

time, as Petitioner had listed those witnesses as potential defense witnesses, the ordered discovery was not an unauthorized exercise of judicial authority; we also noted that Petitioner had not demonstrated that the material sought was work product, and that the Respondent's discovery order did not violate the Discovery Code. *Kepler v. The District Court of Tulsa County, The Honorable Sharon Holmes, District Judge*, No. PR-2016-851 (Okl.Cr. Sept. 28, 2016) (not for publication).

On October 3, 2016, Petitioner asked Respondent to rehear his discovery complaint. Petitioner provided to the State an amended witness list, which was attached to his Petition for Rehearing filed in the Tulsa County District Court on October 3, 2016. This list included thirty-three named defense witnesses, and all the witnesses listed in the State's discovery *except* Lisa Kepler, Josh Mills, and Michael Hamilton. Petitioner also provided Respondent, in this filing, with a list titled "Attorney Work Product Privilege Log", which identified four items: (1) an August 6, 2014 audio recording of Lisa Kepler, Josh Mills, and Michael Hamilton, taken by Petitioner's investigator; (2) a separate audio recording of Josh Mills, taken by Petitioner's investigator; (3) social media statements of Lisa Kepler collected by Petitioner's investigator; and (4) other media statements of Lisa Kepler collected by Petitioner's investigator. Respondent denied Petitioner's rehearing request, holding the court had not ordered the production of work product.

Respondent took up the production of the items listed in Petitioner's privilege log at a hearing on October 12, 2016, and ordered Petitioner to produce, in discovery, these materials relating to State's witnesses Lisa Kepler, Josh Mills, and Michael Hamilton. Petitioner asks this Court to prohibit enforcement of this Order. Petitioner complains that (a) these materials are

work product, and (b) he is under no obligation to produce the witnesses' statements because he does not intend to call those witnesses at trial. A party seeking a writ of prohibition must establish that "(1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy." Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016).

Petitioner argues that Respondent's discovery order requires him to turn over work product. The record does not support his claim. The Oklahoma Criminal Discovery Code defines work product as legal work of either attorney that includes "legal research or those portions of records, correspondence, reports, or memoranda which are only the opinions, theories, or conclusions of the attorney or the attorney's legal staff." 22 O.S.2011, § 2002(E)(3). More broadly, the United States Supreme Court has noted that work product includes written statements, private memoranda, and personal recollections prepared by an attorney in the course of his or her legal duties. *Hickman v. Taylor*, 329 U.S 495, 510, 67 S.Ct. 385, 393, 91 L.Ed. 491 (1947). While work product may certainly encompass material prepared by a defense investigator, all such material is not, as Petitioner appears to claim, protected by work product. Petitioner relies on a Third Circuit case in which a defense investigator was subpoenaed to testify before a grand jury, and told to bring the results of his investigations. *Appeal of Hughes* 633 F.2d 282 (3d Cir. 1980). As the Third Circuit noted, the investigator's testimony necessarily involved revelations of his and his attorney employer's mental processes, including trial preparation and strategy, and converted the attorney's agent into a State witness. *Id.* at 290. The materials listed in Petitioner's "Work Product Privilege

Log” are not comparable. They include recorded interviews taken by an investigator, and publicly-accessible written or electronic statements compiled by an investigator. Petitioner has wholly failed to show that these items meet the definition of work product. We find that Respondent did not order Petitioner to turn over any work product material in discovery. As there was no unauthorized exercise of judicial power, Petitioner is not entitled to a writ of prohibition on these grounds.

Petitioner also notes that the materials in question all pertain to persons not listed on his witness list, and whom he does not intend to call at trial. At the October 12, 2016 hearing, Respondent explicitly ordered Petitioner to turn over the information the State requested (including the disputed material), even though Petitioner did not intend to call those witnesses and they were not on his amended witness list. [10/12/2016 Tr. 13, Supplement to Application] The Oklahoma Criminal Discovery Code governs discovery in all Oklahoma criminal cases. 22 O.S.2011, § 2001. Material the defense is required to disclose, when requested by the State, includes “the names and addresses of witnesses which the defense intends to call at trial, together with their relevant, written or recorded statement, if any, or if none, significant summaries of any oral statement.” 22 O.S.2011, § 2002(B)(1)(a). Nothing in the Discovery Code requires a defendant to disclose information about, or materials concerning, witnesses he does not intend to call. Respondent had no authority to order him to do so. Petitioner has shown that Respondent’s order is an unauthorized exercise of judicial authority in the enforcement of statutory discovery procedure regarding persons not listed as defense witnesses.

IT IS THEREFORE THE ORDER OF THIS COURT that Petitioner’s Petition for Writ of Prohibition is **GRANTED** as to Respondent’s order


concerning persons not listed as defense witnesses. Petitioner's request for a Stay is **DENIED**.

The Clerk of this Court is directed to forward copies of this Order to the Honorable Sharon Holmes, District Judge; to the District Court Clerk; to Stephen Kunzweiler, District Attorney; to Richard O'Carroll and Sharisse O'Carroll, Attorneys for Petitioner; and to Matthew D. Haire, Assistant Attorney General, Attorney for Respondent.


IT IS SO ORDERED.

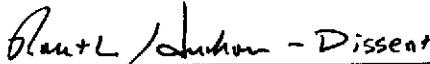
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 18th day of October, 2016.


CLANCY SMITH, Presiding Judge


GARY L. LUMPKIN, Vice Presiding Judge
DISSENT - The Trial Court has the duty to control gamesmanship by an attorney.


ARLENE JOHNSON, Judge


DAVID B. LEWIS, Judge


ROBERT L. HUDSON, Judge
Dissent - The actions of Petitioner are egregious to the purpose of the Discovery Code which is to reveal the truth of a matter.

ATTEST:

A handwritten signature in cursive script, reading "Michael B. Dickie". The signature is written in black ink and is positioned above a horizontal line.

Clerk

OA