

Transcript for Undisclosed Podcast's Bonus Episode "Bail" from 31 October 2016  
<https://audioboom.com/posts/5227853-s2-bonus-episode-bail>

**Rabia Chaudry:** In 1999, shortly after Adnan Syed was arrested for the murder of Hae Min Lee, his attorneys applied for bail. As a juvenile with no record, and all factors in his favor, there was a possibility it could be granted. Though, in any such case, bail is always hard to come by. In his case, though, it was made harder because the state argued against it because of his religion and ethnicity. And then it was made impossible because his charging documents got a very important fact about Adnan wrong. But just last week, nearly 18 years after the fiasco in 1999, Justin Brown, Adnan's attorney, filed for bail again.

**Colin Miller:** A classic 1961 article in the Yale Law Journal notes that,

*"Since the general notion of bail pending trial antedates recorded English law, its original raison d'être is not altogether certain. It probably arose from the medieval sheriff's desire to avoid the costly and troublesome burden of personal responsibility for those in his charge. Trials were delayed by the infrequent visits of itinerant justices, and many accused died because of unsanitary conditions in the prisons."*

And now, in modern day society, with the amount of violence occurring in many prisons, the risk to prisoners has been compounded. After Judge Welch issued his order granting Adnan a new trial, Rabia wasn't initially able to get in touch with him because his prison was on lockdown. This was because there was a brawl that had broken out among 26 inmates using improvised weapons that was exacerbated and perhaps even caused by staffing shortages that have been noted numerous times.

Similar issues led the Department of Justice to recently file an amicus brief in a case out of Calhoun, Georgia, arguing that the State's bail system is unconstitutional and exposes to many inmates to the ills of pretrial detention. Likely in response to this brief, the Maryland Attorney General's Office recently filed an opinion asserting that the state's bail system is also likely unconstitutional and that bail should be more readily given and at lower amounts than under the status quo. It is against this current backdrop that this same Attorney General's Office now must respond to a bail motion in Adnan's case

**Rabia Chaudry:** On Monday, October 24th, Justin Brown, Adnan's attorney, filed a "Motion for Release Pending Appeal" in Adnan's case. The Motion was filed pursuant to Section 7-109(b)(2) of the Maryland Code of the Criminal Appeal, which states that "[if] the Attorney General...states an intention to file an application for appeal...the [circuit] court may: (i) stay the order; and (ii) set bail for the petitioner." It's a pretty robust motion, it's got 38 attached exhibits. And as the Motion notes, Judge Welch entered an order granting Adnan a new trial, and the State Attorney General afterwards filed an Application for Leave to Appeal, meaning that it's now within Judge Welch's discretion whether to grant Adnan bail, and release him from imprisonment while the rest of the appeals process plays out.

As the motion notes, Judge Welch has this discretion because he granted Adnan a new trial, meaning that Adnan is now like any other person awaiting trial with the presumption of

innocence. And specifically, the motion cites to a Supreme Court of Rhode Island case, *Clarke v. Moran*, where a defendant was granted bail after his murder conviction was reversed on appeal. As in that case, Judge Welch has had this discretion because it's not a capital murder case. Justin notes how, in 1999, Adnan was initially denied pretrial release, based on a judge's heavy reliance on the State's misstatement in the charging document that Adnan was an 18 year-old adult eligible for the death penalty, instead of a 17 year-old juvenile.

Justin then notes, in his motion, how there was a review of the bail determination on March 31, 1999. Now, the capital punishment argument was off the table, so Assistant State's Attorney, Vicki Wash, now claimed that bail should be denied because there was a "pattern in the United States where young Pakistani males have been jilted, have committed murder and have fled to Pakistan and we have been unable to extradite them back." Later, Wash had to admit that these statements were fabrications: There was no pattern of jilted young Pakistani males committing murder. There was no pattern of charged Pakistani males fleeing the country. And there was no pattern of failed extradition of Pakistani males who had fled the country. But, as Justin Brown notes, "the damage had been done, and Syed has been locked up ever since."

**Susan Simpson:** In Maryland, as in all jurisdictions, a judge has two primary concerns when trying to determine whether or not someone should be released pending trial or appeal. The first is whether or not they're a flight risk, and the second is whether or not they're a danger to the community. In terms of flight risk prong, the judge has to consider whether a released defendant will flee the jurisdiction, and, in terms of danger to the community, the judge is looking at whether the community at large and/or specific members would be put in danger if the accused is released or whether the defendant is likely to conduct himself as a law abiding citizen for the duration of the time until his hearing or trial.

It does not appear that the Maryland courts have ever stated the burden of proof that the prosecution has to meet before the judge can be allowed to detain a defendant based on the defendant being a flight risk, but, as Justin's motion notes, a judge can order a defendant detained under the based upon danger to the community only if the judge "is persuaded by clear and convincing evidence that no condition or combination of conditions of pretrial release can reasonably protect against the danger that the defendant presents against an identifiable potential victim and/or to the community."

In other words, to detain a defendant based on the defendant being a danger, the judge must first conclude that the defendant poses a danger and, second, conclude that the conditions the judge could impose, such as house arrest and electronic monitoring, would not diminish that danger.

In making such determinations, Maryland judges consider the criteria listed in Maryland Court Rule 4-216(e)(1), and Justin argues in his brief how several of these factors support Adnan's release, and he backs up each of these factors with documentation in exhibits:

**Colin Miller:** So, one factor that a judge considers in deciding whether to detain or grant bail is, “[t]he danger of the defendant to the alleged victim, another person, the victim, or himself.” And as Justin notes in his motion, first, quite clearly, Adnan had no history of violence whatsoever at the time of his arrest as a 17 year-old back in 1999. And second, in the next 17 years, despite being locked up in a maximum security prison, for several of those years as a teenager with many dangerous individuals, and, in essence, in one of the most violent places in our society, Adnan has not been cited for a single violent incident. Instead, according to all the records, he has availed himself of all of the limited educational opportunities at his prison and been described as an “excellent” worker who “requires minimal supervision” and “volunteers for all lock downs and any other job he can help out with.” As the motion notes, his one infraction in 17 years involved being cited for possession of a cell phone, but, otherwise, the records indicate that he is “always very respectful to staff.”

So, I think, Rabia and Susan, on this front, it's pretty clear that Adnan has demonstrated, throughout his entire life, he is not a violent person, and I don't think that there's any identifiable risk the state can point to, other than the charges, obviously, in this case that would show that he would have any tendency to be violent toward anyone if he's released.

**Rabia Chaudry:** And you know, I know a number of people who were incarcerated with him who've come forward in the last couple of years and talked about Adnan, and just his reputation in the prison, and that he's very well-liked and he's very -- you know he's basically friendly, he's non-confrontation, he's not aggressive -- just last week I was on a panel at Georgetown University, and the professor who invited me there, Mark Howard, he teaches at Jessup. And he said that when he was teaching his class at Jessup, some of the inmates said -- Serial came up -- and they said, "You know what? We remember him. We remember Syed and he's a great guy, and he got along with everybody." So, definitely gonna be very difficult for the state to show that he would be a danger, has ever been a danger, given his reputation.

**Colin Miller:** Yeah, and it's tough to point to any sort of general statistics in terms of detention of people charged with murder, because a huge proportion of those have criminal records, they have violent acts in their past, and so very much he is an anomaly in the sense that while he's been charged with this crime, there is nothing in his record otherwise to indicate that he would ever hurt anyone.

**Rabia Chaudry:** The second factor Justin notes in his motion is, "the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community and the length of residence in the state," and these are all fairly straight forward factors.

In terms of residence in the state, Adnan was born in Maryland 1981 and has lived there for each of the past 35 years. With regard to mental condition, Adnan has never been diagnosed with a mental illness, and Justin notes in his motion that Adnan has retained a social worker who is experienced in assisting prisoner in the transition from the general population of a prison

to the regular population of the rest of society. In terms of character evidence and reputation, well, I mentioned some things before, but this motion again notes that Adnan has no history of violence and enjoys a great reputation among the prison staff, his family and the community. And I can say this, nearly every time I've gone to visit him, as we've headed in, some member of the prison staff has said, "Oh, you're here to meet Syed? Great guy." The motion also includes, in the exhibits, all the certificates that Adnan has gotten for study programs, volunteering, his behavior, and commendations from prison staff for his actual work. The motion also notes that Adnan's friends and family have stuck with him through thick and thin and would provide a support system upon his release.

**Colin Miller:** Yeah, the interesting thing for me is, a couple of points. One, the social works actually works at the University of Maryland School of Law, so I think she'd be a fairly strong witness at this bail hearing to be able to explain to the judge exactly why this would be a good case for release, and then, secondly, we've sort of gone through and said how you have these jailhouse informants and it's often the police and the prosecution rounding them up to testify against an inmate. It'll be interesting to see the extent to which Justin is able, at the bail hearing, to maybe call other inmates and staff to, in this case, actually speak to Adnan's good character and why he would be a good candidate for release.

**Rabia Chaudry:** Is that common practice, to be able to call inmates, or prison staff, you know, to prove good character? I didn't know that could actually be done.

**Colin Miller:** It's so rare in this case because, usually you're dealing with a case where the person has only be in prison or jail for a few days, and the question is, do we detail or release them pending trial? Where as in this case, he has a history of 17 years in prison where these people have seen him, over a decade and a half, some of them, and I think in that case they would be valuable people who could be called. I'm not sure because it's such, again, a unique scenario with the new trial being granted.

**Susan Simpson:** Well, the flip side is, who else can Adnan call? No one else has spent daily life with him as an adult. No one else could actually speak to his character now, or to any risk he'd pose.

**Colin Miller:** Except Rabia. Rabia would be a good person to call, I would guess. You might be on the witness list.

**Rabia Chaudry:** If I don't get sequestered somehow.

**Susan Simpson:** Yeah, but they're gonna argue -- they could easily argue, well, you know what, all she sees him is on the phone and visitations, which isn't his normal, daily behavior, so she can't vouch for what he'd be like on a day-to-day basis.

**Rabia Chaudry:** I mean, we could, I wonder, if we submitted letters he's written over the years, to me and other people, to show evidence of how he thinks, what he's doing. But if they've called anybody, I haven't heard from anybody in the prison, or anybody who's been incarcerated with him or has known him in this time who has had anything really negative to say about him.

**Susan Simpson:** Well, the third factor that Justin's brief looked at was, "Any other factor bearing on the risk of a willful failure to appear and the safety of the alleged victim, another person, or the community, including all prior convictions and adjudications of delinquency that occurred within three years of the date that that defendant is charged as an adult

Adnan has no convictions, other than the ones that have been invalidated based upon Judge Welch's opinion. And Justin also notes that friends and family have come forward and are willing to offer bail worth approximately \$1 million. That's what is typically known as a forfeiture agreement, meaning that these friends and family forfeit their property if Adnan were to flee to avoid facing trial. The thinking here is, of course, that Adnan would not do that, and would not cause all of his friends and family who have supported him to lose their homes if he were to not show up again at court.

And, in Justin's motion, he also also discusses a few other recent developments in Maryland law. For instance, in the past two decades, not a single juvenile lifer in Maryland has been paroled. So, basically, up until a couple of weeks ago, when a judge was considering whether to grant release to a juvenile charged with a crime that carries a life sentence, the judge had to consider the inherent flight risk that applies with the defendant, when he faces a conviction that would essentially be a guaranteed life-behind-bars sentence.

Then, back in April, The American Civil Liberties Union filed a federal lawsuit challenging the state's parole system for juveniles, alleging that the current setup is unconstitutional because, even though it's not technically life without parole, it is in practice life without parole, because there's no meaningful chance for release. The Maryland Parole Commission said it plans to hold hearings within the next year for the nearly 300 inmates who were sentenced to life for crimes they committed as juveniles.

So, in terms of the bail motion? As Justin notes, in the event that Adnan were convicted again on retrial, he would be eligible for parole and work release after serving only eight more years. That makes Adnan much less of a flight risk than he would have been mere three weeks ago, when his conviction upon retrial would have been, essentially, a life sentence.

And, Justin notes two additional factors that cut against flight risk. First, Adnan has received a string of favorable opinions from the Maryland courts, meaning there is reason to predict more favorable outcomes in the future. And second, given the publicity that Adnan and his case have received in the media, it would be really difficult for him to disappear at this point. So, without a passport to leave the country, and having, you know, a great deal of notoriety, his odds of living on the run wouldn't be so great.

**Rabia Chaudry:** So, on the ACLU's lawsuit, and then the Maryland Parole Commission's response to that, they're gonna start holding hearings to review these cases and these juveniles. I mean, I know that Adnan has said that a number of people he's incarcerated with, and I don't know if he's been assigned yet, but have been assigned a case worker to start reviewing their stuff, but the ACLU's response to the Maryland Parole Commission is that they're worried that this is going to be kind of just a cursory thing and it's just going through the motions to satisfy the challenge of unconstitutionality, but there won't really be anything meaningful that comes out of it, unless you have a situation where somebody served quite a lengthy sentence, and then they also have to admit to their guilt and admit remorse, these are things that the parole board looks for. So in a situation like Adnan's, where he's maintaining innocence, that would be really complicated.

**Colin Miller:** Yeah, that definitely cuts against Justin's argument a bit. The sense that there's no indication whatsoever that Adnan would ever say that he killed Hae, and so while Justin does include that, and we do have this new provision where there's gonna be bail hearings, it's exceedingly unlikely that he would, in fact, be paroled if he continued to maintain his innocence.

**Rabia Chaudry:** But there's kind of two arguments here. I mean there's two arguments that go for Adnan not having to serve so much time anyway. One is that, if his case is reviewed under this new ACLU stuff, and the parole board decides to give him parole, well, then he'd be out anyway. Or, if he actually is granted a new trial, and is convicted again, he still wouldn't have that many more years to serve. So, why would he flee? So there's almost two different possible scenarios I think that Justin is trying to present that could play out whether or not Adnan got the bail, but one question I have is, if Adnan's case comes up for one of these parole hearings fairly soon, and it's reviewed, and they decide to parole him, what does that do to the conviction being overturned? Does that, kind of, effectively end his sentence, or would he still have to go back? He's been released on parole, would he still be tried again?

**Colin Miller:** I don't think he could be eligible for parole while his conviction has been overturned. So, in other words, I don't think he could be paroled unless the conviction were reinstated. So, I think it's an either-or. So, either we're going to have the order granting him a new trial finalized and the state drops it, there's some type of plea deal, and that ends the matter, or the appellate courts restate the conviction, or there's a conviction upon retrial, and that's the point at which he would have a parole hearing.

**Susan Simpson:** And they're not relevant to Adnan's case, but there actually have been some interesting developments recently in Maryland regarding bail issues. I don't know if you saw how a few, I think last month, when the state's Attorney General released an opinion basically arguing it's a current Maryland system in which -- it's not a debtor's prison exactly, but the result is the same -- where you have many criminal defendants unable to afford the bail they need to be released for largely minor crimes, even with minor bails, they still can't reach.

And then yesterday, Colin and Rabia, did you guys see the article about the judge in Maryland who was recorded saying, essentially acknowledging, she knew the bail she was setting was preventative based on financial prohibitions. Like, they couldn't afford their bail and she knew that, and set the bail for that reason. Just to clarify, that's absolutely not what bail is supposed to be. It's supposed to be that the money, or the voluntary bond, is sort of insurance to get you coming back. It's not supposed to be a bar where they know in advance that you're not gonna make that bail, so, too bad, you can't leave. You're supposed to be able to leave with the extra incentive of not losing your money.

**Colin Miller:** Yeah, there's this Supreme Court case, it's a Red Scare communism McCarthyism-era case, Stack versus Boyle, and that was exactly what the Supreme Court found in that case, that the judge, in effect, was punishing this defendant because he thought that she was a communist, or a communist sympathizer, and set the bail exactly as this Maryland judge, and the Supreme Court said you can't do that. You can't use bail as a pretext to punish someone and keep them incarcerated pending trial.

Yes, that then takes us to the fourth factor cited by Justin, and this is really the heart of the motion, I would say. And that is, "The Nature of the Evidence Against the Defendant." And, essentially, the stronger the evidence, the likelier that the court will order the defendant detained because that both makes him a stronger flight risk, because it's likelier he's going to be convicted, and more of a risk to the community because it's likelier he's guilty of the crime, and in this case, certainly a violent crime. On the other hand, the weaker the evidence, the likelier that the court will allow the defendant to be released.

And, in this Motion, Justin Brown notes that, in ordering a new trial, Judge Welch concluded that the crux, the heart of the State's case was the intersection among three things. One, Jay's claim that Hae was buried in Leakin Park in the 7:00 hour on January 13th. Two, the Leakin Park pings. And three, Hae's body being recovered from Leakin Park.

And really, there's two components to this conclusion. The first component is, Judge Welch specifically points out that this was the crux of the State's case because the rest of Jay's story was contradictory and contradicted by the other available evidence, and Justin in the motion, of course, points out a few of the ways in which this was true.

So, probably most significantly, he notes how Jay's trunk pop story changed from initially him seeing Hae's body in the trunk of her Sentra at a strip off of Edmondson Avenue in his first interview, that then shifts to the Best Buy parking lot in his second interview. That then shifts to his grandmother's house in The Intercept interview with Natasha Vargas-Cooper in December 2014, so he sort of lays bare some of those inconsistencies that Jay has in his story. And then, second, Justin of course digs into the current state of this trinity, this crux that Judge Welch identifies as essentially the heart of the State's case.

**Susan Simpson:** Yeah, and it's not just Jay's intercept interview that's relevant here, it's also Kevin Herck's Intercept interview in which he agrees, this is the crux of the State's case: Jay plus cell phone records. So, the prosecutor at Adnan's original trial has himself gone on the record declaring that here's what the foundation of the State's case is.

**Colin Miller:** Yeah, so let's go ahead and start with the first part of that crux. This was Jay's claim at trial that Hae was buried at the the 7:00 p.m. hour. And, as Justin notes, in his December 2014 Intercept interview, Jay places the burial "closer to midnight," which, of course, directly contradicts his trial testimony. I actually want to dig into this a little bit more because the change is actually even more fundamental than this.

So, if you go back and look at that Intercept interview, this is part one, Jay says that, after Adnan and he went to Cathy's house, Adnan dropped him off at his house at about 6:00 P.M. Now, of course, this is fundamentally inconsistent with Jay's trial testimony which is that Officer Adcock's call was recieved at Cathy's house, and that directly led to Adnan and he to go to Leakin Park to bury the body. But, in this one, we have Adnan, after Cathy's place, dropping Jay off at home. And then, according to Jay in the Intercept interview, after Adnan dropped him off, Adnan left and didn't come back until "several hours later, closer to midnight," so that's the closer to midnight language is that, that is when Adnan is actually returning to Jay's house, not when they're burying the body. So, Adnan returns to Jay's place closer to midnight in Adnan's own car. Also in the story, Jay says that when Adnan comes back he calls him on his phone either when he is driving to Jay's house, or when he is right outside. But, of course, we have Adnan's call log and there's no call to Jay after 10:45 a.m., so, again, a new tweak to Jay's story is that is flatly contradicted by the cell phone evidence.

**Rabia Chaudry:** And can I just remind folks that what happened in the evening, according to Jay, was that after Leakin Park, Adnan dropped him off where Jen picked him up, and then he went with Jen, he had a conversation with Jen that he killed her, and I need to, you know, go clean off the weapon. All of that is gone. Jen is completely gone from this entire evening.

**Susan Simpson:** Not completely -- remember, she is now at Cathy's.

**Colin Miller:** Oh yeah, that's right. Yeah, Jen is now at Cathy's, so that is also shifting, so that's another inconsistency that could be used on retrial. And then additional Jay says, so, Adnan comes back closer to midnight and calls me on his phone (even though there's no call), Adnan doesn't have digging tools, so Jay to goes inside and gets some gardening tools. They then drive to Leakin Park, where Adnan and he dig a hole in Leakin Park for 40 minutes. And then, Jay says that Adnan drives around the corner to Hae's car, where Adnan retrieves Hae's body and spends the next 30-45 minutes burying her. Or, at least in this version, that is what Jay says Adnan told him because Jay, despite saying at trial he was there for the burial, now says he was smoking cigarettes and not watching or helping Adnan bury Hae's body, and so when you add all of this together, it's about five, six, seven new inconsistencies that Jay has created. And when you sort of add up the time and stack it, it's really the burial taking place not even close to

midnight, it is well after midnight, and so you know, overall, this first part of the crux, that we have Jay saying the burial is in the 7:00 hour, this has been undermined seven ways to Sunday by Jay, where he's saying event are completely different than I said before, and the burial is not even close to midnight, it's really after midnight.

**Rabia Chaudry:** You know, one thing that occurred to me when I first read this interview was that it's always been about "why"? Why is Jay changing his story again? That's always been the big mystery. And I remember at this time, is when discussions of the lividity and autopsy were emerging online, and I personally feel like maybe some of that information was conveyed to him so he readjusted his story again. And I could be totally conspiratorial here, but I feel like there is a reason he shifted again. Otherwise there's just no reason for him to do that. I mean, it doesn't serve him at all to completely change it. To basically obliterate Jen's testimony.

**Susan Simpson:** I think it was conveyed to him back in 1999.

**Rabia Chaudry:** That is couldn't have happened?

**Susan Simpson:** You know, there's no way to know now based on the record, but there's a lot of odd ways the case adds up that to me suggest that the cops knew about this problem, they knew they had an issue with it, and that they tried to repair it. For instance, by asking Jay if he and Adnan ever went back to reposition the body, or went back to rebury it. Maybe thinking that that could explain this discrepancy in their case. But, combined with the appalling lack of documentation concerning the burial itself, and the way they question Jay about it, I think they knew and I think Jay might've picked up on that but was stuck with the story.

**Rabia Chaudry:** But it was a really big risk to take. Because if Gutierrez had been competent, even relatively competent, she could have still easily pointed this out at trial. This wouldn't have been that difficult for her, even from the documentation, even though it's meager, that exists, for her to get the examiner to say, well, yeah, lividity is an issue here.

**Susan Simpson:** But they already knew she wouldn't do that, they already knew from the Nicholas case that the exact scenario had been presented and she had failed to pick up on it.

**Colin Miller:** The unimpeachable source, right, had told them Gutierrez does not understand lividity evidence, and so yeah, maybe they knew she wouldn't challenge it. And then, speaking of not challenging evidence, we have the second part of that crux, which is the Leakin Park pings.

**Susan Simpson:** Yeah, as Justin notes, the prosecution never disclosed either to the jury or to it's own expert that the AT&T subscriber activity report that was entered into evidence had been accompanied by a disclaimer saying, "Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable for location." Last year, in 2015, when he shown this disclaimer, Waranowitz stated in an affidavit that if he had seen this "critical information"

prior to trial, he would not have testified the way he did. The way Waranowitz had testified at Adnan's trial was that the two that had come in just after 7:00, at 7:09 and 7:16 P.M., had both originated on L689B, and that that was consistent with Adnan's phone being in the coverage range that would have included Leakin Park and the burial site. But based on the disclaimer, and the knowledge that AT & T itself stated that that incoming call data was not reliable, he would not have been able to give such testimony. Without good data, he couldn't rely on it to give any conclusions about what had actually happened. And as Justin notes, this is a big deal. As the Motion says, Judge Welch found in his opinion that, "but for trial counsel's unprofessional error in failing to confront the State's cell tower expert with this disclaimer, the result of the trial would have been different." Moreover, based on Waranowitz's affidavit, the defense's case seems even stronger for retrial because there is every reason to think that both that evidence and any testimony regarding the cell phone records would be inadmissible pursuant to Frye.

And this is where Justin asks the court to consider again Kevin Urick's own proclamation in the Intercept interview that Jay's testimony alone, or the cell phone evidence alone, wouldn't have been enough for a conviction and that it was only the combination of the two which mutually reinforced and corroborated one another somehow, only that allowed the jury to find Adnan guilty. Well, with neither of those things standing, now that Jay has thoroughly impeached himself and given even more stories, I think earlier Colin said five or six new inconsistencies, but that was pretty generous, I think there were at least a dozen new ones. With both those twin pillars of the prosecution's case have been toppled, what's left to stand on?

**Rabia Chaudry:** The next part is, I think, for me one of the biggest indicators. When people ask me, "Why do you believe Adnan is innocent?" I have lots of reasons for believing that Adnan is innocent, other than, you know, just actually knowing him. But I feel that this is scientific evidence that should help provide proof for people who are on the fence. And that is the lividity evidence here.

Now remember, the third part of the crux of the prosecution's case was Hae's body being found in Leakin Park, which previously had been to corroborate Jay's claim that there was a Leakin Park burial in the 7:00 hour. Now, for the first time in a legal filing, we have direct refutation of that claim. Dr. Leigh Hlavaty, whom we first interviewed on episode 5 in Season 1 of *Undisclosed*, submitted an affidavit with a motion. Dr. Hlavaty, again, is Assistant Professor of Pathology at the University of Michigan, and she's also the Deputy Chief Medical Examiner at the Wayne County Medical Examiner's Office in Detroit.

Let's start by noting that Dr. Hlavaty has now seen all of the pertinent medical evidence and testimony in this case: the testimony of the State's medical examiner at trial, the autopsy report, the autopsy photos, the crime scene photos that were admitted at trial, and even the crime scene photos not admitted at trial. And let's also briefly report the nature of lividity evidence. When a person dies, their heart stops pumping, and blood begins pooling in the dependent, or lowest, portion of her body: for example, lividity will be found on the back if the person is on their back and on the side if the person is on their side. So this pattern formed by this blood pooling is what's called "lividity."

So Dr. Hlavaty notes in her affidavit that lividity begins to fix between 2-4 hours after death and becomes fully fixed between 8-12 hours after death, meaning that it's no longer gonna move. If a body is moved to a different position between these two time frames, between 4 hours and 8 hours, at a minimum, there's gonna be a "mixed" pattern of lividity. So, for instance, if a person is on her back for 4-5 hours after death before being placed on her side, we would expect to see lividity patterns both on her side and on her back. On the other hand, if a body remains in the same position for 8-12 hours after death, we would expect to see one lividity pattern that is consistent with the dependent, or the lowest, portion of the body, so if a body's on its back for 8-12 hours after death, then they're only gonna have one fixed lividity pattern on their back.

So when we look at this case, Jay's claim at trial was that Hae was "pretzeled up" in the trunk of her Nissan Sentra for 4-5 hours after death, and after that, Adnan and him buried her in Leakin Park in the 7 o'clock hour. On top of that, the autopsy report, which was co-signed by a medical examiner who was there for disinterment of Hae's body, said that Hae was found buried on her right side, and Dr. Hlavaty notes the crime scene photos also reflect a right side burial.

And Susan, Colin and I have all seen these photos and we can also corroborate that it's clearly a right-side burial. Now, the problem with all of this, as Dr. Hlavaty has previously said, is that the autopsy report only indicates that there was frontal lividity, which Dr. Hlavaty was able to see in some of the crime scene photos. For example, she notes in her affidavit that in one "photograph, the body is on its right side with a view of the chest and abdomen. In this photograph, the lividity is of equal intensity on both sides of the chest."

This leads Dr. Hlavaty to two explicit conclusions, as well as an implicit one. The first conclusion is, and I quote, "based on a reasonable degree of medical, pathologic and scientific probability, the body was in an anterior (face down) position from approximately 2-4 hours following her death until at least eight hours immediately after death, and possibly longer, resulting in fixed anterior lividity." And second, "The lividity pattern observed with Ms. Lee's body is not consistent with a right sided burial position within eight hours of her death, as lividity was fixed in the front of her body and not its right side. Consequently, she could not have been buried on her right side until more than eight hours following her death."

So, Justin notes in his Motion, that this creates huge problems for the crux of the State's case, given that the State claimed at trial that Hae had been killed at about 2:36 P.M. and might need to push that timeline further back in the event of a retrial based on Asia and other evidence. This means that, at the earliest, the Leakin Park burial would have been at 10:36 P.M., which contradicts Jay's trial timeline and renders the Leakin Park pings completely irrelevant.

**Colin Miller:** Yeah, and I would also say that from this affidavit, we have a third implicit conclusion, and that conclusion is that Hae couldn't have been pretzeled up in the trunk of her Sentra for 4-5 hours after death, as Jay claimed at trial, or even longer, as Jay claims in his Intercept interview. And that's because Hae being pretzeled up seems to strongly imply that

she was on her side. She was about 5' 6", 5' 7", 5' 8", a Sentra trunk is relatively small, Jay even says in one of the stories that he could see her blue lips, so all of this seems to strongly indicate that Hae, according to Jay's story, was on her side in the trunk for at least 4-5 hours after death, and again the Intercept interview is several hours more, which again, would be fundamentally inconsistent with the lividity being solely frontal lividity.

So essentially, when you add these three parts of the crux up now, Jay's story about the burial being at 7:00 is contradicted by Jay himself, the Leakin Park pings are now irrelevant and likely inadmissible, and the lividity evidence clearly shows this burial could not have taken place in the 7:00 hour, which means, in essence, the crux of the State's case is a house of cards that has fallen apart, and I think Justin makes a very strong case here to show that the prosecution really doesn't have a leg to stand on in the event of a re-trial.

**Susan Simpson:** Yeah, and the State certainly did its best to, whether intentionally or not, obscure this fact in the record by having a medical examiner that didn't elaborate any findings, by having an expert they called in who -- the forensic anthropologist -- who didn't take a single note or document a single finding, the inconsistency between the lividity pattern and the body's position wouldn't have been immediately obvious, but there's one thing they couldn't avoid doing, which was taking photographs at the crime scene. And the photographs indisputably show that Hae's right hip was against the ground, and her left hip was not. Which means lividity should have reflected this fact if she was buried there when Jay says she was.

**Colin Miller:** Yeah, I just wanted to address one final thing because Dr. Hlavaty has noted that the bottom half of the body was basically perpendicular to the ground, whereas the front of the body was at a little bit more of an angle, but she has consistently said the body, the upper half, would have to be completely flat for the lividity to match and one thing she also notes in looking at the crime scene photos is that she was able to detect lividity on the left flank of Hae's body, and the flank, as she notes, is the space between the last ribs, the lowest rib, and the hip. And so, if you think about it, that makes no sense because if the body is at a diagonal, then in that case you would expect lividity to be more toward the right side, and what she's saying is generally it was centralized, but she was certainly able to detect some lividity in the left abdomen, and under no theory would that make sense with the body positioning here.

**Rabia Chaudry:** She also talks about the issue of rigor in the affidavit and says that according to the way rigor takes place in a deceased person, that would seem to indicate that Hae was buried within 24 hours of her death, though.

To me, this is not just about disproving the state's case of when Hae was buried and how it all happened, but also it's evidence of what actually happened to Hae, and so I think that's what kind of obsesses me is that, if Hae was flat on her face for 8-12 hours, plus, where was she all that time before she was moved?

**Colin Miller:** It's long been my theory that she was not killed in her vehicle, unlike the State's claim. I think we've discussed various different things, like discounting the theory of pulmonary edema on the shirt, and the fact the state didn't test the trunk liner of Hae's vehicle, I think that all strongly supports the theory that she was killed outside her car, and she was not in her car until at least 8-12 hours after death, if at all.

In addition to discussing how the crux of the State's case has been dismantled, Justin then goes on to point out how the credibility of its star witness has also been dismantled as well. And of course, some of this is the result of what's been discussed above, but Justin also notes in the motion that, since Adnan's case, Jay has has been arrested, convicted, or interrogated by the police more than 20 times. Now, some of these incidents involve acts of dishonesty and could thus be used to impeach Jay's credibility at a re-trial. So, for instance, in September 2000, Jay was pulled over while he was on probation based upon driving a vehicle with expired plated and was found to be in possession of marijuana. And, when asked for his name by the police officers, Jay gave his uncle's name and later admitted that he had intentionally lied and deceived the police officer on this fact. And so for all of these instances in the motion where Justin mentions deceit or dishonesty by Jay, under different rules of evidence, Maryland rule of evidence 5608B, for example, these prior acts of dishonesty by Jay would certainly be used to impeach his credibility and call into question the honesty and veracity of his testimony.

Most of the other incidents, though, involve acts of violence by Jay, and there's one with particular relevance to Adnan's case. And the case mentioned in the motion occurred in November 2009, when a girlfriend reported a domestic assault by Jay based on a dispute over \$250. And according to that girlfriend, Jay punched her in the ribs, and, when she tried to call 911, he strangled her to prevent her from screaming. And Justin actually talked to this girlfriend, and she told Justin that Jay had strangled her with both of his hands and that she was only able to escape by scratching her way out of his grasp.

Now, in our second season case, you might recall how we noted that propensity character evidence is generally inadmissible under Federal Rule of Evidence 404(b) and state counterparts. So, evidence, for instance, that a defendant had strangled or attacked another woman would generally be inadmissible to prove his propensity to strangle or attack female victims, and therefore his likely conformity with that propensity in the case at hand. On the other hand, if the crime at hand and the other acts of violence were similar enough, the prosecution could admit them to prove common plan or scheme, also known as *modus operandi* or *m.o.*.

Now, in some other jurisdictions, this same analysis applies when it's the defendant trying to present evidence that an alternate suspect committed the crime charged. In these jurisdictions, defendants are precluded from presenting this generalized propensity character evidence about alternate suspects, but they can present *m.o.* evidence, and specifically, this is known as "reverse 404(b) evidence." So, in those jurisdictions, Justin/Adnan would have a pretty tough time admitting these other prior acts of domestic violence and strangulation by Jay. But in Maryland, this isn't the case.

**Susan Simpson:** On January 11, 2000, the same day that someone fatally shot Isaac Dawkins on Highway 27 in Rome, Georgia, the Court of Appeals of Maryland issued an opinion in *Sessoms v. State*. In *Sessoms*, the court found that Rule 404(b), which is a rule of exclusion, it does not apply to alternate suspects. Instead, defendants are free to admit propensity evidence implicating alternate suspects so long as it does not run afoul of Maryland Rule of Evidence 5-403, which states that

*"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."*

In other words, the baseline presumption is that such alternate suspect character evidence is admissible, and a court shall only excluded if the value of that evidence has for proving the defendant's innocence is not only outweighed but substantially outweighed by one of the dangers from rule 5-403 As the Court of Special Appeals of Maryland later noted in *Gray v. State*,

*"The admissibility of reverse other crimes evidence, that is, evidence that someone other than the defendant committed other crimes or bad acts, is governed by Maryland Rule 5-403, under which inclusion is presumed."*

**Rabia Chaudry:** So basically, the gist is that, if there is a re-trial, that Justin or Adnan or whoever is, you know, defending, can actually present these prior acts to implicate Jay as an alternate suspect, right? That's what we can get from these rules?

**Susan Simpson:** Well, possibly, that will still be up to the judge whether it's still relevant, and if it's not substantially outweighed by other factors, but yeah, there's a decent chance it would come in at trial. Now, whether or not it's valid evidence that Jay's an alternate suspect is another question. And I think the ultimate purpose here is to show that Jay's value as a witness is gone. Whatever the State hopes that Jay could still do for them, whatever the State thinks that Jay could still testify to, all of these reasons will add up to discount anything he has to say in the jury's mind.

**Rabia Chaudry:** Yeah, I mean, much of this motion, I think, and the exhibits attached, this is what Justin is doing. He is showing the State that, if you go back to trial, this is what you're facing.

Now, even given all of these positive factors, there are factors that cut against Adnan getting released on bail. So, first, the order granting Adnan a new trial actually hasn't been finalized because there's a chance that the Court of Special Appeals, or later the Court of Appeals of Maryland, can reverse Judge Welch's order and reinstates Adnan's convictions. Second, there's the nature and number of Adnan's convictions. Because he wasn't just convicted on murder, but

there was a first-degree murder conviction, then it's accompanied by convictions for robbery, kidnapping, and false imprisonment, all connected to Hae's murder. And while Maryland has indicated that there will be parole hearings for juvenile lifers, it's exceedingly unlikely that Adnan would be granted parole without admitting guilt, which is unlikely to happen.

The question then, is, what's going to happen now that the bail motion's been filed? Well, it's hard to say because there are so few cases in which a defendant's conviction is thrown out based on a finding of ineffective assistance of counsel, as opposed to State error or misconduct. So, if Judge Welch does grant Adnan release, it will probably be with a bail condition in the high figures, money figures, 6 figures, low 7 figures, with accompanying conditions like ankle monitoring or house arrest. But really, this it's all a coin flip.

**Susan Simpson:** It's a long shot, but Adnan has a strong case for it, here. He has evidence to present on every point, and the State is gonna have a hard time grappling with the basic question of whether it could even re-try Adnan right now. Because, even setting aside Urick's own statements, and even setting aside Welch's findings in his order, Jay and the cell phone records are the heart of the State's case. Jay especially. Without Jay, without a witness who can stand up unimpeached, or give a single story -- well, not a single story -- but even close to a coherent story that's not been admitted to be perjury, what are they going to do? Without Jay, the state can't win, and it's not clear that the state still has Jay as a witness.

**Rabia Chaudry:** Well I'm wondering whether or not, before the state decides if they want to re-try or find an alternate route, would they be able to say, okay, you know what, whatever DNA evidence we can find, if we still have it, we're going to go ahead and test that and then make a decision. Can you do that outside of, or before, a trial proceeding? Or anything --

**Susan Simpson:** They can test it whenever they wanted. Any day they want to, they could.

**Rabia Chaudry:** Well then, you have to ask, why don't they? They should go ahead and do it.

**Susan Simpson:** They should.

**Rabia Chaudry:** People say, well, how come Adnan won't get it -- when a defendant wants that kind of thing to happen, it takes years fighting the State in court. I mean, there was a case in Baltimore where -- I can't remember the name of the defendant, but it took him six years to get the State to agree to do the DNA testing.

**Susan Simpson:** That was Malcolm Bryant and he was investigated by Detective Ritz. Convicted of murder, and he spent six years from his first petition for DNA testing before the State finally gave up and the idea that a defendant has the ability to just request DNA testing and call it a day? No. Maryland, and Baltimore especially, fights tooth and nail against every such a request.

**Rabia Chaudry:** On last week's episode of the podcast, *Crime Writers On*, which is hosted by our very own Rebecca Lavoie, they discussed the bail motion and noted that it sounded less like a legal brief than it was written for the public in mind. I personally think the public may already be more aware, or at least those who have been really following the case, of a lot of the facts that Justin presented. But the courts, actually, may not be. Especially because it's been part of an ongoing pattern of the State; to file briefs to the court that contain misrepresentations and outright lies, or inaccuracies, if you want to be nice about it. So I'm really glad the facts -- actual vital facts, like lividity -- which to me prove beyond a doubt that nothing about how or when Hae was killed according to the State is true, that these things are now on the official record. Until now, it's been written about online, in my book, of course, we've discussed it in the podcast, but it's never been presented to a court of law. And the court can actually substantiate everything Justin proffered in this brief because they're going to have access to all of the documentation, including all the photographs of the burial site and autopsy, the testimony of the State's own experts at trial who confirmed, "full anterior fixed lividity, though the body was found on its right side," and by making Jay Wild's criminal record part of the motion, I think Justin was issuing a challenge to the state: this is your witness. Now that you don't have cellphone evidence, and the only forensic evidence, the autopsy report, actually contradicts your case, this guy is all you have to hang your hat on. Are you really gonna go there?

If anything, I hope this pushes the State to finally say, "Hey, we got it wrong, and it's time to get it right." They have the power to re-open the investigation, to do DNA testing, but all of that requires that they admit they got the wrong person. Or, if Adnan is fully ever exonerated in a court of law, they may finally be forced to re-open, and given Jay's record, they could actually go after him directly as a perpetrator. And Jay's been left twisting in the wind thanks to his own statements, because remember, not even Adnan has ever accused Jay of anything. Only Jay accused himself, and put himself in a deeply precarious position whether or not he had anything to do with the crime. So now, we have to wait and see what the Court of Special Appeals has to say about Judge Welch's opinion, and the Circuit Court has to say about the bail motion.

**Dennis Robinson:** And that wraps up this week's special episode of *Undisclosed*, thanks for listening. Hey, at the top of the program, I told you that the Adnan Syed Legal Defense Trust is still actively soliciting money for his defense. You heard it today on the program, Adnan's lawyer, Justin Brown, is fighting to get Adnan out on bail, if necessary, we're going to use a piece of the trust to fund that but, more likely than not, we're raising funds to support his defense efforts, in case this thing goes back to trial.

Longtime listeners of *Undisclosed*, you know that this thing was built on trying to help raise money for Adnan's defense. You have stepped up for us mightily in the past, and right now we're asking you to do so again. The Adnan Syed legal defense trust still maintains a hope on Launch Good. In the past year, more than 4,000 people across the world have donated. Together, those 4,000 folks have given more than \$212,000. That is a lot of money, and we're tremendously grateful for your donations. But, if it were enough to cover down on the cost of the legal fees, we wouldn't be asking you for more. Unfortunately, it's not. So this is our ask. Please,

go back to launch good and give a little bit in support of Adnan's defense. You can find that webpage one of two ways, I'll give you the easy way first. If you just Google "Launch Good," and "Free Adnan," it's going to be the first link that comes up. However, if you want the entire URL, you can find it at [www.launchgood.com/project/the\\_adnan\\_syed\\_trust#/](http://www.launchgood.com/project/the_adnan_syed_trust#/). We'll also put up a few reminders on our Facebook, Twitter and Instagram page, you'll be able to find a link there. And thank you, so much, for all of the support you've given to date and the support you continue to give. And now on to the credits.

Let's thank our sponsors: Warby Parker, new sponsors, Colin, Susan, Rabia look sharp in those frames. Check out the Undisclosed team's favorite styles, go get yourself the Mitchell-style in Earl Grey color. Put 'em on, look like Susan, and be that much smarter. Just kidding, those glasses don't make you smarter. But they make you look like it. Blue Apron, our most delicious sponsor, thank you for continuing to put delicious stuff in my belly, Blue Apron, and for supporting the show. And, as always, stamps.com, thank you.

The great folks behind the scenes that produce this show include Rebecca Lavoie of Partners in Crime Media and the two great podcasts, *Crime Writers On* and *These Are Their Stories*. She gets help from Hannah McCarthy and Brooke Gittings of the *Actual Innocence* podcast. Go check out *Actual Innocence*, 'cause it's awesome.

Super Producer Mital Telhan keeps it all together behind the scenes. Patrick Cortes and Ramiro Marquez on the theme music, Nina Mooser, Christy Williams on the website, Balookey on the logo. Jon Cryer on the *Addendum*.

Jon Cryer on the *Addendum*? That's right, Jon Cryer on the *Addendum*.

You can tweet your questions at Jon about today's episode using the hashtag #UDAddendum. Hit him up on the Twitters, the Facebook. If your question is good, maybe he'll read it on the air. His show, the *Undisclosed Addendum* drops on Thursdays. That'll answer some listener questions about Adnan, too.

And lastly and leastly, the executive producer on of Undisclosed is Dennis Robinson and he looks forward to seeing you next week. Until then.