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A CHANGE OF HEART OR A CHANGE OF LAW? WITHDRAWING A GUILTY PLEA UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 32(e)

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Our criminal justice system is awash in plea bargaining. Because of the overwhelming number of criminal cases processed through plea bargaining, courts are unquestionably reluctant to permit defendants to withdraw from their plea agreements once approved by the court. For if such agreements are readily open to second-guessing by defendants, the purpose of plea bargaining—the efficient adjudication of criminal cases—would be severely undermined. However, each significant appellate decision changing some aspect of criminal law raises a serious and potentially problematic question: Should that change permit each affected defendant to re-evaluate his or her decision to enter into the plea agreement and ultimately withdraw his or her guilty plea based upon the new ruling? In all but the most egregious cases, courts have emphatically answered no—even in cases where the defendant has yet to be sentenced under the agreement. Given the sheer number of potentially affected plea bargains, this result should come as no surprise. But are courts getting the answer right? Are they paying homage to the goal of finality and efficiency at the expense of defendants' rights? This Article seeks to answer these questions using the very tools that courts often use to evaluate and to interpret plea agreements—the principles of contract law. While these doctrines do not permit defendants to re-open plea agreements at will, they do offer additional relief to some defendants by providing a more flexible method for analyzing such motions as well as a rational justification for granting the relief that the defendants seek.

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I. WITHDRAWING A GUILTY PLEA[1]

Under Federal Rule of Criminal Procedure 32(e), a defendant does not have an absolute right to withdraw his or her guilty plea prior to sentencing.[2] Instead, a court will permit a defendant to withdraw a guilty plea prior to sentencing only "if the defendant shows any fair and just reason."[3] To determine whether a defendant has met this standard, courts have developed a four-part balancing test: "(1) whether defendant established a fair and just reason to withdraw his plea; (2) whether defendant asserts his legal innocence of the charge; (3) the

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[1] This Article will analyze motions to withdraw guilty pleas made prior to sentencing. Those brought after sentencing are governed by a different standard—as petitions for habeas corpus—and are thus beyond the scope of the Article.

[2] *See, e.g.*, United States v. Salgado-Ocampo, 159 F.3d 322, 324 (7th Cir. 1998); United States v. Marrero-Rivera, 124 F.3d 342, 347 (1st Cir. 1997); United States v. Isom, 85 F.3d 831, 834 (1st Cir. 1996); United States v. Spencer, 836 F.2d 236, 238 (6th Cir. 1987); United States v. Burnett, 671 F.2d 709, 712 (2d Cir. 1982); *see also* 26 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 632.30[1][a], at 632-91 (1988).

[3] Federal Rule of Criminal Procedure 32(e) provides:

> If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

FED. R. CRIM. P. 32(e); *see also* United States v. Hyde, 520 U.S. 670, 671 (1997); United States v. Muriel, 111 F.3d 975, 978 (1st Cir. 1997); United States v. Knight, 96 F.3d 307, 309 (8th Cir. 1996); United States v. Cray, 47 F.3d 1203, 1206 (D.C. Cir. 1995). The burden is placed on the defendant to set forth a fair and just reason. *See Burnett*, 671 F.2d at 712.

Although courts profess to construe Rule 32 motions to withdraw a guilty plea "liberally," courts rarely grant such motions, and the reversal of such motions on appeal is uncommon. *Compare* Government of the Virgin Islands v. Berry, 631 F.2d 214 (3d Cir. 1980) ("[M]otions to withdraw guilty pleas made before sentencing should be liberally construed in favor of the accused and should be granted freely."), United States v. Loughery, 908 F.2d 1014 (D.C. Cir. 1990) (same), United States v. Hickok, 907 F.2d 983 (10th Cir. 1990) (same), United States v. Schubert, 728 F.2d 1364, 1365 (11th Cir. 1984) ("[S]uch motions before sentence is imposed should be allowed with great liberality."), United States v. Presley, 478 F.2d 163, 167 (5th Cir. 1973) (same), Bergen v. United States, 145 F.2d 181, 187 (8th Cir. 1944) ("[T]he court's discretion should be exercised liberally, so as to promote the ends of justice and to safeguard the life and liberty of the accused . . . ."), and United States v. Artabane, 868 F. Supp. 76, 77 (M.D. Pa. 1994) (holding that courts should grant such motions "liberally in favor of the accused."), *with* United States v. Barker, 514 F.2d 208, 219 (D.C. Cir. 1975) (holding that because granting such motions are discretionary, appellate reversal [is] uncommon."), and 2 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 537, at 188 (1982) (noting that appellate courts "rarely interfere" with decisions of the district court regarding the withdrawal of guilty pleas).

length of time between the guilty plea and the motion to withdraw; and (4) if the defendant established a fair and just reason for withdrawal, whether the government would be prejudiced."[4] Each of these factors poses a potential pitfall for the defendant seeking to withdraw a guilty plea.

A. A FAIR AND JUST REASON

In a fit of redundancy, courts have first required a defendant to demonstrate a "fair and just reason" to withdraw a guilty plea pursuant to the "fair and just reason" standard found in Rule 32(e).[5] Such a showing "is a necessary, but not sufficient, predicate to plea withdrawal."[6] Even though it is a required factor—and the only factor mentioned in Rule 32(e)—courts simply fail to discuss what a fair and just reason actually is.[7] Instead, courts merely examine whether the defendant has satisfied the other three factors of the balancing test.[8] In essence, this factor merely mimics the overall standard without providing any additional means for a court to evaluate whether the defendant has

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[4] United States v. Fitzhugh, 78 F.3d 1326, 1328 (8th Cir. 1996); *see also* United States v. Gonzalez, 202 F.3d 20, 24 (1st Cir. 2000) (same); United States v. Sanchez-Barreto, 93 F.3d 17, 23 (1st Cir. 1996). *See generally* Howard G. Alperin, Annotation, *Withdrawal of Plea of Guilty or Nolo Contendere Before Sentencing Under Rule 32(d) of the Federal Rules of Criminal Procedure*, 6 A.L.R. FED. 665 (1971) (collecting cases regarding these factors).

In addition to these four basic standards, some courts have also considered "the circumstances underlying the entry of the guilty plea; . . . the defendant's nature and background; . . . [and] the degree to which the defendant has had prior experience with the criminal justice system . . . ." United States v. Bashara, 27 F.3d 1174, 1181 (6th Cir. 1994); *see also* United States v. Riascos-Suarez, 73 F.3d 616, 621 (6th Cir. 1996) (considering five factors); *Hickok*, 807 F.2d at 986 n.2 (considering seven factors); United States v. Carr, 740 F.2d 339, 343 (5th Cir. 1984) (same); G. NICHOLAS HERMAN, PLEA BARGAINING 199 (1997).

[5] *See, e.g.*, *Salgado-Ocampo*, 159 F.3d at 324; *Isom*, 85 F.3d at 834; *Bashara*, 27 F.3d at 1181; *Burnett*, 671 F.2d at 712.

[6] *Gonzales*, 202 F.3d at 23.

[7] The drafters of the Federal Rules of Criminal Procedure acknowledge the problem with this standard, noting that "'the terms 'fair and just' lack any pretense of scientific exactness.'" FED. R. CRIM. P. 32(e) advisory committee's note; *see also Spencer*, 836 F.2d at 238 (same); *Barker*, 514 F.2d at 220 (noting that the standard provides "rough guidelines"); 3 WRIGHT ET AL., *supra* note 3, § 537, at 190 ("[T]he standards on when a motion ought to be granted are not easily defined.").

[8] *See, e.g.*, *Spencer*, 836 F.2d at 238-39 (noting that these factors are those which "a district court may consider when evaluating whether a defendant has established a 'fair and just' reason to withdraw his guilty plea"); 26 MOORE ET AL., *supra* note 2, ¶ 632.30[1][b][i], at 632-92 to 632-93 (1988); *see also* G. NICHOLAS HERMAN, PLEA BARGAINING (1997 & Supp. 1999).

actually met the overall standard. Thus, the true analysis for the Rule 32 standard currently focuses only on innocence, delay, and prejudice.

B. THE DECLARATION OF INNOCENCE

Of these three remaining factors, the most critical is the defendant's declaration of innocence. In fact, failing to assert the defendant's innocence will result in the automatic denial of the motion.[9] Yet the defendant cannot merely claim innocence, for as one court has stated, "there are few if any criminal cases where the defendant cannot devise some theory or story which, if believed by a jury, would result in his acquittal."[10] Instead, the defendant must assert some factual[11] or legal[12] basis for the as-

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[9] *See, e.g., Gonzales*, 202 F.3d at 24. *But see* Oksanen v. United States, 362 F.2d 74, 79 (8th Cir. 1966) ("[T]he question of innocence of the accused is normally not involved in the application to withdraw a plea of guilty."); Woodring v. United States, 248 F.2d 166, 169 (8th Cir. 1957) ("The question of a defendant's guilt or innocence is not an issue . . . for leave to withdraw a plea of guilty . . . ."); United States v. Tateo, 214 F. Supp. 560, 564 (S.D.N.Y. 1963) (holding that the "defendant's guilty or innocence is not an issue").

[10] *Barker*, 514 F.2d at 221; *see also* United States v. Holland, 117 F.3d 589, 594 (D.C. Cir. 1997); *Isom*, 85 F.3d at 837; United States v. Fitzhugh, 78 F.3d 1326, 1328 (8th Cir. 1996) ("The plea of guilty is a solemn act not to be disregarded because of belated misgivings about [its] wisdom."); United States v. Rojas, 898 F.2d 40, 43 (5th Cir. 1990) (rejecting a motion where the defendant made unsupported statements of innocence and "overwhelming evidence" existed against him); United States v. Carr, 740 F.2d 339 (5th Cir. 1984) ("[A]lthough the defendant has asserted his innocence, this claim alone is far from being sufficient to overturn denial of a withdrawal motion. Otherwise, the mere assertion of legal innocence would always be a sufficient condition for withdrawal, and withdrawal would effectively be an automatic right." (citations omitted)); Government of the Virgin Islands v. Berry, 631 F.2d 214, 220 (3d Cir. 1980) (holding that an assertion of innocence needs to be credible). *See generally* United States v. Gomez-Orozco, 188 F.3d 422, 425 (7th Cir. 1999) (holding that legal innocence is sufficient, but such a claim "must be supported by credible evidence"); *Salgado-Ocampo*, 159 F.3d at 326 ("Assertions of innocence must be buttressed by facts in the record which support a claimed defense." (citation omitted)); United States v. Hickok, 907 F.2d 983, 986 n.2 (10th Cir. 1990) (holding that the mere assertion of innocence is not enough); United States v. Kobrosky, 711 F.2d 449, 455 (1st Cir. 1983) (finding that although legal innocence is sufficient "the mere protestation of legal innocence cannot in and of itself be issue-determinative"); United States v. Allen, 981 F. Supp. 564, 577 (N.D. Iowa 1997) ("Courts have, however, 'dealt carefully' with motions to withdraw guilty pleas 'based upon newly discovered evidence, or a previously unknown or unavailable defense.'").

[11] United States v. Ramos, 810 F.2d 308, 312 (1st Cir. 1987) (holding that the "defendant's factual contentions" must create a "'legally cognizable defense' to the charges").

[12] *See, e.g.*, United States v. Ford, 993 F.2d 249, 251 (D.C. Cir. 1993) (vacating a guilty plea based upon an argument of legal innocence); *Salgado-Ocampo*, 159 F.3d at

sertion of innocence.[13] Factual innocence, on the one hand, means that based upon all of the facts before the court, the defendant is not guilty of a crime that has been charged: for instance, the defendant has an airtight alibi, or the actual acts performed by the defendant do not amount to a crime. Under both situations, the defendant is "factually" innocent of the crime charged. Legal innocence, on the other hand, asks the court to disregard certain incriminating evidence in order to establish the defendant's innocence: for example, the only evidence linking the defendant to the crime was illegally seized or obtained in violation of the defendant's right against self-incrimination. Without that evidence, the prosecution cannot go forward, and the defendant will be found not guilty.

As a further illustration, in *United States v. Groll*,[14] the defendant moved to withdraw her guilty plea at her sentencing hearing based upon her legal innocence. After retaining new counsel, Groll learned that because the witness who had goaded her into selling drugs was actually a confidential informant, she had a viable entrapment defense to the charges.[15] Even though Groll had admitted the underlying facts that amounted to a crime during the guilty plea hearing, she asked the court to disregard that evidence because it was improperly obtained through her entrapment.[16] The court recognized that although "claims of innocence alone do not mandate permission to withdraw a plea . . . being legally innocent of the crime is a fair and just reason to withdraw a guilty plea" as long as such assertions are "substantiated by evidence."[17] Because her entrapment claim was colorable and did "not contradict her admissions at the change of plea hearing," the court permitted Groll to with-

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326 ("Assertions of innocence must be buttressed by facts in the record which support a claimed defense." (citation omitted)); United States v. Sparks, 67 F.3d 1145, 1151 (4th Cir. 1995); *Barker*, 514 F.2d at 220 (holding that legal innocence is a factor in deciding whether to permit a defendant to withdraw a guilty plea); *see also* FED. R. CIV. P. 32(e) advisory committee notes to the 1983 amendment (noting that legal innocence is a factor to consider).

[13] Even though legal innocence can provide a basis to withdraw a guilty plea, courts look more favorably on claims of factual innocence, finding that they are "stronger assertions of innocence than are claims that the defendant has affirmative defenses to the charges." United States v. Sanchez, Crim. No. 96-646, 1998 U.S. Dist. LEXIS 22145, at *8 (D.N.J. Aug. 26, 1998).

[14] 992 F.2d 755 (7th Cir. 1993).

[15] *Id.* at 759-60.

[16] *Id.* at 758-60.

[17] *Id.* at 758.

draw her guilty plea.[18] As this case demonstrates, once innocence is established, a court is hard-pressed to deny a defendant's motion to withdraw a guilty plea.

C. DELAY IN BRINGING THE MOTION TO WITHDRAW

Beyond requiring an assertion of innocence, courts also demand that defendants take prompt action to make that assertion.[19] The longer the wait to bring a motion to withdraw a plea, the less likely a court will be to grant the motion.[20] Courts view timeliness as a rough proxy for the strength of the reason to withdraw the guilty plea. If a defendant had been truly mistaken in entering the plea, the defendant would move quickly to withdraw it. The longer the defendant waits to withdraw the plea, the less likely the decision was made in error. The longer the defendant waits, the more likely the defendant's motion is based on strategic reasons unrelated to whether the defendant properly entered into the plea agreement.

As a method to refine this rough factor of delay, courts evaluate whether the defendant gained any strategic benefit by waiting to withdraw the guilty plea.[21] Delaying such a motion until after the trial or sentencing of co-defendants could provide the defendant with the opportunity to preview the government's evidence and trial strategy, as well as to discover the potential punishments. If a defendant has enjoyed such bene-

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[18] *Id.* at 759-60.

[19] *See, e.g.*, United States v. Chant, No. 98-10088, 1999 U.S. App. LEXIS 29792, at *8-9 (9th Cir. Nov. 9, 1999) (memorandum opinion) (rejecting a motion to withdraw a guilty plea because although the defendant asserted his innocence, it was not based upon new evidence and thus looked as thought the motion was based merely on a "change of heart"); United States v. Ramos, 810 F.2d 308, 312 (1st Cir. 1987); *see also* 3 WRIGHT ET AL., *supra* note 3, § 538, at 201; Alperin, *supra* note 4, at 670, 680.

[20] *See, e.g.*, United States v. Marrero-Rivera, 124 F.3d 342, 352 (1st Cir. 1997) ("'The rule of thumb is that the longer a defendant waits before moving to withdraw his plea, the more potency his motion must have in order to gain favorable consideration.'"); United States v. Sanchez-Barreto, 93 F.3d 17, 23 (1st Cir. 1996) (same); United States v. Parrilla-Tirado, 22 F.3d 368, 373 (1st Cir. 1994) (same); United States v. Carr, 740 F.2d 339, 343 (5th Cir. 1984) ("[T]he longer a defendant delays in filing a withdrawal motion, the more substantial reasons he must proffer in support of his motion."); *see also* United States v. Barker, 514 F.2d 208, 222 (D.C. Cir. 1975) ("A swift change in heart is itself strong indication that the plea was entered in haste and confusion . . . ."); United States v. Shillitani, 16 F.R.D. 336 (S.D.N.Y. 1954) (noting that a long delay "suggests [the motion] was an afterthought); 26 MOORE ET AL., *supra* note 2, ¶ 632.30[1][b][iii], at 632-95 (same).

[21] *See, e.g.*, United States v. Parrella-Tirado, 22 F.3d 368, 378 (1st Cir. 1994) (evaluating the factor of delay in terms of the strategic benefits gained by the delay).

fits through delay, courts examine such motions with a much more discriminating eye.[22] Thus, delay in bringing a motion to withdraw a guilty plea only serves to impose a greater burden on the defendant to convince the court to grant relief.[23]

D. PREJUDICE TO THE GOVERNMENT

If a defendant has put forth evidence of innocence without undue delay, courts then consider whether the government would be prejudiced by permitting the defendant to withdraw the guilty plea.[24] Such prejudice could arise where the government would have difficulty presenting its case at a subsequent trial—because witnesses have dispersed or cannot be located[25]

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[22] *See* Cordero v. United States, 533 F.2d 723, 725 (1st Cir. 1976); *see also* United States v. Giuliano, 348 F.2d 217, 223 (2d Cir. 1965) ("To permit the withdrawal of the plea at this stage would encourage entering the plea merely as a trial balloon to test the attitude of the trial court. This stratagem has been properly condemned.").

[23] Because the question of improper delay is so fact specific, broad generalities cannot be made regarding how long is too long. Courts have found time periods ranging from merely 13 days to 10 ½ years to be too long to bring a motion to withdraw a guilty plea. *See Ramos*, 810 F.2d at 313 (delay of 13 days too long); *Oksanen*, 362 F.2d 74 (delay of 10 ½ years too long); *see also Marrero-Rivera*, 124 F.3d at 352 (14 weeks); United States v. Isom, 85 F.3d 831, 839 (1st Cir. 1996) (2 months); United States v. Fitzhugh, 78 F.3d 1326, 1328 (8th Cir.) (9 months); United States v. Bashara, 27 F.3d 1174, 1181 (6th Cir. 1994) (6 weeks); *Carr*, 740 F.2d at 345 (22 days); *Burnett*, 671 F.2d at 712 (5 years); United States v. Shillitani, 16 F.R.D. 336, 339 (S.D.N.Y. 1954) (3 years).

[24] *See, e.g.*, 26 MOORE ET AL., *supra* note 2, ¶ 632.30[1][b][i], at 632-93 ("In evaluating motions withdraw, the court should first require the defendant to provide a fair or just reason."); *see also Carr*, 740 F.2d at 343; United States v. Rassmussen, 642 F.2d 165, 168 (5th Cir. 1981) (holding that the failure to show prejudice does not result in an automatic grant of the motion to withdraw a guilty plea); United States v. Stayton, 408 F.2d 559, 561 (3d Cir. 1969) (requiring "substantial prejudice").

[25] *See, e.g.*, United States v. Buckles, 843 F.2d 469 (11th Cir. 1988) (considering "the time, money, and effort the government would have to devote to reassembling witnesses and evidence that were allowed to scatter after the acceptance of the guilty plea."); United States v. Kobrosky, 711 F.2d 499, 455 (1st Cir. 1983) ("The most common form of prejudice is the difficulty that the government would encounter in reassembling its witnesses . . . ."); Government of the Virgin Islands v. Berry, 631 F.2d 214, 221 (3d Cir. 1980) (finding prejudice where one key witness could not be located and others had dispersed); United States v. Brown, 617 F.2d 54, 55 (4th Cir. 1980) (per curiam) (finding prejudice where witnesses were notified they did not have to appear for trial); United States v. Acevedo-Ramos, 619 F. Supp. 570, 576 (D.P.R. 1958) (finding prejudice where the main witness was in prison, and the government "has lost track of its [other] witnesses"); *see also* United States v. Tammaro, 93 F.R.D. 826, 830 (N.D. Ga. 1982) (finding prejudice where witnesses were out of state and one was in the witness protection program and would face increased danger by additional travel); ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 89 (3d ed. 1999); 3 DAVID S. RUDSTEIN ET AL., CRIMINAL CONSTITUTIONAL LAW ¶ 12.05[1] at 12-65 (1999).

or where evidence has already been destroyed.[26] More mundane tasks, such as the re-assembly of trial preparation materials, have also been deemed to establish prejudice to the government.[27] In fact, the same factors considered in whether a defendant gained a strategic benefit through delay also can establish prejudice to the government—such as waiting to withdraw a plea until the eve of trial[28] or waiting until after the government has presented its case against a co-defendant.[29] The longer the delay, the more likely the defendant has gained a tactical advantage at the government's expense.[30]

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[26] *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 89 (3d ed. 1999); 3 DAVID S. RUDSTEIN ET AL., CRIMINAL CONSTITUTIONAL LAW ¶ 12.05[1], at 12-65 (1999).

[27] *See, e.g., Brown*, 617 F.2d at 55 (finding prejudice where the government's trial preparation had been dismantled); United States v. Acevedo-Ramos, 619 F. Supp. 570, 576 (D.P.R. 1985) (finding prejudice where the government had dismantled its case); *see also* United States v. Strauss, 563 F.2d 127, 131 (4th Cir. 1977) (finding prejudice where the government would have to recreate trial preparation); United States v. Figueroa, Crim. No. 91-518-01, 1992 U.S. Dist. LEXIS 15615, at *29 (E.D. Pa. Oct. 15, 1992) ("[T]he government would have to prepare for trial against defendant twice, with the risks and prejudice inherent in doing so."). However, the mere fact that the defendant will exercise his or her constitutional right to go to trial is not sufficient prejudice to the government. *See* United States v. Allen, 981 F. Supp. 564, 572-73 (N.D. Iowa 1997) (requiring prejudice "beyond the necessity of taking a matter to trial, which merely requires the exercise of the defendant's constitutional rights, instead of 'pleading it out.'").

[28] *See, e.g.*, United States v. Bryant, 640 F.2d 170, 172 (8th Cir. 1981) (finding prejudice where three trials had already occurred); *Strauss*, 563 F.2d at 131 (finding prejudice where the plea had been entered on eve of trial); United States v. Crowley, 529 F.2d 1066, 1072 (3d Cir. 1976) (finding prejudice where the plea had been entered on day of trial); United States v. Fernandez, 734 F. Supp. 599, 604 (S.D.N.Y. 1990 (finding prejudice where the plea had been entered on the "eve of summations" during trial).

[29] *See, e.g.*, United States v. Barker, 514 F.2d 208, 222 (D.C. Cir. 1975) (finding prejudice where the plea had been entered during the trial of co-defendants); *Figueroa*, 1992 U.S. Dist. LEXIS 15615, at *29 (finding prejudice where a trial of a co-defendant "revealed all the tactics and strategy that it had planned to use at trial against defendant. Defendant therefore has a preview of the government's case against him. This in itself constitutes prejudice.").

[30] *See Kobrosky*, 711 F.2d at 455 ("[T]he longer the delay in moving for a plea withdrawal, the greater this prejudice is likely to be."). Some courts have also considered its inconvenience as well. *See, e.g.*, United States v. Carr, 740 F.2d 339, 345 (5th Cir. 1997); *Kobrosky*, 711 F.2d at 455 ("[T]he court may properly consider any substantial inconvenience it would suffer were the plea to be withdrawn."); *Barker*, 514 F.2d at 222; United States v. Fernandez, 734 F. Supp. 599, 604-05 (S.D.N.Y. 1990) ("To allow Fernandez to withdraw his guilty plea in the circumstances of this case would undermine confidence in the integrity of judicial procedures, increase the volume of judicial work, and delay and impair the orderly administration of justice.").

A finding of prejudice, however, will not automatically result in the denial of the defendant's motion. Instead, such a finding heightens the defendant's burden to withdraw the plea, requiring the defendant's justification for the withdrawal to meet "exceptionally high standards."[31] Thus, as with a finding of undue delay, the defendant must prove to the court that the reasons for withdrawing the plea heavily outweigh the potential prejudice that such an action would impose on the government.

II. AN INTERVENING CHANGE IN THE LAW

Weighing these four factors (and primarily the innocence factor), courts decide whether a defendant should be permitted to withdraw a guilty plea prior to sentencing under Rule 32(e). One event that can prompt a defendant to bring this type of a motion is a change in the law, such as a judicial decision invalidating part of a criminal statute that relates to the defendant's plea.[32]

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[31] *Carr*, 740 F.2d at 343; *see also* United States v. Mathis, 963 F.2d 399, 410 (D.C. Cir. 1992); *Barker*, 514 F.2d at 222.

[32] Permitting a change in the law to "re-open" the defendant's guilty plea has a parallel in civil contexts. Under Federal Rule of Civil Procedure 59(e), a party may move to alter or amend a judgment based upon an intervening change in the law. *See, e.g.*, Pacific Ins. Co. v. American Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998) ("[T]here are three grounds for amending an earlier judgment [under Rule 59(e)]: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice."); *see also* Abrams v. Communications Workers of Am., 187 F.R.D. 12, 13 (D.D.C. 1999) ("[T]he district court has the discretion to grant a Rule 59(e) motion if the court finds (1) an intervening change of controlling law, (2) the availability of new evidence, or (3) the need to correct a clear error or prevent manifest injustice."). *See generally Abrams*,187 F.R.D. at 14 (holding that an intervening Supreme Court case did not amount to a change in the law because the "Supreme Court went to unusual lengths . . . to limit the scope of its ruling, expressly disavowing any intention to reach" the arguments at issue in this case). However, as in the criminal context, if the change in law occurs well after the entry of judgment, courts are much more hesitant to overturn the final decision of the court. *See* FED. R. CIV. P. 60(b)(6); Bailey v. Ryan Stevedoring Co., 894 F.2d 157, 160 (5th Cir. 1990) ("A change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment"); *see also* Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 131 F.3d 625, 628 (7th Cir. 1997) (same); Batts v. Tow-Motor Forklift Co., 66 F.3d 743, 749 (5th Cir. 1995) ("A circuit court's announcement of a new rule of federal law, like a Supreme Court pronouncement, is similarly insufficient without more to justify Rule 60(b)(6) relief."); Holland v. Virginia Lee Co., 188 F.R.D. 241, 252 (W.D. Va. 1999) ("[I]t is well established that a supervening change in decisional law on its own is insufficient to afford relief under Rule 60(b)(6).").

Under the current Rule 32(e) test for withdrawing guilty pleas, if a defendant brings the motion to withdraw promptly after learning of the change, delay should not be an issue—the defendant could not have brought the motion previously because the change had not yet occurred.[33]

The government might oppose such a motion on the ground of prejudice, but it is far more likely to argue that the defendant has waived any right to challenge the plea by admitting the criminal conduct at issue during the guilty plea hearing. Fearing the re-opening of a wave of guilty pleas, courts have, on occasion, accepted this argument.[34] However, in order for the waiver of the right to challenge the plea to be effective, it must be knowing and voluntary.[35] If the law changes only *after* the defendant entered into the guilty plea, the defendant cannot have knowingly waived an argument based on the *subsequent* change in the law.[36] While a motion to withdraw a plea would

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[33] *See* United States v. Gomez-Orozco, 188 F.3d 422, 427 (1st Cir. 1999). However, conditions of confinement are not seen as a valid excuse for delay. *See* United States v. Mignogna, 157 F.2d 839, 840 (2d Cir. 1983) (defendant was in maximum security confinement but had access to an attorney).

Of course, a policy of not counting the delay until a defendant knows of the change in the law could run the risk of encouraging "willful blindness" by defendants and their attorneys. Failing to factor this delay could result in defendants and their attorneys failing to diligently search new case law in order to preserve a later argument regarding the withdrawal of a guilty plea. However, while this policy could give rise to some tactical maneuvering, such "willful blindness" actually runs counter to the main motivating factor behind the defendant's and the attorney's goal—obtaining the defendant's freedom. The sooner the defendant finds out about the change in the law, the sooner the defendant can argue that the guilty plea should be withdrawn. Thus, this fear should not undermine the approach of factoring delay only after the defendant learns of the change in the law.

[34] *See, e.g.*, United States v. Morris, No. 98-133, 1999 U.S. Dist. LEXIS 13321 (E.D. Pa. Aug. 31, 1999).

[35] *See* Brady v. United States, 397 U.S. 742, 748 (1970) ("[T]he plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); *see also* Bousley v. United States, 523 U.S. 614, 618 (1998) ("A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent'" (citation omitted)); United States v. Presley, 478 F.2d 163, 168 (5th Cir. 1973) (holding that as a result of a change in the law, no waiver occurred because the plea was not knowing); Bell v. United States, 917 F. Supp. 681, 684 (E.D. Mo. 1996) ("[T]he plea must have been voluntary and knowing to comport with the requirements of the Due Process Clause.").

[36] *See, e.g.*, United States v. Ramos, 923 F.2d 1346, 1358 (9th Cir. 1991); United States v. Lucia, 416 F.2d 920, 922 (5th Cir. 1969) (holding that a change in the law "cannot be said to waive a right" because it "was judicially created after the supposed

be considered too late if the defendant was aware (or should have known) of the change at the time the plea was made,[37] courts do not require attorneys to predict changes in the law.[38] Thus, because the changes in the law occur after the guilty plea hearing, courts generally reject this waiver argument.[39]

Even though defendants are likely to satisfy the delay and prejudice factors, the most important factor of the current test—innocence—still looms as a major impediment to relief. And not every change in the law is created equal, for not all changes in the law address the innocence factor.[40] Potentially

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waiver"); United States v. Tammaro, 93 F.R.D. 826, 828 (N.D. Ga. 1982) (holding that a change in the law "might render a guilty plea ineffective as not a knowing and intentional relinquishing of the right to trial.").

[37] *See* United States v. Silva, 122 F.3d 412, 415 (7th Cir. 1997); United States v. Spencer, 836 F.2d 236, 239 (6th Cir. 1987) ("However, where a defendant is aware of the condition or reason for a plea withdrawal, at the time the guilty plea is entered, a case for withdrawal is weaker.").

[38] *See* Cepulonis v. Ponte, 699 F.2d 573, 575 (1st Cir. 1983) ("[C]ounsel need not chase wild factual geese . . . ."); Paulino v. United States, No. 97-Civ-2107, 1998 U.S. Dist. LEXIS 5966, at *13 (S.D.N.Y. Apr. 28, 1998) (holding that a defense attorney does not have to be "omniscient"). *See generally* Ingber v. Enzor, 841 F.2d 450, 454 (2d Cir. 1988) ("Were we to penalize [the defendant] for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court.").

[39] Similar reasoning can also be found in civil context under Federal Rule of Civil Procedure 59(e). *See, e.g.*, Holland v. Big River Minerals Corp., 181 F.3d 597, 605-06 (4th Cir. 1999) ("The intervening law exception to the general rule that the failure to raise an issue timely in the district court waives review of that issue on appeal applies when 'there was strong precedent' prior to the change, such that the failure to raise the issue was not unreasonable and the opposing party was not prejudiced by the failure to raise the issue sooner.") (citation omitted); *see also* Pittston Co. v. United States, 199 F.3d 694, 706 n.9 (4th Cir. 1999) (same).

[40] Of course, a fundamental question should be "What is a *change* in the law?" While courts have not addressed this question very frequently in the criminal context, some courts have dealt with the issue in the civil arena. In these decisions, they have held that such changes must announce "a new legal principle that was previously unavailable to the appellant, for all practical purposes." Kattan v. District of Columbia, 995 F.2d 274, 278 (D.C. Cir. 1993); *see also* Quinones-Ruiz v. United States, 873 F. Supp. 359, 361-62 (S.D. Cal. 1995); United States v. Serafini, 898 F. Supp. 287 (M.D. Pa. 1994); In re Doris D. Coby, 154 B.R. 316, 319 (Bankr. Nev. 1993) (holding that a change in law occurred because "[t]his Court would have followed the holding in" the new decision "if that decision had been rendered at the time the judgment"); Dudosh v. City of Allentown, 722 F. Supp. 1233, 1236 (E.D. Pa. 1989). *See generally* Cincinnati Ins. Co. v. Byers, 151 F.3d 574, 580 (6th Cir. 1998) (granting relief because "[t]he action of the Ohio Supreme Court in reversing itself within one year is certainly an unusual occurrence."); Cespedes v. Coughlin, 969 F. Supp. 254 (S.D.N.Y. 1997) (granting relief based upon two intervening Second Circuit cases); Allen v. Shalala, 835 F. Supp. 462, 464-65 (N.D. Ill. 1993) (granting relief based on an intervening Supreme Court case directly on point). This rule is not without limitations, however, for the "change" must be more than a clarification of existing

relevant changes in the law fall into three main categories: (1) a change relating to the crime underlying the guilty plea; (2) a change relating to a defense to that crime; or (3) a change in the sentencing or other post-conviction consequences of the crime.[41] While changes in any one of these categories could undermine the reason why a defendant entered into a plea agreement, courts using the current test simply focus on whether the change affects a defendant's claim of innocence. Because most of these changes do not affect a defendant's factual innocence, courts have frequently denied motions to withdraw guilty pleas based upon an intervening change in the law.

A. CHANGE RELATING TO THE UNDERLYING CRIME

A change in the law relating to the crime underlying the guilty plea itself provides the strongest basis for withdrawing a guilty plea. If the change decriminalizes the conduct to which the defendant pled guilty, the defendant is now "innocent"—both factually and legally—thus satisfying the most important factor of the current test.[42]

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principles. *See, e.g.*, Bush v. Commonwealth Edison Co., 812 F. Supp. 808, 811-12 (N.D. Ill. 1992) ("Legislative efforts to correct judicial decision making where there is an interpretative chasm must by definition entail more than 'clarification'" and instead be "a change in the law."). Moreover, it must be a change of controlling law and not a different interpretation by a non-binding court. *See, e.g.*, Schneider v. Stokes Vacuum, Inc., Civ. No. 94-0282, 1994 U.S. Dist. LEXIS 10745, at *8-9 (E.D. Pa. Aug. 4, 1994); MCI Telecommunications Corp. v. Ameri-Tel, Inc., No. 91-C-4277, 1994 U.S. Dist. LEXIS 10434, at *8 (N.D. Ill. July 29, 1994); Modern Publishing v. Landoll, Inc., 849 F. Supp. 22, 23 (S.D.N.Y. 1994) (holding that a decision by another district court judge "cannot be regarded as a "controlling decision . . . . Decisions that are 'controlling in this Court, which is to say binding upon it, are issued by the Second Circuit Court of Appeals or the Supreme Court"); Dowell v. State Farm Fire & Cas. Auto. Ins. Co., 774 F. Supp. 996, 1000 (S.D. W. Va. 1991) (not finding a change of law because the new decisions "[s]imply provided clarity through a critical analysis of legislative intent and state public policy"), *aff'd*, 993 F.3d 46 (4th Cir. 1993); Patterson v. McLean Credit Union, 130 F.R.D. 617, 619 (M.D.N.C. 1990) ("[A]n opinion of the North Carolina Court of Appeals will not alter decisional law previously enunciated by the North Carolina Supreme Court."); .

[41] *See, e.g.*, United States v. Andrade, 83 F.3d 729 (5th Cir. 1996) (per curiam) (a change relating to the underlying crime); United States v. Vallejo, 476 F.2d 667 (3d Cir. 1973) (a change relating to sentencing); United States v. Lucia, 416 F.2d 920 (5th Cir. 1969), *aff'd*, 423 F.2d 697 (5th Cir. 1970) (en banc) (a change relating to a defense to the underlying crime).

[42] *See, e.g.*, Stanback v. United States, 113 F.3d 651, 654 (7th Cir. 1997) ("In electing to plead guilty . . . the defendant waives a challenge to the facts underlying the charge, but he does not waive the right to contest whether those facts are sufficient to constitute a crime."); Lee v. United States, 113 F.3d 73, 75 (7th Cir. 1997) (holding on a habeas petition that although a guilty plea waives a challenge to

For instance, in *United States v. Andrade*,[43] the defendant pled guilty to a violation of 18 U.S.C. § 924(c)(1), which prohibited the use of a firearm in the context of a drug trafficking offense. While the defendant's appeal was pending, the Supreme Court held that the mere possession of a firearm was insufficient to constitute "use" under the statute.[44] Because the defendant's guilty plea established the mere possession of a gun, "the defendant pleaded guilty to something that is not a crime" and thus the court permitted the defendant to withdraw his guilty plea.[45] Similarly, in *United States v. Presley*,[46] the defendant entered a plea of nolo contendere to several interstate gambling offenses. However prior to sentencing, a Supreme Court decision[47] tightened the interstate commerce element of those gambling offenses. Because the defendant's conduct did not meet the newly-restricted interstate commerce element, he now had a claim of innocence. After promptly acting to assert that claim, the court permitted the defendant to withdraw his guilty plea.[48]

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the facts themselves, it does not waive the "right to challenge whether those facts constituted a crime"); United States v. Broadus, 450 F.2d 639, 641 (D.C. Cir. 1971) (In permitting the withdrawal of a guilty plea based upon an intervening Supreme Court case, the court held "[t]hus, in essence, he pleaded guilty to nothing. The Government, therefore, does not have the usual interest in punishing a man who admits committing a crime, and the guilty plea should not be allowed to accomplish what the Government could not constitutionally accomplish through legislation."); United States v. Liguori, 438 F.2d 663, 669 (2d Cir. 1971) (reversing a conviction because of a change in the law as to the elements of the offense); United States v. McMillan, 914 F. Supp. 1387, 1389 (E.D. La. 1996) (permitting the withdrawal of a plea based upon a change in the law relating to the underlying crime).

[43] 83 F.3d 729 (5th Cir. 1996) (per curiam).

[44] Bailey v. United States, 516 U.S. 137 (1995).

[45] *Id.* at 731; *see also* United States v. Knowles, 29 F.3d 947, 952 (5th Cir. 1994) (reversing a conviction stemming from a guilty plea because an intervening Supreme Court decision invalidated the statute upon which the conviction was based); Ingber v. Enzor, 841 F.2d 450, 454-55 (2d Cir. 1988) (The court, in a habeas case, permitted the withdrawal of the plea based upon a change in the law because "[w]ere we to penalize [the defendant] for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court. Such a rule would encourage appeals of even well-settled points of law. We see no value in imposing a responsibility to pursue such a 'patently futile' course.").

[46] 478 F.2d 163 (5th Cir. 1973).

[47] Rewis v. United States, 401 U.S. 808 (1971).

[48] *Presley*, 478 F.2d at 168; *see also* United States v. Garcia, No. 95-2186, 1996 U.S. App. LEXIS 5324 (8th Cir. Mar. 25, 1996) (vacating guilty plea because *Bailey* was decided while the case was on appeal); 2 ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 84 (13th ed. 1990) ("[W]here the governing law has changed and the defendant would no longer be guilty of the offense of conviction under the governing law, the defendant should be able to withdraw the plea.").

Thus, if the change relates to the actual crime contained in the guilty plea itself, courts have consistently permitted defendants to withdraw their pleas because "innocence" has been established.[49]

A more interesting question arises, however, when the change in the law concerns one of the indicted charges not found in the guilty plea itself. In other words, the crime contained in the ultimate guilty plea still stands, but at least one of the others dropped by the government in consideration for the defendant agreeing to the plea is no longer valid. In such a situation, courts have taken the opposite stance—because the crime underlying the guilty plea is still valid, so too is the plea agreement. The defendant has no claim of innocence.

For instance, in *United States v. Muriel*,[50] the defendant pled guilty to a single crime in exchange for the government dropping two additional charges. Prior to sentencing, an intervening Supreme Court decision essentially nullified one of the charges that had been dropped, and the defendant brought a motion to withdraw his guilty plea.[51] Even though the plea had less value for the defendant following the Supreme Court's ruling, the court noted that he had received valuable consideration for the plea because the conduct amounted to a crime at the time of the agreement.[52] The court held, therefore, that the defendant could not withdraw his plea merely because the dropped charges now looked "weaker."[53] For the court, because the defendant was still guilty of the crime contained in the plea, the defendant was still bound by the agreement.[54] Thus, depending upon the structure of the guilty plea, *i.e.*, which

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[49] *See also* United States v. Abdul, 75 F.3d 327 (7th Cir. 1996) (permitting the withdrawal of a plea based on an intervening Supreme Court decision); United States v. Andrade, 83 F.3d 729 (5th Cir. 1996) (same); United States v. McMillan, 914 F. Supp. 1387 (E.D. La. 1996) (same).

[50] 111 F.3d 975 (1st Cir. 1997).

[51] *See id.* at 977.

[52] *See id.* at 979-80.

[53] *Id.* at 980; *see also* United States v. Aker, 181 F.3d 167, 171 (1st Cir. 1999) (denying a motion to withdraw a guilty plea because the motion was merely "an after-the-fact recalculation of risks and rewards"); United States v. Knight, 96 F.3d 307, 309 (8th Cir. 1996) (denying a motion to withdraw a guilty plea because the defendant received other consideration for pleading guilty beyond the dropped charge); United States v. Loughery, 908 F.2d 1014, 1019 (D.C. Cir. 1990) (permitting the withdrawal of a guilty plea because the defendant received "nothing of value in exchange for her plea").

[54] *Muriel*, 111 F.3d at 980.

charges were dropped and which remained, the current test of innocence produces conflicting results.

B. CHANGE RELATING TO A COMPLETE DEFENSE TO THE UNDERLYING CRIME

In the second category of cases, the elements of the crime found in the guilty plea remain the same, but the law changes with respect to a defense that the defendant could raise to rebut those elements. In other words, the defendant still admits to the conduct that amounts to a crime but asks the court to disregard that clear evidence based upon a newly available defense, such as entrapment, an illegal search and seizure, a violation of the defendant's right against self-incrimination, or a lack of mental capacity.[55] Because a new defense could establish a defendant's legal innocence, some courts have permitted defendants to withdraw their pleas based on such a change.

For instance, in *United States v. Lucia*,[56] the defendant pled guilty to failing to pay an excise tax on gambling winnings under 18 U.S.C. § 371. Shortly thereafter, the Supreme Court held that invoking the Fifth Amendment right against self-incrimination provided a complete bar to prosecution under that statute.[57] Because the intervening decision gave Lucia a complete defense to the charge, the court permitted the withdrawal of the guilty plea.[58]

Other courts have found such changes to be insufficient to withdraw a guilty plea on the basis that legal innocence cannot overcome factual guilt. In other words, because the defendant had previously admitted his or her factual guilt at the plea hearing, the later assertion of legal innocence is therefore deemed insufficient.[59] For example, in *United States v. Morris*,[60] the de-

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[55] *See, e.g.*, United States v. Lucia, 416 F.2d 920 (5th Cir. 1969), *aff'd*, 423 F.2d 697 (5th Cir. 1970) (en banc) (right against self-incrimination); United States v. Morris, Crim. No. 98-133, 1999 U.S. Dist. LEXIS 13321 (E.D. Pa. Aug., 31, 1999) (illegal search and seizure).

[56] 416 F.2d 920 (5th Cir. 1969), *aff'd*, 423 F.2d 697 (5th Cir. 1970) (en banc).

[57] *See Lucia*, 416 F.2d at 921 (citing Marchetti v. United States, 390 U.S. 39 (1968), and Grosso v. United States, 390 U.S. 62 (1968)).

[58] *See Lucia*, 416 F.2d at 926; *see generally* United States v. Schubert, 728 F.2d 1364, 1366-67 (11th Cir. 1984) (permitting the withdrawal of a guilty plea where the defendant subsequently learned of facts supporting an entrapment defense).

[59] *See, e.g.*, United States v. Morris, Crim. No. 98-133, 1999 U.S. Dist. LEXIS 13321, at *16 (E.D. Pa. Aug. 31, 1999); *see also* United States v. Martin, 147 F.3d 529 (7th Cir.

fendant sought to withdraw his guilty plea based upon a change in suppression law. The court rejected the defendant's motion, holding that the defendant's admission of guilt at the plea hearing precluded consideration of the new legal defense.[61] Thus, under the current test, even legal innocence is uncertain to provide relief to a defendant seeking to withdraw a guilty plea.

C. CHANGE TO SENTENCING LAW OR OTHER POST-CONVICTION CONSEQUENCES

The final category involves those changes relating to sentencing law or other post-conviction consequences of a plea. As with changes permitting new defenses to the crime, the defendant's admission of factual guilt is untouched by these types of changes. However, unlike changes providing newly available defenses, these changes to post-conviction consequences of the plea do not establish a defendant's legal innocence. Instead, they only relate to the consequences of the defendant's factual admission of guilt and do not create a defense to the underlying crime. The key factor of "innocence" required under the current test is therefore not met.

In light of this failure to raise a new theory of innocence, courts have routinely rejected motions based upon changes in the law relating to the sentencing consequences of a guilty plea. For instance, in *United States v. Vallejo*,[62] the defendant sought to withdraw his guilty plea based on an intervening Supreme Court case that limited a judge's sentencing discretion.[63] Even though the consequence of the plea had changed, the court rejected the defendant's request to withdraw his plea. The factual circumstances underlying the plea had not changed, and the defendant knew that by pleading guilty, he "ran the risk of a substantial jail sentence and fine . . . ."[64] Although the risks of

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1998) (rejecting a guilty plea challenge based upon a change in the law to a defense to the crime).

[60] Crim. No. 98-133, 1999 U.S. Dist. LEXIS 13321 (E.D. Pa. Aug. 31, 1999).

[61] *See id.* at *16-19. The court further held that the intervening Supreme Court decision did not amount to a change in the law. *See id.* at *20-27.

[62] 476 F.2d 667 (3d Cir. 1973).

[63] *See id.* at 670.

[64] *Id.*; *see also* Brady v. United States, 397 U.S. 742 (1970) (rejecting a challenge to a guilty plea even though the mandatory death sentence that the defendant had faced prior to the plea was later ruled unconstitutional); Tanceusz v. United States, 831 F.2d 297 (6th Cir. 1987) (unpublished per curiam decision) (holding that a change in parole guidelines after the entry of a guilty plea does not warrant its withdrawal);

the plea had changed, the underlying admission of guilt still stood.[65] And under the current test, without proof of innocence, no relief can be granted.

Changes to non-sentencing consequences of a plea fare no better.[66] Not only do such changes fail to give a defendant any claim of innocence, but courts have also consistently held that such changes are simply too remote to form a basis to withdraw a guilty plea. For instance, prior to accepting a guilty plea, courts are required to ensure that defendants know of the direct consequences of a plea—"those having a 'definite, immediate and largely automatic effect on the range of the defendant's punishment.'"[67] These direct consequences include the range of possible sentences[68] but not the specific sentence that the defendant will ultimately receive.[69] Courts are also not required to tell defendants about any "collateral" consequences of the plea,

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Yanasak v. Seiter, No. 86-3504, 1987 U.S. App. LEXIS 2751 (6th Cir. 1987) (holding that a change in the law eliminating the possibility for death sentence did not warrant withdrawing the guilty plea).

[65] *Vallejo*, 476 F.2d at 669-71.

[66] *See* Xun v. Vasquez, No. C 92-2214, 1992 U.S. Dist. LEXIS 19133 (N.D. Cal. Nov. 6, 1992) (holding that a change in the law relating to deportation did not justify the withdrawal of a plea); *see also* Guerra v. United States, No. 96 Civ. 8425, 1997 U.S. Dist. LEXIS 92, at *3 (S.D.N.Y. Jan. 9, 1997) ("[T]here is no reason to suppose that the change in the law relating to deportation would have led the Court to grant an application by [the defendant] to withdraw his guilty plea simply because the collateral consequences of conviction changed after the plea was entered.").

[67] Bryant v. Cherry, 687 F.2d 48, 50 (4th Cir. 1982) (quoting Cuthrell v. Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973)).

[68] *See, e.g.*, Lewis v. United States, 601 F.2d 1100, 1101 (9th Cir. 1979) (per curiam) (holding that a trial court was required only to give the sentencing range and does not need to inform the defendant of a mandatory special parole).

[69] *See, e.g.*, United States v. Fernandez, 877 F.2d 1138, 1142-43 (2d Cir. 1989) (holding that a trial court need only tell the defendant of the minimum and maximum sentences and does not need to perform sentencing guideline calculations); United States v. Jaramillo-Suarez, 857 F.2d 1368 (9th Cir. 1988) (reversing a guilty plea because the defendant was not told of the possible minimum and maximum sentences); Hunter v. Fogg, 616 F.2d 55 (2d Cir. 1980) (holding that under Federal Rule of Criminal Procedure 11, a defendant must be told of the maximum and minimum sentences); *Lewis*, 601 F.2d at 1101 ("Rule 11 does not require that the court inform the defendant of the probability of his receiving one sentence or another. Indeed it is improper to do so.") (citing Hinds v. United States, 429 F.2d 1322 (9th Cir. 1970)); Paradiso v. United States, 482 F.2d 409, 415 (3d Cir. 1973) (same); Trujillo v. United States, 377 F.2d 266, 269 (5th Cir. 1967) (same); Durant v. United States, 410 F.2d 689, 692 (1st Cir. 1969) (holding that the court need not give the defendant "a detail of every consequence of his sentence, but the loss of something important enough to make a deprivation after sentence constitutionally impermissible, is a matter of which a defendant should be informed in advance." (citation omitted)).

such as confinement conditions,[70] "the possibility of revocation of parole,"[71] potential deportation,[72] and parole eligibility.[73] If these collateral consequences later change, courts accordingly dismiss any consideration of the change: if a defendant does not have the right to know about these consequences at the time of the plea,[74] why should these consequences matter after they have changed? Even though such changes might fundamentally alter the consequences of a plea for the defendant, the changes are simply irrelevant to the court's decision. Without providing a credible claim of innocence—and in some cases, factual innocence—the motion will not be granted under the current test.

III. CONTRACT LAW AND MOTIONS TO WITHDRAW GUILTY PLEAS

With innocence as their primary standard, courts have routinely denied requests to withdraw guilty pleas based upon changes in the law. Defendants have, therefore, been forced to abide by plea agreements that look drastically different in light of intervening changes in the law. But are courts achieving the correct result? Should more defendants be able to re-evaluate their decisions to plead guilty based upon relevant changes in the law? One framework for evaluating the courts' performance

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[70] *See, e.g.*, United States v. Levine, 457 F.2d 1186, 1190 (10th Cir. 1972) (holding that a court did not need to inform the defendant that his plea would not release him from segregated confinement).

[71] *See, e.g.*, United States v. King, 618 F.2d 550, 552 (9th Cir. 1980).

[72] *See, e.g.*, United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000); United States v. Chavez-Huerto, 972 F.2d 1087, 1089 (9th Cir. 1992); Cordero v. United States, 553 F.2d 723, 726 (1st Cir. 1965); Guerra v. United States, No. 96 Civ. 8425, 1997 U.S. Dist. LEXIS 92, at *3 (S.D.N.Y. Jan. 9, 1997) (memorandum opinion).

[73] *See, e.g.*, Hill v. Lockhart, 731 F.2d 568, 570 (8th Cir. 1984) ("The details of parole eligibility are considered collateral rather than direct consequences of a plea, of which a defendant need not be informed before pleading guilty."); Cepulonis v. Ponte, 699 F.2d 573, 577 (1st Cir. 1983) (same); Smith v. United States, 324 F.2d 436, 441 (D.C. Cir. 1963). *But see* United States v. Sanclemente-Bejarano, 861 F.2d 206, 209 (9th Cir. 1988) (holding that a court must disclose supervised release which "may increase the length of the ultimate sentence"); *Trujillo*, 377 F.2d at 269 (holding that a court must inform the defendant of his ineligibility for parole).

[74] *See* FED. R. CRIM. P. 11; *see also Cepulonis*, 699 F.2d at 577 ("Ordinarily, the details of parole eligibility are considered collateral rather than direct consequences of a plea, of which a defendant need not be informed before pleading guilty."); United States v. Sambro, 454 F.2d 918, 920 (D.C. Cir. 1971) (per curiam) ("The trial court is not required later on motion to withdraw the plea to consider possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction on a plea of guilty . . . ."); United States v. Lott, 630 F. Supp. 611, 612 (E.D. Va. 1986) (holding that a trial court need not advise a defendant of collateral consequences).

is one that is deeply embedded in the jurisprudence surrounding plea agreements—contract law. Courts have routinely applied contract law to interpret or enforce plea agreements.[75] However, because contract law was not specifically designed to apply in the criminal context, courts have not slavishly followed the commercially-driven contract law rules.[76] Instead, contract law has provided broad tenets under which courts are better equipped to evaluate and consistently adjudicate disputes concerning plea agreements. Courts have relied upon these principles not simply to interpret plea agreements,[77] but also to evaluate the potential impact of subsequent events on these agreements.[78] A change in the law is simply another example of

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[75] *See, e.g.*, United States v. Williams, 198 F.3d 988, 993 (7th Cir. 1999) (applying the contract law principle of mutual mistake of fact to evaluate a challenge to a guilty plea); United States v. Standiford, 148 F.3d 864, 868 (7th Cir. 1998) (applying the contract law principle of condition subsequent to a challenge to a guilty plea); Kraus v. United States, No. 93-3618, 1995 U.S. App. LEXIS 4168, at *9 (7th Cir. Mar. 1, 1995) (applying the contract law principle of inducement by fraud to a challenge to a guilty plea); United States v. Clarke, No. 95-30073, 1995 U.S. App. LEXIS 38850, at *3-5 (9th Cir. Jan. 9, 1995) (interpreting a guilty plea agreement using a "contract law analysis"); Margalli-Olvera v. INS, 43 F.3d 345, 351 (8th Cir. 1994) ("Plea agreements are contractual in nature, and are interpreted according to general contract principles."); Brooks v. United States, 708 F.2d 1280, 1281 (7th Cir. 1983) ("A plea bargain is, in law, just another contract.").

[76] *See, e.g.*, United States v. Barron, 172 F.3d 1153, 1158 (9th Cir. 1999) ("A plea bargain is not a commercial exchange. It is an instrument for the enforcement of criminal law. What is at stake for the defendant is his liberty. On rescission of the agreement, the prisoner can never be returned to his 'original position'; he has served time by reason of his guilty plea and his surrender of basic constitutional rights; the time he has spent in prison can never be restored, nor can his cooperation in his punishment. What is at stake for the government is its interest in securing just punishment for violation of the law and its interest that an innocent act not be punished at all."); United States v. Olesen, 920 F.2d 538, 541 (8th Cir. 1990) ("Plea agreements are like contracts; however, they are not contracts, and therefore contract doctrines do not always apply to them."); United States v. Partida-Parra, 859 F.2d 629, 634 (9th Cir. 1988) ("The contract analogy is imperfect."); Gov't of Virgin Islands v. Springette, 614 F.2d 360, 364 (3d Cir. 1980) (holding that although guilty pleas are usually interpreted using contract law principles, "constitutional standards require more than contract principles."); Johnson v. Beto, 466 F.2d 478, 480 (5th Cir. 1972) ("Plea bargaining is an accepted folkway of our criminal jurisprudence onto which some, but not all, contract criteria have been superimposed.").

[77] *See, e.g., Margalli-Olvera*, 43 F.3d at 352-53 (using contract law principles to interpret whether the INS was bound by the terms of the guilty plea); United States v. Roberts, No. 91-1721, 1992 U.S. App. LEXIS 20528, at *6 (1st Cir. Sept. 1, 1992) ("Our interpretation of contested plea agreements is guided by general principles of contract law.").

[78] *See, e.g.*, United States v. Gregory, No. 97-1687, 2001 U.S. App. LEXIS 5424, at *11-17 (2d. Cir. April 2, 2001) (holding that under contract law principles a breach of a guilty plea by the defendant relieved the government of its obligations under the

a subsequent event that courts can evaluate using these broad contract law principles—principles that are rigid enough to provide consistency while at the same time flexible enough to provide for just decisions.

Contract law includes a wide range of doctrines designed to alleviate unjust or unequal contract terms, such as those arising because of a change in the law. The purpose of these doctrines is to decide when a contract's terms are so unjust or so unequal that society has a greater interest in the non-performance of the contract rather than the full performance of its terms. In determining which doctrine a court should apply to make such a judgment, two factors are important: (1) whether the "injustice" arose because of the actions of one party[79] or through no fault of either party;[80] and (2) whether the "injustice" existed at the creation of the contract[81] or arose from subsequent events.[82]

In the case of a change in the law affecting a guilty plea, the potential "injustice" does not arise through any action or fault of either party. Instead, the intervening change is an independent event, not influenced by either party. Thus, those contract law doctrines dealing exclusively with party-created fault do not provide much assistance. Moreover, a change in the law is an intervening event, arising after the formulation of the guilty plea agreement. In fact, the very nature of a "change" in the law is that it alters the then-existing legal landscape.[83] If con-

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agreement); United States v. Carrara, 49 F.3d 105, 107 (3d Cir. 1995) (holding that the government's failure to file a § 5k1.1 motion did not amount to a breach of the plea agreement because the defendant had already failed to perform under the contract); United States v. Alvarez, No. 91-50848, 1993 U.S. App. LEXIS 18794, at *7-15 (9th Cir. July 22, 1993) (holding that under contract law principles a breach of the guilty plea by the defendant freed the government from its obligations under the agreement).

[79] Doctrines involving this type of situation include fraud, undue influence, unconscionability and lack of capacity.

[80] Doctrines involving this type of situation include mutual mistake and illegality. Some doctrines, however, can apply in both situations, such as impracticality, failure of consideration, frustration of purpose, and impossibility.

[81] Doctrines involving this type of situation include fraud, mutual mistake, undue influence, unconscionability, and lack of capacity.

[82] Doctrines involving this type of situation include impossibility, frustration of purpose, failure of consideration, and impracticality, and illegality.

[83] An argument can be made that the change was actually an existing condition (although unknown to either party) at the time of the bargain. Under this theory, the decision announcing the "change" was not necessarily a change in the law, but rather was a decision announcing the "proper" interpretation of a statute or an existing precedent. The parties to the guilty plea were, therefore, operating under a mistaken view of the relevant statute or case law when they entered into the plea.

tract law is to provide an apt analogy, the selected doctrine must, therefore, address changes that happen without the fault of either party and that occur after the contract's formation. Two doctrines fit these criteria—impracticability and frustration of purpose. Applying these doctrines to motions to withdraw guilty pleas based upon changes in the law demonstrates that courts have been unduly restrictive in granting such motions. The current standard of "innocence" fails to capture all cases of legitimate inequality.

A. DOCTRINE OF IMPRACTICABILITY

Courts apply the doctrine of impracticability where an intervening event causes one party's performance under the contract to be made "impracticable." In order to gain relief under the doctrine, a party must demonstrate: (1) an intervening event; (2) the event occurred without the fault of either party; (3) a basic assumption of the contract was that the event would not occur; and (4) the event makes one party's performance impracticable.[84]

For instance, in *Specialty Tires of America, Inc. v. The CIT Group*,[85] the defendant was a major equipment leasing company that had leased certain tire presses to a third party, Condere. After Condere breached its leases and entered bankruptcy, the leasing company found a buyer for the equipment, and Condere agreed to the removal of the presses from its factory. Yet, after the contract was signed, Condere refused to permit access to the presses and instead sought to maintain possession of them. In the buyer's subsequent breach of contract suit, the leasing company asserted a defense of impracticability—it could not deliver the goods because Condere would not allow access

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Accepting this theory would permit the comparative use of the contract law doctrine of mutual mistake—where both parties enter into a contract under a mistaken assumption that was central to the performance of the contract. However, the comparison seems to involve some overreaching. Although courts consistently speak of merely interpreting existing case law or applying existing law to new factual situations rather than "creating" new law, the decisions undoubtedly create new reference points or precedent on which parties rely—precedent that was unavailable to the parties when they entered into the plea agreement. Comparing a change in the law to an intervening event would, therefore, seem to be a more apt analogy.

[84] *See* RESTATEMENT (SECOND) CONTRACTS § 261 (1981); *see also* Central Kansas Credit Union v. Mutual Guar. Corp., 102 F.3d 1097, 1102 (10th Cir. 1996); Dorn v. Stanhope Steel, Inc., 534 A.2d 798, 811-12 (Pa. Super. Ct. 1987); West v. Peoples First Nat'l Bank & Trust Co., 106 A.2d 427, 432 (Pa. Super. Ct. 1954).

[85] 82 F. Supp. 2d 434 (W.D. Pa. 2000).

to them. Condere's actions occurred after the contract was signed and happened without the fault of either party.[86] Moreover, both the buyer and seller shared the same basic assumption—that the presses would be available and that possession would not be contested.[87] While the event was foreseeable "in some general sense," its occurrence was so remote that the parties reasonably had not addressed the situation in their contract.[88] Instead, it was a "'bolt out of the blue.'"[89] Thus, the court excused the leasing company's failure to deliver the presses based on the doctrine of impracticability.[90]

In the context of a motion to withdraw a guilty plea based upon a change in the law, two of the impracticability doctrine's requirements are always met. First, the change in the law occurs after the formation of the plea agreement;[91] and second, the change occurs without the "fault" of either party.[92] The crux of the analysis centers, therefore, on the third and fourth factors of the doctrine—whether the parties assumed the change would not happen and whether the change truly made the defendant's performance impracticable.

In applying these two factors, courts have imposed certain key limitations that are relevant here. For instance, a party's performance is not impracticable because it is more burdensome or because the performance produces less value than expected. Instead, the intervening event must result in a burden

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[86] *Id.* at 441.

[87] *Id.* at 441-42.

[88] *Id.* at 438-39.

[89] *Id.* at 441.

[90] *See also* Karl Wendt Farm Equip. Co. v. Int'l Harvester Co., 931 F.2d 1112 (6th Cir. 1991); International Minerals & Chem. Corp. v. Llano, Inc., 770 F.2d 879, 886-87 (10th Cir. 1985) (finding impracticability based on an intervening government regulation); Asphalt Int'l, Inc. v. Enterprise Shipping Corp., S.A., 667 F.2d 261 (2d Cir. 1981); Rockland Indus., Inc. v. E+E (US) Inc., 991 F. Supp. 468, 473 (D. Md. 1998) (declining to apply the doctrine where the risk was foreseeable); Ellwood City Forge Corp. v. Forth Worth Heat Treating Co., 636 A.2d 219 (Pa. Super. Ct. 1994).

[91] If not, the change would not form the basis for a motion to withdraw a plea, because the parties should have known of the change. *See* RESTATEMENT (SECOND) CONTRACTS § 266 (1981) (permitting the application of impracticability doctrine based on existing condition only where the party "has no reason to know" of the condition).

[92] One could make an argument that the change might be the "fault" of the prosecutor because the decision was rendered by another officer of the government. However, this connection is too attenuated to sustain.

to one party that the contract did not intend to cover.[93] Moreover, in order for the intervening event to provide a basis for non-performance, *both* parties to the contract must have assumed that the event would not happen.[94] If one party enters into the contract based on a hidden assumption, that party cannot expect relief when that assumption fails to hold. The doctrine of impracticability will only provide relief where the party shares that assumption with the other party at the time of the creation of the contract.

1. Change Relating to the Underlying Crime

Under the current "innocence" test, courts permit defendants to withdraw their guilty pleas if the subsequent change in the law invalidates the underlying crime. The impracticability doctrine produces the same result. In negotiating the plea agreement, both the government and the defendant assume that the charge to which the defendant pled guilty was a crime and would remain a crime. In fact, this assumption is one of the most, if not *the* most, basic premises underlying the plea agreement itself. A change in the law affecting the underlying charge would destroy this assumption. Moreover, the change in the law would not simply make the defendant's performance more difficult or the government's promises less valuable; instead, enforcing the plea agreement would force a defendant to serve prison time for an invalid conviction. If the underlying crime no longer exists, the defendant's performance (*i.e.*, serving time in prison) has been rendered impracticable.[95] Thus, in the case

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[93] *See* RESTATEMENT (SECOND) CONTRACTS § 261 cmt. d (1981) ("[I]mpracticability means more than 'impracticality.' A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability . . . ."); *see also Karl Wendt Farm Equip. Co.*, 931 F.2d at 1117; Bustop Shelters, Inc. v. Classic Homes, Inc., 900 F.2d 259 (6th Cir. 1990) (unpublished decision); Days Inn of Am., Inc. v. Patel, 88 F. Supp. 2d 928 (C.D. Ill. 2000); Satellite Receivers, Ltd. v. Household Bank (Nevada) N.A., 49 F. Supp. 2d 1083 (E.D. Wis. 1999); Lavin v. Emery Air Freight Corp., 980 F. Supp. 93 (D. Conn. 1997); Columbian Nat'l Title Ins. Co. v. Township Title Serv., Inc., 659 F. Supp. 796 (D. Kan. 1987).

[94] RESTATEMENT (SECOND) CONTRACTS § 261 cmt. b (1981) (noting that the "non-occurrence of that event must have been a 'basic assumption' on which both parties made the contract"); *see also* Glazer Steel Corp. v. United States Metal Co., Civ. No. 81-1679, 1983 U.S. Dist. LEXIS 10406, at *13-14 (W.D. Pa. Dec. 28, 1983) (refusing to apply the doctrine where the assumption was not known to both parties).

[95] Of course, the defendant's performance would not be impossible, but the doctrine of impracticability does not require as much.

of a change to the underlying conviction, the doctrine of impracticality would permit the defendant to withdraw a guilty plea.

What if the change affected a count of the indictment that was dropped in exchange for the plea? Using the current test, such a change is insufficient to withdraw a plea. However, under the impracticability doctrine, the outcome is not as certain. First, while both parties may have doubts as to whether a jury would convict the defendant of some or all of the counts charged, both operate under the assumption that the counts in the indictment are, in fact, crimes and will continue to be crimes for which the defendant could potentially be punished. Based on that basic assumption (and factoring in the probability of the government's success in proving each count), the parties negotiate and ultimately enter into the plea agreement. If the parties did not share this assumption, the negotiations and the plea itself would look quite different—the defendant would have obviously received a much more favorable plea agreement. The change in the law alters this basic assumption and would have changed the dynamics of the negotiations leading up to the plea agreement.

But does the change make the defendant's performance impracticable? Not necessarily. A court must weigh the effect of the change against the initial indictment and the resulting plea. For instance, assume a defendant faces a ten-count indictment containing mostly relatively minor charges, such as trespassing, and one more substantial charge, such as aggravated assault. The resulting negotiations produce a plea of guilty to a lesser included offense—simple assault. If the change in the law only affects one of the minor charges, such as trespassing, the defendant's performance will not be impracticable. The agreement might not be as valuable to the defendant as it once had been, but the relative benefit that the defendant continues to receive from the agreement—the dismissal of the most serious charge—far outweighs the additional burden of not having as beneficial a "deal" as the defendant once had. On the other hand, if the change affected the more important charge—the aggravated assault—the defendant's performance might very well be impracticable. Serving significant jail time in that situation simply to avoid minor charges would

seem to impose an undue burden on the defendant.[96] Thus, unlike the current test's blanket rejection of such cases, the impracticability doctrine offers a more nuanced approach and permits withdrawing a guilty plea in additional limited circumstances deserving of relief.

2. Change Relating to Complete Defenses to the Underlying Crime

Courts applying the current test are split as to whether to permit a defendant to withdraw a guilty plea if a change in the law revives a defense to the crime contained in the plea.[97] Under the impracticability doctrine, defendants would consistently receive relief in such cases.

The primary assumption for both parties to a plea agreement is that the underlying conviction would remain valid. As part of this assumption, the defendant waives any existing defense to that conviction by agreeing to the plea. Yet a change in the law is not, or should not, be part of this waiver—a defendant cannot waive a right not yet known or even in existence at the time of the plea. Pursuant to that change, the newly available defense undermines the basic assumption that the underlying conviction would remain valid, for it establishes the defendant's legal innocence of the crime.

Accepting that the change altered a basic assumption of the contract, the impracticability of the defendant's performance should also be evident. As with the change to the underlying crime itself, a change providing a defense to the crime would force a defendant to serve prison time even though the defendant is now innocent of the crime. Performance by the defendant is not simply more difficult or less valuable; it imposes a burden far beyond what the plea agreement intended to cover. Thus, as with the change to the elements of the crime itself, the

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[96] For instance, in *United States v. Muriel*, 111 F.3d 975 (1st Cir. 1997), the defendant pled guilty to the lesser offense of a felon-in-possession of a firearm in exchange for the dismissal of the charge of using a firearm during a drug transaction and a charge of drug possession. Even though a subsequent change in the law invalidated "the most serious charge" of using a firearm during a drug transaction, the court denied relief. *Id.* at 978-79. Under the impracticability doctrine, the result might very well have been different. And at the very least, the defendant would have been given the opportunity to argue that he deserved relief because the allocated burdens under the plea agreement were so altered by the change in the law.

[97] *Compare* United States v. Lucia, 416 F.2d 920 (5th Cir. 1969), *aff'd*, 423 F.2d 697 (5th Cir. 1970) (en banc), with United States v. Morris, Crim. No. 98-133, 1999 U.S. Dist. LEXIS 13321 (E.D. Pa. Aug. 31, 1999).

newly available defense causes the defendant's performance to be impracticable and should provide the defendant with relief.

3. Change to Sentencing Law or Other Post-Conviction Consequences

While under the current test a change to any post-conviction consequence of the plea agreement provides no relief, the impracticability doctrine permits a defendant to withdraw his or her plea in limited circumstances.

First, not all changes to post-conviction consequences of a plea will affect a basic assumption known to *both* parties. For instance, even though a court does not need to inform defendants about certain post-conviction consequences such as deportation, some defendants are acutely aware of these consequences. In fact, a defendant might actually agree to a plea agreement solely because it would prevent his or her deportation. Under that scenario, a change in immigration law that resulted in the defendant's subsequent deportation would fundamentally alter the nature of the plea and change the basic assumption under which the defendant was operating. However, the impracticability doctrine requires the other party to the contract to share this assumption. Unless the defendant communicated this assumption and its importance to the prosecutor, the impracticability doctrine would not apply. Thus, a court is required to examine the facts and circumstances of each case in order to determine if such a basic assumption was known to both parties.[98]

Second, not all changes in the post-conviction consequences of a guilty plea make the defendant's performance impracticable—more burdensome perhaps, but not necessarily impracticable. Assume that the defendant faced a potential sentence of twenty years prior to pleading guilty and that a change in the law decreased that potential sentence by only one year. Under this scenario, the defendant might have been able to negotiate a more favorable plea agreement if the potential sentence he or she faced was smaller. The defendant's

[98] *See generally* Guerra v. United States, No. 96 Civ. 8425, 1997 U.S. Dist. LEXIS 92 (S.D.N.Y. Jan. 9, 1997); Xun v. Vasquez, No. C 92-2214, 1992 U.S. Dist. LEXIS 19133 (N.D. Cal. Nov. 6, 1992). In both cases, the law subsequently changed after the plea agreement and subjected the defendants to deportation. While the courts denied relief in both cases, had the defendant entered into the plea to avoid deportation and told the government of this assumption, the impracticability doctrine would have provided relief.

performance under the plea is, therefore, more burdensome than he or she otherwise expected. However, in light of the lengthy sentence that the defendant faced, the change of a single year does not rise to the level of impracticability. Thus, the change is not great enough to warrant a wholesale revocation of the plea. If, on the other hand, a subsequent change reduced the potential twenty year sentence by one-half or by two-thirds, performance under the plea would probably be considered impracticable. The doctrine permits courts to examine the facts and circumstances of each individual case in order to decide where this line of impracticability falls.[99] Unlike the current test of innocence, the impracticability doctrine provides courts with discretion to grant motions to withdraw guilty pleas where the circumstances surrounding the negotiation of the plea and the nature of the change itself warrant relief.

B. DOCTRINE OF FRUSTRATION OF PURPOSE

Courts can conduct a similar analysis using the frustration of purpose doctrine and provide relief in deserving circumstances.[100] As with impracticality, the frustration of purpose doctrine requires: (1) an intervening change; (2) without the moving party's fault; and (3) that both parties assumed would not occur.[101] Instead of containing a fourth factor of impracticability, however, this doctrine only requires that the change frustrate, *i.e.* defeat, the moving party's principal purpose for entering into the contract. And the "principal" purpose must

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[99] For instance, in *Brady v. United States*, 397 U.S. 742 (1970), the defendant pled guilty in order to avoid a potential death sentence. Although the Supreme Court later invalidated that sentencing possibility, the Court did not permit the defendant to withdraw the guilty plea. Under the impracticability doctrine, this change would have warranted the plea withdrawal because the elimination of the possibility of death would seem to meet the standard of impracticability.

[100] *See* RESTATEMENT (SECOND) CONTRACTS § 266(2) (1981); *see also* Unihealth v. U.S. Healthcare, Inc., 14 F. Supp. 2d 623, 634 (D.N.J. 1998); Alvino v. Carraccio, 162 A.2d 358, 361 (Pa. 1960); Harford County, MD v. Town of Bel Air, 704 A.2d 421, 431 (Md. Ct. App. 1998); Dorn v. Stanhope Steel, Inc., 534 A.2d 798, 812 (Pa. Super. Ct. 1987); Howard v. Nicholson, 556 S.W.2d 477, 481-83 (Mo. Ct. App. 1977).

[101] Courts will not provide relief if the risk was assumed or reasonably foreseeable. *See, e.g.*, United States v. General Douglas MacArthur Senior Vill., Inc. 508 F.2d 377, 382 (2d Cir. 1974) (holding that the party had assumed the risk); Wheelabrator Envtl. Sys., Inc. v. Galante, 136 F. Supp. 2d 21 (D. Conn. 2001) (holding that the change in law was foreseeable); Amoco Oil Co. v. Gomez, 125 F. Supp. 2d 492, 505-06 (S.D. Fla. 2000) (holding that the event was foreseeable); Sage Realty Corp. v. Jugobanka, D.D., No. 95-Civ-0323, 1998 U.S. Dist. LEXIS 15756, at *7-8 (S.D.N.Y. Oct. 8. 1998) (holding that the event was foreseeable).

be exactly that—the prime motivating factor for entering into the agreement.[102]

For instance, in *Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp.*,[103] the FSLIC took over a failed savings and loan until it found new investors to operate the institution. However, the investors were only permitted to run the institution by using special accounting rules that were created to encourage the turnaround of failed savings and loans. Subsequently, a new federal statute outlawed the use of these special rules. Based on this change, the investors sought to rescind their contract because the primary purpose of the contract had been to "acquire and operate profitably" the savings and loan—a purpose that was destroyed by the intervening federal statutory change.[104] Because neither party caused or foresaw the change, the court released the investors from their contract.[105]

As with impracticability, the two initial requirements of the frustration of purpose doctrine are always met in the case of a change in the law. The change is an intervening event, and it occurs without the fault of either party. The analysis, therefore focuses on the assumption that the change would not occur and that the party's principal purpose is frustrated by that change. To prevent the over-application of the doctrine, the courts have likewise clarified these latter two requirements: the purpose must be known to and understood by both parties;[106] and the

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[102] *See, e.g.*, Kroblin Refrigerated Xpress, Inc. v. Pitterich, 805 F.2d 96, 102 (3d Cir. 1986) (rejecting the application of the doctrine because the changed purpose was only secondary and not the primary reason for entering into the contract); Everett Plywood Corp. v. United States, 1979 U.S. Ct. Cl. LEXIS 1060, at *45-46 (Ct. Cl. Dec. 28, 1979) (applying the doctrine where the principal purpose known to both parties was frustrated even though the purpose differed from the normal contracting situation).

[103] 25 F.3d 1493 (10th Cir. 1994).

[104] *Id.* at 1503.

[105] *Id.*; *see also U.S. Healthcare, Inc.*, 14 F. Supp. 2d. at 637 (finding a frustration of purpose based on an intervening legislative act); Federal Check Exch., Inc. v. Brink's Inc., No. 88-5631, 1989 U.S. Dist. LEXIS 3986, at *4-6 (E.D. Pa. Apr. 13, 1989) (same with regard to an intervening regulatory decision); Federal Leasing Consultants, Inc. v. Mitchell Lipsett Co., 85 Cal. App. 3d Supp. 44 (Cal. App. Dep't Super. Ct. 1978) (same).

[106] RESTATEMENT (SECOND) CONTRACTS § 265 cmt. a (1981) ("It is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense."); Karl Wendt Farm Equip. Co. v. Int'l Harvester Co., 931 F.2d 1112, 1119 (6th Cir. 1991) (holding that the purpose must be known to both parties); Waegemann v. Montgomery Ward

purpose must be *substantially* frustrated and not merely produce a less favorable result.[107] By adding these latter requirements, frustration of purpose is similar to impracticability in that both doctrines encourage parties to share their basic assumptions, and they only grant relief under the most deserving circumstances.

1. Changes to the Underlying Crime or Complete Defenses to the Underlying Crime

The application of the frustration of purpose doctrine is essentially the same regardless of whether the change affects the underlying crime or simply provides a new defense to that crime. As with the impracticability analysis, both parties assumed that the underlying conviction would remain valid. The more important question therefore is whether the change in the law frustrated the defendant's principal purpose for entering into the plea agreement. If a court were to permit the defendant to withdraw the guilty plea, the *government's* principal purpose for the agreement—having the defendant serve jail time—would clearly be frustrated. And a number of courts have applied the frustration of purpose analysis to justify permitting the government's re-indictment of a defendant after a successful motion to withdraw a guilty plea.[108]

& Co., 713 F.2d 452, 454 (9th Cir. 1983) (holding that the purpose must be the "'fundamental reason of both parties for entering into the contract'"); Sabine Corp. v. ONG Western, Inc., 725 F. Supp. 1157, 1179 (W.D. Okla. 1989) (holding that merely because some customers were lost was insufficient); Seaboard Lumber Co. v. United States, 41 Fed. Cl. 401, 417 (Fed. Cl. 1998) (applying the doctrine where the "basic rationale recognized by both parties entering into the contract, has been destroyed by a supervening and unforeseen event"); Molnar v. Molnar, 313 N.W.2d 171 (Mich. Ct. App. 1981).

[107] *See, e.g.*, United States v. Southwestern Elec. Cooperative, Inc., 869 F.2d 310, 315 (7th Cir. 1989); *Waegemann*, 713 F.2d at 454; Butler Mfg. Co. v. Americold Corp., 850 F. Supp. 952, 957 (D. Kan. 1994) ("'Under the doctrine of frustration, performance remains possible, but is excused because a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance.'" (citation omitted)); Conlon Group, Inc. v. City of St. Louis, 980 S.W.2d 37, 41 (Mo. Ct. App. 1998) (holding that even though the change caused costs to increase substantially, the purpose of the contract had not been destroyed); *see also* RESTATEMENT (SECOND) CONTRACTS § 265 cmt. a (1981) ("[T]he frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract.").

[108] *See, e.g.*, United States v. Moulder, 141 F.3d 568, 571-72 (5th Cir. 1998) (applying the frustration of purpose doctrine to permit the government to reindict

But would the change in the law frustrate the defendant's known principal purpose? Yes. In most cases, the defendant's principal purpose for entering into a guilty plea agreement is to avoid the possibility of a longer sentence that could result after a full trial. The invalidation of the underlying crime or a complete defense to that crime would dramatically alter that purpose—the defendant would be serving time for a crime that would have posed absolutely no risk at trial. Eliminating that risk eliminates the defendant's purpose for entering into the plea. The frustration of purpose doctrine would, therefore, provide the same relief that the impracticability doctrine does.

What if the change related to a charge that had been dropped in exchange for the guilty plea? Would the doctrine provide relief for the defendant? As with the impracticability analysis, the answer is a definite maybe. If the change related to a more serious charge that would dramatically alter the defendant's principal purpose—avoiding a much longer sentence following conviction at trial—then the frustration of purpose doctrine should provide the defendant with relief. However, if the change only affects a minor charge, the defendant's principal purpose is not substantially frustrated—the plea still avoids a potentially longer sentence that could have stemmed from the main charges in the indictment. Thus, the frustration of pur-

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the defendant); United States v. Bunner, 134 F.3d 1000 (10th Cir. 1998) (same); *see also* United States v. Thompson, 237 F.3d 1258, 1261 (10th Cir. 2001) (applying the frustration of purpose doctrine to permit the government to reindict the defendant where state officials frustrated the basic purpose of agreement); United States v. Lewis, 138 F.3d 840, 841-43 (10th Cir. 1998) (noting the frustration of purpose doctrine in requiring a challenge to a conviction following a guilty plea to apply to the whole plea rather than one term of plea); *see generally* United States v. Ahlenius, No. 98-1414, 1999 U.S. App. LEXIS 26491, at *8-9 (10th Cir. Oct. 19, 1999) (unpublished opinion) (holding that the defendant could not rely on the frustration of purpose doctrine to withdraw his guilty plea because he assumed the risk that the judge would impose a stricter sentence than required). *But see, e.g.*, United States v. Sandoval-Lopez, 122 F.3d 797, 800-02 (9th Cir. 1997) (holding that the government could not reindict the defendant because the defendant's successful habeas corpus challenge to the plea did not amount to a breach of the agreement); Rodriguez v. United States, 933 F. Supp. 279, 281-83 (S.D.N.Y. 1996) (noting that the defendant's challenge to the conviction amounted to a breach of the plea agreement but holding that the government could not reindict because the defendant could not "be restored to [his former position]"); United States v. Gaither, 926 F. Supp. 50, 52-54 (M.D. Pa. 1996) (holding that while the defendant's challenge to his guilty plea was like the application of the impracticability doctrine, the government was not free to reindict); DiCesare v. United States, 646 F. Supp. 544, 548 (C.D. Cal. 1986) (holding that the government could not reindict the defendant because the defendant's successful habeas corpus challenge to conviction did not amount to a breach of the agreement).

pose doctrine provides essentially the same relief as the impracticability doctrine for these two categories of changes.

2. Change to Sentencing Law or Other Post-Conviction Consequences

The frustration of purpose doctrine can also offer defendants limited relief in cases involving a change to the sentencing or other post-conviction consequences of a guilty plea. In the sentencing context, the analysis is easier for courts to apply because the change would usually affect the defendant's principal purpose. As noted above, in most cases the defendant's principal purpose for entering into the plea agreement is to avoid a longer sentence following a full trial. Because this purpose is the typical motivation for a defendant to enter into a guilty plea, it is one that is known to both parties. If, therefore, the change in the law greatly increases the potential sentence, it would substantially frustrate the defendant's principal purpose, and the frustration of purpose doctrine would provide relief. On the other hand, if the change only results in a minor increase to the defendant's sentence, the purpose would not be substantially frustrated, and a court would not grant a defendant relief under the doctrine. Thus, a court's analysis would simply turn on whether the change in the potential sentence was substantial enough to warrant relief under the doctrine.

On the other hand, a change to non-sentencing post-conviction consequences of a plea will not typically provide relief under the frustration of purpose doctrine. Because a defendant's principal purpose is usually to avoid a longer sentence following a trial, a change to non-sentencing consequences of the plea agreement would not affect this purpose. In certain cases, however, a defendant's principal purpose for entering into the plea agreement is not merely to avoid a longer sentence. Instead, the defendant could enter into the agreement specifically to avoid certain post-conviction consequences, such as deportation. If the law subsequently changes with regard to that consequence, the defendant's purpose for entering into the agreement would be substantially frustrated—the purpose would be completely defeated. And if the government was aware of the defendant's motivation, the frustration of purpose doctrine would provide relief to that defendant. Thus, much like impracticability, the frustration of purpose doctrine can provide certain defendants with relief in post-conviction conse-

quence cases, depending upon the extent of the change and the defendant's underlying purpose for agreeing to the plea.

IV. CONCLUSION

Changes in the criminal law are often followed by motions by defendants to withdraw their guilty pleas based upon those changes. Under the current "fair and just reason" standard applied by courts to evaluate such motions, only proof of the defendant's actual innocence will provide a basis to withdraw a guilty plea. And in some cases, not even legal innocence of the charges is sufficient; only actual factual innocence will do. While courts do consider other factors such as delay or prejudice to the government, these factors are secondary to innocence. Courts do not use these factors to directly evaluate the merits of the defendant's request; instead, they are used to eliminate those motions brought to manipulate the system rather than to earnestly seek relief. However, by essentially substituting innocence for a "fair and just reason," courts have unduly restricted a defendant's right to withdraw a guilty plea in light of an intervening change in the law. Instead of evaluating the actual effect of intervening changes on the terms of and the allocation of burdens found in guilty plea agreements, courts have fallen prey to the siren's call of finality in an effort to prevent a floodgate of defendants seeking to re-open their pleas simply based upon a change of heart.

Contract law doctrines of impracticability and frustration of purpose can provide a bulwark against that feared flood while at the same time permitting those deserving defendants a chance to re-evaluate the consequences of a suddenly and unexpectedly oppressive plea agreement. Unlike the current test, these doctrines provide clear standards that are not only rigid enough to provide consistency, but also flexible enough to permit courts to consider the defendant's changed circumstances on a case by case basis. Moreover, these doctrines contain internal factors, such as requiring the sharing of basic assumptions between the parties and requiring a substantial, rather than a trivial, change in circumstances, that guard against post-hoc manipulation by defendants. When used in conjunction with the existing delay and prejudice factors of the current test (to provide a further bar against purely manipulative motions), the doctrines of impracticability and frustration of purpose can provide courts with

a valuable method to more fairly adjudicate these motions and to provide relief to deserving defendants overlooked under the present innocence test.