IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTHONY FRANK MONACO,	)	
	)	
Petitioner,	)	
	)	Case No. C-2010-260
v.	)	
	)	NOT FOR PUBLICATION
THE STATE OF OKLAHOMA	)	
	)	
Respondent.	)	
	)	

OPINION

SMITH, JUDGE:

On November 12, 2009, Anthony Frank Monaco was charged by Information in the District Court of Canadian County, Case No. CF-2009-575, with ten counts of Child Sexual Abuse, under 21 O.S.Supp.2009, § 843.5(E) (Counts 1-10).[1] Less than three months later, on January 27, 2010, Monaco entered a blind plea of guilty to all ten counts before the Honorable Jack D. McCurdy, Special Judge.[2] No preliminary hearing was held in the case, and very few specific facts were established at the time of Monaco's plea. On March 3, 2010, the Honorable Jack D. McCurdy sentenced Monaco to imprisonment for 25 years on each of Counts 1 through 9, to run concurrently, and to imprisonment for 10 years on Count 10, to be served consecutively to the other counts.[3]

---

[1] Counts 1 through 5 charged Monaco with "knowingly and willfully penetrating the vagina of a child," known as "S.M.," who was under the age of 14, "with his finger." Counts 6 through 10 charged Monaco with "knowingly and willfully touching the body or private parts of" the same child, "in a lewd and lascivious manner . . . on or about the vagina." All of the acts were charged as occurring during the time period from November 16, 2005, to August 31, 2008, while the victim was between 10 and 12 years old. During this entire time period, the applicable statute was actually 10 O.S.Supp.2002(through 2008), § 7115, which in 2009 was renumbered to become 21 O.S.Supp.2009, § 843.5 (effective May 21, 2009).

[2] Monaco was represented by counsel (Mark Hixson) at this blind guilty plea.

[3] Monaco was also ordered to pay costs, fees, and a Victim's Compensation Assessment of $450.

On March 5, 2010, the same counsel who represented Monaco in the taking of his blind guilty plea filed a motion to withdraw this guilty plea.[4] A hearing was held on the motion on March 16, 2010. This hearing was not transcribed, and Monaco's counsel at the plea withdrawal hearing was again the same attorney who had represented him when he entered his blind guilty plea.[5] At the conclusion of the hearing, the Honorable Jack D. McCurdy denied the motion. Monaco is now properly before this Court on a petition for certiorari.

As noted, no preliminary hearing was held in this case, and very few specific facts were established at the time of Monaco's plea. His guilty plea form states the following "factual basis" for his plea: "In Canadian County on or between 11/16/2005 and 8/31/2008 I touched S.M. on or about the vagina in a lewd and lascivious manner at least 10 times."[6] The transcript of Monaco's guilty plea hearing is 12 pages long. The entire discussion of the factual basis for his guilty plea (to ten counts of child sexual abuse) was as follows:

> THE COURT: Did you in fact commit the acts as charged in the Information?
> THE DEFENDANT: Yes.
> THE COURT: This factual basis that is written here says that in Canadian County on or between the 16th day of November, 2005, and the 31st day of August, 2008, you touched a minor by the initials of SM on or about the vagina in a lewd and lascivious manner at least ten different times. Is that a true statement?
> THE DEFENDANT: Yes, sir.

---

[4] Monaco's motion asserted twelve reasons that he should be allowed to withdraw his plea, including: 1) that he "lacked close assistance of counsel," 2) that he "lacked effective assistance of counsel," 3) that his plea "was entered through inadvertence, ignorance, mistake, or coercion," and 4) that his plea "was not voluntarily and intelligently entered."

[5] The trial court's failure to appoint Monaco new counsel on his motion to withdraw his plea, even though the motion was challenging the effectiveness of this same counsel, is the basis for Monaco's claim in Proposition II and is addressed *infra*.

[6] Monaco's plea form also has "Yes" circled as the answer to the question: "Did you commit the acts as charged in the Information?"

No other facts were presented or referenced as the factual basis for the plea.

In Proposition I, Monaco argues that the trial court erred in accepting his guilty plea, because it was not entered knowingly, intelligently, and voluntarily.[7] This Court reviews a trial court's denial of a defendant's motion to withdraw a guilty plea for an abuse of discretion.[8] Monaco argues that his plea was not knowing and intelligent because the Information failed to allege a required element of the crime of child sexual abuse, namely, that he was a "person responsible for the child's health, safety, or welfare" and because this required element was not addressed at the time of his plea or previously. Monaco maintains that because the State failed to charge him with this required element of child sexual abuse *and* because nothing in the record suggests that he was otherwise informed, prior to pleading guilty, that being a "person responsible for the child's health, safety, or welfare" was an element of each of the ten counts to which he was pleading, his guilty plea was not knowing and intelligent.

The State asserts waiver regarding Monaco's Proposition I claim on two grounds: (1) a guilty plea waives all non-jurisdictional defects in the Information, and (2) Monaco failed to raise his "person responsible" claim within his motion to withdraw his plea. This Court begins by noting that Monaco's Proposition I claim is a challenge to the validity of his plea, not to the sufficiency of the Information. The adequacy of the Information is discussed herein insofar as it relates to

---

[7] *See Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969) ("It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."); *King v. State*, 1976 OK CR 103, ¶ 7, 553 P.2d 529, 532 (recognizing that *Boykin* decision mandates "adequate record" to ensure that "accused's plea of guilty is voluntarily and intelligently entered").

[8] *See, e.g., Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251.

whether Monaco was informed of all the elements of the crimes charged against him, in order to evaluate the validity of his plea—not as a direct challenge to the Information itself.[9]

As for Monaco's failure to assert the "person responsible" claim within his original motion to withdraw, Monaco's motion did assert that his plea "was not voluntarily and intelligently entered," that it was entered "through inadvertence, ignorance, mistake, or coercion," and that he was not provided "effective assistance of counsel" at the time of his plea. Although Monaco's counsel did not specifically argue that the "person responsible" element was missing from both the Information and Monaco's actual plea, Monaco's plea withdrawal counsel was the same person as his plea counsel (as discussed *infra* in Monaco's Proposition II ineffective assistance claim).[10] This Court will not ignore the reality of the current situation by a finding of waiver here, particularly since a showing of ineffective assistance due to conflict of interest on Proposition II excuses

---

[9] In *Parker v. State*, 1996 OK CR 19, ¶¶17-23, 917 P.2d 980, 985-86, this Court held that an Information that failed to allege all the elements of a charged crime did not thereby deprive the trial court of subject matter jurisdiction to try the defendant. Rather, such an Information would be evaluated to determine whether "[c]onsistent with Oklahoma constitutional requirements, case law, and criminal procedure, . . . the Information [gave] the defendant notice of the charges against him and apprise[d] him of what he must defend against at trial." *Id.* at ¶ 24, 917 P.2d at 986. The *Parker* court emphasized, "Today, this Court continues to hold that defects in an Information are governed by the Due Process Clause." *Id.* at ¶ 21, 917 P.2d at 985. The *Parker* court noted that "the failure to allege each element of a crime does not *always* constitute a due process violation," since in some cases "material that was made available to a defendant at preliminary hearing or through discovery" could also provide the defendant with adequate "notice to satisfy due process requirements." *Id.* at ¶¶ 23-24, 917 P.2d at 986 (emphasis added). Thus due process remains the governing standard for evaluating the adequacy of an Information, and the issue is whether the defendant had sufficient notice of all the elements of the charges against him. Although the current case does not involve a direct challenge to the Information, the due process question at issue here is whether the defendant had adequate notice regarding all the elements of the crimes charged, in order to have made a voluntary and intelligent plea, which is a parallel issue.

[10] Consequently, it is not surprising that this same counsel (along with the prosecutor and the trial court) twice failed to notice that this element was missing.

Monaco's failure to raise this issue in his original motion to withdraw.[11] Furthermore, this Court has never held that a defendant can waive being informed—in some fashion and at some point prior to pleading guilty—of all the elements of the crime(s) to which he or she is pleading guilty.

Thus we turn to Monaco's claim in Proposition I. In *Cox v. State*,[12] this Court held that "an essential element of the offense of child sexual abuse when charged under 10 O.S.Supp.2002, § 7115(E) is that the defendant must have been a person responsible for the child's health, safety, or welfare."[13] Hence Monaco is correct (and the State concedes) that being "a person responsible for the health, safety, or welfare of the child" was an element of all ten counts of child sexual abuse charged in this case. In fact, it is this requirement of a special relationship between the defendant and the child victim that sets Oklahoma's crime of "child sexual abuse" apart from the more general crimes of rape, incest, and lewd or indecent acts or proposals to a child—which are included within child sexual abuse, but for which no special relationship between the defendant

---

[11] In *Carey v. State*, 1995 OK CR 55, ¶¶ 5-10, 902 P.2d 1116, 1117-18, this Court addressed the situation where the attorney representing the defendant on the withdrawal of his plea was the same attorney who represented the defendant at the taking of the plea and who, due to the fact that the defendant was alleging coercion by the attorney on the plea, had a conflict of interest with the defendant regarding the withdrawal motion. In *Carey*, this Court recognized that a defendant who was raising such a claim would not be precluded from establishing ineffective assistance simply because he had not originally raised this claim in a motion to withdraw. *See id.* at ¶ 10, 902 P.2d at 1118 ("To prevail on an ineffective assistance of counsel claim based on a conflict of interest, a defendant who raised no objection at trial or a hearing on a motion to withdraw a guilty plea need not show prejudice, but 'must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.'" (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980)). In such situations, a showing of conflict of interest with the attorney absolves what would otherwise be waiver. *Carey* is discussed further *infra*, in connection with Monaco's Proposition II claim.

[12] 2006 OK CR 51, 152 P.3d 244.

[13] *Id.* at ¶ 24, 152 P.3d at 253; *see also Huskey v. State*, 1999 OK CR 3, ¶ 12, 989 P.2d 1, 7 (promulgating uniform jury instruction for child sexual abuse, under 10 O.S.Supp.1995, § 7115, which includes element that abuse was "by a person responsible for the child's health or welfare").

and the victim would otherwise be required.[14] The fact that a defendant had a special relationship with the child victim and responsibility for that child's welfare makes Oklahoma's crime of child sexual abuse especially despicable.

This Court has likewise recognized that under 10 O.S.Supp., § 7102(B), which § 7115(E) explicitly incorporates, the term "person responsible for a child's health, safety or welfare" includes the following:

> a parent; a legal guardian; a custodian; a foster parent; a person eighteen (18) years of age or older with whom the child's parent cohabitates or any other adult residing in the home of the child; an agent or employee of a public or private residential home, institution, facility or day treatment program . . . ; or an owner, operator, or employee of a child care facility . . . .[15]

Hence a defendant can only be convicted of child sexual abuse under 10 O.S., § 7115(E)—and its successor provision, 21 O.S., § 843.5(E)—if the defendant fits into at least one of these specific categories of persons who are responsible for the child victim's health, safety, or welfare.[16]

---

[14] This Court notes that 10 O.S., § 7115 was modified in 2002, 2006, 2007, and 2008. In each of these versions, however, § 7115(E) incorporated the definition of "child sexual abuse" found at 10 O.S., § 7102(B)(6). *See* 10 O.S.Supp.2002, 2006, 2007, 2008, § 7115(E). During this same time, "sexual abuse" was defined by § 7102(B)(6) as "limited to[] rape, incest and lewd or indecent acts or proposals made to a child, as defined by law, *by a person responsible for the child's health, safety or welfare.*" *See* 10 O.S.Supp.2002, 2005, 2006, 2007, § 7102(B)(6) (emphasis added). And the "person responsible . . ." element remains an element of child sexual abuse under the current statute. *See* 21 O.S.Supp.2010, § 843.5(E) (incorporating same definition of "sexual abuse").

[15] *Cox*, 2006 OK CR 51, ¶ 24, 152 P.3d at 253 (quoting 10 O.S.Supp.2002, § 7102(B)(5)). We note that this definition remained the same during the time period relevant to this case. *See* 10 O.S.Supp.2005, 2006, 2007, § 7102(B)(5).

[16] In the current case, the only category that appears to fit Monaco is that of "custodian." In *Townsend v. State*, 2006 OK CR 39, ¶¶ 3-6, 144 P.3d 170, 171-72, this Court held that "a person who voluntarily accepts responsibility for a child, for a significant period of time" meets the definition of "custodian" and "person responsible for the child's health, safety, or welfare" under 10 O.S., § 7102(B)(5). It seems worth noting, however, that the current version of the re-numbered successor to § 7102(B) contains a definition of "custodian" that is inconsistent with our analysis in *Townsend*. *See* 10A O.S.Supp.2010, § 1-1-105(16) (defining "custodian" as "an individual other than a parent, legal guardian or Indian custodian, to whom legal custody of the child has been awarded by the court," but not the Department of Human Services). Thus the definition of "custodian" has been narrowed, subsequent to the crimes charged in this case.

The Information in this case totally fails to allege that Monaco was a "person who was responsible for the health, safety, or welfare" of the child he was charged with sexually abusing, *i.e.*, S.M., who was his step-granddaughter. Even the Information's statutory reference to the crime charged did not give any kind of "notice" regarding this element, since Monaco was (incorrectly) charged with violating 21 O.S.Supp.2009, § 843.5(E)—the renumbered version of 10 O.S.Supp., § 7115(E). Unfortunately, when this provision was renumbered in 2009, the reference to the definition of "child sexual abuse" was not adjusted and continued to refer to § 7102(B)(6) "of this title," *i.e.*, title 21, which did not then and does not now exist. *See* 21 O.S.Supp.2009, § 843.5(E).[17] Thus the Information did not correctly inform Monaco of the statute he was charged with violating or include all the elements of the crime he was charged with committing; nor did the Information even intelligibly reference the "person responsible" element.

Furthermore, the "person responsible" element of child sexual abuse was not addressed or referenced in any way at the time Monaco actually pled guilty. The record currently before this Court contains no evidence that Monaco was *ever* given notice or advised—at the time of his plea or at any time prior to his plea—that being a "person responsible" for the child victim's health, safety, or welfare was an element of all ten counts to which he was pleading guilty.[18]

---

[17] This discrepancy has since been corrected. *See* 21 O.S.Supp.2010 § 843.5(E) (which now explicitly incorporates the definition of "child sexual abuse" found in "Title 10A," namely, 10A O.S., § 1-1-105(2)(b), the renumbered version of the former 10 O.S.Supp.2007, § 7102(B)(6)).

[18] The State relies heavily on *Fields v. State*, 1996 OK CR 35, 923 P.2d 624, in response to Monaco's Proposition I claim. Fields was charged with and pled guilty to first-degree felony murder, although the Amended Information in his case did not specifically list each element of

Guilty pleas, along with pleas of *nolo contendere* and *Alford* pleas,[19] have become such a common and integral part of our criminal justice system that it is sometimes easy to forget the significance of what each plea represents and what the defendant is giving up thereby.[20] As the Supreme Court recognized back in *Boykin v. Alabama*, a defendant who pleads guilty is relinquishing several constitutional protections guaranteed to all who are accused of a crime, including (1) the privilege against compulsory self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers.[21] The *Boykin* Court proclaimed: "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."[22] Although this Court has not always

---

first-degree burglary, which was the underlying felony. *Id.* at ¶ 24, 923 P.2d at 628. The *Fields* court noted, however, that the Amended Information did "specif[y] the statutes under which Petitioner was charged" and, more importantly, that at the time of his plea, Fields testified "that he knew all of the elements of the crime(s) he was charged with" and also specifically admitted to each of the required factual elements of his crime. *Id.* at ¶ 26-27, 923 P.2d at 629. Thus *Fields* is not analogous to the current case.

[19] *See North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162 (1970) (defendant can validly plead guilty, even while denying or declining to admit actual commission of crime: "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.").

[20] *See, e.g., Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970) ("That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized.").

[21] *Boykin*, 395 U.S. at 243, 89 S.Ct. at 1712. In pleas of *nolo contendere* and *Alford* pleas, however, the defendant does not necessarily give up his right not to incriminate himself. *See Alford*, 400 U.S. at 37, 91 S.Ct. at 167 ("Thus, while most pleas of guilty consist of a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of a criminal penalty. . . . Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act [a *nolo* plea] and a plea containing a protestation of innocence [an *Alford* plea] . . . .").

[22] *Id.* at 243-44, 89 S.Ct. at 1712; *see also Brady*, 397 U.S. at 748, 90 S.Ct. at 1469 (recognizing that because a guilty plea is a waiver of constitutional right to trial before a jury or judge, plea "not only must be voluntary but must be knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences").

required the utmost solicitude of which courts are capable, we have not wavered in maintaining our commitment to the principle that in order to be constitutionally valid, guilty pleas be both voluntarily and intelligently entered.[23] Furthermore, this Court has recognized that a plea cannot be truly voluntary unless the defendant possesses a basic understanding of the law in relation to the facts of the case.[24]

Hence in order to have knowingly and intelligently pled guilty to child sexual abuse in this case, Monaco needed to be informed and aware that his status as a "person responsible for the health, safety, or welfare" of the child victim was a requirement for his convictions.[25] And the occasion of Monaco's

---

[23] *See, e.g., Hagar v. State*, 1999 OK CR 35, ¶ 4, 990 P.2d 894, 896 (recognizing that although this Court held, in *Ocampo v. State*, 1989 OK CR 38, ¶ 8, 778 P.2d 920, 923, that requirements for guilty pleas established in *King*, 1976 OK CR 103, 553 P.2d 529, are to be used as " guideline," rather than mandatory checklist, this Court's evaluation of "validity of a guilty plea" still depends upon "whether or not the plea was entered voluntarily and intelligently" (citing *Boykin*)).

[24] *See Feaster v. State*, 1975 OK CR 151, ¶ 9, 539 P.2d 401, 404 ("Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." (quoting *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969))); *Berget v. State*, 1991 OK CR 121, ¶ 24, 824 P.2d 364, 371 ("[W]e agree with the principal [sic] cited by Petitioner, that a guilty plea 'cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts . . . .'" (quoting *McCarthy*); *see also Boykin*, 395 U.S. at 243 n.5, 89 S.Ct. at 1712 n.5 (same). Although a 1990 "Order Denying Certiorari" of this Court took issue with this principle, *cf. May v. State*, 1990 OK CR 14, ¶ 7, 788 P.2d 408, 412, we had already adopted this principle in 1975 in *Feaster*, and we affirmed it again one year later in *Berget* (1991). Furthermore, although *May* indicated that the task of *"[e]xplaining* the elements of the criminal charge, together with the possible defenses, is a mater left to the realm of the defense counsel," *id.* (emphasis added), *May* did not hold that a defendant could validly plead guilty without ever being informed of all the elements of the crimes charged against him. We have never so held.

[25] In *Berget*, 1991 OK CR 121, ¶¶ 24-26, 824 P.2d at 371-72, this Court noted that under certain circumstances, such as when a simple and valid Information has been read to a defendant or when the defendant discussed the plea with an experienced defense attorney, a reviewing court could sometimes "presume that the defendant understood the nature of the charges when the defendant fails to present evidence otherwise." *See, e.g., United States v. Dayton*, 604 F.2d 931, 938 (5th Cir. 1979) ("For simple charges such as those in this case, a reading of the indictment, followed by an opportunity given the defendant to ask questions about it, will usually suffice.") (cited in *Berget*). Yet neither *Berget* nor the cases relied upon by *Berget* suggested that a defendant could be presumed to have understood the charges against him—without any affirmative evidence in the record—if the Information filed in the case did not properly charge all the elements at issue. *See, e.g., Worthen v. Meachum*, 842 F.2d 1179, 1183 (10th Cir. 1988)

plea is, of course, the perspective from which we must evaluate whether the plea was knowingly and intelligently entered.[26] It is not enough to look back and say that Monaco was "surely" such a person, during the time period of the crimes charged—since evidence from Monaco's later sentencing established that the victim, his step-granddaughter, would sometimes stay overnight in his home—if there is nothing in the record to suggest that Monaco had any knowledge that this fact had any relevance to the crimes charged against him. The question for this Court is whether Monaco's plea was knowingly and intelligently entered *at the time it was entered.*[27]

The only pre-plea reference in the entire record before this Court to Monaco as a potential "person responsible" for the health, safety, or welfare of S.M. is in a "Probable Cause Affidavit," dated October 23, 2009. In this affidavit an investigating officer, whose signature is indiscernible, lists evidence in support of Monaco's arrest, which occurred that same day. The officer states in the affidavit that he (or she) interviewed Monaco and that, among other things,

---

(noting that defendant contended that plea "not knowing and voluntary because he was not advised on the record of the acts sufficient to constitute the offense," that defendant "does not allege what he did not understand about the charge against him," hence court would "assume he is contending that the record lacks an *explanation* of the nature or elements of the crime") (emphasis added). *Worthen* was specifically quoted and relied upon in *Berget*. *See* 1991 OK CR 121, ¶¶ 24-25, 824 P.2d at 372. Yet *Worthen* explicitly recognized that "in order for a guilty plea to be 'voluntary in a constitutional sense,' a defendant must not merely understand the rights he waives, but he must also have a competent understanding of the charge against him." 842 F.2d at 1183 (citation omitted).

[26] *See Boykin*, 395 U.S. at 242, 89 S.Ct. at 1711-12 ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.").

[27] *See Zakszewski v. State*, 1987 OK CR 152, ¶¶ 6-7, 739 P.2d 544, 545-46 (invalidating guilty plea where defendant "did not make a detailed statement" of facts of crime, "nor was he even advised of the elements of the crimes charged," and where trial court's inquiry into factual basis for plea "was grossly inadequate," since court "inquired only whether the petitioner was pleading guilty because he committed the acts with which he had been charged").

Monaco "stated that S.M. would stay the night at his house and he was her caretaker when she was there."[28] Such an affidavit, however, is clearly *not* the actual charging document, nor does it establish the crimes (or the elements of the crimes) against which a defendant will actually have to defend. In fact, the Information in this case, filed on November 12, 2009, did not ultimately charge Monaco regarding some of the allegations asserted in the affidavit.[29] And even the affidavit does not assert that Monaco was informed that being a "caretaker" for S.M. could be an element of the crimes that could be charged against him, and no reference was made to the affidavit or its "caretaker" reference at the time of Monaco's plea.[30]

Although in the current case it may be tempting to "fill in the blank" regarding the "person responsible" element—and find that Monaco *would have* admitted to this element if he had been informed of it and asked to do so—it is not the job of this Court to either fix or excuse what should have been done, and so easily could have been done, at the charging stage and the guilty plea stage . . . but was not.[31] And it is fundamental to the Rule of Law that this Court's analysis of whether Monaco's plea was voluntarily and intelligently entered *not* be driven or affected by the fact that he is charged with and has admitted to committing repulsive and contemptible sexual crimes against a child. It is the

---

[28] No law enforcement officer ever actually testified against Monaco, however, and when he was later questioned, at his sentencing, regarding some of the specific admissions that the affidavit asserted he had made, he denied that he had made some of the statements attributed to him.

[29] For example, the affidavit states that Monaco "confessed to S.M. touching his penis on at least five different occasions," but the Information did not charge this against Monaco.

[30] Nor is there any evidence in the record that Monaco was ever provided this affidavit.

[31] The uniform jury instruction for Child Sexual Abuse, which has existed in its current form since 2000 (post-*Huskey*), lists as its first element that the sexual abuse be by "a person responsible for the child's health, safety or welfare." *See* OUJI-CR(2d)(Supp. 2000) 4-39.

job of this Court to evenhandedly apply the legal standards for plea validity that are at issue without regard to the character of the defendant, our compassion for the victim, or the nature of the crimes at issue.[32] Again, this is fundamental to the Rule of Law.

The very-sparse record before this Court does not appear sufficient to support a finding that Monaco knowingly and intelligently pled guilty to the crimes charged against him, since there is no evidence in this record that Monaco knew or had been informed, at the time he pled guilty, that the State was required to prove that he was a "person responsible" for S.M.'s health, safety, or welfare, in order to convict him on all ten of the counts charged. This Court notes that the record for evaluating the validity of a plea is not limited to evidence actually put on at the time of the plea. This Court has recognized, in particular, that evidence presented during a plea withdrawal hearing can be considered as part of an evaluation of whether a defendant's plea was both intelligent and voluntary, since evidence is often presented in such hearings about the specific circumstances of a particular plea that was not part of the formal record of that plea.[33]

In the current case, however, Monaco's plea withdrawal hearing was not transcribed. In addition, Monaco's motion to withdraw his plea was submitted

---

[32] In *Coyle v. State*, 1985 OK CR 121, 706 P.2d 547, in which the defendant challenged the validity of his plea for failing to follow the requirements of *King* (and this Court reversed his conviction on this basis), *id.* at ¶ 2. 706 P.2d at 547, we asserted, "The alleged facts underlying the charge filed against the petitioner will not be recited, as they are irrelevant to a disposition of this case." *Id.* at ¶ 3, 706 P.2d at 548.

[33] *See, e.g., State v. Durant*, 1980 OK CR 21, ¶¶ 2-3, 609 P.2d 792, 793-94 (recognizing that evidence presented at hearing on application to withdraw guilty plea can be considered "in determining whether or not a plea was voluntarily and intelligently entered" (quoting *Feaster v. State*, 1975 OK CR 151, ¶¶ 5-6, 539 P.2d 401, 403-04)).

by the same attorney who represented him at his plea and this same attorney continued to represent Monaco during the hearing on his motion to withdraw. Hence this Court moves to Monaco's Proposition II claim.[34]

In Proposition II, Monaco asserts that his right to conflict-free assistance of counsel was violated when the trial court failed to appoint him new counsel on his motion to withdraw his plea, even though he was asserting ineffective assistance of this same counsel and lack of "close assistance of [this] counsel" as two of the justifications for his motion. In *Randall v. State*,[35] this Court held that a defendant is entitled to the assistance of counsel on a motion to withdraw a guilty plea and at the evidentiary hearing on such a motion. In *Carey v. State*,[36] we further held that this right to counsel includes the right to the *effective* assistance of counsel, which "includes the correlative right to representation that is free from conflicts of interest."[37]

This Court recognizes that an actual conflict of interest exists where a defendant is asserting that his or her attorney's ineffectiveness or coercion resulted in an invalid plea, yet this same attorney still represents the defendant.[38] Consequently, when a defendant is asserting ineffective assistance

---

[34] This Court notes that within his Proposition I claim, Monaco asserts that the record in this case does not contain an adequate "factual basis" for his guilty plea, a claim that has not yet been addressed. Recognizing both the limited nature of the record before this Court and our resolution of Proposition II, *see infra*, this Court declines to specifically address this portion of Monaco's Proposition I claim. Instead, the trial court will be directed to address this claim, upon the remand of this case for further proceedings regarding the validity of Monaco's plea.

[35] 1993 OK CR 47, ¶¶ 5-7, 861 P.2d 314, 316.

[36] 1995 OK CR 55, 902 P.2d 1116.

[37] *Id.* at ¶ 8, 902 P.2d at 1118 (citing *Woods v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981)).

[38] *See Carey*, 1995 OK CR 55, ¶ 10, 902 P.2d at 1118; *Oklahoma Rules of Professional Conduct*, Rule 1.7, 5 O.S.2001, Ch. 1, App. 3-A (unless certain conditions are met, including written "informed consent" by client, "a lawyer shall not represent a client if the representation involves a

or attorney coercion as a reason that his or her guilty plea is invalid, the trial court should automatically appoint new, conflict-free counsel on the defendant's motion to withdraw the plea.

In the current case, the only record of what occurred during the (non-transcribed) plea withdrawal hearing is contained in the trial court's April 2, 2010, "Order Denying Motion to Withdraw Plea," which summarizes what happened at the March 16, 2010, plea withdrawal hearing as follows:

> No evidence was presented by the Defendant at the hearing and instead he simply urged the Court to find that he was denied effective assistance of counsel at his sentencing hearing based solely on the sentence imposed. The Defendant contended that his lengthy prison sentence standing alone demonstrates inadequate assistance. The Defendant did not claim, nor argue, that his guilty plea was entered as a result of ineffective assistance, ignorance, misunderstanding, or misapprehension, or that it was not entered into freely and voluntarily.

The next paragraph of the court's order states as follows:

> Based upon the Court's observations of the Defendant's attorney and his handling of the plea and sentencing hearing and the Defendant's answers to the Court's questions at the time of plea and sentencing, the Court finds the Defendant's claims to be without merit and his motion to withdraw his previous plea of guilty is denied.

This Court notes that the lack of a transcript of Monaco's plea withdrawal hearing severely limits this Court's ability to evaluate the adequacy of that hearing and the plea that was at issue. Nevertheless, even this inadequate record supports this Court's more general conclusion that new counsel must be appointed whenever a defendant is asserting ineffective assistance of plea counsel as a basis for a motion to withdraw his or her plea. The court's

---

concurrent conflict of interest," which includes situations where "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer").

summary suggests that continuing counsel in this case failed to put on any evidence or argument whatsoever in support of Monaco's claim that this same counsel was ineffective regarding Monaco's plea. Even though the current record does not contain a request by Monaco or his continuing counsel to appoint new counsel, the trial court should have recognized the need for new counsel, because Monaco was entitled to effective and conflict-free representation on his motion to withdraw his plea.

Hence this Court finds that the current case should be remanded to the district court for appointment of new counsel for Monaco on his motion to withdraw his guilty plea. We recognize that neither the State nor the Appellant has had the opportunity to present evidence regarding Monaco's knowledge or awareness of the "person responsible" element at the time of his plea, since this claim was not specifically raised in the district court. Nor has the trial court had the opportunity to focus upon this particular aspect of Monaco's ineffective assistance claim and his claim that his plea was not voluntary and intelligent. Upon remand, the trial court is directed to determine whether Monaco's plea was, in fact, voluntarily and intelligently entered and also the adequacy of the factual basis for Monaco's plea.[39]

In Proposition III, Monaco asserts that his sentence is excessive and seeks

---

[39] This Court notes that the trial court is not limited to the defendant's plea colloquy and plea form in determining whether there was a "factual basis" for the plea. *See Wester v. State*, 1988 OK CR 126, ¶ 4, 764 P.2d 884, 887 (Opinion on Rehearing) (noting that trial court may look to sources other than defendant and plea itself to obtain "a factual basis for accepting the plea," including preliminary hearing transcript, a stipulation of facts by the parties, and "documentary evidence presented to the court"); *see also Hagar v. State*, 1999 OK CR 35, ¶ 4, 990 P.2d 894, 897 ("The factual basis of the plea must be sufficient to provide a means by which the judge can test whether the plea is being entered intelligently." (citing *Alford*)).

a sentence modification. Because this Court is remanding this case based upon Proposition II, Monaco's Proposition III sentencing claim is not yet ripe. Thus we decline to address it.

This case is remanded for appointment of new counsel on Monaco's motion to withdraw his plea, based upon his Proposition II ineffective assistance claim. Both parties will be free to present additional, relevant evidence on the issue of whether Monaco's plea was voluntarily and intelligently entered, and whether there was an adequate factual basis for the plea, particularly regarding the "person responsible" element. The trial court is directed to make its determination regarding Monaco's motion to withdraw his plea in accord with the discussion herein.

Decision

Monaco's petition for certiorari is **GRANTED**, and this case is **REMANDED** to the district court **FOR APPOINTMENT OF NEW COUNSEL ON MONACO'S MOTION TO WITHDRAW HIS GUILTY PLEA**. The district court is directed to determine the adequacy of Monaco's guilty plea consistent with the principles and discussion contain herein. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEYS IN TRIAL COURT

MARK HIXSON
ATTORNEY AT LAW
800 W. MAIN
YUKON, OKLAHOMA 73099
ATTORNEY FOR DEFENDANT
AT PLEA & PLEA WITHDRAWAL

STEPHANIE HAMPTON
PAUL A. HESSE
ASSISTANT DISTRICT ATTORNEYS
CANADIAN COUNTY D.A.'S OFFICE
COURTHOUSE
303 NORTH CHOCTAW
EL RENO, OKLAHOMA 73036
ATTORNEYS FOR THE STATE

ATTORNEYS ON APPEAL

CINDY BROWN DANNER
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
KEELEY L. HARRIS
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

OPINION BY: SMITH, J.

A. JOHNSON, P.J.:	CONCUR
LEWIS, V.P.J.:	CONCUR IN RESULTS
LUMPKIN, J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR

LEWIS, V.P.J., concurring in result.

I concur in the Court's conclusion that plea counsel's conflict of interest at the time of the hearing on Petitioner's motion to withdraw his plea requires remand for a new hearing. Because Petitioner's initial motion to withdraw his plea, and the hearing thereon, were tainted by a conflict of interest that effectively left Petitioner without counsel to actively represent his interests in connection with these proceedings, the Court's entire analysis regarding the alleged involuntariness of the plea in Proposition One is premature.

On remand, the district court should appoint new counsel for Petitioner and direct counsel to consult with Petitioner regarding the filing of a new motion to withdraw setting forth all of the specific grounds upon which Petitioner seeks to withdraw his plea. The district court should then schedule a new hearing on the motion to withdraw, determine the precise grounds upon which Petitioner wishes to proceed, and afford the parties an opportunity to present their evidence relevant to the specific grounds asserted in the motion to withdraw.

New counsel will have the opportunity to consult with Petitioner and interview plea counsel about the extent of his advice to Petitioner concerning the nature of the charges against him, including the elements of the crimes to which Petitioner pled guilty. Considering the procedural posture of the case, this Court should not pass upon any of the claims previously raised, as the same may either be mooted, abandoned, or refuted by the evidence presented

on remand. Consistent with this view, I express no opinion about the merits of the grounds previously asserted by Petitioner on *certiorari*.

LUMPKIN, JUDGE: CONCURRING IN PART/DISSENTING IN PART

I concur in remanding this matter to the trial court for a new hearing with conflict free counsel based upon the actual conflict of interest that existed between Petitioner and his counsel at the evidentiary hearing on the motion to withdraw. *Carey v. State*, 1995 OK CR 55, ¶¶ 10-12, 902 P.2d 1116, 1118. However, I dissent to the majority's treatment of Petitioner's claim in proposition one. The present opinion disregards our role and responsibility as an appellate court.[1]

In discussing judicial decisions, the public, and often lawyers, speak of rogue actions. It is especially incumbent upon appellate courts to maintain the appropriate perspective of the Court's role if respect for the judicial system is to be preserved. "The purpose of an appellate court is to review rulings on matters of law. When the issues of fact are properly presented to it, the Court may rule on whether as a matter of law there is any evidence to support the conclusions of the trier of fact." *Ramirez v. State*, 1967 OK CR 129, ¶ 19, 430 P.2d 826, 829 (quotations and citation omitted). The appellate court and its judges are to adjudicate the propositions of error presented based on the record developed at the trial court and through the attorneys of record. *D.M.H.*

---

[1] I recognize that some disfavor prosecution for the offense of child sexual abuse and instead prefer the charge of lewd or indecent acts with a child under 21 O.S.Supp.2010, § 1123. However, the decision regarding which criminal charge to bring lies within the wide parameters of prosecutorial discretion. *State v. Franks*, 2006 OK CR 31, ¶ 6, 140 P.3d 557, 558; *Leech v. State*, 2003 OK CR 4, ¶ 6, 66 P.3d 987, 993; *Childress v. State*, 2000 OK CR 10, ¶ 18, 1 P.3d 1006, 1011; *Carpenter v. State*, 1996 OK CR 56, ¶ 23, 929 P.2d 988, 995; *Romano v. State*, 1993 OK CR 8, ¶ 114, 847 P.2d 368, 393.

v. State, 2006 OK CR 22, ¶ 2, 136 P.3d 1054, 1058 (Lumpkin, V.P.J., dissenting). "This Court should never render an interpretation of the law just because it can. The Court should be guided and restrained by prior case law to ensure consistency and finality in the law. This ensures a rule of law and not of men." *Dennis v. State*, 1999 OK CR 23, ¶ 7, 990 P.2d 277, 289 (Lumpkin, V.P.J., concurring in part/dissenting in part).

Following this role, this Court has steadfastly refused to issue advisory opinions. *Murphy v. State*, 2006 OK CR 3, ¶ 1, 127 P.3d 1158; *Lambert v. State*, 1999 OK CR 17, ¶ 15, 984 P.2d 221, 229; *Steffey v. State*, 1996 OK CR 17, ¶ 3, 916 P.2d 263, 263; *Canady v. Reynolds*, 1994 OK CR 54, ¶ 9, 880 P.2d 391, 394 ("[A]bsent statutory authority, this Court could not issue an opinion in any matter not at issue before it."); *Matter of L. N.*, 1980 OK CR 72, ¶ 4, 617 P.2d 239, 240 ("An advisory opinion does not fall within the Court's original or statutory jurisdiction; neither does it come within its appellate review."). However, in this case the entire discussion of proposition one solely consists of advisory *dicta*.

As the Court does not determine or resolve proposition one, the entire discussion is *dicta*. "Opinions of a judge which do not embody the resolution or determination of the specific case before the court" are considered *dicta* and therefore "not binding in subsequent cases as legal precedent." Black's Law Dictionary 454 (6th ed. 1990). "[A]ny opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression."

Carroll v. Carroll's Lessee, 57 U.S. 275, 287, 16 How. 275, 287, 14 L.Ed. 936 (1853).

The discussion is advisory *dicta* because proposition one is not at issue. *Canady*, 1994 OK CR 54, ¶ 9, 880 P.2d at 394. Petitioner did not specifically raise the instant challenge in his motion to withdraw plea filed in the District Court. "No matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea." Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2011). In *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355, this Court interpreted Rule 4.2 and stated "[w]e do not reach the merits of the first proposition, for [Petitioner] waived the issue by failing to raise it in his motion to withdraw guilty plea." Petitioner did not assert in his motion to withdraw plea before the district court that he lacked a full understanding of the crimes charged. Instead Petitioner alleged the following boiler plate language as grounds to withdraw his plea:

a. The Defendant asserts he is innocent;
b. A withdrawal of plea would not prejudice the government;
c. The Defendant has filed this motion without unnecessary delay;
d. A withdrawal would not substantially inconvenience the Court;
e. The Defendant lacked close assistance of counsel;
f. The Defendant lacked effective assistance of counsel;
g. A withdrawal would not waste judicial resources;
h. The Plea was entered through inadvertence, ignorance, mistake, or coercion;
I. The sentence imposed upon Defendant was excessive and contrary to the evidence presented;
j. The defendant was not mentally competent at the time of the act charged;

k. The Defendant was not mentally competent to a enter a plea; and
l. The plea was not voluntarily and intelligently entered into by the Defendant.

(O.R. 44). At the evidentiary hearing, Petitioner only argued that he received ineffective assistance of counsel. He neither asserted a lack of understanding regarding the crimes charged nor a lack of notice of any element of the offense. (O.R. 60). Because the claim was not specifically raised before the trial court, the trial judge had no opportunity to adjudicate the claim.[2] This issue is not properly before this Court. *Davis v. State*, 1990 OK CR 20, ¶ 6, 792 P.2d 76, 81 (finding that unless a timely objection affording the trial court an opportunity to correct the error was presented the issue is not properly before this Court).

Instead of adjudicating those issues which are properly before the Court the opinion disregards the totality of the proceedings and enters into legal gymnastics to parse a process which is in fact a single event, i.e. plea and sentencing constitute only one legal appealable event, regardless of the times scheduled to complete. To find otherwise is "straining out a gnat and swallowing a camel," i.e. disregarding our rules and procedures to achieve a desired result. Matthew 23:24 (RSV).

---

[2] We review the district court's decision denying a motion to withdraw guilty plea for an abuse of discretion. *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998. In the present case, the trial court found that Petitioner did not present any evidence or argument at the hearing in favor of his claims that his plea was not knowingly and intelligently entered. (O.R. 60). Instead, Appellant only argued that he received ineffective assistance of counsel at the hearing. Clearly, the trial court did not abuse its discretion in denying the instant claim.

The majority determines that ineffective assistance of counsel excuses Petitioner's failure to specifically raise this issue in the application to withdraw plea. However, the proper remedy for the denial of effective assistance at a hearing on a motion to withdraw is to remand the matter for a proper evidentiary hearing. *Carey*, 1995 OK CR 55, ¶¶ 10-12, 902 P.2d at 1118; *Randall v. State*, 1993 OK CR 47, ¶¶ 4-11, 861 P.2d 314, 315-17. This affords a petitioner the opportunity to fully develop the record regarding the claim that counsel failed to effectively present and gives the trial court an opportunity to correct any error that occurred. If the opinion was properly limited to this simple issue, then I could concur in the action.

Instead, the opinion creates out of whole cloth a new exception to Rule 4.2(B). The opinion states this Court has never held that a defendant can waive being informed of the elements of the crime(s) to which he or she is pleading guilty. This wholly new exception is contrary to our interpretation of Rule 4.2(B). We have determined that a petitioner's failure to raise an issue in his application to withdraw waives appellate review for all but jurisdictional defects. *Walker*, 1998 OK CR 14, ¶ 3, 953 P.2d at 355 (refusing to reach the merits of petitioner's claim that he was not advised of several fundamental rights); *Cox v. State*, 2006 OK CR 51, ¶¶ 4, 9, 152 P.3d 244, 247, 249 (recognizing statute of limitations as jurisdictional defect that may be raised for the first time on certiorari appeal). Further, this new exception is unnecessary as, ultimately, the opinion does not decide the issue but after pontification regarding its view of the waived issue remands the case based upon error in

proposition two. Vacillations of this type give federal courts the ability to claim this Court is not disciplined in its application of its Court rules and provides an excuse to not defer to and be bound by either the rules or this Court's decisions.

Since the record has not been fully developed, the discussion of proposition one is advisory *dicta*. The State has filed a brief disputing the facts as set forth in Petitioner's brief. As admitted by the majority, the district court has never had the opportunity to receive evidence and argument upon this specific issue. "This Court functions as an appellate court and cannot efficiently decide factual disputes." *Banks v. State*, 1998 OK CR 5, ¶ 6, 953 P.2d 344, 346. "[A]n appellate court [is] unable to make first-instance rulings on issues of fact or law which have been neither raised nor assessed at *nisi prius*." *State v. Torres*, 2004 OK 12, ¶ 8 n. 15, 87 P.3d 572, 578 n. 15.

Finally, the opinion directs the trial court, upon remand, to determine the adequacy of the factual basis for Petitioner's plea. However, in the past when we have remanded a case such as this to the district court for a new hearing with conflict free counsel, it has been for a new hearing on the original motion to withdraw as filed. *See Carey*, 1995 OK CR 55, ¶ 12, 902 P.2d at 1118; *Randall v. State*, 1993 OK CR 47, ¶ 11, 861 P.2d at 316-17.

If Petitioner properly presents the claim to the district court, then the trial court is free to reach its own conclusions. The opinion states "there is no evidence in this record that Monaco knew or had been informed, at the time he pled guilty, that the State was required to prove that he was a "person

responsible for S.M.'s health, safety, or welfare. . . ."[3] It is not this Court's role to offer advice to the trial court as such would interfere with the responsibility of the trial court to exercise the powers confided to it. *Matter of L. N.*, 1980 OK CR 72, ¶ 4, 617 P.2d at 240. In fact, if members of this Court have prejudged the case then they must recuse from any future appeals. It is first the trial court's responsibility to hold an evidentiary hearing and rule on the application to withdraw plea. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2011). The opinion's discussion of proposition one is neither binding on the trial court nor this Court as it is *dictum*. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351 n. 12, 125 S.Ct. 694, 706 n. 12, 160 L.Ed.2d 708 (2005) ("Dictum settles nothing, even in the court that utters it."); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67, 116 S.Ct. 1114, 1129, 116 S.Ct. 1114 (1996) (Finding that the Court is bound by "those portions of the opinion necessary to that result."). This "reach out and touch someone" methodology conflicts with the disciplined role judges should take in performing their judicial duties. Judges, and especially appellate judges, are not advocates and should not succumb to the temptation to become the enlightened philosopher kings described by Plato in "*The Republic.*"[4]

---

[3] The opinion also implies that Petitioner was not informed of the "person responsible" element in its statement that "it may be tempting to "fill in the blank" regarding the "person responsible" element—and find that Monaco would have admitted to this element if he had been informed of it and asked to do so. . . ."

[4] Former Chief Justice Maura D. Corrigan, Michigan Supreme Court, discusses this tendency in relation to the "textualist approach to judicial interpretation" in *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, Texas Review of Law & Politics, Vol. 8, No. 2, 261-67 (2004).

While I do not address the merits of the claim, I cannot agree with the citation to law and the analysis applied in proposition one. A plea is not voluntary and intelligently entered "unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S.Ct. 2253, 2257-58, 49 L.Ed.2d 108 (1976) *quoting Smith v. O'Grady*, 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859. Due process is met "[w]here the Information alleges an offense and pleads particular facts constituting the offense in ordinary language, such that a person of common understanding can know what is intended and prepare a defense to the charge." *Parker v. State*, 1996 OK CR 19, ¶ 23, 917 P.2d 980, 986. In determining whether due process requirements were satisfied, this Court looks to the "four corners" of the Information together with all material that was made available to a defendant at preliminary hearing or through discovery. *Id.*, 1996 OK CR 19, ¶ 24, 917 P.2d at 986. The United States Supreme Court has "never held that the judge must himself explain the elements of each charge to the defendant on the record" for a plea to be valid. *Bradshaw v. Stumpf*, 545 U.S. 175, 183, 125 S.Ct. 2398, 2405, 162 L.Ed.2d 143 (2005). "Explaining the elements of the criminal charge, together with the possible defenses, is a matter left to the realm of defense counsel and the trial court is not required to address those matters to have a valid plea of guilty." *May v. State*, 1990 OK CR 14, ¶ 7, 788 P.2d 408, 412.[5]

[5] "Where a defendant is represented by competent counsel, the court usually may rely on that

The opinion distorts the purpose and requirement that there exist a factual basis for the plea. This Court has long required that before accepting a plea, the trial court determine whether a factual basis exists for the plea. *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 535. The requirements in *King* are guidelines for the trial court "in establishing the totality of the circumstances surrounding the entry of the guilty plea which will provide a proper record to determine its validity." *Ocampo v. State*, 1989 OK CR 38, ¶ 8, 778 P.2d 920, 923. The purpose of the factual basis is to provide a means by which the judge can test whether the plea is being intelligently entered. *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91 S.Ct. 160, 167-68, 27 L.Ed.2d 162, 171-72 (1970).

In establishing the factual basis for a plea, "the court may require the defendant to make a detailed statement in the defendant's own words concerning the commission of the offense." *Hagar v. State*, 1999 OK CR 35, ¶ 4, 990 P.2d 894, 896-97; *Zakszewski v. State*, 1987 OK CR 152, ¶ 5, 739 P.2d 544, 545. However, a trial court may look to sources other than the defendant to obtain a factual basis for the plea. *Id*; *Wester v. State*, 1988 OK CR 126, ¶ 4, 764 P.2d 884, 887 (Opinion on rehearing). The trial court has the ability to look at the entire record to determine whether a factual basis exists. *Berget v. State*, 1991 OK CR 121, ¶ 17, 824 P.2d 364, 370 (recognizing that the trial court's ability to look at the entire record is a double edged sword which may

---

counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty." *Bradshaw v. Stumpf*, 545 U.S. 175, 183, 125 S.Ct. 2398, 2405, 162 L.Ed.2d 143 (2005).

also indicate that some element of the crime is lacking). The record consists of those pleadings and evidence available to the trial court at the time of sentencing. *Id.*, 1991 OK CR 121, ¶ 16, 824 P.2d at 370. Also included for the trial court is the presentence investigation completed by the Department of Corrections pursuant to 22 O.S.Supp.2002, § 982, unless the investigation is waived.

Without citation to authority, the opinion excludes the probable cause affidavit as a potential source from which the trial court could obtain a factual basis for accepting the plea. This is wholly inconsistent with the rule of law and the very authority cited in the opinion, to wit:

> a trial court is not required to have a defendant make a detailed statement in his own words concerning the commission of the offense to which he is pleading, *Hagar*, 1999 OK CR 35 at ¶ 4, 990 P.2d at 897, and may look to other sources to establish the factual basis for the plea, *Wester v. State*, 1988 OK CR 126, ¶ 4, 764 P.2d 884, 887 (Opinion on rehearing) . . . .

Cox v. State, 2006 OK CR 51, ¶ 28, 152 P.3d 244, 254.

When this Court reviews the validity of a guilty plea we look at the entire record. *Berget*, 1991 OK CR 121, ¶ 16, 824 P.2d at 370 ("we will examine the entire record before us to determine whether the guilty plea was entered in a knowing and voluntary manner."); *State v. Durant*, 1980 OK CR 21, ¶ 3, 609 P.2d 792, 793 ("The record from which the validity of a guilty plea must be assessed is not limited to that developed at the plea proceedings.").

The opinion discusses that this Court has recognized evidence presented during the plea withdrawal hearing can be considered as part of any evaluation

of the validity of a defendant's plea. However, the opinion omits consideration of the evidence from the sentencing hearing. In *Cox*, this Court considered the entire record including but not limited to the summary of facts form, the plea colloquy, and the evidence from the sentencing hearing. *Cox*, 2006 OK CR 51, ¶¶ 27-29, 152 P.3d at 254-55. If the Court had followed that precedent in this case it would be required to acknowledge the testimony of the victim, her parents and the Petitioner. The Petitioner admitted both the sexual abuse and his status as a caretaker.

The guilty plea process includes both the plea and sentencing. This Court has long abided by *King* as the appropriate procedure to be utilized in a guilty plea. *Ocampo*, 1989 OK CR 38, ¶ 3, 78 P.2d at 921. Under *King*, the final guideline in the plea process is the pronouncement of the sentence. *King*, 1976 OK CR 103, ¶ 11, 553 P.2d at 534-35. The plea process is not complete until the pronouncement of the Judgment and Sentence is made. This is the reason why the time for the right to appeal runs from date of sentencing until ten (10) days after the pronouncement of the judgment and sentence. *See* Rule 4.2(A), *Rules for the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). In *Zakszewski*, this Court implicitly recognized sentencing as part of the plea process when we determined that the trial court erred when it failed to make certain there was a factual basis for the plea of guilty when the defendant appeared at sentencing thirty days after the plea and denied culpability after admitting guilt during the plea. *Zakszewski*, 1987 OK CR 152, ¶ 7, 739 P.2d at 546.

Cases like this create confusion and uncertainty for trial judges and practitioners, and are the anathema to what is our constitutional role. This Court has a responsibility to be clear and consistent in our opinions. The analysis should follow a logical and settled methodology that can be anticipated by the trial courts in ruling on the cases brought before them. Our previous decisions in *Parker*, *King*, and *Berget* told trial judges they were not required to go down an elements checklist to have a valid plea of guilty. This Court stated it would examine the entire record that was before the trial judge in determining whether the trial judge's decision to deny a petitioner's motion to withdraw plea was an abuse of discretion, i.e., clearly erroneous and against the weight of the law and evidence. Instead, of only sawing the logs that are properly before the Court in this case, the opinion decides to take out a National Forest, creating uncertainty in the law through its *dicta* and scarring the legal landscape. For the above reasons, I must respectively dissent to that part of the opinion which is merely an advisory opinion.