
UNDISCLOSED SEASON 2: THE STATE VS. JOEY WATKINS**ADDENDUM 12:
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Jon Cryer: Hello! And welcome to the *Undisclosed Addendum*. I am Jon Cryer, and you are listening to the podcast about all things *Undisclosed*.

Now, in Episode 12 of *Undisclosed*, 'Exit Wounds', Colin and Susan deconstructed the State's ballistic evidence against Joey Watkins and discovered some troubling discrepancies between what they found and what they actually *testified* to that clearly favored the prosecution.

Now, with us today is one of the hosts of *Undisclosed* – Colin Miller – he's an associate dean and professor of law at the University of South Carolina School of Law, and he blogs at *Evidence Prof Blog*. Hello, Colin, how're you doing?

Colin Miller: Hey Jon, pretty good!

Jon Cryer: Alright! But we also have *guests* this week. Our first guest is Congressman Keith Ellison. He's the US representative for Minnesota's Fifth Congressional District, since 2007, he's the co-chair of the Congressional Progressive Caucus, and the chief deputy whip. He serves on the House Committee on Financial Services, but he's also a long-time defense attorney and the host of *We the Podcast*, which you should check out if you get a chance. You might *also* recognize him from the recent TV hit, the *C-SPAN-Wells Fargo Comedy Hour*--

Keith Ellison: [laughs]

Jon Cryer: Which was the congressional hearings that looked into the fraud at Well's Fargo. Now, full disclosure – I was the voice of Wells Fargo commercials for about five years. It was: "Seize your Sunday. Wells Fargo." That was me. [laughs] I was surprised that *I* was not called before the Congressional Committee--

Keith Ellison: [laughs]

Jon Cryer: I was expecting that phone call at some point. Because I-- But I have to say, I defrauded relatively few people. [laughs] Just not as many. But actually, Congressman, it's great to have you here, but I just wanted to ask you for a *quick* run-down. It's confusing to me as a consumer of news, exactly how the fraud that Wells Fargo was committing actually *worked*. Because I understood that it was creating fake bank accounts, but what beyond that?

Keith Ellison: Well, there are a number of things that they were doing. One is, it would use high-pressure tactics to get people to open accounts. They would use these long lists of people who'd bought *other* products – maybe one product – and call them up and just push these other products on them. They call them the 'Great Eight.'

So, it would start off with high-pressure sales tactics, then after they got folks to open up accounts that they didn't need, they might actually open up credit cards on those accounts that the consumer never authorized. So, that happened quite a bit. And there were even

some lines of-- Mortgage equity lines, things like that, that were never authorized by the consumer.

Now, it's *also* important to note that opening up all these accounts, you wonder, like, "What's all that about?" Well, if *you* don't maintain a certain minimum balance on your account, you will be charged a fee. And then the level of the fee depends on the nature of the account. So, if you have something that might be a cash management account, that's one thing. A checking account is another, simple saving might be another, but at the end of the day, if you can get somebody to open up about six or seven accounts, and they only really use *one or two*, then you could probably generate substantial fees from those sort of dormant accounts. So that was sort of what it was all about, but some of it was a little bit of identity theft, some of it was,

Jon Cryer:

Just a *little* bit of identity theft. We're dipping our toe in identity theft.

[laughter]

Keith Ellison:

But that was sort of how it worked. 5,300 people were let go, the company says that they all had engaged in unethical conduct, but I *will* say, that there *is* a group of employees who is keeping a close eye on the situation, and who is advocating for employees and they say that a lot of people who were fired among those 5,300 were people who simply did not meet sales goals. The workers would describe a situation where every morning they would have sales huddles, and people would say, "Everybody has to sell three credit cards today", open up a certain number of accounts today. A lot of pressure. And if you didn't do them you had your name put on a list for not making your sales goals – so, public shaming – and then your pay was sort of tied to meeting these sales goals. And these folks have base pay of \$12 an hour. If you wanted to do better than that you had to really move these products.

So, that sort of was a very tough environment to work in, for a lot of people. And many people contest this claim that all 5,300 were let go for unethical conduct. And by the way, we're talking about about *two million* separate transactions that were ethically tainted. So it was kind of wide-ranging, and the real fight at the committee hearing was, you know, "Okay Mr CEO, you're going to let go of all these people and tell the public that "We've handled the problem", but the problem didn't crop up overnight; it had something to do with your sales system, your high-pressure tactics, and the unrelenting pressure on the workers to just move the merchandise. So, that's kind of the nature of the conversation.

Jon Cryer:

Well, also a big part of the conversation was apparently the CEO of Wells Fargo, John Stumpf, claiming he just didn't know. [laughs]

There's a marvelous supercut floating around of all the times he had to say he did not know. Now obviously, the CEO of a company is not going to know, on a terribly granular basis *exactly* what's going on. But it seemed like the hearings were an opportunity to expose behavior that – while much of it wasn't necessarily illegal – it was certainly *unethical*.

Keith Ellison:

Yeah. And I'll say this: I think that if you're paying somebody \$22 million a year, they might want to know something about the sales program that's being delivered to the public.

Jon Cryer:

[laughs] Perhaps.

Keith Ellison:

You know, and look: I have no problem with people making a good living. But if you're going to make that living, then justify your existence by knowing what's going on in your company. Now, as you said, they can't know every single thing. But if you have a *system* in place that says, "This is what is expected to sell", then I think that he ought to know. So, like, one question I didn't get a chance to ask him is: "Why did you discontinue your sales goals program

if you don't even know what's *wrong* with your sales goals program?" Because, you know, I don't think there's anything wrong with having a sales goals program for employees – I think it has to do with how much pressure are you putting, what are the consequences for not meeting them. And are they fair? Are they ethical? And do they serve the public? There are sales goals programs that are *not* good, and there are those that are just fine. *Why* was his at Wells Fargo unacceptable? He could not answer that question, and--

Jon Cryer: Along with many other questions. [laughs]

Keith Ellison: Along with many other questions. And so I just-- I got the impression that I wasn't exactly getting candid answers from the CEO, Mr Stone.

Jon Cryer: Well, thank you for filling me in on that.

On today's show we *also* have another guest, and his name is James Weirick. He's a retired marine lieutenant colonel, lawyer, and a podcaster, and his podcast, *Military Justice*, can be followed at @PodcastMJ, and I've just listened to the first episode, and I think it's terrific, and looking for more. Welcome to the show, James!

James Weirick: Thank you very much! Great to be here.

Jon Cryer: Now, I notice our producer, Dennis Robinson, just refers to you as *Weirick*, is that what you prefer?

James Weirick: Yeah... James-- I've always thought that I sound like a carriage driver from olden times.

Jon Cryer: [laughs]

James Weirick: So, *Weirick's* always the preferred nomenclature.

Jon Cryer: Yeah but the way he says it, he always sounds kind of dismissive, he's always like, "*Weirick!*"

James Weirick: [laughs]

Jon Cryer: Like you've been bugging him for a while.

James Weirick: Well, he's my executive producer... Yeah.

Jon Cryer: Oh okay, well, there you go. Well, terrific episode, and I'm very much looking forward to your coverage of the Bowe Bergdahl case--

James Weirick: Thank you.

Jon Cryer: Actually, you mention there's been a lot of things going on in the case recently – could you go into that a little bit?

- James Weirick:** Yeah. Well, I think that some of the things that we've seen in the Bowe Bergdahl case indicate that we still need reform in the military justice system. That we still have commanders – non-legal trained commanders – in charge of military justice that are subject to outside pressures. And that the modernization of the military justice process would include removing them – at least from some crimes. And we've seen that proposed by Senator Gillibrand and it's got bipartisan support for a number of years, but has never been able to overcome the filibuster.
- Jon Cryer:** Well, but could you explain to me exactly how commanding officers operate in those sorts of situations? Now, I'm a layperson – I was on an episode of *NCIS*, that's as close as I've gotten to the military justice system... [laughs] So what function do the commanding officers actually fulfil in that situation?
- James Weirick:** Well, in the military, the commanding officer acts much like a US attorney. They have the ability to determine what charges are going to be brought. For example, in the Bergdahl case, you had General Abrams-- There's a preliminary hearing called an Article 32 Investigation – much like a Grand Jury – that recommended that the case go to a misdemeanor court. And the commanding officer, General Abrams, overturned that decision and said, "Send it to a felony court."
- We've also just had a recent ruling by the trial judge, but there were previous *public* statements – one by Senator McCain, where he said, as head of the senate armed services committee he would be holding hearings if Bergdahl wasn't punished in this case.
- So, I think from just a fundamental fairness point of view, that *that* really calls that system a little bit into question. It's a good case to illustrate the changes that would be good for those who protect our nation.
- Jon Cryer:** So the Bergdahl case was originally going to be referred to a *misdemeanor* court? That's just surprising only because you know, desertion is obviously considered with tremendous gravity in the military – that was the first recommendation?
- James Weirick:** Yeah, that was the recommendation by the lawyer, the lieutenant colonel lawyer who conducted the grand jury investigation – called the 'Article 32', but similar to a Grand Jury.
- Jon Cryer:** So, as I said, as a layperson, I don't expect commanders to have that skill set at *all*. My hope is that a commander knows how to defend our country militarily – that's all I ask of he or she, frankly. [laughs] But I don't demand that they know all about the *legal* process. I'm surprised that that has been delegated to commanders – is that just a function of--
- James Weirick:** It's historical.
- Jon Cryer:** Yeah?
- James Weirick:** It goes back 200 years ago. So it's one of the reforms that – at least in my opinion – we need for the military, that we've just held on to tradition. It's only been five years ago that we had open homosexual service in the military. The military's a little slow to adapt to changing times. So we need our legislators to push them in the enlightened direction.
- Jon Cryer:** Well, yeah. And also, you pointed out on the podcast that we're now in our 15th year of being a country at war, and so we've had *millions* of people processed through the military in that time, and have had to experience some interaction with the military justice system. And it's

interesting. There's a couple of cases in the news recently that I wanted to bring up: One is the Jena Urban protest case. She was an intelligence specialist and reserve who refused to stand for the national anthem. My understanding is she *is* being reprimanded in some way, but I wondered what-- You know, the military doesn't seem like a natural place for free speech – it's the military, but I guess when you're joining you're not giving up your civil rights, am I correct?

James Weirick: Well... You probably *are*. First, I've gone on record before – I absolutely support the actions of Colin Kaepernick. I wish he was just a little better at quarterback--

Jon Cryer: [laughs]

James Weirick: But absolutely. You know, that type of protest – that's what our people of character should be doing in our nation. That being said, my recommendation to the sailor would be, definitely, there's Article 92, there's violations of a general regulation or order, and- [sighs] Although the navy are saying now they're investigating it, putting my 'criminal defense attorney' hat on, that would definitely be a violation for her to do that while in uniform.

And I think we can kind of understand that in the sense that while we might agree with what *she's* saying, you had service members going to *other* types of rallies and things, we would not want them representing the United States military at such rallies.

Jon Cryer: Well, also, on a day-to-day basis, I don't know how one would maintain military discipline if everybody's taking a moment to honor their particular political beliefs.

James Weirick: Right.

Jon Cryer: I mean, I understand why the military appears ossified. Because, you know, it's an organization with an incredibly important, *deadly* mission.

James Weirick: And she's still free to, you know, write an op-ed, and do it out of uniform. She can still *hold that view*, for sure. But there just needs to be that disclaimer that she's not representing the views of the United States military or government.

Jon Cryer: And that's one of the things that struck me as interesting about all of the protesters, in terms of Colin Kaepernick and a lot of the other athletes that have taken a knee for the anthem, is that people have interpreted it as an attack on the military. Which has always struck me as odd, because it was clearly always aimed as an attack on what they perceived as police violence, and having nothing to do with the military. You know, I don't know if you guys can chime in on your thoughts on how that gets conflated.

James Weirick: I think that you definitely have members of the military, or former members, that don't like the message, so they try to say that this is an insult to the military. It absolutely, and I'm speaking as a veteran, saying it's not an insult to the military. It's clearly, you know, Mr Kaepernick standing up for an important issue in our nation. And I think that that's the responsibility of all important and informed citizenry.

Jon Cryer: Thank you very much. [laughs]

James Weirick: [laughs] So, say I.

Jon Cryer: Yes. [laughs]

[16:54]

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Jon Cryer: So, I wanted to get around to this week's episode of *Undisclosed*, because in the opening of the episode Susan mention that there is a new PCAST report that would be required reading for *Undisclosed* listeners. And, first of all, I would like to file a complaint. When I took this job, I was told there would be no homework. [laughs] And if she is going to make-- I mean that report is *174 pages*. I mean, just getting to the introduction is-- That's page *34*. [laughs] So... That's a lot of stuff to wade through!

But it came out, and the PCAST is, I believe the President's Council of Advisors on Science and Technology, and they weighed-in on the state of forensic science in criminal courts. And actually, Colin, I was hoping that you could talk to us a little more about that report.

Colin Miller: Yeah. So, PCAST is, as you said, President's Council. And it's a group of, essentially, the nation's leading scientists and engineers and what they were looking at was comparison evidence. You have a bite mark on a victim – what are the methods we currently use to determine whether the defendant has a distinctive bite mark that matches that bite mark? We have a shoe print evidence. We have a shoe print at the crime scene – to what extent can we match that to a shoe size and type worn by the defendant?

And as it speaks to this case – we have ballistics evidence, and you're trying to match a bullet to a gun, and exclude other guns. And essentially what this report says, is a *lot* of this comparison forensics is not independent in that the testers are beholden to the government. They're often – whether explicitly or implicitly – biased in favor of the government. They're overseeing the results, and PCAST essentially asks for an overhaul of the way that forensics comparisons are done because the current field is not sufficient. It leads to false positives and false negatives.

And unfortunately the response by the attorney general, by district attorneys, by the FBI is: "We're going to ignore this report. We're going to proceed with what we're doing with this evidence."

Jon Cryer: Well, I can understand on their part, because it opens up an enormous can of worms. I mean, this is a, you know, my understanding is that all the things you mentioned, that's the *bedrock* of forensic science and the criminal justice system. If it's found to be lacking-- It sounded like, by the way, there's been only one peer-reviewed study of all of these sciences – did I *misunderstand* that?

Colin Miller: No, that's correct. A lot of these – including fingerprints, by the way – they don't have a lot of studies that actually back it up, and there is, I think, the misconception that forensic science developed very much independent of the government, it was very much J Edgar Hoover and the FBI – they very much invented this field of forensic science. And it *was* something always seen as a tool used by the government against defendants, so it's not independent, and that's the problem – these are things that were developed in the petri dish of the government, and there have been some disastrous results. That's a big segment of the false conviction cases... *Are these faulty forensic sciences.*

Jon Cryer: And the FBI lab has it's own share of scandals. As a matter of fact I think I should have brought that up when I had Jim Clemente on the show. [laughs] But my understanding was that the

forensic lab was rife with methodology that was suspect, and people testifying to things that they weren't necessarily certain of... Is that a fair judgement of it?

Colin Miller:

Yeah it's fair, I mean, the big study that came out recently was the hair analysis where it went to show that hair analysis is 90-plus percent of the time wrong, and almost always in a way that hurts the defendant.

And then beyond that, even when-- And those are cases where the testimony is shaded in favor of the government, sort of the Jay Jarvis situation we discussed in this episode. But then there are the cases of the quote-unquote 'dry-labbing' I've been looking into, where you had people claiming they tested drugs that were taken from the defendant, and dry-labbing means that you just made up the results, and used that against defendants. And that's happened in Texas, it's happened in Massachusetts, there's been a few jurisdictions where these sorts of cases have cropped up.

Keith Ellison:

You know, I've tried a *lot* of cases to juries over the years that involved scientific evidence, and before I was in congress I spent 16 years doing criminal defense work. And I can tell you that it's *very* powerful when an expert witness takes the stand, and is qualified as an expert. The jury, and even the lawyers may not understand exactly everything that's being said, despite what they might represent, but it's still very powerful in the eyes of the jury. I mean, they listen to that, and the guy says, "You know what? I've compared this" and they use some jargon, "and this bullet matches..." you know, "this casing follows the bullet in the body" or "this tire tread matches the car of the defendant". And it just really *really* throws the things in favor of the State when this kind of evidence is admitted.

And so, I mean, I think that if anybody really needs to read that PCAST report, it needs to be judges – who are going to make decisions about admissibility. Because, you know, there's a scientific standard for admissibility of evidence called the 'Daubert Standard' and this standard test, not only is it relevant but it is *reliable*, and it has to meet this standard in order to be admitted.

And yet reliability is the heart of the matter. And new scientific techniques are coming online all the time, and so I think if anybody really needs to dig into that PCAST it is judges throughout this country so that they apply a very strict standard as to whether or not a piece of scientific evidence comes in. Because it is powerful. Once it *does* come in.

Jon Cryer:

Well also, my understanding is across the United States it is a hodge-podge of different laws, in terms of what states will accept what scientific evidence. My understanding is that there are still states that accept polygraph evidence, is that true?

Colin Miller:

There's one state – New Mexico – allows polygraph results to be admitted. Beyond that, there are *some* jurisdictions that say if the prosecution and the defense stipulate, before the taking of the polygraph, that the result will be admissible after the defendant takes it, then in some jurisdictions *that's* permissible, but New Mexico is the only one that says *per se*. There are some standards, but you know without an agreement by the prosecution and defense the polygraph evidence can't come in.

Keith Ellison:

Well, can I just say this about polygraph? Basically it measures a galvanic skin response. Basically how nervous are you? How twitchy are you? And it measures at a level where even if you try to act calm, if you have a response to a certain kind of a question, then if you are *lying*, then it takes a certain amount of energy and it'll register on your skin. But let me tell you, it basically just records a skin response; it doesn't detect *lies*. It detects *reactions*.

And, you know, I'm going to tell you, I've had people who've taken polygraphs and they weren't admissible, but two different polygraphers can come out with two different results! I

had a client one time who was pregnant, and the polygraph administrator didn't even know it. And I'm like, "Well, wait a minute, you've got two heartbeats going on here – you've got the mom and you've got the baby. How come you didn't know that?"

And so, in my opinion, it really is a tactic just to, sort of, *up the ante* on someone who is claiming that they're innocent, and making them think that there's something there. I just think it's a shame that a polygraph could ever be introduced as evidence. But then again, it seems 'science-y' so people might think that it would be valuable.

James Weirick: Congressman, if I may, if I could summarize this – polygraph machines are voodoo--

Keith Ellison: [laughs]

James Weirick: And they are machines to try to get confessions out of defendants. Because--

Keith Ellison: Bingo!

James Weirick: It will use the follow-up questions of, "Well I had some problems with question number three, and could you clarify this?" Hey, if you don't say, "Hey, I had a problem with your x-ray, can you tell me if your arm's broken?" Either your machine works or it doesn't, buddy.

Keith Ellison: Right.

Colin Miller: Tying those last two points together, too, is there's a well-known effect, the 'White Coat Effect', which is, if you're going to see a doctor, you're stressed. If you're a suspect asked to speak to a polygrapher about a crime, you're stressed. And that can cause these results and polygraph tests that aren't real. And then, congressman, going back to *your* point about these experts and how much reliability jurors place on them, well that goes back to this White Coat Effect.

And if you have a forensic expert, if you have someone who is being proffered as someone in the field of ballistics or fingerprint evidence, or hair evidence... Jurors put so much weight onto that testimony and that's a huge problem. And that's why this screening of the Daubert Test or the Fry Test is so essential. And it's interesting.

We'll see what the defense bar does with this PCAST report, but you can imagine that starting when this report first came out, that defense attorneys at these hearings and before jurors are going to be arguing, "Look, this evidence being presented – we have this body of the State's experts saying it's unreliably done and it's not something you should take on faith.

Jon Cryer: It sounds like *part* of the reason that they might be hesitant to institute these reforms is that, as I said, it opens up an enormous can of worms. But *also*, all of these methods have been of late, proving *very* problematic. And if they *are* in fact disproven, I don't know where you begin to go over the enormous backlog of cases that were decided on the basis of this.

Keith Ellison: Well, you know, this is a good point, Jon, because if you really start looking at some of the scientific evidence that has been the basis of a conviction, you're going to start looking at a lot of convictions. The thing is, is that so *much* of the comparison-type evidence, you know, I think in a way, I mean, I feel mixed. It *should* meet a very high threshold to be admitted, and then of course I think there should be some instructions, some way for the judge to

demonstrate to the jury that they have every right to question this evidence without dipping into the defense attorney's role.

I think that the White Coat Effect is just so powerful that there's got to be some kind of curative instruction that: "Look, you cannot just *assume* that this stuff is right, you have a right to question it". Maybe a judicial instruction might be a way to get a fair evaluation of this evidence.

And actually, I've been looking at the first page of the PCAST report, because I can't be depended on to read the *whole thing*. [laughs] And that's why I was asking Colin to summarize it for me – but the recommendations *do* sound fairly common-sensical. They don't sound like they're crazy. They want the National Institute of Standards and Technology: "They should perform evaluations on an on-going basis, of the scientific validity of newly developed forensic feature-matching technologies and should issue an annual public report on the results."

Well, *that* makes sense. It's kind of hard justifying turning that down. Especially since that would provide enormous guidance to the states, who would at this point have to wait for various cases to be brought up for them to overturn scientific evidence. I imagine that's the process?

Colin Miller:

Yeah! And if you look further in the report, I mean, this is basically the scientific method. They say "Foundational validity. If you're going to introduce this comparative evidence you need..."

I'm reading from the report:

A reproducible and consistent method for:

1) identifying features in evidence samples,

2) comparing the features in two samples, and

3) determining, based on the similarity between the features in two sets of features, whether the samples should be:

a) declared to be likely to come from the same source, and then

b) empirical estimates from appropriately designed studies from multiple groups to establish the method's false positive rate, and the method's sensitivity, that is the probability that declares a proposed identification between samples that actually came from the same source.

So, I mean, that is just the scientific method there. They're just asking that to be used when they have this comparison evidence, and yeah, the attorney general, the FBI is saying, "We're not going to do it – we're fine with the way we do things."

Standard operating practices is going to be what continues for the foreseeable future.

Keith Ellison:

So hey, if we were going to put a number on the rate of exonerations of people being convicted – do we have any kind of even a ball park number on that? I've heard it's as high as 10%, but I'm not sure that's accurate. Does anybody know?

Jon Cryer:

People exonerated in what respect? Exonerated by forensic evidence? Or--

Keith Ellison: Well, after they've been convicted, they've been later found to be-- Their conviction was vacated based on actual innocence.

Jon Cryer: Oh... You know what? I'm not aware of that, actually. I've banded about the false confession statistic *way* too much, because people are getting mad at me about it now. [laughs] But I'm not aware. I think that would be a statistic that would be very difficult to derive, because there's so many reasons that people could be exonerated.

Keith Ellison: But you could take the sum total of people convicted in a given year. And then you could stretch it out, I don't know, maybe 10 years, and then just say how many of those people have been found to be exonerated, and, you know, convictions vacated. And I'd be curious to know.

I mean, some of them would be eyewitness testimony, some would be false confessions, and I want to thank you for the episode you did on that, I think that was awesome. But I mean, I bet there'd be a substantial number where this forensic, scientific evidence that played a role in the case where the evidence was either not sound, or was applied in an unsound way, or was *misapplied*... I mean, I would guess this would be a driver of how people end up being convicted. And I'm just curious to know.

[30:21]

Colin Miller: It's 46% of DNA exonerations, invalid forensic science evidence played a role in the case. Almost *half*. That's pretty significant, yeah. I don't know in terms of the overall percentage. I think that would understate it because there's still so many people in prison who are innocent and haven't been released yet, so it's tough to get that. So I don't know about the overall number but 46% of DNA exoneration involved faulty forensic science evidence.

Keith Ellison: And I tell you, Jon, one reason why I think that this is critically important is because, you know, the judges tell the jury that the defendant is presumed innocent. The defense attorney and the judge say that they've got to prove the case beyond a reasonable doubt. But you know, the defendant being brought in there, just being accused – those instructions, I don't know if they really matter. I mean, I know that people try to take their oath seriously – I believe that. But just the *circumstances* just sort of create this overwhelming impression that this guy is the one who did it.

So just getting more news and information out there about just how often exonerations *do* happen, and the role that forensic evidence plays, is key – particularly some of the stuff in the popular media you know? We're just led to believe forensic evidence is conclusive. The TV tells us that every night.

Jon Cryer: Well also, people generally want to believe that the State is doing things by the book, and by the way, you know, in the United States, the State *is* pretty transparent. I mean, the reason we are aware of all these problems is because we're *talking* about them – you know, we can make a podcast about them.

So, hopefully, when people serve on juries, when they see the defendant brought before them, they won't *automatically* assume that what the State is presenting them is *absolutely* the case.

But unfortunately these *labs* that are run by the state governments come in with the imprimatur of that – they are the State, or the FBI, which of course has a very powerful reputation.

But in *this* case, actually, in the Joey Watkins case, it's interesting because Colin and Susan pointed out two very subtle areas where that bias can come through in a lab. First being in the actual instructions that are posed to the lab – what the prosecutor is asking the lab to find can be, you know, tricky. Because they're basically saying, "Here's what we *want* you to say".

Colin, are there any ideas floating around in terms of how do we fix that? How can we make it that labs *aren't* given instructions on basically what they are supposed to find?

Colin Miller:

Yeah. I mean, it's a great question, and I think that that is *definitely* an area that is essential. And I'm not aware – other than having these labs that are completely independent from the State – where you would really solve the problem.

Because right now it really is an idea where the lab is an extension of the prosecutor's office, and when you have that you're going to have the prosecutor coming in and saying, or the police coming in and saying: "Listen, we *need* this to match *this*, and we need it not to match *that*. Please write your report in a way that is going to be most helpful to our case". That's essentially what Jay Jarvis told us in this case.

Jon Cryer:

The other thing that you guys brought up was his interesting use of language on the stand, by saying that the findings were consistent with a .9mm Ruger – he was in fact giving the *impression* that it matched a .9mm Ruger, but what *in fact* what he was saying was that he *wouldn't rule out* a .9mm Ruger – is that correct?

Colin Miller:

Yeah! And it's very similar to what we discussed in our first season case – the Adnan Syed case – where there were these two hairs found on the clothes of the victim – Hae Min Lee – and it was *clear* from what this person testing the hair had found was that Adnan Syed could be ruled out as the source of the hair, and so could Hae Min Lee.

But the way it was presented on the stand – very similar to Jay Jarvis in this case – made it look *much more* equivocal than that, and the jurors in that case were not at all certain that the hairs came from someone else. And in this case, as you know, it made it seem as though this was open and shut! The three parts of the bullet – the jacket, the lead core, and the cartridge case all came from a .9mm, you could link them together. And in actuality, when Jarvis was talking to Clare and Susan, it became quite clear that significantly overstated the weight of his conclusion.

James Weirick:

Yeah, I was *particularly* offended by the idea that he could say it came from a .9mm Ruger. That's like saying, "I've identified these Michelin tires and they were on a Honda Civic." No, they could have been on *any* vehicle! And just because you identified it as a .9mm, I mean, the Ruger is one of *a hundred* different handguns that fire a .9mm... At *least* a hundred. So that type of testimony I found to be-- That's an *extraordinary* jump to say that it came from that make of gun.

[35:06]

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Jon Cryer:

So, a question for Keith, actually, and for Colin. So is that going to mean that in these sorts of situations it's going to be incumbent on the defense attorney to poke that hole and say, "You're saying 'consistent' but what you *mean* is, 'we're not ruling it out'?"

Keith Ellison:

Well, that is going to be the primary responsibility of the defense attorney. Which is scary, given that you've got so many public defender offices all over this country that are overburdened, and you have the situation with people not getting Discovery, and adequate time to really challenge it.

So, it's kind of scary, you know? But Jon, I'd go a little further and say it is the court's responsibility. You know, the court *cannot* say, in my opinion, just say, "I'm just here to call balls and strikes." The court has to make sure there's a fair trial. And to me that means that the court may have to ask that question, or make sure that there is an *in limine* hearing, to make sure that these issues are brought out.

And you know, judges *are* authorized to ask questions in the trial. I've seen it many times. You don't want them to ask questions that really prejudice *your* case, but if it's key for the jury to *know* it, to make a fair decision, I think the court does need to intervene and make sure that the jury's aware of that.

Colin Miller:

Yeah. That's a great point. There's a rule – 614 in the Rules of Evidence – that allows judges to interrogate witnesses. And I think that's spot-on to say if you are a judge in a courtroom, if defense counsel has not stepped up and really dug into the question of what is consistent with *mean*, and you're the judge sitting there and knowing the jurors are likely to overvalue that...

Yeah, I mean you can certainly, in a neutral fashion, simply follow up the expert and ask, "Can you please explain *exactly* what you mean by 'consistent with'? How far does that go? How far *doesn't* it go?" And just make sure the jurors understand *exactly* the weight they should give to that expert's conclusion.

Keith Ellison:

Yeah and a lot of times I've seen trials where the judge takes a hands-off approach and just kind of takes a hands-off approach and says, "Well, it's your case, counsel". But when you're talking about somebody's liberty... You might be talking about a murder case or something very important to the victims as well, and their family. You know, I think the judge has an important role to make sure the jury understands that.

Colin Miller:

What I'll add on too, is: In a majority of jurisdictions – a vast majority – jurors can't ask questions. I'm of the opinion that I support the minority of jurisdictions where jurors – through the judge – they submit the questions to the judge, and have the judge ask them, so you don't know which jurors asked the question. But I think that by allowing the jurors to take part in that way, it makes them more active in engaging in the proceedings.

And I think probably the forensics and expert evidence is something that's most confusing to them, and allows them to ask something like that where you can say, "Please explain further what is meant by your conclusion that this cartridge case or this lead core is consistent with a .9mm." And I think that's something that courts should definitely consider.

James Weirick:

The military... We do that quite a bit. We have our jurors ask quite a few questions.

Jon Cryer:

Or rather, your *members*, as they call them.

James Weirick:

Oh yeah, the members do, the congressmen. They submit them written to the judge, then they're shown to both counsel, and then we lodge our objections and they're handed back to the judge. And then he or she asks directly.

Jon Cryer:

Quick question: Who is the authority on forensic science for the *military* justice system, or does it vary from service to service? Does the navy have a different standard of forensic science that they'll let into their courts than, say, the army?

James Weirick:

No, it's standardized. The army has a central lab down in Georgia. But the different services do run-- like the navy will run a lab for your urine analysis cases, because, you know, we have a lot of drug cases that are the result of random urine analysis. But it's just like the congressman said, that you know, you have a scientist that is mostly working with the prosecution, and he comes in there and talks about agrellites and gives all the clinical definition and all the gold standard machinery they have – it's a pretty impressive presentation when you're trying to deal with that as a defense attorney.

- Keith Ellison:** Yeah, and you know, a lot of defense attorneys – I don't think it's *required* that they get any specialization, in say, DNA or certain kinds of forensic evidence. I mean, you might have somebody who's been out of law school for six months--
- James Weirick:** Absolutely.
- Keith Ellison:** And has a ton of cases, gets Discovery *late*... And you know, that's why you get a lot of people pleading, because you know, you get some scared-to-death defense attorney says, "Look, you know, we're done for, you might as well seek a deal." And then the prosecutor can name their price.
- So *all* these things kind of come together to make for, I think, a criminal justice system that can be a lot better. And saying that, I'll even say that we probably *do* have the best criminal justice system in the world, or I'll say, *one* of them. But that doesn't mean we're as good as we *could* be. And given the just sheer number of people who have got out of death row, because of bad forensics or bad DNA, it's worth it.
- James Weirick:** Absolutely. We should *all* be agitating for a better system. It makes for a better nation.
- Keith Ellison:** Absolutely. I worry sometimes that people won't have confidence *in* the criminal justice system if we do not really sort of make sure that these convictions have integrity. There's a new show coming out – Jon, this is kind of in your area – called *Conviction Integrity Unit*. I think it's pretty cool, because it's kind of the opposite of *Law and Order*, you know?
- Jon Cryer:** [laughs]
- Keith Ellison:** [laughs] It's saying, "Hey you guys, these things aren't always right."
- Jon Cryer:** Yes, absolutely. I think they actually sponsor the show, as a matter of fact.
- James Weirick:** So can we write another portion where Ducky actually grew up, got a PhD, and ran that integrity unit?
- Jon Cryer:** Yes, but he did it with a flair for fashion. [laughs]
- James Weirick:** Yes. Absolutely.
- Jon Cryer:** Yes, *I'd* do that show. But you know-
- James Weirick:** I'd love to watch it.
- Jon Cryer:** I am one of the people who believe that you can't shine enough attention on this kind of stuff. And so I'm hoping, obviously, that the show's a hit, and that it brings this stuff to mind.
- I also think a lot of people don't even know that a lot of states *have* these conviction integrity units. And I know *I* didn't know it until recently – and I think it's such a laudable concept for

the State to say: “Hey wait a minute, let’s look at this again.” You know, as long as they’re not a ‘rubber stamp’ outfit.

Because you know, any bureaucracy can make huge mistakes. When we look at the criminal justice system, we are hoping that it is a process that has, over the years, *evolved* enough that it’s worked out all the kinds, you know? [laughs] And we’re going to get as close to the truth as we can possibly get.

But obviously, these forensic sciences that we are employing on a daily basis situation are clearly flawed in many ways. You know, and that’s not even to mention *how* the evidence is gathered. It’s only since the OJ Simpson case that they take a *lot* greater care in collecting this evidence, in terms of contamination, and all these things.

So, you know... But I think the public *yearns* to have some certainty in these situations, and you know, this is just how people try to provide it.

Keith Ellison:

Oh yeah. So I think the popular media has an important role to play here. You know, you raise- like you said, OJ- you know helping- and I think actually you know, art can drive real life, you know?

Jon Cryer:

I agree. I so approve of the concept of jurors asking questions, I’m going to take a question from Twitter. That was a nice segue right there. Here’s one – this is from ‘Big Grizzly Chap’ [laughs] – I love the tag names here – he says, “Vague ballistics point to a handgun never owned by Watkins. How can this be evidence?”

And I’ve actually heard that from a *lot* of people who don’t understand why the court was trying to make this connection, when it didn’t appear that Joey even actually owned this gun.

Colin Miller:

Yeah, I mean that goes back to, if you recall, a few episodes back now, I guess, Adam Elrod, who had this story of Joey supposedly purchasing a .9mm handgun from a man with a scraggly beard at a gas station. And that’s pretty much it! They tried to say: “Look, Adam says he bought this .9mm, we have these three pieces of a bullet, and our expert, Jay Jarvis, is saying it’s a .9mm, and you can link the two together! And that’s how you can conclude he used a .9mm handgun to kill Isaac Dawkins. That was pretty much the strength of the State’s case right there.

Jon Cryer:

And we had a corollary question from ‘Big Grizzly Chap’ again, which was, “Heath owns handguns and allegedly fired upon others on the highway. How can Watkins, who has no handguns, be considered?”

Obviously they eliminated Heath because of the time discrepancy, but it still seems like, you know, they’re trying to fit a square peg in a round hole with such effort, in this case.

Colin Miller:

Yeah. And that really goes back to our last few episodes on character evidence. In essence the State’s case against Joey Watkins was a mountain of character evidence – their entire case was essentially *motive*. To say: Brianne and he broke up, Brianne started dating Isaac Dawkins, this threw him into a rage and a fury, and based upon all this character evidence we’re presenting to show how he’s responded in similar situations, you can conclude from that, that he was the one who took Isaac Dawkins’ life – who else could it have been?

And *that* was enough to convince the jurors in the case, and obviously we’re looking back now at everything involved in the case, but there’s not much more to the case than that.

James Weirick:

To follow up on that, that amount of *propensity* evidence that was brought in, and *MO*, that was, just *really* overwhelming. I think that was one of the most damaging parts of this entire case.

And this idea that we aren't focusing, you know, judges letting in this evidence, and we're not focusing on the *crime charged*. We are spending *massive* amounts of time deciding, you know, if they were at a Dairy Queen, and told each other to "screw off", and someone threw something at each other – that's not even *connected* to the crime.

It seemed like it was just a referendum on Joey Watkins as a *person*, and then *this* will be the crime that he gets convicted of.

Colin Miller:

Yeah. And sort of taking everything full circle, going back to forensics and the experts, the *other* component of the State's case that we'll get to are the cell tower pings, which again also takes us full-circle to Season 1. So, we'll have a whole episode on the cell tower pings and how they played a role in the case, and what we think we can conclude from them, based upon our own drive test, and some experts who reviewed the materials.

Jon Cryer:

So, if we're 'Monday morning quarterbacking', the *big* problem with the propensity evidence appears to have been the judge. That it was the judge who had the discretion to allow the evidence in or *not*, and in our estimation, it appears they erred too much on the side of allowing the prosecution to just allow things that were completely tangential into the case. I mean, if one was to Monday morning quarterback such a thing.

Colin Miller:

I think that's part of it... I would say: Number one: The way that Georgia rules are set up to allow the prosecutor to proffer as opposed to having the hearing where the defense can cross examine. Two: I think the prosecutor, Tami Colston, overstated things significantly – I don't know whether that was in good faith or bad faith. Three: I think definitely the judge allowed too much evidence in, in this case.

So, I think the combination of those three allowed this character evidence to inundate the jurors and we'll certainly-- We have some audio from jurors we've talked about the case with. That's definitely the impression we got, is that they heard this deluge of character evidence, and that was it. That was largely enough to allow them to return a conviction.

Jon Cryer:

I've got another social media question, from 'Amy Lowe', who says, "How can evidence with chain of custody issues such as this be used in court? This is startling. Does the evidence still exist, and can it be retested?"

Colin Miller:

That's a great question. We've had some fights with Georgia trying to get some of this evidence. So in terms of whether the evidence still exists, there are some big question marks on that, and we'll get to that in remaining episodes.

In terms of the evidence getting in, this is something again, in our first season case with Hae's car being released to the family's auto shop before the video was taken – we have that here with Heath Wilson's gun disappearing – I don't know. I mean that is something that is absolutely critical for me as an evidence professor. If you are in a trial and you are defense counsel, and the prosecution has not established chain of custody, that is *absolutely* something you need to *require* them to establish.

And in this case, with *many* different pieces of evidence, that chain of custody was not even *existent*. And that is something that definitely could lead to evidence being excluded, or at the very minimum, the jurors being told: "We have some serious questions about what was done with this evidence."

- Jon Cryer:** Could that be used by the Georgia Innocence Project to try and reopen Joey's case?
- Colin Miller:** No. That's something that wouldn't be grounds for appeal. That could've been raised initially on appeal, but chain of custody is not something now that's viable.
- Jon Cryer:** And Susan got all cryptic with that mention of an anonymous case file – are we going to hear a little more about that? I'm hoping.
- Colin Miller:** Yeah! That's something else that in the remaining episodes we'll touch upon.
- Jon Cryer:** Ooh, I'm excited. So, now, I don't know, congressman, you're a very busy man, and obviously, Weirick. Have you guys gotten a chance to listen to the show, completely?
- Keith Ellison:** Yeah! I try to keep up with the show, I think it's fantastic, and I'm on an airplane going from Minneapolis to DC and back again. So I'm plugged in, and I really enjoyed everything you guys had to say about the character evidence episodes.
- And it brings it back to a point I made earlier: So much of whether or not we have equal justice is whether the *judge* is gonna be on top of things. Because if the judge lets it in, on a shaky chain of custody... Unless that issue was raised on direct appeal, it might be lost.
- And *then* the Court of Appeals may decide that it's *de minimus*, or harmless error. So, that's why it *is* so key to have a judge that's taken careful attention to all the evidence admitted.
- And then also, I wish I could talk a little bit more about the need for more funds and resources to go into public defenders. There are jurisdictions in this country where public defenders are just *woefully* under-funded, over-worked... And it just means we get more pleas than we should; not enough trials. And it means that innocent people go to prison.
- And again, when character evidence is allowed to be poured in, it just really is disturbing. *One* question I had about that: Is that, *is* there an ample record of the defense attorney objecting to all of that? That character evidence, that 404-B evidence? I mean, how much of a fight was put up to stop that stuff from coming in?
- Colin Miller:** There was somewhat of a fight. And it's tough for me to second-guess, because... You mentioned 404-B. At the time, Georgia was one of the few jurisdictions that didn't have rules of evidence modeled after the federal rules, and as I said before, Georgia doesn't require a hearing to be held where evidence can be presented and defense can cross-examine.
- So, I'm not sure the extent to which it was... Yeah, the defense falling short versus Georgia has a system where it's exceedingly difficult for the defense to be able to put any reasonable fight up to this character evidence. So I think it's tough to disaggregate those two.
- James Weirick:** And I think along *those* lines, also you've had, you know, with the passage in the early '90s of 413 and allowing in other evidence in sex crimes, I think that we've kind of conditioned our judges to allowing in propensity evidence. You know, there's got to be a spill-over effect, because, judges are more accustomed to allowing in that type of evidence. And I think it's a bad turn that we've taken in criminal justice.
- Jon Cryer:** How did that come about? I'm not familiar with that.

James Weirick:

Well, in the early '90s they just passed the Federal Rules of Evidence 413 that allows in sexual assault crimes. You could admit evidence of other sexual crimes. So, I mean, I don't know exactly how it came about, other than it happens in Washington and that there's sausage and law made there, but... [laughs] That seems to- That has a spill-over effect because our judges are more *accustomed* now to allowing in that evidence that previously we just always disallowed. You know, the few exceptions for *modus operandi, et cetera*. But for the most part, you concentrated on the charged offence – that was it. You didn't bring in, "Hey, he's been convicted three times previously of *theft*, so you can consider that for his guilt *this time*." You know, that was verboten. But we've let it seep back into criminal justice.

Jon Cryer:

And it seems like in Georgia, specifically, the laws are structured to allow that. I don't know if that was a reaction what you were mentioning, or if it just evolved in Georgia on its own terms.

Colin Miller:

Yeah. It's not new in Georgia, I mean Georgia very recently – the last couple of years – *did* modernize the rules of evidence, but it's sort of back in 2000-2001, their rules were a vestige of old Common Law rules and that, I think, is something that hindered the defense.

I think under the *new* rules it's a lot better, but those old rules that existed until like, 2013, '14, '15 were just not very helpful to the defense in trying to exclude this evidence.

Keith Ellison:

So like, Rule 413. The original *concept* should be that the sexual assault needs to be similar in the way the crime was committed to help the jury determine whether or not it may have been committed by the same person. But once you kick the door in and say, you know, evidence may be considered on *any* matter which is relevant, you know, when you start saying that *any* other sexual assault can come in, you really do damage to what, I think, the original concept of 'similar crimes evidence' was supposed to be.

We all know that if somebody commits a crime a certain way a certain kind of a signature... But 413 is to me-- I would hope that any good judge would say: "You're going to have to show that this in *some* way identifies the defendant, not just *any* other crime." Because it's just so incredibly prejudicial, you might as well dispense with the trial at that point.

Colin Miller:

Yeah. And this sort of cycles back to Weirick's comment before about John McCain commenting on Bowe Bergdahl. Essentially in the mid-'90s – going back the whole picture – so, Rule 404 says you can't have propensity character evidence. You can't prove, "Once a burglar, always a burglar". Rule 404-B says for certain purposes like signature crime, *modus operandi*, you can present prior crimes to show that this person's a serial arsonist – they commit arson in a very specific way.

413 through 415 says despite that general distinction, you can prove 'once a rapist always a rapist'; 'once a child molester, always a child molester'. In large part that was due to the under-reporting of those crimes, under-conviction in those cases, jurors not believing rape victims and child molestation victims.

The way those rules were accomplished, though, was congress pushed them through, *not* through the regular rule-making process. There was actually a committee of lawyers, judges and law professors who opposed those rules, and congress overcame that – and there's been a lot of controversy surrounding those rules. And now, of course, you can understand why they have those rules, and the reasons I discussed before, those are certainly reasons why you would want to have corroborating evidence that helps the victims to prove their cases. But a lot of people disagree with the methods used. And then to Weirick's point again – yeah there's the possibility that with those rules that judges have taken a more casual approach in terms of the admission of character evidence more broadly.

- Keith Ellison:** Can I just say that, you know, of *all* the crimes that is the *worst* to be accused of when you're innocent – it's got to be a sex-related crime. I mean, of course murder is going to get you life in prison, of maybe the death penalty, but you know, other than that, I guess my point is, I guess it's even *more* important to keep propensity evidence out of a sex crime, in my opinion.
- James Weirick:** Yeah, absolutely. Yeah.
- Keith Ellison:** Because it's so inflammatory. It's just *so* inflammatory. It really sends the jury over the edge. The jury is revolted by people charged with these kinds of crimes, and you know, you barely have to prove your principal case at all, once you're wheeling in this other stuff.
- Jon Cryer:** Yes. You would have to hope for a, you know, a jury blessed with equanimity beyond most human understanding, for them to ignore those types of things in the past. The stigma is so huge.
- But one thing, actually, you were mentioning, that public defenders need more funding, certainly, and I've actually mentioned this before on the show, is, I think we also need to vastly improve funding for evidence storage and retrieval. Because it's thought of as an *afterthought*, most of the time, and we *assume* the authorities have all the time in the world to store these things, and all the time in the world to catalogue them correctly and make sure everything is available, and it's just *not* the case.
- These jurisdictions are under a lot of financial pressure – if they're faced with a lot of crime, evidence storage isn't where they're going to spend their money. They're going to spend it on putting more boots on the ground, and more people out on the street, and better equipment, and all that stuff.
- But in terms of the transparency of the justice system – like, Bob Ruff on the *Truth and Justice* podcast has been looking into the Edward Ates case, and there's DNA evidence that *could* have exonerated him, but once the State of Texas made a law to preserve all that evidence, it was all mysteriously destroyed in the Smith County evidence locker.
- So, *again*, while better funding couldn't have necessarily saved *that*, the real integrity of these investigations is utterly dependent on evidence storage. On having access to the evidence and allowing these people who've been convicted *access* to it at some point, if they're ever going to be given *any* kind of chance to overturn what could be a wrongful conviction.
- James Weirick:** I know in the army's criminal lab, about 10 years ago, they found at one point, hundreds of DNA samples in one of the break room refrigerators. That, you know, completely destroying the chain of custody. And I've always, in my mind's eye, seen them under old birthday cake and you know, there's years of forensic evidence right there, just destroyed.
- Colin Miller:** Yeah. And speaking to the issue of rape and sexual assault, I want to thank and congratulate the congressman and others with bipartisan support, the recent passage of Rape Survivors Bill of Rights, which deals with the physical evidence recovery kits done, and it is more notice given to the rape survivor and making sure we don't destroy those kits. And it's going to help with testing, so, *that's* something that's going to help in rape and sexual assault prosecutions that is a *positive*, that is, a *good* method to achieve that, and assuming that goes through, that's going to be a very positive impact in those types of cases.
- Jon Cryer:** Yeah. Think of the political ramifications of an electorate that actually *really believes* that the criminal justice system works. I mean, think of how great that would be! [laughs] Think of, I mean, just in terms of the unrest we're going through right now in terms of police violence

and all these things – if people felt they were at least thought they were going to get a fair shot, I think it would transform the politics that are going on today.

Now, Weirick, just out of curiosity, did you have any questions that you wanted to pose to Colin, having listened to the show?

James Weirick: No. I just love the show.

Jon Cryer: [laughs] Nothing!

James Weirick: I'm up to date on everything. I'm not as busy as the congressman, so I'm able to listen to every episode multiple times, and like a good member of the *Undisclosed* family, I subscribe and listen to all shows. Especially *Addendum*. I really like the discussion afterwards. I think that that's been a great addition to Season 2, that we have the original episode and then *Addendum* separately. And, Jon, if I could take *one* moment, it's a little bit off topic-

Jon Cryer: Okay...

James Weirick: But if the listeners could kindly go to my Twitter feed and look at the top tweet – I talked to the family this week – we've got a young soldier named Shadow McLaine missing. Now, missing about 30 days from Fort Campbell. I know the listeners are very passionate, I talked to the family this week. Any help we could get in that case would be so greatly appreciated.

Jon Cryer: Well, thank you for letting us know. I will do that right after we finish recording, as a matter of fact.

James Weirick: Thank you very much.

Jon Cryer: And, thank you, congressman, for being here, and thank you *Weirick* – that's how I'm going to refer to you from now on, with a little edge. *Weirick!* Like you just ruined something of mine; you spilled coffee on my notebook or something.

James Weirick: Yeah, yeah... That sounds jus like my mother, yeah.

Jon Cryer: *Way to go, Weirick!* [laughs] But thank you guys so much for being here, it's such a pleasure. And we'd love to have you guys back on any time you'd like.

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