

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
3

4 August Term 2003

5 (Argued June 9, 2004 Decided October 1, 2004)

6 Docket No. 02-1412

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8 UNITED STATES OF AMERICA,  
9

10 Appellee,  
11

12 -- v. --  
13

14 CARLOS LOPEZ, ANGEL TEJEDA, also  
15 known as Gargola, MIGUEL TEJEDA,  
16 also known as Kilepi, LINDEN EARL RUSH,  
17 also known as Efro LNU, also known as  
18 Lynden Earl Rush and BARRY JAMES,  
19

20 Defendants,  
21

22 JULIO RAMIREZ, also known as Augusto,  
23

24 Defendant-Appellant.  
25

26 -----x

27  
28 B e f o r e : WALKER, Chief Judge, WINTER and JACOBS,  
29 Circuit Judges.

30 Appeal from a judgment of conviction entered against  
31 defendant-appellant following the district court's denial of  
32 his motion to withdraw from his plea agreement.

33 AFFIRMED.

34 MARSHA R. TAUBENHAUS, New  
35 York, NY, for defendant-  
36 appellant.  
37

38 ROBERTO FINZI, Assistant

1 United States Attorney (David  
2 N. Kelley, United States  
3 Attorney for the Southern  
4 District of New York, and Marc  
5 L. Mukasey, Assistant United  
6 States Attorney, on the  
7 brief), New York, NY, for  
8 appellee.  
9

10 JOHN M. WALKER, JR., Chief Judge:  
11

12 Defendant-appellant Julio Ramirez appeals from a June  
13 28, 2002 judgment of conviction entered, following his  
14 guilty plea, in the United States District Court for the  
15 Southern District of New York (Richard M. Berman, Judge).  
16 Ramirez contends that his conviction should be reversed  
17 because the district court erroneously denied his motion to  
18 withdraw from his plea agreement. The district court  
19 analyzed Ramirez's motion as if it were a motion to withdraw  
20 a guilty plea, even though Ramirez sought to keep his guilty  
21 plea intact. We affirm, but on different grounds than those  
22 relied on by the district court.

23 **BACKGROUND**

24 On June 3, 2000, Ramirez was charged with one count of  
25 conspiracy to distribute five or more kilograms of cocaine,  
26 in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). On May  
27 24, 2001, he signed a plea agreement with the Government and  
28 entered a plea of guilty in the district court. The plea  
29 agreement provided that "[n]o additional understandings,  
30 promises, or conditions have been entered into other than

1 those set forth in [the] Agreement, and none will be entered  
2 into unless in writing and signed by all parties.”

3 Before accepting Ramirez’s plea, the district court  
4 examined him in accordance with Rule 11(b) of the Federal  
5 Rules of Criminal Procedure.<sup>1</sup> In response to the court’s  
6 inquiry, Ramirez stated, inter alia, that he was satisfied  
7 with his attorney’s representation and that no one had made  
8 any promises to induce him to plead guilty. At the end of  
9 the allocution, the court accepted the plea.

10 In September 2001, Ramirez retained new trial counsel,  
11 replacing Roy R. Kulcsar, Esq., with B. Alan Seidler, Esq.  
12 On February 18, 2002, Seidler moved for an order “permitting

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<sup>1</sup> At the time of Ramirez’s guilty plea, Rule 11(b) was Rule 11(c). See Fed. R. Crim. P. 11 advisory committee’s note on 2002 amendments. The Federal Rules of Criminal Procedure (the “Rules”) were subsequently re-arranged and modified in some respects, effective December 1, 2002 (after the district court decided Ramirez’s motion). See id. The differences between the old and new Rules are not substantive in any respect that is relevant to this case, see id. (“The amendments are not intended to make any change in practice.”), and both parties refer throughout their briefs to the new version of the Rules, not the old. For ease of reference, and to provide clearer guidance for the future, we join the parties in citing to (and quoting) the current version of the Rules. Cf. United States v. Mercado, 349 F.3d 708, 710 (2d Cir. 2003) (discussing method for choosing which version of Fed. R. Crim. P. 11 applied in case where 2002 amendments took effect after defendant’s guilty plea but before appeal, and where appeal implicated substantive difference between the new and old versions of the Rule), cert. denied, 124 S. Ct. 1190 (2004). We add footnotes, however, to identify both the prior incarnation of a given rule and any noteworthy distinctions between the text in effect at the time Ramirez’s motion was under consideration and the text now in effect.

1 defendant to withdraw his guilty plea pursuant to the Plea  
2 Agreement, and plead guilty without such an agreement." In  
3 his affidavit in support of the motion, Ramirez sought  
4 simply "to withdraw from the restrictions of [his] Plea  
5 Agreement," and Seidler clarified during oral argument on  
6 the motion that Ramirez sought "to withdraw from the plea  
7 agreement, not to withdraw the guilty plea." When the  
8 district court inquired about Ramirez's motives for seeking  
9 release from his plea agreement, Seidler stated that Ramirez  
10 wanted to be free to move for a downward departure from the  
11 sentencing range set forth in the agreement, and that he  
12 wanted to be able to appeal his sentence.

13 In support of his motion, Ramirez argued that his  
14 decision to enter into the plea agreement had been based on  
15 a misrepresentation by his prior counsel. Ramirez claimed  
16 that Kulcsar had represented to him that if he signed the  
17 agreement, the Government would allow Ramirez's brother to  
18 assist in ongoing investigations and would give Ramirez a  
19 reduced sentence in return for his brother's cooperation.  
20 Ramirez further asserted that those purported promises had  
21 not been fulfilled.

22 The district court held a two-day evidentiary hearing  
23 to assess whether Ramirez should be permitted to withdraw  
24 from his plea agreement. Ramirez testified that Kulcsar had

1 made the above-described representations to him. Kulcsar  
2 testified that he had not done so. The district court then  
3 denied Ramirez's motion from the bench.

4 The district court analyzed the motion as if it were a  
5 motion to withdraw a guilty plea, on the assumption that if  
6 Ramirez were allowed to withdraw from his plea agreement,  
7 his guilty plea would also have to be withdrawn. Crediting  
8 Kulcsar's version of the facts, the court concluded that  
9 Ramirez had failed to demonstrate any "fair and just reason"  
10 warranting withdrawal of the guilty plea. See Fed. R. Crim.  
11 P. 11(d)(2)(B).<sup>2</sup> On June 27, 2002, the district court  
12 sentenced Ramirez to 108 months' imprisonment, in accordance  
13 with his plea agreement. Ramirez filed this appeal on July  
14 11, 2002, contending that the district court erred by  
15 applying the standard set forth in Rule 11(d)(2)(B) to  
16 evaluate his motion.

17 We agree with Ramirez that neither Rule 11(d)(2)(B) nor  
18 the analytical criteria that courts have developed to assist  
19 in applying that Rule (and its precursor, Fed. R. Crim. P.  
20 32(e) (effective Dec. 1, 1999)) govern the disposition of a  
21 motion to withdraw from a plea agreement where the defendant  
22 does not seek to withdraw his guilty plea. We conclude,

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<sup>2</sup> Formerly Fed. R. Crim. P. 32(e). See Fed. R. Crim. P. 11 advisory committee's note on 2002 amendments. The "fair and just reason" requirement is common to the old and new Rules.



1 apply (such a recommendation or request does not  
2 bind the court) ["Non-binding Sentence  
3 Agreement"]; or  
4

- 5 (C) agree that a specific sentence or sentencing range  
6 is the appropriate disposition of the case, or  
7 that a particular provision of the Sentencing  
8 Guidelines, or policy statement, or sentencing  
9 factor does or does not apply (such a  
10 recommendation or request binds the court once the  
11 court accepts the plea agreement) ["Binding  
12 Sentence Agreement"].

13 Fed. R. Crim. P. 11(c)(1).<sup>4</sup> In the usual course, the court  
14 will accept a defendant's guilty plea as soon as it is  
15 entered, but will defer acceptance of the plea agreement

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<sup>4</sup> Formerly Fed. R. Crim. P. 11(e), which provided as follows:

(1) In General. The attorney for the government and the attorney for the defendant -- or the defendant when acting pro se -- may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will:

- (A) move to dismiss other charges; or
- (B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or
- (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

Fed. R. Crim. P. 11(e) (effective Dec. 1, 1999).

1 until it has reviewed the pre-sentence report. See United  
2 States Sentencing Guidelines ("U.S.S.G." or "Guidelines")  
3 § 6B1.1(c) (directing district court to defer acceptance of  
4 any plea agreement until it has had "an opportunity to  
5 consider the presentence report"); but see Fed. R. Crim. P.  
6 11(c) (3) (A) (giving court the option, where the agreement is  
7 a Charge Bargain or a Binding Sentence Agreement, to "accept  
8 the agreement, reject it, or defer a decision until the  
9 court has reviewed the presentence report").<sup>5</sup>

10 Subsections (d) and (e) of Rule 11 govern the  
11 withdrawal of guilty pleas.<sup>6</sup> Subsection (d) provides as  
12 follows:

13 A defendant may withdraw a plea of guilty or nolo  
14 contendere:

15  
16 (1) before the court accepts the plea, for any reason  
17 or no reason; or

18  
19 (2) after the court accepts the plea, but before it  
20 imposes sentence if:

21  
22 (A) the court rejects a plea agreement under Rule  
23 11(c) (5); or

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<sup>5</sup> Formerly Fed. R. Crim. P. 11(e) (2).

<sup>6</sup> Formerly Fed. R. Crim. P. 32(e) ("fair and just reason" standard for withdrawal of guilty plea) and Fed. R. Crim. P. 11(e) (2) & (4) (setting forth procedures for withdrawal of guilty plea where the court rejects a Charge Bargain or Binding Sentence Agreement). Subsections (d) and (e) of the current Rule 11 expand upon the former Rules 11(e) and 32(e) by spelling out a defendant's right to withdraw his guilty plea before its acceptance by the court. See note 8, infra; Fed. R. Crim. P. 11 advisory committee's note on 2002 amendments.

1 (B) the defendant can show a fair and just reason  
2 for requesting the withdrawal.

3 Subsection (e) provides that a defendant may not withdraw a  
4 guilty plea once sentence has been imposed; after that  
5 point, a plea may be set aside only on direct appeal or  
6 through collateral attack. See Fed. R. Crim. P. 11(e).<sup>7</sup>

7 II. Mechanics of Guilty Plea Withdrawal

8 In every instance, irrespective of the type of plea  
9 agreement involved, a defendant may, as a matter of right,  
10 withdraw his guilty plea before it has been accepted by the  
11 district court. See Fed. R. Crim. P. 11(d)(1).<sup>8</sup> A  
12 defendant who has entered into a Charge Bargain or Binding  
13 Sentence Agreement also has an unrestricted right to  
14 withdraw his guilty plea after its acceptance but before  
15 sentence if the district court rejects his plea agreement.<sup>9</sup>

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<sup>7</sup> Formerly Fed. R. Crim. P. 32(e).

<sup>8</sup> Before the 2002 amendments to the Rules, there was no explicit provision governing withdrawal of a plea prior to the court's acceptance thereof, and the circuits were split on whether such withdrawal should be as of right or subject to the "fair and just reason" standard. See United States v. Shaker, 279 F.3d 494, 497 (7th Cir. 2002) (discussing circuit split). This circuit, like the Seventh Circuit, had adopted the view that the "fair and just reason" standard of former Fed. R. Crim. P. 32(e) was not triggered until the plea had been accepted. See United States v. Persico, 164 F.3d 796, 800-01, 806 (2d Cir. 1999).

<sup>9</sup> This was equally true before the 2002 amendments, but the operative provisions, which were then contained in Fed. R. Crim. P. 11(e)(2) and (e)(4), were less explicit. Subsection (e)(4) provided that if the district court decided to reject the plea

1       See Fed. R. Crim. P. 11(d)(2)(A); Fed. R. Crim. P.  
2       11(c)(5).<sup>10</sup> But if the defendant has entered into a Non-  
3       binding Sentence Agreement, the agreement becomes effective  
4       upon entry of the guilty plea; it does not require a formal  
5       acceptance or rejection by the district court. See Fed. R.  
6       Crim. P. 11 advisory committee's note on 1979 amendments.  
7       As a result, in the latter case, the district court's  
8       refusal to follow the agreement's sentencing recommendations  
9       will not entitle the defendant to withdraw his plea. See  
10      Fed. R. Crim. P. 11(c)(3)(B) (requiring court to advise  
11      defendant at plea allocution that he "has no right to  
12      withdraw the plea if the court does not follow [a Non-  
13      binding Sentence Agreement's] recommendation or request").<sup>11</sup>  
14      Instead, the defendant will be permitted to withdraw his  
15      plea only if he can show a "fair and just reason" for the

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agreement, it had to "afford the defendant the opportunity to then withdraw the plea." Fed. R. Crim. P. 11(e)(4) (effective Dec. 1, 1999). Subsection (e)(2) clarified, however, that subsection (e)(4) applied only to rejection of Charge Bargains and Binding Sentence Agreements. Fed. R. Crim. P. 11(e)(2) (effective Dec. 1, 1999); see also Fed. R. Crim. P. 11 advisory committee's note on 1979 amendments.

<sup>10</sup> Formerly Fed. R. Crim. P. 11(e)(2) and (4). See note 9, supra.

<sup>11</sup> Formerly Fed. R. Crim. P. 11(e)(2) ("If the agreement is [a Non-binding Sentence Agreement], the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.").

1 withdrawal -- the same standard that applies when the court  
2 has already accepted the plea agreement (or, in the case of  
3 a Non-binding Sentence Agreement, adopted the agreement's  
4 sentencing recommendations). See Fed. R. Crim. P.  
5 11(d) (2) (B).<sup>12</sup>

6 III. Withdrawal from the Plea Agreement

7 Although Rule 11 provides extensive direction  
8 concerning the procedures for pleading guilty pursuant to a  
9 plea agreement and for subsequent withdrawal of the guilty  
10 plea itself, it makes no mention of the rules and procedures  
11 attendant on a defendant's withdrawal from a plea agreement.  
12 The district court concluded that Ramirez's withdrawal from  
13 his plea agreement would require withdrawal of his guilty  
14 plea and entry of a new guilty plea. Accordingly, the court  
15 treated Ramirez's motion as a motion to withdraw a guilty  
16 plea pursuant to Rule 11(d) (2) (B). It then denied the  
17 motion after concluding that Ramirez had failed to  
18 demonstrate a "fair and just reason" for withdrawing the  
19 plea.

20 We disagree with the district court's analysis in two  
21 respects. As an initial matter, nothing in the text of the  
22 Federal Rules of Criminal Procedure would have required that  
23 Ramirez's guilty plea be withdrawn either following or as a

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<sup>12</sup> Formerly Fed. R. Crim. P. 32(e).

1 prerequisite to nullification of his plea agreement.

2 Second, we conclude that while Rule 11(d)(2)(B)'s "fair and  
3 just reason" standard is useful in considering a motion to  
4 withdraw from a plea agreement, neither the Rule itself nor  
5 the judicially crafted criteria for applying it govern the  
6 disposition of such a motion.

7 A. *Withdrawal of Guilty Plea as Prerequisite to, or*  
8 *Necessary Consequence of, Withdrawal from the Plea*  
9 *Agreement*

10 Ramirez's plea agreement was a Non-binding Sentence  
11 Agreement; it included only provisions of the type described  
12 in Rule 11(c)(1)(B). As explained above, had the district  
13 court refused to follow the sentencing recommendations  
14 contained in the agreement, that refusal would not have  
15 entitled Ramirez to withdraw his plea. See Fed. R. Crim. P.  
16 11(d)(2)(A) and (c)(3)(B). In light of this fact, we cannot  
17 agree with the district court that Ramirez would have been  
18 required to withdraw his plea if the district court had  
19 granted his motion. As Rule 11(c)(3)(B) makes plain, the  
20 validity of a guilty plea made pursuant to a Non-binding  
21 Sentence Agreement is wholly independent of the court's  
22 acceptance of the recommendations contained in the agreement  
23 -- a fact of which the defendant, when he enters his plea,  
24 is made fully aware. See Fed. R. Crim. P. 11(c)(3)(B); see  
25 also Fed. R. Crim. P. 11 advisory committee's note on 1979

1 amendments (there is no "need for rejection with opportunity  
2 for withdrawal [from a Non-binding Sentence Agreement] in  
3 light of the fact that the defendant knew the nonbinding  
4 character of the recommendation or request"). If a guilty  
5 plea is impervious to the court's rejection of a Non-binding  
6 Sentence Agreement, then it should also be impervious to a  
7 defendant's voluntary withdrawal from a Non-binding Sentence  
8 Agreement. (In the latter case, of course, the Government  
9 is released from its obligations under the plea agreement  
10 and may, therefore, seek a higher sentence than stipulated  
11 in the agreement.)

12 For the foregoing reasons, we hold that where a  
13 defendant seeks to withdraw from a Non-binding Sentence  
14 Agreement and consents to keeping his guilty plea intact,  
15 permission to withdraw from the plea agreement does not  
16 necessitate the entry of a new guilty plea. See United  
17 States v. Standiford, 148 F.3d 864, 867-68 (7th Cir. 1998)  
18 (assuming that plea agreement can be withdrawn without  
19 withdrawing guilty plea); United States v. Modafferi, 112 F.  
20 Supp. 2d 1192, 1196-97 (D. Haw. 2000) (following  
21 Standiford).<sup>13</sup> Accordingly, the district court's assumption

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<sup>13</sup> We have no occasion to decide whether a defendant who has pleaded guilty pursuant to a Charge Bargain or Binding Sentence Agreement would be permitted to withdraw from his plea agreement without also withdrawing his guilty plea. The difference between that scenario and the one presented in this case is that here,

1 that Ramirez would have had to withdraw his plea in order to  
2 withdraw from his plea agreement was erroneous.

3 B. *The "Fair and Just Reason" Requirement*

4 The question remains, however, whether the requirements  
5 for withdrawal of a guilty plea set forth in Rule 11 ought  
6 nevertheless to govern motions to withdraw from plea  
7 agreements as well. The Seventh Circuit, the only other  
8 circuit to have considered the question, has held that they  
9 should. See Standiford, 148 F.3d at 868.<sup>14</sup> As explained  
10 below, although we do not share that court's view that Rule  
11 11(d)(2)(B) applies of its own accord to a defendant's  
12 motion to withdraw from his plea agreement without  
13 withdrawing his guilty plea, we think the standard  
14 incorporated in the Rule serves as an appropriate benchmark  
15 for evaluating such a motion.

16 In Standiford, the defendant argued that because a

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the guilty plea was neither premised on the validity of the plea agreement nor conditioned on the court's acceptance of the plea agreement. But that difference may not be critical. A defendant who enters into a Charge Bargain or Binding Sentence Agreement always has the option of keeping his guilty plea intact in the event that his agreement is rejected by the district court, even though the plea was entered on the understanding that the agreement would be accepted. See, e.g., In re Ellis, 356 F.3d 1198, 1207 (9th Cir. 2004) (en banc).

<sup>14</sup> Standiford was decided before the 2002 amendments to the Federal Rules of Criminal Procedure. Consistent with the approach adopted throughout this opinion, see note 1, supra, and for clarity's sake, we cite to the new version of the Rules even though the court in Standiford used the old version.

1 plea agreement is not accepted by the district court until  
2 sentencing, see U.S.S.G. § 6B1.1(c), he had an unrestricted  
3 right to withdraw from his plea agreement (while keeping his  
4 guilty plea intact) up until that point.<sup>15</sup> The court  
5 rejected the argument. It reasoned that a plea agreement,  
6 unlike a plea, is a contract between a defendant and the  
7 Government to which the court is not a party. Standiford,  
8 148 F.3d at 868. Accordingly, the court explained, a plea  
9 agreement is binding on a defendant even in the absence of  
10 court approval, and thus may not be freely repudiated prior  
11 to its acceptance by the district court. Id. The court  
12 further held that because, in its view, pleas and plea  
13 agreements are “bound up together,” id. (quoting United  
14 States v. Hyde, 520 U.S. 670, 677 (1997)), the rule  
15 requiring a defendant to show a “fair and just reason” for  
16 withdrawing a guilty plea governs a motion to withdraw from  
17 a plea agreement as well, even where (as was the case in  
18 Standiford) the court has not yet accepted or adopted the  
19 plea agreement. Id.

20 We disagree with the Standiford court that Rule

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<sup>15</sup> At the time Standiford was decided, the Seventh Circuit had not yet resolved whether a defendant had an unrestricted right to withdraw his guilty plea prior to its acceptance by the court. The court answered that question in the affirmative in January 2002. See Shaker, 279 F.3d at 497; see also note 8, supra.

1 11(d) (2) (B) applies, of its own accord and with all its  
2 attendant jurisprudence, to a motion to withdraw from a plea  
3 agreement where the defendant wants to keep his guilty plea  
4 intact. As noted above, Rule 11 does not expressly address  
5 motions to withdraw from plea agreements; it deals only with  
6 motions to withdraw guilty pleas. And the guilty plea and  
7 plea agreement are not so intertwined with one another that  
8 a rule governing one should be read to govern the other when  
9 the language of the rule does not so provide. See Hyde, 520  
10 U.S. at 677 (“[The Federal Rules of Criminal Procedure]  
11 nowhere state that the guilty plea and the plea agreement  
12 must be treated identically.”); Ellis, 356 F.3d at 1205  
13 (rejecting view that plea and plea agreement are  
14 “inextricably bound up together”). Indeed, as the  
15 Standiford court recognized, the plea and the plea agreement  
16 bind a defendant in different ways and are accepted (or, in  
17 the case of Non-binding Sentence Agreements, informally  
18 adopted) by the sentencing court at different stages of the  
19 litigation.

20 But our rejection of the view that Rule 11 governs a  
21 defendant’s motion to withdraw from his plea agreement (but  
22 not his guilty plea) does not prevent us from borrowing the  
23 “fair and just reason” requirement for use in this  
24 situation. And an examination of the competing concerns

1 surrounding withdrawal from a plea agreement compels us to  
2 do just that.

3 On the one hand, it would be anomalous to require a  
4 defendant seeking to withdraw only from his plea agreement  
5 to show more than a fair and just reason for permitting  
6 withdrawal, for a defendant in such a case is asking the  
7 court to sanction a lesser breach of the plea agreement than  
8 withdrawal of the guilty plea would entail. There is less  
9 prejudice to the Government where a defendant seeks to  
10 withdraw from his plea agreement but not his guilty plea  
11 because such a withdrawal does not raise the prospect of a  
12 trial. And withdrawal from a plea agreement, without more,  
13 does not "'undermine[] confidence in the integrity of our  
14 judicial procedures,'" United States v. Maher, 108 F.3d  
15 1513, 1529 (2d Cir. 1997) (quoting United States v. Sweeney,  
16 878 F.2d 68, 70 (2d Cir. 1989) (per curiam)), in the same  
17 way that withdrawal of a guilty plea does because the court  
18 is not a party to the abrogated agreement and the withdrawal  
19 does not result in a wholesale reexamination of the central  
20 issue, viz., the guilt or innocence of the defendant.

21 On the other hand, permission to withdraw from a plea  
22 agreement without withdrawing a guilty plea should not  
23 simply be granted upon request. Although the prejudice to  
24 the Government may be less than it would be if the guilty

1 plea were withdrawn, it is not negligible; the Government  
2 will have to litigate sentencing disputes that had  
3 previously been resolved by the plea agreement. Moreover,  
4 there are administrative costs imposed on the court as a  
5 result of a defendant's withdrawal motion and subsequent  
6 sentencing arguments. Finally, a defendant like Ramirez  
7 has, in one sense, a less worthy claim to relief than a  
8 defendant seeking to withdraw his plea: whereas the latter  
9 may harbor a claim that he is innocent, the former has no  
10 such claim; he is hoping only to secure a more favorable  
11 sentence.

12 In light of these competing concerns, we think it  
13 appropriate to require a defendant who wants to withdraw  
14 from his plea agreement, but keep his guilty plea intact, to  
15 demonstrate some justification for the withdrawal, and the  
16 "fair and just reason" standard articulated in Rule  
17 11(d)(2)(B) satisfactorily captures the proper balance.

18 We hasten to observe, however, that the criteria  
19 developed by courts to determine whether a defendant has  
20 presented a "fair and just reason" for withdrawing his  
21 guilty plea under Rule 11(d)(2)(B) do not readily apply  
22 where a defendant wants to keep his guilty plea intact. A  
23 district court deciding whether to permit a defendant to  
24 withdraw his guilty plea generally considers, among other

1 things: (1) the amount of time that has elapsed between the  
2 plea and the motion to withdraw; (2) whether the defendant  
3 is asserting his innocence; and (3) whether -- and to what  
4 degree -- the Government will suffer prejudice as a result  
5 of the withdrawal. See, e.g., United States v. Couto, 311  
6 F.3d 179, 185 (2d Cir. 2002); United States v. Karro, 257  
7 F.3d 112, 117 (2d Cir. 2001). Moreover, "[t]o get  
8 permission to withdraw a guilty plea, a defendant must raise  
9 a significant question about the voluntariness of the  
10 original plea." United States v. Torres, 129 F.3d 710, 715  
11 (2d Cir. 1997).

12 The first factor may be relevant here, if we assume  
13 that withdrawal from a plea agreement, like withdrawal of a  
14 guilty plea, should be allowed only in those cases where a  
15 defendant plausibly maintains that his entry into the plea  
16 agreement was procured by nefarious means or was the result  
17 of his own confusion. As the First Circuit has noted,

18 the timing of a defendant's attempted plea withdrawal  
19 is highly probative of motive . . . . While an  
20 immediate change of heart may well lend considerable  
21 force to a plea withdrawal request, a long interval  
22 between the plea and the request often weakens any  
23 claim that the plea was entered in confusion or under  
24 false pretenses.

25  
26 United States v. Doyle, 981 F.2d 591, 595 (1st Cir. 1992).

27 But the fact of delay may not always cast suspicion on a  
28 defendant's reason for seeking withdrawal from his plea

1 agreement; where, as in this case, the assertion is that the  
2 Government failed to fulfill its side of the bargain (as the  
3 defendant understood it), a delay may be consistent with the  
4 defendant's good faith expectation of the Government's  
5 performance.

6 The second factor is even less helpful. A defendant's  
7 assertion of innocence normally weighs in favor of  
8 permitting plea withdrawal. See, e.g., id. at 596 ("Courts  
9 look more hospitably on a motion to withdraw a guilty plea  
10 when the motion is coupled with an assertion of  
11 innocence."). It is easy to see why; greater injustice is  
12 done to a defendant who may actually be innocent yet is  
13 denied a trial than to one who admits his guilt but insists  
14 on a trial. Cf. United States v. Roberts, 570 F.2d 999,  
15 1009 (D.C. Cir. 1977). Where a defendant is seeking only to  
16 withdraw from his plea agreement, however, the same  
17 rationale does not apply; the defendant necessarily admits  
18 his guilt, and he is not seeking a trial.

19 The third factor, prejudice to the Government, will be  
20 essentially the same (and relatively minor) in most cases  
21 where a defendant seeks to withdraw from his plea agreement  
22 but not to withdraw his guilty plea. "Prejudice" in the  
23 context of plea withdrawal typically refers to depriving the  
24 Government of the benefit of its bargain by having the

1           burden of trial preparation suddenly thrust upon it, as well  
2           as the potential difficulty to the Government in securing  
3           evidence against the defendant that would have been easier  
4           to secure at an earlier moment in time. See, e.g., United  
5           States v. Lineback, 330 F.3d 441, 445 (6th Cir. 2003)  
6           (Gilman, J., concurring). But neither form of prejudice  
7           exists where the defendant simply wants to be released from  
8           his plea agreement.

9           The Government here claims, rather vaguely, that it  
10          would have lost "the benefit of the bargain it expected" if  
11          Ramirez's motion had been granted. But the primary benefit  
12          to the Government under a plea agreement is the defendant's  
13          guilty plea. See Hyde, 520 U.S. at 677 (noting that  
14          defendant performs his side of plea bargain when he pleads  
15          guilty). This benefit would have been fully realized even  
16          if Ramirez's motion had been granted. The only prejudice to  
17          the Government in a case like this is that it may be forced  
18          to litigate the defendant's sentence (which, under a typical  
19          plea agreement, is subject to stipulation) and, perhaps,  
20          defend or seek an appeal from whatever sentence is imposed.  
21          These added burdens are not trifling, but they are not as  
22          onerous or as unpredictable as those associated with  
23          withdrawal of a guilty plea.

24          We can imagine circumstances in which the potential

1 prejudice to the Government is of a different kind and/or  
2 magnitude than that presented here. For example, prejudice  
3 may be an important factor weighing against withdrawal from  
4 a plea agreement in a case where the defendant has agreed,  
5 as part of his deal, to provide assistance to the  
6 Government, and wishes to renege on that deal.<sup>16</sup> Because  
7 such possibilities exist, the prejudice factor should never  
8 be ignored. As indicated above, however, it will generally  
9 have little weight where the defendant is not seeking to  
10 withdraw his guilty plea.

11 Finally, where a defendant seeking to withdraw from his  
12 plea agreement does not also seek withdrawal of his guilty  
13 plea, the voluntariness of the guilty plea is not at issue,  
14 and, therefore, should bear no direct relation to the  
15 fairness of granting the defendant's request. Instead, the  
16 relevant question is likely to be whether the defendant  
17 failed to understand, was misled about, or simply does not  
18 like certain subsidiary terms of the plea agreement (e.g.,  
19 the length of the sentence). Therefore, while voluntariness

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<sup>16</sup> Because we do not decide whether a defendant can move to withdraw from an agreement other than a Non-binding Sentence Agreement (e.g., a Charge Bargain) without also moving to withdraw his guilty plea, see note 13, supra, we decline to speculate about what special prejudice, if any, the Government might suffer if, for example, the district court were to grant a motion to withdraw from the terms of (but not the plea made pursuant to) a Charge Bargain.

1           may be relevant, the focus here ought to be on the  
2           voluntariness of the defendant's consent to the terms of the  
3           plea agreement, not the voluntariness of the plea itself.

4           Taken together, the criteria used under Rule  
5           11(d)(2)(B) to determine whether withdrawal of a guilty plea  
6           should be permitted are largely unhelpful in deciding  
7           whether to grant a defendant's motion to withdraw from his  
8           plea agreement without withdrawing his guilty plea.

9           Therefore, although we borrow Rule 11(d)'s "fair and just  
10          reason" requirement, we do not borrow its accoutrements.

11          Instead, the factors to be considered in determining whether  
12          a defendant has demonstrated a "fair and just reason" should  
13          be tailored to the context of plea agreement withdrawal.

14          For example, rather than ask whether the defendant is  
15          asserting his innocence (he is not), or whether the guilty  
16          plea itself was voluntary (an inquiry that is beside the  
17          point), the district court should ask whether there is  
18          credible evidence that the defendant did not freely and  
19          voluntarily enter into the plea agreement, either because he  
20          was coerced or improperly induced to accept its terms, or  
21          because he misunderstood them. The court should also seek  
22          to determine the extent of any prejudice likely to be  
23          suffered by the Government, keeping in mind that, as we have  
24          explained, such prejudice will generally be considerably

1 less than would attend withdrawal of a guilty plea. Other  
2 factors may be relevant to the analysis, but these two  
3 questions ought to be at its center.

4 IV. The District Court's Ruling

5 In the instant case, the district court believed that  
6 permitting Ramirez to withdraw from his plea agreement would  
7 have required withdrawal of his guilty plea. Accordingly,  
8 it evaluated Ramirez's motion in light of the criteria  
9 normally applied to motions to withdraw guilty pleas. The  
10 court found that the "absence of a claim of innocence  
11 weigh[ed] in favor of allowing [Ramirez's] guilty plea [and  
12 plea agreement] to stand." It also concluded that the  
13 voluntariness of Ramirez's guilty plea -- i.e., the fact  
14 that no one had induced him to plead guilty -- weighed  
15 against granting the motion. As explained above, Ramirez's  
16 failure to either claim his innocence or challenge the  
17 voluntariness of his guilty plea should not have been  
18 considered in examining the merits of his motion.

19 Nevertheless, based on our review of the facts of this  
20 case, we conclude that the district court's error was  
21 harmless. Ramirez's only argument in support of his motion  
22 was that his counsel had misled him, thus inducing him to  
23 sign the plea agreement under false pretenses. After an  
24 evidentiary hearing, the district court rejected that claim.

1 Specifically, the court found that Kulcsar had not "made any  
2 representation to the defendant prior to the signing of the  
3 plea agreement [that] was at odds or variance with the plea  
4 agreement." Under any analysis, the district court's  
5 crediting of Kulcsar's account of events and its concomitant  
6 discrediting of Ramirez's testimony preclude Ramirez from  
7 obtaining the relief he seeks. Because Ramirez has not  
8 adduced any credible evidence that he either misunderstood  
9 the terms of the plea agreement or was improperly induced  
10 into signing it, there is no "fair and just reason" to  
11 warrant withdrawal from the plea agreement.

12 **CONCLUSION**

13 For the foregoing reasons, the conviction is AFFIRMED.