

# New Guidance On Guilty Plea Withdrawals Is Long Past Due

By **Mark Allenbaugh and Alan Ellis** (June 10, 2024)

The Sentencing Reform Act, passed in 1984, created the U.S. Sentencing Commission to promulgate sentencing guidelines that would promote a fundamental principle nationwide: Similarly situated individuals should be treated similarly regardless of who is imposing the sentence.

As we approach the law's 40th anniversary, it's a fitting time to assess how well the guidelines have achieved this goal, in particular through the guidance it gives regarding plea agreements. While measures of the guidelines' effectiveness tend to focus on assessing sentencing practice, an equally important, but often overlooked, measure is assessing the regulation of plea practices.

We discuss below a significant blind spot that the guidelines have yet to address: providing guidance regarding withdrawals from guilty pleas.

In fiscal year 2023, there were 64,124 individuals sentenced nationwide under the guidelines.[1] Nearly all — 97.2% — were convicted by way of a guilty plea.[2] In some circuits, the rate of conviction by guilty plea was even higher. In the Ninth Circuit, for example, it was 98%; and in the Fifth Circuit, the rate was 98.9%.[3]

When looking at offense types, immigration offenses, which made up the largest offense type in fiscal year 2023, had a conviction rate by guilty plea of 99.6%.[4] Drug trafficking, the second-largest offense type, had a rate of 97.7%; and firearms, the third largest, had a rate of 97.5%.[5] As the U.S. Supreme Court recognized in its 2012 decision in *Lafler v. Cooper*, federal "criminal justice today is for the most part a system of pleas, not a system of trials." [6]

Given this so-called system of pleas, it is not surprising that the commission devotes half of an entire chapter of the guidelines to plea procedures. Largely mirroring Rule 11 of the Federal Rules of Criminal Procedure, Part B of Chapter 6 addresses plea agreement procedure,[7] standards for acceptance of plea agreements,[8] resolution of disputed factors,[9] and how courts are to treat stipulations[10] within plea agreements.

According to the introductory commentary to Part B, this section is "intended to ensure that plea negotiation practices:

- (1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and
- (2) do not perpetuate unwarranted sentencing disparity." [11]

But there is a critical part of Rule 11 that is not addressed by the guidelines, namely, the withdrawal of guilty pleas. Per Rule 11(d) of the Federal Rule of Criminal Procedure, "A defendant may withdraw a plea of guilty or nolo contendere:



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- (1) before the court accepts the plea, for any reason or no reason; or
- (2) after the court accepts the plea, but before it imposes sentence if:
  - (A) the court rejects a plea agreement under 11(c)(5);[12] or
  - (B) the defendant can show a fair and just reason for requesting the withdrawal."[13]

With respect to the first prong of this rule, courts have held that a defendant has an absolute right to withdraw a guilty plea, but only before the court accepts the plea.[14] So, the decision and power to withdraw a guilty plea prior to the court's acceptance of it rests exclusively with the defendant.

With respect to the second prong, however, a defendant may only withdraw from a guilty plea if the court has either rejected the plea agreement — generally because, in those pleas entered pursuant to a plea agreement, the stipulated sentence was not lengthy enough — or, more pertinently, if the defendant can show a "fair and just reason" for doing so.

Yet, despite offering standards as to when to accept a plea agreement, the guidelines are silent as to when a court may reasonably reject a guilty plea, or what constitutes a fair and just reason to allow a defendant to withdraw from a guilty plea once it has been accepted.

This silence is puzzling, because without guidance on this essential aspect of the system of pleas, the statutory purposes of sentencing not only are not advanced, but the absence of guidance could actually thwart those purposes.

For example, a plea agreement that binds a court to a stipulated sentence of 30 months may be readily accepted by one judge because the stipulated sentence is sufficient in the court's view, but an identical agreement for a similarly situated offender may be rejected outright by another judge on the basis that the stipulated sentence is not lengthy enough.

Likewise, one judge may find a particular reason as fair and just, thereby allowing a defendant to withdraw from a plea agreement to possibly negotiate a better agreement or plead "straight up" without entering into a plea agreement, but another judge may find that the same reason is neither fair nor just.

Such situations inevitably not only lead to unwarranted sentencing disparity but also uncertainty in the sentencing process, thereby undermining these fundamental purposes of the guidelines.

Of course, a defendant should not be allowed to withdraw from a plea agreement that has been accepted based upon trivial reasons. According to the U.S. Court of Appeals for the First Circuit's decision last year in *U.S. v. Nieves-Melendez*, "[B]uyer's remorse is not a valid basis on which to dissolve a plea agreement and the fact that a defendant finds himself faced with a stiffer sentence than he had anticipated is not a fair and just reason for abandoning a guilty plea."[15]

In contrast, courts, like the U.S. Court of Appeals for the Seventh Circuit in *U.S. v. Kamkarian* last year, have generally "recognized three broad reasons that may justify allowing a defendant to withdraw a guilty plea: (1) the defendant is innocent, (2) the defendant received ineffective assistance of counsel, and (3) the plea was not knowing and

voluntary."[16]

In addition, courts have also considered (4) whether withdrawal would prejudice the government, (5) whether the defendant unreasonably delayed filing the withdrawal motion, and (6) whether withdrawal would substantially inconvenience the court or otherwise waste judicial resources.[17]

Of course, this list is not exhaustive; there can be and are other reasons. For example, an intervening change in law that would result in a different sentence than expected generally does not provide sufficient grounds to withdraw a guilty plea.[18] But what if the intervening change renders the conduct to which the defendant pled guilty no longer criminal? In such a situation, courts have granted a motion to withdraw a guilty plea.

In *U.S. v. Noble*,[19] for example, pursuant to a plea agreement, the defendant pled guilty to aggravated identity theft. The U.S. District Court for the Northern District of Georgia thereafter accepted the guilty plea last year. However, three weeks later, the Supreme Court issued its decision in *Dubin v. U.S.*,[20] which held that aggravated identity theft required a showing of materiality. The defendant then sought to withdraw his guilty plea because the factual basis set forth in the plea agreement failed to establish materiality and thus did not constitute aggravated identity theft.

The district court agreed and granted the motion to withdraw. As the Supreme Court held in its 2018 *Class v. U.S.* decision, while a "plea of guilty is, of course, a confession of all the facts charged in the indictment, ... if the facts alleged and admitted do not constitute a crime against the laws of the [government], the defendant is entitled to be discharged." [21]

Similarly, what if the commission issues an amendment to the guidelines that lowers a stipulated calculation but does not take effect until after sentencing occurs? For example, in April, the commission promulgated an amendment that precludes the use of acquitted conduct for purposes of calculating the total offense level under the guidelines, but it will not take effect until Nov. 1.[22]

Are defendants now awaiting sentencing who have already pled guilty with the understanding that any acquitted conduct may be used to calculate their total offense level stuck with such a plea agreement? What if the amendment is made retroactive, as the commission is considering?[23]

All this is to say that on the eve of the 40th anniversary of the U.S. sentencing guidelines, it is long past time for the commission to promulgate a new guideline — we suggest at Section 6B1.5 — that would provide meaningful guidance to courts addressing the issues canvassed above regarding (1) when to reject a proffered binding plea agreement, and (2) what constitute fair and just reasons for allowing a defendant to withdraw a guilty plea.

Promulgating such guidance will go a long way toward ensuring this system of pleas is more uniform not just in terms of the acceptance of guilty pleas, but equally with respect to their withdrawal. Doing so will likely help reduce the significant number of prisoner petitions brought each year alleging ineffective assistance of counsel regarding the voluntary and knowing nature of a guilty plea.

Moreover, such guidance will signal that the commission views both the acceptance and withdrawal of guilty pleas of equal importance for advancing nationwide its mission to provide guided discretion to federal judges in all aspects of the sentencing process.

On a final note, on May 31, the commission announced it is seeking comment on priorities it should consider for its next amendment cycle beginning later this summer. The commission wrote that

In light of the 40th anniversary of the Sentencing Reform Act of 1984 ... the Commission intends to focus on furthering the Commission's statutory purposes and missions [by] ... [e]stablishing sentencing policies and practices for the Federal criminal justice system that ... provide certainty and fairness in meeting the purposes of sentencing [including] avoiding unwarranted sentencing disparity.

Adding Section 6B1.5 to the guidelines as we suggest will go a long way toward achieving that goal.

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[1] U.S. Sentencing Comm'n, 2023 Sourcebook of Federal Sentencing Statistics, tbl.11, available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table11.pdf>.

[2] See id.

[3] See id.

[4] See id. Tbl. 12.

[5] See id.

[6] *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

[7] USSG §6A1.1.

[8] USSG §6A1.2.

[9] USSG §6A1.3.

[10] USSG §6A1.4.

[11] USSG, Ch 6., Pt.B, intro. comment.

[12] This provision of Rule 11 concerns plea agreements that bind the court to the stipulated sentence in a plea agreement. Once the plea agreement is accepted by the court, it is then bound to impose the stipulated sentence. Otherwise, the court may reject the plea agreement, which then frees the defendant from the same.

[13] After sentencing has occurred, a defendant may no longer withdraw a guilty plea. Fed. R. Crim. Proc. 11(e). It "may be set aside only on direct appeal or collateral attack." Id.

[14] See, e.g., *United States v. Arami*, 536 F.3d 479, 483 (5th Cir. 2008) (citation omitted).

[15] *United States v. Nieves-Meléndez*, 58 F.4th 569, 575 (1st.Cir. 2023) (cleaned up).

[16] *United States v. Kamkarian*, 79 F.4th 889, 892 (7th Cir. 2023).

[17] *United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir. 1984).

[18] This was perhaps most starkly illustrated by the wave of post-Booker litigation regarding motions to withdraw guilty pleas. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that treating the Guidelines as mandatory did not comport with the Constitution. Therefore, they were merely advisory. Many defendants sought to withdraw their pre-Booker guilty pleas as a result because they likely would receive a more favorable sentence under a merely advisory sentencing scheme. Courts held that such did not provide a fair and just reason to withdraw a guilty plea. See, e.g., *United States v. Cieslowski*, 410 F.3d 353, 362 (7th Cir. 2005) (in context of challenging appellate waiver in plea agreement, "a later change in law that is favorable to the defendant--even one as major as Booker--is not enough to relieve a defendant of his bargain").

[19] No. 1:23-cr-00165, \_ F. Supp. 3d \_\_, 2024 U.S. Dist. LEXIS 11377, 2024 WL 253623 (N.D. Ga. Jan. 23, 2024).

[20] 599 U.S. 110 (2023).

[21] *Class v. United States*, 583 U.S. 174, 180 (2018) (internal quotation marks and citation omitted).

[22] See U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines, 1 Apr. 30, 2024, [https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405\\_RF.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf).

[23] See U.S. Sentencing Comm'n, Federal Register Notice: Submission of 2024 Amendments to Congress, Request for Comment, <https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-submission-2024-amendments-congress-request-comment>.