No. _____

In the
Supreme Court of the United States

DANIEL K. HOLTZCLAW,
Petitioner,
v.

THE STATE OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

JAMES L. HANKINS
Counsel of Record
Timberbrooke Business Center
929 N.W. 164th Street
Edmond, Oklahoma 73013
(405) 753-4150
jameshankins@ocdw.com

Counsel for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1.

DNA evidence played a central role in this sexual assault case, in the form of a "match" between DNA from a complaining witness and the major contributor in DNA mixtures found on the fly of Petitioner's pants. This evidence was conveyed to the jury by state forensic analyst Elaine Taylor. However, concerns over Taylor's personnel record arose while direct appeal was pending, and the state appellate court remanded to the district court which held a remarkable two-day hearing *in camera* and *ex parte* on the matter. Although defense counsel were excluded from this hearing, the transcript and exhibits were made available to defense counsel, but not to the defense expert DNA witness. The prosecutor at trial misrepresented the DNA evidence during closing arguments. The question presented for review is:

What is the standard of materiality applicable in assessing the prejudicial impact of potential exculpatory evidence relating to the State's chief forensic expert which was obtained in a secret *ex parte* hearing at which defense counsel were excluded entirely, and thereafter precluded from sharing the results of which with the defense DNA expert?

2.

This case stemmed from initial counts in one incident involving alleged forcible oral sodomy and procurement of lewd exhibition, but ballooned to a total of thirty-six counts ranging from burglary in the first degree to stalking to rape, alleged by thirteen different

complaining witnesses against a police officer. Petitioner has alleged improper joinder. The question presented is:

Is there a constitutional limit on joinder of complaining witnesses and counts?

LIST OF DIRECTLY RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

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CONSTITUTION AND STATUTES

TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Daniel K. Holtzclaw petitions respectfully for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals.

OPINION BELOW

The Oklahoma Court of Criminal Appeals issued a published opinion filed August 1, 2019. *See* attached Appendix "A" (*Holtzclaw v. State,* 2019 OK CR 17, 448 P.3d 1134).

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered August 1, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Justice Sotomayor granted an extension of time to file a Petition on October 28, 2019–extending the deadline to December 29, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI, provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to...the assistance of counsel for his defense.

United States Constitution, Amendment XIV, provides, in part:

> No state shall...deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

In 2014, the state of Oklahoma charged Holtzclaw with eight counts of procuring lewd exhibition, ten counts of sexual battery, seven counts of forcible oral sodomy, six counts of first degree rape, two counts of second degree rape by instrumentation, one count of indecent exposure, one count of first degree burglary, and one count of stalking.

The case was tried to a jury sitting in Oklahoma City, Oklahoma, who acquitted Holtzclaw of eighteen of the thirty-six counts, but convicted him of 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. The jury recommended punishment at five years in prison for each of the procuring counts; eight years in prison for each of the sexual battery counts; sixteen years in prison for each of all but one of the sodomy counts, twenty years on the remaining sodomy count; thirty years in prison on each count of first degree rape; and twelve years in prison on the count of second degree rape.

On January 21, 2016, the trial judge sentenced Holtzclaw in accordance with the recommendation of the jury, and ordered all counts to run consecutively–for an effective combined sentence of 263 years.

Holtzclaw appealed to the Oklahoma Court of Criminal Appeals, which denied relief in a published opinion filed August 1, 2019. *See Holtzclaw v. State*, 2019 OK CR 17, 448 P.3d 1134.

STATEMENT OF THE FACTS

Back in June, 2014, Daniel Holtzclaw was a police officer on the Oklahoma City Police Department. He was assigned to the Springlake Division which patrolled a high crime area in the northeastern section of the city. His regular shift during this time was 4:00 p.m.-2:00 a.m.

On June 18, 2014, Holtzclaw ended his shift at 2:00 a.m.. However, on his way home he spotted a vehicle swerving and drifting within its lane, so he pulled it over. He questioned the driver, J.L., but concluded that there was no evidence of intoxication, so he let her go and continued home.

Several hours later, J.L., as well as members of her family, reported to other law enforcement that she had been sexually assaulted by Holtzclaw during this traffic stop. A sex crimes detective from the police department was called in to question J.L. A second detective was also investigating similar allegations against an unknown officer by another woman. T.M., one month prior; only after J.L. came forward did detectives attempt to pin the allegations of T.M. on Holtzclaw.

This is how the investigation began, and by the time it was over, law enforcement had developed and procured thirteen complaining witnesses who had asserted sexually impropriety by Officer Holtzclaw. As to J.L., the jury found that Holtzclaw had committed the crimes of procuring lewd exhibition and forcible oral sodomy, although the SANE kit came back

negative and she described her assailant as a short man with blond hair.

However, the jury *acquitted* Holtzclaw of half the counts with which he was charged, finding the testimony and evidence insufficient, including allegations made by S.H., who claimed that Holtzclaw had assaulted her while she was in a hospital bed after having been arrested on drug charges; allegations made by C.R., who had told detectives initially that no officer had been inappropriate with her except for a black police officer who had exposed himself to her, but then claimed later that Holtzclaw had contacted her as she walked down the street and directed her to lift up her shirt and expose her breasts; allegations by F.M., a crack addict who had smoked crack with another complainant and who had claimed that Holtzclaw had fondled her breast; allegations by T.M., who accused Holtzclaw of forcing her to expose her breasts and of coercing her into oral sex; and allegations by K.L, who had accused Holtzclaw of oral sodomy, rape and forcing her to expose her body to him.

Other allegations showed that the jury believed some but not all of the claims. In the case of T.B., the jury convicted Holtzclaw of sexual assault, but acquitted him of burglary and stalking; as to R.G., a prostitute and crack addict, the jury convicted Holtzclaw of forcible oral sodomy, but acquitted him of rape.

In one case, the jury believed allegations made by S.E., even though she was unable to identify Holtzclaw in court, and described him as a black man shorter than her height of 5'11" and darker than her own skin

tone–when Holtzclaw is 6'1" tall, pale-skinned, and Japanese-American.

Part of the State's case involved DNA evidence as to complaining witness A.G. A.G. had accused Holtzclaw of stopping her as she walked down the street, taking her to her mother's home, and putting his hands on her breasts and inside her vagina, and having sex with her through the unzipped fly of his buckled uniform pants. She also gave a DNA sample to police.

Law enforcement had obtained a DNA mixture from at least three individuals, including at least one male and a major contributor who was an "unknown female" from the fly area of Holtzclaw's pants, which were collected as evidence when Holtzclaw was questioned by police on the afternoon of June 18, 2014. The unknown DNA profile on the fly of his pants turned out to match the DNA of A.G. This was a contested part of the case, since the police chemist, Elaine Taylor, admitted that it was possible that the DNA of A.G. could have been a "secondary transfer" via Holtzclaw's hands to the fly area of his pants after he had searched her purse.

The DNA issue became more critical during closing argument, when the prosecutor asserted that the biological material found on the fly of the pants was vaginal fluid–when there was no science to confirm this, as a subsequent defense DNA expert has opined.

As the state appellate court summarized, the larger investigation by law enforcement consisted of analyzing police department records, including warrant check logs, computer reports, computer dispatch records, and

the vehicle locator software on Holtzclaw's patrol car as to the time frames and locations of the accusations.

However, missing from the factual recitation by the OCCA is the fact that detectives used Holtzclaw's police records to contact and solicit further complaining witnesses. This was done in the case of ten of the thirteen complainants through the police questioning specifically African-American women with criminal records who had been stopped or approached by Holtzclaw. When detectives contacted more than *forty* African-American women with drug and prostitution histories and arrest warrants, detectives told these women that police had "received a tip" that they were "possibly sexually assaulted by an Oklahoma City police officer" who "was a really bad guy."

Thus, for the most part, there was no dispute that Holtzclaw had contact with the women accusing him; the dispute was whether he had ever committed sexual crimes against them during his contact with them as a police officer.

As outlined above, out of the thirteen female complaining witnesses, the jury acquitted Holtzclaw of all charges concerning five of them; acquitted him of some charges as to two of the witnesses; and convicted him of all charges involving six witnesses.

The state appellate court characterized the testimony against Holtzclaw as a "pattern" whereby Holtzclaw would conduct a traffic stop or stop the women as they walked down the street, ask them about contraband, and then he would make demands or coerce them into sexual acts or conduct.

On direct appeal, Holtzclaw made various claims, including improper joinder of the multitude of counts, and a claim of ineffective assistance of counsel involving counsel's handling of the DNA evidence as to complaining witness A.G.

The joinder issue is straightforward: the State was allowed to present evidence from thirteen complaining witnesses *en masse* concerning disparate acts of sexual assault, creating a self-corroborating cascade of testimony which reinforced its own credibility through volume. This dynamic would have been absent had the State been forced to try the allegations of each complaining witness separately, as evidenced by the fact that the jury acquitted Holtzclaw of exactly half the counts; and there is evidence of a compromised verdict because the jury convicted him of dubious charges, *e.g.*, J.L.'s SANE kit was negative; R.G.'s chair, on which she had claimed to have wiped fluids following oral sodomy, revealed the full DNA profile of a male who was *not* Holtzclaw; S.E. who claimed that her assailant was a short, black police officer; and A.G.'s mother told a detective that her runaway teen daughter had simply called the officer a "hot cop."

The DNA issue is less so. As Holtzclaw sees it, the DNA evidence was the lynchpin of the State's case, and the only independent evidence proffered by the prosecution in an attempt to substantiate any of the claims; and even this evidence was misrepresented by the State's forensic analyst. Complicating this issue is the fact that the Oklahoma Court of Criminal Appeals remanded the matter to the district court, which held an *in camera* and *ex parte* hearing over two days from

June 26 & 27, 2017, the subject of which was a purported internal Oklahoma City Police Department review of the trial testimony and personnel records of Elaine Taylor–the State's forensic analyst and the State witness who testified in front of the jury about the DNA findings in this case.

The internal review of Taylor's testimony was conducted after her retirement because of questions raised by appellate counsel about her trial testimony. The District Attorney and the Office of the Attorney General had access to information related to Taylor–and thus knew its contents before any *in camera* inspection could be made. Notably, the State conceded at the outset that Holtzclaw was entitled to disclosure of at least a portion of the information related to Taylor, and the prosecutor who had misrepresented the DNA evidence in his closing argument was allowed to question witnesses at the *ex parte* hearing.

Yet, in an Order filed June 8, 2018, in the Oklahoma Court of Criminal Appeals, the appellate court concluded that it was error for the district court to hold the hearing *ex parte* and exclude defense counsel for Holtzclaw, but that this legal error was harmless. Appx. B at 3.

The OCCA eventually allowed Holtzclaw's lawyers to review the *ex parte* hearing transcripts and exhibits, but refused to allow his lawyers to share the secret hearing transcripts or exhibits with a third party–namely, the defense DNA expert, Dr. Michael Spence. Defense counsel sought to share these records

with Dr. Spence so that he could analyze them to critique the conclusions of Dr. Taylor. Appx. C at 1-2.

Thus, this case involves joinder of charges with a disparity of evidence caused by misrepresented DNA evidence, but also an unusual, secret hearing involving the State's forensic expert witness at which defense counsel was excluded, and for which the OCCA found error but deemed it harmless.

REASON FOR GRANTING THE WRIT

I.

THIS COURT SHOULD ACCEPT THIS CASE IN ORDER TO ESTABLISH THE LEGAL STANDARD FOR EXAMINING PROSECUTORIAL MISREPRESENTATION OF SCIENTIFIC EVIDENCE AT TRIAL, ESPECIALLY IN A CASE INVOLVING A SECRET HEARING ON DNA EVIDENCE WHERE DEFENSE COUNSEL IS BOTH EXCLUDED FROM ATTENDING AND ALSO PRECLUDED FROM SHARING THE TESTIMONY AND EXHIBITS WITH A DEFENSE EXPERT.

This case raises an issue of national importance regarding incompetent government forensic analysts and non-disclosure of faulty DNA analysis and testimony, all under the shroud of a secret hearing attended by government lawyers where defense lawyers were excluded.

The secret hearing in this case was held on June 26 & 27, 2017, in the district court of Oklahoma County.

It concerned an internal Oklahoma City Police Department review of Elaine Taylor, the State's chief forensic expert who testified at to the DNA evidence in this case. Defense counsel was excluded.

After this secret hearing was reported in the local press, counsel for Holtzclaw complained in the Oklahoma Court of Criminal Appeals, seeking an order to direct the district court, after the hearing had concluded, to reserve entry of its Findings of Fact and Conclusions of Law until defense counsel had an opportunity to cross-examine witnesses who testified at the hearing, and to make argument regarding that testimony and the material at issue in the district court. Appx. B at 3.

The OCCA concluded that "Defense counsel should have had the opportunity to participate fully in that *in camera* hearing, but counsel's absence was harmless beyond a reasonable doubt. *Id*. Just six days later, the OCCA issued another Order, addressing the defense position that the defense had a constitutional right to disclosure of the sealed documents at issue at the secret hearing in order to prepare his defense. The OCCA refused to unseal the documents related to the hearing, and they remain sealed to this day. Appx C.

Finally, the defense argued that the documents and testimony at the secret hearing pertained to complex scientific testimony of DNA analysis, and therefore disclosure to the defense DNA expert for review and analysis was crucial in order to support a claim of ineffective assistance of trial counsel and for supplementation of the record with extra-record facts pursuant to the Rules of the Oklahoma Court of

Criminal Appeals. The defense sought to disclose the material to Dr. Michael J. Spence, the defense DNA expert. This motion was also denied. *Id.*

The secret hearing is problematic. The district court judge, who was following a remand order from the OCCA, relied on state law for the proposition that the personnel investigation of Elaine Taylor was not for public disclosure, even in the context of a criminal prosecution (relying on *Ross v. City of Owasso*, 389 P.3d 396 (Okla. Civ. App. 2017)). This was an odd ruling, as argued by defense counsel, because the City of Oklahoma City had in fact released the "confidential" personnel records relating to Elaine Taylor to multiple outside state agencies.

What happened on appeal was even more problematic. Holtzclaw raised a claim of ineffective assistance of counsel for failing to, *inter alia*, present available expert testimony concerning the DNA evidence. The State responded and relied, in part, on the secret order issued by the district court after the secret meeting, making it impossible for the defense to respond in a meaningful manner, and also allowing the State the unfair litigation advantage to pre-litigate the issue, obtain a favorable one-sided ruling in the district court, and then use that finding in the OCCA which the defense had neither the opportunity or ability to contest or explain.

Moreover, there was prejudice because the jury was affirmatively misled about the DNA evidence and testimony that was presented–in the form of the forensic analyst Taylor telling the jury that Holtzclaw's DNA was not present on his pants which supported the

presence of vaginal fluid–and the prosecutor telling the jury during closing argument that it was a "fact" that the DNA found on the fly of Holtzclaw's pants transferred in vaginal fluids was from the vaginal walls of complaining witness A.G. The problem with this argument is that DNA science cannot reach such conclusions; and in fact, the evidence is more consistent with a passive transfer of non-intimate DNA from A.G.'s purse to Holtzclaw's pants as no stains or deposits were observed on the fly of the pants.

This is especially so in light of the concession of the State's expert, Elaine Taylor, that she could not say how the DNA of A.G. ended up on Holtzclaw's pants, and that she could not "disagree with" the possibility that it could have been a secondary transfer from the purse when he searched it. Even worse, and contrary to the testimony of Taylor, the DNA of Holtzclaw himself could not have been excluded from any of the DNA samples obtained from the fly of his uniform pants; and the quantification of the DNA of A.G. from the swabs from the fly of the pants was very low, indicating that secondary transfer was much more likely than direct sexual contact.

At trial, Taylor used her false testimony that Holtzclaw's DNA was absent to argue that it was a "very good possibility" that the female DNA transferred in a liquid such as vaginal fluid; and the prosecutor repeatedly elicited this false testimony that Holtzclaw's own DNA was not found on his pants.

Despite all of this, the OCCA refused to consider any argument regarding the secret hearing or to supplement the record with the affidavit of the defense

DNA expert to support the claim of ineffective assistance of counsel. The OCCA dismissed the secret hearings in a footnote, concluding that nothing in those hearings was relevant to any issue on appeal. Appx A at 37 n. 7.

In one sense, the OCCA has not issued any meaningful opinion at all on the secret hearings, choosing instead to deem them irrelevant; and the one legal error that it found–the exclusion of defense counsel from the process–harmless error.

But the record in this case suggests guidance from this Court is necessary. The state district court refused to divulge any of the information from the secret hearing to the defense under the standard in *Giglio v. United States*, 405 U.S. 150 (1972), which requires reversal of a conviction based upon false or misleading testimony if such evidence could in any reasonable likelihood have affected the judgment of the jury.

Counsel for Holtzclaw pointed out that this *Giglio* standard is an appellate standard used to determine prejudice of a trial that has occurred; whereas counsel at that time was claiming entitlement to new information that might be exculpatory or beneficial to the accused, which would seem to be governed by the standard of *Brady v. Maryland*, 373 U.S. 83 (1963) requiring disclosure of information favorable to the accused. *See United States v. Sudikoff*, 36 F.Supp.2d 1196, 1199 (C.D. Cal. 1999) (noting the distinction between the definitions of materiality that govern appellate review as opposed to the pre-trial discovery context).

Thus, there is tension in Holtzclaw's case straight away regarding the correct legal standard that applies to the information generated at the secret hearing: does the *Giglio* standard govern disclosure to the defense, or the more relaxed *Brady* standard? This is a question for this Court to answer.

Holtzclaw also detects a more fundamental issue in his case because it involves complicated DNA science, and the inherent opportunity for manipulation and misleading of the jury by the representatives of the State, which happened in this case. Holtzclaw asserts that scientific evidence is different, and deserves special attention in the courts below.

Texas death row inmate Rodney Reed has raised a similar issue in this Court in a Petition for Certiorari filed September 26, 2019. *See Reed v. Texas*, No. 19-411. Reed observed that the standard under *Giglio*, as understood by this Court in *Napue v. Illinois*, 360 U.S. 264 (1959), traditionally requires some level of knowledge by the prosecutor that the testimony is false.

However, the question has arisen whether the *Napue* standard applies to claims concerning the use by the State of scientifically invalid expert testimony, as was done in Holtzclaw's case. In *Longus v. United States*, 52 A.3d 836 (D.C. 2012), the court held that the *Napue* standard does apply in these situations. *See also United States v. Ausby*, 916 F.3d 1089 (D.C. Cir. 2019) (government testimony about microscopic hair comparison was false testimony that amounted a Napue violation); *Jones v. United States*, 202 A.3d 1154

(D.C. 2019) (FBI examiner's testimony statements exceeded the bounds of science).

In contrast, the Third Circuit and the Ninth Circuit appear to analyze Due Process claims involving invalid scientific evidence and testimony utilizing a more general fundamental fairness test. In *Han Tak Lee v. Houtzdale SCI*, 798 F.3d 159 (3rd Cir. 2015), the court held that admission of fire expert testimony undermined the fundamental fairness of the trial. *See also Giminez v. Ochoa*, 821 F.3d 1136 (9th Cir. 2016) (Due Process violated where introduction of flawed expert testimony undermined the fundamental fairness of the entire trial).

Holtzclaw, like Reed, asserts that the *Napue* standard better reflects the uniquely prejudicial impact that faulty scientific evidence has on lay jurors, and is thus the proper standard to review such errors. This Court should grant review to resolve the tension in the lower courts of appeals on the proper legal analysis of claims involving complex scientific evidence that is misrepresented by the prosecutor at trial and forbidden from being subjected, on appeal, to a fully adversarial process involving scientists able to explain the severity of forensic science errors at the heart of the convictions.

II.

THIS COURT SHOULD ACCEPT THIS CASE IN ORDER TO ESTABLISH THE LEGAL STANDARD FOR EXAMINING IMPROPER JOINDER IN EXTREME CASES LIKE THIS ONE WHERE THE STATE WAS ABLE TO PRESENT TO THE JURY EVIDENCE AND TESTIMONY FROM THIRTEEN COMPLAINING WITNESSES ALLEGING THIRTY-SIX CRIMINAL ACTS.

Holtzclaw's case is emblematic of numerous cases of mass sexual assault allegations against targeted individuals. The lower courts need direction on how to prevent the accused from being prejudice from improper joinder of offenses, as Holtzclaw was in this case, by the sheer number of disparate allegations of which lead the public and the courts to conclude, erroneously, that the accused is guilty of at least some of the charges.

As the First Circuit has observed, one of the dangers of joining offenses with a disparity of evidence is that the State may be joining a strong evidentiary case with a weaker one in the hope that an overlapping consideration of the evidence will lead to a conviction on all counts. *United States v. Clayton*, 450 F.2d 16, 19 (1st Cir. 1971). This was clearly the State's plan in Holtzclaw's case, and it worked.

The Oklahoma Court of Criminal Appeals found no error, concluding that Holtzclaw as charged with similar crimes, all occurring in a particular section of northeast Oklahoma City, over a span of just over six

months. Appx. A at ¶ 20. The court also rejected Holtzclaw's assertion that joinder of all counts denied him a fair trial. *Id*. ¶ 22. The court reached this conclusion despite the fact that "the prosecutors repeatedly referred to the victims' testimony as a whole." *Id*.

The court cited the fact that jurors acquitted Holtzclaw entirely of charges against five of the complaining witnesses and in part on another two. According to the OCCA, this was evidence that the jury considered the counts individually and carefully; however, Holtzclaw asserts that the admonition of the First Circuit in *Clayton* bears repeating here and applies: what the State really did is join weak cases with ones slightly less weak in the hope of convicting on all of them.

In addition, there is overlap with the DNA evidence. The OCCA concluded that the DNA evidence impacted only the allegations made by A.G., and had no bearing on the counts associated with other complaining witnesses. Appx. A at ¶ 45. Holtzclaw is skeptical that this can be so. The OCCA ignored the disparity of evidence by failing to recognize that DNA evidence is given disproportionate weight by jurors.

In addition, after the trial, jurors told the press that the DNA evidence was highly influential not only with regard to the allegations made by A.G., but with regard to the allegations made by the other complainants.

Remember that Holtzclaw was a police officer on patrol. He patrolled the area where the complainants worked and lived. There was thus substantial evidence

corroborating his contact with these women as part of his job. This is not surprising because detectives acquired the identities of ten of the complainants by using the police department records of Holtzclaw's whereabouts during his shifts, and to procure allegations specifically from at-risk African-American women, most with significant criminal histories. As explained by appellate counsel, "[T]he alleged victims did not, in most cases, come forward of their own volition, but rather did so only after they were sought out, interrogated, and in some cases, badgered by police detectives on a mission."

Except for the DNA evidence involving A.G., the other allegations were supported by nothing more than the bare testimony of the complaining witnesses–most of whom were addicted to drugs, and had criminal records including crimes involving deceit and dishonesty.

It strains credulity to believe that the State would have obtained the convictions that it did had the cases not been joined. As Holtzclaw argued below, the State was able to bootstrap poorly supported accusations with those of more credible witnesses and evidence–and especially the DNA evidence in one case.

As outlined, *supra*, the prosecutor took liberties with the DNA evidence by telling the jury that the swab from the fly of Holtzclaw's pants was from vaginal fluid from A.G.–even though DNA science cannot prove that; and in fact shows that it was more likely a non-intimate transfer from Holtzclaw's interaction with her and handling her purse as he searched it. The defense presented an affidavit on

appeal by its DNA expert, Dr. Spence, that sets forth how the jury was misled fundamentally by the statements and misstatements of the prosecutor and the State's forensic expert about the DNA evidence.

Another example is that the State's expert, Elaine Taylor, testified that the swabs from Holtzclaw's pants excluded him as a donor. This was false because the DNA data were inconclusive on this point, and even the OCCA recognized that Taylor "may have either misinterpreted or misstated her own findings regarding the possible presence of male DNA as a contributor to the DNA samples found on the different pant swabs." Appx. A at 46. The prosecution then used this false claim to argue to the jury unscientifically in favor of the presence of vaginal fluid on the fly of Holtzclaw's pants, on which nothing suspicious was observed by Taylor.

Another fundamental problem is that the Information (the accusatory document) joined dissimilar counts, some of which were not sexual in nature (burglary and stalking). Thus, it is clear that joinder here was improper, the real question is whether there was prejudice.

This Court has held that in order to establish prejudice, "a defendant must point to a 'specific trial right' that was compromised or show the jury was 'prevented...from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993); *see also United States v. Pursley*, 474 F.3d 757, 766 (10th Cir. 2007).

Holtzclaw asks this Court to grant review to consider whether the level of evidentiary presentation by the State crossed a constitutional threshold. Thirteen separate complaining witnesses telling the jury about thirty-six different types of crimes (burglary, stalking, rape, procuring lewd exhibition, forcible sodomy), combined with the prosecution's misrepresentation of the DNA evidence, must necessarily have prevented the jury from making a reliable judgment about guilt or innocence.

Holtzclaw is not aware of a case from this Court that has granted relief on facts like his case under the *Zafiro* standard. Review is proper on this issue to provide the lower courts a proper constitutional framework within the Fourteenth Amendment on how to analyze properly claims of prejudicial joinder involving multiple claims from multiple complainants.

CONCLUSION

For the reasons stated above, the Petitioner prays respectfully that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

JAMES L. HANKINS
Counsel of Record
Timberbrooke Business Center
929 N.W. 164th St.
Edmond, Oklahoma 73013
(405) 753-4150
jameshankins@ocdw.com

Counsel for Petitioner

DATED this 30th day of December, 2019