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FILED

IN THE COURT OF CRIMINAL APPEALS IN COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA STATE OF OKLAHOMA

APR 20 2017

DANIEL K. HOLTZCLAW,)	Case No. F-2016-62	MICHAEL S. RICHIE
<i>Appellant,</i>)		CLERK
)	District Court of Oklahoma County	
v)	Case No. CF-2014-5869	
)		
THE STATE OF OKLAHOMA,)		
<i>Appellee.</i>)		

PETITION FOR REHEARING

Amici Curiae Prof. Randall T. Coyne and J. Christian Adams, by and through the undersigned counsel and pursuant to Rule 3.14 and Rule 3.4(F)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), respectfully file this Petition seeking rehearing of the Court’s March 31, 2017 Order denying them leave to submit an *Amicus Curiae* brief.¹ In support of their Petition, *Amici* state:

1. *Amici* through counsel on March 9, 2017 filed a Motion for Leave to submit an *Amicus Curiae* brief in connection with Issue III raised in Appellant Holtzclaw’s brief. *Amici* fully complied with Rule 3.4(F)(4) by setting out with specificity the basis in both law and fact why the brief would be of assistance to the Court in deciding this appeal. Necessarily, because the court rule forbids filing the *Amicus* brief until leave is granted, the Motion provided only a one-page synopsis of the brief’s substance, ¶¶ 5-6, along with background about the credentials and interest of *Amici*, ¶¶ 2-4, rather than trying to end-run the court rule by stating extensive portions of the proposed brief’s contents.

¹ Although Rule 3.14(A) speaks of rehearing from “the opinion,” rehearing also may be sought from an order. See *Tiger v. State*, 1995 OK CR 59, 907 P.2d 1075, 1076.

2. On March 21, 2017, the Attorney General filed an 11-page Opposition to the Motion. Remarkably, given that the State had never seen the proposed *Amicus* brief, the Opposition stated “it appears that *amici curiae* propose to make *exactly the same arguments as the defendant already has made with the same law and based upon the same facts from the record.*” Opposition, ¶ 3 (emphasis added). The State further alleged that in their proposed brief, *Amici* would be “reiterating the same arguments, authorities, and citations to the record,” thereby prejudicing it. *Id.*, ¶ 6.

3. On March 31, 2017, this Court entered an Order in which, after quoting the above passages from the State’s Opposition, pg. 1, it denied *Amici* leave to file their brief. *See* Opinion, attached as Attachment 1. Vice Presiding Judge Lewis dissented, noting that he “would accept the brief and then decide their issue.” *Id.*, pg. 2.

4. However, the assertion that the as-yet unseen *Amicus* brief “make[s] exactly the same arguments as the defendant already has made with the same law and based upon the same facts from the record,” is incorrect. *Amici* in their proposed brief provide a concise yet thorough discussion of a line of U.S. Supreme Court jurisprudence dating back more than a century, to *Frank v. Mangum*, 237 U.S. 309 (1915), and continuing through *Pena-Rodriguez v. Colorado*, 580 U.S. at ___ (March 6, 2017), in which the Supreme Court defined the parameters of the right to a fair trial free from outside influence, and reaffirmed the jury as “a criminal defendant’s fundamental protection of life and liberty against race or color prejudice.” *Pena-Rodriguez*, slip op. at 15 (citations omitted). In contrast, as the State concedes, Holtzclaw’s brief relies largely on a trio of cases decided in the five-year period of 1961-66. Opposition, ¶ 3 (citations omitted). Indeed, Holtzclaw’s brief was filed *five weeks before* *Pena-Rodriguez* was even issued. *Amici* submit that their detailed legal analysis, discussing several Supreme Court cases not cited by Holtzclaw,

including one that could not have been cited because it postdates his brief, will indeed assist this Court in its task of resolving this matter.

6. Similarly, the Attorney General's charge that the sight-unseen *Amicus* brief will be based "upon the same facts from the record," Opposition, ¶ 4; Order, pg. 1, also is incorrect. As stated in the original petition, the proposed *Amicus* brief directs the Court's attention to more than a dozen publicly available and judicially noticeable² news sources depicting the full extent to which the atmosphere in and around the courthouse during the trial took on a mob-like air, and inevitably enveloped jurors. While Holtzclaw's brief necessarily presents only those limited instances when the bedlam made it into the official record, the proposed *Amicus* brief *fully describes both its source and its significance under the Supreme Court's fair-trial jurisprudence.*

7. Of perhaps greatest import, and again contrary to the State's assertion, *Amici* do indeed assert "an interest of their own separate and distinct" from that of Holtzclaw. Opposition, ¶ 7, *quoting United States v. Barnett*, 376 U.S. 681, 738 (1964) (internal citations omitted). Neither *Amici* knows Holtzclaw or to his knowledge has ever met him or any of his family, and in sharp contrast to *both* of the actual parties to this appeal, neither *Amici* has an opinion about his guilt or innocence. Rather, as highly experienced constitutional and civil-rights practitioners of national renown, from vastly divergent political backgrounds, they are concerned that, in this age of social media and 24-hour news cycles, outsiders are increasingly bringing irresistible pressures to bear on jurors in high-profile criminal cases, in a manner that threatens the Sixth Amendment right to a fair trial. *See Note, Beyond the Verdict: Why Courts Must Protect Jurors from the Public Before, During, and After High-Profile Cases*, 89 Ind. L.J. 911 (Spring 2014) (describing outrage, harassment, and even death threats directed at jurors who acquitted defendants Casey Martin and

² *Linscome v. State*, 1978 OK CR 95, 584 P.2d 1349, 1350, *citing Frazier v. State*, 1953 OK CR 1, 267 P.2d 155.

George Zimmerman). “When a jury fears a public backlash from an unpopular verdict, and that fear finds its way into the jury room, the defendant’s Sixth Amendment right to a fair trial is compromised.” *Id.* at 916. *Amici* view the Holtzclaw trial as the latest troubling instance of juror intimidation in high-profile criminal cases, and thus they offer their brief to assist the Court in analyzing the nature of the fundamental right to a fair trial to which all Americans are entitled, so as to protect it.

8. One of two bases for seeking rehearing is that “[s]ome question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court.” Rule 3.14(B)(1). As the above discussion reflects, the legal and factual discussion contained in the proposed *Amicus* brief should be decisive of the fair-trial issue raised in this appeal. Yet it now has been overlooked as a result of the State’s inaccurate suppositions about, and descriptions of, *a brief it has never seen*. Certainly, this Court is free to disagree with the legal and factual discussion in the *Amicus* brief. But *Amici* respectfully suggest that, as Vice Presiding Judge Lewis indicated in dissent, the Court should first at least read the brief.

UPON THE FOREGOING and for just cause, *Amici Curiae* Prof. Randall T. Coyne and J. Christian Adams ask the Court to enter an Order granting this Petition and allowing them to file their proposed brief in this matter, within 7 days of the Order's entry.

Respectfully submitted,

RANDALL T. COYNE and
J. CHRISTIAN ADAMS

By:



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RANDALL T. COYNE and
J. CHRISTIAN ADAMS

Date: April 20, 2017

CERTIFICATE OF SERVICE

This is to certify that on April 20, 2017, a true and correct copy of the foregoing Petition for Rehearing was served upon the Attorney General by leaving a copy with the Clerk of the Court of Criminal Appeals for submission to the Attorney General pursuant to the Clerk's instructions and protocol, and served via United States Postal Service, first-class postage prepaid, to appellate defense counsel at the following address:

James H. Lockard, Deputy Division Chief
Michael D. Morehead, Appellate Defense Counsel
Homicide Direct Appeals Division
P.O. Box 926
Norman, Oklahoma 73070-0926



LAURA K. DESKIN

ATTACHMENT 1



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL K. HOLTZCLAW,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 31 2017

No. F 2016-0062

MICHAEL S. RICHIE
CLERK

ORDER DENYING MOTION TO FILE AMICUS CURIAE BRIEF

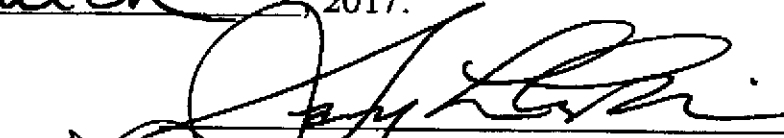
On March 9, 2017, Prof. Randall T. Coyne and J. Christian Adams, by and through counsel Laura K. Deskin, filed a motion for leave to file an *amicus curiae* brief in support of Appellant Daniel K. Holtzclaw. Movant states that the “proposed brief will assist this Court with regard to both the facts and the law in resolving the issue of whether Holtzclaw, under these unique and troubling circumstances, received a fair trial.”

On March 21, 2017, Appellee, by and through Matthew D. Haire, Assistant Attorney General, filed an objection. Appellee argues that “it appears that *amici curiae* propose to make exactly the same arguments as the defendant already has made with the same law and based upon the same facts from the record.” Appellee asserts that to permit the proposed *amicus curiae* brief “reiterating the same arguments, authorities and citations to the record unfairly and improperly permits the defendant more briefing space on an issue than his appointed attorneys chose to allot to it in his appeal” and that filing of such brief would be prejudicial to the State.


Rule 3.4(F)(4), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2017), directs that a motion to the Court requesting authorization to file an *amicus curiae* brief shall set out with specificity the basis in law or fact why an *amicus curiae* brief would be of assistance to the Court in deciding the issue presented. After reviewing the motion and the State's objection, Movant's request for leave to file an *amicus curiae* brief is **DENIED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 31st
day of March, 2017.



GARY L. LOMPKIN, Presiding Judge

 *Dissenting the brief and they decide this issue*

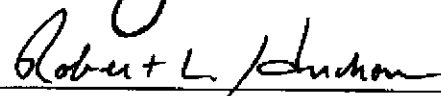
DAVID B. LEWIS, Vice Presiding Judge



ARLENE JOHNSON, Judge

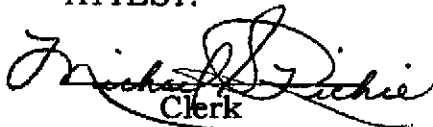


CLANCY SMITH, Judge



ROBERT L. HUDSON, Judge

ATTEST:


Clerk

NF