



## MEMORANDUM IN SUPPORT

### Statement of Facts

The Defendant herein, Dustin Plottke, entered pleas of not guilty to the five count indictment herein on or about August 2, 2013. The charges included one count of Aggravated Murder in violation of O.R.C. 2903.01, two counts of Murder in violation of O.R.C. 2903.02 and two counts of Felonious Assault in violation of O.R.C. 2903.11. As of the date of the filing of this Motion to Vacate Plea, the Defendant still maintains his innocence of these charges and desires to exercise his right to a jury trial as required by the Constitutions of the United States and the State of Ohio.

On or about January 22, 2014, the Defendant pled guilty to one count of Aggravated Murder pursuant to a plea bargain agreement in which his understanding that he will be sentenced to a twenty five to life term and the remaining counts in the indictment will be nolleed or dismissed with prejudice..

The Defendant states in the attached Affidavit that he only pled guilty out of fear and panic that he could be sentenced to a mandatory life term if he proceeded to jury trial and lost. He states that this panic and fear clouded his judgment and prohibited him from truly understanding his trial rights and the consequences of his plea. He states that he has had time to reflect on his decision to plead guilty and now wants to withdraw his plea. He states that he is not guilty of the crimes alleged and desires to exercise his constitutional right to a jury trial. Finally, he states that the statement he made at sentencing regarding

his participation in the crimes charged was something that he read from or learned of in the discovery materials and not the true facts as he recalls them.

### Argument

Criminal Rule 32.1 provides in pertinent part that “[a] motion to withdraw a plea of guilty \* \* \* may be made only before sentence is imposed \* \* \*. The general rule is that such motions should be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 527 (1992). While a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing, the trial court *must* conduct a hearing to ascertain whether the motion has a reasonable and legitimate basis. (Emphasis added.) *Xie* at 527. *See also State v. Casey*, 9th Dist. Lorain No.11CA010125, 2012-Ohio-3740, ¶ 7 (“It was inappropriate for the trial court to deny [the defendant’s presentence] motion [to withdraw] without conducting at least some inquiry into his reasons for seeking to withdraw his plea.”) and *State v. Wilborn*, 9th Dist. Summit No. 25352, 2011-Ohio-1038, ¶ 8 (“Under *Xie*, the trial court does not have any discretion regarding whether it should hold a hearing on a presentence motion to withdraw a plea.”).

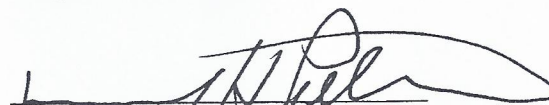
In *State v. Griffin* (2001), 141 Ohio App. 3d 551, the Court held that a Motion to withdraw a guilty plea should have been sustained where professed innocence, timeliness of the motion, confusion, and the judicial standard that such motions should be liberally granted were to be weighed against the prosecutor being placed back in the position of having to prove guilt. Prejudice will not be presumed from the prosecutor being put in such a position. In *State v. Bekesz* (1991), 75 Ohio App. 3d 436, the Court held that the trial court may have carefully complied with Crim. R. 11 at the time the plea was entered, this does not excuse it from the obligation to conduct a full and fair hearing should the

defendant seek to withdraw his guilty plea before sentence is passed. Such motions are to be freely granted and a court abuses its discretion by refusing to even consider such a motion. Also see *State v. Wyke* (April 8, 1993) Franklin Co. App. No. 92AP-1137, unreported (1993 Opinions 1319); *State v. Barnett* (1991), 73 Ohio App. 3d 244 (court focused only on the fact a plea had been entered).

In the present case, the Defendant is professing his innocence and expressing his desire to proceed to jury trial. He claims that his judgment was impaired when he entered his guilty plea to emotions of fear and panic. His plea, in essence, was not freely and voluntarily entered into, despite an appropriate Rule 11 discussion on the record. The law requires that a presentence motion to withdraw plea be freely granted. To overrule Defendant's motion in this case would be an abuse of discretion.

For the foregoing reasons, Defendant urges the Court to grant his Motion to Withdraw his Guilty Plea.

Respectfully Submitted,



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Attorney for Defendant

**CERTIFICATE OF SERVICE**

I, hereby certify that a true copy of the foregoing was sent by hand delivery and facsimile to the office of the Geauga County Prosecutor, on this 5 day of February, 2014.

  
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MICHAEL H. PETERSON, Esq.

AFFIDAVIT

STATE OF OHIO

Dustin Plottke, after being duly sworn, does hereby depose and state the following:

1. He is the Defendant in State of Ohio v. Dustin Plottke, currently pending before Judge Forrest W. Burt in the Court of Common Pleas of Geauga County.
2. He was indicted in a five count indictment The charges included one count of Aggravated Murder in violation of O.R.C. 2903.01, two counts of Murder in violation of O.R.C. 2903.02 and two counts of Felonious Assault in violation of O.R.C. 2903.11.
3. On or about January 22, 2014, the he pled guilty to one count of Aggravated Murder pursuant to a plea bargain agreement in which his understanding that he will be sentenced to a twenty five to life term and the remaining counts in the indictment will be nolleed or dismissed with prejudice.
4. That he only pled guilty out of fear and panic that he could be sentenced to a mandatory life term if he proceeded to jury trial and lost. He states that this panic and fear clouded his judgment and prohibited him from truly understanding his trial rights and the consequences of his plea. He states that he has had time to reflect on his decision to plead guilty and now wants to withdraw his plea. He states that he is not guilty of the crimes alleged and desires to exercise his constitutional right to a jury trial. Finally, he states that the statement he made at sentencing regarding his participation in the crimes charged was something that he read from or learned of in the discovery materials and not the true facts as he recalls them.
5. He innocent of the all of the charges in the indictment.

FURTHER AFFIANT SAYETH NAUGHT.

  
DUSTIN PLOTTKE

Sworn to and subscribed before me this 4 day of February, 2014.

  
NOTARY PUBLIC

**Michael H. Peterson**  
Notary Public State of Ohio  
Commission has no expiration date  
Section 147.30 R.C.