

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF ERIE

---

**THE PEOPLE OF THE STATE OF NEW YORK,**

*Plaintiff,*

**NOTICE OF MOTION  
TO WITHDRAW GUILTY  
PLEA**

-vs-

[REDACTED]

[REDACTED]

*Defendant.*

---

PLEASE TAKE NOTICE, that upon the annexed affirmation of [REDACTED] and upon all of the papers and proceedings heretofore had herein, a motion will be made on behalf of the defendant, [REDACTED] on the 25th day of [REDACTED] am, or as soon thereafter as counsel may be heard, for an Order granting the following relief:

- I. Allowing the accused to withdraw his previously entered plea of guilty in the above matter pursuant to CPL 220.60(3).

DATED: May 24, 2022  
Buffalo, New York

[REDACTED]  
ATTORNEY FOR [REDACTED]

**TO:**

**HON. [REDACTED]**

**ERIE COUNTY COURTHOUSE**

25 Delaware Avenue, Part 9

Buffalo, New York 14202

[REDACTED]

Assistant District Attorney Felony Trials Bureau

Erie County District Attorney's Office

25 Delaware Avenue

Buffalo, New York 14202

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

---

**THE PEOPLE OF THE STATE OF NEW YORK,**

*Plaintiff,*

**AFFIRMATION**

-vs-

[REDACTED]

[REDACTED]

*Defendant.*

---

[REDACTED] affirms the following to be true under penalty of perjury:

1. I am an attorney duly licensed to practice law in the State of New York and represent [REDACTED] under the auspices of the Erie County Bar Association's Aid to Indigent Prisoner's Society Inc. (The Assigned Counsel Program).
2. Your deponent was appointed successor attorney to [REDACTED] on or about [REDACTED].
3. At the time that your deponent was appointed successor attorney to [REDACTED] [REDACTED] the procedural posture of this case was that it was post-entry of guilty plea but prior to the imposition of sentence. It is my understanding that a pre-sentence investigation had been ordered but at the time the pre-sentence investigation interview was to be conducted at the Erie County Correctional Facility that [REDACTED] refused to participate in the interview as long as [REDACTED] continued as attorney of record. It was this breakdown between [REDACTED] which lead to my involvement as successor attorney in this action.

4. As current counsel of record I have had several lengthy discussions with Mr. [REDACTED] who adamantly maintains his innocence as to any and all charges contained in the indictment allegedly that he had criminal sexual contact with the complainant herein.

5. Prior to the preparation of this motion to withdraw the previously entered guilty plea in this matter, I have ordered, obtained and reviewed the transcript of the plea proceedings in this action which occurred on [REDACTED]. A copy of same is attached hereto and incorporated herein.

6. Prior to filing this motion on behalf of [REDACTED] he was fully advised as to the potential consequences associated with moving to withdraw the previously entered guilty plea and, that if successful in that endeavor, he would then stand trial on a Class A felony with a potential maximum sentence of life in prison if convicted after trial. This was all placed on the record in open court on the last in court appearance on [REDACTED]. [REDACTED] maintains his innocence and is determined to seek to withdraw his previously entered plea of guilty to an attempted course of sexual conduct against a child in violation of Penal Law section 110/130.75(1).

7. New York Criminal Procedure Law Section 220.60(3) provides: " At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to part of the indictment, or a plea of not responsible by reason of mental disease or defect, to withdraw such plea, and in such event the entire indictment, as it existed at the time of such plea, is restored"

8. On [REDACTED] while on the record and immediately prior to entry of his guilty plea the accused expressly stated and maintained his innocence of the criminal charges contained in the indictment. On Page 8 of the transcript at line 5 the following

discussion is conducted “ THE COURT : Okay. So going back to my question, you said that you understand that, if you are convicted of that top count, that you are looking at a sentencing range of 25 years to life; right ? You understand that ? THE DEFENDANT : Yeah. It’s a risk I’m going to have to take for something I didn’t do “ ( Hereafter, T8,5-10)

9. Furthermore, on the same date of [REDACTED] the date of the entry of the plea, after having been sworn in and after the actual plea colloquy had commenced the following on the record exchange occurred “ THE COURT : I’m asking you if you understand that, if we had a trial, that the People would have to prove beyond a reasonable doubt that you’ve done what they’ve claimed you’ve done in order to secure a conviction again (sic) you ? THE DEFENDANT : I thought that’s what the Family Court thing was. THE COURT: I’m asking you if you understand, if we have a trial, that they have to prove that you did – committed this crime; do you understand that ? MR. [REDACTED] If we start the trial on December 9<sup>th</sup> and we had a trial that lasts, say, a week, it’s the People’s obligation to prove beyond a reasonable doubt that you did what the indictment claims you did; do you understand that ? THE DEFENDANT: But they can’t, because I didn’t do it. I’m confused now. See ? “ ( T15, 5-20)

10. Not once but twice during the same court proceeding within which the guilty plea was taken the accused specifically and clearly stated his innocence of the criminal conduct constituting the offenses charged in the Indictment. The Fourth Department expressly held in *People v. Leslie* 98 AD2d 977 (4<sup>th</sup> Dept. 1983) that in the absence of prejudice to the People such an assertion of innocence during the plea colloquy warrants permitting the accused to withdraw said guilty plea. The factual scenario contained in the

Leslie case is directly comparable to the scenario presented herein ~ an initial declaration of innocence followed by a subsequent admission of guilt. See also *People v. McIntyre* 40 AD2d 1038, *People v. East* 39 AD2d 606, *People v. Gerald Slip Opinion No. 2d Dept. 2021*.

11. The accused's protestations of innocence at the time immediately prior to and subsequent to the entry of the guilty plea are collaborated and substantiated by evidence of recantation on the part of the complainant herein. Evidence of said recantation is contained in the CPS narrative reports regarding the investigation of the companion case in Erie County Family Court under Docket No. [REDACTED]

12. As of September 2, 2021 CPL 200.50(8) requires the Court to advise a defendant prior to accepting a guilty plea to a count in an indictment as to the effect said guilty plea has on his/her voting rights. The presiding magistrate is obligated to advise the accused as follows " Do you understand that a conviction of a felony will result in your loss of the right to vote while you are serving the felony sentence in a correctional facility and the right to vote will be restored upon your release ? " This required advisement regarding the impact of a felony conviction upon [REDACTED] voting rights involving a mandatory period of incarceration in a correctional facility was not conducted by the Court herein at the time the plea was entered in the above matter. The failure to provide this required advisement of the deprivation of voting rights renders the plea colloquy invalid.

13. It is well established case law that for a guilty plea to be valid it must be knowingly, intelligently and voluntarily made. On two (2) occasions during the plea proceedings on November 16, 2021 it was necessary for the on the record proceeding to be interrupted and suspended so that [REDACTED] could have additional conversations

about how to proceed with his counsel of record . (See T10,8) and (T16-11) Furthermore, as noted above ██████ expressly expressed his confusion and uncertainty during the plea proceedings. In fact at one point ██████ seemed to conflate the admission in Erie County Family Court with his guilty plea in the criminal proceeding. ( T15,9-10)

14. The factor which appears to have persuaded prior counsel of record that the matter should be resolved by way of a guilty plea rather than a trial was the provision to prior counsel of a transcript of the family court proceedings conducted on January 10, 2020 constituting an admission to abuse along with the Fourth Department's holding in *People v. Babb* 186 AD 3d 1058 (2020) that such an admission can be used by the prosecution in their case in chief as evidence in a criminal prosecution.

15. The record reveals that this information came to the attention of prior counsel on ██████ and that it was discussed with ██████ in person on ██████ ██████ for approximately one hour at the Erie County Correctional Facility. This would be five (5) days before the November 16, 2021 court appearance in which the guilty plea on this matter was eventually entered. Upon information and belief, and supported by the expressed confusion and multiple interruptions of the proceedings on the day in which the plea was entered, ██████ plea was not knowingly, intelligently and voluntarily entered. There was insufficient time devoted to a meaningful discussion of the plea and its consequences afforded to ██████ by prior counsel and he expressed confusion on the record regarding the legal import of the Family Court admission as it pertained to the criminal prosecution.

16. For all the reasons specified above it is hereby requested that [REDACTED] be permitted to withdraw his previously entered guilty plea pursuant to CPL 220.60 (3) and the charges contained in the indictment herein be reinstated for resolution at trial.

