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.	)	

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,
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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