

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

United States of America

v.

Aticha Jittaphol

No. 21-CR-10270-MLW

DEFENDANT’S MEMORANDUM RE SPEEDY TRIAL CALCULATION

Aticha Jittaphol, in response to the Court’s request, provides her position concerning a speedy trial calculation. Ms. Jittaphol maintains that the clock should run from May 2, 2022, the day that she filed a Notice of Withdrawal of Guilty Plea. The government counters that the clock runs from May 10th, when Judge Wolf entered an order providing that the guilty plea was withdrawn.

The government relies upon 18 U.S.C. § 3161(i) of the Speedy Trial Act, stating that when a defendant withdraws a guilty plea, “the defendant shall be deemed indicted ... on the day the order permitting withdrawal of the plea becomes final.” This provision should not be applied in the circumstances of this case because Ms. Jittaphol had an absolute right to withdraw her “C” plea, there was no motion required or pending, there is no basis to treat her notice of withdrawal as a motion, and there was nothing for Judge Wolf to decide.

On September 9, 2021, Ms. Jittaphol entered into a plea agreement pursuant to F.R.Crim.P. 11(c)(1)(C), providing for a sentence of no incarceration.

Rule 11(c)(5)(B) states that if the court declines to follow the recommendation in a “C” plea, it “must” allow the defendant to withdraw the plea. There is no discretion involved, and the defendant need not file a motion

asking for the court to permit the withdrawal. The court has no choice.

At a hearing on January 20, 2022, Judge Wolf stated, “... I have questions as to whether it’s reasonably likely that I’ll accept the binding plea agreement ...” He added that if he were to reject the agreement, he would “... allow the defendant an opportunity to withdraw her plea, as required by Federal Rule of Criminal Procedure 11(c)(1)(4) and (5).” Tr. 1/20/22, p. 16; Attachment 1.

On March 8th, Judge Wolf accepted Ms. Jittaphol’s waiver of indictment and guilty plea. He again told her, “... if I reject the binding plea agreement, if I do not accept it, you will have an opportunity to withdraw your guilty plea and go to trial.” Tr. 3/8/22, p. 11; Attachment 2. There was no suggestion that Ms. Jittaphol’s ability to withdraw her guilty plea was conditioned upon the court’s subsequent allowance of the permission that was previously granted, and which was not discretionary to begin with.

Absent the rejection of a “C” plea agreement, the defendant has no absolute right to withdraw a guilty plea and there is a basis to treat a notice of withdrawal as a motion, since the court must decide whether to permit the withdrawal. *See United States v. Parrilla-Tirado*, 22 F.3d 368 (1st Cir. 1994). The same is true where a defendant files a notice of a change of plea to guilty. The court must conduct a Rule 11 hearing to determine whether there is sufficient basis to warrant acceptance and to establish the voluntary and knowing nature of the plea. Unlike the withdrawal of a plea based on the court’s rejection of a “C” plea agreement, the filing of a notice of a guilty plea, or of the withdrawal of a “B”

plea, or of the withdrawal of a “C” plea that has not been rejected by the court, are not exercises of a unilateral right controlled by the defendant.

In communications with counsel, the government has cited *Coviello v. United States*, 287 F. App’x 503, 508 (6th Cir. 2008), for the proposition that the withdrawal of a guilty plea must be treated as a motion. In *Coviello*, the Court stated, “[b]ecause we treat a notice of a change of plea as a pretrial motion requiring a hearing, we exclude the time from the filing through the conclusion of the plea hearing ...” *Id.* at 508. But *Coviello* is not about the withdrawal of a guilty plea; it’s about a notice to change to a guilty plea. Unlike Ms. Jittaphol, *Coviello* had no unilateral right to the change of plea. The court treated the notice as a motion for a Rule 11 hearing, properly excluding the time from the filing of the notice/motion and the court’s acceptance of the plea at a Rule 11 hearing.

In *United States v. Mack*, 669 F. 2d 28, 30 (1st Cir. 1982), the Court described the Speedy Trial Act as “more like a jigsaw puzzle with missing parts than a complete mosaic.” How to deal with a withdrawn “C” plea is one of those missing parts. The Court details the rationale and legislative history behind § 3161(i), and it is apparent that the purpose of the provision is not applicable in this case. The purpose is to prevent a defendant from gaming the system by amassing non-excludable days prior to entering a guilty plea, and then withdrawing the plea before sentencing and after expiration of the time limit, or so late in the permissible time that the government could not adequately prepare for trial. *Id.* at 31-32; accord *United States v. Carter*, 804 F.2d 508, 512 (9th Cir.

1986) (“The purpose of § 3161(i) is to prevent defendants from pleading guilty and then withdrawing the plea to thwart the time limit.”). Using the date of the court’s order granting withdrawal is simply a reflection of the exclusion of time from “delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.” 18 U.S.C. § 3161(h)(1)(D).

The notion that Ms. Jittaphol withdrew her plea to play the system is absurd. She would not have withdrawn her plea if Judge Wolf had accepted the “C” plea agreement to a guideline sentence.

In *Carter*, 804 F.2d at 58, the defendants entered “C” pleas, and the court told the parties that the agreements would be rejected unless restitution was included. *Id.* at 510. The defendants withdrew their pleas. There were no orders issued. There were no hearings. The court treated the withdrawals as sufficient, consistent with Rule 11(c)(5)(B). *See also, United States v. Robertson*, 260 F.3d 500, 503 (6th Cir. 2001) (trial court did not issue order confirming withdrawal of rejected “C” plea and clock began anew at the time of withdrawal). The Ninth Circuit held that the clock “started anew when the defendants withdrew their guilty pleas ...” *Carter* at 512. It simply makes no sense to find that if the trial court had waited a month to issue an order that was unnecessary to begin with and did nothing other than confirm the defendants’ unilateral right to withdraw their “C” pleas a month earlier, the clock would have stopped while waiting for the unnecessary order. Imagine two different cases -- in one case the court

proceeds like the court in *Carter* and recognizes the legitimacy of the plea withdrawal without issuing an order; in the other case the court takes Judge Wolf's approach and issues an order confirming the withdrawal – what possible reason is there for treating the defendants' speedy trial rights differently?

The government has voiced reliance on *United States v. Solarzano-Rivera*, 368 F.3d 1073 (9th Cir. 2004). This case, too, does not support the government's position. In *Solarzano-Rivera*, the defendant entered into a plea agreement and pled guilty a few weeks after arrest. Three months later, he "moved to withdraw his guilty plea." The court granted the motion two weeks later. The STA exclusion of those two weeks has nothing to do with this case. To begin with, there is no suggestion that there was a "C" plea, and this may explain why the defendant filed a motion to withdraw the guilty plea, rather than a notice of withdrawal. Equally important, even if there was a "C" plea agreement, there is no suggestion that the court rejected it. The unilateral right to withdraw a guilty plea under Rule 11(c)(5) is not triggered unless the court informs the defendant that the "C" plea agreement has been rejected. Absent the court's explicit rejection of a "C" plea, the only way a defendant can withdraw a guilty plea is by motion, with the court's allowance. *Solarzano-Rivera*'s routine holding that delay caused by the reasonable consideration of a motion is excludable is irrelevant.

For these reasons, the Court should find that Ms. Jittaphol's speedy trial clock began anew on May 2, 2022, when she filed a Notice of Withdrawal of Guilty Plea.

ATICHA JITTAPHOL

By her Attorney,

/s/ Keith Halpern

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on June 2, 2022.

/s/ Keith Halpern