IN THE
**SUPREME COURT**
OF THE
**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,**
Plaintiff-Appellee,

**v.**

**ANGEL J. SANTOS,**
Defendant-Appellant.

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**SUPREME COURT NO. 2011-SCC-0020-CRM**
SUPERIOR COURT NO. 10-0132E

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**OPINION**

**Cite as: 2013 MP 18**

Decided December 26, 2013

Mark B. Hanson, Saipan, MP, for Defendant-Appellant Angel J. Santos
James B. McAllister, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; and PERRY B. INOS, Associate Justice.

PER CURIAM:

¶ 1 Defendant-Appellant Angel J. Santos ("Santos") pled guilty to conspiracy to commit sexual assault in the first degree. He now appeals the trial court order denying his motion to withdraw his guilty plea. The trial court denied the withdrawal because Santos failed to furnish a fair-and-just reason. Santos argues the trial court applied the wrong legal standard for assessing a motion to withdraw a plea. We AFFIRM the trial court's denial of Santos' motion to withdraw his guilty plea.

## I. Factual and Procedural Background

¶ 2 Santos was charged with kidnapping, 6 CMC §§ 1421(a)(1), (2)(B); conspiracy to commit kidnapping, 6 CMC § 303(a), § 1421(a)(1); sexual assault in the first degree, 6 CMC §§ 1301(a)(1), (a)(2); conspiracy to commit sexual assault in the first degree, 6 CMC § 303(a), § 1301(a); aggravated assault and battery, 6 CMC § 1203(a); and disturbing the peace, 6 CMC § 3101(a).

¶ 3 The Commonwealth and Santos entered a plea agreement in which Santos agreed to cooperate against his co-conspirators and plead guilty to conspiracy to commit sexual assault in the first degree in exchange for a dismissal of the other five charges and a sentence of between ten and twenty years of incarceration.

¶ 4 Nine months later, but before sentencing, Santos moved to withdraw his guilty plea in response to the Commonwealth dismissing the charges against his co-conspirators. The trial court denied the motion and, in a subsequent proceeding, sentenced Santos in accordance with the terms of his agreement.

¶ 5 Santos timely appealed. Santos' court-appointed counsel then filed an *Anders* brief,[1] which contained two parts: Santos' opening brief and counsel's motion to withdraw. We denied the motion and ordered further proceedings on what standard the Superior Court should apply when considering a motion to withdraw a plea.

## II. Jurisdiction

¶ 6 We have jurisdiction over trial court final judgments and orders, NMI CONST. art. IV, § 3; 1 CMC § 3102(a).

## III. Standard of Review

¶ 7 This appeal presents two issues: (1) the standard for withdrawing guilty pleas and (2) whether the trial court abused its discretion in denying Guerrero's motion to withdraw his guilty plea. We review de novo the standard for withdrawing a guilty plea under Rule 32(d) of the Commonwealth Rules of

[1] An *Anders* brief is a motion to withdraw filed by a criminal defendant's court-appointed counsel because counsel claims the defendant has no non-frivolous grounds for appealing his or her conviction. *Commonwealth v. Santos*, 2013 MP 10 ¶ 17.

Criminal Procedure ("Rule 32(d)"). *See Commonwealth v. Cabrera*, 2 NMI 311, 316 (1991) (reviewing de novo whether a defendant validly entered an Alford plea under Rule 32(d)). We review for abuse of discretion whether the trial court erred in denying Santos' motion to withdraw his guilty plea. *United States v. Ensminger*, 567 F.3d 587, 590 (9th Cir. 2009).

## IV. Discussion

### *A. Standard for Determining a Motion to Withdraw a Guilty Plea*

¶ 8 Rule 32(d) governs plea withdrawals. Under Rule 32(d), which was patterned after Rule 32(d) of the Federal Rules of Criminal Procedure ("Federal Rule 32(d)"), a defendant may submit a motion to withdraw a plea before sentencing, upon suspension of a sentence, or to correct manifest injustice after sentencing:

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

NMI R. CRIM. P. 32(d). The language does not establish a standard for reviewing a motion to withdraw a guilty plea before sentencing.

¶ 9 To remedy that silence, federal courts dusted off *United States v. Kercheval*, which noted a defendant may withdraw a guilty plea for any "fair and just" reason. 274 U.S. 220, 224 (1927). The case, however, provided little guidance on what might constitute a "fair and just" reason.

¶ 10 As a result, despite the ubiquity of *Kercheval*'s "fair and just" standard, the United States Courts of Appeals differed in their application of what constituted a fair-and-just reason. Some Courts of Appeals interpreted the standard to mean a defendant could withdraw his or her guilty plea before sentencing so long as it did not prejudice the government. *United States v. Savage*, 561 F.2d 554, 556-57 (4th Cir. 1977); s*ee also Kadwell v. United States*, 315 F.2d 667, 670 (9th Cir. 1963) (noting plea withdrawals should be "freely allowed"). Findings of prejudice included evidence being discarded, *United States v. Jerry*, 487 F.2d 600, 611 (3d Cir. 1973), or a key witness dying after the plea. *United States v. Vasquez-Velasco*, 471 F.2d 294, 294-95 (9th Cir. 1973). Meanwhile, other Courts of Appeals required "substantial reasons" such as procedural or constitutional defects in the plea, or a renewed claim of innocence combined with additional facts that, if accepted as true, would form "a legally cognizable defense to the charges." *United States v. Barker*, 514 F.2d 208, 220-22 (D.C. Cir. 1975).

¶ 11 The split was mended through amendments to the Federal Rules of Criminal Procedure. The current rule, which moved the standard for plea withdrawals to Federal Rule 11(d), borrowed from both views. Under the amended rule, a defendant may withdraw his or her plea "for any reason or no reason"

before the court accepts his or her plea. FED. R. CRIM. PROC. R. 11(d).[2] But after the court accepts the plea, a defendant may only withdraw his or her plea under two circumstances: (1) the court rejected a Rule 11(c)(5) plea agreement or (2) the defendant "can show a fair and just reason for requesting the withdrawal." *Id.*

*1. Effect of Amendments to Federal Rules*

¶ 12 Federal rule changes, such as the 1983 amendment and the local litigation it sparks in the Commonwealth, highlight a recurring issue: the practical effect, if any, the federal rule amendments have on their counterpart Commonwealth rules. Technically, these changes are merely persuasive, *Commonwealth v. Jing Xin Xiao*, 2013 MP 12 ¶ 47 n.5, but their "strong persuasive authority," *Commonwealth v. Laniyo*, 2012 MP 1 ¶ 9, leaves some trial courts guessing case-by-case whether to apply the original rule or the amended rule. *Compare Laniyo*, 2012 MP 1 ¶ 16 (affirming trial court's application of an amended federal rule), *with Syed v. Mobil Oil Mariana Island Inc.*, 2012 MP 20 ¶¶ 11, 53 (reversing trial court's application of the revised federal pleading standard). To untangle that conundrum, we offer a presumption: clerical, stylistic, and other modest changes to the federal rules presumptively apply in the Commonwealth while substantive revisions, such as an effort to resolve a split among the United States Courts of Appeals, require approval via Commonwealth statute, court rules, or case law.

¶ 13 This presumption, however, does not resolve the case-at-bar. The Commonwealth adopted Federal Rule 32(d). Following that adoption, Federal Rule 32(d) has since moved to Federal Rule 11(d), a move the Commonwealth has not matched. As part of the move, the plea-withdrawal standard was extensively re-written to settle a circuit split among the United States Courts of Appeals. Because of that large-scale change, the modest-change presumption does not apply.

*2. Plea-Withdrawal Standard*

¶ 14 Because the modest-change presumption does not apply, we must resolve what standard trial courts should apply when deciding whether to grant a pre-sentence motion to withdraw a guilty plea.

¶ 15 Santos argues we should adopt the Fourth Circuit's permissive standard. That standard favors granting plea-withdrawal motions, regardless of the reason, unless the government can show it would suffer prejudice. For instance, in *United States v. Savage*, a defendant pled guilty, but requested to withdraw his plea before sentencing. 561 F.2d 554, 555 (4th Cir. 1977). The trial court "ignored the request" and sentenced the defendant to ten years in jail. *Id.* Reviewing the rejection, the *Savage* court noted that trial courts should normally grant motions to withdraw a plea unless it would prejudice the

[2] Rule 11(d) of the Federal Rules of Criminal Procedure states: "[a] defendant may withdraw a plea of guilty or nolo contendere: (1) before the court accepts the plea, for any reason or no reason; or (2) after the court accepts the plea, but before it imposes sentence if: (A) the court rejects a plea agreement under 11(c)(5); or (B) the defendant can show a fair and just reason for requesting the withdrawal."

government. The *Savage* court then remanded, directing the trial court to determine whether the government would suffer prejudice from the plea withdrawal. *Id.* at 556-57. If not, the *Savage* court instructed, "the defendant should be allowed to withdraw his plea." *Id.*

¶ 16 Santos contends we should adopt this reasoning, because the current federal rule unjustly favors efficiency over the fundamental rights of criminal defendants. These rights represent "'the spinal column of American democracy,'" Appellant's Suppl. Br. at 6 (quoting *Neder v. United States*, 527 U.S. 1, 30 (1990) (Scalia, J., concurring in part and dissenting in part, joined by Souter and Ginsburg, JJ.)). Such rights should not be swept aside merely because the rule occasionally inconveniences the judiciary and prosecutors. Instead, the fundamental nature of this right, Santos asserts, should mandate the Commonwealth to show prejudice caused by a defendant's plea withdrawal.

¶ 17 The Commonwealth disagrees, claiming we should adopt the current federal rule, which requires the defendant to show a fair-and-just reason for setting aside a plea, for three reasons. First, doing so is consistent with Commonwealth precedent. In *Laniyo*, for example, we encountered an analogous issue—whether to adopt a federal rule that had been revised to address a circuit split. We ultimately adopted the revised federal rule. 2012 MP 1 ¶ 16. Second, the 1983 amendments codified the majority rule and the Commonwealth prefers majority rules. *See* 7 CMC § 3401 (adopting, under certain circumstances, the Restatements and common law "as generally understood and applied in the United States"). Third, the current rule conserves judicial resources. These savings, according to the Commonwealth, outweigh the defendant's due process concerns, which are sufficiently protected by the plea colloquy process and the ability to have a guilty plea withdrawn if the defendant can show a fair-and-just reason.

¶ 18 We reject the permissive standard because it would turn the plea colloquy into a meaningless ritual "reversible at the defendant's whim." *Barker*, 514 F.2d at 221. Allowing defendants to walk away from their pleas on a whim, rather than for a fair-and-just reason, would add little protection to defendants and impose costs on both the executive and judicial branches. For the executive, it would force the police and prosecutors to spend their limited resources working on cases that had already secured a guilty plea because of the possibility of plea withdrawal. *See id.* at 222 (acknowledging the injury to the government from "reassembling" a case following a guilty plea, especially "where the delay between the plea and the withdrawal motion has substantially prejudiced the Government's ability to prosecute."). For the judiciary, it would mean the loss of time and resources devoted to reviewing the case, examining the plea, and going through the plea colloquy process. *See Pelletier v. United States*, 350 F.2d 727, 728 (D.C. Cir. 1965) (balancing "considerations of judicial administration" versus "a Defendant's interest in not having an improper guilty plea stand against him"). Given the costs to the Commonwealth, a defendant cannot revoke it at a whim; he must first furnish a fair-and-just reason.

¶ 19 We likewise reject substituting Federal Rule 11(d) for Commonwealth Rule 32(d). Federal Rule 11(d) is substantially different than Commonwealth Rule 32(d). Federal Rule 11(d) has been completely re-written and moved from Federal Rule 32(d) to Federal Rule 11(d). These changes have, in turn, fundamentally altered the rule. That substantial difference in wording, location, and content is a bridge too far to adopt as judicial gloss.

¶ 20 Instead, we adopt the majority position as expressed prior to the 1983 amendments to the plea-withdrawal standard. We adopt this approach because it safeguards the rights of the defendant while protecting the Commonwealth's limited resources from groundless requests. Consequently, defendants bear the burden of showing a fair-and-just reason for setting aside a court-accepted plea prior to sentencing. *United States v. Burnett*, 671 F.2d 709, 712 (2d Cir. 1982). In considering such a motion, trial courts should "freely grant[]" "[t]he withdrawal of a plea of guilty . . . before sentence where there is a fair and just reason for doing so." *United States v. Navarro-Flores*, 628 F.2d 1178, 1183 (9th Cir. 1980). If, however, granting the request would significantly prejudice the government, such as because of the loss of key evidence since the defendant entered his or her plea, the trial court may deny the motion. *Vasquez-Velasco*, 471 F.2d at 294-95 (affirming the denial of a plea withdrawal made after the death of the government's key witness). Under these circumstances, "the trial court must weigh the defendant's reasons for seeking to withdraw his plea against the prejudice . . . the government will suffer." *United States v. Tabory*, 462 F.2d 352, 354 (4th Cir. 1972).

*B. Application of the Plea-Withdrawal Standard*

¶ 21 Under the majority approach preceding the 1983 amendments, Santos concedes the trial court did not abuse its discretion by denying Santos' motion to withdraw his guilty plea. Oral Argument at 9:55:00-22, *Commonwealth v. Santos*, 2011-SCC-0020-CRM (NMI Sup. Ct. Nov. 14, 2013) (conceding Santos had no fair-and-just reason for withdrawing his plea). We agree.

¶ 22 "Fair and just reasons" include "inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, or any other reason for withdrawing the plea that did not exist when the defendant entered his plea." *United States v. Briggs*, 623 F.3d 724, 728 (9th Cir. 2010) (internal quotations omitted).[3] Erroneous predictions by counsel, however, are not a fair-and-just reason for withdrawing a plea, *United States v. Oliveros-Orosco*, 942 F.2d 644, 646 (9th Cir. 1991), unless counsel "grossly mischaracterized" the possible sentence. *See United States v. Davis*, 428 F.3d 802, 805-08 (9th Cir. 2005) (granting a plea withdrawal because defense counsel "grossly mischaracterized" the

[3] While we adopt the pre-1983 amendment majority position regarding plea withdrawals, post-amendment cases interpreting fair-and-just reasons consistent with the pre-1983 amendment majority position are persuasive. *See Estate of Ogumoro v. Han Yoon Ko*, 2011 MP 11 ¶ 24 n.8 (relying on post-amendment federal cases to interpret a Commonwealth rule because the pre- and post-amendment federal rule were nearly identical regarding the issue before the *Ogumoro* court).

defendant's potential sentence by claiming defendant would likely get probation instead of the eight-year incarceration that the government was seeking). A defendant's "belief that the government had a weaker case than he originally thought . . . " is not a fair-and-just reason either. *United States v. Showalter*, 569 F.3d 1150, 1156 (9th Cir. 2009). Likewise, changing one's mind is usually not a fair-and-just reason, *see United States v. Saft*, 558 F.2d 1073, 1082 n.11, 1083 (2d Cir. 1977) (affirming denial of a plea-withdrawal motion where the defendant claimed a change of mind), especially "if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times . . . ." *Barker*, 514 F.2d at 222.

¶ 23 Applying that standard, Santos did not furnish a fair-and-just reason for withdrawing his plea. Santos did not present any law or evidence supporting a withdrawal. He did not challenge the plea colloquy or indicate new evidence, intervening circumstances, or any other post-plea consideration meriting withdrawal. He similarly did not suggest he lacked competent counsel, or that counsel mischaracterized the case or the consequences of pleading guilty. Instead, Santos simply changed his mind nine months after entering his guilty plea because the government had yet to bring his co-conspirators to trial. Changing one's mind by itself, however, is not a fair-and-just reason to withdraw a guilty plea, *Saft*, 558 F.2d at 1082 n.11, especially so far after entering a plea. *Barker*, 514 F.2d at 222. Consequently, we hold that the trial court did not abuse its discretion by denying Santos' motion to withdraw his guilty plea.

## V. Conclusion

¶ 24 For the foregoing reasons, we AFFIRM the trial court's denial of Santos' motion to withdraw his guilty plea.

SO ORDERED this 26th day of December, 2013.