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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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STATE OF OKLAHOMA

JUN 11 2018

DANIEL K. HOLTZCLAW, )  
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 Appellant, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

Case No. F-2016-62

MOTION TO UNSEAL THE PROCEEDINGS

Appellant, Daniel K. Holtzclaw, by and through his undersigned appellate counsel, respectfully requests clarification of this Court’s June 8, 2018, Order Granting Motion to Unseal Documents and Setting Briefing Schedule (hereinafter “Order”). In this Order, the Court granted Appellant’s Motion to Unseal Proceedings, filed in this Court on August 2, 2017, which requested all pleadings, with the exception of the allegedly confidential information filed under seal by the State of Oklahoma on May 4, 2017. *See* Order at 3-4. On the other hand, the Court upheld the trial court’s determination 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.”<sup>1</sup> *Id.* at 3. Nevertheless, the Court granted Appellant’s counsel permission to review the State’s original motion, “which remains under seal,” and gave Appellant thirty days to supplement his Application for Evidentiary Hearing, if necessary. *Id.* at 4.

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<sup>1</sup> Appellant respectfully maintains that this determination represents a misapplication of the Open Records Act, which states in pertinent part that “[a]ll records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction,” subject to narrow exceptions for information *required by law* to be kept confidential. OKLA. STAT. tit. 51, § 24A.5 (Supp. 2017). Section 24A.7(A)(1) does not *require* the described personnel records to be kept confidential. *See* Objection to Judge Henderson’s *Ex Parte* Findings of Fact and Conclusions of law at 4 (filed on August 29, 2017). Accordingly, these documents must be disclosed unless the pertinent agency, here the City of Oklahoma City, makes a determination that they should be kept confidential, not the other way around. As Appellant pointed out in the aforementioned Objection at page 8, the City of Oklahoma City’s conduct of releasing the documents at issue to multiple outside entities can only be interpreted as a decision *not* to keep these documents confidential.

Because the documents at issue pertain to complex scientific testimony (*i.e.*, DNA analysis), in order to determine whether it is necessary to amend the Application for Evidentiary Hearing, filed in this Court on February 1, 2017, counsel for Appellant must be able to disclose the contents of those documents to his retained expert, Dr. Michael J. Spence, Ph.D. Ideally, Counsel would like to send copies of the documents to Dr. Spence, so he can review them directly. However, so long as the documents remain under seal at the Court, this would be impossible. In fact, it is not even clear whether Appellant's counsel can, after reviewing the documents *in camera*, verbally relay the contents of those documents to Dr. Spence, since they "remain under seal." *Id.* at 3-4.

When the Court first remanded this case to district court for findings of fact and conclusions of law, the Court directed the district court to address the following issues:

1. Whether the information submitted with the State's motion is discoverable by Holtzclaw's appellate counsel and whether the information contains impeachment or exculpatory material;
2. If discoverable, which portions of the material are subject to discovery; and
3. The portions of discoverable material which are subject to the confidentiality statute governing personnel records.

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 at 5 (filed on May 30, 2017). In his amended findings of fact and conclusions of law, filed under seal in this Court on August 8, 2017, Judge Henderson found not only that the documents at issue are subject to the confidentiality statute but also that none of the documents were discoverable by appellate counsel. He concluded that some of the documents were

not discoverable because they had nothing to do with Mr. Holtzclaw's case<sup>2</sup> and that the other documents are not material, because there is no reasonable probability that the outcome of the trial would have been different.<sup>3</sup> This Court's June 8, 2018, Order does not address these findings. Even if the documents at issue are protected from disclosure by Title 51, Section 24A.7(A)(1), disclosure may still be required by the United States Constitution. *See Browning v. Trammell*, 717 F.3d 1092, 1095 (10<sup>th</sup> Cir. 2013); *see also 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, 31 L.Ed.2d 104 (1972); *United States v. Bagley*, 473 U.S. 667, 677, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985); *United States v. Abello-Silva*, 948 F.2d 1168, 1179 (10<sup>th</sup> Cir. 1991); *Anderson v. State*, 2006 OK CR 6, ¶ 28, 130 P.3d 273, 283. Because the Court's order did not address this issue, it is unclear to Appellant's counsel whether and how they may utilize any pertinent information in the documents at issue.


Accordingly, Appellant respectfully requests clarification on whether the contents of the documents at issue may be disclosed to Dr. Spence for review. Appellant further requests that he be allowed, subject to whatever protective orders this Court may deem appropriate, to forward copies of the documents at issue to Dr. Spence so that he may review them and inform counsel whether any of the information contained therein would warrant amending the Application for Evidentiary hearing previously filed in this Court.


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<sup>2</sup> Appellant would point out that even if certain documents pertain to work done on other cases, not Mr. Holtzclaw's, that information might still be fertile cross-examination material to the extent it goes to the quality of the work done by the State's DNA expert.

<sup>3</sup> As Appellant pointed out in his Objection at 9-11, the standard of materiality for purposes of a motion for new trial based on newly discovered evidence is not appropriate at the discovery stage. Moreover, because the material at issue will be but one small part of a broader claim of ineffective assistance of counsel pertaining to the DNA evidence presented at trial, should review by appellate counsel and/or Dr. Spence warrant amending the Application for Evidentiary Hearing, the question to be decided will be whether all the evidence presented to this Court, not just these documents, may have produced a different result at trial.

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