IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL K. HOLTZCLAW,	)	
	)	
APPELLANT,	)	
v.	)	**Case No. F-2016-62**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
APPELLEE.	)	

APPELLEE'S OBJECTION TO MOTION OF PROF. RANDALL T. COYNE AND J. CHRISTIAN ADAMS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT DANIEL K. HOLTZCLAW

Comes now the State of Oklahoma, by and through Attorney General Mike Hunter, and objects to the "Motion of Prof. Randall T. Coyne and J. Christian Adams for Leave to File *Amicus Curiae* Brief in Support of Appellant Daniel K. Holtzclaw" (hereafter "Motion") filed in this Court on March 9, 2017. In support of this Objection, the State provides the following:

1. The defendant, represented by appointed counsel James H. Lockard and Michael D. Morehead, of the Oklahoma Indigent Defense System, filed a brief on behalf of the defendant on February 1, 2017. Due to the extraordinarily large record assembled in this particular case, the defendant's appointed counsel sought, and were granted, a total of 134 days following a final extension date of September 20, 2016.[1]

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[1] On July 28, 2016, this Court granted the defendant's appointed appellate attorneys a first extension of 30 days to file the Brief of Appellant on August 21, 2016; a second request for a 30-day extension, granted by this Court on August 25, 2016, made the brief due on a final extension of September 20, 2016. Thereafter, appointed appellate counsel requested two more extraordinary extensions of time to file the defendant's (continued...)

2. The defendant claims in Proposition III of his Brief of Appellant that he was denied due process by what he describes as "a circus atmosphere that pervaded throughout [his] trial" (Brief of Appellant, p. 31). As part of the protective measures undertaken by the trial judge, the defendant has cited to "specific questioning of the prospective jurors directed to incidents in Ferguson, Missouri, and Baltimore, Maryland, as well as locally in Oklahoma City involving a police resources officer at a school" (Brief of Appellant, p. 32). The defendant has also referred this Court to various other instances that occurred during the proceedings that he believes caused both the jury's verdicts and the trial itself to be constitutionally unfair (Brief of Appellant, pp. 32-34). In particular, the defendant points to the transcript where the trial judge admonished the jury to disregard chants outside the courthouse of "Give him life, give him life," and a record made concerning allegations of a "man in the hallway or foyer yelling at the jurors 'racist cop' and 'racist jury'" (Brief of Appellant, p. 33).

3. All of the defendant's contentions Proposition III are grounded in the related principles that a criminal defendant is entitled to impartial jurors free from outside influences, and that those outside influences can sometimes

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[1](...continued)
opening brief, on September 20 and October 19, 2016, respectively. After a hearing before this Court, *en banc*, the defendant's appellate attorneys were ordered to file his Brief of Appellant on or before February 1, 2017.

become so pervasive that a judge must – as a matter of due process – grant a defendant's request for a change of venue (*see* Brief of Appellant, pp. 31-32) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 600 (1966); *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1961)). The defendant also supported these constitutional arguments in Proposition III with a case from the Montana Supreme Court (*see* Brief of Appellant, p. 34) (citing *State, ex rel. Coburn v. Bennett*, 655 P.2d 502, 507 (Mont. 1982)). The tenor of the defendant's argument on appeal is that the high-profile nature of his case and racial tensions between police and African-American victims combined to deny him a fair trial.

4. The State objects to the Motion. Although the State is still in the process of reviewing the extensive trial record in the defendant's case, it appears that *amici curiae* propose to make exactly the same arguments as the defendant already has made with the same law and based upon the same facts from the record. As such, the proposed *amicus curiae* brief will have little, if any, value to this appeal. *See* Motion, at ¶¶ 5-6.

5. The cases where this Court has found such *amici curiae* briefs beneficial, and to which *amici curiae* have drawn this Court's attention, are all distinguishable from this one. In *Malone v. State*, 2002 OK CR 34, 58 P.3d

208, the Court granted leave to file amicus briefs by the Oklahoma County Public Defender and the Oklahoma Indigent Defense System in the rehearing of an appeal arising out of Tulsa County; the original opinion had "adopted a new approach to the concept of allocution and the ability of a non-capital defendant to present mitigating and aggravating evidence in the sentencing stage of a bifurcated jury trial, after the jury's verdict." *Malone*, 2002 OK CR 34, ¶ 2, 58 P.3d 208, 209. Following Malone's filing of a Petition for Rehearing, this Court further considered the process, in non-capital bifurcated trials, for the presentation of mitigating evidence; such an issue had obvious and direct importance to the *amici* who were invited to weigh in on a novel subject. The defendant does not present a novel subject for resolution in Proposition III. In *State ex rel. Moss v. Couch*, 1992 OK CR 66, 841 P.2d 1154, this Court upheld a lower court's finding that a statute seeking to recover unpaid wages was unconstitutional as it essentially set up "a debtor's prison[.]" *Moss v. Couch*, 1992 OK CR 66, ¶ 3, 841 P.2d at 1154. After hearing oral argument, this Court "allowed amicus curiae briefs to be filed by the Oklahoma Attorney General, the Oklahoma Department of Labor and the Oklahoma Criminal Defense Lawyers Association." *Moss*, 1992 OK CR 66, ¶ 6, 841 P.2d at 1155. Under the circumstances, this made sense as this Court was deciding whether an action involving the

Oklahoma Department of Labor constituted a criminal offense that violated the Oklahoma Constitution. In *State v. Littlechief*, 1978 OK CR 2, 573 P.2d 263, the *amici* were Indian tribes weighing in on the construction of federal law over Native American lands; the *amici* brief might have been praiseworthy, but it could not have had anything to do with this Court's disposition of the case, as the dispositive fact was that the federal judge had already determined the issue at hand. *Littlechief*, 1978 OK CR 2, ¶ 1, 573 P.2d at 264. Even so, the *amici* in *Littlechief* clearly had a unique interest at stake in the litigation. Lastly, the defendant's case is unlike *Ochoa v. Bass*, 2008 OK CR 11, 181 P.3d 727. First, *Ochoa* involved the unusual interplay of federal immigration law, a new state statute regarding possible illegal immigrants, non-English-speaking defendants, and questioning under *Miranda*.[2] Second, Ochoa and his co-defendant petitioned this Court for writ of habeas corpus and prohibition; thus, the procedural and legal posture of *Ochoa* was urgent. Perhaps most importantly, *amicus curiae* in *Ochoa* was the Oklahoma Attorney General. Because of the procedural posture of Ochoa, the State had no representation on these important issues; thus, it was logical – perhaps even necessary – for this Court to have the Attorney General's position before proceeding. None of the unique

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct.1602, 16 L. Ed. 2d 694 (1966).

factors in the cases provided by *amici curiae* for filing a proposed brief are present in the defendant's case.

6. Finally, the people of Oklahoma have already provided the defendant with two competent and experienced appellate counsel who have already made the arguments *amici curiae* propose to repeat and apparently expand upon. The defendant's appellate counsel have submitted a brief on their client's behalf that is the maximum length permitted by the *Rules* of this Court for both parties. *See* Rule 3.5(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18. App. (2017) (limiting length briefs in regular noncapital appeals to fifty pages). To permit the proposed *amicus curiae* brief of twenty pages – or of any length – reiterating the same arguments, authorities, and citations to the record unfairly and improperly permits the defendant more briefing space on an issue than his appointed attorneys chose to allot to it in his appeal. In that respect, the filing of such brief would be prejudicial to the State.

Rule 3.5(F)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18. App. (2017), provides in relevant part:

> An amicus curiae brief shall not be filed until leave of Court is granted. Any person or organization seeking to file an amicus curiae brief shall first submit a motion to the Court requesting authorization to file a grief which shall set out with specificity the basis in law or fact why

> an amicus curiae brief would be of assistance to the Court in deciding the issue presented.

As set forth above, nothing in the description of the Motion shows how the proposed *amicus curiae* brief would be of assistance to this Court. The proposed brief aims to make the same arguments that are already before this Court, and to merely advocate the defendant's position on Proposition III again.

Regarding the filing of amicus briefs in the federal courts, the United States Supreme Court has recognized:

> A traditional function of an amicus is to assert "an interest of its own separate and distinct from that of the (parties)," whether that interest be private or public. It is "customary for those whose rights (depend) on the outcome of cases * * * to file briefs amicus curiae, in order to protect their own interests." Wiener, Briefing and Arguing Federal Appeals (1961), 269.

United States v. Barnett, 376 U.S. 681, 738, 84 S. Ct. 984, 1011-12, 12 L. Ed. 2d 23 (1964) (quoting *Universal Oil Products Co. v. Root Rfg. Co.*, 328 U.S. 575, 581, 66 S. Ct. 1176, 1179, 90 L. Ed. 1447 (1946) (parentheses and star ellipses in original). From the cases cited by the defendant, this appears to be the standard this Court has always used to determine whether briefs from *amici curiae* are appropriate in a given case (*see* Motion, ¶ 7, and cases cited therein). And that standard counsels against the proposed brief in this case.

Amici curiae do not appear to represent any organization or entity that has a particular interest in this litigation apart from the parties. Rather, they seem

to have a representative interest in the defendant himself regarding the issue in Proposition III. Indeed, *amici curiae* concede their brief will be "in support of" the defendant, and have made clear their position that the defendant's trial was rendered unfair on the very same bases already put forth in Proposition III (Motion, pp. 1, 5). The defendant already has appointed counsel who have briefed that issue for him. The defendant is not entitled to two teams of counsel, particularly when one is funded by tax payers, and proposed *amici* have cited no legal authority that would permit such in this case.

Finally, because proposed *amici curiae* are representing the sole interests of the defendant, the suggested brief would prejudice the State by unfairly allotting the defendant greater briefing space on a single proposition of error, thereby circumventing the *Rules* of this Court that limit the number of pages permitted in a non-capital brief.[3] Moreover, as proposed *amici* are advocates for the defendant – and the defendant only – potential confusion will arise as to whether the State must also respond to any expanded arguments made in the proposed amicus brief within the Brief of Appellee or in some other fashion, for which there is no authorized procedure under this Court's *Rules*. Proposed *amici*'s offer of a supplemental brief is not reasonable in this case, nor do the citations to *Malone*

[3] The defendant's appointed appellate counsel did not request that this Court allow him to file a brief in excess of fifty pages. Hence, appointed counsel apparently believed the regular maximum page limitations set by this Court were adequate to properly brief all the defendant's issues.

and *Dutton v. Dixon*, 1988 OK CR 107, 757 P.2d 376, *overruled on other grounds*, *Cartwright v. State*, 1989 OK CR 41, ¶ 11, 778 P.2d 479, 483, provide any equivalent comparative justification for taking such a course (Motion, ¶ 8).

First, as noted above, *amici* propose to submit a brief covering exactly the same issues, using the same citations to the record and the same law, and advocating for the same interest as a party to the litigation whose position on the issue is already before this Court. That a supplemental brief might be necessary implies that supplemental *arguments* will be made on the defendant's behalf; otherwise, there is no purpose for the proposed *amici curiae* brief as it promises to persuade this Court that the defendant was denied due process using the same law and facts as his appointed counsel (Motion, ¶¶ 5-6). This type of advocacy departs from this Court's prior practice regarding amicus briefs and would be inconsistent with the traditional function of *amici curiae* as enunciated in *Barnett*. Second, the prospect of supplemental briefing would impose an unnecessary burden upon the State to potentially respond to two sets of advocates representing identical interests. Third, the circumstances the Court considered in *Malone* were not only unique, but impacted procedures in *every* non-capital bifurcated jury trial in the State. It was for that obvious reason that this Court invited not only *amici curiae* briefs from all public defenders in Oklahoma, but permitted the Attorney General the opportunity to respond to those briefs. By contrast, the

defendant's claim in Proposition III affects the defendant's, and only defendant's, jury trial. Thus, both the context for inviting amicus briefs, and a corresponding supplemental brief in *Malone* was entirely different from this case.

The citation to *Dutton* is equally unhelpful. There, Dutton's death sentence was vacated by the Tenth Circuit Court of Appeals and remanded to the state district court for resentencing. Dutton filed an application for a writ of prohibition and/or mandamus challenging the retroactive application of Oklahoma's then newly-enacted resentencing statute to him. *Dutton*, 1988 OK CR 107, ¶¶ 1-2, 757 P.2d at 376-77. Similar to *Ochoa*, the procedural posture of *Dutton* left no representation for the citizens of Oklahoma as a whole on critical issues related to the constitutional application of a new death penalty statute. The implications of this Court's decision in *Dutton* were possibly far reaching, having the potential for affecting numerous other capital defendants whose death sentences would be vacated. It was for these apparent reasons that this Court granted leave to the Oklahoma Attorney General "to file an amicus curiae response and supplemental brief." *Dutton*, 1988 OK CR 107, ¶ 1, 757 P.2d at 377. Although the defendant's right to a fundamentally fair trial is without doubt important and worthy of the strongest vindication, the Motion points to no interest broader than what has already been voiced by his appointed counsel.

For all of the reasons stated herein, the State objects to the Motion and respectfully urges this Court to deny it.

Respectfully submitted,

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CERTIFICATE OF MAILING

On this 21st day of March, 2017, a true and correct copy of the foregoing was mailed to:

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