our request to expedite this appeal will cause irreparable harm to our ability to accurately report about Mr. Watkins's case. In the coming weeks, we will report on Mr. Watkins's pre-trial hearings and trial. We need access to the trial audio before producing these episodes so that we can accurately portray the trial to our audience and so that we can investigate any issues illuminated by the recordings. The value of the recordings will significantly diminish after season two concludes because our regular audience will no longer be tuning in for weekly episodes about Mr. Watkins's case.

19.

I give this affidavit in support of Undisclosed's request to amend the trial court's order prohibiting copying of the audio recordings of Mr. Watkins' trial and in support of its request for expedited consideration.

Susan Simpson
Susan Simpson

Sworn to and subscribed before me

This 8th day of November, 2016.

[Signature]
Notary Public

My Commission Expires:

Aug. 1, 2017

