

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

JUAN GABRIEL CHOXMIS,

) JUN 14 2013

Petitioner,

) MICHAEL S. RICHIE  
) CLERK

) NOT FOR PUBLICATION

vs.

) No. C-2012-664

THE STATE OF OKLAHOMA,

)

Respondent.

)

)

**SUMMARY OPINION GRANTING PETITION FOR WRIT OF CERTIORARI**

**SMITH, VICE PRESIDING JUDGE:**

Juan Gabriel Choxmis entered a blind *Alford* plea to First Degree Rape in violation of 21 O.S.2001, § 1114, in the District Court of Tulsa County, Case No. CF-2006-4403. After a sentencing hearing the Honorable Bill Musseman sentenced Choxmis to life imprisonment. Choxmis must serve 85% of this sentence before becoming eligible for parole consideration. Choxmis moved to withdraw his plea. After a hearing this motion was denied.

Choxmis raises two propositions of error in support of his petition:

- I. Petitioner Juan Choxmis was deprived of his right to conflict-free counsel when the court failed to appoint a new attorney to represent Petitioner at the hearing on his motion to withdraw his plea of guilty. Petitioner was denied his Sixth Amendment right to effective assistance of counsel; and
- II. Petitioner's sentence is excessive and should be modified.

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After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that Choxmis' case must be remanded.

In Proposition I Choxmis claims counsel at the hearing on his Motion to Withdraw Plea was ineffective. The right to counsel on a motion to withdraw a guilty plea includes the right to representation free from conflicts of interest. *Carey v. State*, 1995 OK CR 55, ¶ 8, 902 P.2d 1116, 1118. An actual conflict exists where a defendant claims his attorney coerced his plea, and that same attorney continues to represent the defendant. *Carey*, 1995 OK CR 55, ¶ 10, 902 P.2d at 1118. Under the circumstances, Choxmis should have been represented by conflict-free counsel. Taken together, Choxmis' petitions to withdraw his plea include allegations that his attorney was ineffective in counseling him to enter the blind plea. At the hearing on the motion to withdraw his plea Choxmis' attorney completely failed to bring this out, and resisted his attempts to testify to that effect. Whether or not his claims were true, Choxmis should have had conflict-free counsel to present them to the trial court. We express no opinion on the merits of Choxmis' claims.

Our resolution of Proposition I renders Proposition II moot. However, we note that a claim of excessive sentence was not raised before the trial court and is not properly before us. Rule 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013). Furthermore, this is not a complaint which may be heard on a Petition for Writ of Certiorari. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142.

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### **DECISION**

The Petition for Writ of Certiorari is **GRANTED**. The case is **REMANDED** to the District Court for appointment of conflict-free counsel, and a new hearing on the Motion to Withdraw Plea consistent with this Opinion. The Motion to Remand for Evidentiary Hearing is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma*

*Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE BILL MUSSEMAN, DISTRICT JUDGE

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NO RESPONSE NECESSARY

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**OPINION BY: SMITH, V.P.J.**

LEWIS, P.J.: CONCUR  
LUMPKIN, J.: CONCUR  
C. JOHNSON, J.: CONCUR  
A. JOHNSON, J.: CONCUR