

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

TABITHA BARNES, <i>et al.</i> ,)	
)	
<i>Plaintiffs,</i>)	
)	
vs.)	Case Nos.: CIV-16-19-HE
)	CIV-16-184-HE
DANIEL HOLTZCLAW, <i>et al.</i> ,)	CIV-16-349-HE
)	CIV-16-412-HE
)	
<i>Defendants.</i>)	

**DEFENDANT HOLTZCLAW’S MOTION AND BRIEF TO
RECONSIDER DENIAL OF MOTION TO COMPEL DISCOVERY; AND
TO STAY THESE PROCEEDINGS IF RECONSIDERATION IS DENIED**

Respectfully submitted,

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 RECONSIDER DENIAL OF MOTION TO COMPEL DISCOVERY; AND
 TO STAY THESE PROCEEDINGS IF RECONSIDERATION IS DENIED**

Defendant Daniel Holtzclaw, through the undersigned counsel, moves the Court reconsider its Order (Doc. 399 in CIV-16-184-HE, filed November 10, 2021) denying, in substantive part, his motion to compel discovery material from the City of Oklahoma City (Doc. 347 in CIV-16-184-HE, filed August 31, 2021); and to issue a STAY of these proceedings if reconsideration is denied so that Holtzclaw may take up a writ.

The Court’s Order denying discovery contravenes the low threshold of discoverability under Rule 26(b), is based upon invalid and speculative considerations relating to the underlying state criminal case, and would deprive

Holtzclaw of a fair opportunity to defend against the allegations leveled against him.

Holtzclaw thus moves this Court to reconsider its decision and compel the City to produce or allow access to, the uniform pants and belt, the DNA extracts and controls from the fly of the pants and from Holtzclaw, the associated DNA raw digital files, digital photographs of the pants, the DNA profiles of Det. Gregory and Nathaniel John Davis, and the written review prepared by Campbell Ruddock.

FACTUAL BACKGROUND

Holtzclaw maintains his actual innocence of the allegations against him, specifically those made by Plaintiffs Lyles and Morris, who allege that he assaulted them sexually through the unzipped fly of his buckled uniform pants. The requested discovery material is relevant to refute the allegations of oral sodomy and rape made by Lyles; and the allegation of oral sodomy made by Morris, all of which Holtzclaw was acquitted at the state criminal trial.

In denying the motion to compel, this Court appears to have made a legal error by applying a standard of evidentiary relevance rather than the much more relaxed standard of discoverability under Rule 26. *See* Doc 399 at 3-4 (requested material directly relevant to Gardner allegations, “somewhat marginal” to the claims in this case; and concluding that “the marginal relevance and relatively speculative nature of the information sought for use in resolving the claim of Plaintiff Lyles is

outweighed by the competing considerations of remoteness and the need to avoid jeopardizing the evidence for use in a potential criminal re-trial.”)

The information requested by Holtzclaw is discoverable because it relates directly to the sexual assault allegations of Lyles and Morris because it would allow him to prove that there was no evidence of visible or latent body fluid stains on the fly of the uniform pants.

The requests for the pants and high-resolution digital photographs are necessary to address the allegations of Lyles, who alleged that she was sexually assaulted through the unzipped fly of the pants *on the day that the pants were seized as evidence by the police*.

As to Morris, police obtained a buccal swab of her DNA upon the belief that her biological material might be found on the fly of the pants six weeks after the alleged crime.

As to Det. Gregory, he likely contaminated the pants, on videotape, with both his own DNA and biological material from Morris when he handled a paper form from the case file and a pen, and then inserted his bare hand into the evidence bag into which Holtzclaw placed his pants and belt.

In addition to direct evidence of sexual assault, the requested evidence is needed by Holtzclaw to prove that non-intimate DNA transfer is the best explanation

for the DNA profiles from the fly of the pants, which included not just a complete DNA profile of Plaintiff Gardner, but also an unknown male and unknown female DNA profiles that were inconclusive, ergo: those profiles may have derived from Lyles, Morris, Holtzclaw, Det. Gregory, or Nathaniel Davis (an individual pat-searched by Holtzclaw prior to the interaction with Lyles).

If any of them are DNA contributors, without any evidence of body fluid, this fact would support Holtzclaw's innocence defense that the DNA transfer was conducted in a non-intimate, non-sexual manner. This is also why analysis by Holtzclaw of the DNA raw data files to learn about the identity of the unknown male contributor(s) is important because the presence of a male DNA contributor on the pants proves that a non-sexual transfer of female DNA was possible.

Finally, the written review by Campbell Ruddock would impeach police investigators for failing to realize that the female DNA profiles from the fly and the uniform pants were explained by non-intimate DNA transfer via Holtzclaw's hands after the pat-searches and restroom breaks (whereas police believed, instead, unscientifically that the female DNA profiles meant that Holtzclaw was guilty of sexual assault rather than innocent non-intimate contact).

Reconsideration is warranted based upon the following points:

A. The Evidence Relates to Morris and Lyles, not just Gardner.

Recall that Plaintiff Ligons accused Holtzclaw of oral sodomy committed on her through the unzipped fly of his buckled uniform pants during a traffic stop on June 18, 2014. The DNA expert employed by the City, Dr. Elaine Taylor, was tasked with determining if any forensic evidence could be found on the pants.

She saw no visible evidence of this, so she swabbed the fly on four stretches of fabric by the zipper, which resulted in four extracts containing DNA. *See* Doc. 379, attachment 2 at 9-10 (opinion summary by Holtzclaw expert Dr. Michael J. Spence).

A major contributor in three of these four extracts was matched to Gardner, but this does not mean that the DNA evidence relates to Gardner only. There were also female profiles not matched to Gardner which could have come from Lyles or Morris; in addition to a male DNA profile. *See* attached Exhibit 1 at 5, 12, 16-18, and 23-28.

The reason why the materials requested by Holtzclaw are discoverable is that the DNA profile of Lyles would be expected on the pants if he had in fact sexually assaulted her; and they are discoverable as to both Lyles and Morris because the DNA evidence consists of mixtures of DNA from at least three persons, which may include Lyles or Morris.

The pants and the digital photographs are important because Taylor analyzed

the pants using only a bright light and a magnifying glass. She conducted no tests for latent body fluids that may not be visible to the naked eye, event though testing for body fluids was a crucial step because clothing stains are expected after sexual contact, and DNA without body fluids supports a non-intimate DNA transfer explanation because non-intimate female DNA can transfer from a female's face and hands via a man's hands to his underpants and even his genitals. *See* attached Exhibit 2 (Jones & Scott article) at 109; *see also* Exhibit 3 (Jones, et al.) at 94-95.

This is important to the defense of Holtzclaw to show that any DNA material on his pants, either from a Plaintiff or an unknown male, is explained best by non-intimate indirect contact transfer, *e.g.*, a pat search like the one performed here pursuant to the way Holtzclaw was taught. *See* attached Exhibit 4 (Holtzclaw deposition).

While Taylor matched correctly the unknown female complete DNA profile to Plaintiff Gardner, she failed to conduct probabilistic genotyping to investigate the likely identities of the unknown female and male contributors; rather, she excluded Holtzclaw incorrectly from DNA mixtures that were inconclusive. Because they were inconclusive, no one could be excluded.

Her scientifically invalid conclusions were, in turn, utilized by Taylor at the criminal trial to bolster the explanation that the female DNA profiles (which may

derive from Lyles or Morris) transferred in body fluids during a sexual assault, as opposed to a non-criminal transfer via Holtzclaw's hands. *See* Doc. 379, attachment 2 at 9-12 (opinion summary by Holtzclaw expert Dr. Michael J. Spence).

This requested evidence is pertinent to refute the allegations of Lyles because testing the pants and viewing the digital photographs may show that there is no evidence of body fluids on the fly of the pants. In this Court's order denying the motion to compel, this Court failed to mention and thus consider, the issue of body fluids and whether any were found.

The timeline of the allegations of Lyles shows that she alleged that she was raped vaginally by Holtzclaw through the unzipped fly of his uniform pants at approximately 1:40 a.m. for "probably like 20 or 30 minutes" on the morning of June 18, 2014. *See* attached Exhibit 5 (Lyles trial testimony) at 3626-28. If this was true, the presence of body fluids, including visible staining, would be expected.

Research by Sarah Jones *et al.*, found that when men had unprotected sexual intercourse for two minutes without ejaculation and then pulled on their underwear, "visible staining was found on the underwear." *See* Summary of Opinions by Dr. Michael Spence at 6; attached Exhibit 3 at 95. This would mean that a finding of no stains would support Holtzclaw's innocence.

Moreover, the timing is again important. The multiple sexual assault

allegations leveled against Holtzclaw culminated during his final overnight shift as a police officer on June 17, 2014, when he was later accused of assaulting Gardner, Lyles, and Ligons—all through the unzipped fly of his buckled uniform pants.

On June 17, 2014, at 7:00 p.m., Holtzclaw questioned and pat-searched Gardner, Nathaniel Davis, and a woman called Melodie Coleman before he was accused of raping Gardner at 9:30 p.m. Holtzclaw was accused of raping Lyles just four hours later, on June 18, 2014, between 1:36 a.m. and 1:47 a.m (when the police tracking software showed that his patrol car was motionless), which is an 11-minute time span during which Lyles testified that she was raped for “probably like 20 or 30 minutes,” and then also sodomized orally through the unzipped fly of the pants. *See* Exhibit 5 at 3626; *see also* attached Exhibit 6 (Det. Davis trial testimony) at 3707-09, and attached Exhibit 7 (Patrol car AVL 06.18.2014).

Holtzclaw was then accused of stopping Ligons on June 18, 2014, at 2:00 a.m. and committing oral sodomy on her. Ligons reported this assault that morning, which led Det. Gregory to obtain Holtzclaw’s uniform pants and belt that afternoon when he was questioned.

Second, the high resolution digital photographs are important not only because Holtzclaw needs them to analyze whether there was any visible stains on the pants, but also because the City has provided only PDF scans of black and white prints of

the pants, no color and with streaks left from the printer, with little to no evidentiary value.

Holtzclaw asserts that this is obviously intentional on the part of the City. The digital photographs exist because Taylor testified that they did during her deposition, and that she sent digital copies of the photos to the State prosecution team on a DVD because the files were so large. *See* Doc. 379 exhibit 1 at 157-58.

Third, the pants are required for body fluid testing because Taylor did not view the pants with an Alternate Light Source (which causes body fluids to fluoresce), neither did she conduct any body fluid tests at all to determine if latent body fluid stains (not visible to the naked eye) such as small quantities of saliva or vaginal fluids, were present on the fly of the pants. *See* attached Exhibit 8 at 4083-84 (trial testimony of Elaine Taylor).

Taylor's stated reason at trial for not testing the pants for body fluids was that when she conducted the forensic testing she thought the allegations were all oral sodomy. *Id.* 4064. She also gave a false rationale for not testing for body fluids, agreeing with the prosecutor that there are no presumptive tests "to determine...if there was fluid in the transfer if it's saliva, urine, vaginal fluids," which is false because such tests exist. *Id.* 4065.

Finally, Taylor admitted during her deposition in this case that when she tested

the fly of the pants she was not looking for a liquid such as saliva, but was instead looking specifically for touch DNA from the hands of Plaintiff Ligons that she surmised should be there from the alleged sodomy. *See* attached Exhibit 9 at 54-55, 98 (Taylor deposition).

- B. The evidence is pertinent to the Morris allegations because those allegations can be refuted by a lack of body fluid and contamination by Det. Gregory.

This Court denied Holtzclaw's efforts to obtain discovery material in the possession of the City relating to the allegation of oral sodomy by Plaintiff Morris because, "[T]he alleged conduct as to Morris was almost six weeks before the date Holtzclaw's pants were seized by investigators and any suggestion that further examination now would reveal relevant information is extraordinarily remote and borders on pure speculation." Doc. 399 at 4. This Court should reconsider this ruling for two reasons.

First, although this Court expresses skepticism about the prospects of such evidence being on the pants at this point, detectives investigating Holtzclaw had no such skepticism, and in fact believed that biological material from Morris could have transferred to the fly of the pants. This is the reason that Det. Gregory collected the buccal swab DNA from Morris for comparison analysis after "it was learned that unknown [female] profiles were found on SU Holtzclaw's outside pants zipper flap."

See attached Exhibit 21 at 1 (OCPD report).¹

Second, this Court has overlooked the fact that, disregarding the timing of the allegations made by Morris, Det. Gregory interacted with her, jointly handling paper and a pen on June 3, 2014, prior to when Det. Gregory interrogated Holtzclaw on June 18, 2014, and handled paperwork related to Morris, creating the potential that Det. Gregory contaminated the inside of the evidence bag with his not only his DNA, but also that of Morris, when he inserted his bare hand inside the bag immediately before Holtzclaw placed his pants and belt inside. *See* attached Exhibit 11 (screen shots of Det. Gregory's bare hand inside the evidence bag).

The point is that, by doing this, Det. Gregory's DNA and that of Morris is likely to have transferred from the inside of the bag to the pants and belt as they were placed inside the bag. Even lead detective Kim Davis testified during her deposition that Det. Gregory should not have stuck his hand inside the evidence bag. *See* attached Exhibit 12 at 107, 109-10 (Davis deposition).

Recall that Holtzclaw was acquitted at the state criminal trial of the allegations made by Morris. She alleged that on May 24, 2014, she was orally sodomized on

¹ In fact, police acquired buccal swabs from several women who alleged sexual assaults even earlier than Morris: Plaintiff Ellis (May 7, 2014), Plaintiff Copeland (April 25, 2014), Plaintiff Grate (April 24, 2014), and an accuser Ms. Mathis who alleged that her breasts were groped (April 14, 2014).

May 20 or May 21, by an unknown white police officer, dark-skinned, around 40-years-old driving an old black-and-white police cruiser at a city location far from where Morris interacted on May 8 with Holtzclaw, who is Japanese-American, light-skinned, 27-years-old at the time, and drove a brand-new all-black police cruiser at the time. *See* attached Exhibit 13 at 1 (OKCPD report).

On June 3, 2014, Morris signed a “Refusal to Prosecute” form in the presence of Detective Gregory. *See* attached Exhibit 14 at 1 (OKCPD report). The videotape shows that on that day, Det. Gregory interacted for more than 20 minutes with Morris, and that he touched both the “Refusal to Prosecute” form that she had signed as well as the pen that she used to sign it.

The point is that when Morris handled the form and the pen, this created DNA transfer routes by which her DNA could have transferred to Det. Gregory’s hands prior to the time that he interrogated Holtzclaw on June 18 and then inserted his bare hand into the evidence bag before placing the pants and the belt; not to mention that yet a second DNA transfer route was created when Det. Gregory questioned Holtzclaw about Morris and he carried paperwork related to her case and a pen that he gave to Holtzclaw.

- C. Plaintiff Lyles and Morris may be contributors to the inconclusive female DNA profiles obtained along with unknown male DNA from the fly of Holtzclaw’s pants.

The key aspect of the DNA evidence in this case is that it was a mixture of DNA from several persons, including at least one unknown female and at least one unknown male. The identities of these male and female contributors are unknown because the DNA data are inconclusive. This means that the data do not allow a conclusion about whether or not any particular person is a contributor because the profiles were an “indistinguishable mixture” or “not suitable for comparison purposes.” *See* attached Exhibit 8 at 4040-44, 4056, 4069-72 (Taylor trial testimony).

This means that it is possible that the unknown DNA may have been derived from Lyles, Morris, Holtzclaw, Det. Gregory, or Nathaniel Davis (who was pat-searched by Holtzclaw just hours before stopping Lyles).

Holtzclaw expert Dr. Gill *et al.*, state, “Calculating the weight of evidence towards exclusion of DNA from Mr. Holtzclaw or any of the complainants from the four DNA mixtures, for which allele drop-out was a possibility, can only be carried out by using a probabilistic statement such as a likelihood ratio (LR), which was not utilized by the OCPD forensic analyst.” *See* attached Exhibit 1 at 24.

This means that the request by Holtzclaw to access the DNA evidence is justified in order to allow his experts to perform the probabilistic genotyping that Taylor failed to perform.

- D. Taylor bolstered an unscientific argument that body fluid transferred the unknown female DNA when she excluded incorrectly Holtzclaw and Lyles from the inconclusive DNA profiles obtained from the fly of the pants.

Taylor's most damaging, unscientific error at trial was the she repeatedly excluded Holtzclaw from being a contributor to the DNA from the fly of the pants, not once, but seven times during the state criminal trial, even though the DNA were inconclusive and she thus could not have scientifically justified excluding Holtzclaw as being a contributor. *See* attached Exhibit 8 at 4056-59, 4071-73, 4084, 4087, and 4089.

This erroneous testimony is significant because Taylor and the State claimed at the criminal trial that Holtzclaw's DNA was absent, an absence which she asserted was "very difficult to try and explain," which was used to bolster her conclusion that there was a "very good possibility" that the female DNA transferred in a liquid such as vaginal fluid rather than non-intimate DNA transfer via hands.

Holtzclaw's DNA experts and others from around the world have realized the error made by Taylor and have criticized her for testifying repeatedly that she could exclude potential contributors from DNA profiles that are inconclusive. *See* attached Exhibit 1 at 23-26.

Moreover, Taylor bolstered this incorrect conclusion when she testified that

there was no evidence of male DNA in the two DNA extracts from the inside of the fly of Holtzclaw's pants when her own data show that male DNA was detected when she quantified the amount of DNA in both extracts. *See* Doc. 379, attachment 2 at 11-12 (opinion summary by Holtzclaw expert Dr. Michael J. Spence).

Taylor also failed to note that both DNA extracts have many alleles in common with Holtzclaw, which suggests that some, but not all, of his genetic regions may have been detected. *Id.*

Taylor also ignored the exculpatory significance of the unknown male DNA (containing "Y" chromosomes) that she testified was found in one of the DNA extracts from an outer surface of the fly of the pants, but was actually found in all four DNA extracts. *Id.* 9; *see also* Exhibit 8 at 4044, 4056, 4073.

Obviously, males do not make vaginal fluid, which means that the male DNA transferred *without* vaginal fluid to the fly of the pants. The unknown male DNA is thus significant because it proves that non-intimate (that is, non-vaginal fluid) routes exist to explain how female DNA, possibly derived from Lyles or Morris, transferred to the fly of the pants.

Finally, Taylor erred yet again in her trial testimony in the state criminal case when she testified that she found no DNA evidence from Lyles around the zipper area, meaning that Lyles was excluded from being a potential contributor to the DNA

extracts from the fly of the pants, which was contradicted her earlier, correct, testimony that the unknown DNA profiles were “not suitable for comparison purposes,” *i.e.*, are inconclusive. *See* Exhibit 8 at 4056, 4081-82.

Taylor’s error in excluding Lyles is significant because the exclusion hid the possibility that the DNA mixtures include a low level of DNA from Lyles on the fly of the pants, without visible evidence of body fluid, which supports a non-intimate contact explanation for the possible presence of the DNA of Lyles (e.g., transfer from the pat-search of Lyles by Holtzclaw), as opposed to an explanation preferred by the State and the Plaintiffs in this civil action that involves sexual assault.

- E. The DNA extracts, raw data, Holtzclaw’s DNA, and DNA profiles of Det. Gregory and Davis are needed to investigate how unknown male and female DNA transferred to the pants.

These materials are needed by Holtzclaw for him to conduct statistical analyses to determine the likelihood of the evidence if Lyles, Morris, Holtzclaw, Det. Gregory, or Nathaniel Davis are contributors. This means that finding a high likelihood that they are contributors, plus the absence of evidence of body fluids, would support the conclusion that the DNA evidence is the result of non-intimate indirect transfer.

The testing sought to be conducted by Holtzclaw is pertinent to the allegations of Lyles and Morris for the following reasons:

First, the four DNA extracts, associated control samples, and Holtzclaw’s DNA

are needed for Y-chromosome genetic testing to discover the minimum number of male contributors and, like paternity testing, to learn whether Holtzclaw is likely a contributor. These results would show whether DNA from a male who is not Holtzclaw is present on the fly of the pants, which would prove a non-intimate route for the *female* DNA to be there as well.

Second, the raw digital “GeneMapper” files associated with the four DNA extracts from the fly of Holtzclaw’s pants are needed for probabilistic genotyping to calculate how likely the DNA profile evidence is if Lyles, Morris, Holtzclaw, Det. Gregory, or Nathaniel Davis are contributors of the DNA profiles.

These results could help explain how female DNA may have transferred without sexual contact to the fly of the pants, as well as refute the conclusion of Taylor that female DNA was more likely to have transferred in body fluids.

Third, Holtzclaw requests Det. Gregory’s DNA profile (not his DNA) because comparing it to the DNA profiles from the pants may support the assertion that Det. Gregory contaminated the pants through non-intimate DNA indirect transfer of his own DNA (and perhaps that of Morris) when he inserted his bare hand into the evidence bag.

The objections of this Court to this request appear to have been based on misunderstandings. First, this Court stated that “no discovery request for DNA

samples via Rule 35 was made prior to filing the motion to compel at the conclusion of the discovery period,” and, second, “The City indicates, and Holtzclaw does not appear to dispute, that it does not have existing records as to the DNA of Gregory or Davis.” Doc. 399 at 5.

To clarify, Holtzclaw does not request that Det. Gregory submit to a DNA sample such as a buccal swab; rather, Holtzclaw requests that the OCPD DNA lab produce his DNA or DNA profile because he testified during his deposition that the lab had a reference sample of his DNA and it may have been used to obtain his DNA profile. *See* attached Exhibit 10 at 146-47 (deposition of Det. Gregory).

Finally, Holtzclaw requests the DNA profile of Nathaniel Davis to analyze the possibility that he contributed to the unknown male profiles as a result of the pat search conducted on him by Holtzclaw on June 17, 2014, just hours before Holtzclaw had interacted with Lyles. No physical sample of DNA from Davis is required because his DNA profile should have already been acquired by the police department under Oklahoma law after his felony conviction in 2009. *See* attached Exhibit 16 (criminal docket); *see also* 74 O.S. § 150.27A.

- F. The written review of Taylor’s trial testimony by Campbell Ruddock is pertinent to the claims of Lyles and Morris because it will help prove faulty DNA analysis caused investigation flaws.

Holtzclaw requests release of the written review prepared by OCPD lab

manager Campbell Ruddock because it contains impeachment evidence against the testimony of Taylor and detectives for concluding incorrectly that the female DNA profiles on the pants were explained best by sexual body fluid transfer rather than non-intimate DNA indirect transfer.

In this Court's Order denying Holtzclaw's motion to compel this review, the Court stated, "It is unclear from the current submissions who or what initiated Ruddock's review of Taylor or how that relates to the court review apparently triggered by the Court of Criminal Appeals' consideration of Holtzclaw's appeal." Doc. 399 at 5.

Ruddock's review came into existence between February 1, 2017, and early April, 2017, because he was asked to write a review of Taylor's trial testimony because Holtzclaw had filed his appeal brief on February 1, 2017, which included a legal claim criticizing Taylor's testimony and conclusions.

Initially, the state Attorney General agreed to turn over the review to Holtzclaw because it contained information relevant to his legal claims concerning Taylor on direct appeal. *See* attached Exhibit 16 at 2. In early April, 2017, OCPD shared the review with outside entities including the Oklahoma County District Attorney and the Oklahoma Attorney General. *See* attached Exhibit 17 at 6, 7.

The state Attorney General then notified the Oklahoma Court of Criminal

Appeals and appellate counsel for Holtzclaw that they had come into possession of information related to Taylor, some of which they agreed should be turned over to Holtzclaw. *Id.* The materials turned over involved “an internal review of former Oklahoma City Police Department Chemist Elaine Taylor’s testimony in Appellant’s trial.” *See* attached Exhibit 18 at 2, 3.

The Oklahoma Court of Criminal Appeals then ordered an *in camera* hearing by the district court to decide if Ruddock’s written review and other exhibits related to Taylor should be considered protected personnel files. *Id.* What actually happened was an *ex parte* hearing held by the district court, which held ultimately that the written report was a protected personnel file and that the appropriate entity to decide its release is the City of Oklahoma City, rather than the Oklahoma Court of Criminal Appeals. *See* Exhibit 17 at 16.

The City has thus far refused to allow release of the written review.

Holtzclaw asserts that this written review contains evidence impeaching the work and testimony of Taylor because the deposition of Campbell Ruddock reveals that this is true. *See* Doc. 379, attached Exhibit 3 (deposition of Campbell Ruddock) at 15, 25-26, 29-30, 45.

Ruddock testified in his deposition that there is an innocent explanation for the DNA on Holtzclaw’s pants, and, at the time of his verbal review of Taylor’s

testimony in the state criminal trial, prior to his written review, he thought that Taylor gave too much weight to the possibility that vaginal fluid was the cause of the female DNA, and not enough weight to the possibility that there was an innocent explanation for the presence of DNA on the fly of the pants. *Id.*

Therefore, Ruddock's written review, which he created after his verbal review of Taylor's testimony in the state criminal trial, should contain these critiques as well as others that he gave in his verbal review, according to his deposition testimony. The written review should contain even more criticisms of Taylor that Ruddock testified about in his deposition because the City refused to allow Ruddock to discuss any aspect of the written review during his deposition, going so far as to prevent him from discussing whether he agreed with another DNA expert who was critical of Taylor's testimony. *Id.* 15, 16, 21-23.

Holtzclaw also requests the written review in order to impeach the investigative flaws of the OCPD detectives who believed incorrectly that the female DNA profiles equated to the guilt of Holtzclaw. *See* attached Exhibit 12 (deposition of Davis) at 115-16, 119-20; Exhibit 10 (deposition of Gregory) at 115-16, 119-20; Exhibit 20 (deposition of Lt. Muzny) at 225-27. In fact, the depositions of Det. Davis and Lt. Muzny reveal that they were not even aware that unidentified male DNA was found on the fly of the pants. Exhibit 12 at 109-10, 261-62; Exhibit 20 at 227.

The serious flaws in the investigation conducted by the OCPD are described in the crime scene analysis and case linkage report completed by defense criminologists Dr. Turvey and Dr. Mares, who concluded that there existed substantial investigation errors and negligence of the OCPD investigation. *See* attached Exhibit 19 at 16, 18-19, 21-22, 25-26.

The primary investigative flaw was that, because detectives believed that the presence of the female DNA profile meant that Holtzclaw was guilty, detectives thus used improper investigative methods as they searched for the female who matched the DNA profile even when women were interviewed in vulnerable states, such as being in jail, thus increasing the risk that women interviewed would seek ways to cooperate or would misidentify Holtzclaw as the assailant.

A prime example of this is Morris, who was interviewed by Det. Gregory in jail, and then changed her story to match the suggestions offered to her by Det. Gregory (she changed the location of her alleged assault to match the location suggested by Det. Gregory to a place where he knew that Holtzclaw had made contact with her).

G. Chain of custody and consuming evidence.

This Court had concerns about chain of custody issues and the possible destruction of evidence. Doc. 399 at 3. Holtzclaw clarifies that there should be no

issues involving chain of custody, and no evidence will be consumed.

Viewing the pants with an Alternate Light Source will not destroy the pants or any potential body fluids; and body fluid testing would require only swabbing a small area. Counsel was in error at the hearing when he stated that fabric of the pants would need to be cut. This is incorrect. Swabbing would take place, not cutting fabric, and of course, digital photographs, digital data files, and DNA profiles are electronic records that are easily duplicated without any risk of destruction of the source material.

BRIEF IN SUPPORT

Discovery of information under Rule 26(b) is wide and deep, and information within the scope of discovery need not even be admissible in evidence to be discovered. Rule 26(b)(1). As the Notes to the Rule make clear, discovery is meant to be broad in scope, and not a corollary to relevance under the rules of evidence.

The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469 (2nd Cir. 1943).

The Order of this Court denying Holtzclaw's motion to compel is too restrictive under Rule 26, and without the key DNA information and materials requested from the City, Holtzclaw will not be able to defend the allegations.

Thus, in the event this Court denies his motion for reconsideration, Holtzclaw moves for a stay of these proceedings so that he may pursue extraordinary relief in the Tenth Circuit Court of Appeals.

WHEREFORE, good cause having been shown, Defendant Holtzclaw moves for reconsideration of the denial of his motion to compel discovery from the City; and to a stay of these proceedings in the event his motion is denied so that he may seek extraordinary relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2021, I filed the foregoing document with the Clerk of this Court and that, based upon the records on file in this case, the Clerk of Court will transmit Notice of Electronic Filing to those registered participants of the Electronic Filing System.

s/ James L. Hankins