IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHRISTOPHER DEWAYNE BANKS,	)	
	)	
Petitioner,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. C-2017-33**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

SUMMARY OPINION GRANTING CERTIORARI

HUDSON, JUDGE:

On September 28, 2016, Petitioner Christopher Dewayne Banks entered a negotiated guilty plea in Carter County District Court, Case No. CF-2015-746A, before the Honorable Dennis R. Morris, District Judge, to First Degree Manslaughter, in violation of 21 O.S.2011, § 711, After Former Conviction of a Felony. In accordance with the plea agreement, Banks was sentenced to twenty-three (23) years imprisonment.[1]

On October 11, 2016, Banks filed a motion to withdraw his plea. Three separate hearings were held before Judge Morris on Banks' motion. At the conclusion of the third and final hearing, Judge Morris denied Banks' motion. Banks now seeks a writ of certiorari alleging two propositions of error:

I. MR. BANKS' PLEA WAS NOT ENTERED VOLUNTARILY OR KNOWINGLY AND INTELLIGENTLY; and

II. ALTERNATIVELY, RELIEF IS REQUIRED BECAUSE ANY FAILURE TO ADEQUATELY PRESERVE ISSUES FOR

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1 Under 21 O.S.Supp.2015, § 13.1, Banks must serve 85% of the sentence imposed before he is eligible for parole.

REVIEW WAS THE RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Banks also submits for consideration his *Application for Evidentiary Hearing on Sixth Amendment Claim* and Brief in Support.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and the parties' briefs, we find that relief is required under the law and evidence. Banks' Petition for Writ of Certiorari is **GRANTED**. The Judgment and Sentence of the District Court is **AFFIRMED** but **MODIFIED** to run Banks' sentence in this case concurrently with his sentence in Carter County Case No. CF-2014-128. Banks' *Application for Evidentiary Hearing on Sixth Amendment Claim* is **DENIED.**

Relevant Background

The record shows that in exchange for Banks' guilty plea, the State agreed to (1) amend Banks' original charge of murder in the second degree to first degree manslaughter; (2) dismiss its motion to revoke Banks' suspended sentence in Carter County Case No. CF-2014-128;[2] and (3) recommend to the trial court that Banks be sentenced to twenty-three (23) year imprisonment with credit for time served. The State's motion to revoke Banks' sentence in CF-2014-128 case was dismissed of the close of the plea proceedings.

Banks alleged in his motion to withdraw his plea that his plea was not knowing and intelligent because "he did not fully understand the nature and consequences of the plea proceedings." On the same date in which Banks filed

2 Notably, both on the plea form and at the plea hearing, Banks' prior conviction is erroneously referenced as CF-2014-746.

his withdrawal motion, the State re-filed its motion to revoke Banks' suspended sentence in Case No. CF-2014-128. A hearing on the State's motion to revoke was had on October 19, 2016, before the Honorable Thomas Baldwin, Associate District Judge. At that time, Judge Baldwin revoked the remaining twelve years of Banks' suspended sentence.[3] Later, during the hearings on Banks' motion to withdraw his plea, Banks asserted that the State's revocation of his suspended sentence in CF-2014-128 invalidated his plea and was grounds for granting his motion to withdraw. The District Court ultimately denied relief finding that Banks' plea was knowing and voluntary.

I.

In his first proposition of error, Banks argues that his plea was not knowingly, intelligently and voluntarily entered because: 1) contrary to his plea agreement with the State the remainder of his fifteen year sentence in Carter County Case No. CF-2014-128 was revoked; and 2) his plea was coerced.

On certiorari review of a guilty plea, this Court's review is limited to two inquiries: (1) whether the plea was made knowingly and voluntarily; and (2) whether the district court accepting the plea had jurisdiction. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. This Court reviews the denial of a motion to withdraw a guilty plea for an abuse of discretion. *Lewis*, 2009 OK

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3 The record is conflicting as to whether Banks was represented by counsel at the revocation hearing. According to court minutes, Ms. Tressler was appointed "instanter" to represent Banks in the revocation proceedings (O.R. II 3, 5). However, Judge Baldwin's written order vacating Banks' suspended sentence states Banks appeared "without counsel; Kimberly Tressler" (O.R. II 6). A transcript of the revocation hearing is not part of this record.

CR 30, ¶ 5, 220 P.3d at 1142; *Cox v. State, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251, overruled on other grounds, State v. Vincent,* 2016 OK CR 7, ¶ 12, 371 P.3d 1127, 1130. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. The burden is on the petitioner to show a defect in the plea process that entitles him to withdraw the plea. *See Elmore v. State,* 1981 OK CR 8, ¶ 8, 624 P.2d 78, 80. We examine the entire record before us on appeal to determine the knowing and voluntary nature of the plea. *Fields v. State,* 1996 OK CR 35, ¶ 28, 923 P.2d 624, 630.

Although Banks' claim on appeal is presented under the label of "unknowing and involuntary", his claim goes beyond this fundamental determination and encompasses a due process issue resulting from the breach of his plea agreement. *See Puckett v. United States,* 556 U.S. 129, 137-38, 129 S. Ct. 1423, 1430, 173 L. Ed. 2d 266 (2009) (once a plea agreement has been reached and a valid plea made, "the Government is obligated to uphold its side of the bargain"); *Santobello v. New York,* 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427 (1971) (due process mandates that plea negotiations be attended by adequate "safeguards to insure the defendant what is reasonably due (in) the circumstances"); *United States v. Van Thournout,* 100 F.3d 590, 594 (8th Cir. 1996) ("Allowing the government to breach a promise that induced a guilty plea violates due process."). This substantive due process

issue forms the basis of Banks' claim.[4] Before addressing this issue, however, we must first determine the knowing and voluntary nature of Banks' plea. *See Puckett*, 556 U.S. at 137-38, 129 S. Ct. at 1430 (the Government's breach of a plea agreement does not retroactively cause the defendant's plea to have been unknowing or involuntary; rather, it is because the defendant's plea was knowing and voluntary that "the Government is obligated to uphold its side of the bargain").

A. Knowing and Voluntary Nature of Banks' Plea

The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *Hopkins v. State*, 1988 OK CR 257, ¶ 2, 764 P.2d 215, 216. When a defendant claims their guilty plea was entered through inadvertence, ignorance, influence or without deliberation, they have the burden of showing that the plea was entered as a result of one of these reasons and that there is a defense that should be presented to the jury. *Estell v. State*, 1988 OK CR 287, ¶ 7, 766 P.2d 1380, 1383.

As noted above, a prosecutorial breach of a plea agreement does not ex post facto render a defendant's plea unknowing and involuntary. *Puckett*, 556 U.S. at 137-38, 129 S. Ct. at 1430. Banks additionally argues, however, that the failure of his lawyers to communicate with him contributed to his "overall lack of understanding of the situation he faced." Aplt. Br. at 13. Banks raised

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[4] Banks raised this issue orally during the November 30, 2016 and January 4, 2017 hearings on his motion to withdraw.

this assertion in his written motion to withdraw his plea. Banks further contends he was coerced into entering his plea. Banks orally raised this claim during the first hearing on his motion when he specifically contended, "I feel like I was coerced and pressured into signing on that day." Conflict counsel also reasserted this claim at Banks' third and final hearing on his motion. Thus, given the circumstances presented here, Banks' oral amendment to his motion sufficiently preserved this issue for appellate review.

Nonetheless, upon review of the record, we find Banks fully understood the consequences of entering his plea and entered his plea of his own free will. This is not a case where Banks entered his plea through inadvertence, ignorance or without deliberation. The trial court's finding that Banks' plea was entered knowingly and voluntarily was not an abuse its discretion.

B. Breach of Plea Agreement Terms

Having found Banks' plea was both knowing and voluntary, we turn next to his substantive due process claim. Remarkably, this Court has not previously had the opportunity to address this specific issue.

Plea bargaining has long been recognized as an "essential component of the administration of justice." *Santobello*, 404 U.S. at 260, 92 S. Ct. at 498; *Jiminez v. State*, 2006 OK CR 43, ¶ 6, 144 P.3d 903, 905; *Gray v. State*, 1982 OK CR 137, ¶ 13, 650 P.2d 880, 883. Plea agreements can result in the prompt disposition of criminal cases and eliminate the need for full-scale trials, saving the State time, money and other resources. *Santobello*, 404 U.S. at 261, 92 S. Ct. at 498. They can also reduce the amount of time a defendant spends

awaiting disposition of charges against him or her, *id.*; can reduce the risk of additional convictions when charges are dismissed; and reduce a defendant's exposure to potentially higher penalties if their case went to trial. *See Missouri v. Frye*, 566 U.S. 134, 144, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379 (2012) (recognizing that plea agreement can benefit both parties); *United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1216 (10th Cir. 2008) (observing that the defendant benefited from his plea agreement by avoiding the possibility of a conviction on two counts versus one).

A plea agreement is analogous to a contract. *Puckett*, 556 U.S. at 137, 129 S. Ct. at 1430 (stating that, "[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts"); *see also State v. Salathiel*, 2013 OK CR 16, ¶ 14, 313 P.3d 263, 268 (recognizing that "[p]lea agreements involve a *quid pro quo* between a criminal defendant and the government). Plea agreements are unique, however, in that they involve a waiver of constitutional and statutory rights. Unlike a normal commercial contract, due process requires that the government adhere to the terms of any plea bargain. *See Mabry v. Johnson*, 467 U.S. 504, 509, 104 S. Ct. 2543, 2547, 81 L. Ed. 2d 437 (1984), *disapproved of by Puckett*, 556 U.S. 129, 129 S. Ct. 1423. Hence, the application of ordinary contract principles must be tempered accordingly with "special due process concerns for fairness and the adequacy of procedural safeguards." *United States v. Woltmann*, 610 F.3d 37, 39–40 (2d Cir. 2010).

We must remain mindful too that a plea agreement is not merely a contract between two parties, but "[i]t necessarily implicates the integrity of the

criminal justice system." *United States v. Cvijanovich*, 556 F.3d 857, 862 (8th Cir. 2009). Violations of plea agreements adversely impact the integrity of the prosecutorial office and the entire judicial system. Moreover, because a plea agreement requires a defendant to waive fundamental rights, prosecutors and courts must be held to meticulous standards to ensure that promises made are faithfully performed.

Therefore, because of the important due process rights involved, "plea negotiations must accord a defendant requisite fairness and be attended by adequate 'safeguards to insure the defendant what is reasonably due (in) the circumstances.'" *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir. 1981) (quoting *Santobello*, 404 U.S. at 262, 92 S. Ct. at 499). If a defendant enters a plea in expectation of some agreed sentence, or predicated on a particular agreed condition, that promise should be fulfilled. *Santobello*, 404 U.S. at 262, 92 S. Ct. at 499); *see also Couch v. State*, 1991 OK CR 67, ¶ 6, 814 P.2d 1045, 1047 (defendant must be allowed to withdraw plea where trial court accepted plea agreement but imposed different sentence). As the Supreme Court in *Puckett* explained:

> When a defendant agrees to a plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished, *i.e.*, to withdraw his plea. But rescission is not the only possible remedy; in *Santobello* we allowed for a resentencing at which the Government would fully comply with the agreement—in effect, specific performance of the contract.

Id., 556 U.S. at 137, 129 S. Ct. at 1430 (internal citation omitted).

Not all plea agreement violations, however, require reversal or for that matter necessarily warrant relief. *Id.*, 556 U.S. at 138 n.1, 129 S. Ct. at 1430 n.1; *Hartjes v. Endicott*, 456 F.3d 786, 790 (7th Cir. 2006). "The defendant whose plea agreement has been broken by the Government will not always be able to show prejudice." *Puckett*, 556 U.S. at 141, 129 S. Ct. at 1432. If prejudice is shown and relief is warranted, it is important to recognize that "the reason [for such relief] is not that the guilty plea was unknowing or involuntary." *Id.*, 556 U.S. at 138 n.1, 129 S. Ct. at 1430 n.1. Rather, "[i]t is precisely *because* the plea was knowing and voluntary (and hence valid) that the Government is obligated to uphold its side of the bargain." *Id.*, 556 U.S. at 137-38, 129 S. Ct. at 1430.

In the present case, Banks knowingly and voluntarily entered his plea in reliance on his plea agreement with the State. In so doing, he waived fundamental rights. The plea agreement provided, among other things, that the State would dismiss its motion to revoke Banks' suspended sentence in Carter County Case No. CF-2014-128. Banks did not receive the benefit of this promise. The State was and is ultimately responsible for the resulting breach. By prematurely re-filing its motion to revoke in Banks' 2014 case, the State set into motion the events that led to the breach. Regardless of what the State's underlying motivation may have been for re-filing its motion, one thing is clear—the State jumped the gun. Banks' motion seeking to withdraw his guilty plea did not constitute a breach. Banks' plea agreement with the State was not complex. Banks' sole obligation under the agreement was fulfilled when he

entered his plea of guilty. Unless and until the trial court granted his request to withdraw his plea, Banks remained in compliance with the parties' agreement and the State remained bound by their promise not to seek revocation of Banks' sentence in CF-2014-128.

Thus, Banks was ultimately denied a key benefit for which he bargained, i.e., avoiding revocation of his sentence in his 2014 case. This breach violated Banks' right to due process. Moreover, the resulting breach was undoubtedly prejudicial and warrants relief. The breach was both material and substantial. In other words, the breach violated the specific terms of the parties' agreement, which in turn defeated a significant benefit Banks was to receive in exchange for his plea. Because of the breach, the remaining twelve years of Banks' sentence in CF-2014-128 was revoked. This was twelve additional years of imprisonment Banks' plea agreement was specifically crafted to avoid.

In *Kernan v. Cuero*, __ U.S. __, 138 S. Ct. 4, 9, 199 L. Ed. 2d 236 (2017), *reh'g denied,* 2018 WL 311875 (U.S. Jan. 8, 2018), the Supreme Court clarified that the "ultimate relief" to which a petitioner is entitled when the State materially breaches a plea agreement should be left "to the discretion of the state court," which is in the better position to determine the type of relief required given the circumstances of the case. Banks asks this Court to vacate his negotiated plea agreement. This is certainly one potential remedy. However, reversal of Banks' conviction is not without significant issues. While Banks would obtain the plea withdrawal he sought shortly after entering his plea, he would lose the full benefit of his original plea agreement that reduced

his charge to first degree manslaughter and limited his exposure to a possible life sentence. Moreover, vacating Banks' plea does nothing to rectify the sentence revocation that already occurred in his 2014 case. Thus, specific performance is not a viable remedy in this case as Banks cannot be placed back into the same position he was prior to his plea.

Moreover, if Banks' conviction was to be reversed, the State would undoubtedly be confronted by the risk and hardships that often accompany the retrial of a case. As the United States Supreme Court observed in *United States v. Mechanik*, 475 U.S. 66, 72, 106 S. Ct. 938, 942–43, 89 L. Ed. 2d 50 (1986):

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. See *Morris v. Slappy*, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617, 75 L.Ed.2d 610 (1983). The "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle v. Isaac*, 456 U.S. 107, 127-128, 102 S. Ct. 1558, 1571-1572, 71 L.Ed.2d 783 (1982). Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution," *id.*, at 128, 102 S. Ct., at 1572, and thereby "cost society the right to punish admitted offenders." *Id.*, at 127, 102 S. Ct., at 1572. Even if a defendant is convicted in a second trial, the intervening delay may compromise society's "interest in the prompt administration of justice," *United States v. Hasting, supra*, 461 U.S., at 509, 103 S. Ct., at 1981, and impede accomplishment of the objectives of deterrence and rehabilitation.

Compare Lafler v. Cooper, 566 U.S. 156, 170, 132 S. Ct. 1376, 1389, 182 L. Ed. 2d 398 (2012) (finding Sixth Amendment remedies should be tailored to the injury suffered by the defendant, i.e., *neutralize the taint*—but at the same time

"not grant a windfall to the defendant or needlessly squander the considerable resources [of] the State[.]").

To appropriately tailor the relief warranted in this case to the injury suffered by Banks, we are mindful of two significant factors: (1) Banks' guilty plea was entered knowingly and voluntarily; and (2) the injury suffered by Banks because of the breach is the burden of serving twelve additional years of imprisonment. While Banks' 2014 case—CF-2014-128—is not presently before this Court, the harm caused by the State's breach can be eliminated by running Banks' sentences in the present case and CF-2014-128 concurrently. This is an equitable remedy that avoids the societal costs of reversal and effectively neutralizes the taint of the breach without granting Banks or the State a windfall.

Thus, given the totality of the circumstances presented in this case, we affirm Banks' conviction and sentence but order that his sentence in this case be run concurrently with his sentence in Carter County Case No. CF-2014-128.

II.

Banks asserts he was denied his right to effective assistance of counsel because counsel failed to (1) allege coercion in Banks' written motion to withdraw; and (2) make a sufficient record regarding the revocation of Banks' sentence in CF-2014-128. Appellant has filed an accompanying Rule 3.11(B) application presenting non-record evidence in support of his challenge to defense counsel's preservation of the record to support his due process claim arising from the sentence revocation in CF-2014-128.

Defendants have a Sixth Amendment right to effective assistance of counsel during the plea-bargaining process. *Lafler*, 566 U.S. at 162, 132 S. Ct. at 1384; *Frye*, 566 U.S. at 143-44, 132 S. Ct. at 1407; *Padilla v. Kentucky*, 559 U.S. 356, 373, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010); *Jimenez v. State*, 2006 OK CR 43, ¶ 6, 144 P.3d 903, 905. To succeed on his ineffectiveness claim, Banks must show that plea counsel's conduct was "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984). He must also show that there is a reasonable probability that, but for counsel's alleged errors, that the outcome of the plea process would have been different. *Lafler*, 566 U.S. at 163, 132 S. Ct. at 1384; *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). Banks fails to meet this burden.

In Proposition I, we found Banks' motion to withdraw his guilty plea was orally amended to include his claim of coercion. We accordingly addressed this issue and found Banks' plea was entered both knowingly and voluntarily. Thus, Banks fails to show prejudice resulted from counsel's failure to formally allege coercion in Banks' written motion to withdraw. Banks' failure to show prejudice is fatal to his claim. *Hill*, 474 U.S. at 59, 106 S. Ct. at 370.

Banks' second contention—asserting counsel failed to make a sufficient record regarding the revocation of Banks' sentence in CF-2014-128—likewise fails. As is evident from the Court's lengthy discussion in Proposition I, the record presented on appeal was sufficient to address the merits of Banks'

substantive due process claim. Banks has thus failed to "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067. He is therefore not entitled to relief for this sub-claim.

Banks' Proposition II is denied and his request for an evidentiary hearing on this particular claim is likewise **DENIED.**

DECISION

The Petition for Writ of Certiorari is **GRANTED**. The Judgment and Sentence of the District Court is **AFFIRMED** as **MODIFIED** to run concurrent with Banks' sentence in Carter County Case No. CF-2014-128. Banks' *Application for Evidentiary Hearing on Sixth Amendment Claim* is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY
THE HONORABLE DENNIS R. MORRIS, DISTRICT JUDGE

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OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART
LEWIS, V.P.J.: CONCUR IN RESULTS
KUEHN, J.: CONCUR
ROWLAND, J.: CONCUR

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART:

I concur in the Court's resolution of the dilemma created by the State being too fast on the trigger in the filing of the motion to revoke based only on the fact Appellant filed a motion to withdraw his plea. I also concur with the Court applying the principles of contract law to the plea agreement.

I disagree though with the application of the vaporous concept of substantive due process. The concept is not found in the literal language of the United States Constitution. It is a judicially created doctrine holding that the Fourteenth Amendment's Due Process Clause protects unenumerated liberties. The doctrine was applied frequently in the early 20th century to strike down economic regulations, most prominent of those cases being *Lochner v. New York*, 198 U.S. 45, 56, 25 S.Ct. 539, 540, 49 L.Ed. 937 (1905). The focus of the doctrine was later shifted to cases involving personal liberty interests, notably *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

However, since its creation, warnings about its application and overreach have been numerous. As early as 1930, Justice Holmes wrote in his dissent to *Baldwin v. Missouri*, 281 U.S. 586, 50 S.Ct. 436, 74 L.Ed. 1056 (1930):

> I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its

> prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.

281 U.S. at 595, 50 S.Ct. at 439 (Holmes, J. dissenting).

Justice White commented in his dissent to *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977):

> Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.

431 U.S. at 543-44, 97 S.Ct. at 1958 (White, J. dissenting).

Justice Scalia expressed his view in his dissent to *City of Chicago v. Morales,* 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999):

> The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called "substantive due process") is in my view judicial usurpation.

527 U.S. at 85, 119 S.Ct. at 1873 (Scalia, J. dissenting). *See also Johnson v. United States,* ___ U.S. ___, 135 S.Ct. 2551, 2564, 192 L.Ed. 569 (2015) (Thomas, J. concurring) ("substantive due process, a judicially created doctrine

lacking any basis in the Constitution"); *United States v. Carlton*, 512 U.S. 26, 39, 114 S.Ct. 2018, 2026, 129 L.Ed.2d 22 1994) (Scalia, J. dissenting) ("[i]f I thought that 'substantive due process' were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation").

I have previously written to this illusory concept in *Luna v. State*, 1992 OK CR 26, ¶¶ 1-2, 829 P.2d 69 (Lumpkin, J. concur in results) and *D.M.H. v. State*, 2006 OK CR 22, ¶ 1, 136 P.3d 1054, 1058 (Lumpkin, J. dissenting). The essentially standardless doctrine of substantive due process imperils the constitutional separation of powers. Well-meaning judges, no less subject to human frailty than anyone else, find within this doctrine an unrestrained mandate to right those wrongs they see by usurping the policy-making powers properly belonging the legislative branch of government. In this particular case the constitutional grant of due process addressed the situation without venturing into the never, neverland of substantive due process. This Court should act in a disciplined manner and apply the written constitution rather than engaging in what Justice Scalia defined as "judicial usurpation."

LEWIS, VICE PRESIDING JUDGE, CONCURRING IN RESULTS:

I concur in the Court's conclusion that the State breached its plea agreement by moving to revoke Petitioner's suspended sentence in a related case, and obtaining a ruling on that motion, prior to the trial court's determination of Petitioner's motion to withdraw his plea in the case before us. I also agree that ordering the Petitioner to serve his twenty-three (23) year sentence for manslaughter concurrently with the hastily revoked twelve-year remainder of his other sentence obviates any prejudice from the State's breach of the plea agreement. Petitioner's plea was otherwise knowing and voluntary, and should not be vacated for the reasons offered here.

Today's opinion contains the familiar precept that certiorari is limited to two inquiries: (1) whether the plea was knowing and voluntary; and (2) whether the court accepting it had jurisdiction. This statement fails to describe the real scope of certiorari review, which currently includes whether the plea was entered voluntarily before a court of competent jurisdiction, *Cox v. State,* 2006 OK CR 51, ¶ 4, 152 P.3d 244, 247; whether a sentence is excessive, *Whitaker v. State,* 2015 OK CR 1, ¶ 9, 341 P.3d 87, 90; whether plea and plea withdrawal counsel were effective, *Carey v. State,* 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 1118, and whether the State has the power to prosecute the defendant at all. *Weeks v. State,* 2015 OK CR 16, ¶ 12, 362 P.3d 650, 654.[1]

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[1] These issues, of course, should be raised in the motion to withdraw a guilty or no contest plea, or may be deemed waived. *Weeks*, 2015 OK CR 16, ¶ ¶ 27-29, 362 P.3d at 657; Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2017).

On certiorari, the Court generally reviews the trial court's determination of questions presented in a motion to withdraw a plea for abuse of discretion. The Court has at times defined such "abuse" as "any unreasonable or arbitrary action taken without proper consideration of the facts and law," *e.g., Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225; at other times as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *E.g., Stouffer v. State*, 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263. Perhaps in a spirit of compromise, the Court has more recently taken to quoting these standards side by side.

One formulation of this somewhat elusive concept is enough; and the latter of these is the more factually and legally objective of the two. The former seems little more than the kind of high-voltage legalese that readily disguises subjective judgments about the action of the court below. True, as Justice Holmes famously remarked, the "life of the law has not been logic; it has been experience."[2] Still, the effort to describe the nature of our review should aspire to some conceptual precision, rather than burgeon new official decisions with more of the same old ambiguities.

I also question the statement in today's opinion that a defendant seeking to withdraw a plea must show not only that his plea was involuntary (founded on ignorance, inadvertence, misapprehension, or even coercion), but also that the evidence, or law, or both, disclose some "defense that should be presented

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[2] Oliver W. Holmes, THE COMMON LAW 1 (1881).

to the jury."[3] This statement appears in many cases, and may be sensible as a matter of policy, but the Court has *not* consistently required the presence of some plausible trial defense to trigger legal entitlement to withdrawal of a plea. More often, the defendant's right to withdraw a plea "is the same whether his claim is founded in righteousness or iniquity."[4] The Court should not continue to publish cases suggesting otherwise.

[3] Though published certiorari cases are comparatively few, *Marshall v. State*, 1998 OK CR 30, 963 P. 2d 1, seems to be the most recent case indicating the presence of a *trial* defense as a condition precedent to withdrawal of a guilty plea.

[4] Holmes, THE COMMON LAW 133.