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

**ADDENDUM 1:**                      **ILLUSION OF TRUTH**  
**POSTED:**                              **JULY 14, 2016**

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**Jon Cryer:**                              Hello! And welcome to the *Undisclosed Addendum*. I'm Jon Cryer, and this is the podcast about all things *Undisclosed*.

Now I, like you, have been an avid listener of *Undisclosed* and this is *my* chance, and yours, to get questions answered directly from the *Undisclosed* team. Now, I don't know about you, but, I was losing my mind waiting for the new season, and it did *not* disappoint. Season 2 of *Undisclosed* tells the story of *The State vs. Joey Watkins* – a man who spent 16 years in prison in Georgia for the murder of Isaac Dawkins, but who *may well* be wrongfully convicted.

Now, with us today are two of the *Undisclosed* team, and a very special guest. First I want to introduce Susan Simpson – everybody say it with me: She's an associate at the Volkov Law Group and blogs at *The View from LL2*.

Hey Susan, how you doing?

**Susan Simpson:**                      Good!

**Jon Cryer:**                              Alright! I also want to welcome Colin Miller, who you might have heard, is an associate dean and professor of law at the University of South Carolina School of Law and he blogs at *Evidence Prof. Blog*. There. [laughs] But our very special guest for this very first *Addenda* episode is US Representative Keith Ellison. He's from the Fifth Congressional District in Minnesota. He is co-Chair of the Congressional Progressive Caucus, and a long-time criminal defense attorney. Welcome to the show Keith Ellison!

**Keith Ellison:**                              Great to be here, thanks for having me, you guys.

**Jon Cryer:**                              Oh, so glad, and I just want to take a moment, to thank you 'cause I know it's been a horrific week of violence in the national news and after the deaths of Alton Sterling and Philando Castile, and the mass shooting of police officers in Dallas, I did want to make time to talk to you later on the show about that stuff and the many urgent issues that that brings up. But thanks so much for making time for us.

**Keith Ellison:**                              Really a pleasure, and you know, talking about issues of justice and our criminal sanctions system is not only fascinating to me, it's also a little therapeutic, 'cause I think that your show, *Undisclosed*, is critical in helping create public awareness about how we get to a system that we can *all* have confidence in, that is fair, just and is something that the American people can have real confidence in.

**Jon Cryer:**                              Well, we will get to that, and digging into Episode 1, but first a word from the people who are bringing us to you.

[4:41]

- Jon Cryer:** Okay, in this first episode, *The Panama City Incident*, we heard about the mysterious death of Isaac Dawkins in the *big* small town of Rome, Georgia. And how Joey Watkins immediately came under suspicion. So I wanted to actually address my first question to Susan. So, I know that the Georgia Innocence Project brought this case to you guys, but what aspects of this case made you guys want to pursue it?
- Susan Simpson:** I think the biggest for me was that of all the people who contacted us, and asked us to look into cases, this was the only one where the *attorneys* reached out to us. And I felt like, in order for us to make the biggest impact we could – in order for this podcast to make a difference in a case – we needed that sort of support. We needed to have attorneys who were on board with the project and *wanted* this to go forward. And that’s probably the first thing that caught my eye.
- Jon Cryer:** Yeah. And a lot of people have been asking – ‘cause it’s *alluded* to in the podcast, that you had some special connection to Rome, Georgia – were you sequestered there in a nunnery, or something? [laughs] Or how do you... What is your special connection?
- Susan Simpson:** I’ve never lived there, but my mom’s side of the family is from there. And, most of my relatives have moved away since then, or are no longer living in Rome. But growing up I spent time, basically... [laughs] Most of my time in Rome was during Christmas breaks and summer breaks. My parents would drop me off at the grandparents’. So as an adult, I’d not spent much time there until recently, for this podcast.
- Jon Cryer:** Well I’m sure that’s a big help for you, because for me one of the issues is I have a very hard time understanding the accents, as they are presented. Like that policeman, Stanley Sutton, unfortunately, sounds like a human *didgeridoo*. To me he says: [affects *didgeridoo* sound] And I’m sure your history there must help you in understanding what they’re talking about.
- Susan Simpson:** I mean it must. I haven’t had a problem with it yet, but I guess it’s a local thing.
- Jon Cryer:** See, that is amazing to me, ‘cause I listen to the *Truth & Justice* podcast as well, and often he’ll talk about things that happen in these police interviews, and he’ll play them, and I still can’t understand them. Am I *alone* in that?
- Susan Simpson:** Yes.... No. [laughs]
- Jon Cryer:** [laughs] Okay great! That’s good to know. And--
- Susan Simpson:** Based on social media, it seems that you are far from alone. And I guess in the future we’ll try and provide translations for-- [laughs]
- Jon Cryer:** [laughs] Thank you.
- Susan Simpson:** Certain quotes.

- Jon Cryer:** And Colin, were there any interesting legal aspects for you? Or was it just the power of the case that made you want to pursue it?
- Colin Miller:** I think for me, it was a combination of the two. It's a really compelling story with a lot of interesting angles, but there are *several* evidentiary issues that we're going to explore, and in fact there's a evidentiary issue that we're developing now that might lead to a new trial. So, across the board, it was something where it piqued my interest based upon my specialty in the rules of evidence.
- Jon Cryer:** Okay. Well, we're so excited about you working the rules of evidence. We're also... I just want to say, as a fan, I'm excited about... 'Cause I've heard there is some amount of cell tower evidence that is involved here, with Susan. And honestly I have to say, cell tower evidence is like Susan Simpson's super power. Honestly. [laughs] Honestly, if there was a series of *Undisclosed* and she *wasn't* going through cell tower evidence, it would be like seeing a *Superman* movie, and not seeing him fly. So... [laughs] We are... I, as a fan, am grateful that you're going to be doing that. Now I--
- Susan Simpson:** I think some fans might be feeling the opposite. But I feel like the cell phone issues in this case... They're not the same as Adnan's case, and they're very fascinating in their own way. It's not a repeat of what happened for Adnan. It does involve cell phone misuse, by prosecutors, and a misunderstanding of cell phone evidence by the defense attorneys, but the issues themselves are not the same ones that we saw with Adnan.
- Jon Cryer:** So, I wanted to very quickly get to the millions of *Twitter* questions... Okay, that's little bit of an exaggeration. [laughs] But we had many, many questions on *Twitter*, and I wanted to start addressing them as quickly as we could. A lot of people had questions about the actual incident that resulted in the murder of Isaac Dawkins. Like, here's one from 'Alec Thinks Stuff', and he says, "Is there any way that the bullet that hit the victim could've been a stray bullet from a hunting/target practice near the road?"
- And I want to supplement that question with a *Twitter* user named 'Kim Lord' who bombarded us with many similar questions saying, "Theories", "Theories for *Undisclosed*: Suicide? Sniper? Passenger in car escaped?" She also hit us with, "Did 911 calls see accident or just aftermath?" And then, "How many gunshot wounds? How many bullets? Drive-by car? What angle was the gunshot wound?" [laughs] So obviously, Kim has a job as an interrogator waiting for her, but if you could explain a little more about the actual circumstances of the shooting, it would be appreciated.
- Susan Simpson:** I think Kim's questions are a whole episode we have planned in future. [laughs]
- Jon Cryer:** Okay. [laughs]
- Susan Simpson:** And they're the same questions I had when I first saw the case. Trying to figure out, like, what actually happened here? Yes, the 911 callers, or at least one of them- we don't- they didn't record who the other one was from, but one of them *did* see the accident. And there were a few people who didn't everything before it, but they did see the car as it crossed into the southbound lane. But we only really have one *real* eyewitness here, who saw more than a tiny portion of the wreck, and that'd be the first 911 caller.
- Jon Cryer:** And is it possible that it's a stray bullet from hunting, or target practice nearby?

- Susan Simpson:** I'm still wondering that. The ballistics are a *huge* issue in this case. They're going to be a very large part of what we talk about. So, I think I lean towards "No", but I very much looked into that early on, wondering if that's possible. I have talked to people in Rome who have said that they, either themselves did, or knew of people who hunted deer in that area. There's like woodlands on both sides of the road, on the east side past the factories, and on the west actually, right there, supposedly there were deer, especially back in the day – in '99-2000. So it's *possible*... I don't think it seems *likely*.
- Colin Miller:** I basically break it down into three categories, where it's *one*: Someone was trying to shoot him and was successful, and for that, we'll get into the question of, well what type of accuracy and proficiency would a shooter need to have to be able to accomplish that shot? The *second* is: It was someone, maybe with road rage, blowing off steam, and they were firing and unintentionally hit him, and the *third* is what was suggested in this question: Which is that it wasn't even someone on Route 27 itself – it was someone peripherally who was maybe shooting at a deer in the woods, and a stray bullet struck the victim. So, for me at least, all three of those, at this point, are still on the table.
- Susan Simpson:** Wait, Colin, you're ruling out the Beckstein theory?
- Jon Cryer:** Okay, I'll bite. *What?!* [laughs]
- Susan Simpson:** There's *other* versions of events that are, I guess, on the table. But their level of plausibility is pretty low.
- Jon Cryer:** Well, it's such a bizarre accident. You know, for a car accident to be investigated, and then suddenly turn into a shooting, is unusual. So I can see why unusual theories might grow out of it.
- Colin Miller:** Yeah, and there's no shortage of them in this case. There's other people who might have confessed to the crime, there are plenty of people with possible motivations, although it's not entirely clear. So, there's going to be any number of theories that are going to be put out there this season as to what might have happened here.
- Jon Cryer:** Okay. Well, I've got another question from 'Bishop Fionchetto', who by the way, I hope is elected pope next. [laughs] He says, "Does it sound like the 'friends'", in quotes, "Were recording the phone call as a way to set Joey up?"
- Susan Simpson:** The recording was done at the request of the police.
- Jon Cryer:** Ah.
- Susan Simpson:** So, it was part of the investigation.
- Jon Cryer:** Okay. That explains it. Oh, a lot of people are asking why did the jurisdiction that was in Rome Police Department move to the *Floyd County* Police Department?
- Susan Simpson:** That is *definitely* an episode in itself.

- Jon Cryer:** Okay. Yeah, it's alluded that the family of the victim had something to do with it, but I suspect there's a bigger story there.
- Susan Simpson:** Yes. [laughs]
- Jon Cryer:** Yes.
- Susan Simpson:** I'm going to try really hard to answer that! [laughs] Now, one thing at the beginning of the episode – Joey himself hints very darkly at the deeds in his past, that are bad, in some respect.
- Jon Cryer:** What exactly *are* there? I mean at one point the family's interviewed and they talk about shooting his dog. Well, but nothing seems actually nailed down of *what are* the things that he actually did that were so terrible.
- Susan Simpson:** We're going to get into this more *next* episode, but in terms of actual criminal record, I think the *worst* thing he had was drag racing. But what he's referring to is not so much a criminal background of any sort, it's more just a reputation for getting into scraps, being a jerk... Not really a *criminal* sort of reputation.
- Jon Cryer:** Okay, so it's... One of the things that I thought that you – that the episode – brought up that was really fascinating to me, was the whole idea of the 'Illusion of Truth Effect' – the idea being that the reputation that Joey had as a troubled young man, poisoned the atmosphere such that he was thought of as being guilty of all manner of things. Are there other examples of the illusion of truth sort of infecting a case in this way?
- Susan Simpson:** It affected *me*! When I first started getting into it, I really thought that Joey was going to be, like a very dark, angry figure, that you know, he would be... Really *did* have a terrible history or something, and I thought it would be interesting to try and address that and show, like, well it doesn't matter if someone's a *jerk* or not, like it's still a wrongful conviction or not. Like that's not relevant to what we're looking at. Because the case sets it up to be like him, he's this – like he said – this 'big bad wolf'. And then the more I got into it, the more I realized, it was... It's not that his reputation was undeserved, but it is *way* over exaggerated. And it's not as if he markedly stood out from the crowd he was hanging with.
- Colin Miller:** Yeah, I would say Jon, in researching this case, what I found in terms of the Illusion of Truth Effect is that it most often comes up in arson cases, and I think that's because arson investigations are so subjective. So, there's one case out of Texas, and the arson investigator was misinformed. He believed the wife and the husband were having marital problems, they were having financial troubles, and he investigated a fire at their house and he concluded it was an arson, and then they had someone else come in and investigate it independently and determined that it seemed to be, from step one, he was looking at this a certain way based upon assumptions about their relationship and financial status and that infected the case. Whereas an objective look at the evidence from someone who *wasn't* aware of this fake history came to the conclusion it was an accidental fire.
- So, yeah, in *many* cases where this or something similar comes up, where the police get a lead, they go down a certain path and they can't correct themselves. And they determine that initial lead maybe wasn't correct.
- Jon Cryer:** So, I wanted to direct my next question to Congressman Ellison actually, because you've been a criminal defense attorney. Have you noticed in your criminal defense practice that this Illusion of Truth Effect has affected cases that you've worked on?

**Keith Ellison:**

Well, yeah. I mean, I did criminal defense work for about 16 years. I took every kind of case – murder, rape, robbery – I was the director of the Legal Rights Centre of Minneapolis, where I was glad to spend many years, and then I went into private practice and did federal, state... And you know, it's one of those things that explains why people come to erroneous conclusions. Because we basically have a tendency to believe that the things in our life that we are repeatedly exposed to are in fact true, and therefore don't challenge our underlying assumptions. So it's kind of a recurring theme when we think about, you know, how somebody can be convicted unlawfully, or without the basis of being actually guilty. It's these sort of assumptions that we operate on.

So, I have a case, you know, where my defendant started out being a person who was in prison. And he was accused of participating in a murder with two gang-banging groups who were shooting it out on the street. And my particular client, because he would come out into the courtroom from inside of the courtroom, the jury even was aware that he was in custody, they knew that he was in prison based on the testimony. And they just sort of assumed that if he *was* in prison for something else, or he was in custody, that he probably, you know, *belonged* there. Which I think is a version, you know, of the Illusion of Truth Effect. So I just think it's one of those operative things that probably explains a lot of reasons why we see people who get wrongfully convicted.

**Jon Cryer:**

Well, I was wondering if there was also sort of a social effect to it, that in smaller towns where the police often know the people they feel are part of the so-called 'criminal element', they often direct their investigations at those people, because it feels like a part of the social knowledge of this small town that *those* are the 'trouble' ones and they're responsible for whatever crimes occur. Have you experienced that?

**Keith Ellison:**

No doubt. So, let me tell you. So, in St Paul there was a case where the police actually did a study where they found that black men were arrested most for shoplifting, but were shoplifting, in fact, the *least*. And that *white females* were shoplifting the most. People had an idea in their head that a certain kind of people shoplift and certain people *don't*. Some people are law-abiding, some people are *not*. And guess what? *Everybody knows that*. Quote, unquote.

And so, yeah! No question about it. If you are sort of considered, you know, outside of the circle of the 'trusted' ones, if you're in the outside group, you just increased your likelihood of being suspected and suspicious, right? And it's something that every defense attorney better be on the alert for. And we probably should *voir dire* jurors on this issue, and get them to start really challenging some of their fundamental assumptions from the very beginning of the case. Because it is with those basic assumptions that they will use to understand the evidence.

**Jon Cryer:**

Yes one of the more famous examples of the 'illusion of truth' for me was, I grew up in New York City, and part of the sort of mythology of New York City was the Kitty Genovese case. Which was a case in 1964 where a woman was attacked and raped and murdered, while 38 bystanders supposedly watched and did nothing. And this of course was incredibly scandalous at the time, and was used as evidence that the social fabric of New York City was frayed, and that we had become a 'bystander culture', where, you know, nobody will help anybody.

And that story *stood* until 2007 when somebody went through the actual evidence and discovered that actually it was only about five or six people who had actually heard the incident. One of them actually yelled at the assailant and got him to run off and stop his attack. He later came back and continued it, and another neighbor actually stayed with the victim and consoled her until the ambulance arrived. So this was actually not a case of that, but it became part of the urban mythos.

**Keith Ellison:**

But everybody knew it. Right? It wasn't—

**John Cryer:**

Exactly.

**Keith Ellison:**

It wasn't true, but everyone knew... And you know, it reminds me of that civil case in which people would try to sort of trivialize civil redress by saying, "Oh well, somebody got a million dollars by suing MacDonald's for hot coffee". In fact, that case is *way* more complicated than that. It was an older, very delicate woman, they had been warned many, many times, and there was a whole, real case that would lead one logically to say, "Well *maybe* MacDonald's at least should warn people that the coffee is really super hot..." And maybe juries are not just handing out a million dollars because of hot coffee.

But it just kind of became the kind of like *Exhibit A* that our civil redress system was just passing out money all the time, and that there was no real justice for people who were a defendant in a civil case. You know, these things get into our culture, and you know what? Obviously in this particular case that we're talking about today – the Joey Watkins case – it just became to be a matter of assumption that he was dangerous to the victim in this case. And that people just sort of passed it around until it was sort of like in the fabric and the basic, you know, legend of the town.

**Susan Simpson:**

I think a lot of wrongful convictions sort of fit this mold of where there's a moral panic, and a defendant is found that, for whatever reason, fits the trope. Fits this, like, caricature of a bad guy that the moral panic is centered around. And you can see it with the West Memphis Three. When they had 'satanic panic' going around, wherever it was. There's this fear of young men or people worshipping the *devil* and Satan, and trying to do 'dark arts' or who knows what. So when this murder happens, this tragic murder, they make it fit that mold, and they find three kind of, 'not fitting the norm guy'-like young men in the community, and they decide that they are Satan-worshippers.

It happened with Amanda Knox. And not a US case, but it does seem very much like the media saw this 'seductress' – American female, who was, like, living a lavish, like a total hedonistic life and with sex and like, murder and drugs – and she fit that profile so well she became the defendant.

**Jon Cryer:**

It fit the idea that Europeans had of Americans at the time as well.

**Keith Ellison:**

So what do we do about this? We know that there is this illusory effect here, we know it exists, it's been documented. From a *defense* standpoint, from a *prosecutorial* standpoint, what do we *do*? Is this a matter of *voir dire*? Is this a matter of instructions from the judge? How do we go about making sure there's a fair trial? And that these assumptions and biases don't, sort of like, stow away into the case?

**Jon Cryer:**

Well, as the guy who played Alan on *Two and a Half Men*, I think... No, I have no idea what we should do, I have nothing! [laughs] Colin? Susan? Do you have better ideas than the guy on *Two and a Half Men*?!

**Susan Simpson:**

For *me*, the best way to approach it is just to... [sighs] Make sure that these 'shorthand notations', that evoke larger ideas and fears, aren't relied on; aren't used. Don't use the 'small-town bully who wanted to beat everyone up' trope. And break it down to the actual facts. 'Cause when people hear these key words that trigger, like, their biases and past stories- it's not even just prejudices, it's like past narratives ingrained in their head. And then once that's triggered, it's off to the races.

So, trying to break that down and show, "Here's what factually happened" – Yes, you could make it fit this larger narrative that we're scared of, whatever it might be that time, but I do

think that, getting back to the facts and looking at the reality of the situation can help sort of dispel that illusion of truth.

**Keith Ellison:**

Are part of the facts of the case... It's just that they're not legitimate facts in the case. They're evidence that is accepted as truth that isn't necessarily true, and that isn't necessarily even part of the proof to make out the elements of the case. It seems to me that the defense attorney *and* the judge and the part of the prosecutor to make sure the trial's fair, have to try to identify – I'll call these 'stowaway facts', that just sort of get embedded because they're repeatedly heard – and sort of confront them from the very beginning, and maybe they need to be confronted at you know, maybe you should have an instruction, maybe there needs to be some *voir dire* on this point. I don't know. It'd be... I think it's worthwhile talking about.

**Jon Cryer:**

I do think podcasts like *Undisclosed* do highlight these subjects. You know, I learn so much from the *Truth & Justice* podcast when he talked about false confessions – I did not know that they were so prevalent in convictions. And that 25% of DNA exonerations, the conviction resulted from a false confession. Which means you can extrapolate that out and say 25% of confessions are probably false. But that's a fact I would not have known if not for these justice-based podcasts.

**Keith Ellison:**

Yeah, that's why I'm glad to be on here with you guys, because I believe that this is helping create a higher quality of justice. And you know when you look at... We've got a record number of people exonerated in 2015, you know, well over 100 people. I mean if we're ever going to have our criminal justice system be respected, then it's going to have to be trusted. And that means we're going to have to learn how to do the process of justice better. And I think *Undisclosed* is a very important part of that.

**Colin Miller:**

Yeah and I think, from an evidentiary perspective, a lot of this goes back to the rules regarding character evidence. Character evidence is evidence of a person's reputation and their 'prior bad acts', and historically it was disfavored because, originally it was back in England under the the Tudors and the Stuarts – they had the Star Chamber, and they had a paucity of evidence in a lot of cases and they used this character evidence to convict – and that led the US to eventually say, "Listen, we don't want character evidence coming in".

But that said, a person's prior convictions can come in to show they're lacking in credibility as a witness, and that actually leads to a lot of defendants not testifying because they know the jurors are going to overvalue those prior convictions. And even though character evidence can come in to prove, "Well generally this is a violent guy", or "This is a dishonest guy", or "This is a bad guy" – there are so many exceptions.

We'll explore many of them in this case that'll allowed this character evidence to come in. And it's tough. I know the congressman mentioned *voir dire*, which is the questions to the jury during jury selection. A judge can give limiting instructions to the jury, but actually studies often show pursuant to the Illusory Truth Effect, that whether it's consumers given warnings or jurors being given instructions, that in fact it often only highlights that they could use the evidence for an impermissible purpose, or that they could draw negative inferences from a product.

So, it's so tough. I really think that the main thing that courts need to do is take a long, hard look at the extent to which character evidence is admissible at trials, and I think it comes in far too often.

**Keith Ellison:**

Well you know, when you talk about prior conviction evidence, you know I've been in this situation many times where my client wanted to testify, go to the jury, look them in the eye and deny doing what she was accused of, but you know, that prior conviction... Even though it had absolutely *nothing* to do with the facts in front of the jury, you know, oftentimes it made

it a much tougher call. And I remember a number of defendants who just said "I'm not going to testify 'cause I don't want them to bring that up".

But I will tell you this: There were a number of cases also where my client did want to testify, and I always took the attitude where if you want to testify, then I would probably advise against it, but if you really are committed to it, it's your case and you have a right to do it, I would always bring that conviction out.

First, I would make a motion to suppress it. If that didn't work, then, you know, I would preserve the record, but then I'd be the one to maybe say, "You have a prior conviction." "Yeah." And then look the jury in the eye and say, "It has *nothing* to do with this, but yeah, I did at *one time* steal some donuts from, you know, Super America. It has nothing to do with the case." But, I don't know. Does it help to get it out in front of the jury and confront it? And I don't know--

**Jon Cryer:**

Well--

**Keith Ellison:**

I kind of think there's different ways of looking at it.

**Jon Cryer:**

Yeah, as a juror, that donut thing would really put me over the edge. I have a real issue with people taking baked goods. That's my thing. I've served on a jury a couple of times and I have found that when people are very upfront, it really does diffuse the issue for jurors. I had a civil trial, where a fire inspector admitted fully that he had had a traffic accident, that he was not paying attention when he had the traffic accident and we were all very grateful for that on the jury. And it did really reinforce the honesty of his testimony at that point. I like those admonitions that the judge gives about how we have to view things. I have found that it really *does* make people at least think twice about imposing a bias on something.

**Colin Miller:**

Jon that's interesting that you mention that because there's a Supreme Court case – the Oler case – and some of the things we've been talking about here, such as let's say the defendant's on trial for murder and they have a prior conviction for shoplifting, or tax fraud, or vandalism. What the Oler case says is, if the defendant and defense counsel do *exactly* what you're suggesting, on direct examination they say, "Listen, before you testify about this murder let's just get this out there. Five years ago you were convicted of shoplifting." And they elicit that during direct examination, what that means is that according to the Supreme Court, you cannot appeal that issue to an appellate court.

So in other words, if you wait for the prosecution on cross-examination to bring out that conviction you can appeal it and say, "This was improper for the jury to consider." But if you do exactly what you said and you try to lessen the blow by listing it yourself, you cannot appeal that and say that the jury should not have considered this conviction in the case.

**Jon Cryer:**

So that's why they don't do it very much I would imagine.

**Colin Miller:**

It's a Catch-22. Yeah.

**Jon Cryer:**

Uh-huh. Okay.

**Keith Ellison:**

Yeah, it's too bad that the court would take a position like that, because obviously, if the goal of the trial is to get all the facts out, that kind of ruling actually prevents facts from getting out, which is unfortunate.

**Colin Miller:**

Yeah. I was just going to add on, if we're speaking of the Illusory Truth Effect and all the facts getting in, the most classic example of the Illusory Truth Effect that I use in class is the so-called 'Twinkie Defense' – that's the case where Dan White killed Harvey Milk in San Francisco – and there was a defense known as 'diminished capacity', that said if you have depression, maybe borderline personality disorder, you're still guilty but it's sort of a lesser guilt than full-blown guilt. And he had his psychiatrist testify to several things pointing to his depression, including the fact that he was eating a lot of junk food and the media labelled this the 'Twinkie Defense', where the claim was mis-reported as: He had a sugar high from eating a bunch of Twinkies and that's why he claimed he shot Harvey Milk.

And it led to, across the country, most states getting rid of the 'diminished capacity' defense and there's a pretty big link between mental illness and crime, and both in response to that as well as the assassination attempt on Ronald Reagan, that led to a lot of states changing their insanity defense rules. And again, it's based upon sort of these misimpressions of a lot of these issues that criminal defendants face in many cases.

**Jon Cryer:**

Well, yeah, like in the MacDonald's civil case you mentioned. That woman got *third degree burns*. That's some hot coffee. I'm sorry... [laughs] You know? And so there're often, a lot of times, one of the things that I said that I'm really grateful about the podcast for, when you get into the minutiae of the trial, you start to understand *why* things happen as they do, and maybe, you know, a difference *is* being made, slowly but surely.

And actually Congressman Ellison, I wanted to bring up the thing I brought up at the beginning of the show, which was that, you know, obviously it's been an awful week and I feel like much of what we've been witnessing is due to an egregious breakdown in the relationship between the police and the people that they're there to protect. And I know there's actually been some legislation introduced recently to take steps to address that, including police de-escalation training and use of 'use of force standard'. So, I'm hearing that there's been some push-back on that. So, can you let us know what's the status of the legislation?

**Keith Ellison:**

We've had a *number* of conversations like the two items that you just mentioned. Also there's a program called 'COPS' which is Community-Oriented Policing funding. There's been some bipartisan discussion around increasing that, to try to make sure we can get officers out of the cars and really engage community much more. And then of course there's the recurring dialogue around bodycams.

And you know, it's funny, the area of criminal justice, the environment is very different than the way it was, say, ten years ago. Ten years ago, if you were a politician, you had to be tough on crime. If you were a Democratic politician you had to be tougher on crime than the Republicans were, which is really what helped drive the 'War on Drugs' as this competition to be tougher on crime.

But we're in a different place today. Today, Republicans and Democrats are talking about reducing drug sentences, we're talking about reforming asset forfeiture, we're talking about making sure that we get rid of mandatory minimum sentencing. So, there is a range of things that we're looking at doing. And so, we've had some preliminary conversations, but at this point, just getting anything done is not easy.

And by the way, we don't have *that* many legislative days. I mean, by the end of the week we'll be out for the summer recess, and be gone back in our districts talking to constituents there in the district, for about seven weeks, then we'll be back in September, have about four weeks of legislation, then a little bit in October, then the election, and then the 'Lame Duck'... Nobody expects that much to get done either. But we're going to keep on pressing.

And I just want to say to the people listening to the podcast, if you want your member of congress to do something about criminal justice reform, police-community relations, call them. It does make a huge difference. We check our mail and our emails every day, and our calls. And the only way to really get reform here is when constituents consistently demand it

so, I don't want to sound *too* pessimistic and I think that the *way* to reverse that pessimism and get some things done is to really engage constituents.

**Susan Simpson:** It's just hard to get political support for a platform of, 'make it harder to convict bad guys'.

**Keith Ellison:** Well, you know here's the thing though. I mean, we *are* talking about lifting mandatory minimums, and this is a bipartisan thing. We are talking about reducing drug sentences. We had this disparity of 100:1 – this sentencing disparity between crack and powder cocaine – as you guys well know. Well, you know, during the time that I served in congress, we reduced it to 18:1, which is not what I think justice requires, but it's better than what it was.

Even in this, there's a criminal reform bill right now, which would retroactively – if passed – would retroactively reduce drug sentencing for non-violent cocaine – crack cocaine – offenders. It might even let as many as 5,000 people out of prison. There's bipartisan authors on both. And so, I think we're in a new political moment. I think the 'tough on crime' mantra has passed, and if we're going to get something done, it might be within the next few years.

**Susan Simpson:** I feel like 'tough on crime' is itself an illusion of truth.

**Jon Cryer:** Well--

**Keith Ellison:** Yeah! It's something that's repeated over and over, and over again and assumed to be right, but it's wrong.

**Jon Cryer:** Well it comes out of a climate of fear. A climate of abject terror. And when you feel like your politicians are 'tough' it might make you feel slightly better, even if it doesn't accomplish the goal it was that it was meant for. And for me, you know, when I hear about legislation that would require police de-escalation training, it's like, we're trying to give cops another tool. You know, they've got their gun, they've got their taser, let's give them a tool to *not* let this get violent.

And I'm sure there are plenty of people out there wondering why it feels like a no-brainer. But I'm hoping actually for criminal justice reform to also take some of the load off the justice system, which is so over-burdened at the moment. I mean, the sixth amendment requiring a speedy trial has become kind of ridiculous.

I mean, like, if you look at Adnan Syed's case. The process has *become* the punishment. He's in jail for 17 years. You know? It should have played out *much*, much faster than it did.

**Susan Simpson:** This is fast. Adnan's case is super fast. That's the sad thing.

**Jon Cryer:** That's the sad thing! And by the way, the job of the court is not to do it fast, it's to get it *right*. Which I understand. And there's so many layers to the bureaucracy at this point. But I feel like if we can end the 'War on Drugs' we can take the burden off the justice system just from the sheer amount of stuff that they deal with. I think that is a great start.

**Keith Ellison:** I think you're absolutely on the right track. Because if the system just took fewer cases in, you could focus on the cases that you have. You can look at a Public Defender's office like that in New Orleans. I mean they're so over-burdened, I mean, it's hard to even make the *claim* that your average defendant in New Orleans is getting anything *close* to justice. I mean it's totally an abrogation of anything that *Gideon vs. Wainwright* ever was supposed to represent!

And they're not the only ones. There's all kinds of weighted case studies across the country where public defense systems are just not able to keep up with the volume. I mean, how many people who were charged with stuff that they *didn't* do plead, because they said "You've been in jail for two weeks already and you're too poor to bail out, if you plead to it you can get out today." How often does *that* happen?

**Jon Cryer:** And then these people have to live with the record that they now have built. Because they had to do the expedient thing at that moment. And it just adds to itself. Yeah.

**Keith Ellison:** And we act like only guilty people plead guilty. Now that is absolutely absurd. We definitely are on another kind of trajectory than 'tough on crime' nowadays. I think that just the massive number of people exonerated is helping to move the political environment in another kind of direction. I just want to urge everybody to keep their eyes on the criminal justice reform bills – bipartisan bills – that are working their way through the house. It *is* sort of a bright light – and uncertain light – but a bright light in a otherwise dim situation.

**Susan Simpson:** I am likely too pessimistic, but, this is part of why I like doing the podcast so much. 'Cause at times it does seem so overwhelming, and the process and the system is too big. But at least with this, I can focus on one problem, and take a step forward there. Hopefully, in the bigger picture that can help lead to change elsewhere, but you start looking at all the issues currently facing the criminal justice system, and it *does* feel too big to attack at times.

**Keith Ellison:** See the public is seeing their loved-ones go to do real time for for meth, for cocaine, for crack, for all kind of things. I mean we really... This country puts a *lot* of people in prison you know, 2.5 million people – more people than China – even though we're one third the population of China. And it really is weighing on our shoulders.

I was binge-watching *Orange is the New Black* the other day, the fourth season, and one of the things that is so interesting about that show is that got this white Smith graduate doing time. Something we didn't used to see before. The prison industrial complex has invaded upper middle-class America!

**Jon Cryer:** Well, yeah. Well, I think we also, as consumers of media culture, have become *way* to comfortable seeing celebrity mug shots. [laughs] Hopefully you'll never see one of mine. But-but on a serious note, it *does* normalize the idea that everybody gets arrested sooner or later, which I... That shouldn't be normal. I don't think that should be normal.

**Susan Simpson:** Every other country in the *world* gets by with incarcerating a tiny fraction of what we do. So, does that mean we're better, or something? We're just way better at incarcerating?

[laughs]

**Jon Cryer:** We are. We're so good at it. We're awesome.

**Keith Ellison:** We have an industry. It's an industry.

**Jon Cryer:** And we're good at industry. That's what we do.

**Susan Simpson:** Yeah!

[laughter]

**Keith Ellison:** It's an industry. But polls do show the majority of Americans are open to re-evaluating sentencing laws. I mean, a lot of people think we're not doing the right thing. I remember the early '90s, late '80s, when, you know, a lot of how the criminal justice system worked, you know, was racialized. Today, that's not really the case. I mean people get that this thing has gone out of control. You get someone like Bernard Kerik, you know? A top policing official going to prison. Something we never saw before. And then able to come out and talk about the problems with the criminal justice system, and how it's really not making us safer. Although we're locking up more and more and more people.

I remember when I was a state legislator, a very conservative, small government conservative guy and I – a guy named Erik Lipman – co-authored an Op-Ed in the *Minneapolis Star Tribune* saying we should cut sentencing and put the money into treatment. He said we should also put some of the money into tax-reduction, like a fine conservative would suggest, and you know what? We were roundly attacked by *everybody* – liberals, conservatives, everybody. Nowadays, that's a conversation you can have. There's going to be a *lot* more pushing that needs to happen, but every time you see somebody exonerated, getting off death row, I think it builds the case a little bit more. Every time, you know, *Undisclosed* airs, and we see that, you know, that there is a lot more support for criminal justice reform.

**Susan Simpson:** And I think one thing I'd like to show with this season, is that, I mean obviously, there are a lot of issues with Baltimore, but this isn't like a big city thing. This isn't a Baltimore thing. It's not a specific police department, a specific area, it's all around the nation, small towns, large cities...

**Keith Ellison:** Right.

**Susan Simpson:** The same things happen again and again.

**Keith Ellison:** Well, I want to tell you, that's why I'm glad you guys picked out Joey Watkins' case. Because I think, when people think 'criminal justice reform' they're thinking 'big city, people of color, low income, drugs, guns, all that'. The truth is, Joey Watkins' case is actually has a degree of 'typical' to it. You know? There really are many people from small town America, rural America, suburban America who are in prison who are charged with crimes, who the evidence is very questionable and quite shaky and built on some untrustworthy assumptions.

You know whoever, selected this case, did a good job because I think it really is going to help reinforce who's in prison, and that the fact that the quality of evidence that is convicting people really, really must be higher without regard to, you know, whether Joey really did do it or didn't do it. I think the evidence, I think we probably all would agree, is thin.

**Susan Simpson:** One of Joey's previous attorneys told me, "If it can happen to Joey it can happen to anyone."

**Keith Ellison:** Good point. Oh yeah.

**Colin Miller:** Yeah, and we've been focusing a lot on that first crime, that first arrest or conviction, but another huge part of the puzzle is America's recidivism rate. And the Bureau of Justice Statistics has looked into this and found that, I think the most recent data that I use in class is a study of prisoners from 30 states and, I think it was 67.8% were re-arrested within three years of release and 76.6% were re-arrested within five years.

Those rates are just much higher than they are in many other countries, and it leads to the question, of course, of what are we doing in terms of both the quality and quantity of criminal sentences in this country that contributes to the high rate of recidivism rates. Where people are reoffending when they have been released.

**Keith Ellison:** Well let me ask you this: If you were to disaggregate those numbers and unpack them a little bit, how many of those are just probation and parole violations? Which might be anything from, like, missing a meeting with your PO or having a UA with some THC in it, or new cases?

**Jon Cryer:** Okay Keith I have no idea what you just said. [laughs]

**Susan Simpson:** [laughs]

**Keith Ellison:** Oh, sorry...

**Susan Simpson:** You know what?

**Jon Cryer:** "A UA with some THC in it?" I need--

**Keith Ellison:** That's weed!

**Jon Cryer:** It's weed? Oh, great! Oh, see I need to do more drugs.

**Susan Simpson:** [laughs]

**Jon Cryer:** That's the problem.

**Keith Ellison:** [laughs]

**Jon Cryer:** [laughs] Thank you Congressman for filing me in.

**Keith Ellison:** For the record THC is weed, but I only know that because I study this stuff.

**Susan Simpson:** [laughs]

**Jon Cryer:** Okay, yes. Thank you, thank you. [laughs] I don't want to--

**Colin Miller:** Yeah, well it's--

**Jon Cryer:** Instigate a scandal here, but go ahead, Colin, I'm sorry.

**Colin Miller:** Yeah, I mean, I do have some of those statistics. So, in the case of drug offenders, the recidivism rate is 77%, violent offenders it's 71%... Depends... Property offences I think about 62.5% I'm seeing. So, it does vary, crime to crime, but certainly, if not the highest, drug crimes is up there in recidivism rates. And there have been numerous articles and studies done about the lack of effective narcotics treatment programs and then in terms of what's going on in halfway houses. People reintegrate back into society, I think, certainly the drug epidemic is tied to the imprisonment issue, and I think if you're going to address the *one* you have to address the other because they're so intertwined.

- Susan Simpson:** And incarceration for, minor parole violations plays a role in this case too.
- Jon Cryer:** Well, yeah.
- Keith Ellison:** Are people going back because of a dirty UA? – That’s ‘Urine Analysis’ you know.
- Jon Cryer:** Thank you.
- Susan Simpson:** [laughs]
- Keith Ellison:** Sorry about that. Or are they going back because they committed a new crime?
- Susan Simpson:** Or they forget to pay a fine? Or forget to be on time to a meeting?
- Jon Cryer:** Well, and I actually have a question. I read something recently that blew my mind, that John Ehrlichman, former aide to Richard Nixon, he of Watergate fame, actually admitted that the ‘drug war’ was escalated by President Nixon, specifically with the aim of disenfranchising black voters and leftists, that it was... That he specifically... Am I the only one that heard this? ‘Cause this was a bombshell for me.
- Keith Ellison:** That’s out there.
- Jon Cryer:** That’s a pretty remarkable admission. Because the tone certainly changed with the Nixon administration. And it has had devastating effects on the African-American population. Exactly, apparently, as he predicted. Which is so disturbing.
- Keith Ellison:** You know, just for folks who want to dig into it more, you know, Richard Nixon’s aide, admitted that the ‘War on Drugs’ was a policy tool to go after anti-war protesters and black people. But it is something that absolutely needs to be explored. You know, this is really when we started cranking up drug crimes. We really started, you know, saying we had ‘crack babies’. That’s another, I think, ‘Illusion of Truth’ kind of thing.
- Susan Simpson:** Absolutely.
- Jon Cryer:** And ‘super predators’. I remember the ‘super predators’ scare, that was my favorite.
- Keith Ellison:** Yeah, and it was driven by all this stuff, and you know, you would think there would be some kind of accountability, but that story you just referenced... It just seemed like it was a one or two day story and then it was out of the news.
- Susan Simpson:** I missed it. My excuse is that I’ve been busy with Joey’s case but that’s news to me.
- [crosstalk]
- Colin Miller:** I just pulled it up and it’s interesting to... I don’t know, because I’m looking and I guess the children of Ehrlichman, who now has passed away, are refuting it because it wasn’t included in the initial... So this could be accurate or it could be another example of illusory truth, I’m

not sure, but I hadn't read it myself but looking at the article, it's something where there does seem to be a debate. But, yeah. I don't know.

**Jon Cryer:** Now, and Colin, I just want to let you know, I have not let you off the hook, I'm going to give you crud about the bombshell once more, but I've decided what I'm going to do is try to ask you an innocuous question, and then insert it, like, okay like this, like, hey Colin, what's your favorite sports team?

**Colin Miller:** Jets.

**Jon Cryer:** What's the bombshell?!

**Susan Simpson:** [laughs]

**Jon Cryer:** So, I don't know if that worked, or not... [laughs] But I wanted to thank you guys, this is the first episode of the *Addendum* and it's been great, and I admire what you guys do. I thought the first episode was awesome and I'm looking forward to learning a lot more about Joey. Thanks for your time today.

**Susan Simpson:** I was really relieved when I got your email, 'cause you were one of the first people who's not part of the process to listen to it and you always wonder what the outcome was like from the outside and when I saw your email I was like, "Alright, we got one fan on board" [laughs]

**Jon Cryer:** And the most important one, as far as I'm concerned. [laughs] Again, I think what you do is important, but the fact that you do it so *well* is remarkable. So, thank you for doing what you do.

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