

We review the trial court's denial of a motion to withdraw a guilty plea for abuse of discretion. *Vuletich v. State*, 1987 OK CR 61, ¶ 12, 735 P.2d 568, 570. In Proposition 1, Petitioner argues that appointed counsel's representation at the hearing on the motion to withdraw his plea was adversely affected by a conflict of interest and violated his Sixth Amendment right to counsel. We agree. At the evidentiary hearing, defense counsel indicated he would "allow the motion to stand on its own merits." Counsel stated that in addition to the grounds alleged in the motion to withdraw the plea, "there may be an additional ground of ineffective assistance of counsel," which defense counsel concluded he could not argue to the Court.

Counsel presented no argument or evidence in support of the boilerplate allegations in his written motion. The District Court considered a letter from Petitioner (apparently containing the ineffective assistance allegation), but this letter is not included in the record on appeal. Counsel did not call Petitioner to give testimony supporting the motion to withdraw, nor did counsel seek to withdraw from representation after announcing that he could not advance Petitioner's claim of ineffective assistance.

The evidentiary hearing on a motion to withdraw a plea of guilty is a critical stage of criminal proceedings where the defendant is entitled to effective assistance of counsel. To show a denial of this right arising from conflict of interest, a Petitioner "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Carey v. State*, 1995 OK CR 55, ¶

10, 902 P.2d 1116, quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980). Such conflicts of interest may be harmless beyond a reasonable doubt “where: (1) the defendant neither alleges that he is innocent nor that his plea was involuntary; and (2) it is clear that the defendant is not entitled to withdraw his plea.” *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316.

The record before the Court does not suggest that Petitioner is innocent, but “we cannot clearly find with certainty that appellant would not be entitled to withdraw his guilty plea.” *Randall*, at ¶ 10, 861 P.2d at 316. We are unable to discern from the record the factual grounds for Petitioner’s motion, as Petitioner did not testify and his appointed counsel declined to argue his case. Because counsel’s conflict of interest adversely affected the presentation of Petitioner’s factual and legal grounds for withdrawal of the guilty plea, we are precluded from finding the error harmless beyond a reasonable doubt.

The writ of certiorari is **GRANTED**. The Judgment and Sentence of the District Court of Blaine County is **REVERSED** and **REMANDED** with instructions to conduct a new evidentiary hearing on Petitioner’s motion to withdraw his guilty plea after the appointment of conflict-free counsel.

DECISION

The Petition for the Writ of Certiorari is **GRANTED**. The judgment and sentence of the District Court of Blaine County is **REVERSED** and **REMANDED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF BLAINE COUNTY
THE HONORABLE MARK A. MOORE, DISTRICT JUDGE

APPEARANCES AT TRIAL

W. MARK HIXSON
800 W. MAIN
YUKON, OK 73099-1040
ATTORNEY FOR DEFENDANT

BARRY RETHERFORD
ASST. DISTRICT ATTORNEY
212 N. WEIGLE
WATONGA, OK 73772
ATTORNEY FOR THE STATE

OPINION BY LEWIS, J.

CHAPEL, P.J.: Concurs
LUMPKIN, V.P.J.: Dissents
A. JOHNSON, J.: Concurs
C. JOHNSON, J.: Concurs

APPEARANCES ON APPEAL

DANNY G. LOHMAN
OKLA. INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR PETITIONER

NO RESPONSE NECESSARY

LUMPKIN, V.P.J.: DISSENT

I dissent to the Court's Summary Opinion Granting Writ of Certiorari in the instant case. While there may have been some potential conflict in this case, the record simply does not give us enough to go on. Indeed, at the motion to withdraw hearing, defense counsel only acknowledged that there "may be an additional ground of ineffective assistance" based, presumably, upon a pro se letter the defendant wrote. However, that letter and the possible ineffective assistance claim it *may* contain (and the possible conflict that possible claim *may* have caused) were never made part of the record. The trial court was never presented the issues. That is fatal to this claim.

Thus, no conflict of interest has been demonstrated in this case. We should not be granting relief on possibilities that may or may not present themselves in a pro se letter that no one on this Court has ever seen. At the very least we should allow the State the opportunity to respond before pulling the appellate trigger.