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NOW I'M GUILTY, NOW I'M NOT: THE AUTOMATIC RIGHT TO
PRE-SENTENCE GUILTY PLEA WITHDRAWALS IN PENNSYLVANIA
SINCE *COMMONWEALTH v. FORBES*

THOMAS P. REILLY*

“Such a construction of our Supreme Court’s precedents would constrain trial courts to reward rather than sanction the most disingenuous of such claims, and the most brazen of perjuries.”¹

I. INTRODUCTION: THE FUNDAMENTAL RIGHT TO TRIAL VERSUS THE
EFFICIENT ADMINISTRATION OF JUSTICE

Imagine for a moment that a young child, ten years of age, has been the victim of ongoing sexual abuse by an adult familiar to the child.² After being indicted and having the opportunity to observe the incriminating evidence that begins to pile up, the accused perpetrator decides that pleading guilty is the best course of action.³ With the victim and victim’s

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1. *Commonwealth v. Cole*, 564 A.2d 203, 208 (Pa. Super. Ct. 1989) (Kelly, J., concurring) (arguing that trial courts should be able to assess credibility of movants’ explanations for seeking pre-sentence guilty plea withdrawals and rule accordingly, rather than being required to grant such motions upon any bald assertion of innocence).

2. Although these facts are fictional, they are loosely based on factual scenarios in several Pennsylvania cases where accused sexual offenders sought to withdraw their guilty pleas before sentencing and send their cases back to trial, requiring their victims to testify. *See, e.g., Commonwealth v. Gordy*, 73 A.3d 620, 623 (Pa. Super. Ct. 2013) (reversing trial court and allowing pre-sentence withdrawal of guilty plea in case involving ongoing sexual abuse of minors aged five and twelve); *Commonwealth v. Katonka*, 33 A.3d 44, 45 (Pa. Super. Ct. 2011) (en banc) (granting motion to withdraw guilty plea before sentencing where accused allegedly sexually abused his stepdaughter for over six years, beginning when she was eight years old); *Commonwealth v. Kasecky*, 658 A.2d 822, 822–23 (Pa. Super. Ct. 1995) (observing that defendant pleaded guilty to one count of Involuntary Deviate Sexual Intercourse for abusing his fifteen-year-old daughter but later sought to withdraw his guilty plea); *Commonwealth v. Ammon*, 418 A.2d 744, 745–46 (Pa. Super. Ct. 1980) (noting that defendant pleaded *nolo contendere* to Involuntary Deviate Sexual Intercourse with ten-year-old boy and later sought to withdraw his plea after one day of trial where sexual abuse victim had already testified).

3. *See, e.g., Brady v. United States*, 397 U.S. 742, 756 (1970) (“Often the decision to plead guilty is heavily influenced by the defendant’s appraisal of the prosecution’s case against him and by the apparent likelihood of securing leniency

family attempting to put the traumatic episode behind them, the victim approves a plea deal struck between the accused and the prosecution.⁴ After holding an extensive on the record guilty plea colloquy where the trial judge asks the defendant numerous questions to assure that the guilty plea is being made knowingly and voluntarily, the trial court accepts the defendant's plea.⁵ However, several days before the matter is scheduled for sentencing the accused sexual predator moves to withdraw the guilty plea, offering the bare assertion that "I am innocent of the alleged

should a guilty plea be offered and accepted."); Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1004 (1986) [hereinafter *The Prosecutor's Duty to Disclose*] ("A criminal defendant's decision to plead guilty reflects his assessment of the strength of the state's case against him.").

4. Although this Note focuses on guilty pleas rather than plea bargaining specifically, it recognizes that a large portion of such guilty pleas will come as a result of bargaining between the prosecution and the defendant. See *State v. Slater*, 966 A.2d 461, 470 (N.J. 2009) (recognizing that vast majority of criminal cases are resolved through plea bargaining); Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 754-55 (1998) (observing that despite persistent arguments in favor of banning plea bargaining from scholars and policymakers alike, "plea bargaining remains the primary method of disposing of criminal cases"); Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 600 (2005) ("Guilty pleas, mostly induced by government concessions, remain the method by which the criminal justice system resolves approximately ninety percent of all criminal cases in America." (footnote omitted)); Kirke D. Weaver, *A Change of Heart or a Change of Law? Withdrawing a Guilty Plea Under Federal Rule of Criminal Procedure 32(e)*, 92 J. CRIM. L. & CRIMINOLOGY 273, 273 (2002) (observing that overwhelming number of cases in our criminal justice system are processed through plea bargaining).

5. See PA. R. CRIM. P. 590(A) (requiring that guilty pleas be taken in open court and stating that trial judges should not accept pleas unless such colloquies demonstrate that they are voluntarily and understandingly tendered). The comment to Rule 590 describes the mandatory minimum baseline inquiry that must be made by a trial judge before accepting a plea as follows:

- (1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or *nolo contendere*?
- (2) Is there a factual basis for the plea?
- (3) Does the defendant understand that he or she has the right to trial by jury?
- (4) Does the defendant understand that he or she is presumed innocent until 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 that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?
- (7) Does the defendant understand that the Commonwealth has a right to have a jury decide the degree of guilt if the defendant pleads guilty to murder generally?

Id. cmt. Inquiry into these fundamental questions is mandatory. See *Commonwealth v. Persinger*, 615 A.2d 1305, 1307 (Pa. 1992) (noting that inquiry into these minimum requirements is mandatory and that failure to make these inquiries will require that defendants are able to withdraw their pleas); *Cole*, 564 A.2d at 206 ("The entry of a guilty plea is a protracted and comprehensive proceeding wherein the court is obliged to make a specific determination after extensive colloquy on the record that a plea is voluntarily and understandingly tendered.").

crimes.”⁶ In Pennsylvania, this bare assertion of innocence would suffice to allow a defendant to withdraw a guilty plea and proceed to trial, unless there is a clear showing that withdrawal would prejudice the prosecution.⁷

In order to prove it would be prejudiced by a defendant's withdrawal, the prosecution must affirmatively show that an event occurring after the defendant's plea has made it significantly more difficult to prove its case.⁸ Such freely allowed plea withdrawals often force victims, like the one in the above scenario, to take the stand and testify at trial, eradicating the potential closure they attempted to reach when originally approving the defendant's plea deal.⁹

6. See, e.g., *Commonwealth v. Randolph*, 718 A.2d 1242, 1242–43 (Pa. 1998) (noting that defendant sought to withdraw his guilty plea on day scheduled for sentencing and asserted he was not guilty of crimes he admitted to in his plea); *Commonwealth v. Unangst*, 71 A.3d 1017, 1019 (Pa. Super. Ct. 2013) (noting that defendant sought to withdraw two separate guilty pleas by merely stating in his withdrawal motion: “[d]efendant asserts his innocence in all matters and desires to proceed to trial”); *Katonka*, 33 A.3d at 45 (observing that defendant sought to withdraw his guilty plea over four months after initially entering it and subsequently asserted his innocence at hearing held on that motion).

7. See, e.g., *Randolph*, 718 A.2d at 1244–45 (holding that defendant's initial assertion that he was not guilty was sufficient to allow him to withdraw his plea, despite his subsequent admissions that he was not innocent of every crime charged); *Katonka*, 33 A.3d at 50 (holding that defendant's two clear assertions of innocence were sufficient to require trial judge to have allowed him to withdraw his plea before sentencing). For a further discussion of Pennsylvania's modern day plea withdrawal jurisprudence, see *infra* notes 85–95 and accompanying text.

8. See *Commonwealth v. Gordy*, 73 A.3d 620, 624 (Pa. Super. Ct. 2013) (declaring that proving prejudice relates to Commonwealth's ability to try its case, rather than inconvenience to complainants); *Commonwealth v. Kirsch*, 930 A.2d 1282, 1286 (Pa. Super. Ct. 2007) (noting that prejudice requires prosecution to show its ability to prove its case would be weakened if defendant were able to withdraw guilty plea); *Cole*, 564 A.2d at 205–06 (holding that Commonwealth would clearly be prejudiced by defendant's plea withdrawal where defendant waited to plead guilty until after Commonwealth had transported star witness from Georgia, then moved to withdraw his plea once said witness had returned to Georgia); *Commonwealth v. Ammon*, 418 A.2d 744, 748 (Pa. Super. Ct. 1980) (finding prosecution had proven that withdrawal would cause substantial prejudice where ten-year-old sexual assault victim had already testified and had provided defendant with preview of Commonwealth's case). The Superior Court in *Kirsch* further elaborated on the prejudice prong as follows:

[I]t would seem that prejudice would require a showing that due to events occurring after the plea was entered, the Commonwealth is placed in a worse position than it would have been had trial taken place as scheduled. This follows from the fact that the consequence of granting the motion is to put the parties back in the pre-trial stage of proceedings. This further follows from the logical proposition that prejudice cannot be equated with the Commonwealth being made to do something it was already obligated to do prior to the entry of the plea.

Kirsch, 930 A.2d at 1286 (footnote omitted).

9. See *Gordy*, 73 A.3d at 627 (rejecting trial court's suggestion that complainant sexual abuse victims may be unwilling to testify if case were sent back for trial, stating it was unsupported by record); *Kirsch*, 930 A.2d at 1287 (noting that even if victims are reluctant to testify on remand, such reluctance would have affected prosecution had matter gone to trial in first place).

The vast majority of criminal convictions in the United States result from guilty pleas.¹⁰ The United States Supreme Court has highlighted key advantages of guilty pleas to both defendants and prosecutors alike.¹¹ Pleading guilty can have tangible benefits for criminal defendants who believe they have a slim chance of acquittal; specifically, guilty pleas generally result in more lenient sentences.¹² The principal utility of guilty pleas from the state's perspective is in securing the efficient administration of criminal justice.¹³ Some courts and commentators have even suggested that the criminal justice system would collapse under the weight of its unmanageable caseload without guilty pleas and plea bargaining.¹⁴ How-

10. See Sean Rosenmerkel, Matthew Durose & Donald Farole, Jr., *Felony Sentences in State Courts, 2006—Statistical Tables*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. 25 tbl. 4.1 (2010), available at <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf> (noting that 94% of state court felony convictions in 2006 resulted from guilty pleas). The percentage of convictions resulting from guilty pleas was higher in drug (96%) and property (95%) offenses than in violent offenses (90%). See *id.*

11. See *Brady v. United States*, 397 U.S. 742, 752 (1970) (“For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.”). The United States Supreme Court has described the advantages that guilty pleas provide to the prosecution as well:

[T]he more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, *scarce judicial and prosecutorial resources* are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Id. (emphasis added). The Supreme Court goes on to suggest that this “mutuality of advantage” may indeed explain the large proportion of cases that are resolved through guilty pleas. See *id.*

12. See Rosenmerkel et al., *supra* note 10, at 24 (“Prison sentences imposed in state courts were longer for felons convicted in a trial (8 years and 4 months) than for felons who pleaded guilty (3 years and 11 months) in 2006.” (citation omitted)). Furthermore, “[a]mong persons convicted of murder or non-negligent manslaughter, sentences to life in prison or death occurred more often in trial convictions (47%) than in guilty pleas (13%) in 2006.” *Id.* (citation omitted).

13. See *Santobello v. New York*, 404 U.S. 257, 261 (1971) (asserting that plea discussions are desirable largely for their ability to facilitate “prompt and largely final disposition of most criminal cases”); *Brady*, 397 U.S. at 752 (noting that guilty pleas dispose of cases more quickly and help preserve scarce local government resources); Weaver, *supra* note 4, at 273 (noting that principal purpose of plea bargaining is efficiency in adjudicating criminal cases).

14. See *Santobello*, 404 U.S. at 260 (“If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”); Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645, 651 (2011) (asserting that United States Supreme Court's decision in *Brady*, which held that it is permissible for criminal defendants to plead guilty in exchange for the probability of lesser punishments, was “likely necessitated by the reality that the criminal justice system would collapse if plea bargaining was invalidated”); *The Prosecutor's Duty to Disclose*, *supra* note 3, at 1019 (“[P]lea bargaining is the primary means by which our system reaches ver-

ever, in deciding whether to waive their constitutional right to trial, defendants are faced with an extremely difficult choice in whether or not to plead guilty.¹⁵ The pressure to do so is often further increased by counsel that zealously advise their clients to plead guilty.¹⁶

When defendants seek to withdraw their guilty pleas, they often offer a plethora of explanations, including that their attorneys pressured them to plead guilty, that they did not understand the significance of their pleas, or simply that they are innocent.¹⁷ In adjudicating such plea withdrawal motions, two competing interests collide: a defendant's fundamental right to trial and the state's interest in the efficient administration of justice.¹⁸ While important constitutional rights are at stake, the gravity of

dicts Defendants who agree to sacrifice their right to a trial help keep the criminal justice system from collapsing under the weight of its caseload.”)

15. See *Brady*, 397 U.S. at 756 (stating that defendants' assessments of prosecution's case against them often present “imponderable questions for which there are no certain answers”); *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975) (“A guilty plea is very typically entered for the simple tactical reason that the jury is unlikely to credit the defendant's theory or story. . . . A guilty plea frequently involves the making of difficult judgments.” (internal citations and quotations omitted)); *People v. Breslin*, 140 Cal. Rptr. 3d 906, 912 (Cal. Ct. App. 2012) (“All decisions to plead guilty are heavily influenced by difficult questions as to the strength of the prosecution's case and the likelihood of securing leniency.”).

16. See, e.g., *United States v. Adam*, 296 F.3d 327, 330 (5th Cir. 2002) (observing that defendant attempting to withdraw his plea asserted that his defense counsel pressured him into pleading guilty); *Commonwealth v. Randolph*, 718 A.2d 1242, 1243 (Pa. 1998) (recounting that appellant later stated he only pleaded guilty to follow advice of his counsel); *Commonwealth v. Forbes*, 299 A.2d 268, 270 (Pa. 1973) (acknowledging that defense counsel threatened to withdraw from representing defendant if he attempted to withdraw his guilty plea); *Commonwealth v. Moseley*, 423 A.2d 427, 428 (Pa. Super. Ct. 1980) (indicating that defendant asserted that his defense counsel coerced him into entering guilty plea).

17. See, e.g., *State v. Munroe*, 45 A.3d 348, 351 (N.J. 2012) (observing that defendant admitted guilt, but later attempted to withdraw his guilty plea, stating that while he killed victim, he acted in self-defense); *Commonwealth v. Katonka*, 33 A.3d 44, 46 (Pa. Super. Ct. 2011) (en banc) (observing that defendant originally stated in his withdrawal motion that he did not fully understand his guilty plea, and later asserted his innocence); *Commonwealth v. Cole*, 564 A.2d 203, 203 (Pa. Super. Ct. 1989) (en banc) (noting that defendant sought to withdraw his plea by stating he was innocent and that his plea was not voluntarily tendered). For a further discussion of cases where defendants seeking to withdraw their guilty pleas asserted that their defense counsel pressured them into making their pleas, see *supra* note 16 and accompanying text.

18. Compare *Commonwealth v. Gordy*, 73 A.3d 620, 628 (Pa. Super. Ct. 2013) (emphasizing, in context of pre-sentence guilty plea withdrawal motions, right to trial as one of “the most fundamental and obvious constitutional protections that all courts must join in protecting”), with *Commonwealth v. Turiano*, 601 A.2d 846, 852 (Pa. Super. Ct. 1992) (discussing how squandering of judicial resources was inherent in any rule that liberally allows guilty plea withdrawals before sentencing), and *Weaver*, *supra* note 4, at 273 (“Because of the overwhelming number of criminal cases processed through plea bargaining, courts are unquestionably reluctant to permit defendants to withdraw from their plea agreements once approved by the court.”); see also *State v. Slater*, 966 A.2d 461, 467 (N.J. 2009) (describing competing interests of finality of pleas for both state and victims versus basic rights and protections for criminal defendants). The *Slater* court expressly acknowledged

a guilty plea would be significantly diminished if such pleas could be withdrawn as an automatic right.¹⁹

The American Bar Association has codified and continually updated model standards to guide states in handling requests to withdraw guilty pleas.²⁰ Under these standards, when defendants seek to withdraw their pleas after sentencing, they must prove that a manifest injustice would occur if they were not permitted to do so.²¹ However, these standards state that if the defendant's withdrawal request is made before sentencing, withdrawal should be permitted for "any fair and just reason."²² The drafters noted that there is wide variation concerning how a fair and just reason is determined among different state and federal jurisdictions.²³

In 1964, based on the prevailing ABA Standards, Pennsylvania adopted Rule of Criminal Procedure 320, which sought to indicate when

the difficult dilemma posed by such plea withdrawal requests, noting that "a defendant's application to retract a plea must be considered in light of the competing interests of the State and the defendant." *Id.*

19. See *United States v. Buckles*, 843 F.2d 469, 472–73 (11th Cir. 1988) ("Guilty pleas would be of little value to the judicial system if a defendant's later conclusory assertion of innocence automatically negated his plea."); *Slater*, 966 A.2d at 471 ("If a defendant represented by counsel were permitted to withdraw a guilty plea which he voluntarily and knowingly entered . . . the efficient and orderly administration of justice would be impeded. Criminal calendars would become increasingly congested and the State's efforts to effectively prosecute lawbreakers would be seriously hampered by the delays." (quoting *State v. Herman*, 219 A.2d 413, 416 (N.J. 1966))); *Weaver*, *supra* note 4, at 273 ("For if such agreements are readily open to second-guessing by defendants, the purpose of plea bargaining—the efficient adjudication of criminal cases—would be severely undermined.").

20. See generally ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY (3d ed. 1999), available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.authcheckdam.pdf (providing general black letter standards for guilty pleas and updating previous editions).

21. See *id.* § 14-2.1(b), at 81 ("After a defendant has been sentenced pursuant to a plea of guilty or nolo contendere, the court should allow the defendant to withdraw the plea whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice."). Examples of a manifest injustice include: ineffective assistance of counsel, a plea not authorized by the defendant or someone representing him, a plea that was involuntary or entered without knowledge of the potential resulting sentence, or if the defendant did not receive the concessions promised by the prosecution as part of a plea agreement. See *id.*

22. See *id.* § 14-2.1(a) ("After entry of a plea of guilty or nolo contendere and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason.") Furthermore, "[i]n determining whether a fair and just reason exists, the court should also weigh any prejudice to the prosecution caused by reliance on the defendant's plea." *Id.*

23. See *id.* cmt., at 85–89 (discussing multitude of factors taken into consideration by trial judges in adjudicating motions to withdraw guilty pleas before sentencing, ultimately noting that many states place final decisions within sound discretion of trial judges).

guilty pleas may be withdrawn.²⁴ In 1973, the Pennsylvania Supreme Court addressed what constitutes a fair and just reason for plea withdrawal in *Commonwealth v. Forbes*,²⁵ which is now considered Pennsylvania's seminal decision concerning pre-sentence guilty plea withdrawal motions.²⁶ Under the standard for plea withdrawals developed in *Forbes* and later extended by the Pennsylvania Supreme Court in *Commonwealth v. Randolph*,²⁷ criminal defendants do not need to offer an explanation or pertinent facts to support their plea withdrawal motions, but rather a bare assertion of innocence suffices to provide the requisite fair and just reason.²⁸ Therefore, unless the prosecution can prove it would be prejudiced by a defendant's plea withdrawal, defendants may withdraw their guilty pleas before sentencing by merely stating they are innocent, despite expressly contradicting their original plea taken under oath.²⁹ However, while many state and federal jurisdictions follow either an identical rule of criminal procedure or some similar variation, the majority of these jurisdictions put the burden on defendants to provide either a plausible explanation of inno-

24. See PA. R. CRIM. P. 591(A) ("At any time before the imposition of sentence, the court may, in its discretion, permit, upon motion of the defendant, or direct, *sua sponte*, the withdrawal of a plea of guilty or *nolo contendere* and the substitution of a plea of not guilty."); *Commonwealth v. Forbes*, 299 A.2d 268, 271 (Pa. 1973) (indicating that Pennsylvania's Rule of Criminal Procedure was in complete harmony with prevailing ABA Standards at that time).

25. 299 A.2d 268 (Pa. 1973).

26. See, e.g., *Commonwealth v. Randolph*, 718 A.2d 1242, 1243 (Pa. 1998) (recognizing *Forbes* as Pennsylvania Supreme Court's seminal decision on pre-sentence guilty plea withdrawal motions); *Commonwealth v. Katonka*, 33 A.3d 44, 46 (Pa. Super. Ct. 2011) (en banc) (same); *Commonwealth v. Kirsch*, 930 A.2d 1282, 1285 (Pa. Super. Ct. 2007) (same).

27. 718 A.2d 1242 (Pa. 1998).

28. See *id.* at 1244–45 (holding that defendant's testimony at withdrawal hearing that he was "not guilty" provided fair and just reason for withdrawal, despite later making other contradictory statements); *Commonwealth v. Gordy*, 73 A.3d 620, 629 (Pa. Super. Ct. 2013) ("Nevertheless, an assertion of innocence, even though it conflicts with a plea-hearing admission of guilt, can be raised in a motion to withdraw a guilty plea and will normally serve as a fair and just reason for pre-sentence plea withdrawal."); *Commonwealth v. Unangst*, 71 A.3d 1017, 1023 (Pa. Super. Ct. 2013) ("It is settled law that a simple assertion of innocence, standing alone, is considered a fair and just reason to withdraw [a defendant's] plea prior to sentencing." (alteration in original) (internal quotation marks omitted)); *Commonwealth v. Pardo*, 35 A.3d 1222, 1229–30 (Pa. Super. Ct. 2011) (acknowledging "the well-established principle that the mere articulation of innocence is a 'fair and just' reason for withdrawal of a guilty plea."); *Katonka*, 33 A.3d at 49 (holding that defendant's two assertions of innocence, despite coming after prompting from prosecutor, sufficiently provided fair and just reason for plea withdrawal); *Kirsch*, 930 A.2d at 1285 (holding that defendant need not make "bold assertion of innocence," but rather any assertion of innocence will suffice).

29. See *Gordy*, 73 A.3d at 624 (noting that proving prejudice focuses on Commonwealth's ability to try its case, rather than on inconvenience to complainants); *Kirsch*, 930 A.2d at 1286 (noting that prejudice requires prosecution to affirmatively prove its ability to establish its case would be weakened if defendant were able to withdraw guilty plea).

cence or facts indicating why they should be allowed to withdraw their pleas, rather than merely accepting a bare assertion of innocence.³⁰

This Note argues that the *Forbes* rule minimizes the significance of a guilty plea in Pennsylvania and recommends that the Commonwealth adopt an alternative approach that requires a showing of facts or explanation for the withdrawal of a guilty plea.³¹ Part II traces the controversial development of Pennsylvania's jurisprudence on allowing guilty plea withdrawals before sentencing, with a particular focus on case law following the *Forbes* decision.³² Part III describes recent decisions in the Pennsylvania Superior Court (Superior Court) and the current state of Pennsylvania law on guilty plea withdrawals.³³ Part IV examines the jurisprudence of neighboring jurisdictions, both at a micro- and macro-level, in order to illustrate alternative methods of handling pre-sentence requests to withdraw guilty pleas.³⁴ Part V argues that the *Forbes* rule can no longer be justified by its original policy rationale and results in the wasting of scarce judicial resources.³⁵ Part VI concludes by suggesting an alternative framework for handling pre-sentence requests to withdraw guilty pleas that more appropriately balances the competing interests.³⁶

II. THE TURBULENT DEVELOPMENT OF GUILTY PLEA WITHDRAWAL JURISPRUDENCE IN PENNSYLVANIA SINCE *COMMONWEALTH V. FORBES*

Although Pennsylvania's current jurisprudence clearly dictates that, under *Forbes*, a pre-sentence assertion of innocence provides a sufficient

30. For an extended comparison of Pennsylvania's pre-sentence guilty plea withdrawal jurisprudence with that of other jurisdictions, see *infra* notes 85–138 and accompanying text.

31. For a further discussion of how the *Forbes* rule reduces the significance of guilty pleas in Pennsylvania and results in the wasting of scarce judicial resources, see *infra* notes 139–59 and accompanying text. For a further discussion of a suggested alternative analytical framework for pre-sentence plea withdrawal motions, see *infra* notes 160–70 and accompanying text.

32. For a further discussion of the facts, holding, and rationale of *Forbes*, see *infra* notes 41–57 and accompanying text. For a further discussion of the development of Pennsylvania's jurisprudence on pre-sentence guilty plea withdrawals after *Forbes*, see *infra* notes 58–95 and accompanying text.

33. For a further discussion of the current state of Pennsylvania law regarding the allowance of guilty plea withdrawals before sentencing, see *infra* notes 85–95 and accompanying text.

34. For a further discussion of the various approaches used by courts in other jurisdictions for adjudicating pre-sentence guilty plea withdrawal motions, see *infra* notes 96–138 and accompanying text.

35. For a further discussion of why the *Forbes* rule can no longer be justified by its original policy rationale and results in the wasting of scarce judicial and prosecutorial resources, see *infra* notes 139–59 and accompanying text.

36. For a further discussion of a suggested alternative framework for handling pre-sentence requests to withdraw guilty pleas, see *infra* notes 160–70 and accompanying text.

reason for plea withdrawal, the law has not always been this clear.³⁷ In *Forbes*, the Pennsylvania Supreme Court quickly adjudicated the facts at issue and allowed the defendant to withdraw his plea; however, subsequent court decisions interpreted *Forbes* as providing a blanket rule, matching Pennsylvania's current jurisprudence.³⁸ Yet during the late 1980s and 1990s, the Superior Court regularly evaded the dictates of the *Forbes* rule and openly criticized it, going as far as expressly urging that it be overruled.³⁹ However in *Randolph*, the Pennsylvania Supreme Court not only reaffirmed that *Forbes* does create a blanket rule allowing for pre-sentence plea withdrawals upon an assertion of innocence, but also vehemently criticized the Superior Court for failing to follow precedent, and in doing so set the stage for Pennsylvania's current plea withdrawal jurisprudence.⁴⁰

A. *Forbes: A Relatively Straightforward Case Creates Lasting Precedent*

The Pennsylvania Supreme Court's decision in *Forbes* laid the groundwork for the state's current jurisprudence allowing guilty pleas to be liberally withdrawn before sentencing.⁴¹ It has become a point of contention whether the Pennsylvania Supreme Court actually intended to create such a broad rule from its *Forbes* ruling.⁴² Still, the *Forbes* decision has had a lasting impact on Pennsylvania's jurisprudence regarding guilty plea with-

37. For a further discussion of Pennsylvania's modern plea withdrawal jurisprudence, which mandates that pre-sentence assertions of innocence qualify as a fair and just reason for plea withdrawal, see *infra* notes 85–95 and accompanying text. For a further discussion of the controversial development and inconsistent application of the *Forbes* rule culminating in the Pennsylvania Supreme Court's decision in *Randolph*, see *infra* notes 41–84 and accompanying text.

38. For a further discussion of the facts, holding, and rationale of *Forbes*, see *infra* notes 41–57 and accompanying text. For a further discussion of subsequent interpretations of *Forbes* suggesting that it created a blanket rule requiring that pleas be allowed to be withdrawn upon a defendant's pre-sentence assertion of innocence, see *infra* notes 58–60 and accompanying text.

39. For a further discussion of the Superior Court's explicit criticism of the *Forbes* rule and reluctance to follow it during the 1980s and 1990s, see *infra* notes 61–70 and accompanying text.

40. For a further discussion of the facts, holding, and rationale of *Randolph*, see *infra* notes 71–84 and accompanying text.

41. See generally *Commonwealth v. Forbes*, 299 A.2d 268 (Pa. 1973) (holding that defendant's assertion of innocence early in proceedings provided fair and just reason to allow withdrawal of his guilty plea).

42. See *Commonwealth v. Cole*, 564 A.2d 203, 207–08 (Pa. Super. Ct. 1989) (McEwen, J., concurring) (opining that *Forbes* did not create blanket rule that assertions of innocence always provide fair and just reason for plea withdrawal, but rather that *Forbes* court adjudicated facts of particular case where defendant's assertion was made very soon after his plea); see also *id.* at 208 (Kelly, J., concurring) (agreeing with Judge McEwen that *Forbes* did not mandate that all pleas be able to be withdrawn upon bare assertions of innocence).

drawals, and has separated Pennsylvania's approach from a majority of neighboring state and federal courts.⁴³

In *Forbes*, the defendant Robert Forbes pleaded guilty to numerous crimes in connection with the 1969 death of a woman in Philadelphia.⁴⁴ The trial court conducted an on the record guilty plea colloquy, after which it expressed satisfaction that the defendant's pleas were "voluntarily and understandingly made."⁴⁵ Roughly two months after his original plea, Forbes sought to withdraw his plea, stating: "I don't want to plead guilty to nothing I didn't do."⁴⁶ At a subsequent hearing, held approximately two months later, defendant Forbes abandoned his request to withdraw his plea.⁴⁷ It later came to light that his defense counsel threatened to withdraw from the case if he were to proceed with his plea withdrawal motion.⁴⁸ Nevertheless, the trial court proceeded with Forbes's original plea and sentenced him to life imprisonment.⁴⁹ On appeal, Forbes argued that the trial court erred in failing to grant his original plea withdrawal request made before sentencing.⁵⁰

After holding that counsel's threat to withdraw rendered Forbes's abandonment of his plea withdrawal request involuntary, the Pennsylvania Supreme Court then turned to the issue of pre-sentence guilty plea withdrawals generally.⁵¹ The court began its analysis by noting that although

43. For a further discussion of subsequent cases built on the foundation of precedent started in *Forbes* and expanding upon its holding, see *infra* notes 71–95 and accompanying text. For a further discussion on how the *Forbes* rule differentiates Pennsylvania's guilty plea withdrawal jurisprudence from that of other jurisdictions, see *infra* notes 85–138 and accompanying text.

44. See *Forbes*, 299 A.2d at 269 (noting that defendant pleaded guilty to murder, burglary, aggravated burglary, larceny, receiving stolen goods, and conspiracy).

45. See *id.* (discussing trial court's compliance with Pennsylvania Rule of Criminal Procedure 319(a), which requires that on record colloquies are conducted before admitting guilty pleas of defendants). It should be noted that Pennsylvania Rule of Criminal Procedure 319(a) has been renumbered as Pennsylvania Rule of Criminal Procedure 590. See PA. R. CRIM. P. 590.

46. See *Forbes*, 299 A.2d at 269 (noting that Forbes's indications of his desire to withdraw his plea came after three judges were empaneled to handle case). After defendant Forbes expressed his desire to withdraw his plea, the court continued the matter until a hearing could be held on his request. See *id.*

47. See *id.* at 269–70 (noting that trial court panel then scheduled degree of guilt hearing for one week later).

48. See *id.* at 270 (concluding, after testimony during degree of guilt hearing, that defendant only abandoned his plea because of defense counsel's threat to withdraw from case).

49. See *id.* (noting that defendant's sentence was for first degree murder charge and that his sentence was suspended for all other charges).

50. See *id.* (arguing that defendant's efforts to withdraw his guilty plea were obstructed by his counsel's threat to withdraw).

51. See *id.* ("These circumstances rendered involuntary appellant's decision to abandon his withdrawal request and continue with his original guilty plea. What plea to enter is a decision which must be made voluntarily and intelligently, [b]y the accused."). Additionally, the court emphasized that appellant was only sixteen years old and appeared confused throughout the proceeding. See *id.* at 271.

there is no absolute right to withdraw a guilty plea, requests made before sentencing should be liberally allowed.⁵² The court then laid out the framework for handling guilty plea withdrawal requests as follows:

Thus, in determining whether to grant a pre-sentence motion for withdrawal of a guilty plea, 'the test to be applied by the trial courts is fairness and justice.' If the trial court finds 'any fair and just reason', withdrawal of the plea before sentence should be freely permitted, unless the prosecution has been 'substantially prejudiced.'⁵³

The court did not elaborate further on what constitutes a fair and just reason, but it noted that the "efficient administration of criminal justice" was an important policy rationale supporting the liberal allowance of plea withdrawals.⁵⁴

After laying out this general framework, the court quickly decided—with seemingly little difficulty and limited factual analysis—that the trial court should have allowed Forbes to withdraw his guilty plea.⁵⁵ The ease with which the Pennsylvania Supreme Court came to a decision on these particular facts is perhaps most clearly exhibited by its statement: "Obviously, appellant, by this assertion of innocence—so early in the proceedings—offered a 'fair and just' reason for withdrawal of his plea."⁵⁶ Notably, the court did not proffer a blanket rule that any assertion of innocence provides a per se fair and just reason for plea withdrawal; rather, it quickly adjudicated these unique facts where fairness required that Forbes be able to withdraw his plea.⁵⁷

52. *See id.* (emphasizing that defendant Forbes requested to withdraw his plea well before sentencing was set to occur). While the court's statement that plea withdrawals should be liberally allowed before sentencing essentially restated the corresponding Pennsylvania Rule of Criminal Procedure, it cited several Third Circuit cases and the American Bar Association's Project on Minimum Standards for Criminal Justice. *See id.* at 271 (citing *United States ex rel. Culbreath v. Fundle*, 466 F.2d 730 (3d Cir. 1972); *United States v. Young*, 424 F.2d 1276 (3d Cir. 1970); *United States v. Stayton*, 408 F.2d 559 (3d Cir. 1969); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 2.1(b) (Approved Draft, 1968)).

53. *Id.* (citation omitted) (noting that this view is in "complete harmony" with prevailing ABA Minimum Standards for Criminal Justice).

54. *See id.* (quoting *United States v. Young*, 424 F.2d 1276, 1279 (3d Cir. 1970)) (explaining that liberal withdrawal rule reduces number of appeals that claim pleas were not knowingly and voluntarily made, avoids difficulties of handling such claims, and ensures defendants are not denied their right to trial unless they clearly waive it).

55. *See id.* at 272 ("Applying these standards to the facts presented, it must be concluded that the trial court should have allowed withdrawal of appellant's guilty plea. Appellant stated, as his reason for the request . . . prior to adjudication and sentence, 'I don't want to plead guilty to nothing I didn't do.'").

56. *Id.* (stating in addition that record revealed no indication that prosecution would be prejudiced by withdrawal of Forbes's plea).

57. *See Commonwealth v. Cole*, 564 A.2d 203, 207–08 (Pa. Super. Ct. 1989) (en banc) (McEwen, J., concurring) ("It has long been my position that the Su-

However, subsequent decisions from the Pennsylvania Supreme Court fueled the notion that a pre-sentence assertion of innocence always constitutes a fair and just reason for plea withdrawal under *Forbes*.⁵⁸ The Superior Court, however, provided the first express statement that an assertion of innocence before sentencing constitutes a per se fair and just reason for plea withdrawal.⁵⁹ Likewise, in the early 1980s, the Superior Court continued to recognize that *Forbes* mandated that any assertion of innocence must be considered a per se fair and just reason to allow a guilty plea to be withdrawn.⁶⁰

B. *The Superior Court Fights Back: Ongoing Criticism and Movement Away from the Forbes Rule*

In the 1980s and 1990s, the continued validity of the *Forbes* rule became unclear because the Superior Court strongly criticized its rationale and displayed reluctance to follow precedent.⁶¹ Generally, the Superior Court often looked for any distinguishing factor it could find to avoid applying the *Forbes* rule and having to allow defendants to withdraw their pleas.⁶² Some Superior Court judges argued that *Forbes* did not actually

preme Court in [*Forbes*] . . . did not proclaim as a principle, applicable to *all* such presentence motions, that the assertion of innocence is *per se* a 'fair and just' reason to permit withdrawal of a guilty plea.”).

58. *See* Commonwealth v. Santos, 301 A.2d 829, 831 (Pa. 1973) (stating generally that any trial court abuses its discretion by not allowing guilty pleas to be freely withdrawn before sentencing unless prejudice would inure to prosecution); Commonwealth v. Woods, 307 A.2d 880, 881–82 (Pa. 1973) (holding that appellant's pre-sentence assertion of innocence, though four months after pleading guilty, obviously provided fair and just reason for withdrawal of his plea). *But see* Woods, 307 A.2d at 883 (Pomeroy, J., dissenting) (“If we mean that ‘any fair and just reason’ will support a withdrawal (provided no substantial prejudice to the Commonwealth), that must mean something other than a complete retraction of everything the defendant had previously stated under oath in response to meticulous questioning.”).

59. *See* Commonwealth v. Boofer, 375 A.2d 173, 174 (Pa. Super. Ct. 1977) (“An assertion of innocence is a ‘fair and just reason’ for permitting withdrawal of a guilty plea. Under these circumstances, the lower court’s denial of the request for withdrawal was an abuse of discretion.” (citations omitted)).

60. *See* Commonwealth v. Kay, 478 A.2d 1366, 1368 (Pa. Super. Ct. 1984) (noting that while appellant never asserted his innocence, it would have constituted fair and just reason for withdrawal if he did so); Commonwealth v. Carelli, 454 A.2d 1020, 1026 n.14 (Pa. Super. Ct. 1982) (noting that any assertion of innocence has been found by Superior Court to be fair and just reason for plea withdrawal); Commonwealth v. Whittall, 450 A.2d 669, 673 (Pa. Super. Ct. 1982) (recognizing generally that assertions of innocence before sentencing constitute requisite fair and just reason for plea withdrawal).

61. For a further discussion of the Superior Court’s heavy criticism and reluctance to follow the *Forbes* rule throughout the 1980s and 1990s, see *infra* notes 62–70 and accompanying text.

62. *See, e.g.*, Commonwealth v. Turiano, 601 A.2d 846, 853 (Pa. Super. Ct. 1992) (“The Siren song of the *Forbes* standard lures criminal defense attorneys into the false hope that the guilty plea colloquy does not for all practical purposes finalize the proceedings, only to dash these hopes on the rocks of our reluctance to

mandate that all assertions of innocence be considered a per se fair and just reason for withdrawal, but instead posited that *Forbes* left room for trial judges to weigh the totality of the circumstances and determine if a defendant's assertion of innocence was credible.⁶³ Other panels of the Superior Court bemoaned the fact that the *Forbes* rule diminished the gravity of the guilty plea colloquy, which was supposed to be a solemn admission of guilt.⁶⁴

The Superior Court made its disdain for the *Forbes* rule well-known and specifically argued that the increased extensiveness of the guilty plea colloquy better served the original policy goal of the *Forbes* rule—the efficient administration of criminal justice.⁶⁵ A common complaint proffered by the Superior Court was that the *Forbes* rule opened the door to gamesmanship and allowed defendants to make a mockery of their guilty plea colloquy.⁶⁶ Some Superior Court panels argued that the “manifest injustice” standard should be applied to pre-sentence withdrawal requests—the same heightened standard applied to such requests made after sentencing.⁶⁷ Other judges advocated for an approach that would have given trial

follow it.”); *Cole*, 564 A.2d at 206 (“Under the circumstances of this case, the bald assertion of innocence appearing in appellant’s petition did not constitute a fair and just reason for allowing appellant to withdraw his plea of guilty.”).

63. See *Cole*, 564 A.2d at 208 (McEwen, J., concurring) (“The Supreme Court, in either of these decisions, could well have stated—but did not—that the assertion of innocence by itself offered a ‘fair and just’ reason for withdrawal.”); *id.* (Kelly, J., concurring) (“I believe that it is for the trial court to determine whether a post-guilty plea claim of innocence and the explanation for the inconsistent plea (or any other purported ‘just cause’ to withdraw a plea) are credible and genuine.”).

64. See *Turiano*, 601 A.2d at 854 (“We should also recognize that the *Forbes* standard, if anything, emasculates the significance of a guilty plea colloquy and encourages defendants dissatisfied with their plea to contradict their confession of guilt sworn to under oath.”); *Cole*, 564 A.2d at 206 (positing that allowing defendants to withdraw guilty pleas upon bald assertions of innocence would allow them to “make a mockery of the guilty plea hearing process”).

65. See *Commonwealth v. Rish*, 606 A.2d 946, 948 n.6 (Pa. Super. Ct. 1992) (“The developments in the guilty plea colloquy have successfully fulfilled the policy concerns underlying *Forbes*.”); *Turiano*, 601 A.2d at 852 (“We submit that, given the developments in the thoroughness of the guilty plea colloquy, the efficient administration of justice is no longer served by the *Forbes* standard.”); *Cole*, 563 A.2d at 206 (emphasizing that many safeguards already exist to ensure guilty pleas are voluntarily and knowingly made, thus defendants should not be able to merely recant their admissions of guilt made during extensive guilty plea colloquies).

66. See *Commonwealth v. Miller*, 639 A.2d 815, 819 (Pa. Super. Ct. 1994) (noting that facts suggested defendant’s plea withdrawal efforts were attempting to play “fast and loose” with guilty plea process); *Commonwealth v. Iseley*, 615 A.2d 408, 414 (Pa. Super. Ct. 1992) (“Appellant’s assertion of innocence at this late stage smacks of little other than a self-serving attempt to improperly manipulate the system, and provides perhaps an apotheosis to illustrate the reason for rejecting a rule which allows withdrawal under such circumstances.”); *Cole*, 563 A.2d at 206 (noting that allowing defendant to withdraw his plea would have allowed him to make mockery of guilty plea process).

67. See *Turiano*, 601 A.2d at 854 (recommending that all attempts to withdraw properly entered guilty pleas be adjudicated under manifest injustice standard);

courts more authority to weigh the totality of the circumstances and available evidence, and assess the credibility of a defendant's proffered reason for withdrawal.⁶⁸ Regardless, several Superior Court opinions expressly urged the Pennsylvania Supreme Court to abolish the *Forbes* rule.⁶⁹ At the time, these decisions provided rather unclear precedent for practitioners, given the Superior Court's heavy criticism of the *Forbes* rule and the Supreme Court's silence since 1973.⁷⁰

C. *How Dare You Question Our Precedent: The Pennsylvania Supreme Court Scolds the Superior Court in Commonwealth v. Randolph*

While *Forbes* is still considered the seminal case in Pennsylvania regarding pre-sentence plea withdrawals, the Pennsylvania Supreme Court's reaffirmation of *Forbes* in *Commonwealth v. Randolph* has arguably had a more important and lasting effect on plea withdrawal jurisprudence.⁷¹ The defendant in *Randolph*, after confessing to committing various burglaries, pleaded guilty in open court to multiple crimes.⁷² The court accepted Randolph's plea after an on the record colloquy and deferred

Cole, 564 A.2d at 207 n.6 (suggesting that *Forbes* rule is wrong in its focus and advocating for use of manifest injustice standard for adjudicating pre-sentence plea withdrawal motions).

68. See *Iseley*, 615 A.2d at 414 (contending that approach allowing trial judges to evaluate plea withdrawal motions in light of totality of surrounding circumstances "would more wisely serve reason, not to mention the citizenry, without intruding upon the fundamental rights of those defendants who present a valid basis for withdrawal"); *Cole*, 563 A.2d at 208 (McEwen, J., concurring) (suggesting that trial courts should "consider the totality of the circumstances reflected by the record, and that a pre-sentence assertion of innocence may compose the required 'fair and just reason' provided that the totality of circumstances reflected by the record does not establish otherwise."); *id.* (Kelly, J., Concurring) (opining that trial courts should have discretion to decide whether post plea claims of innocence or other explanations for withdrawal motions are credible).

69. See, e.g., *Rish*, 606 A.2d at 948 n.6 (noting court's agreement with colleagues who had suggested *Forbes* rule should be overturned in light of extensive guilty plea colloquies better serving rules underlying policy goals); *Turiano*, 601 A.2d at 854 ("[W]e urge that our Supreme Court reverse the standard set forth in *Forbes* and subsequent cases . . .").

70. See *Turiano*, 601 A.2d at 853 ("The *Forbes* standard, as perhaps this case indicates, is a trap for lawyers not thoroughly acquainted with our reluctance to adhere to it."); *Cole*, 563 A.2d at 206 (defying *Forbes* rule and holding that under specific circumstances of case at hand, bald assertion of innocence would not suffice to provide requisite fair and just reason for plea withdrawal).

71. For a further discussion of the facts, holding, and rationale of *Randolph*, see *infra* notes 72–84 and accompanying text. For a further discussion of the lasting impact of *Randolph* on subsequent Pennsylvania Superior Court jurisprudence, see *infra* notes 85–95 and accompanying text.

72. See *Commonwealth v. Randolph*, 718 A.2d 1242, 1242 (Pa. 1998) (noting specifically that defendant pleaded guilty to thirteen counts of burglary, one count of aggravated assault, and one count of carrying firearms without license).

sentencing to a later date.⁷³ On the day scheduled for sentencing, the defendant's counsel informed the court that the defendant now wished to withdraw his guilty plea.⁷⁴

After the trial court questioned Randolph as to why he wished to withdraw his plea, he stated that he was not guilty of the crimes to which he originally pleaded guilty.⁷⁵ After questioning the defendant, the trial court decided to deny his motion to withdraw his guilty plea, and proceeded to sentence him to twenty-one to forty-two years of incarceration.⁷⁶ During a subsequent hearing held to supplement the record for appeal, Randolph indicated that the major reason he pleaded guilty was because of the advice of his counsel.⁷⁷ At this hearing, the defendant admitted that he was not innocent of all the burglary charges, but out of the thirteen burglary charges, he had only committed four or five of them.⁷⁸ On appeal, the Superior Court affirmed the trial court's withdrawal denial under the rationale that "appellant should not be permitted to withdraw his guilty pleas by stating 'I am not guilty of some of the crimes' when his plea is supported by an extensive colloquy where he expressly admitted guilt."⁷⁹

After discussing the *Forbes* decision in great detail, the Pennsylvania Supreme Court proceeded to address the instant circumstances.⁸⁰ The court labeled the Superior Court's rationale as "spurious," given that Randolph clearly asserted his innocence during his initial hearing in front of the trial court.⁸¹ The *Randolph* court then proceeded to expressly declare that the court had never abandoned or altered the *Forbes* rule and held

73. *See id.* (noting that trial court informed defendant that if he wanted to withdraw his plea he should do it before sentencing because his right to do so would be severely limited after sentencing).

74. *See id.* (observing that defense counsel made this motion despite noting that he did not think plea withdrawal was in defendant's best interests).

75. *See id.* at 1243 (including that defendant also claimed he gave his original confessions under duress because police were withholding medical treatment from him until he answered their questions).

76. *See id.* (detailing trial court's focus on fact that defendant was in good health when he expressly admitted his guilt in open court during original guilty plea colloquy).

77. *See id.* (specifying that defendant pinpointed representations made by his counsel in regards to potential sentences he could receive after trial).

78. *See id.* (noting that defendant only admitted his partial guilt for first time on cross examination).

79. *Id.* at 1244 (quoting *Commonwealth v. Randolph*, No. 00683 PHL 96, slip op., at 9 (Pa. Super. Ct. Sept. 16, 1996) (noting that Superior Court acknowledged that it is bound by *Forbes*, but distinguished instant circumstances on basis of defendant's partial admittance of guilt)).

80. *See id.* at 1243–44 (discussing facts and holding of *Forbes*). For a further discussion of the facts, holding, and rationale of *Forbes*, see *supra* notes 41–57 and accompanying text.

81. *See Randolph*, 718 A.2d at 1244–45 (suggesting that given liberal standard articulated in *Forbes*, defendant's partial admission of guilt should not have defeated his withdrawal request).

that Randolph should have been able to withdraw his plea after his initial request.⁸² In addition to its reaffirmation of a strict *Forbes* rule, the *Randolph* court also offered a stinging rebuke to the Superior Court for its reluctance to follow the *Forbes* rule:

Consequently, we are troubled, to say the least, by the Superior Court's cavalier disregard of the *Forbes* standard, which appears to be motivated not by the facts of this case, but instead by the Superior Court's steadfast disagreement with this Court's rationale set forth therein. . . . [T]he Superior Court [has] noted its reluctance to follow *Forbes* and its desire to abandon the standard set forth therein based upon its belief that the standard has become obsolete. *We take this opportunity to admonish the Superior Court that it is obligated to apply and not evade our decisions.* It is a fundamental precept of our judicial system that a lower tribunal may not disregard the standards articulated by a higher court.⁸³

Superior Court jurisprudence since this stinging rebuke suggests that this harsh criticism may have had an even stronger effect on the Superior Court's subsequent jurisprudence than the reaffirmation of the *Forbes* rule itself.⁸⁴

III. THE SUPERIOR COURT LEARNS ITS LESSON: THE CURRENT STATE OF PRE-SENTENCE PLEA WITHDRAWAL JURISPRUDENCE IN PENNSYLVANIA AFTER *COMMONWEALTH V. RANDOLPH*

Since *Randolph* was decided in 1998, the Superior Court has consistently reiterated that it must follow the *Forbes* rule and in many respects has extended the *Forbes* rule even further.⁸⁵ The Superior Court has made it clear that a defendant need not make a bold assertion of innocence to qualify as a fair and just reason for withdrawal, but rather, any assertion of innocence will suffice.⁸⁶ It has also developed difficult standards to meet

82. *See id.* at 1245 (“We wish to make it clear that we do not now, nor have we ever, abandoned, altered or modified the standard articulated in *Forbes* regarding a defendant’s ability to withdraw a guilty plea prior to sentencing.”).

83. *Id.* (emphasis added) (citation omitted).

84. *See, e.g., Commonwealth v. Kirsch*, 930 A.2d 1282, 1285 (Pa. Super. Ct. 2007) (“Although it is apparently an extremely unpopular rule with prosecutors and trial courts, since *Forbes*, case law has continuously upheld an assertion of innocence as a fair and just reason for seeking the withdrawal of a guilty plea.” (citing *Commonwealth v. Randolph*, 718 A.2d 1242 (Pa. 1998))).

85. For a further discussion of recent Pennsylvania jurisprudence on pre-sentence guilty plea withdrawals and extension of the *Forbes* doctrine, see *infra* notes 86–95 and accompanying text.

86. *See Kirsch*, 930 A.2d at 1285 (holding that trial court erred by denying defendant’s motion to withdraw his plea for failing to make bold assertion of innocence); *Commonwealth v. Clinger*, 833 A.2d 792, 795 (Pa. Super. Ct. 2003) (holding that defendant’s statement that he felt he did not commit criminal conspiracy was sufficient expression of innocence to constitute fair and just reason for plea withdrawal under *Forbes*).

in order for the prosecution to prove that it would be prejudiced by a defendant's withdrawal.⁸⁷ However in *Commonwealth v. Tennison*,⁸⁸ the Superior Court appeared to once again call into doubt the central thrust of the *Forbes* rule, that any assertion of innocence constitutes a per se fair and just reason for withdrawal.⁸⁹ Although the *Tennison* decision appeared to openly circumvent the dictates of *Forbes*, the Superior Court later backtracked by stating that *Tennison* had to be limited to its unique facts.⁹⁰

The Superior Court has recently stated that trial courts are not allowed to make credibility determinations as to a defendant's assertion of innocence at the motion to withdraw stage.⁹¹ Additionally, the Superior Court recognized that while appellate review of this issue is under an abuse of discretion standard of review, such discretion is automatically abused when defendants proffer their innocence and the trial court refuses to find a fair and just reason for withdrawal.⁹² One recent decision has indicated that it is an abuse of discretion for a trial court to conclude that a defendant's withdrawal efforts are simply aimed at playing games with the system.⁹³ In another recent Superior Court decision, the court discussed the importance of the *Forbes* rule in protecting the core constitu-

87. See *Commonwealth v. Gordy*, 73 A.3d 620, 624 (Pa. Super. Ct. 2013) (stressing that prejudice prong focuses on Commonwealth's ability to try its case, not inconvenience to complainants); *Kirsch*, 930 A.2d at 1286 (holding that to show prejudice, prosecution must show that it has become more difficult to prove its case due to events subsequent to defendant's plea withdrawal request).

88. 969 A.2d 572 (Pa. Super. Ct. 2009).

89. See *id.* at 578 (holding that denial of plea withdrawal motion is proper when evidence available to trial court belies reason offered by defendant for withdrawal). *Tennison* involved a rather unique set of facts in which the defendant continually waffled back and forth between wanting to plead guilty or withdraw his plea in an effort to delay his state sentencing until after he was sentenced for a federal matter, so as to not aggravate his federal sentence. See *id.* at 577-78.

90. See *Commonwealth v. Katonka*, 33 A.3d 44, 48 (Pa. Super. Ct. 2011) (en banc) (asserting that *Tennison* court limited its holding to that case's specific, unique facts). The *Katonka* court also indicated that the trial court in the case at hand, which denied the defendant's motion to withdraw his plea, erred by relying specifically on the line of reasoning employed in *Tennison*. See *id.* at 49.

91. See *Gordy*, 73 A.3d at 629 ("[A] credibility determination as to innocence is not a proper basis for rejecting a pre-sentence request to withdraw a plea."); *Commonwealth v. Unangst*, 71 A.3d 1017, 1022 (Pa. Super. Ct. 2013) ("[T]he trial court was not permitted to make a determination regarding the sincerity of Appellant's unambiguous claims that he did not commit theft or reckless endangerment."); *Katonka*, 33 A.3d at 49 ("[T]he trial court undertook the same type of analysis condemned by the Supreme Court in *Randolph*, i.e., rendering a credibility determination as to the defendant's actual innocence.")

92. See *Commonwealth v. Pardo*, 35 A.3d 1222, 1227 (Pa. Super. Ct. 2011) ("An abuse of discretion exists when a defendant shows any 'fair and just' reason for withdrawing his plea absent 'substantial prejudice' to the Commonwealth."). The *Pardo* court proceeded to reaffirm "the well-established principle that 'the mere articulation of innocence is a fair and just reason' for withdrawal of a guilty plea." *Id.* at 1229-30.

93. See *Unangst*, 71 A.3d at 1022 ("[A]ny time a defendant moves to withdraw a guilty plea prior to sentencing, he could be accused of engaging in a dilatory tactic to avoid sentencing. Thus, if we were to permit this type of reasoning . . . we

tional right to trial—a justification that was never before raised in *Forbes* and its progeny.⁹⁴ Ultimately, *Forbes*, *Randolph*, and subsequent Superior Court cases all strongly establish that defendants in Pennsylvania may withdraw their guilty pleas as an automatic right any time before sentencing, as long as no prejudice inures to the prosecution.⁹⁵

IV. A GLANCE AT PENNSYLVANIA'S NEIGHBORS: AN ABUSE OF DISCRETION STANDARD IN BOTH NAME AND SUBSTANCE

Case law from other jurisdictions reveals that the *Forbes* rule is by far the minority approach to pre-sentence plea withdrawal requests.⁹⁶ Most states operate under a rule of criminal procedure similar to Pennsylvania's Rule 591(a), which allows withdrawal of a guilty plea for any "fair and just reason," and have likewise developed bodies of case law interpreting the rule.⁹⁷ Federal Rule of Criminal Procedure 32(d) also closely mirrors Pennsylvania's Rule 591(a).⁹⁸ Furthermore, in accordance with the prevailing ABA Standards, most courts look to whether the movant has provided a fair and just reason and whether the prosecution would be prejudiced by a defendant's plea withdrawal.⁹⁹ Despite these similarities,

would be ignoring the clear pronouncements from our Supreme Court in *Forbes* and *Randolph*.").

94. See *Gordy*, 73 A.3d at 630 (chastising trial court for displaying "a dismissive attitude toward bedrock constitutional rights").

95. For a further discussion of Pennsylvania case law indicating that defendants may withdraw their pleas before sentencing, essentially rendering such withdrawal an automatic right, see *supra* notes 41–95 and accompanying text.

96. See generally Howard G. Alperin, *Withdrawal of Plea of Guilty or Nolo Contendere, Before Sentence, Under Rule 32(d) of Federal Rules of Criminal Procedure*, 6 A.L.R. FED. 665 (1971) (compiling list of relevant state and federal cases adjudicating plea withdrawal requests occurring before sentencing).

97. See, e.g., CAL. PENAL CODE § 1018 (West 2013) ("On application of the defendant at any time before judgment . . . the court may . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice."); ME. R. CRIM. P. 32(d) ("A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed."), N.J. CT. R. 3:9-3(e) ("If at the time of sentencing the court determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel . . . the court may vacate the plea or the defendant shall be permitted to withdraw the plea.").

98. Compare FED. R. CRIM. P. 32(d) ("If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed . . . the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason."), with PA. R. CRIM. P. 591(A) ("At any time before the imposition of sentence, the court may, in its discretion, permit, upon motion of the defendant, or direct, *sua sponte*, the withdrawal of a plea of guilty or *nolo contendere* and the substitution of a plea of not guilty.").

99. See, e.g., *United States v. Jones*, 336 F.3d 245, 252 (3d Cir. 2003) (noting that under Federal Rule of Criminal Procedure 32(e), defendants must provide fair and just reason in order to withdraw any guilty plea); *Chavous v. State*, 953 A.2d 282, 285 (Del. 2008) (noting that under Delaware Superior Court Criminal Rule 32(d), defendants seeking to withdraw guilty pleas have burden of proving

most courts depart from Pennsylvania's approach in *interpreting* what constitutes such a "fair and just reason" for plea withdrawal and give trial judges more discretion to weigh the credibility of an assertion of innocence when deciding on a motion by considering the totality of the circumstances.¹⁰⁰

A. *A Macro-Level View: Pennsylvania's Per Se Approach to Plea Withdrawals Is an Outlier*

A brief glance at the jurisprudence of neighboring jurisdictions reveals that in the majority of such forums, unlike Pennsylvania, a bare assertion of innocence is not sufficient in itself to allow defendants to withdraw their guilty pleas before sentencing.¹⁰¹ In fact, the vast majority of jurisdictions put the burden on the moving defendant to proffer a plausible theory of innocence that is buttressed by facts of record.¹⁰² Strikingly,

fair and just reason for doing so); *State v. Malivao*, 98 P.3d 285, 287 (Haw. Ct. App. 2004) (observing generally that under Hawaii Rule of Penal Procedure 32(d), "[t]he court should grant the motion if the defendant has presented a fair and just reason for his request and the State has not relied upon the plea to its substantial prejudice"); *State v. Watkins*, 672 S.E.2d 43, 50 (N.C. Ct. App. 2009) (asserting that defendants are generally accorded right to withdraw guilty pleas if they can establish any fair and just reason).

100. For a further discussion of the greater amount of discretion afforded to trial judges in most other jurisdictions when adjudicating motions for pre-sentence plea withdrawal, see *infra* notes 101–12 and accompanying text.

101. See *United States v. Chavers*, 515 F.3d 722, 725 (7th Cir. 2008) ("[B]are protestations of innocence' are insufficient to withdraw a guilty plea, particularly after a knowing and voluntary plea made in a thorough Rule 11 colloquy. Rather, the defendant must produce some credible evidence of his innocence."); *United States v. Brown*, 250 F.3d 811, 818 (3d Cir. 2001) ("Bald assertions of innocence, however, are insufficient to permit a defendant to withdraw her guilty plea."); *United States v. Salgado-Ocampo*, 159 F.3d 322, 326 (7th Cir. 1998) ("However, claims of innocence alone do not mandate permission to withdraw a plea." (internal quotations omitted)); *United States v. Buckles*, 843 F.2d 469, 472 (11th Cir. 1988) ("A mere declaration of innocence does not entitle a defendant to withdraw his guilty plea."); *White v. United States*, 863 A.2d 839, 842 (D.C. 2004) ("The mere assertion of a defense is insufficient to allow withdrawal of a plea, and withdrawal will not be permitted where the defense, even if legally cognizable, is 'unsupported by any other evidence.'"); *State v. Lambert*, 775 A.2d 1140, 1142–43 (Me. 2011) ("The mere presence of the assertion of innocence 'does not necessarily entitle a defendant to withdraw his plea of guilty.'"); *State v. Munroe*, 45 A.3d 348, 356 (N.J. 2012) (noting that requirement of colorable claim of innocence requires more than "a bare assertion of innocence").

102. See *Chavers*, 515 F.3d at 724 ("Because the defendant's statements at the plea colloquy are presumed to be true, the defendant bears a heavy burden of persuasion in showing that such a fair and just reason exists. A defendant faces an uphill battle in seeking to withdraw a guilty plea after a thorough plea colloquy." (citation omitted)); *Brown*, 250 F.3d at 818 (explaining that defendants seeking to withdraw their pleas must point to facts of record supporting their claims of innocence and must provide reasonable explanations for earlier contradictory statements in plea proceedings); *Salgado-Ocampo*, 159 F.3d at 326 ("Assertions of innocence must be buttressed by facts in the record which support a claimed defense."); *People v. Breslin*, 140 Cal. Rptr. 3d 906, 910 (Cal. Ct. App. 2012) ("The defendant has the burden to show, by clear and convincing evidence, that there is

these jurisdictions give trial judges a great deal more discretion to weigh the credibility of the statements presented by such movants and to observe the totality of the relevant circumstances and evidence in ruling on such withdrawal motions.¹⁰³

While observing this key difference, it is important to emphasize that Pennsylvania courts review trial court rulings on plea withdrawal motions for abuse of discretion.¹⁰⁴ Yet under *Forbes*, any discretion is essentially

good cause for withdrawal of his or her guilty plea.”); *State v. Stocking*, 26 A.3d 117, 120 (Conn. App. Ct. 2011) (stating that defendants seeking to withdraw guilty pleas always have burden of showing plausible reason for plea withdrawal); *White*, 863 A.2d at 842 (“When a criminal defendant moves to withdraw his guilty plea, he must set forth some facts, which when accepted as true, make out some legally cognizable defense to the charges, in order to effectively deny culpability.”); *State v. Denmark-Wagner*, 258 P.3d 960, 964 (Kan. 2011) (noting that defendants have burden of affirmatively proving trial court abuse of discretion when challenging determinations on appeal); *Munroe*, 45 A.3d at 356 (“In moving to withdraw a guilty plea, the defendant bears the burden of presenting a ‘plausible basis for his request’ and a good-faith basis for ‘asserting a defense on the merits.’”); *People v. Jacob*; 942 N.Y.S.2d 627, 628 (N.Y. App. Div. 2012) (noting that defendants must point to some evidence of innocence to be allowed to withdraw guilty pleas); *State v. Watkins*, 672 S.E.2d 43, 50 (N.C. Ct. App. 2009) (explaining that defendants bear burden of affirmatively proving fair and just reason for plea withdrawal).

103. See *Buckles*, 843 F.2d at 472 (“The good faith, credibility and weight of a defendant’s assertions in support of a motion under Rule 32(d) are issues for the trial court to decide.”); *Breslin*, 140 Cal. Rptr. 3d at 910 (“The decision to grant or deny a motion to withdraw a guilty plea is left to the sound discretion of the trial court.”); *White*, 863 A.2d at 842 (“The judge is permitted to compare the two conflicting versions of events, and to credit one over the other. As with other credibility determinations entrusted to the trial court, we defer to the trial judge’s assessment.”); *State v. Guileau*, 52 So. 3d 310, 312–13 (La. Ct. App. 2010) (“The withdrawal of a guilty plea is within the broad discretion of the trial court, and is subject to reversal only if that discretion is abused or arbitrarily exercised.”); *Commonwealth v. Hunt*, 900 N.E.2d 121, 124 (Mass. App. Ct. 2009) (stating that motions to withdraw guilty pleas are addressed to sound discretion of trial judges and will not be disturbed absent manifestly unjust decision); *Munroe*, 45 A.3d at 356 (“The authority to grant a plea withdrawal is vested in the sound discretion of the court.”); *Jacob*, 942 N.Y.S.2d at 628 (“The decision as to whether to permit a defendant to withdraw a previously entered plea of guilty rests within the sound discretion of the court and generally will not be disturbed absent an improvident exercise of discretion.”); *Jackson v. State*, 273 P.3d 1105, 1111 (Wyo. 2012) (emphasizing that decisions on whether to allow defendants to withdraw guilty pleas are entirely discretionary); see also *Alperin*, *supra* note 96, § 4 (“[V]irtually all the cases . . . either expressly or impliedly recognize that a defendant does not have an absolute right to withdraw a plea of guilty . . . prior to sentencing, but that the granting of such a motion is discretionary with the trial court . . .”).

104. See, e.g., *Commonwealth v. Gordy*, 73 A.3d 620, 624 (Pa. Super. Ct. 2013) (“The decision to grant or deny a motion to withdraw a guilty plea rests within the trial court’s discretion, and we will not disturb the court’s decision on such motion unless the court abused that discretion.”); *Commonwealth v. Pardo*, 35 A.3d 1222, 1227 (Pa. Super. Ct. 2011) (“A trial court’s decision regarding whether to permit a guilty plea to be withdrawn should not be upset absent an abuse of discretion.”); *Commonwealth v. Miller*, 748 A.2d 733, 735 (Pa. Super. Ct. 2000) (“When reviewing a trial court’s denial of a motion to withdraw a guilty plea, we will not disturb the court’s decision absent an abuse of discretion.”); *Commonwealth v. Boatwright*, 590 A.2d 15, 19 (Pa. Super. Ct. 1991) (“Although [t]he withdrawal of a

abdicated the moment movants assert their innocence, unless there is a clear showing that the prosecution would be prejudiced by withdrawal of the defendant's plea.¹⁰⁵ Indeed, very few jurisdictions take a comparable approach to Pennsylvania, which essentially allows defendants to withdraw their pleas as an automatic right.¹⁰⁶ New Jersey courts in particular have expressly emphasized that liberality in allowing withdrawal motions before sentencing does not mean the trial judge must completely abdicate all discretion.¹⁰⁷

The majority approach in other jurisdictions exhibits that, while a defendant's assertion of innocence is an important factor to consider, such an assertion should not itself be dispositive.¹⁰⁸ In fact, a colorable claim of innocence is most often one of several important factors that are all considered together when ruling on a defendant's motion to withdraw a guilty plea.¹⁰⁹ The high courts of both New Jersey and Maine, along with the

guilty plea prior to sentencing should be freely permitted for any fair and just reason . . . there is no absolute right to withdraw such a plea, and we will not disturb the trial court's decision in such a matter absent an abuse of discretion." (citations and internal quotation marks omitted)).

105. See *Commonwealth v. Woods*, 307 A.2d 880, 883 (Pa. 1973) (Pomeroy, J., dissenting) (asserting that while withdrawal motions are nominally reviewed for abuse of discretion, Pennsylvania Supreme Court's rule simultaneously takes away any such trial judge discretion once defendants assert their innocence).

106. See, e.g., *Walden v. State*, 728 S.E.2d 186, 188 (Ga. 2012) ("A defendant has the right to withdraw a guilty plea up until the time the trial judge pronounces a sentence."); *Justus v. Commonwealth*, 645 S.E.2d 284, 289 (Va. 2007) ("[T]he withdrawal of a guilty plea should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place." (internal quotation and citation omitted)).

In addition, several state jurisdictions sentence defendants immediately after their pleas are entered, thus avoiding the pre-sentencing versus post-sentencing distinction addressed by the states referred to in this article, and only adopting one uniform standard for plea withdrawal. See, e.g., *People v. Feldman*, 948 N.E.2d 1094, 1097 (Ill. App. Ct. 2011) (noting that defendant entered negotiated guilty plea on November 14, 2008 and was sentenced that same day); *State v. Hughes*, 758 N.W.2d 577, 579 (Minn. 2008) (noting that defendant pleaded guilty to one count of robbery on March 19, 2004 and was then sentenced in accordance with his plea); *Sherrod v. State*, 784 So. 2d 256, 258 (Miss. Ct. App. 2001) (observing that defendant pleaded guilty to robbery and assault on March 13, 1997 and was immediately sentenced to two consecutive ten year terms).

107. See, e.g., *Munroe*, 45 A.3d at 355–56 ("[L]iberality in exercising discretion does not mean an abdication of all discretion and, accordingly, any plea-withdrawal motion requires a fact-specific analysis." (internal quotations and citations omitted)).

108. See *United States v. Santiago-Miranda*, 654 F.3d 130, 136 (1st Cir. 2011) (describing several important factors to consider in adjudicating plea withdrawal motions, one of which was whether defendants present "a serious claim of actual innocence"); *White*, 863 A.2d at 842 ("Although a claim of innocence is an important factor in the court's determination of whether it will allow a defendant to withdraw a guilty plea, this claim is not dispositive." (internal quotations omitted)).

109. See *United States v. Brown*, 250 F.3d 811, 815 (3d Cir. 2001) (noting that whether defendant has made assertion of innocence is only one prong of three-factor test in evaluating such motions to withdraw); *State v. Lambert*, 775 A.2d 1140, 1142 (Me. 2011) (noting that defendant's assertions of innocence consti-

United States Court of Appeals for the D.C. Circuit, have pointed out the fundamental problem with treating an assertion of innocence as being dispositive, specifically stating that such a legal standard would make plea withdrawal an automatic right.¹¹⁰ Other courts, including the Eleventh Circuit Court of Appeals, have noted that making withdrawal an automatic right would fail to provide due deference to the other competing interests arising in the context of plea withdrawals: the rights of victims to move on from traumatic incidents and the judicial system's interest in finality.¹¹¹ Whatever the reasoning of the various state and federal courts, a review of these authorities reveals that the *Forbes* rule makes Pennsylvania's approach to pre-sentence plea withdrawals quite the outlier.¹¹²

B. *A Micro-Level View: Case Studies of Noteworthy Approaches to Pre-sentence Plea Withdrawal Requests in Other Jurisdictions*

The sheer number of jurisdictions that handle pre-sentence plea withdrawal motions differently than Pennsylvania is in itself striking, yet a deeper substantive look at these different approaches perhaps best highlights some viable alternatives to the *Forbes* rule.¹¹³ Both the New Jersey

tuted one prong of four-factor test defendant must satisfy in order to withdraw guilty plea); *Munroe*, 45 A.3d at 356 (listing four-factor test defendants must meet in order to be able to withdraw their guilty pleas, one of which was "whether the defendant has asserted a colorable claim of innocence"); *State v. Phelps*, 329 S.W.3d 436, 447 (Tenn. 2010) (holding that "[w]hether the defendant has asserted and maintained his innocence" is one of five non-exclusive factors to be weighed in adjudicating plea withdrawal motions).

110. See *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975) ("Were mere assertion of legal innocence always a sufficient condition for withdrawal, withdrawal would effectively be an automatic right. There are few if any criminal cases where the defendant cannot devise some theory or story which, if believed by a jury, would result in his acquittal."); *Lambert*, 775 A.2d at 1143 ("[W]ere mere assertions of legal innocence always a sufficient condition for withdrawal, withdrawal would effectively be an automatic right."); *State v. Slater*, 966 A.2d 461, 468 (N.J. 2009) (noting that if defendants did not have to present plausible theories of innocence supported by facts of record, "trial judges would automatically be required . . . to grant plea withdrawal motions, and would be stripped . . . of any discretion in the matter." (internal quotations omitted)).

111. See *United States v. Buckles*, 843 F.2d 469, 472-73 (11th Cir. 1988) ("Guilty pleas would be of little value to the judicial system if a defendant's later conclusory assertion of innocence automatically negated his plea."); *Slater*, 966 A.2d at 467 (discussing important competing interests of state, victims, and defendants arising in context of motions to withdraw guilty pleas).

112. Compare *Commonwealth v. Kirsch*, 930 A.2d 1282, 1285 (Pa. Super. Ct. 2007) ("Although it is apparently an extremely unpopular rule with prosecutors and trial courts, since *Forbes*, caselaw has continuously upheld an assertion of innocence as a fair and just reason for seeking the withdrawal of a guilty plea." (citing *Commonwealth v. Randolph*, 718 A.2d 1242 (Pa. 1998))), with *Brown*, 250 F.3d at 818 (holding that defendants will not be permitted to withdraw their guilty pleas upon bald assertions of innocence), and *Munroe*, 45 A.3d at 356 (requiring defendants to proffer more than bare assertions of innocence).

113. For a further macro-level discussion of how the jurisprudence of a majority of state and federal courts significantly departs from Pennsylvania's *Forbes* rule

Supreme Court and the United States Court of Appeals for the Third Circuit employ non-exclusive multi-factor tests that seek to appropriately balance the important competing interests arising in the context of plea withdrawal motions.¹¹⁴

1. *A Short Trip Across the Border to New Jersey: State v. Slater*

The Pennsylvania courts need not look far for an alternative approach to pre-sentence guilty plea withdrawal requests. In *State v. Slater*,¹¹⁵ the Supreme Court of New Jersey set forth a standard that appropriately balances the competing interests raised by such motions.¹¹⁶ The *Slater* court adopted an approach that considers four factors in ruling on motions for plea withdrawal: “(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant’s reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused.”¹¹⁷ The New Jersey Supreme Court has continued to provide guidance on evaluating these factors, but has reminded trial courts that each case requires a fact-specific analysis.¹¹⁸

In *Slater*, the defendant reached a plea agreement with the prosecution, pleading guilty to second-degree possession of a controlled substance with intent to distribute.¹¹⁹ Only twelve days after pleading guilty in open court, Slater filed a pro se motion to withdraw his guilty plea, stating: “I had no control over the drugs that was found in [sic] motel room therefore I should not be punished.”¹²⁰ The trial court denied his motion for

in their handling of pre-sentence plea withdrawal motions, see *supra* notes 96–112 and accompanying text.

114. For a further discussion of the New Jersey Supreme Court’s application of a non-exclusive multi-factor test to pre-sentence plea withdrawal motions, see *infra* notes 115–30 and accompanying text. For a further discussion of the Third Circuit’s use of a similar multi-factor test, see *infra* notes 131–38 and accompanying text.

115. 966 A.2d 461 (N.J. 2009).

116. For a further discussion of how a nonexclusive multi-factor test, like the one adopted by the New Jersey Supreme Court in *Slater*, more effectively addresses the competing interests aroused by a plea withdrawal request, see *infra* notes 160–70 and accompanying text.

117. *Slater*, 966 A.2d at 468 (explaining that these factors should be weighed and balanced in light of totality of circumstances and evidence before evaluating court).

118. See *State v. Munroe*, 45 A.3d 348, 355–56 (N.J. 2012) (noting that in close cases, scales should tip in favor of allowing defendant to withdraw plea).

119. See *Slater*, 966 A.2d at 464–65 (noting that officers found Slater in motel room when they were searching for two other men and subsequently found drugs in this motel room after Slater willingly allowed them to come inside).

120. *Id.* at 465 (internal quotation marks omitted) (noting that Slater’s motion indicated further that his brother-in-law had rented this specific motel room and brought him there). The court also noted that before Slater initially entered his plea, he expressed some dissatisfaction with his attorney, but he subsequently indicated that those problems were eventually resolved. See *id.*

plea withdrawal, noting that “changing your mind” was not a sufficient basis for plea withdrawal, and the appellate division affirmed this denial.¹²¹

The New Jersey Supreme Court’s analysis of its four-factor balancing test in *Slater* distinguishes its approach to plea withdrawal motions from Pennsylvania’s in several ways, the first of which is its express acknowledgment of the competing interests of all parties involved.¹²² While the court similarly noted that pre-sentence withdrawal requests should be liberally construed in favor of defendants, it emphasized that the burden rests on defendants to present plausible factual bases for such withdrawal requests.¹²³ Unlike the prevailing standard in Pennsylvania, the *Slater* court expressly stated that: “A bare assertion of innocence is insufficient to justify withdrawal of a plea. Defendants must present specific, credible facts and, where possible, point to facts in the record that buttress their claim.”¹²⁴ Furthermore, unlike in Pennsylvania, New Jersey courts are encouraged to evaluate the defendant’s claim of innocence in light of evidence that was available to both parties through discovery at the time the plea was entered.¹²⁵ In a similar vein, the *Slater* approach tasks courts with

121. *See id.* at 465–66 (adding that trial court sentenced Slater to five years in prison in accordance with his plea agreement).

122. *See id.* at 467 (“To begin with, a defendant’s application to retract a plea must be considered in light of the competing interests of the State and the defendant. Our case law has long recognized the important interest of finality to pleas.” (internal quotations omitted)). The Court further elaborated that:

[T]he State’s strong interest . . . is in having criminal wrongdoers account and in the finality of that accounting. The victims of an offense also have an obvious interest in the finality of criminal proceedings. At the same time, defendants are entitled to fairness and protection of basic rights.

Id.

123. *See id.* at 467–68 (observing further that if defendants were not required to explain their requests, then trial judges would be required to grant plea withdrawal motions as matter of right and would be stripped of all discretion). The *Slater* court went on to state that “[l]iberality in exercising discretion does not mean an abdication of all discretion.” *Id.* at 468. The court also noted that meeting this burden must entail more than a simple change of heart and that trial courts will need to undertake a fact-specific analysis in each case to determine whether a defendant has met their burden. *See id.*

124. *Id.* at 468–69 (describing what defendants must prove to establish first factor of four-factor test, whether “the defendant has asserted a colorable claim of innocence”).

125. *Compare* Commonwealth v. Katonka, 33 A.3d 44, 50 (Pa. Super. Ct. 2011) (en banc) (“[E]vidence in this case, including Katonka’s confessions to the police, is not relevant in determining whether his assertion of innocence was credible.”), *with Slater*, 966 A.2d at 469 (“When evaluating a defendant’s claim of innocence, courts may look to evidence that was available to the prosecutor and to the defendant through our discovery practices at the time the defendant entered the plea of guilt.”). The *Slater* court noted further that: “In some cases, the proffered evidence may serve to rebut the assertion of innocence; in others, it may move a court to vacate the plea to the end that justice be done.” *Slater*, 966 A.2d at 469.

determining the nature and strength of the defendant's reasons for withdrawal, especially in light of the record.¹²⁶

As to the third factor, whether the plea was entered as part of a plea bargain, the court suggested that this is the least important of the three factors.¹²⁷ The fourth factor is, much like in Pennsylvania, whether the state would be unfairly prejudiced by the defendant's withdrawal.¹²⁸ Perhaps most importantly, *Slater* indicates that even under this more balanced standard, deserving defendants can, and often do, prevail on their motions to withdraw their pleas before sentencing, as the defendant did in that particular case.¹²⁹ This multi-factor test seeks to do justice while simultaneously screening for defendants who try to game the system or proffer theories of innocence that are entirely inconsistent with the evidence of record.¹³⁰

2. *A Look to Pennsylvania's Federal Courts: The Third Circuit's Approach in United States v. Brown*

Given the similarities between Pennsylvania Rule of Criminal Procedure 591(A) and its federal counterpart governing plea withdrawal motions, the Third Circuit provides another ideal comparison to

126. See *Slater*, 966 A.2d at 469–70 (providing several examples of situations where defendants have presented requisite fair and just reasons for plea withdrawal). The court also noted that the timing of the attempted plea withdrawal is an extremely important factor in determining the strength of a defendant's assertion of innocence, emphasizing that “the longer the delay in raising a reason for withdrawal, or asserting one's innocence, the greater the level of scrutiny needed to evaluate the claim.” *Id.* at 470.

127. See *id.* at 470 (noting that under New Jersey's case law, defendants must meet heavier burden when seeking to withdraw pleas that were entered from plea bargaining process). However the New Jersey Supreme Court went on to stipulate that it “recognize[d] that the vast majority of criminal cases are resolved through plea bargains and [it does] not suggest this fact be given great weight in the balancing process.” *Id.*

128. See *id.* (“The critical inquiry in those and other situations is whether the passage of time has hampered the State's ability to present important evidence.”).

129. See *id.* at 471–72 (applying four-factor test to defendant's motion to withdraw, noting that his explanation for his withdrawal request found support in evidence of record, and holding that trial court abused its discretion in denying his motion to withdraw his plea); see also *State v. Munroe*, 45 A.3d 348, 359 (N.J. 2012) (applying four-factor *Slater* test to defendant's plea withdrawal motion and holding that trial court abused its discretion for failing to grant withdrawal motion, ultimately sending defendant's case back for trial). Much of the *Munroe* court's analysis emphasized the fact that defendant Munroe's reason for plea withdrawal, a self-defense claim, found support in the facts of record. See *id.* at 358–59.

130. See *Munroe*, 45 A.3d at 356 (“A court should evaluate the validity of the reasons given for a plea withdrawal with realism, understanding that some defendants will be attempting to game the system, but not with skepticism, for the ultimate goal is to ensure that legitimate disputes about the guilt or innocence of a criminal defendant are decided by a jury.”).

Pennsylvania's jurisprudence.¹³¹ In *United States v. Brown*,¹³² the Third Circuit applied a much stricter standard to plea withdrawals than the Pennsylvania courts.¹³³ The Third Circuit applied a three-factor test in evaluating the defendant's motion to withdraw her plea, evaluating "(1) whether the defendant asserts her innocence; (2) whether the government would be prejudiced by the withdrawal; and (3) the strength of the defendant's reason to withdraw the plea."¹³⁴

After rejecting the defendant's first two arguments that her plea was rendered involuntary by the surrounding circumstances, the court found that her bare assertion of legal innocence was insufficient to allow her to withdraw her plea.¹³⁵ The court then expressly stated that such bare assertions of innocence are not sufficient to permit a defendant to withdraw a guilty plea.¹³⁶ It further elaborated that a defendant seeking plea withdrawal must point to facts on the record that corroborate their assertions of innocence and explain why a contradictory position was taken before the district court.¹³⁷ *Brown* thus serves as an example of how applying a stricter standard of evaluation to plea withdrawal motions can filter out claims that amount to nothing more than defendants changing their minds or later realizing their dissatisfaction with a plea.¹³⁸

131. For a further discussion of the similarities between Pennsylvania's rule governing plea withdrawals and its federal counterpart, see *supra* note 98.

132. 250 F.3d 811 (3d Cir. 2001).

133. *See id.* at 815 (holding that defendant Brown, who sought to withdraw her plea one week before scheduled sentencing, failed to provide fair and just reason for withdrawal).

134. *Id.* (requiring defendant to show reason behind motion to withdraw plea).

135. *See id.* at 817–18 (noting that while defendant asserted government could not prove her to be guilty, she never asserted her factual innocence to alleged crimes). Defendant Brown's first two claims, asserting that her plea was rendered involuntary, were based on her allegations that the government both excluded exculpatory evidence and changed its theory of the case during the plea colloquy. *See id.* at 815–16. The court's opinion systematically addressed these initial claims and held that there was no support in the record for either assertion. *See id.*

136. *See id.* at 818 (finding that defendant Brown failed to point to any supporting evidence of record tending to corroborate her bare assertion of innocence).

137. *See id.* (noting that defendant Brown failed to explain why she originally pleaded guilty before district court and never suggested that she did not illegally purchase firearms or conspire to do so).

138. *See id.* at 815 ("A shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to impose on the government the expense, difficulty, and risk of trying a defendant who has already acknowledged his guilt by pleading guilty.").

V. CRITICAL ANALYSIS: THE *FORBES* RULE SUBVERTS ITS ORIGINAL POLICY OBJECTIVES

The *Forbes* rule undermines the significance of guilty pleas in Pennsylvania courts, thwarts the policy goal of efficient administration of criminal justice, and results in the wasting of scarce judicial resources.¹³⁹ Pennsylvania's jurisprudence has expanded to a point where pre-sentence plea withdrawals are far more freely allowed than was likely ever intended by the state supreme court's decision in *Forbes*.¹⁴⁰ Much to the chagrin of victims, trial courts, and prosecutors alike, the *Forbes* rule continues to elevate the interests of criminal defendants above all else, rather than seeking an appropriate balance of all the competing interests.¹⁴¹

It is crucial to recall that the underlying policy rationale that the *Forbes* court used to justify liberal allowance of plea withdrawals was the efficient administration of criminal justice.¹⁴² Ironically, the rule's subsequent expansion has subverted this original policy goal, as a defendant's guilty plea brings little finality to a criminal proceeding. In fact, it can be withdrawn at the defendant's whim before sentencing.¹⁴³ Trial courts also continue to regularly defy *Forbes* and deny motions for plea withdrawals in situations where there is overwhelming evidence that the defendant's assertion of

139. For a further discussion of the negative impact the *Forbes* rule has on the efficiency of the criminal justice system, see *infra* notes 140–59 and accompanying text.

140. For a further discussion of the expansion of plea withdrawal jurisprudence after *Forbes* and *Randolph*, resulting in Pennsylvania's modern day plea withdrawal jurisprudence, see *supra* notes 85–95 and accompanying text. For a further discussion of the straightforward nature of the *Forbes* decision and arguments that the court never intended to lay down a hard and fast rule, see *supra* notes 41–60 and accompanying text.

141. See, e.g., *Commonwealth v. Turiano*, 601 A.2d 846, 851 (Pa. Super. Ct. 1992) (“*Forbes* illustrated the adoption of an almost paternalistic concern for the rights of a pleading defendant.”); *Commonwealth v. Iseley*, 615 A.2d 408, 413 (Pa. Super. Ct. 1992) (“The rule in *Forbes* is made, perhaps over-solicitously, in favor of justice, to protect against the possibility that an innocent defendant will erroneously plead guilty.”).

142. See *Commonwealth v. Forbes*, 299 A.2d 268, 271–72 (Pa. 1973) (“The liberal rule for withdrawal of a guilty plea before sentence is consistent with the efficient administration of criminal justice. It reduces the number of appeals contesting the ‘knowing and voluntariness’ of a guilty plea, and avoids the difficulties of disentangling such claims.” (quoting *United States v. Young*, 424 F.2d 1276, 1279 (3d Cir. 1970))).

143. See *Turiano*, 601 A.2d at 852 (“The *Forbes* standard accordingly undermines the guilty plea colloquy by giving the impression that a pre-sentence plea can be liberally withdrawn.”); see also *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1976) (“Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim.”).

innocence is not credible, yet such rulings are routinely reversed by the Superior Court on appeal.¹⁴⁴

Forbes was decided before Pennsylvania had any formal requirement for an on the record colloquy or for the inquiries made during one.¹⁴⁵ Pennsylvania Rule of Criminal Procedure 590 now sets mandatory minimum requirements for such on the record pleas, where the trial judge must ensure there is a factual basis for the plea and that it is voluntarily and understandingly tendered.¹⁴⁶ Requiring an extensive on the record colloquy serves the interests of efficiency in the criminal justice system better than the *Forbes* rule.¹⁴⁷ In fact, spending time and effort ensuring that guilty pleas are made both voluntarily and knowingly seems rather super-

144. See, e.g., *Commonwealth v. Gordy*, 73 A.3d 620, 626 (Pa. Super. Ct. 2013) (observing that trial court denied defendant's withdrawal motion by suggesting that time elapsed between plea and withdrawal request may have resulted in diminishment of complainant's memory); *Commonwealth v. Unangst*, 71 A.3d 1017, 1021 (Pa. Super. Ct. 2013) (noting that trial court denied defendant's pre-sentence withdrawal motion, finding his assertion of innocence insincere in light of contradictory admissions made to pre-sentence investigator); *Commonwealth v. Pardo*, 35 A.3d 1222, 1224 (Pa. Super. Ct. 2011) (stating that trial court denied defendant's plea withdrawal motion because written guilty plea expressly waived right to later withdraw his plea); *Commonwealth v. Katonka*, 33 A.3d 44, 45–46 (Pa. Super. Ct. 2011) (en banc) (noting that trial court denied defendant's plea withdrawal motion because it found it to be incredible and because he delayed substantially in seeking withdrawal); *Commonwealth v. Kirsch*, 930 A.2d 1282, 1284 (Pa. Super. Ct. 2007) (noting that trial court denied defendant's plea withdrawal motion by finding that he did not make "bold assertion of innocence").

145. See *Turiano*, 601 A.2d at 852 ("[T]he essential elements of the colloquy as we know it were not molded by our Supreme Court until the mid-seventies." (citing *Commonwealth v. Willis*, 369 A.2d 1189 (Pa. 1977))). However, the *Turiano* court noted that "as early as 1963 there existed a lenient rudimentary requirement in our Commonwealth that pleas be taken in open court and that a judge ascertain whether the plea was knowingly and understandingly tendered . . ." *Id.*

146. See *Commonwealth v. Cole*, 564 A.2d 203, 206 (Pa. Super. Ct. 1989) (en banc) ("The entry of a guilty plea is a protracted and comprehensive proceeding wherein the court is obliged to make a specific determination after extensive colloquy on the record that a plea is voluntarily and understandingly tendered.") The *Cole* court then proceeded to list several mandatory inquiries that a trial judge must make of the defendant before accepting a guilty plea. See *id.* at 206–07. For a further discussion of the specific inquiries that trial judges are currently required to make before accepting a guilty plea under Pennsylvania Rule of Criminal Procedure 590, see *supra* note 5 and accompanying text.

147. See *Turiano*, 601 A.2d at 852 ("[T]he developments in the guilty plea colloquy have so successfully fulfilled the policy concerns underlying *Forbes* that the standard itself is obsolete. An extensive guilty plea colloquy undoubtedly is more effective in conserving judicial resources than the *Forbes* standard."); *Commonwealth v. Rish*, 606 A.2d 946, 948 n.6 (Pa. Super. Ct. 1992) ("We note that we are in agreement with many of our colleagues who have expressed dissatisfaction with the standard set out in *Forbes*. The developments in the guilty plea colloquy have successfully fulfilled the policy concerns underlying *Forbes*."); *Cole*, 564 A.2d at 208 n.1 (McEwen, J., concurring) ("Such a colloquy not only insures that the plea is voluntarily and understandingly entered, but also enables more perceptive study, in the event that the accused subsequently seeks to withdraw the guilty plea, of whether 'fair and just reason' to withdraw the plea has been presented.").

fluous when defendants can later withdraw their pleas at will. Thus, the *Forbes* rule wastes scarce judicial resources on a procedure that is anything but final.¹⁴⁸ The continued resistance of trial courts toward following the *Forbes* rule in situations where doing so would defy common sense leads to further judicial resources being squandered on numerous appeals challenging such determinations.¹⁴⁹ Furthermore, in an era of tight state budgets, limited state prosecutorial resources are often stretched thin by a policy of freely allowed plea withdrawals.¹⁵⁰

The current *Forbes* rule has also skewed the legislative intent behind both the original ABA Standard and the corresponding Pennsylvania Rule of Criminal Procedure.¹⁵¹ The ABA Standard, upon which the *Forbes* rule is based, seeks to appropriately balance the defendant's right to a jury trial with the judicial system's interest in finality.¹⁵² Furthermore, given the

148. See *Turiano*, 601 A.2d at 852 (“Judicial resources, additionally, are expended every time a defendant is given a colloquy, which can be quite extensive. The *Forbes* standard thus results in the expenditure of precious time on a procedure that is not, for all intents and purposes, final.”); *Commonwealth v. Iseley*, 615 A.2d 408, 414 (Pa. Super. Ct. 1992) (noting that state’s criminal dockets are already too overburdened to allow pleas to be withdrawn a second time).

149. For a sampling of recent cases displaying the reluctance of several trial courts to follow the *Forbes* rule, causing them to deny withdrawal motions, see *supra* note 144. The number of appeals contesting trial court denials of withdrawal motions is surely much greater than this sampling indicates however, as roughly 95% of Pennsylvania Superior Court decisions take the form of unpublished memorandum decisions. See ADMIN. OFFICE OF THE PA. COURTS, DEP’T OF RESEARCH & STATISTICS, 2012 CASELOAD STATISTICS OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA 5 (July 24, 2013), available at <http://www.pacourts.us/assets/files/setting-768/file-2598.pdf?cb=52fe30> (providing that 4,612 of the 4,889 (94%) Pennsylvania Superior Court decisions filed in 2012 were unpublished memorandum decisions, while only 277 (6%) were published opinions); ADMIN. OFFICE OF THE PA. COURTS, DEP’T OF RESEARCH & STATISTICS, 2011 CASELOAD STATISTICS OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA 5 (Mar. 1, 2012), available at <http://www.pacourts.us/assets/files/setting-768/file-1764.pdf?cb=1fe78a> (providing that 4,879 of the 5,157 (95%) Pennsylvania Superior Court decisions filed in 2011 were unpublished memorandum decisions, while only 278 (5%) were published opinions); see also 210 PA. CONS. STAT. ANN. § 65.37 (West 1990) (noting that publication decisions require approval of all judges sitting on panel for particular case).

150. See, e.g., *State v. Slater*, 966 A.2d 461, 471 (N.J. 2009) (noting difficulties inherent in assembling witnesses and preparing prosecution for trial and concluding that “it is neither fair nor just to compel the State to repeat this procedure as to the same defendant when the first trial is terminated by the defendant’s own guilty plea given freely and understandingly.” (quoting *State v. Herman*, 219 A.2d 413, 416 (N.J. 1966))). But see *Commonwealth v. Kirsch*, 930 A.2d 1282, 1287–88 (Pa. Super. Ct. 2007) (asserting that plea withdrawals simply result in negation of favorable break to prosecution, and withdrawals force prosecution to do what it would have been required to do all along—prove its case).

151. See ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-2.1(a) cmt., at 85 (3d ed. 1999), available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.authcheckdam.pdf (“The burden is on the defendant to establish a ‘fair and just’ reason for the plea to be withdrawn.”).

152. See *id.* (“Standard 14-2.1 accommodates these competing values by allowing presentence withdrawal of pleas ‘for any fair and just reason’ but providing

statutory construction of Pennsylvania Rule of Criminal Procedure 591, stating that “[a]t any time before the imposition of sentence, *the court may, in its discretion, permit . . . the withdrawal of a plea of guilty,*” it hardly seems that the legislature intended to create such an automatic right to withdrawal.¹⁵³ Likewise, if the Pennsylvania Supreme Court had originally wanted to create a rule where any assertion of innocence before sentencing automatically provides a fair and just reason for plea withdrawal, it would have expressly said so in *Forbes*, rather than quickly disposing of the simple facts at hand.¹⁵⁴

The rule calling for liberal allowance of plea withdrawals intended to give trial courts discretion rather than force them to completely ignore relevant evidence.¹⁵⁵ However, the *Forbes* rule, as presently interpreted, seriously undermines the significance of guilty pleas by allowing defendants to routinely contradict their sworn statements.¹⁵⁶ The rule has

that the court should also ‘weigh any prejudice to the prosecution caused by reliance on defendant’s plea.’”). These standards further elaborate on the competing policies balanced in the rule:

There are sound reasons for allowing a fairly generous standard for withdrawal of pleas before sentencing. The conviction is not yet final, the court has not taken the time to weigh an appropriate sentence, and no appeal from the judgment is possible. Moreover, if the defendant has second thoughts before sentencing about having pleaded guilty, this fact may suggest that the plea was entered without sufficient understanding and contemplation. At the same time, given the considerable care pursuant to which pleas are required to be taken, it is difficult to justify allowing a defendant to withdraw a plea without any reason at all.

Id.

153. PA. R. CRIM. P. 591(A) (emphasis added). The comment accompanying this rule also expressly states that trial judges have the discretion to decide that a defendant has failed to present a fair and just reason for plea withdrawal. *See id.* cmt. (“If the court finds that there is not a fair and just reason, then the motion should be denied, and the court should proceed to sentencing.”).

154. *See* Commonwealth v. Cole, 564 A.2d 203, 208 (McEwen, J., concurring) (discussing opinion that *Forbes* court did not lay down hard and fast rule applicable to all pre-sentence withdrawal motions). Judge McEwen opined:

The Supreme Court found that “fair and just reason” was presented in those benchmark cases only by the assertion of innocence *together with* the fact that it was made so early in the proceedings. The Supreme Court, in either of these decisions, could well have stated—but did not—that the assertion of innocence by itself offered a “fair and just” reason for withdrawal.

Id.

155. *See id.* (“The admonition of *Forbes* and *Woods* that a presentence request to withdraw a guilty plea be ‘construed liberally’ in favor of the accused, is not a direction to blithely ignore the obvious, or to heedlessly abandon reason.”). For a further discussion of how the text of Pennsylvania Rule of Criminal Procedure 591(A) calls for trial judges to exercise their discretion in ruling on plea withdrawal motions, see *supra* note 153 and accompanying text.

156. *See* Commonwealth v. Turiano, 601 A.2d 846, 854 (Pa. Super. Ct. 1992) (“We should also recognize that the *Forbes* standard, if anything, emasculates the significance of a guilty plea colloquy and encourages defendants dissatisfied with their plea to contradict their confession of guilt sworn to under oath.”); *Cole*, 564 A.2d at 207 n.6 (“As it pertains to a presentence motion to withdraw, it diminishes

opened the door to gamesmanship where defendants attempt to abuse the automatic right to withdraw their pleas.¹⁵⁷ The *Forbes* rule also allows defendants to further terrorize their victims by withdrawing their pleas and moving to trial after victims already sought closure by approving a plea deal. This risk is particularly acute in the context of rape and sexual assault cases.¹⁵⁸ Ultimately, the *Forbes* rule can lead to some genuinely head scratching results: a trial judge presiding over a withdrawal motion cannot consider the evidence of record or surrounding circumstances in making a determination and therefore defendants whose subsequent assertions of innocence are completely and utterly contradicted by the record can still withdraw their pleas by merely stating, "I am innocent."¹⁵⁹

the gravity of the entry of a guilty plea . . . to allow the plea to be withdrawn prior to sentencing upon a bald assertion of innocence."); *id.* at 208 (Kelly, J., concurring) ("Otherwise, a disingenuous incantation of the words 'I now claim I am innocent' by judicial alchemy would become magic words with which to evade the legitimate requirement of 'just cause' for withdrawal of the plea.").

157. See *Commonwealth v. Kirsch*, 930 A.2d 1282, 1289 (Pa. Super. Ct. 2007) (McEwen, J., concurring) ("[A]s I see it, appellant's assertion of innocence was but a contrived ploy, tantamount to the incantation of 'magic words,' all of which, in my view, should fall short of a fair and just reason to warrant the withdrawal of the guilty plea."); *Commonwealth v. Iseley*, 615 A.2d 408, 413–14 (Pa. Super. Ct. 1992) (asserting that *Forbes* rule was not meant to encourage "gamesmanship and cyclical manipulation" that would result if defendants could withdraw their guilty pleas multiple times); *Cole*, 564 A.2d at 207 n.6 (discussing gamesmanship encouraged by *Forbes* rule and noting that defendant in this particular case attempted to use plea withdrawal strategically to prevent prosecution from obtaining key witness). The *Iseley* court noted further that the "[a]ppellant's assertion of innocence at this late stage smacks of little other than a self-serving attempt to improperly manipulate the system, and provides perhaps an apotheosis to illustrate the reason for rejecting a rule which allows withdrawal under such circumstances." *Iseley*, 615 A.2d at 414.

158. See *Commonwealth v. Gordy*, 73 A.3d 620, 628 (Pa. Super. Ct. 2013) (noting that trial court denied defendant's withdrawal motion and stated its belief that complainant sexual assault victims were being "abused by the legal system"); *Commonwealth v. Mosley*, 423 A.2d 427, 430 (Pa. Super. Ct. 1980) ("Rape is one of the most, if not the most, psychologically devastating crimes committed. [The trial court], in [its] desire to protect the defendant's interests, has unjustifiably ignored the victim."). The *Moseley* court proceeded to further elaborate on how victims' interests are often subverted by an approach freely allowing plea withdrawals in cases involving sexual assault victims:

The justice system protects us all from violence. Defendants must not be permitted to recruit the justice system to further harm their victims. This case illustrates the actual harm that our courts can inflict on a victim of crime by application of a contrived and purely formal analysis of the 'rights' of the defendant unrelated to the ultimate interests and stakes at risk. The lower court has 'protected' a speculative interest of the defendant to the harm of the hapless victim whose protection is the first aim of criminal justice.

Id. at 430 (discussing trial court's allowance of plea withdrawal despite psychiatric testimony suggesting that victim was emotionally unstable and may commit suicide if forced to relive brutal rape she suffered by testifying at trial).

159. For a further discussion of Pennsylvania case law indicating that trial judges may not consider evidence of record, the surrounding circumstances, or

VI. BALANCING THE COMPETING INTERESTS: A SUGGESTED ALTERNATIVE
APPROACH TO WITHDRAWAL MOTIONS

The time has come for the Pennsylvania Supreme Court to reevaluate the *Forbes* rule because its current application continues to defy goals of both efficiency and finality in the criminal justice system.¹⁶⁰ A glance at neighboring federal and state jurisdictions reveals that Pennsylvania clings in lonely fashion to the notion that a bare assertion of innocence should justify plea withdrawal.¹⁶¹ Perhaps more importantly, the jurisprudence of these neighboring courts and the criticism of past members of Pennsylvania's judiciary provide common sense solutions to this important issue.¹⁶²

Pennsylvania should adopt the following four-factor test for evaluating plea withdrawal motions: (1) whether the defendant has made a colorable assertion of innocence; (2) whether the defendant's assertion contradicts the record or finds support in it; (3) the length of time between entry of the plea and the motion to withdraw; and (4) whether withdrawal would unfairly prejudice the prosecution.¹⁶³ The first two factors reflect the judgment that a bare assertion of innocence should not suffice to allow for plea withdrawal, and that defendants should be required to proffer a plausible basis for any assertion of innocence and draw support from facts of record.¹⁶⁴ Moreover, trial judges must be able to consider the totality of the circumstances and make credibility determinations in ruling on these motions.¹⁶⁵ The third factor reflects the idea that if a

make credibility determinations when ruling on a plea withdrawal motion, see *supra* note 91 and accompanying text.

160. See *Turiano*, 601 A.2d at 852 (asserting that *Forbes* rule results in pleas that bring little finality to criminal proceedings, despite abundance of time spent on ensuring that guilty pleas are knowingly and understandingly tendered); Weaver, *supra* note 4, at 273 (explaining that major goal of plea bargaining—efficient administration of criminal justice—cannot be accomplished if pleas are subject to open second-guessing at whim of defendants); see also *State v. Smullen*, 571 A.2d 1305, 1309 (N.J. 1990) (“All plea-bargaining jurisprudence recognizes the important interest of finality to pleas.”).

161. For a further discussion of the large amount of states that give their trial judges significantly more discretion than Pennsylvania judges have in ruling on plea withdrawal motions, see *supra* notes 96–112 and accompanying text.

162. For a further discussion of past Pennsylvania Superior Court jurisprudence advocating for a more balanced approach than the *Forbes* rule, see *supra* notes 61–70 and accompanying text. For a further discussion of a suggested alternative approach to the *Forbes* rule incorporating these Superior Court opinions and the case law of other state and federal jurisdictions, see *infra* notes 163–70 and accompanying text.

163. For a further discussion of why a non-exclusive four-factor test for plea withdrawal motions better serves the competing policy interests aroused by presentence plea withdrawal motions, see *infra* notes 164–70 and accompanying text.

164. For a detailed discussion of the numerous jurisdictions that require defendants attempting to withdraw their pleas to proffer a plausible theory of innocence supported by facts of record, see *supra* note 102 and accompanying text.

165. See *United States v. Nostratis*, 321 F.3d 1206, 1211 (9th Cir. 2003) (noting that in ruling on plea withdrawal motions, district courts are free to credit

defendant seeks to withdraw a plea soon after it is entered, the plea was likely entered into hastily, whereas withdrawal motions occurring closer to the scheduled sentencing date more often reflect strategic decisions or changes of heart.¹⁶⁶ Finally, the fourth factor would remain largely unchanged from the current rule and would address circumstances where the prosecution's ability to prove its case would be severely hampered.¹⁶⁷

This multi-factor test would stay true to the policy goal of liberally allowing pre-sentence plea withdrawals, by permitting defendants with a remotely reasonable assertion of innocence to withdraw their pleas and proceed to trial.¹⁶⁸ Yet this standard would also allow trial judges to deny withdrawal motions that are completely unsupported by the record, or smack of buyer's remorse and gamesmanship.¹⁶⁹ Such an approach

certain testimony over other contradictory testimony, and that such credibility determinations should not be second guessed on appeal); *White v. United States*, 863 A.2d 839, 843 (D.C. 2004) (noting that on withdrawal motions, trial judges must weigh credibility and can credit one version of events over another and that "[a]s with other credibility determinations entrusted to the trial court, we defer to the trial judge's assessment."); *Commonwealth v. Iseley*, 615 A.2d 408, 413 (Pa. Super. Ct. 1992) (espousing approach allowing trial courts to consider evidence of record and totality of circumstances in ruling on plea withdrawal motions); *Commonwealth v. Cole*, 564 A.2d 203, 208 (Pa. Super. Ct. 1989) (McEwen, J., concurring) ("I view the law to be that . . . a pre-sentence assertion of innocence may compose the required 'fair and just reason' provided that the totality of circumstances reflected by the record does not establish otherwise.").

166. See *Nostratis*, 321 F.3d at 1211 (noting that two year delay between guilty plea and subsequent withdrawal motion made district court understandably suspicious of defendant's purpose for attempting to withdraw his plea); *United States v. Gonzalez-Vazquez*, 34 F.3d 19, 23 (1st Cir. 1994) ("The timing of a motion to withdraw a guilty plea often serves as a gauge for measuring the legitimacy of a proffered reason. . . . [T]he 'longer a defendant waits before moving to withdraw his plea, the more potency his motion must have in order to gain favorable consideration.'"); *United States v. Barker*, 514 F.2d 208, 222 (D.C. Cir. 1975) ("A swift change of heart is itself strong indication that the plea was entered in haste and confusion By contrast, if the defendant has long delayed his withdrawal motion . . . the reasons given to support withdrawal must have considerably more force."); *State v. Slater*, 966 A.2d 461, 470 (N.J. 2009) ("In general, the longer the delay in raising a reason for withdrawal, or asserting one's innocence, the greater the level of scrutiny needed to evaluate the claim.").

167. For a further discussion of the current standard the prosecution must meet in order to prove it would be prejudiced by a defendant's withdrawal, see *supra* notes 8, 29, 87 and accompanying text.

168. See *State v. Munroe*, 45 A.3d 348, 356 (N.J. 2012) ("It is more than '[a] bare assertion of innocence,' but the motion judge need not be convinced that it is a winning argument because, in the end, legitimate factual disputes must be resolved by the jury." (internal citation omitted)); *Slater*, 966 A.2d at 471-72 (applying four-factor test to defendant's plea withdrawal motion on appeal, ultimately reversing and remanding trial court denial of motion); *State v. Phelps*, 329 S.W.3d 436, 448-51 (Tenn. 2010) (applying multi-factor test to defendant's plea withdrawal motion and holding that defendant met his burden of proving fair and just reason for withdrawal, reversing and remanding trial court's denial of his motion).

169. See *Nostratis*, 321 F.3d at 1211 (finding that defendant moved to withdraw his plea because he was unhappy with his likely sentence and upholding denial of his motion, stating that "[d]efendants cannot plead guilty to 'test the weight of

would allow trial courts to appropriately exercise more discretion and give due deference to the competing interests of defendants' rights and the efficient administration of criminal justice, while simultaneously providing concrete, measurable criteria to prevent a large disparity of outcomes.¹⁷⁰

VII. CONCLUSION

Pennsylvania's *Forbes* rule essentially gives criminal defendants the automatic right to withdraw guilty pleas before sentencing, absent a clear showing of prejudice to the prosecution.¹⁷¹ While this standard seeks to protect a criminal defendant's basic right to a trial, it undermines the important role that guilty pleas play in an overburdened criminal justice system—ensuring the efficient administration of criminal justice.¹⁷² Furthermore, it undermines the role of guilty pleas at the expense of trau-

potential punishment' and then withdraw their plea if the sentence is 'unexpectedly severe.'"); *Cole*, 564 A.2d at 208 (McEwen, J., concurring) (lamenting fact that majority's interpretation of *Forbes* did not allow trial courts to deny plea withdrawal motions where defendants' asserted reasons completely conflicted with record, noting view that liberal allowance of plea withdrawals should not be "a direction to blithely ignore the obvious, or to heedlessly abandon reason"); Chris Rowe, Note, *Criminal Law—A Plea of Guilty—A Criminal Defendant's Right to Withdraw a Guilty Plea Before Sentencing*, 79 TENN. L. REV. 669, 685–86 (2012) (asserting that Tennessee Supreme Court's adoption of multi-factor test for plea withdrawals in *State v. Phelps* provides "a balancing of the Court's desire to provide more equal justice across the board for all defendants and the need for the trial court's perspective to remain capable of flexing and bending as necessitated by the facts of a particular case").

170. See *Iseley*, 615 A.2d at 413 (asserting that approach allowing trial judges to weigh totality of circumstances in handling plea withdrawal motions "would more wisely serve reason, not to mention the citizenry, without intruding upon the fundamental rights of those defendants who present a valid basis for withdrawal"); Rowe, *supra* note 169, at 685 ("[B]y setting out a non-exhaustive and multi-factor test for determining when 'any fair and just reason' has been presented, the Tennessee Supreme Court correctly limited trial court discretion in this matter without completely eliminating it."). Much of Rowe's article discusses the Tennessee Supreme Court's handling of this identical issue when faced with it as a matter of first impression. See generally Rowe, *supra* note 169.

171. See, e.g., *Commonwealth v. Randolph*, 718 A.2d 1242, 1244–45 (Pa. 1998) (holding that trial court abused its discretion by denying defendant's plea withdrawal motion when defendant offered reason that he was not guilty, despite later admissions that he may have only committed some of burglaries charged); *Commonwealth v. Forbes*, 299 A.2d 268, 272 (Pa. 1973) (holding that defendant's assertion of innocence soon after his plea was entered obviously constituted fair and just reason for plea withdrawal).

172. See *Commonwealth v. Turiano*, 601 A.2d 846, 854 (Pa. Super. Ct. 1992) (observing that *Forbes* rule severely diminishes significance of guilty pleas and suggests to defendants that pleas can be freely withdrawn at any point); *Cole*, 564 A.2d at 207 n.6 (noting that *Forbes* rule diminishes gravity of guilty pleas and allows criminal defendants to make mockery of plea process); *id.* at 208 (Kelly, J., concurring) ("Such a construction of our Supreme Court's precedents would constrain trial courts to reward rather than sanction the most disingenuous of such claims, and the most brazen of perjuries."); Weaver, *supra* note 4, at 273 (noting generally that when plea agreements are readily open to second guessing, that policy goal of such agreements—efficient administration of justice—is severely undermined).

matized victims who have given their blessing to plea agreements, in order to move on from traumatic crimes.¹⁷³ The Pennsylvania Supreme Court should reevaluate the continued vitality of this one-sided rule and adopt a non-exhaustive multi-factor test that allows plea withdrawals where a defendant's assertions do not contradict the record, while still maintaining trial court discretion to deny motions that smack of strategic gamesmanship or attempts to abuse victims.¹⁷⁴ This multi-factor test would provide a common sense solution that appropriately balances the truly important competing interests raised by plea withdrawal motions.¹⁷⁵

173. For a further critique of how the *Forbes* rule overlooks the interests of victims in its one-sided focus on the rights of criminal defendants, see *supra* notes 141, 158 and accompanying text.

174. For a further discussion of the advantages of adopting a non-exclusive multi-factor approach to addressing plea withdrawal motions, see *supra* notes 160–70 and accompanying text.

175. See *State v. Slater*, 966 A.2d 461, 471–72 (N.J. 2009) (stating that motions to retract guilty pleas must be analyzed in light of states' interest in finality, victims' interest in closure, and criminal defendants' fundamental rights and protections).

