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Commonwealth v. Culbreth: Pre-Sentence Withdrawal of Guilty Pleas

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Notes

COMMONWEALTH v. CULBRETH: PRE-SENTENCE WITHDRAWAL OF GUILTY PLEAS

In *Commonwealth v. Culbreth*[1] the Pennsylvania Supreme Court refused to allow a defendant leave to withdraw a plea of guilty and enter a plea of not guilty to the crime of murder. The motion to withdraw the guilty plea had originally been made after the plea had been accepted by the trial judge[2] but before the defendant was sentenced. The court held that only when a manifest abuse of discretion is shown will the decision of a lower court refusing to allow a defendant leave to withdraw a plea of guilty be reversed on appeal.[3]

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1. 439 Pa. 21, 264 A.2d 643 (1970).
2. PA. R. CRIM. PROC. 319(a) provides:
> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The judge may refuse to accept a plea of guilty and shall not accept it unless he determines after inquiry of the defendant that the plea is voluntarily and understandingly made. Such inquiry shall appear on the record.

The comments to Rule 319 suggest that at least the following questions be asked of the defendant:
> (1) Does the defendant understand the nature of the charges to which he is pleading guilty?
> (2) What acts defendant performed and whether these acts constitute the crime charged?
> (3) Does the defendant understand that he has the right to trial by jury?
> (4) Does the defendant understand that he is presumed innocent until he is found guilty?
> (5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?
> (6) Is the defendant aware of any plea bargain or other arrangement?
> (7) Is the defendant aware that the judge is not bound by any plea bargain or other arrangement between defense counsel and attorney for the Commonwealth?

3. 439 Pa. 21, 28, 264 A.2d 643, 646 (1970).

In a dissenting opinion[4] written by Justice Roberts, a minority of the court questioned the standards which the majority applied in ruling that in this particular case the defendant should not be permitted to withdraw his guilty plea. Referring to the applicable standards which have been promulgated by the federal courts[5] and suggested by the *ABA Project on Minimum Standards for Criminal Justice*,[6] the dissenters asked the court to recognize a distinction between pre-sentence and post-sentence plea withdrawals and formulate a more liberal policy governing pre-sentence withdrawals.

This Note will discuss the federal and *ABA Minimum Standards* approach to the problem of pre-sentence withdrawal of guilty pleas in order to ascertain whether any appreciable distinction can be drawn between those approaches and the approach taken by the majority of the Pennsylvania Supreme Court in *Commonwealth v. Culbreth*. This Note will also discuss whether an application of the ostensibly liberal language of the federal courts and the *ABA Minimum Standards* would have necessitated a different result in *Commonwealth v. Culbreth*.

I. Facts and Holding of Commonwealth *v.* Culbreth

The defendant in *Culbreth*[7] had decided to plead guilty to a general charge of murder on the day his case was scheduled for trial. In the presence of his court appointed counsel the defendant was questioned on the record by the trial judge as to the voluntariness and intelligence of the plea;[8] the court then entered a plea of guilty. After hearing testimony the trial judge concluded that the degree of guilt did not rise above second degree murder. A pre-sentence investigation was ordered. Several months later the defendant petitioned the court for leave to withdraw his guilty plea. The petition was dismissed and the defendant was sentenced to from six to twelve years.

On appeal the defendant contended that the trial court abused its discretion in dismissing his petition for leave to withdraw his plea of guilty. Immediately before the defendant had decided to plead guilty his trial counsel, an assistant district attorney, and the trial judge had met in the judge's chambers; when they returned the de-

4. *Id.* at 29, 264 A.2d at 646 (dissenting opinion).
5. *See, e.g.*, Kercheval v. United States, 274 U.S. 220 (1927); Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963); *cf.* Fed. R. Crim. P. 32(d).
6. ABA Minimum Standards for Criminal Justice, Pleas of Guilty (Approved Draft 1968) [hereinafter referred to as ABA Minimum Standards].
7. 439 Pa. 21, 264 A.2d 643 (1970).
8. See note 2 *supra*.

fendant changed his plea to guilty. The defendant contended that he was under the misapprehension that his attorney and the assistant district attorney had agreed that he would receive a maximum sentence of two years if he plead guilty. Because the judge had invited the parties to his chambers, the defendant contended that he was led to believe that the judge had acquiesed in the bargain. The defendant's attorney testified that he may have misled the defendant into believing that the probabilities were good that the trial judge would follow the district attorney's recommendations as to the sentence to be imposed. The assistant district attorney did make a recommendation to the judge that a maximum sentence of two years be imposed. To these contentions the supreme court replied:

> [O]ur review of the part of the record which dealt with the examination of the defendant by both his trial counsel and the trial judge makes it abundantly clear that the defendant knew that no promises have been made by the court, and that the court was not bound by any of the discussion that had taken place.[9]

His reason for attempting to withdraw his plea was labeled as "disappointment in the length of sentence imposed."[10] This language was used even though the original motion was made before the defendant knew what his sentence would be.

II. Leave to Withdraw a Plea of Guilty in Pennsylvania—Within the Discretion of the Trial Judge

The procedure in Pennsylvania regarding the granting of a motion for leave to withdraw a plea of guilty before sentencing is governed by Rule 320 of the Pennsylvania Rules of Criminal Procedure, which provides:

> At any time before sentence the court may in its discretion permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted.[11]

The granting of a motion to withdraw a plea of guilty lies solely within the discretion of the trial court.[12] The trial court's decision will not be reversed in the absence of a clear abuse of discretion or error of law which controlled the decision.[13] If the plea is found to

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9. 439 Pa. 21, 27, 264 A.2d 643, 646 (1970).

10. *Id.*

11. Pa. R. Crim. P. 320. Rule 320 repealed the Act of April 15, 1907, P.L. 62, § 1 as amended, Act of June 15, 1939, P.L. 400, § 1 which provided that a defendant could withdraw his plea of guilty at any time before sentence, by leave of the court.

12. *See, e.g.*, Commonwealth v. Batley, 436 Pa. 377, 260 A.2d 793 (1970); Commonwealth v. Scoleri, 415 Pa. 218, 202 A.2d 521 (1964); Commonwealth v. Kirkland, 413 Pa. 218, 195 A.2d 338 (1963).

13. *See, e.g.*, Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540, *cert. denied*, 391 U.S. 920 (1967); Commonwealth *ex rel.* Rivers v. Meyers, 414 Pa. 439, 200 A.2d 303, *cert. denied*, 379 U.S. 866 (1964); Commonwealth v. Lynch, 210 Pa. Super. 172, 231 A.2d 880 (1967).

have been knowingly and intelligently entered, the trial court's refusal to allow withdrawal will be affirmed.[14] In the hands of the trial court, motions for withdrawal of guilty pleas can be liberally granted;[15] but on appeal refusal to allow withdrawal will seldom be reversed.[16]

In *Commonwealth v. Scoleri*[17] the Pennsylvania Supreme Court set forth the following illustrations of when withdrawal of a guilty plea should be granted:

> The withdrawal of a plea of guilty is properly allowed (a) where it has been entered in ignorance of the nature of the crime with which the defendant has been charged and the consequences of his plea, or (b) where the plea of guilty was not made fully and voluntarily, or (c) where the plea was entered by mistake or without the consent of the defendant or (d) where the plea was entered by an uncounselled defendant in a homicide case, or in a felony case in which the defendant was indigent or was refused counsel, (citations omitted) or (e) where the plea was induced by fraud or threats or justifiable fear or (f) where a trial or hearing judge has made, but has not kept, a promise or commitment which induced the plea or (g) where because of very unusual circumstances the court believes that justice will best be served by submitting the case to the jury. . . .[18]

Refusal to allow withdrawal when any of these circumstances surrounds the entry of a guilty plea should be considered an abuse of discretion.[19] However, if the record refutes the existence of any of the above factors, a defendant may be denied the privilege of withdrawing his guilty plea and the denial may be upheld on appeal.[20]

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14. *Cf.* Commonwealth v. Metz, 425 Pa. 188, 191, 228 A.2d 729, 731 (1967); *see, e.g.*, Commonwealth *ex rel.* West v. Meyers, 423 Pa. 1, 222 A.2d 918 (1966); Commonwealth v. Cavanaugh, 183 Pa. Super. 417, 133 A.2d 288 (1957).

15. *See, e.g.*, Commonwealth v. Jackson, 69 Lack. Jur. 124 (Pa. 1968).

16. *See, e.g.*, Commonwealth v. Batley, 436 Pa. 377, 260 A.2d 793 (1970); Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540, *cert. denied*, 391 U.S. 920 (1967); Commonwealth *ex rel.* Rivers v. Meyers, 414 Pa. 439, 200 A.2d 303, *cert. denied*, 379 U.S. 866 (1964); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).

17. 415 Pa. 218, 202 A.2d 521 (1964).

18. *Id.* at 247-48, 202 A.2d at 536. *See also* Commonwealth v. Phelan, 427 Pa. 265, 274, 234 A.2d 540, 546 (1967). In *Commonwealth v. Evans*, 434 Pa. 52, 252 A.2d 689 (1969), the supreme court extended the defendant's right to withdraw a guilty plea to situations where the trial judge openly participates in a sentencing arrangement before an agreement has been reached between the prosecution and the defense as to the sentence to be recommended to the court. See note 36 and accompanying text *infra*.

19. *See, e.g.*, Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969); Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540, *cert. denied*, 391 U.S. 920 (1967); Commonwealth v. Scoleri, 415 Pa. 218, 202 A.2d 521 (1964).

20. Commonwealth v. Dillinger, 440 Pa. 336, 338, n.4, 269 A.2d 505, 507, n.4 (1970).

The Pennsylvania Supreme Court has held where an accused pleads guilty relying on the opinion of his trial counsel as to the probable Commonwealth sentence recommendation and the concurrence of the trial judge therewith, the accused will not be permitted to withdraw his plea on the grounds that he was ill advised.[21] There is a certain degree of calculated risk involved when an accused decides to enter a plea of guilty. The possibility of leniency is usually a very important consideration. Miscalculation of the trial judge's predisposition in regard to the penalty to be imposed, when not induced by statements made by the prosecuting attorney or the trial judge[22] should not affect the validity of the plea.[23] In *Commonwealth v. Kirkland*[24] the Pennsylvania Supreme Court held:

> The fact that in the finding of the Court as to the degree of defendant's guilt and the sentence imposed the expectations or hopes of the appellant or her counsel were not realized is not the kind of mistake or misapprehension which in the interest of justice, justifies the withdrawal of a plea of guilty.[25]

Under such circumstances the court held that there was no abuse of discretion in the trial court's refusal to grant the defendant leave to withdraw her guilty plea.[26]

If a defendant seeks to rely on misleading statements made by his atttorney as grounds for withdrawing his guilty plea supporting evidence must appear on the record. In *Commonwealth v. Lynch*[27] the Pennsylvania Superior Court refused to allow the defendant to withdraw his plea of guilty before sentence upon an allegation of misunderstanding as to the judge's acquiescence in the district attorney's sentence recommendation. The defendant alleged that at a conference between his defense counsel, an assistant district attorney, and the trial judge, the judge promised to impose a sentence to run concurrently with a jail sentence previously imposed. This allegation was denied by the judge. A concurrent sentence was

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21. Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959). *See also* Commonwealth *ex rel.* Mercer v. Banmiller, 193 Super. 411, 165 A.2d 121 (1960). In Commonwealth v. Scoleri, 415 Pa. 218, 202 A.2d 521 (1964), the supreme court classified inadequate grounds for withdrawal as follows:

> [T]here is no legal justification for the withdrawal of a plea of guilty which is entered (a) under the belief that as a result of such plea he will receive life imprisonment or lenient treatment (b) where he and his lawyer had erroneously drawn the conclusion that he will not receive a penalty of death or a severe penalty or (c) where his lawyer and the District Attorney have agreed upon the exact crime which he has committed and the penalty to be imposed.

415 Pa. at 248, 202 A.2d at 536.

22. *See,* Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969); Commonwealth v. Senauskas, 326 Pa. 69, 191 A. 167 (1937); Commonwealth v. Todd, 86 Pa. Super. 272, 142 A.2d 174 (1958). *See also* notes 35-42 and accompanying text *infra.*

23. *Cf.* Commonwealth v. Kirkland, 413 Pa. 48, 195 A.2d 338 (1963).

24. 413 Pa. 48, 195 A.2d 338 (1963).

25. *Id.* at 56, 195 A.2d at 341-42.

26. *Id.* at 57, 195 A.2d at 342.

27. 210 Pa. Super. 172, 231 A.2d 880 (1967).

originally imposed but, as a result of the post-sentence investigation, the defendant was called for re-sentencing. At this time he asked for leave to withdraw his guilty plea. This motion was denied and the defendant was given a consecutive sentence. The defendant contended that even if the judge had not in fact promised to impose a concurrent sentence, his counsel misled him into believing that the judge had made a commitment. The superior court found no evidence on the record that the defense counsel told the defendant that the judge had promised to impose a concurrent sentence.[28] The record showed that the defense attorney knew that the judge could make no commitments until all of the facts of the case were made known to him.[29]

Commonwealth v. Lynch presumes a distinction which must be drawn between cases in which defense counsel expresses a belief as to the court's position which later proves to be erroneous, and cases in which counsel states to the accused that the court has promised that it will impose a lenient sentence. In the former case an accused will never be able to reverse the lower court's refusal to allow withdrawal.[30] In the later case if the accused can present sufficient facts in support of his allegation, his guilty plea should be withdrawn and a plea of not guilty entered. The distinction manifests a reluctance to provide a liberal procedure for a defendant to withdraw his guilty plea because of his disappointment with the sentence of the trial court. In most cases the defendant's miscalculation as to the expected sentence will not become apparent until after sentence has been imposed.[31] However, when a pre-sentence investigation is ordered, as in *Culbreth*, the defendant may learn of the judge's decision during the pre-sentence investigation. In such a situation the defendant's petition for withdrawal prior to actual sentencing should not affect the result. It is immaterial when, during the criminal procedure, hindsight affords the defendant a realization of his miscalculation.

If the defendant's misapprehension concerning the sentence to be imposed is the result of statements made by either the trial judge or the district attorney a different conclusion is possible. A guilty plea may be the result of an agreement between defense counsel and the prosecuting attorney.[32] The Pennsylvania Supreme Court

28. *Id.* at 177, 231 A.2d at 883.
29. *Id.*
30. Commonwealth v. Kirkland, 413 Pa. 48, 195 A.2d 338 (1963); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 24 (1959).
31. *Cf.* Commonwealth v. Lynch, 210 Pa. Super. 172, 231 A.2d 880 (1967).
32. Commonwealth *ex rel.* Kerekes v. Maroney, 423 Pa. 337, 223 A.2d 699 (1966). In regard to the benefits of plea agreements, the court stated:

has held that the existence of a plea bargain alone will not invalidate a guilty plea.[33] A prosecuting attorney may agree to recommend a lighter sentence, to accept a plea of guilty to a lesser included offense, or to dismiss other pending charges.[34] If a prosecuting attorney agrees to make one of the above recommendations but fails to comply with his promise at the time of sentencing, the defendant should be allowed to withdraw his guilty plea if made in reliance upon the prosecuting attorney's promise.[35]

A judge may never participate in any way in the negotiation of a plea agreement.[36] Any attempt to do so will invalidate the plea.[37] The pressure placed on the defendant by the judge's role in the bargaining inevitably taints the plea, regardless of whether the judge fulfills his part of the bargain.[38] In *Commonwealth v. Evans*[39] the Pennsylvania Supreme Court invalidated a guilty plea which was induced by an agreement between counsel for the defendant, the district attorney, and the court to the effect that if the defendant pled guilty to all five of the bills of indictment against him, the judge would sentence him on only one of the bills. The decision adopts section 3.3 of the *ABA Minimum Standards* forbidding participation by the trial judge in the initial plea bargaining process, as the law of Pennsylvania.[40] Section 3.3 also provides that the trial judge may be informed of the final bargain once it has been reached and before the guilty plea is formally offered. The trial judge must

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> From the Commonwealth's viewpoint the inability to bargain would lead to a substantial increase in required manpower prosecutional and in the number of necessary trials even though a satisfactory resolution of the state's interest can often be obtained with less than the potential maximum punishment available.
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> From the accused's viewpoint, the abolition of plea bargaining might be disastrous for there would be little incentive for the state to acquiesce in less than the maximum available punishment. . . . Even when the evidence, although not overwhelming is more than sufficient to sustain a conviction it may well be in the defendant's best interest to plead guilty rather than to gamble a loss, when losing may result in the deprivation of liberty for an extended period of time or the death sentence.

Id. at 347-48, 223 A.2d at 704-05.

33. Commonwealth v. McCauley, 428 Pa. 107, 237 A.2d 204 (1968); Commonwealth *ex rel.* Bostic v. Cavell, 424 Pa. 573, 227 A.2d 662 (1967).

PA. R. CRIM. P. 319(b) impliedly condones plea bargaining by providing:

> The court, with the consent of the attorney for the Commonwealth may accept a plea of guilty to any included offense or to any count in an indictment and may discharge the defendant on the other offenses or counts charged.

34. Commonwealth *ex rel.* Kerekes v. Maroney, 423 Pa. 337, 345, 223 A.2d 699, 703 (1967); *see also*, § 3.1 ABA Minimum Standards for Criminal Justice, Pleas of Guilty (Approved Draft 1968).

35. Commonwealth v. Todd, 186 Pa. super. 272, 142 A.2d 174 (1958).

36. United States *ex rel.* McGrath v. LaVallee, 319 F.2d 308, 319 (2d Cir. 1963); Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969); Commonwealth *ex rel.* Kerekes v. Maroney, 423 Pa. 337, 223 A.2d 699 (1966).

37. Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969).

38. *Id. See also* United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966).

39. 434 Pa. 52, 252 A.2d 689 (1969).

40. *Id.* at 55, 252 A.2d at 690.

either acquiesce in the bargain or give the defendant the opportunity to withdraw his plea if he does not agree with the bargain.[41] Section 3.3 of the *ABA Minimum Standards* was adopted *in toto*.[42] The supreme court also held:

> Moreover, if a judge refuses to accept a plea bargain agreed to by the defense and the Commonwealth or if a plea of guilty or nolo contendere is withdrawn because the trial judge decides that his original agreement was inappropriate then the trial should be held where practical before another judge who has no knowledge of the prior plea bargaining.[43]

If the trial judge promises to impose the sentence agreed upon but fails to comply with his promise at the time of sentencing, the plea is rendered invalid.[44]

The time interval which has elapsed between the entry of the guilty plea and the accused's first attempt to withdraw the plea may be an important factor to consider when determining whether the accused is asking to withdraw for a legitimate purpose or only because of his disappointment with the court's position in regard to punishment.[45] A petition for leave to withdraw which is filed shortly after entry of the plea would also create less prejudice to the Commonwealth if a trial is subsequently granted.[46] The initial attempt to withdraw need not be in the form of a petition to the trial court but may be an informal request to the police, the district at-

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41. ABA MINIMUM STANDARD OF CRIMINAL JUSTICE, PLEAS OF GUILTY (Approved Draft 1968) § 3.3(b) provides:

> If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before the court will be dismissed or that sentence concession will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the pre-sentence report is consistent with the representations made to him. If the trial judge concurs, but later decides that the final disposition should not include the charge or sentence concessions contemplated by the agreement, he shall so advise the defendant and then call upon the defendant to either affirm or withdraw his plea of guilty or nolo contendere.

42. *Id.*

43. 434 Pa. 52, 56-57, 252 A.2d 689, 691 (1969).

44. *See, e.g.*, Commonwealth v. Senauskas, 326 Pa. 69, 191 A. 167 (1937).

45. *Cf.* Commonwealth v. Turchetta, 404 Pa. 41, 171 A.2d 54 (1961).

46. *But see,* Farnsworth v. Sanford, 115 F.2d 375 (5th Cir. 1940). Usually, the sooner withdrawal is requested, the greater the chances are that the government has done nothing to its detriment in reliance on the plea. In this case, however, within 3 days of the entry of the plea, 43 witnesses were dismissed.

torney or defense counsel, or an assertion of innocence.[47] In *Commonwealth v. Turchetta*[48] the defendant made five attempts to withdraw his plea of guilty. Four attempts were made before sentencing. One-half hour after the defendant signed the indictment he asked his attorney and the district attorney what he had signed and stated that he did not wish to plead guilty. Fourteen months later the defendant formally petitioned the court to change his plea. The Commonwealth contended that the defendant's petition was not filed in a timely manner and reflected only the defendant's fear that his sentence expectations would not be met. In holding that the trial court abused its discretion by disallowing withdrawal, the Pennsylvania Supreme Court held, "We should not be ingenious to find reasons to deny a man his trial by jury when he presses for it before trial."[49]

The Commonwealth has no burden of proof when a guilty plea is entered.[50] Any testimony received is used only as an aid to the court in passing sentence.[51] If the defendant's evidence or testimony, if believed, would create a doubt as to the accused's actual guilt, the guilty plea should be withdrawn and a trial should be scheduled.[52] In *Commonwealth v. DiPaul*[53] the superior court stated that a guilty plea is of questionable validity, "where it appears that the plea was entered through a misapprehension of the facts or the law; where there is doubt of the defendant's guilt, or where the defendant has a defense worthy of consideration by a jury. . . ."[54] If any of the above circumstances are clear from an inspection of the record, it will be an abuse of discretion to deny withdrawal.[55] However, the defendant's burden of proof on any of these grounds for withdrawal will be extremely difficult if, at the time of entry, the defendant was represented by counsel and a judicial inquiry concerning the intelligence and voluntariness of the plea appears on the record.[56]

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47. *Cf.* Commonwealth v. Turchetta, 404 Pa. 41, 171 A.2d 54 (1961).

48. 404 Pa. 41, 171 A.2d 4 (1961).

49. *Id.* at 47, 171 A.2d at 57.

50. *See, e.g.*, Commonwealth v. Petrillo, 340 Pa. 33, 16 A.2d 50 (1940); Commonwealth v. Cavanaugh, 183 Pa. Super. 417, 133 A.2d 288 (1957).

51. *See, e.g.*, Commonwealth v. Cavanaugh, 183 Pa. Super. 417, 133 A.2d 288 (1957).

52. *See, e.g.*, Commonwealth v. Walters, 431 Pa. 74, 244 A.2d 757 (1968); Commonwealth v. Cavanaugh, 183 Pa. Super. 417, 133 A.2d 288 (1957).

53. 122 Pa. Super. 53, 184 A. 480 (1936).

54. *Id.* at 55, 184 A. at 481.

55. *See, e.g.*, Commonwealth v. Cavanaugh, 183 Pa. Super. 417, 133 A.2d 288 (1957); *cf.* Commonwealth v. Metz, 425 Pa. 188, 228 A.2d 729 (1967).

56. *See, e.g.*, Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540, *cert. denied*, 391 U.S 920 (1967); Commonwealth *ex rel.* Rivers v. Myers, 414 Pa. 439, 220 A.2d 303, *cert. denied*, 379 U.S. 866 (1964); Commonwealth *ex rel.* Mercer v. Banmiller, 193 Pa. Super. 412, 165 A.2d 121 (1960).

Compare Commonwealth v. Scoleri, 415 Pa. 218, 202 A.2d 521 (1964) in which the Pennsylvania Supreme Court allowed withdrawal because the unusual facts of the case made it impossible to determine what the defend-

III. The Federal Procedure—Withdrawal for any Fair and Just Reason

Justice Roberts, in his dissenting opinion in *Commonwealth v. Culbreth*[57] placed great emphasis upon the withdrawal procedure applicable in the federal courts.[58] It was Justice Roberts' view that,

> prior to sentencing leave to withdraw should be allowed whenever the defendant advances any fair and just reason for withdrawal, unless the Commonwealth can show that it was substantially prejudiced by its reliance on the defendant's guilty plea.[59]

The dissenting justices believed that the defendant had advanced a fair and just reason in that:

> He first believed that the Judge had agreed to a plea bargain for a two year sentence, but later realized that the judge was not informed of and did not concur in, the bargain.[60]

Federal procedure distinguishes between pre-sentence and post-sentence guilty plea withdrawals.[61] The current standard for presetence withdrawals was articulated by the United States Supreme Court by way of dicta in *Kercheval v. United States*:[62]

> The court in the exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just.[63]

After sentence, however, a court may withdraw a guilty plea only upon a showing of "manifest injustice" to the defendant.[64] The

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ant's counsel had told him concerning the plea and what the defendant, whose credibility was questionable, had relied on in entering the plea, the decision was labeled as sui generis.

57. 439 Pa. 21, 264 A.2d 643 (1970) (dissenting opinion).

58. *Id.* at 30-31, 265 A.2d at 647-48 (dissenting opinion).

59. *Id.* at 30, 265 A.2d at 647 (dissenting opinion).

60. *Id.* at 32, 264 A.2d at 648 (dissenting opinion).

61. Fed. R. Crim. P. 32(d) provides:

> A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

See also Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963); Note, *Pre-Sentence Withdrawal of Guilty Pleas in the Federal Courts*, 40 N.Y.U. L. Rev. 759 (1965).

62. 274 U.S. 220 (1927). Decided before Federal Rule 32(d), the case has been carried over by cases decided after the rule was adopted. *See, e.g.*, Nagelberg v. United States, 377 U.S. 266 (1964); Everett v. United States, 336 F.2d 979 (D.C. Cir. 1964); United States v. Nigro, 262 F.2d 783 (3d Cir. 1959).

63. 274 U.S. at 224.

64. Fed. R. Crim. P. 32(d). *See also* DeGregory v. United States, 382

distinction ostensibly affords a better opportunity for a defendant to protect his right to trial by petitioning the trial court to withdraw before sentencing, while avoiding motions for withdrawal based solely upon dissatisfaction with a sentence already imposed.[65]

The granting of a pre-sentence motion is solely within the discretion of the trial judge.[66] A defendant who enters a plea of guilty accepted by the trial court has no absolute right to withdraw that plea.[67] However, considering the slight chance of prejudice to the government's case, it has been urged that motions to withdraw pleas of guilty made before sentence be liberally granted.[68] The issue on appeal continues to be whether the trial court abused its discretion in denying withdrawal.[69]

A pre-sentence motion to withdraw will be denied if the government can show that substantial prejudice will result to its case if the defendant is given a trial.[70] For example, in *Farnsworth v. Sanford*[71] the government, in reliance upon the defendant's guilty plea, dismissed fifty-two witnesses previously subpoenaed from throughout the country. When the defendant attempted to withdraw his plea, the whereabouts of many witnesses was unknown. It was held that under these circumstances there was no abuse of discretion in denying the defendant leave to withdraw his plea of nolo contendere.[72] Time is an important factor in this regard since the longer a defendant waits to file his motion, the greater the

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U.S. 850 (1965); Sullivan v. United States, 348 U.S. 170 (1954); Sherburne v. United States, 433 F.2d 1350 (8th Cir. 1970); United States v. Shneer, 194 F.2d 598 (3d Cir. 1952).

65. *See* Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963):

> This distinction rests upon practical considerations important to the proper administration of justice. Before sentencing the inconvenience to the court and prosecution resulting from a charge of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease after sentence the accused might be encouraged to plead guilty to test the weight of potential punishment and withdraw the plea if the sentence was unexpectedly severe. The result would be to undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process.

Id. at 671.

66. *See, e.g.*, Oksanen v. United States, 362 F.2d 74 (8th Cir. 1966); Smith v. United States, 359 F.2d 481 (8th Cir. 1966).

67. *See, e.g.*, United States v. Young, 424 F.2d 1276 (3d Cir. 1970); Byes v. United States, 402 F.2d 429 (8th Cir. 1968); United States v. Ptomey, 366 F.2d 759 (3d Cir. 1966).

68. *See, e.g.*, United States v. Stayton, 408 F.2d 559 (3d Cir. 1969); Everett v. United States, 336 F.2d 976 (D.C. Cir. 1964); Poole v. United States, 250 F.2d 396 (D.C. Cir. 1957).

69. 8A MOORE, FEDERAL PRACTICE § 32-07 (2d ed. 1968); United States v. Thomas, 415 F.2d 1216 (9th Cir. 1969). *See, e.g.*, United States v. Hughes, 325 F.2d 789 (2d Cir. 1964); United States *ex rel.* Phelan v. Brierly, 312 F. Supp. 350 (E.D. Pa. 1970).

70. 8A MOORE, FEDERAL PRACTICE § 32-08 (2d ed. 1968); United States v. Stayton, 408 F.2d 557 (3d Cir. 1969); Farnsworth v. Sanford, 115 F.2d 375 (5th Cir. 1940).

71. 115 F.2d 375 (5th Cir. 1940).

72. *Id.* at 377.

chances that the government will not be able to present a case against him if he is permitted to go to trial.[73]

Rule 11 of the Federal Rules of Criminal Procedure provides *inter alia* that a trial court,

> may not accept a (guilty) plea without first determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.[74]

In most instances careful compliance with Rule 11 will remove grounds for any subsequent attack on the validity of the plea.[75] Any representations on the part of the defendant at the time his plea is accepted that he understands the significance of his plea and is satisfied of his guilt cannot be lightly disregarded by the circuit court.[76] As under the Pennsylvania rule, the federal courts have held that if it appears that the defendant knew what he was doing and there is no evidence of force, mistake, or ignorance, withdrawal should be denied.[77]

The difference between the Pennsylvania and federal rules is one of semantics. Even before sentence, under the federal rule, disappointment with the prospective penalty to be imposed will not sustain the burden required to withdraw a guilty plea.[78] Both rules place a heavy responsibility on defense counsel to insure that the defendant plead guilty only if he is in fact guilty of the offense charged.[79] If defense counsel is derelict in this responsibility, as where he advises a plea of guilty before interviewing witnesses to ascertain the possibility of a defense, the defendant should be allowed to withdraw his plea.[80] Under these circumstances, the ineffectiveness of counsel vitiates the voluntariness of the plea itself.[81] However, as the Pennsylvania Supreme Court held in *Commonwealth v. Culbreth*,[82] the exercise of mistaken judgment by counsel in regard to the trial court's possible acceptance of sentence recom-

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73. United States v. Washington, 341 F.2d 277, 286 (3d Cir. 1965).
74. FED. R. CRIM. P. 11.
75. Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963); Barley v. United States, 312 F.2d 679 (10th Cir. 1963); Gundlack v. United States, 262 F.2d 72 (4th Cir. 1958).
76. *See* United States v. Briscoe, 428 F.2d 954 (8th Cir. 1970).
77. Ptomey v. United States, 336 F.2d 979 (D.C. Cir. 1964).
78. *See, e.g.*, White v. United States, 354 F.2d 22 (9th Cir. 1965); United States v. Fina, 289 F. Supp. 288 (E.D. Pa. 1968). *Compare* Melnick v. United States, 356 F.2d 493 (9th Cir. 1966); United States *ex rel.* McGrath v. LaVallee, 319 F.2d 308 (2d Cir. 1963).
79. *See* United States v. Rodgers, 389 F. Supp. 726 (D. Conn. 1968).
80. *Id.*
81. *Compare* United States v. Briscoe, 428 F.2d 954 (8th Cir. 1970) *with In re* Parker, 423 F.2d 1021 (8th Cir. 1970).
82. 439 Pa. 21, 264 A.2d 643 (1970).

mendations is not sufficient ground for a motion to withdraw under federal rule 32(d).[83]

Application of the Federal and Pennsylvania procedural rules renders essentially the same result. In either case, the trial court's refusal to allow withdrawal will be reversed only where an abuse of discretion is shown. This proposition was substantiated by Judge Hannum of the Federal District Court for the Eastern District of Pennsylvania in *United States Ex Rel. Culbreth v. Rundle*.[84] In an opinion denying habeas corpus relief he stated:

> In both the federal and state courts the withdrawal of a plea of guilty is a matter that is left to the sound discretion of the trial court and will not be reversed absent a clear showing of abuse of discretion or error of law.[85]

This opinion was written in response to a petition for Writ of Habeas Corpus filed by Culbreth after the Pennsylvania Supreme Court decided the principal case of this Note.

IV. The A.B.A. Minimum Standards—(Pleas of Guilty) § 2.1

The American Bar Association Project on Minimum Standards for Criminal Justice has formulated a standard dealing with the withdrawal of guilty pleas which is quite similar in its language to the federal approach.[86] The *ABA Minimum Standards* provide that unless a "manifest injustice" has been shown, a defendant may not withdraw his guilty plea as a matter of right.[87] The trial court may, however, before trial at its discretion allow a defendant to withdraw his plea for "any fair or just reason," unless the prosecution has been prejudiced by reliance upon the defendant's plea.[88] The *ABA Minimum Standards*, however, fail to set forth any criterion for determining when a "fair and just" reason has been presented. As in the Pennsylvania and federal court rules, the final decision is left to the sound discretion of the trial judge. It is submitted that reversals on appeal would be as infrequent under an application of this rule as they have been under both the federal and Pennsylvania rules.

The *ABA Minimum Standards* provide two requirements which must be met before withdrawal of a guilty plea must be allowed. First, the motion for withdrawal must be timely made.[89] Second, the withdrawal must be necessary to correct "a manifest injustice."[90]

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83. United States v. Briscoe, 428 F.2d 954 (8th Cir. 1970); *cf.* Parker v. N.C. 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970).
84. 320 F. Supp. 1052 (E.D. Pa. 1970).
85. *Id.* at 1053.
86. *Compare*, ABA Minimum Standards For Criminal Justice, Pleas of Guilty § 2.1 (Approved Draft 1968) *with* Fed. R. Crim. P. 32(d).
87. ABA Minimum Standards For Criminal Justice, Pleas of Guilty § 2.1 (Approved Draft 1968).
88. *Id.*
89. *Id.*
90. *Id.*

In further defining the first of the above requirements, the Standard provides that a motion for withdrawal need not necessarily be made subsequent to judgment or sentence to be timely.[91] The motion must be made with due diligence and, as the commentators point out, the fact that the motion comes after sentence may have a bearing upon whether the motion is timely.[92] For example, if the defendant alleges that the prosecuting attorney failed to request the sentence agreed upon in a plea agreement, it is reasonable to expect the defendant to file a motion to withdraw immediately upon learning of the prosecuting attorney's inaction.

In defining "manifest injustice" the *ABA Minimum Standards* provide:

> (ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:
>
> (1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute or rule;
>
> (2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;
>
> (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed;
>
> (4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement; or
>
> (5) he did not receive the charge or sentence concessions contemplated by the plea agreement concurred in by the court, and he did not affirm his plea after being advised that the court no longer concurred and being called upon to either affirm or withdraw his plea.[93]

The above propositions are all currently adhered to by both Pennsylvania and Federal Courts. The standards for determining when a plea of guilty should not be allowed to stand, set forth by the Pennsylvania Supreme Court in *Commonwealth v. Scoleri*[94] are roughly equivalent to the examples of manifest injustice presented by the drafters of the *ABA Minimum Standards.* Barring these clear and readily identifiable circumstances, all three approaches allow the trial judge wide discretion to deal with the defendant's withdrawal request as his own predispositions dictate. The decisions are *not* uniform and many times are contradictory. It is

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91. *Id.*
92. Comments, ABA MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 2.1 p. 55 (Approved Draft 1968).
93. ABA MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 2.1(ii) (Approved Draft 1968).
94. 415 Pa 218, 202 A.2d 521 (1964).

clear, however, that for the most part, a trial judge's decision to disallow withdrawal will be upheld on appellate review.

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