Case No. F-2016-62

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

DANIEL K. HOLTZCLAW

Appellant,

vs.

THE STATE OF OKLAHOMA

Appellee.

Appeal from the District Court of Oklahoma County
Case No. CF-2014-5869

BRIEF OF *AMICI CURIAE* RANDALL T. COYNE AND J. CHRISTIAN ADAMS IN SUPPORT OF APPELLANT

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Date: March 2017

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INTEREST OF *AMICI CURIAE*

Prior to his retirement in 2014, *amicus curiae* Randall T. Coyne was the Frank and Edna Asper Elkouri Professor of Law at the University of Oklahoma College of Law, and he is a past President of the Oklahoma chapter of the American Civil Liberties Union and two-time member of the ACLU's National Board of Directors. Prof. Coyne's scholarship and teaching have focused on constitutional law, criminal law and procedure, capital punishment, civil liberties, and terrorism. He has written extensively on issues of constitutional law and the death penalty, and served on the defense team in *United States v. Timothy James McVeigh*, and in 2005 led a team of lawyers representing two Muslim prisoners confined indefinitely as enemy combatants at Camp X-ray Guantanamo, Cuba; both were released in December 2007. For more than two decades he has served as Vice-Chair of the Committee on the Death Penalty of the American Bar Association's Section on Individual Rights and Responsibilities.

Amicus curiae J. Christian Adams served as an attorney in the Voting Section of the Department of Justice's Civil Rights Division from 2005 to 2010. In that capacity, he brought a wide range of election cases to protect African-American, Asian, and other minorities in states throughout the South, in matters involving vote-dilution, redistricting, and other issues. Mr. Adams also has litigated cases involving military voting protections and voter intimidation, including the case against the New Black Panther Party in Philadelphia, and participated in the successful Voting Rights Act prosecution in *United States v. Ike Brown*. He is the author of *Injustice: Exposing the Racial Agenda of the Obama Justice Department* (Regnery, 2011).

Thus, *amici* have extensive experience as practitioners in some of the highest-profile criminal cases in Oklahoma and/or the nation, and in the case of Prof. Coyne, academic experience. Both *amici* have frequently appeared and given legal commentary on a wide variety

of nationwide cable-news programs. Yet while they come from divergent political backgrounds, they share a belief that the troubling circumstances under which Holtzclaw's case was tried to the jury violated his fundamental constitutional right to due process and a fair trial. They wish to provide this Court with the benefit of their insight.

INTRODUCTION

"Mob law does not become due process of law by securing the assent of a terrorized jury." *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting). As Justice Holmes wrote those words, Jewish factory owner Leo Frank sat in the Fulton County jail awaiting execution, convicted of a rape and murder he did not commit by a Georgia jury buffaloed by an audible mob of protesters.[1] Frank would receive vindication in the form of an exoneration, but only decades later and posthumously: long after he was pulled from his cell and lynched on the streets of Atlanta.

A century later, Daniel Holtzclaw was tried under similarly egregious circumstances. The Sixth Amendment and due process of law each mandate that he receive a new trial.

STATEMENT OF THE FACTS

As Holtzclaw's brief relates, pp. 31-34, this matter was tried in a chaotic setting aptly described as "circus-like."

I. The leadup to trial

Holtzclaw's trial began on November 2, 2015, TR 4, but did not take place in a vacuum. During the preceding 18 months, racially charged civil unrest wracked Ferguson, Mo., Baltimore, Md., and other cities around the country, after police officers involved in the use of physical force against African-Americans, sometimes lethally, either were not charged or were charged and acquitted. *See* Shannon Luibrand, "How a Death in Ferguson sparked a movement in America," (Aug. 7, 2015), available at http://www.cbsnews.com/news/how-the-black-lives-matter-movement-changed-america-one-year-later/ (accessed Feb. 20, 2017).[2] These incidents

[1] *See* Colin Starger, "Fifty Years Before *Brady*," 37 CHAMPION 34 (May 2013).

[2] This Court can take judicial notice of a matter of common knowledge within the jurisdiction of the court (though it does not have to be universally known) and settled beyond doubt. *Linscome v. State*, 1978 OK CR 95, 584 P.2d 1349, 1350, *citing Frazier v. State*, 1953 OK CR 1, 267 P.2d 155. Certainly, the heightened state of tensions surrounding police and the Black Lives Matter

gave rise to Black Lives Matter and other such movements, pushing the notion that police systemically abuse African-Americans, and that "Ferguson is everywhere." *Id*. But despite analyses by serious academics debunking those claims, *see* Heather MacDonald, *The War on Cops: How the New Attack on Law and Order Makes Everyone Less Safe* (Encounter Books 2016), the unrest spread by BLM's narrative did not go unnoticed among politically elected prosecutors.

In many instances, those officials responded to police incidents involving African-Americans by hastily charging the officer(s), in an effort to head off mob-fueled rioting. Luibrand, *supra* ("But just last week, a prosecutor was quick to charge a Univ. of Cincinnati police officer with the death of Samuel DuBose during a traffic stop in Ohio"); *see also* Sheryl Gay Stolberg and Alan Blinder, "Marilyn Mosby, Prosecutor in Freddie Gray Case, Takes a Stand and Calms a Troubled City," *The New York Times* (May 1, 2015), available at https://www.nytimes.com/2015/05/02/us/marilyn-mosby-prosecutor-in-freddie-gray-case-seen-as-tough-on-police-misconduct.html (accessed Feb. 20, 2017) (prosecutor announces charges against six Baltimore police officers less than two weeks after death of Freddie Gray and ensuing riots). Though such prosecutors appeased the mob and achieved transient political gain through the sacrifice of individual due-process rights, *id*., most of their ill-advised rushes to judgment culminated in acquittals and dropped charges. *See*, *e.g.*, Sheryl Gay Stolberg and Jess Bidgood, "All Charges Dropped Against Baltimore Officers in Freddie Gray Case," *The New York Times* (July 27, 2016), available at https://www.nytimes.com/2016/07/28/us/charges-dropped-against-3-remaining-officers-in-freddie-gray-case.html (accessed Feb. 20, 2017).

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movement in 2015 and beyond, in the wake of Ferguson, Baltimore, and other such incidents, meets this standard.

Oklahoma City in August 2014 was not immune to this phenomenon. Michael Brown was fatally shot by a white Ferguson officer on August 9, and by August 16, President Obama had ordered a federal investigation of the police department, Attorney General Eric Holder directed the FBI to conduct a separate autopsy, and Missouri Gov. Jay Nixon imposed a curfew and declared a state of emergency to quell the nightly unrest on Ferguson's streets. Emily Wax-Thibodeaux, "Ferguson timeline: What's happened since the Aug. 9 shooting of Michael Brown," (Nov. 21, 2014), available at https://www.washingtonpost.com/news/post-nation/wp/2014/11/21/ferguson-timeline-whats-happened-since-the-aug-9-shooting-of-michael-brown/?utm_term=.619317b0ec32 (accessed Feb. 22, 2017). Four days later, on Aug. 20, a crowd of around 100 activists gathered at the Capitol in Oklahoma City to protest Brown's death and equate it with that of Luis Rodriguez, a 44-year-old Hispanic man who had died six months earlier in Moore, while being restrained by five officers who were not charged. Jennifer Palmer, "Oklahoma City speakers say police killing in Ferguson, Mo. could happen anywhere," (Aug. 21, 2014), available at http://newsok.com/article/5334467 (accessed Feb. 22, 2017).

Against this backdrop of mounting political pressure and social agitation, including protests coordinated by a group called OKC Artists for Justice, police *the very next day*, Aug. 21, arrested Holtzclaw – who had been on administrative leave since June – and released his mugshot to the media. Matt Dinger, "Oklahoma City police officer is charged with rape, 14 other counts," (Aug. 29, 2014), available at http://newsok.com/article/5337168 (accessed Feb. 22, 2017). Prosecutors brought the first 15 charges against Holtzclaw on August 29, *Id.*, and ultimately charged him with 36 offenses relating to 13 black women.

The timing of the charges reeked of an effort to spare Oklahoma City the sort of racial unrest recently seen elsewhere following police-related incidents. And, as with the hastily filed

charges in Baltimore (which were all later dismissed or resulted in acquittals), the national media voiced its approval. As one NBC commentator noted:

> Compared to the foot dragging and stalling seen in Cleveland, or Ferguson or Sanford Florida the OKC police seemed to have acted swiftly. Holtzclaw was arrested, and he was fired from the police department before he was even indicted….over 34 counts have been levied against him.
>
> Even GoFundMe dropped him and publicly, no political pundit, politician or journalist has stood by his side. For many African Americans, this was a done deal….[Jason Johnson, "The Holtzclaw Trial – When Rape Culture Meets #Black Lives Matter," (Nov. 13, 2015), available at http://www.nbcnews.com/news/nbcblk/holtzclaw-trial-when-rape-culture-meets-blacklivesmatter-n458741 (accessed Feb. 20, 2017)].

On Nov. 17, 2014, fearing more protests and rioting upon release of an impending grand jury decision on whether or not to charge Officer Darren Wilson in the Ferguson matter, Missouri Gov. Nixon declared a state of emergency, allowing him to activate the Missouri National Guard. Wax-Thibodeaux, *supra*. The following day, Nov. 18, Holtzclaw was bound over for trial in Oklahoma City.

By the time Holtzclaw came to trial one year later, his case was being used by the national media to whip up a frenzy and paint Oklahoma City and its police force as the latest example of racist America:

> A white officer accused of raping, stalking and assaulting 13 black women while on duty? A police department oblivious to the problem until the 'perfect victim' came along? This case is the grotesque mixture of every Rape Culture and Black Lives Matter discussion in the public narrative over the last few years.
>
> The only way that we can hope to unpack this story and this trial, now wrapping its second week, is if the focus remains squarely on the lives of black women. [Johnson, *supra*].

It was against this backdrop, accurately described as a "circus atmosphere," Holtzclaw Brief, pg 31, that trial commenced on Nov. 2, 2015.

II. Trial

Problems with attempted improper influence of the jury began during jury selection, when an unidentified activist approached a juror from another case in the courthouse snack bar and, mistakenly thinking she was a Holtzclaw juror, told her "we need to make sure we convict that – or that that police officer gets convicted." TR 269-272. The actual Holtzclaw jurors were questioned at length in voir dire about news coverage, the Baltimore rioting, and the Ferguson unrest. TR 123-130, 136-138. Indeed, the prosecutor dwelled on the latter two to such an extent that Holtzclaw objected that the State was signaling jurors they had to convict, in order to avoid similar unrest in Oklahoma City:

> MR. ADAMS: I'm trying not to draw too much attention to this, but this – the rioting and everything has nothing to do in my opinion of trying to pick a fair and impartial jury. I'm afraid that we're getting dangerously close to societal alarm, to where somehow this jury panel's going to think that if they don't vote the way the Government wants them to vote then we're going to have burning down –
>
> MR. GIEGER: No, I'm
>
> MR. ADAMS: Just let me finish making the record. I don't know why we keep interjecting Baltimore, Maryland and Ferguson, Missouri and all these other things that are happening around the country when I haven't seen a shred of that happening here in Oklahoma City. And I'm afraid that we're planting some societal alarm that is concerning to me. As I'm sitting back there listening to it I can see other jurors nodding their heads and things of that nature. I'm afraid we're planting a seed in their head that somehow this case rises to the level of Baltimore, Maryland or Ferguson, Missouri when that is not what we're dealing with in my opinion here. [TR 289-290].

As defense counsel concluded:

> …I've told the Court repeatedly in pre-trial motions and stuff I have zero intention of making this a race issue. And I have no intentions today of making it a race issue. But it

> appears that the State in their discussions during this voir dire are getting dangerously close to that line and I object to it and I think it's interjecting things into this case that don't need to have any place whatsoever in this courtroom. [TR 290].

Once the jury was seated and testimony began, things only became more chaotic. While a witness testified on the stand, a member of the gallery, Royal Long, tried to take a picture; after the deputy confiscated his camera, Long lied to the judge about what he had been doing. TR 520; 579-581. Further into trial, defense counsel complained that in the hallway just outside it was "literally getting nuts out there" between protesters and news media conducting interviews. TR 1530. More than 100 people regularly jammed the hallway with multiple TV interviews and other press interviews taking place, a throng so packed one could hardly move through it. TR 1530-32. As the prosecutor acknowledged, "it's very, very crowded and a lot of – a lot of activity going on out there and it seems like every reporter is trying to get some sound bite from anybody who'll talk to them is what it appears." TR 1532. The courtroom has an "extremely small" jury room, and jurors during breaks would be in the same hallway as the crowd, using the same public restrooms and having to wait up to 7-8 minutes amid the chaos for one of the slow courthouse elevators to arrive. TR 1531-32; 4315. The situation prompted the trial court to try to restrict interviews to a roped-off area, albeit still within sight of jurors. TR 1533-36. That effort was ineffectual, however, and the disruptions continued. TR 2317.

The bedlam outside the courthouse was even worse, and little if any effort was made to stop its deliberate intrusion into the jury box. A throng of more than 100 protesters choked a blocked-off street one floor below the courtroom window, chanting at length in a manner the judge acknowledged could "clearly" be heard in the courtroom and by the jury. TR 2303-06; *see also* Adam Snider, "High Volume of Chanting Protesters Interrupt Holtzclaw Trial," (Nov. 17,

2015) available at http://kfor.com/2015/11/17/chanting-protesters-interrupt-holtzclaw-trial/ (accessed Feb. 17, 2017). Their chants deliberately targeted the courtroom above:[3]

During the testimony of one alleged victim, the mob's shouts of "give him life, give him life" were so loud the trial had to be interrupted because defense counsel couldn't hear the witness. TR 2303-06; *see also*, Snider, *supra*, and Kyle Schwab, "Protesters chant outside Oklahoma County Courthouse during ex-officer's sex crimes trial," (Nov. 18, 2015) available at http://newsok.com/article/5461162 (accessed Feb. 21, 2017) ("Whenever [OKC Artists for Justice leader Grace] Franklin yelled, '36 counts,' the group shouted, 'We want life!'"); Tom

[3] Uncredited photo from "Why Daniel Holtzclaw's Conviction Matters," available at http://empowering.hearst.co.uk/be-informed/why-daniel-holtzclaws-conviction-matters/, (accessed Feb. 23, 2017).

George, "Group rallies outside Holtzclaw trial," (Nov. 17, 2015), available at http://okcfox.com/news/local/protesters-rally-outside-holtzclaw-trial (accessed Feb. 17, 2017) ("It was a message the jury and Holtzclaw were forced to hear Tuesday. The protesters chants echoed up to the second floor of the courtroom so loud that the judge had to stop and remind the jury not to let it impact their decision"). The protesters evidently had assistance from inside the courtroom, since their shouts suddenly stopped as defense counsel rose to object, or when the jury was out. TR 2303-06; 2318. By the end of trial, jurors exiting the courtroom were themselves subjected to harangues and shouting demonstrations, and cries of "racist jury" and "racist cop." TR 2315-18.

As the barrage against the jury intensified, Holtzclaw requested that jurors be sequestered to insulate them from the escalating hostile environment and "all the protesting and yelling and screaming." TR 2316, 2317. The court denied that request, and instead simply admonished the jury to ignore the outside influences. TR 2317-21. But as Holtzclaw notes, under the egregious circumstances, such cautionary comments were worse than saying nothing at all. Brief, pg. 33.

III. Conviction and aftermath

The court did sequester the jury in a hotel during its deliberations, but given the "extremely small" jury room, deliberations themselves took place in the courtroom – the same courtroom in which the audible protest chants of "Give him life!" were readily heard at trial. TR 4315. The jury returned a verdict that can only be called unusual, splitting the 36 charges right down the middle and convicting Holtzclaw of exactly half. Local TV stations cut into their programming to broadcast the verdicts' reading, which were also live-streamed worldwide. *See* 12/7/15 Trial Media Coverage Order (allowing coverage by "all members of the media requesting to be able to film and/or photograph the reading of the verdict….").

Even that did not fully satisfy the mob, however. As one New York City daily reported with evident satisfaction following the guilty verdicts, "[p]rotesters outside the Oklahoma courthouse sarcastically sang 'Happy Birthday' to the predator, who turned 29 Thursday." Alfred Ng and Jason Silverstein, "Jury convicts ex-Oklahoma cop of rape, sodomy charges; faces life in prison," (Dec. 11, 2015), available at http://www.nydailynews.com/news/crime/jury-convicts-ex-oklahoma-rape-charges-article-1.2462256 (accessed Feb. 21, 2017).

Holtzclaw is now serving a 263-year sentence.

DISCUSSION

I. Protesters' pervasive attempts to buffalo and intimidate the jury deprived Holtzclaw of the fair trial guaranteed by the U.S. and Oklahoma Constitutions.

A. Improper extraneous influences on the jury rendered Holtzclaw's trial void and require that his convictions be vacated.

Both this Court and the U.S. Supreme Court have made plain that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Nichols v. Dist. Court of Oklahoma Cty.*, 2000 OK CR 12, ¶ 8, 6 P.3d 506, 508, *quoting In re Murchison*, 349 U.S. 133, 136 (1955) (internal citation omitted). "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness…. (T)o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Id*. "The atmosphere essential to the preservation of a fair 'public' trial – the most fundamental of all freedoms – must be maintained." *Nichols*, ¶ 8, *citing In re Murchison*, 381 U.S. at 540. "[I]f in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law…." *Moore v. Dempsey*, 261 U.S. 86, 90-91, 43 S. Ct. 265, 67 L. Ed. 543 (1923), *citing Frank*, 237 U.S. at 335 (habeas petition revived for adjudication where defendants' trial took place amid backdrop of threatened mob violence, contrary to due process); *see also Ex Parte Hollins*, 54 OK CR 70, 14 P.2d 243 (1932) (African-

American charged with forcible rape of 17-year-old white girl was deprived of due process where magistrate hastily arranged arraignment, guilty plea, and imposition of death sentence at night session of court in county jail and without counsel, for fear of mob violence) (*citing Moore*). Such a mob-influenced trial is "absolutely void." *Moore*, 261 U.S. at 92.

Indeed, "it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." *Remmer v. United States*, 350 U.S. 377, 381-382 (1956); *see also Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a fair trial by an impartial jury free from outside influences"). "Efforts by spectators at a trial to intimidate judge, jury, or witnesses violate the most elementary principles of a fair trial." *Lambert v. State*, 743 N.E.2d 719, 733 (Ind. 2001), *quoting Smith v. Farley*, 59 F.3d 659, 664 (7th Cir. 1995). The jury's verdict "must be based upon the evidence developed at trial…regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life in which he occupies." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Indeed, protesters marching outside a courthouse with threatening signs, where they are designed to affect the verdict or interfere with deliberations, are one of the few instances of "outside influence" sufficient to meet the limited exceptions for taking juror testimony about the verdict. *McQuarrie v. State*, 380 S.W.3d 145, 166 (Tex. Ct. Crim. App. 2012) (Cochran, J., dissenting) (analyzing FRE 606(b)). As the Supreme Court recently reiterated in further chipping away at that "no-impeachment" rule**,** "[t]he jury is to be a criminal defendant's fundamental protection of life and liberty against race or color prejudice." *Pena-Rodriguez v. Colorado*, 580 U.S. at __ (March 6, 2017), Op. at 15, *quoting McCleskey* v. *Kemp*, 481 U. S. 279, 310 (1987) and *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) (internal quotation marks omitted).

The undisputed record shows that Holtzclaw's trial was indeed so dominated by the mob that there was actual interference with the course of justice, rendering the trial void. *Moore*, 261 U.S. at 91-92. Jurors were subjected to overwhelming pressure from protesters, who acted with calculation so as to have their words reach the jury box and thereby tamper with the trial process. From overtly trying to tell a juror she must convict, to setting up shop directly below the second-story courthouse window and chanting on cue, to yelling and screaming in the hallway as jurors exited, to subjecting them to untold comments while they waited for slow courthouse elevators, to defying the courtroom camera ban and then lying about it, to chanting "racist jury, racist cop," protesters subjected the jurors to overwhelming pressures. Parts of this trial bore a closer resemblance to a Maoist show trial than an American judicial proceeding.

Nor were the pressures brought to bear on jurors spontaneous or isolated ones. Each juror arrived at the courthouse each day knowing that part of the community was outraged by Holtzclaw's alleged actions, and was issuing thinly veiled threats to turn Oklahoma City into another Ferguson or Baltimore if the juror's vote was for acquittal. Indeed, jurors had been probed at length in *voir dire* about Ferguson and Baltimore, as well as another recent incident in Oklahoma City involving a different officer, to the point where defense counsel objected as to the questioning's suggestive nature. TR 125-129, 136-138, 286-290.

Jurors in high-stakes, high-profile trials are especially susceptible to outside influence. "[U]nconsciously, jurors may want to return a decision consistent with community sentiment – a community potentially angry and scared and mourning the loss of their own." Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1324 (2007). "In addition, jurors may be afraid of being the future target of attack, making them less likely to entertain doubt as to the guilt of the accused." *Id*.

These jurors, all of whom were white, faced all those pressures. They knew they were under a microscope, and if they did not deliver the "right" verdict, those raging on the streets and in the hallway would ignite Oklahoma City, and make it the latest American urban center to be convulsed in flames and rioting.

The Jim Crow South had a long, sordid history of trying racially-charged sex-offense cases in a volatile atmosphere dominated by agitated, racist mobs demanding "justice" according to skin color. *Moore*, *supra*; *see also Downer v. Dunaway*, 53 F.3d 586, 588-590 (5th Cir. 1931) (habeas relief granted to black defendant sentenced to death for raping a white woman; trial that was conducted against backdrop of mob intimidation and with "large and unruly crowd of people congregated in the courthouse square" was void); *Powell v. Alabama*, 287 U.S. 45, 51-52 (1932) (vacating black defendants' conviction of raping two white women in Scottsboro rape case due to the denial of counsel; proceedings "from beginning to end, took place in an atmosphere of tense, hostile, and excited public sentiment"); *Shepherd v. Florida*, 341 U.S. 50, 54 (1951) (Jackson, J., concurring in the result) (convictions and death sentences for two blacks in rape of white girl vacated; court's decision to do so based on errors in jury selection and not the public uproar under which case was tried "is to stress the trivial and ignore the important…[this] case presents one of the best examples of one of the worst menaces to American justice"). That Holtzclaw's case involves a near-reverse of the Jim Crow fact patterns – a half-white defendant accused of sex crimes against black women – is of no significance. Every American, of every color, is equally entitled to due process, and an unpressured jury hearing the evidence and deliberating in an atmosphere free from the howling mob.

Alone and certainly taken together, the instances of direct outside influence on the jury – the shouts of "Give him life!"; "Racist jury!" and "Racist cop!" and the untold comments to

which jurors were exposed in the chaotic hallway – certainly warrant a new trial. In cases involving far more isolated and limited instances of extraneous influence on a jury, courts have had little trouble setting aside jury verdicts as improperly reached. *See Rodriguez v. State*, 433 So. 2d 1273, 1276 (Fla. App. 1983) (shouted epithets and impassioned statements by murder victim's widow during her testimony necessarily engendered sympathy for her and antagonism for defendant, depriving him of a fair trial); *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627, 629-631 (1982) (new trial granted where trial judge erroneously denied mistrial based on courtroom spectator glaring at jurors and making remarks they overheard as to defendant's guilt or innocence; court's admonitions were insufficient and it should have conducted inquiry into spectator's conduct and its prejudicial effect); *Price v. State*, 149 Ga. App. 397, 399, 254 S.E.2d 512, 514 (1979), *overruled on other grounds*, *State v. Clements*, 289 Ga. 640, 715 S.E.2d 59 (2011) (three outbursts by victim's mother and her seat at counsel table with the prosecutor denied defendant a fair trial); *State v. Gevrez*, 61 Ariz. 296, 305-306, 148 P.2d 849 (1944) (defendant denied fair trial in part because victim's mother sat weeping near jury and engaged in verbal outburst; "the best witness in a trial sometimes never takes the witness stand, the greatest influence often comes from the unsworn person who is allowed to parade before the jury"); *accord Glenn v. State*, 205 Ga. 32, 52 S.E.2d 319 (1949).

Cases to the contrary, where extraneous influence on the jury is excused, typically involve single, limited instances of spectator misconduct that were promptly corrected by a curative instruction, or protesters the jury never even heard or saw. *See, e.g.*, *People v. Lucero*, 44 Cal. 3d 1006, 1022, 245 Cal. Rptr. 185, 750 P.2d 1342 (1988) (victim's mother's outburst at defendant as jury left to deliberate was a single, isolated instance and promptly followed by judge's admonition to disregard); *Homsher v. State*, 937 N.E.2d 433; 2010 WL 4410544, *4 (Ind.

Ct. App. unpublished 2010) (conviction affirmed; "there is no evidence that any juror ever saw or heard any protestors, much less had any contact with them"). Here, in stark contrast, jurors not only heard the protesters, but repeatedly confronted them – in the hallway during breaks, while waiting for the elevator, likely in the restroom, and even inside the courtroom. Further, they were well-aware of the other chaotic circumstances surrounding the trial.

The law protects jurors from being coerced by counsel through the questions asked on *voir dire*. *Payne v. State*, 1954 OK CR 123, 276 P.2d 784, 790 (citation omitted). It protects them from coercion by trial judges who would seek to break deadlocks via *Allen* or "dynamite" charges. *Day v. State*, 1980 OK CR 94, 620 P.2d 1380. Certainly, it must also protect jurors from coercion by outside protesters seeking to influence the verdict for their own political and/or racial reasons, thus depriving the defendant of his fundamental rights.

B. The trial court wrongly subordinated Holtzclaw's rights to a fair trial and due process to protesters' First Amendment rights.

As noted above, protesters outraged by the allegations against Holtzclaw gathered throughout the trial to express their views. While they were certainly entitled to do so under the First Amendment, the trial court erred in not doing more to protect Holtzclaw's greater rights to due process and a fair trial.

In *Nichols*, *supra*, this Court balanced the accused's right to a fair trial against the public's right to television coverage, and came down squarely on the side of the former, finding that the right to a fair trial under Article 2 of the Oklahoma Constitution trumps any right to televise the proceeding. As the Court noted,

> Article 2 of the Oklahoma Constitution affords an accused the right to a fair public jury trial and due process of law. Our state constitution also affords all persons the freedom of speech and press. Okla. Const. art. II, § 22. Thus, the issue before us presents the same clash of constitutional rights as discussed above in our analysis of the federal constitutional claims. And we reach the same result.

> We specifically find that to televise or record a criminal trial over the objection of a defendant would violate an accused's right to due process of law as guaranteed by Section 7, Article 2 of the Oklahoma Constitution.

Televising proceedings "amounts to the injection of an irrelevant factor into court proceedings," and may in some instances cause actual unfairness to the defendant – in ways so subtle as to defy control by the trial judge. *Id., citing In re Murchison*, 381 U.S. at 544-545. Included among those is the potential impact on jurors. *Id*.

Similarly, in *Commonwealth v. Berrigan*, 509 Pa. 118, 501 A.2d 226 (1985), Pennsylvania's Supreme Court affirmed a trial court's decision to limit public access during *voir dire* in the trial of several anti-nuclear protestors. It described the circumstances that justified such a move:

> We note that during the entire jury selection process and trial, supporters of [defendants] stationed themselves outside the courthouse, and blocked access to the building and surrounding streets while demonstrating, singing, yelling, and waving placards and banners. Supporters and news media representatives also blocked the halls of the courthouse, impeding access into and out of the courtroom. Given the physical layout of the courtroom and atmosphere surrounding the proceedings, we cannot say that the trial court erred in limiting public access during the voir dire proceedings. [509 Pa. at 132, 501 A.2d at 234].

Nichols, In re Murchison, and *Berrigan* teach that where First Amendment rights threaten to impinge on the Sixth Amendment right to a fair trial, the former must yield. Although Appellant is somewhat forgiving of the trial court's failure to do more to protect his right to a fair trial, Brief, pp. 33-34, *amicus* respectfully disagrees. Where a man's freedom hangs in the balance, and a baying mob outside is audibly shouting to jurors to "give him life!" it is hardly an "extreme measure" to relocate the trial up a few floors in the courthouse, or to another county, or to move demonstrators down the block, so jurors may rule based on the evidence, not coercion and fear. The Scottsboro Boys and the other victimized Jim Crow defendants deserved such protection in 20th-century America; so too does Holtzclaw today.

There is a First Amendment right of free speech; there also is a First Amendment right to petition the government for a redress of grievances. But for outsiders at a criminal trial, there is no First Amendment right to petition the jury, and browbeat it into delivering one's preferred verdict.

CONCLUSION/RELIEF REQUESTED

The Judgment and Sentence imposed upon Holtzclaw should be vacated.

Respectfully submitted,

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