

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL K. HOLTZCLAW,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 26 2017

MICHAEL S. RICHIE
CLERK

FILED UNDER SEAL

No. F-2016-62

CLARIFICATION ORDER

On May 30, 2017, this Court remanded this matter to the District Court of Oklahoma County, the Honorable Timothy Henderson, District Judge. Judge Henderson was directed to conduct an *in camera* hearing on Appellant Holtzclaw's constitutional appellate right to material generated as a result of the filing of his Brief-in-Chief and application for evidentiary hearing. This Court also issued a protective order prohibiting the public dissemination of those materials. The brief and application were filed in Holtzclaw's direct appeal of his conviction in Oklahoma County Case No. CF-2014-5869, assigned this Court's Case No. F-2016-62.

In response to this Court's order, a hearing was conducted on June 26 - 27, 2017. On July 18, 2017, the State of Oklahoma, by and through Attorney General Mike Hunter, and Assistant Attorney General Matthew D. Haire, filed, under seal, a Motion Requesting Guidance Regarding Transmittal of Record of Remanded Evidentiary Hearing.

The State alleges that testimony was heard and recorded at the *in camera* hearing to assist the District Court in determining which materials, if any, were subject to disclosure to appellate defense counsel in this case. The State's motion filed with this Court alleges that testimony regarding these documents was detailed, but the record of the remanded proceedings "reflects that all of the commentary was almost certainly made in the context of a legally protected confidential employee review process and included with the materials provided to this Court." The State seeks guidance regarding the record of the *in camera* proceedings to the extent the District Court determines Holtzclaw is not entitled to some, or any, of the materials if they are protected and non-discoverable, because the transcript of the *in camera* proceeding effectively reveals and discusses the content of all of the reviewed documents.

This Court's May 30, 2017 order directed the District Court Reporter, within twenty (20) days of the hearing, to prepare an original and two (2) copies of the transcript of the *in camera* hearing, along with any exhibits. The District Court was directed to prepare written findings of fact and conclusions of law to be submitted to this Court within twenty (20) days of the filing of the transcripts in the District Court. It is clear from this Court's order that these documents are to be filed under seal.

The District Court Clerk was then directed to transmit the record of the hearing to this Court's Clerk within five (5) days of the District Court's written findings of fact and conclusions of law. Upon receipt of the record, this Court's Clerk was originally ordered to transmit copies of the record to Holtzclaw's

appellate counsel and the Attorney General. It is this portion of our original order which now requires clarification.

The purpose of the *in camera* hearing was to determine what, if any, of this information compiled as the result of a personnel investigation, is germane to Holtzclaw's appeal and is required to be turned over to his appellate counsel. The documents required more than a simple inspection by Judge Henderson, which is the usual procedure in an *in camera* proceeding. The District Court determined that the nature of the documents required in-depth testimony regarding how and why the documents were generated to allow the court to adequately address the questions posed in this Court's order. Witnesses were called and thoroughly examined regarding the documents. The State and Judge Henderson questioned the witnesses about the materials, inquiring about information protected, or potentially protected, by 51 O.S.Supp.2014, § 24A.7(A). It is the information disclosed during this questioning, which may or may not be proper for disclosure to Holtzclaw's appellate counsel, about which the State seeks guidance.

As noted by the State, the unusual circumstances surrounding this newly-generated confidential information present a unique challenge for all involved. At the time this Court issued its order remanding this matter for an *in camera* hearing, it was impossible to predict what evidence, if any, the District Court might require in evaluating the documents presented by the State for review. In light of this new information regarding witness testimony about the documents, and the protected or potentially protected information

disclosed during this testimony, this Court hereby **MODIFIES** and **CLARIFIES**, in part, its May 30, 2017 order remanding this matter for an *in camera* hearing.

IT IS THE ORDER OF THIS COURT that the District Court Reporter, within twenty (20) days of the hearing, is to prepare an original and two (2) copies of the transcript of the *in camera* hearing, along with any exhibits. The District Court is directed to prepare written findings of fact and conclusions of law to be submitted to this Court within twenty (20) days of the filing of the transcripts in the District Court. As in this Court's May 30, 2017 order, these documents are to be filed under seal. The District Court Clerk is directed to transmit the record of the hearing to this Court's Clerk within five (5) days of the District Court's written findings of fact and conclusions of law.

IT IS FURTHER ORDERED that Judge Henderson is directed to ensure that the Findings of Fact and Conclusions of Law delineate with specificity as to each examined document the following:

1. Whether the document is discoverable by Holtzclaw's appellate counsel;
2. Whether the document contains impeachment or exculpatory material;
3. If discoverable, which portion of each document is subject to discovery; and
4. The portion of each discoverable document which is subject to the confidentiality statute governing personnel records.

In the event the court's Findings of Fact and Conclusions of Law require modification to comply with the above directive, Judge Henderson shall file a modified copy of his Findings of Fact and Conclusions of Law in the District

Court within ten (10) days of the date of this order. If no such modification is required, no action is required. Once the record is complete, the District Court Clerk shall file the record with the Clerk of this Court.

IT IS FURTHER ORDERED that upon receipt of the transcripts, exhibits and the District Court's Findings of Fact and Conclusions of Law from the *in camera* hearing, this Court shall give notice to Holtzclaw's appellate counsel and the Attorney General of the State of Oklahoma. Appellate defense counsel and appellate counsel for the State may contact the Marshal of this Court, Tina Percival, to arrange a time for viewing of the *in camera* transcripts, exhibits and the District Court's Findings of Fact and Conclusions of Law at the Oklahoma Court of Criminal Appeals. Any objections, by either party, to Judge Henderson's Findings of Fact and Conclusions of Law shall be filed with this Court no later than thirty (30) days from the date notice is given to the parties.

IT IS FURTHER ORDERED that the Clerk of this Court shall not distribute, transmit or otherwise disseminate the record of the *in camera* hearing to the parties or any other party, including transcripts, exhibits, the District Court's Findings of Fact and Conclusions of Law, orders or any other accompanying documentation, until further order of this Court.

IT IS FURTHER ORDERED that the interim protective order issued May 30, 2017, governing the State's original motion and the documentation, materials, reports and other information contained therein remains in effect until further notice. The protective order also applies to the instant motion and this order.

IT IS FURTHER ORDERED that this Court's order, the State's motion and its accompanying documentation, materials, reports and other information, the District Court's Findings of Fact and Conclusions of Law addressing the *in camera* motion, the record of the *in camera* proceedings and the transcripts of the same, shall be filed under seal and remain so pending further order of this Court.

IT IS FURTHER ORDERED that the parties are prohibited from making public or distributing to any unauthorized third party the contents of this motion and the documentation, materials, reports or other information contained therein, the District Court's Findings of Fact and Conclusions of Law addressing the *in camera* motion, the record of the *in camera* proceedings and the transcripts of the same, orders and any information related to the *in camera* hearing, until further order of this Court.

IT IS FURTHER ORDERED that briefing in this matter is **STAYED** pending resolution of this matter and issuance by this Court of an order setting a new briefing schedule.

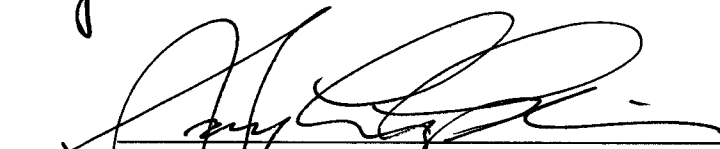
IT IS FURTHER ORDERED that the Clerk of this Court transmit copies of the State's Emergency Motion Requesting Guidance Regarding Transmittal of Record of Remanded Evidentiary Hearing, filed in this Court on July 17, 2017, along with this Order, to the Honorable Timothy R. Henderson, District Judge, Oklahoma County.

The Clerk of this Court is directed to transmit a copy of this order to the Court Clerk of Oklahoma County; the Attorney General of the State of Oklahoma and Appellate counsel of record.


IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 20th

day of July, 2017.



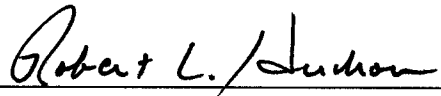
GARY L. LUMPKIN, Presiding Judge



DAVID B. LEWIS, Vice Presiding Judge

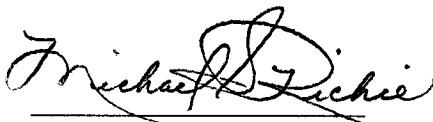
NOT PARTICIPATING

ARLENE JOHNSON, Judge



ROBERT L. HUDSON, Judge

ATTEST:



 Clerk

NF