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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL K. HOLTZCLAW,)
)
Appellant,)
vs.) No. F-2016-62
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

ORDER GRANTING MOTION TO UNSEAL DOCUMENTS AND SETTING BRIEFING SCHEDULE

Appellant Holtzclaw timely perfected a direct appeal from his conviction for three counts of procuring lewd exhibition, six counts of sexual battery, four counts of forcible oral sodomy, four counts of first degree rape, and one count of second degree rape in Oklahoma County District Court Case No. CF-2014-5869. In his Brief-in-Chief and his Application for Evidentiary Hearing, both filed in this Court on February 1, 2017, Holtzclaw alleges he was denied effective assistance of trial counsel, including the failure to present available expert testimony regarding the DNA evidence admitted at trial. Appellate briefing is not complete and the appeal is not yet at issue in this Court.

We briefly summarize the appellate procedural history of this case. On May 4, 2017, the State of Oklahoma filed a motion ("Original Motion") requesting an *in camera* hearing to determine whether information, included as part of the State's Original Motion, was legally protected from public view by statute and/or discoverable by Appellant on appeal. The Original Motion and exhibits were filed under seal. On May 30, 2017, this Court remanded the case to the District Court of Oklahoma County to conduct an *in camera* hearing addressing Appellant's

constitutional right to the materials referenced in the Original Motion, and whether or not the information was protected by law. At the State's request, this Court issued an interim protective order prohibiting the public dissemination of those materials until they could be reviewed by the District Court, and directed that further documents in this matter be filed under seal. The *in camera* hearing was held on June 26-27, 2017 and the District Court's Findings of Fact and Conclusions of Law were filed on August 7 and 8, 2017. On July 20, 2017, this Court issued an Order which, among other things, continued the interim protective order and the requirement to file documents under seal, as well as the prohibition against disseminating information related to the *in camera* hearing; stayed briefing in the direct appeal; and directed the parties to contact the Court Marshal to view the *in camera* hearing record. On August 2, 2017, Appellant filed a Motion to Unseal the Proceedings. On August 22, 2017, Appellant's counsel completed review of the *in camera* record. The State completed its review of that record on September, 9, 2017.

After thorough consideration of the issues raised in Appellant's Motion to Unseal Documents, we **GRANT** that motion and set a briefing schedule to complete the submission of arguments in this appeal.

Appellant makes four requests of this Court in his Motion to Unseal Documents. Two requests – that defense counsel receive transcripts of the *in camera* hearing, and that counsel receive copies of orders filed in the District Court of Oklahoma County on July 17, 2017 – have occurred, and are **MOOT**.

Appellant also asks this Court to order the District Court to reserve entry of its Findings of Fact and Conclusions of Law until counsel has had an opportunity to cross-examine witnesses who testified at that hearing, and to make argument regarding that testimony and the material at issue to the District Court. Defense counsel should have had the opportunity to participate fully in that *in camera* hearing, but counsels' absence was harmless beyond a reasonable doubt. Appellant's counsel have now had access to, and the opportunity to review, the original materials at issue as well as the materials developed below, including the evidence presented and transcripts of the *in camera* hearing, and the District Court's findings and conclusions. This request is **MOOT**.

Appellant requests in his Motion to Unseal that "all documents filed under seal in this case be unsealed, except to the extent that redaction or exclusion may be required." This request is **GRANTED**. The District Court determined that some material consists of personnel records protected by 51 O.S.Supp.2014, § 24A.7(A)(1), which are subject to disclosure only at the discretion of the City of Oklahoma City. We find no abuse of discretion in that decision. This Court will preserve under seal or redact documents containing that material, unless and until such time as it may be released by the City of Oklahoma City. Specifically, the following documents **REMAIN UNDER SEAL**:

- May 4, 2017: State's Motion to File Accompanying Material Under Seal
- May 30, 2017: Order Remanding for *In Camera* Hearing, Granting State's motion for Interim Protective Order and Holding Appeal in Abeyance
- August 7 & 8, 2017: Oklahoma County District Court Order and Amended Order

- August 10 & 16, 2017: Transcripts and Exhibits admitted at the *in camera* hearing

The following documents are **ORDERED UNSEALED, AS REDACTED**:

- August 2, 2017: Appellant's Motion to Unseal Documents
- August 29, 2017: Appellant's Objection to District Court's findings of fact and conclusions of law
- February 15, 2018: State's Response to Motion to Unseal Documents
- February 28, 2018: Appellant's Reply to State's 2/15/2018 Response

All other documents filed in this Court in this appeal are **ORDERED UNSEALED**. Henceforth, only filings which refer to in detail, or include, protected material shall be filed under seal.

In addition, appellate counsel is **GRANTED** permission to review the State's Original Motion, filed May 4, 2017, which remains under seal. Counsel is directed to contact the Court Marshal to arrange a time to view this Original Motion at the Oklahoma Court of Criminal Appeals.

ORDER SETTING BRIEFING SCHEDULE

IT IS THEREFORE THE ORDER OF THIS COURT that Appellant shall have thirty (30) days from the date of this Order to supplement his Application for Evidentiary Hearing, if necessary. The State's answer brief shall be due sixty (60) days from the date Appellant's supplemental Application for Evidentiary Hearing is filed. Rule 3.4(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). The answer brief shall address the issues raised in Appellant's brief in chief as well as those addressed in his application for evidentiary hearing, amended or as originally filed.

Appellant's reply brief, if any, shall be due twenty (20) days from the date the State's response brief is filed. Rule 3.4(F)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). The reply brief is limited to ten (10) pages. Rule 3.4(F)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). Any request to exceed the page limitation must be filed in writing, setting forth a specific basis for need. The reply brief shall address any issues raised in Appellee's answer brief.

The Clerk of this Court is directed to transmit a copy of this Order to the Court Clerk of Oklahoma County; the District Court of Oklahoma County, the Honorable Timothy Henderson, District Judge; 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 8th **day of** June **, 2018.**

C/P/D/P with writing

GARY L. LUMPKIN, Presiding Judge

DAVID B. LEWIS, Vice Presiding Judge

C/P/D/P w/ writing

ROBERT L. HUDSON, Judge

DANA KUEHN, Judge

RECUSED
SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden
Clerk

NF

LUMPKIN, PRESIDING JUDGE: CONCURRING IN PART/DISSENTING IN PART

While I agree with the unsealing of documents and the redaction and release for public view other documents, I disagree with the inconsistency in applying the provisions of 51 O.S.Supp.2014, § 24A.7(A)(1).

The Order recognizes that it is the City of Oklahoma City that has the authority to determine what records constitute confidential personnel records. To date this Court has no record that the City of Oklahoma City has been petitioned to release those records. Due to the fact the City has not had an opportunity to review those records, it was proper for Judge Henderson to hold the *in-camera* hearing without Appellant's counsel present. This is the same procedure utilized when a defendant in a criminal case petitions the trial court to review defense evidence for a ruling prior to disclosing it to the State. In effect, if defense counsel had been present at the *in-camera* hearing the personnel records would have been disclosed prior to any action by the City. The same is true as it relates to releasing the State's original motion to the defendant in this case prior to the City of Oklahoma City having the opportunity to review the request pursuant to the statutory provisions. The order affirms Judge Henderson's determination there is no disclosable material in the record for the purpose of the defense.

Because of this inconsistency, I must dissent to that part of the Order that states defense counsel "should" have been allowed to participate at the *in-camera* hearing and to the release of the State's original motion to the defense

prior to the City of Oklahoma City being afforded its statutory right to review and determine what part of the records are subject to release.

HUDSON, JUDGE: CONCUR IN PART/DISSENT IN PART

I dissent to the majority's decision to unseal documents. Despite the Court's redaction of some of these documents, such censoring does not negate the fact that the release of these documents is improper. This Court directed Judge Henderson to conduct an *in camera* hearing addressing Holtzclaw's constitutional appellate right to the materials referenced in the State's May 4, 2017 motion. Judge Henderson did just that on June 26-27, 2017. The majority determination that the hearing was improperly conducted without Appellant's counsel presence is erroneous. *See, e.g., Contreras v. Artus,* 778 F.3d 97, 114 (2d Cir. 2015) ("Where the very question at issue is whether the prosecution is obliged to reveal certain material to the defendant, the inquiry cannot begin by revealing that material to the defendant."). Thereafter, in a most thorough and complete written order entered and filed August 4, 2017, Judge Henderson concluded that the exhibits[1] examined during the *in camera* hearing are personnel records subject to discretionary disclosure pursuant to 51 O.S.Supp.2014, § 24A.7(A)(1).[2] He further found that none of the exhibits in question contained exculpatory, material evidence or impeachment evidence, and thus were not subject to discovery by Holtzclaw's appellate counsel.[3]

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[1] During the course of the *in camera* hearing, the State presented five exhibits labeled A-E.

[2] Notably, the majority inaccurately states that the district court determined that "some materials" were personnel records.

[3] In reaching this determination, Judge Henderson appropriately looked to *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 11947, 10 L. Ed. 2d 215 (1963) and cases construing *Brady* for guidance. The district court also referred to the standard set forth in *United States v. Bagley,* 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) where the United States Supreme Court reiterated the test for materiality of exculpatory evidence:

The majority finds no abuse of discretion in Judge Henderson's ruling. On this finding, I concur. However, notwithstanding this determination, the majority inexplicably grants Holtzclaw's Motion to Unseal various pleadings filed with this Court relating to the protected materials. The majority's Order is devoid of any reasoning to support such action. This is a leap I cannot make.

I reiterate Judge Henderson's sound findings with regard to the issues before this Court—(1) the records in question are personnel records, subject to disclosure only at the discretion of the City of Oklahoma City; and (2) the records contain no exculpatory, material evidence or impeachment evidence so as to warrant disclosure based upon Holtzclaw's Constitutional right to disclosure of such evidence.

For the above reasons, I respectfully dissent.

"...the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome."

See also Frederick v. State, 2001 OK CR 34, 37 P.3d 908.

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	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

MOTION TO UNSEAL THE PROCEEDINGS

Appellant, Daniel K. Holtzclaw, by and through his undersigned appellate counsel, respectfully requests that this Court lift the veil of secrecy that has come to shroud the proceedings in this appeal. In support of this request, Appellant states:

1. Appellant was convicted in Oklahoma County District Court on 18 of 36 criminal charges, for which he was sentenced to a combined 263 years in prison. He timely perfected his appeal to this Court and filed his Brief of Appellant, along with an Application for Evidentiary Hearing on Sixth Amendment Claims, in this Court on February 1, 2017.

2. On May 4, 2017, two days after having filed its second request for an extension of time, the State filed a Motion to File Motion and Accompanying Material under Seal on the Grounds That Such Material and the Motion Discussing It Contains Confidential Information Protected from Public Disclosure by Oklahoma Law. Appellant never received a copy, but a scanned copy of this one-paragraph motion, citing only rule 2.7(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), is available on the web-based docket of this case. A presumably more detailed motion was simultaneously filed under seal.[1]

[1] In two phone calls – one with Jamie Pybas, undersigned counsel's supervisor, and one with undersigned counsel – Assistant Attorney General Matt Haire did inform counsel of the general nature of this material, but he was unable to provide any substantial details of the nature of information at issue other than that it pertained to Elaine Taylor.

3. Neither Appellant nor his counsel has seen this sealed motion, and the only clues to its contents come from this Court's Order Remanding Cause to District Court of Oklahoma County for *In Camera* Hearing, Granting State's Motion for Interim Protective Order and Holding Appeal in Abeyance Pending Outcome of the *In Camera* Hearing (hereinafter, "Order Remanding Cause"), filed on May 30, 2017, which indicates the allegedly protected material involves an internal review of former Oklahoma City Police Department Chemist Elaine Taylor's testimony in Appellant's trial.

4. The Order Remanding Cause remanded this matter to the Oklahoma County District Court, the Honorable Timothy R. Henderson, District Judge, for an "*in camera* hearing to determine whether legally protected information is discoverable by Holtzclaw on appeal. The district court was ordered to address three issues: (1) whether the information submitted by the State is discoverable by Appellant's counsel and whether the information contains impeachment or exculpatory material; (2) which portions of the material, if any, are subject to discovery; and (3) whether portions of discoverable material are subject to the confidentiality statute governing personnel records.

5. On June 26 and 27, 2017, a hearing was held in the district court. Undersigned counsel had no prior notice of this hearing and was not invited or allowed to attend.

6. On July 17, 2017, Judge Henderson filed two orders in the district court. Undersigned counsel has not seen or been provided copies of these orders, and counsel has no idea what are in these orders or what is ordered by them.

7. On July 18, 2017, the State filed under seal an Emergency Motion Requesting Guidance Regarding Transmittal of Record of Remanded Evidentiary Hearing. Even though this motion was filed under seal, undersigned counsel received a copy of it. In the motion, Mr. Haire describes the secret hearing that

occurred in June as involving the testimony of three witnesses. He acknowledges that neither Appellant nor his counsel were present for this hearing and that the proceedings were closed to the public. Mr. Haire further avers that the trial court "interpreted this Court's Order as permitting neither the presence of the defendant nor his counsel during the *in camera* proceedings." Noting that providing Appellant's counsel with a transcript of this secret hearing, as was originally ordered in this Court's Order Remanding Cause, would reveal information to which Appellant may not be entitled, Mr. Haire requested guidance on how to proceed, helpfully suggesting that perhaps the transcripts should be redacted prior to transmittal to the parties.

8. On July 20, 2017, this Court entered a Clarification Order. This order was also filed under seal, but a copy was provided to undersigned counsel. In this Clarification Order, the Court modified the procedure set out previously in its Order Remanding Cause, in pertinent part, by holding that the transcripts, exhibits, and findings of the district court will be held at the Oklahoma Court of Criminal Appeals, and that counsel for the State and for the defense may arrange with the Marshal of the Court, Tina Percival, a time for viewing them *in camera*.

Argument and Authority

Given the nature of how this issue arose, with counsel for the State bringing the issue up on his own initiative, undersigned counsel was content to await patiently the outcome of the trial court's review of the documents, confident that he would receive the information to which Appellant is entitled without undue delay. Recent developments and revelations in the local news media have undermined counsel's confidence in that regard, however.

Contrary to the trial court's interpretation, nothing in this Court's Order Remanding Cause dictated that undersigned counsel be excluded from the *in camera* hearing and, indeed, not even informed of the dates and times of the

hearing ahead of time.[2] *"In camera"* does not mean *"ex parte."* *See, e.g.*, BLACK'S LAW DICTIONARY 597, 763 (7th ed. 1999). Indeed, the fact that the Court contemplated transcripts of the hearing being made and provided to both parties strongly indicates that Appellant's counsel should have been present. Even if some of the testimony at the hearing would necessarily entail privileged information, that is no basis for barring Appellate Defense Counsel entirely from attending, participating, or even knowing about the hearing.

Two developments that appear to have come out of this secret hearing give Appellant pause. First, and most obvious, is the fact that the district court will make findings of fact and conclusions of law, not only on the question of whether some of this information is discoverable on appeal, but whether the information is even protected in the first place, without Appellant's being able to have any input whatsoever into whether this so-called "personnel review" of Ms. Taylor's work really is protected by law. Once the proceedings at the district court have concluded, and the case returned to this Court, Appellant may no longer have an effective mechanism for litigating the issue and protecting his rights before a final, binding order is entered. The second development is that, while counsel for the State seemed previously to be conceding that Appellant is entitled to disclosure of at least some of this information,[3] the State's emergency motion for clarification

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[2] Based on the limited information available to him at the time, undersigned counsel had little idea what would be entailed in this *in camera* hearing aside from the trial court reviewing the documents submitted by the State to determine how much of those documents should be disclosed. Counsel had no way of knowing that actual testimony would be required. With the deadline for holding the hearing approaching, and undersigned counsel having heard no word from the State or the district court, counsel contacted Mr. Haire on June 26, 2017, by e-mail, inquiring if Mr. Haire had heard from the trial court on this issue. Counsel received no response. Counsel had been monitoring the district court's online docket for the setting of a hearing, but nothing showed up until June 28, when docket entries indicating a hearing had been held on June 26 and 27 suddenly appeared.

[3] *See* Order Remanding Cause at 4 ("The State agrees that some of the information it has received should be turned over to Holtzclaw's counsel, but states that not all of the information from the personnel investigation is germane to Holtzclaw's appeal.").

twice indicates at least the possibility that the trial court will decide that all of the information is protected by law and that none of it is discoverable on appeal.

Both the State and this Court have noted the unusual nature of this issue, in that this normally comes up before trial, not on appeal. Fundamentally, however, there is no reason the procedure should be particularly different on appeal – the confidential or other legally privileged information is submitted to the court for *in camera* inspection to determine whether the information contains anything of impeachment or exculpatory value. *See* Order Remanding Cause at 3 (citing *Frederick v. State*, 2001 OK CR 34, ¶¶ 87-90, 37 P.3d 908, 933-34). What is truly unusual about the issue in this case, however, is not that the issue has arisen on appeal, or even that it was at the behest of the State, not the defense, but that the secrecy that is arguably necessary to protect the privileged information from disclosure has been expanded to cover the whole process. In the ordinary course of legal proceedings, the request for access to protected information, and what defense counsel expects to find in that protected information, is open and public, not under seal. The request for the information is not sealed. The State's argument, if any, that the information is legally protected, and the basis therefor, is not sealed. The fact that the court will be reviewing the information is not under seal, and hearings about whether the information is protected and/or discoverable are not kept secret from either the public or the defense. And once it is determined that the confidential information must be provided to the defense, it is allowed to be offered openly and publicly into evidence at trial.

This secrecy has had unfortunate and unforeseen consequences. Between this Court's protective order and the fact that undersigned counsel is almost completely in the dark as to the nature and contents of the allegedly protected information at issue, counsel has been unable to adequately and accurately explain to his client what is going on in his case. Meanwhile, the local news media have

been in a feeding frenzy over any scrap of information pertaining to the case.

As early as June 28, 2017, the day after the two-day *ex parte* hearing concluded, Fox 25 News in Oklahoma City was reporting on "secret court hearings held in Holtzclaw case" and complaining that the no one would even say who was present at the hearing, let alone what it was about.[4] In a later article that same day, Fox 25 News reported that currently Presiding Judge Gary Lumpkin had "refused to answer questions about the need for secrecy in the case or what Oklahoma law required keeping details about a public case confidential."[5] By June 30, 2017, Fox 25 News was broadcasting to its television audience surveillance video showing Assistant Attorney General Matt Haire, Oklahoma County Assistant District Attorney Gayland Gieger, Oklahoma City Deputy Police Chief Johnny Kuhlman, Oklahoma City Attorney Richard Smith, and Oklahoma City Police Department DNA Lab Supervisor Campbell Ruddock entering and exiting Judge Henderson's chambers before and after the secret hearings.[6] This report also revealed that the issue at the hearing pertained to DNA evidence admitted at Appellant's trial.[7]

Since that time, numerous other news sources – locally, throughout Oklahoma, and even nationwide – have published similar reports, including

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[4] <http://okcfox.com/news/fox-25-investigates/secret-court-hearings-held-in-case-of-convicted-cop> (last visited Aug. 1, 2017).

[5] <http://okcfox.com/news/fox-25-investigates/new-details-in-Holtzclaw-case-but-state-says-you-have-no-right-to-know> (last visited Aug. 1, 2017).

[6] <http://okcfox.com/news/fox-25-investigates/videos-reveal-who-took-part-in-secret-court-proceedings> (last visited Aug. 1, 2017).

[7] *Ibid.*

Oklahoma City Channels KFOR,[8] KOCO,[9] and KWTV,[10] as well as Lawton Channel KSWO[11] and national public opinion and news conglomeration website Rasmussen Reports.[12] In short, an impression of a cover-up, harkening back to the dark days of the Joyce Gilchrist scandal, is developing among the public, and undersigned counsel cannot even alleviate the growing concerns of his client and client's family, because this Court's orders prevent counsel from even discussing the nature of the issue, let alone the contents of documents counsel has never seen.

This growing hysteria could have been prevented if only it had been made publicly known at least this: that due to questions raised about Ms. Elaine Taylor's testimony by Appellant in his appeal briefs, a review of Ms. Taylor's work in this case was conducted; that the results of this review may be protected against public disclosure by State law governing confidentiality of personnel records, OKLA.STAT. tit. 51, § 24A.7(A) (Supp. 2014); that despite the protection afforded this information, some or all of the information may be required to be produced to the defense pursuant to the United States Constitution; and that a hearing is being held to determine if the information is, in fact, privileged and, if so, whether some or all of that information must nevertheless be disclosed to the defense. Assuming,

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[8] <http://kfor.com/2017/06/29/oklahoma-judge-conducts-closed-hearing-in-officers-appeal/> (last visited Aug. 1, 2017).

[9] <http://www.koco.com/article/oklahoma-judge-conducts-closed-hearing-in-daniel-holtzclaws-appeal/10241805> (last visited Aug. 1, 2017).

[10] <http://www.news9.com/story/36006200/emails-raise-questions-about-witness-in-Holtzclaw-case> (last visited Aug. 1, 2017).

[11] <http://www.kswo.com/story/36012674/validity-of-forensic-samples-under-fire-in-holtzclaws-closed-court-hearing> (last visited Aug. 1, 2017).

[12] <http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_michelle_malkin/the_crisis_in_america_s_crime_labs> (last visited Aug. 1, 2017).

arguendo, that the results of this so-called "personnel review" are protected from disclosure, the statute would have been satisfied by protecting the contents of that file from disclosure. There is no reason why the rest of the information detailed above must also have been kept secret, either from Appellant, his counsel, or the general public. But because of the request for and granting of complete secrecy over this whole issue, counsel could not tell anyone any of it.

Meanwhile, some recent revelations have caused undersigned counsel grave concern. On July 28, 2017, Fox 25 News reported that the secret hearing held on June 26 and 27 pertained to "the DNA evidence some jurors have said guaranteed the convictions." Fox 25 News also reported that it had received more than 4000 pages of documents from the City of Oklahoma City, pursuant to an open records request.[13] Included within these documents were e-mails exchanged between DNA Lab Supervisor Campbell Ruddock and Elaine Taylor.[14] Also included was an e-mail from District Attorney David Prater to all his prosecutors: "Please notify me immediately if you have a pending case wherein Elaine Taylor, OCPD DNA Lab employee, is endorsed as a witness."[15] This Fox 25 News report indicates that "[t]he emails reveal several criminal cases have been marked for retesting since the identification of concerns with Taylor in the Holtzclaw case."[16] The report also indicates that in an e-mail exchange with an Iowa scientist named Erica Fuchs, Mr. Ruddock "explain[ed] that Touch DNA, or DNA involving very small samples is not as useful in solving crimes as was portrayed in the Holtzclaw case" and that "[h]is

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[13] <http://okcfox.com/news/local/emails-show-dna-lab-concerns-related-to-Holtzclaw-case> (embedded video) (last visited Aug. 1, 2017).

[14] *Ibid.* (text article).

[15] *Ibid.*

[16] *Ibid.*

exchange casts doubt on many assertions made during the expert testimony during the trial."[17] Most alarmingly, the report indicates that "[t]he city also said it deleted all of Taylor's emails after her resignation."[18]

Adding to the concerns that a binding ruling detrimental to Appellant's constitutional rights will be entered without Appellant's ability to even be heard, it now appears that pertinent evidence related and relevant to the issue may have been, or be in the process of being, destroyed for all time.[19] The unnecessary secrecy surrounding this issue is thus doing real and imminent damage to Appellant's constitutional rights, and there is no reason for this secrecy to continue. The cat is out of the bag, so to speak, as the local news media has repeatedly reported in detail much about the nature and contents of the information at issue. What is missing from the reports is context.

The State has a duty to provide defendants in a criminal case exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). This duty also extends to impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 677, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985); *Browning v. Trammell*, 717 F.3d 1092, 1105-06 (10th Cir. 2013); *United States v. Abello-Silva*, 948 F.2d 1168, 1179 (10th Cir. 1991), *Anderson v. State*, 2006 OK CR 6, ¶ 28, 130 P.3d 273, 283. Such information must be disclosed even if it is otherwise protected by law.[20] *Browning*, 717 F.3d at 1095. This duty to disclose does not end once the trial is over, but

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[17] *Ibid.*

[18] *Ibid.*

[19] Accordingly, Appellant is simultaneously filing a Motion for Order to Preserve Documents and Evidence.

[20] In such cases, a court is to review the information in camera to determine whether it meets the Brady standard. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58, 107 S. Ct. 989, 1001-02, 94 L. Ed. 2d 40 (1987).

instead "continues throughout the judicial process." *Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009); *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997) (applying *Brady* to a claim that the prosecutor failed to disclose evidence received after trial but while the case was on direct appeal). Accordingly, Appellant is entitled to access to any impeachment or exculpatory evidence contained in Ms. Taylor's personnel file, whether it has only recently come to light or was not previously disclosed prior to trial.

By this Court's own rules, materials will be removed from the public record only "in those instances where such withholding is necessary in the interest of justice and required by law." Rule 2.7(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (*eff.* November 1, 2016) (citing *Nichols v. Jackson*, 2001 OK CR 35, ¶ 10, 38 P.3d 228, 231; OKLA.STAT. tit. 51, § 24A.29 (Supp. 2012). Further, such materials will not be sealed "when a reasonable redaction will adequately resolve the issue." *Id.* "[T]here is a strong presumption in Oklahoma in favor of public access to judicial proceedings and court records." *Ober v. State ex rel. Dep't of Pub. Safety*, 2016 OK CIV APP 2, ¶ 9, 364 P.3d 659, 661-62.

Because nothing that has been filed or occurred in this case required being completely sealed from view of either the public or Appellant, the motions and orders previously filed in this case should be ordered unsealed, except perhaps for the allegedly confidential material submitted to the Court along with the initial motions.[21] Furthermore, undersigned counsel should be provided access to the transcripts of the *ex parte* hearing before the trial court enters his findings of fact

[21] To the extent that the motion submitting those documents to this Court make explicit reference to factual material that is arguably protected by law from disclosure, those references can and should be redacted.

and conclusions of law.[22] Counsel should further be afforded an opportunity to cross-examine these witnesses and/or to offer argument to the trial court on the issues of whether this supposed "personnel review" is even protected from disclosure in the first instance, and if so, the extent to which any impeachment or exculpatory evidence appearing anywhere in Ms. Taylor's personnel file, before or since Appellant's trial, should nevertheless be disclosed.[23] Only after both parties have had a full and fair opportunity to be heard should the trial court enter its findings of fact and conclusions of law.

Again, until recently, undersigned counsel had no reason to believe other than that he would be timely provided with the information to which Mr. Holtzclaw is constitutionally entitled. Even after learning of his exclusion from the *in camera* hearing, counsel still believed, albeit now with some apprehension, that he would soon be given access to the apparently exculpatory or otherwise impeachment material recently produced. However, the developments and revelations discussed in this motion have made it so that counsel can no longer sit idly by while his client's constitutional rights are possibly being endangered by the unnecessary veil of secrecy that has shrouded this case since early May.

Based on the foregoing, Appellant respectfully requests that this Court (1)

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[22] Again, to the extent that specific reference to facts contained within the allegedly protected documents was made during this testimony, those narrowly specific parts may be redacted, but it is highly unlikely that the entire testimony of the witnesses, occurring over the course of two days, is such that none of it can or should be made available to defense counsel.

[23] It is worth noting here that the confidentiality statute at issue indicates that "[a] public body *may* keep personnel records confidential." OKLA.STAT. tit. 51, § 24A.7(A) (Supp. 2014) (emphasis added). The use of the word *may* in a statute usually connotes a procedure that is permissive or discretionary, rather than mandatory. *See Mott v. Carlson*, 1990 OK 10, ¶ 6 & n.4, 786 P.2d 1247, 1249 & n.4; *Falconhead Prop. Owners Ass'n v. Fredrickson*, 2002 OK CIV APP 67, ¶ 5, 50 P.3d 224, 226. The only personnel information that is mandated to be kept secret is home addresses, telephone numbers, and social security numbers of past or current employees. § 24A.7(D). Accordingly, the City of Oklahoma City, or the Oklahoma City Police Department, should perhaps be given the opportunity to waive any alleged confidentiality of the documents recently produced.

order that all documents filed under seal in this case be unsealed, except to the extent that redaction or exclusion may be required; (2) order that complete or minimally redacted transcripts of the *ex parte* hearing held on June 26 and 27 be provided to undersigned counsel forthwith; (3) order that copies of the orders filed in the district court on July 17, 2017, be provided to undersigned counsel; and (4) order the district court to reserve entering its findings of fact and conclusions of law until such time as undersigned counsel has been afforded an opportunity to cross-examine the witnesses who testified at the hearing and/or to make argument as to whether the information at issue is even protected in the first instance and, if so, whether such information must nevertheless be disclosed to defense counsel.

Respectfully submitted,
DANIEL K. HOLTZCLAW

By: _____
JAMES H. LOCKARD
Oklahoma Bar No. 18099
Deputy Division Chief

_____
MICHAEL D. MOREHEAD
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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that on the date of filing of the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court with instructions to deliver said copy to the Office of the Attorney General of the State of Oklahoma.

_____
JAMES H. LOCKARD

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.	)	

APPELLANT'S OBJECTION TO JUDGE HENDERSON'S *EX PARTE* FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appellant, Daniel K. Holtzclaw, by and through his undersigned appellate counsel, and pursuant to this Court's Clarification Order of July 20, 2017, objects to Judge Henderson's findings of fact and conclusions of law filed in this Court as an Order on August 7, 2017, and an Amended Order on August 8, 2017.[1] (For clarity and ease of citation, these orders will hereinafter be referred to as "Findings of Fact and Conclusions of Law.") Appellant respectfully requests that all of the exhibits filed by the State of Oklahoma with this Court on May 4, 2017, be unsealed and provided to Appellant's counsel. Appellant further renews his objection to the unnecessary secrecy shrouding these proceedings, filed under seal in this Court on August 2, 2017, and requests that all motions and orders, as well as the transcript of the proceedings of the *ex parte* hearing held on June 26 and 27, 2017, be unsealed and made available to public view, with copies of the State's original motion and the transcripts provided to Appellant's counsel.

A. INTRODUCTION

It is worth remembering at the outset that the current controversy began with the State coming forward with information to which counsel for the State, Matt Haire, conceded Appellant was entitled, at least in part, but which Mr. Haire felt he could not lawfully provide to Appellant's counsel without a court order.

[1] The Amended Order simply makes a minor clerical correction to the original order.

Though Appellant's counsel has still not seen the actual motion Matt Haire filed on May 4, 2017, this Court's Order Remanding Cause to District Court of Oklahoma County for *In Camera* Hearing, Granting State's Motion for Interim Protective Order and Holding Appeal in Abeyance Pending Outcome of the *In Camera* Hearing (hereinafter "Order Remanding Cause"), filed on May 30, 2017, specifically states on page four of the order, "The State agrees that some of the information it has received should be turned over to Holtzclaw's counsel, but states that not all of the information from the personnel investigation is germane to Holtzclaw's appeal." This is consistent with the telephone conversation Appellant's counsel had with Matt Haire shortly before he filed his motion on May 4.

Since that time, however, the State of Oklahoma has managed to obtain a legal ruling from Judge Henderson that all of the information is protected personnel information and that Appellant's counsel is not entitled to have access to any of the information, not even so much as the State had previously admitted should be turned over to Appellant's counsel. This finding came after an *ex parte* hearing to which not only was Appellant's counsel not invited or allowed to attend, but which counsel had no prior knowledge of. Nor was Appellant's counsel given any opportunity to provide the district court with any pertinent legal authority. Appellant vehemently objects to the illegal, *ex parte* manner in which the proceedings unfolded,[2] objects to the unnecessary shroud of secrecy in this matter,

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[2] At the conclusion of the *ex parte* hearing, Oklahoma County Assistant District Attorney Gayland Gieger described this Court's remand order as requiring the district court to "conduct this hearing under seal, ex parte." (*Ex Parte* Hrg. Tr. 338) This is a fundamental misreading of this Court's May 30 order remanding the case to the district court for an ***in camera*** hearing. The words *"ex parte"* do not appear anywhere in that order. To be sure, the remand order anticipated Judge Henderson reviewing the records outside of the presence of counsel. *See* Order Remanding Cause at 3. But the Court ordered more than just an in chambers review. The Court ordered an *in camera* **hearing** – *i.e.*, a hearing held with all spectators excluded, *see* BLACK'S LAW DICTIONARY 763 (7th ed. 1999) – and ordered transcripts of that hearing provided to counsel for both parties. Clearly the Court expected both parties to be able to participate in the remanded hearing. Even if confidentiality concerns required taking *some* of the testimony outside of the presence of Appellant's counsel, there is no reason that the *whole hearing* should have been held without counsel's

and to the factually and legally inaccurate findings and conclusions filed by Judge Henderson on August 7 and 8, 2017.

B. STANDARD OF REVIEW

Appellant asserts that Judge Henderson's Findings of Fact and Conclusions of Law are entitled to **no deference**. Judge Henderson's findings of fact are not well-supported by the record, and his conclusions of law are based on an inappropriate legal standard. Had Appellant's attorneys been permitted to participate in the proceedings, even if *some* of the testimony required counsel's brief and intermittent exclusion, these errors could have been avoided. But for reasons that defy comprehension, Appellant's attorneys were not permitted to know about or participate in the proceedings. Counsel were not given any opportunity to cross-examine any of the witnesses or otherwise offer contrary legal arguments on either the question whether these documents are protected in the first instance, or assuming they are protected, whether they must nevertheless be disclosed to Appellant's counsel. The only point of view Judge Henderson considered was that of the prosecution. To give his findings of fact and conclusions of law any amount of deference would be to adopt and perpetuate his violation of Appellant's due process rights.

C. ALL OF THE DOCUMENTS SUBMITTED TO THIS COURT BY THE STATE SHOULD BE DISCLOSED TO APPELLANT'S COUNSEL

The claim that the material at issue is protected from disclosure cites to Title 51, Section 24A.7. This provision, it should be noted, is not part of a "Right to Keep Things Secret from the Public Act." Rather, it is part of the "Oklahoma Open Records Act," the stated purpose of which is to protect the "inherent right"

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presence or awareness. There is no reason why counsel could not have been present to cross-examine the witnesses on matters that were clearly not confidential, and no reason why counsel could not at least have been afforded the opportunity to provide the district court with relevant legal authority and argument.

of the people of Oklahoma to "be fully informed about their government" and therefore to "ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power." OKLA.STAT. tit. 51, § 24A.2 (2011). The privacy interest of individuals are expressly made subservient to the public's right to know. Section 24A.7 represents an exception to the requirement of disclosure and should be narrowly construed in light of the overall purpose of the act.

Appellant submits that the record of the proceedings below clearly demonstrates that the material at issue is not protected from disclosure by law. Even if any of portions of the documents submitted to this Court by the State may properly be found to be part of Ms. Taylor's "personnel file," and therefore subject to discretionary disclosure, the interests of justice and due process of law favor disclosure under the facts and circumstances of this case. Accordingly, all the materials at issue should be disclosed to defense counsel and/or made public.

1. The documents at issue are not protected from disclosure by law.

Title 51, Section 24A.7(A) states that a "public body *may* keep personnel records confidential." (Emphasis added.) It is important to note at the outset that this provision *does not mandate* confidentiality of personnel records. The use of the word *may* in a statute usually connotes a procedure that is permissive or discretionary, rather than mandatory. *See Mott v. Carlson,* 1990 OK 10, ¶ 6 & n.4, 786 P.2d 1247, 1249 & n.4; *Falconhead Prop. Owners Ass'n v. Fredrickson*, 2002 OK CIV APP 67, ¶ 5, 50 P.3d 224, 226. The only personnel information that is mandated to be kept secret is home addresses, telephone numbers, and social security numbers of past or current employees. § 24A.7(D).

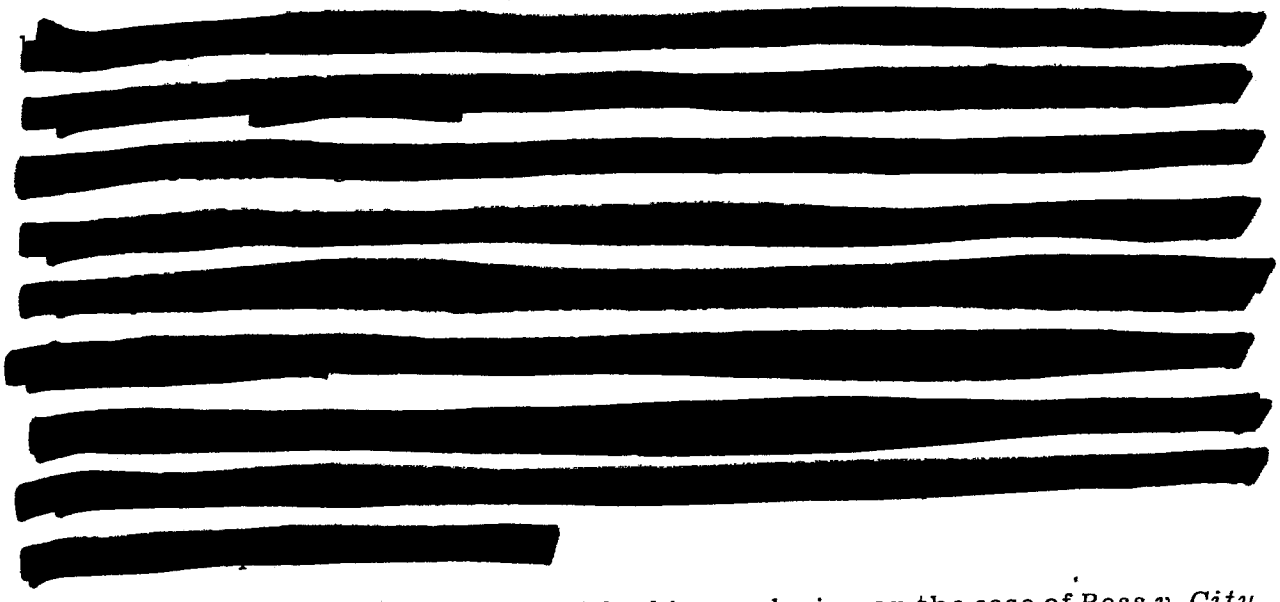
The statute does not define the term *personnel records*. However, the two subsections which follow provide an aid to interpretation of what types of information may be kept confidential. Subsection A(1) refers to records "[w]hich

relate to internal personnel investigations including examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation." While this list is non-exhaustive, the types of records described involve anticipated future or continued employment. It is undisputed that Elaine Taylor retired on February 2, 2017. [redacted] Subsection A(2), on the other hand, allows records to be kept confidential "[w]here disclosure would constitute a clearly unwarranted invasion of personal privacy." Appellant has seen nothing to indicate the information at issue constitutes any kind of invasion of privacy. Her work in this case is clearly a matter of public concern.[3]

[redacted]

[3] Ironically, the same entities who seem so reticent now [redacted] compunction against making every alleged violation of department policy, no matter how minor (including turning his computer off before arriving home, failing to fill out and return Field Interview Cards, and giving subjects rides in his patrol car), a substantial part of the State's case in chief against Appellant.

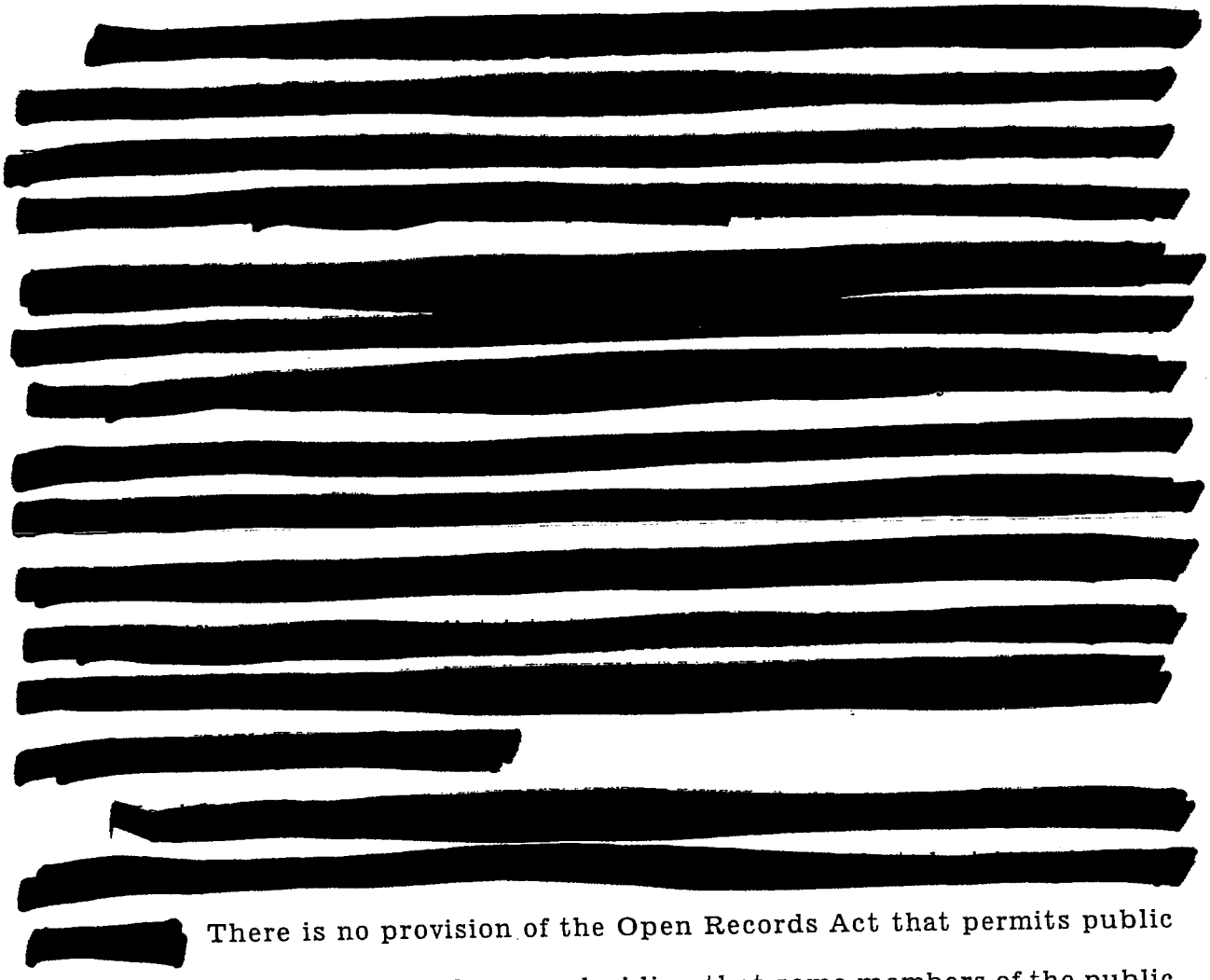
[Page 6 redacted in its entirety]



Judge Henderson relied in part for his conclusion on the case of *Ross v. City of Owasso*, 2017 OK CIV App 4, 389 P.3d 396, which he cited for the proposition, inapposite to the facts and circumstances of this case, that a personnel investigation does not become a matter of public disclosure merely because it involves allegations of criminal misconduct. Had Appellant's attorneys been permitted to participate in the proceedings, they could have directed Judge Henderson's attention to the very next sentence, which indicates that a public body's decision to keep personnel records is subject to review for an abuse of discretion. *Id.* at ¶ 10, 389 P.3d at 399.

The material at issue in *Ross* was generated while the subject was still an employee of the City of Owasso, and the court easily concluded that it constituted a personnel record. That did not end the inquiry, however. Noting that such records are not "*inherently confidential*," the court explained that Section 24A.7 "grants a public body *discretion* to keep such records confidential." *Id.* at ¶ 11, 389 P.3d at 400. In the end, the court found that it could not decide whether the Owasso City Council had abused its discretion in the matter, because the City Council had never actually made a decision wether the report should be declared confidential or publicly released. *Id.* at ¶ 18, 389 P.3d at 401. Accordingly, the court

remanded the case to allow the City Council "to properly respond to Ross's ORA request, at which point any decision to withhold or release the Report will be ripe for examination by the courts." *Id.*



There is no provision of the Open Records Act that permits public bodies to make selective disclosures, deciding that some members of the public may see official documents while other members of the public may not. Accordingly, even if the materials at issue are deemed "personnel records," within the meaning of Section 24A.7, the police department's decision not to keep these documents confidential means that they must be made publicly available and therefore should be disclosed to Appellant's counsel.

2. **Even if the documents are determined to be confidential, *Brady* and *Giglio* nevertheless require their disclosure to Appellant's counsel.**

In the event this Court nevertheless upholds Judge Henderson's erroneous decision that the documents at issue are protected from disclosure by Section 24A.7, Appellant submits that disclosure is nevertheless required pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Under *Brady*, the prosecution is required to disclose "evidence that is favorable to the accused ... where the evidence is material either to guilt or to punishment." 373 U.S. at 87, 83 S.Ct. at 1196-97. In *Giglio*, that principle was extended to require disclosure of potential cross-examination information. 405 U.S. at 154-55, 92 S.Ct. at 766. Under these standards, Judge Henderson should have ordered disclosure. Even if the information contained within the documents is not considered "exculpatory," the information is certainly favorable to the defense, within the meaning of *Brady* and *Giglio*, because the information could provide useful cross-examination material.

[redacted]

Again, this is an issue that could have been litigated more fully below had Appellant's counsel been permitted to participate

in the proceedings.

The standard of materiality requiring a showing that the outcome of the proceedings would have been different comes from the standards governing motions for new trial based on newly discovered evidence, because that is the context in which *Brady/Giglio* claims are usually raised – *i.e.*, favorable evidence is discovered by the defense after trial and presented to an appellate court in support of a request that the defendant's conviction(s) be reversed and remanded for a new trial. It has long been settled that even a violation of the United States Constitution does not automatically result in reversal of a conviction. The reasonable likelihood standard is simply part of the reviewing court's duty to assess whether any error is harmless. *See, e.g., Giglio*, 405 U.S. at 154, 92 S.Ct. at 766.

Appellant submits that this standard is not appropriate at the disclosure/discovery phase. Usually, when a court is determining whether to order disclosure of protected evidence, the trial has not yet occurred, so it would be virtually impossible for the court to assess whether there is a reasonable likelihood that the evidence would change the outcome. *See, e.g., United States v. Rudolph,* 224 F.R.D. 503, 514 (N.D. Ala. 2004); *United States v. Jordan,* 316 F.3d 1215, 1251 n.79 (11th Cir. 2003). As at least one court has observed, "Because the definitions of materiality as applied to appellate review are not appropriate in the pretrial discovery context, the Court relies on the plain meaning of 'evidence favorable to an accused' as discussed in *Brady*." *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999).

This is not to say that there will never come a time when it must be determined that there is a reasonable likelihood of a different outcome. [redacted]

[redacted] This Court's original May 30, 2017, remand order made provision to allow Appellant to supplement his application in light of any disclosures as a result of the *in camera* hearing. This Court will ultimately have the opportunity to consider the impact, if any, of this material, considered not just in isolation but also in combination with the other evidence already submitted to this Court, as well as in conjunction with other errors identified in Appellant's brief in chief. More importantly, this Court will be able to make this determination after *both parties* have had a full and fair opportunity to litigate the issues as an adversarial matter, consistent with the longstanding traditions of American jurisprudence.

D. Conclusion

In summary, the documents at issue here cannot be considered confidential personnel records, [redacted]. Finally, regardless of how the Court chooses to characterize the documents under the provisions of the Oklahoma Open Records Act, their production to the defense is required by the United States Constitution. *See Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97; *Giglio*, 405 U.S. at 154-55, 92 S.Ct. at 766.

On August 2, 2017, Appellant filed in this Court, under seal, a Motion to Unseal the Proceedings. In an order dated August 24, 2017, this Court determined that motion was premature because Judge Henderson's sealed order, filed on August 7, 2017, had not been reviewed by the parties or this Court. Counsel for Appellant has now reviewed Judge Henderson's order, as well as the transcripts of the two-day hearing held without their knowledge, presence, or participation. In addition to the objection herein to Judge Henderson's erroneous findings of fact and conclusions of law, Appellant specifically renews his motion for this Court to unseal the proceedings. As the foregoing argument and authority clearly demonstrate, the materials at issue are not protected from disclosure by law and should be immediately made available for public viewing.

Based on the foregoing, Appellant respectfully requests that this Court order all documents previously filed under seal – including the State's original motion to file material under seal, filed in this Court on May 4, 2017; all material filed under seal, to wit: Exhibits A through E; the transcripts of the two-day *ex parte* hearing held in the district court on June 26 and 27, 2017; and any and all other motions and orders pertaining to this issue – be unsealed and made available to public view. Appellant further requests that a copy of the transcripts of the *ex parte* hearing be transmitted to Appellant's counsel.

Respectfully submitted,
DANIEL K. HOLTZCLAW

By: 

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that on the date of filing of the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court with instructions to deliver said copy to the Office of the Attorney General of the State of Oklahoma.

JAMES H. LOCKARD

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,	)	**FILED UNDER SEAL**
	)	
APPELLEE.	)	

RESPONSE TO DEFENDANT'S MOTION TO UNSEAL THE PROCEEDINGS

Comes now the State of Oklahoma, by and through Attorney General Mike Hunter, and as directed by this Court on December 20, 2017, responds to the defendant's *Motion to Unseal the Proceedings* (hereafter "Motion"), filed on August 2, 2017. Moreover, on August 29, 2017, the defendant filed an *Objection to Judge Henderson's Ex Parte Findings of Fact and Conclusions of Law* (hereafter "Objection"). This Objection made arguments germane to providing an adequate response to this Court's *Order Directing a Response* to the defendant's August 2, 2017, motion.[1] Because the State interprets this Court's Order to cover all unsealed documents filed at the time of the defendant's original Motion as well as all documents since filed in this Court, the State will also refer to the defendant's Objection where necessary to comply with this Court's directive. However, it is to that extent – and that extent only – that the defendant's Objection will be

[1] In his Objection, the defendant "renew[ed] his motion for this Court to unseal the proceedings" because he had not yet had an opportunity to review the transcripts of the remanded hearing or the District Court's findings of fact and conclusions of law (Objection, p. 12).

addressed as this Court has directed the State to respond to the limited question of whether the sealed documents/information should remain sealed from public view.

The Office of the Attorney General again emphasizes that it does not support the sealing of any document or pleading in this Court, or any other legal forum, unless doing so is grounded in a good faith belief that such is necessary to comply with the law. Every action by the Office of the Attorney General in the unique litigation in this case over the past several months has been conducted in good faith, and driven by the sole desire to protect those whose legal rights are at stake and to fulfill all applicable constitutional and statutory mandates. In this case, however, the State's position is that all information deemed by the District Court to be confidential – and thus protected from public disclosure under Oklahoma law – should remain sealed.

As discussed below, the District Court's conclusion that the material at issue here qualifies as confidential personnel records is supported by the record. The District Court, having reviewed the materials tendered by the Office of the Attorney General to this Court on May 4, 2017, and thoroughly considered the full context and conditions in which they were generated in the remanded proceedings, decided that Oklahoma law did not authorize disclosure to the defendant. Those materials and all the information ultimately generated about

them in these proceedings should therefore not be unsealed and released to the public.

Further, the defendant's Motion must be distinguished from any constitutional right to *discovery* he may have to the sealed materials. Whether the defendant holds a constitutional right to discover the information now contained within the sealed documents in this Court does not, *a fortiorari*, require that such information be disclosed to the public.

Documents accessible to the Defendant.

Initially, the State notes that circumstances have changed since the filing of the defendant's Motion on August 2, 2017. As of August 2, 2017, the defendant's counsel had not yet had the opportunity to review the record of the remanded proceedings together with all of the material sealed in this Court.[2] In addition, on August 24, 2017, this Court ordered the unsealing of some documents that now reveal much of the genesis of the central issues that are now pending, as well as how they have been handled by this Court, the District Court, and the Office of the Attorney General up to that point.[3] Thus, more information

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[2] On July 20, 2017, this Court issued a *Clarification Order* which permitted both counsel for the defendant and appellate counsel for the State to view the *in camera* transcripts and exhibits from the remanded proceedings, and the Findings of Fact and Conclusions of Law of Judge Henderson. The Findings of Fact were filed in this Court on August 7, 2017. An Amended Order of the District Court was filed in this Court on August 8, 2017. The transcript and exhibits were filed in this Court on August 10, 2017.

[3] The Court ordered the unsealing of its May 30, 2017, *Interim Protective Order*, its July 20, 2017, *Clarification Order*, the State's July 18, 2017, *Emergency Motion*

about these proceedings that was previously sealed has been open to the defendant, as well as the public, for nearly five months since the filing of the defendant's Motion.

There now remain four documents currently sealed in this Court: the State's original motion (hereafter "Original Motion") filed May 4, 2017; this Court's *Order Remanding Cause to District Court of Oklahoma County for In Camera Hearing, Granting State's Motion for Interim Protective Order and Holding Appeal in Abeyance Pending Outcome of the In Camera Hearing* issued May 30, 2017; the defendant's instant Motion filed August 2, 2017; and the defendant's Objection filed August 29, 2017. All of these documents make specific reference to and discuss in detail the documents that have been the centerpiece of this litigation for the past several months. For the reasons set forth more fully below, these documents should remain sealed from public view.

With one exception, the defendant's counsel has now had the opportunity to review every pleading and order that is/was filed under seal in this Court. The record reflects that the defendant was not served with the State's Original Motion;

Requesting Guidance Regarding Transmittal of Record of Remanded Evidentiary Hearing, and the defendant's August 2, 2017, *Motion for Order to Preserve Evidence*. Release of this information effectively renders moot the defendant's initial wholesale request for the unsealing of *all* sealed information filed in this case (as well as his concomitant complaints over an alleged media "feeding frenzy over any scrap of information pertaining to the case[,]" and that "because of the request for and granting of *complete* secrecy over this whole issue, counsel could not tell anyone of it") (Motion, pp. 5-7) (emphasis supplied).

the defendant also includes this particular instrument in the renewal of his Motion (*see* Objection, p. 12). Even though the defendant's counsel have not seen the Original Motion, it is clear they have been privy for quite some time to the reasons the State filed it with this Court under seal and the person to whom they relate (*see* Objection, pp. 3-8).[4] The transcript and exhibits of the remanded proceedings, as well as the defendant's Objection to them, reflect defense counsel has now seen the actual material that was filed under seal with the Original Motion, as well as the underlying basis sought for sealing them from his and the public's view. At this point, the State sees no legal reason why the defendant's counsel should not also be able to view at the Court the Original Motion provided to this Court. However, because the Original Motion contains as attached exhibits the personnel records at issue, the Original Motion should not be released to the defendant until a legal determination is made concerning the defendant's right to discovery of these materials. Hence, the State does not object to the defendant's counsel viewing the State's Original Motion.

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[4] This fact is unambiguous, as this Court directed transmission of its *Order Remanding Cause to District Court of Oklahoma County for In Camera Hearing, Granting State's Motion for Interim Protective Order and Holding Appeal in Abeyance Pending Outcome of the In Camera Hearing* issued May 30, 2017 – less than a month after the State filed the Original Motion – to ". . . Appellant; and counsel of record" (*Order Remanding Cause to District Court of Oklahoma County for In Camera Hearing, Granting State's Motion for Interim Protective Order and Holding Appeal in Abeyance Pending Outcome of the In Camera Hearing*, p. 8).

As the defendant has been granted access to all the sealed documents filed in this Court *sans* the State's Original Motion supporting its request for a judicial finding (and something the State agrees he should now be able to view at the Court), the only question raised by the defendant's Motion is whether the material considered by the District Court and the Orders/pleadings concerning it should remain sealed from the public. Hence, the remainder of this response addresses only that question.

DISCUSSION

It is important to recall how the documents, pleadings, transcripts, and related orders now at issue became sealed and why. As detailed in the State's first filing on the matter, in early April 2017, the State came into possession of information generated after the defendant's trial that pertained to a single prosecution witness: OCPD chemist Elaine Taylor. After alerting the defendant's counsel to as much about the material that could legally be disclosed, and especially because it might be relevant to a specific claim already raised in the defendant's pending application for evidentiary hearing concerning the performance of his trial counsel, the undersigned gathered as much information about it as possible and provided it to this Court under seal. Because there is no procedure, as there is at the trial level, for *in camera* inspection of sensitive materials protected from disclosure by law before they are disclosed, the State requested a neutral judicial forum where the appropriate legal status could be

made. And until that determination was concluded, the State also asked for an interim protective order.[5] This Court responded to the State's request for *in camera* inspection by remanding the case to the District Court for an *in camera* hearing, and that hearing was held.

As ordered by this Court, the District Court heard testimony about how, when, and why the materials submitted by the State on May 4, 2017, were generated, the District Court entered Findings of Fact and Conclusions of Law commensurate with this Court's remand Order.[6] The District Court concluded,

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[5] The defendant's situation was made even more unusual by the fact that the District Attorney and Office of the Attorney General came into possession of the information – and thus knew its contents – before any *in camera* inspection could be made, as opposed to the typical situation prior to a trial where a party desires a category of materials, *e.g.*, personnel records of a witness, and those records (without either party knowing their contents) are ordered by a *third party* (*e.g.*, an employer) to be turned over to the trial judge for *in camera* review to determine the extent of relevance, materiality, and dissemination.

[6] This Court's original remand Order was issued on May 30, 2017. On July 20, 2017, in a *Clarification Order* now unsealed and open to public view, the Court altered in some respects the Findings of Fact and Conclusions of Law required of the District Court on remand and the procedure by which the record would be transmitted and reviewed by the parties. Pursuant to the *Clarification Order*, the District Court was tasked with determining:

> 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

in relevant part, that all of the material provided by the State and attendant information about them qualified as "personnel records [redacted] pursuant to 51 O.S.[Supp.2014], § 24A.7(A)(1)[,]" and were thus "subject to discretionary disclosure" (Amended Order, pp. 9, 11).[7] The District Court further determined that the material was "not discoverable by Holtzclaw's appellate counsel" (Amended Order, p. 11). Thus, there has been a judicial finding – currently under review by this Court – that the items the defendant wishes to be exposed to public viewing (and anything relating to them) are confidential personnel records.

On remand to the district court for an evidentiary hearing, this Court generally upholds a district court's findings when they are supported by the record. *See, e.g., Warner v. State*, 2006 OK CR 40, ¶¶ 92-105, 144 P.3d 838, 873-75 (upholding district court's conclusion after remanded hearing that separation of the jury was not improper within meaning of statute governing jury separation during deliberations where the district court's finding was supported by the record).

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personnel records.

(Clarification Order of July 20, 2017, p. 4).

[7] The Amended Order is not paginated; these page numbers are provided as if the Amended Order had been paginated.

As the defendant correctly notes, the general policy of the Oklahoma Records Act (hereafter, "Act") "is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power." 51 O.S.2011, § 24A.2. With this public policy, the Office of the Attorney General wholeheartedly agrees. But the Act also provides that "[e]xcept where specific state or federal statutes create a confidential privilege," some information generated by a public body may be withheld from public view. 51 O.S.2011, § 24A.2. One of those confidential privileges that is specifically created by Oklahoma law applies to personnel records. Section 24A.7(A) of Title 51 provides in pertinent part:

> A. A public body may keep personnel records confidential:
>
> 1. *Which relate to internal personnel investigations* including examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation; or
>
> 2. Where disclosure would constitute a clearly unwarranted invasion of personal privacy such as employee evaluations . . . .

51 O.S.Supp.2014, § 24A.7 (emphasis supplied). Here, after thoroughly examining materials submitted to this Court by the State, testimony about them, and the context in which all of it was generated, the District Court has concluded that all of the information the defendant now seeks to open to the public is

covered by 51 O.S.Supp.2014, § 24A.7 (Amended Order, pp. 9, 11). The District Court's finding to this effect is supported by the record. Consequently, unsealing is not proper.

This Court construes statutes according to the plain and ordinary meaning of their language. *State v. Stice*, 2012 OK CR 14 ¶ 11, 288 P.3d 247, 250. As the emphasized language above shows, the statute regarding "personnel records" covers those items that "relate to internal personnel investigations," then provides a list of those things that would obviously be included in such "internal personnel investigations." A plain reading of the statute then would cover all types of records that "relate" to *any* internal personnel investigation. That is what the materials here are about, and they fall into two general categories.

[Page 11 redacted in its entirety]

[Page 12 redacted in its entirety]

[Page 13 redacted in its entirety]

[Page 14 redacted in its entirety]

[redacted]

The trial court's findings are all commensurate with the [redacted] testimony

[redacted]

The defendant's arguments for wholesale release [redacted] are weak. The defendant first relies upon the discretionary language in 51 O.S.Supp.2014, § 24A.7(A) to support his contention that even if the material at issue here qualified as confidential personnel information, its disclosure is still permissive "rather than mandatory" (Objection, p. 4). The defendant notes that the term "personnel records" is not defined by the Legislature and that the only personnel information "mandated to be kept secret is home addresses, telephone numbers, and social security

numbers of past or current employees" (Objection, p. 4) (citing 51 O.S.Supp.2014, § 24A.7(D)). To this extent, the defendant is technically correct. But the defendant seems to forget that there are two sides to discretionary release, *i.e.*, "may," of confidential personnel records falling within 51 O.S.Supp.2014, § 24A.7(A): such information may *not* be released under certain circumstances. Merely because it may be permissible to release certain information does not mean it is required by the public body holding the discretion to do so. Therefore, the defendant's apparent contention that this finding mandates their current public release is not compelling.

More importantly, however, is that the District Court has made a determination in this case, supported by the record, that the materials are confidential personnel records, and the appropriate body to make the discretionary determination whether they are released to the public is the "public body" that generated them; here, the City of Oklahoma City (hereafter "City"). *See* 51 O.S.Supp.2014, § 24A.7(A). The defendant wholly fails to show why the City should be forced to release confidential personnel information – information to which he has access – to the public when the Legislature has clearly given the City the option of deciding when and how much of such material may be kept confidential [redacted] When examining a statute, this Court "considers the

'natural or absurd consequences of any particular interpretation' of a statute." *Nesbitt v. State*, 2011 OK CR 19, ¶ 20, 255 P.3d 435, 440 (quoting *State v. Anderson*, 1998 OK CR 67, ¶ 3, 972 P.2d 32, 33). The Legislature could not have intended that public disclosure of such partial information clearly covered by the statute, without the mechanisms of due process that were supposed to be afforded the subject of that information, be required. Not only would it be unfair to Taylor, but the public is not well-served by receiving only part of the story.

The District Court's conclusions that the documents are personnel records are supported by the record. [redacted]

Respectfully submitted,

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ATTORNEY GENERAL

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CERTIFICATE OF MAILING

On this 15th day of February, 2018, a true and correct copy of the foregoing was mailed to:

James H. Lockard, OBA # 18099
Michael D. Morehead, OBA # 18114
Homicide Direct Appeals Division
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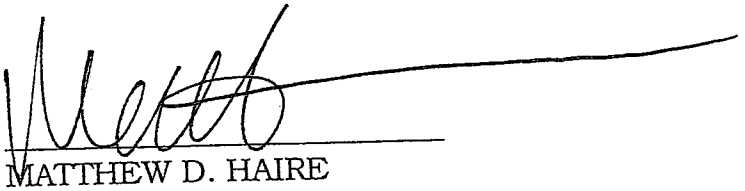
Norman, OK 73070



MATTHEW D. HAIRE

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.	)	

REPLY TO STATE'S DIRECTED RESPONSE TO DEFENDANT'S MOTION TO UNSEAL THE PROCEEDINGS

Appellant, Daniel K. Holtzclaw, by and through his undersigned appellate counsel replies to the State of Oklahoma's directed Response to Defendant's Motion to Unseal the Proceedings, filed under seal on February 15, 2018. It is Appellant's further request that this Court enter a final ruling on the disposition of the information brought forth by the State in its sealed motion in this Court, filed on May 4, 2017; and that the Court set a briefing schedule for the filing of the State's response to the Brief of Appellant, filed in this Court on February 1, 2017.

At the outset, Appellant believes some clarification is in order. There are actually two inter-related but ultimately separate issues that must be addressed. One issue is Appellant's Motion to Unseal the Proceedings, filed under seal in this Court on August 2, 2017. The other issue, which is more paramount and central to the pending appeal, is what to do with the information the State of Oklahoma filed under seal in this Court on May 4, 2017, asking for an *in camera* determination of whether this information may be disclosed to Appellant. Appellant's arguments on this latter issue are contained within Appellant's Objection to Judge Henderson's *ex Parte* Findings of Fact and Conclusions of Law (hereinafter "Objection"), filed under seal in this Court on August 29, 2017.

In its Response to Defendant's Motion to Unseal the Proceedings

(hereinafter "Directed Response"), the State of Oklahoma narrowed its argument to "the limited question of whether the sealed documents/information should remain sealed from public view," addressing Appellant's arguments in his Objection only "where necessary to comply with this Court's directive." *Directed Response* at 1-2. In so doing, however, the State conflates two different arguments Appellant made on the separate issues into an argument that Appellant has never made [redacted] Appellant's motion twice specifically acknowledged that the information brought forth by the State may remain sealed until a final determination is made as to whether that information is protected from disclosure by law and, if so, whether disclosure is nonetheless required by the United States Constitution.[1] *See Motion to Unseal* at 7-8, 10.

One thing the State is absolutely correct about is that "circumstances have

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[1] That Appellant's argument was directed at everything else but the allegedly protected information is self-evident from the following observation:

> What is truly unusual about the issue in this case, however, is not that the issue has arisen on appeal, or even that it was at the behest of the State, not the defense, but that the secrecy that is arguably necessary to protect the privileged information from disclosure has been expanded to cover the whole process. In the ordinary course of legal proceedings, the request for access to protected information, and what defense counsel expects to find in that protected information, is open and public, not under seal. The request for the information is not sealed. The State's argument, if any, that the information is legally protected, and the basis therefor, is not sealed. The fact that the court will be reviewing the information is not under seal, and hearings about whether the information is protected and/or discoverable are not kept secret from either the public or the defense. And once it is determined that the confidential information must be provided to the defense, it is allowed to be offered openly and publicly into evidence at trial.

Motion to Unseal at 5.

changed since the filing of the defendant's Motion [to Unseal Proceedings] on August 2, 2017." *Directed Response* at 3. At the time of filing the Motion to Unseal, all Appellant's counsel knew about the information brought forth by the State was that it pertained to Elaine Taylor. Counsel knew nothing of the nature and quality of the material, except that it supposedly involved "personnel records" and that it must have been at least minimally relevant for the State to have come forward with the information in the first instance. After the matter was remanded to the district court on May 30, 2017, a secret *ex parte* hearing was held on June 26 and 27, 2017, without the knowledge, presence, or participation of Appellant or his counsel. It was this level of secrecy, causing grave "concerns that a binding ruling detrimental to Appellant's constitutional rights will be entered without Appellant's ability to even be heard," *Motion to Unseal* at 9, that prompted Appellant to file his Motion to Unseal the Proceedings, wherein he specifically requested "an opportunity to cross-examine [the witnesses presented at the *ex parte* hearing] and/or to offer argument to the trial court" before a final ruling is entered, *id.* at 11. This request was frustrated, however once the district court rendered a decision on the merits in orders filed in this Court on August 8 and 10, 2017.

Since the filing of the Motion to Unseal, however, Appellant was eventually allowed to inspect the transcript and exhibits (but still has not seen the actual documents filed by the State on May 4, 2017) of the secret *ex parte* hearing held on June 26 and 27, 2017. Pursuant to this Court's July 20, 2017, Clarification Order (*see* p. 5, granting either party 30 days to file objections to Judge Henderson's Findings of Fact and Conclusions of Law), Appellant filed his Objection on August 29, 2017. Moreover, in an order filed on August 24, 2017, at least some of the pleadings have been ordered unsealed. Accordingly, because (1) the proceedings have been at least partially unsealed, (2) counsel has had an

opportunity to read the transcripts of the *ex parte* hearing and to file objections to the district courts findings and conclusions, and (3) said findings and conclusions were nevertheless entered without Appellant having any opportunity to participate in the decision-making process, Appellant's Motion to Unseal Proceedings has largely been rendered moot.

What is far more paramount at this time is a final ruling on the disposition of the information the State filed in this Court under seal on May 4, 2017. It is now over a year since Appellant filed his brief in chief, and almost ten months since the State filed its sealed motion. Under the Court's original Remand Order and subsequent Clarification Order, the briefing in this case is currently stayed, pending a final determination of the disposition of the sealed information. Appellant would therefore respectfully request that this Court "cut to the chase," as it were, and enter a final ruling on the disposition of the sealed information. If it is determined that the information is not protected from disclosure by law, then the Court can further order that all the pleadings, transcripts, and exhibits be ordered unsealed. If, on the other hand, it is determined that the information is protected from disclosure by law and that, as the district court found, Appellant is not entitled to disclosure of any of the evidence, despite the State's admissions to the contrary, then this issue can be put to bed and a final deadline set for the State's answer brief. If only part of the information is determined to be discoverable, then the Court can order disclosure of that information, with guidance over how it can be used (*i.e.*, can Appellant share the information with his expert to see if there is anything of value to add to the Application for Evidentiary Hearing filed simultaneously with Appellant's brief in chief, and can Appellant have leave to supplement said Application?) from that point. A final ruling on the disposition of the evidence will therefore both also essentially decide Appellant's Motion to Unseal the

Proceedings, as well as put this case back on track to a more timely resolution of the issues raised on appeal.

Appellant has already set out his legal arguments and authority regarding the sealed information in his Objection filed on August 29, 2017, and will not further waste the Court's time by repeating it here. However, there are two points raised by the State in its Directed Response that must be addressed. First, the State argues that this Court "generally upholds a district court's findings [at a remanded evidentiary hearing] when they are supported by the record." *Directed Response* at 8 (citing *Warner v. State*, 2006 OK CR 40, ¶¶ 92-105, 144 P.3d 838, 873-75). The State fails to note a glaring difference between the hearing held in *Warner* and other such cases, in which both parties are given a full and fair opportunity to participate, cross-examine witnesses, and provide the court with legal citations and argument, and the secretive *ex parte* hearing that took place in this case. Appellant's first opportunity to present any evidence, legal authority, or argument in favor of his position came when he filed his objection to the findings and conclusions. Accordingly, deference to the trial court's one-sided findings and conclusions would not be proper in this instance. Indeed, it does not even seem possible to both defer to the trial court's *ex parte* findings and also give due consideration to Appellant's counter-arguments, which the district court refused to even hear.

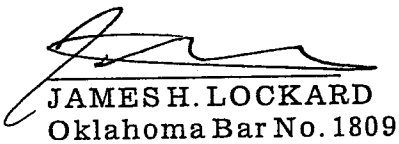
Second, the State argues that Appellant "wholly fails to show why the City (of Oklahoma City) should be forced to release confidential personnel information – information to which he has access – to the public when the Legislature has clearly given the City the option of deciding when and how much of such material may be kept confidential." *Directed Response* at 16. As already noted, the State here conflates Appellant's argument in his Objection that he is entitled to this information with his argument in the Motion to Unseal the

Proceedings that everything else *but* this material should be unsealed. The State is correct in noting that "the appropriate body to make the discretionary determination whether they are released to the public is the 'public body' that generated them; here, the City of Oklahoma City." *Id.* at 16 (citing OKLA.STAT. tit. 51, § 24A.7(A) (Supp. 2014)). What the State fails to recognize, however, is that not only has the city of Oklahoma City not stated a formal determination to keep this information confidential, the City has acted in a manner directly contrary thereto. [redacted] Nothing in the Open Records Act gives a state agency or entity the right to disseminate public information to some people but not to others.

Finally, even if it is determined that all of the sealed information is protected from disclosure by law, Appellee has still not countered, despite numerous opportunities to do so, Appellant's argument that disclosure is constitutionally mandated. *See Objection* at 9-11. This Court has held that "the State, like defendants, must raise proper objections and preserve errors and/or opportunities, otherwise they are waived." *A. J. B. v. State*, 1999 OK CR 50, ¶ 9, 992 P.2d 911, 912. Indeed, the State conceded from the outset that Appellant was entitled to disclosure of at least *some* of this information [redacted]

Based on the foregoing, Appellant respectfully requests that this Court enter a final ruling on the disposition of the sealed information and set a briefing schedule for supplementing the Application for Evidentiary Hearing, if allowed, and for the State's answer brief.

Respectfully submitted,
DANIEL K. HOLTZCLAW

By: 

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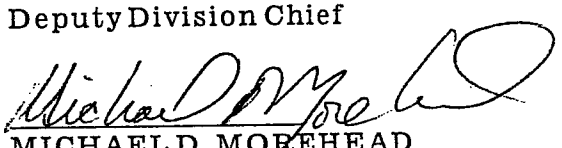

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that on the date of filing of the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court with instructions to deliver said copy to the Office of the Attorney General of the State of Oklahoma.

JAMES H. LOCKARD