

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO**

**ANTHONY CIOFFI, JR**

Inmate #332-078

Lake Erie Correctional Institution  
501 Thompson Road  
Conneaut, Ohio 44030-8000

Petitioner

vs.

**RICH GANSHEIMER, WARDEN**

Lake Erie Correctional Institution  
501 Thompson Road  
Conneaut, Ohio 44030-8000

Respondent

) **CASE NO:**

) Cases of Record: 95-CR-696, 96-CR-599  
) (Consolidated)

) **JUDGE:**

) **PETITION FOR:**

) **WRIT OF HABEAS CORPUS (PRO SE)**  
) 28 U.S.C. 2254  
) State Custody

Now comes petitioner, Anthony Cioffi, Jr., who for his Petition against respondent says:

## **JURISDICTION**

All events set forth in this petition occurred in, or are substantially related to, the Northern District of Ohio.

This case involves and arises directly from a question of Federal law; and the court in which this Petition is filed has jurisdiction pursuant to 28 U.S.C. 2254.

Petitioner's State Court remedies were exhausted on September 10, 2003, pursuant to an order of the Ohio Supreme Court.

## **THE PARTIES**

Petitioner Anthony Cioffi, Jr. is an inmate confined by the Ohio Department of Corrections at the Lake Erie Correctional Institution, pursuant to an order issued by the Trumbull County Court of Common Pleas, Trumbull County, Ohio.

Respondent Rich Gansheimer is the Warden of the Lake Erie Correctional Institution and has the power to give appellant his unconditional freedom.

## **TRIAL COUNSEL**

Thomas E. Zena

## **CONVICTION/SENTENCE UNDER ATTACK**

### **Preamble**

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.

These words of Thomas Jefferson form the basis of this appeal; a Habeas Corpus Petition.

### **Rule of Law Concerning Habeas Corpus**

In *Brown v. Vasquez*, 952 F.2d 1164, 1166 (9th Cir.1991), cert. denied, 112 S.Ct. 1778 (1992), the court observed that the Supreme Court has "recognized the fact that [t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969). Therefore, the writ must be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris*, 394 U.S. at 291.

**Be it known by these presents:**

**That** Anthony Cioffi, Jr., the Petitioner herein, is a citizen of the United States,

**That**, on the 11th of December, 1996, the Petitioner was deprived of rights that are guaranteed under Article V and Article VI of the Constitution of the United States,

**That** said deprivation was due to violations of said Articles by a State court, and

**That** the Petitioner demands relief and will not rest until relief is granted.

**CLAIMS**

**Violation of Constitutional Rights**

**I. Article V - 5th Amendment to the U.S. Constitution**

The 5th Amendment to the U.S. Constitution holds, inter alia:

**That** no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury

**That** no person accused of crime shall be compelled to be a witness against himself, and

**That** no person accused of crime shall be deprived of life, liberty or property without due process of law.

The Petitioner asserts that, in the conduct of his trial, his 5th Amendment rights were violated in each of the above-mentioned particulars, and thereby makes the following claims:

**Claim 1: His indictment was deficient on its face, because:**

(a) The specified time frame rendered the alleged acts impossible.

In the second case of record, the Indictment alleges the acts complained of were committed on or about the summer of 1992. Under penalty of perjury, the Petitioner asserts he did not have contact with his sons, the alleged victims, from 1992 until 1995, which would make the alleged acts impossible. (Ann. Ref. 14 at p. 1; See also Exhibit A)

(b) The Bill of Particulars did not coincide with the Indictment.

The Bill of Particulars for this Case alleges the acts complained of occurred on or about the summer of 1991, which does not coincide with the time alleged in the Indictment. (Ann. Ref. 13 at p. 1)

(c) The specified time frame was indeterminate.

No specific date or dates are given as to when the alleged acts were supposed to have occurred.

(d) There was no constructive notice.

The Bill of Particulars was not date-stamped; and, thus, presented no proof of recording. This failure to give constructive notice shows, incontrovertibly, that the Petitioner was not legally indicted; to wit, he was not indicted in such a way as to meet the 5th Amendment requirement of due process.

It cannot be countered that the Indictment itself was date-stamped, since this was a secret document; and, thus, could not have served to give constructive notice.

(e) An error by a U.S. District Judge revealed the trial court's failure to comprehend the content of its own indictment.

In resolving a document pertaining to the Petitioner's first case of record, Jame S. Gwin, a United States District Judge wrote:

In denying Cioffi's petition for a writ of habeas corpus on March 3, 2005, the Court detailed the factual background of this suit. [Doc. 16]. To recap, in December 1996 the petitioner pled guilty before the Trumbull County Court of Common Pleas to two counts of gross sexual imposition and one count of kidnapping as to his girlfriend's nine year old daughter... ( Ann. Ref. 33 at p. 1)

In the indictment; which, apparently, was not recorded, the petitioner was charged with kidnapping the mother; NOT the daughter!

The kidnapping charge was unsubstantiated, as the court failed to show the mother was removed from the place she then was or confined against her will. The state's evidence, an uncorroborated statement made by the alleged victim, showed only that there was a heated argument, lasting approximately one hour.

Thus, the alleged Indictment is deficient on its face and, in any event, would fail due to contradictions and lack of specificity.

#### **Rules of Law:**

5th Amendment, U.S. Constitution

- (1) No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, and
- (2) No person shall be held to answer for a capital or otherwise infamous crime and deprived of life, liberty or property without due process of law.

**Claim 2:** His guilty plea was in fact coerced; and, as there were no witnesses, the plea itself amounted to self-incrimination; to wit, he was compelled to testify against himself.

#### **Supporting Facts:**

As proof of coercion, the Petitioner asserts that:

- (1) The prosecution, in collusion with the trial court, racked up numerous, staggering claims in drafting indictments against the Petitioner; utilizing documents containing no more than hearsay evidence and speculation in support of said indictments.

( Ann. Ref. 31 at p. 2 [charges], Ann. Ref. 15 at pp. 1 and 2 [no corroboration], Ann. Ref. Ann. Ref. 4 at p. 1 [results of examination conducted 4 days after alleged incident were admitted into evidence], Ann. Ref. 5 at p.2 [negative test results served as basis for speculative finding].

(2) The trial court failed to enter documents into evidence which contained exculpatory statements, although these documents had been subpoenaed by the Petitioner prior to the day of his trial. (Ann. Ref. 11 at p. 1 [claims unsubstantiated], Ann. Ref. 26 at p. 1 [exculpatory documents were not reviewed prior to the Petitioner's plea], Ann. Ref. 20 at p. 27 [subject of exculpatory records never revisited], See Exhibits B & C).

(3) On the day prior to the Petitioner's trial, his trial counsel quashed his subpoenas of witnesses favorable to the Petitioner. Rather than defend the Petitioner's case, which was described as highly defensible, the Petitioner's trial attorney elected to coerce the Petitioner into a plea bargain agreement, which required the Petitioner to enter a plea of guilty to all of the charges. (Ann. Ref. 30 at p. 5)

(4) The Petitioner's trial counsel suggested to the Petitioner that, in all probability, he would receive a life sentence if his cases went to trial. (Ann. Ref. 37 at p. 3)

(5) In response to a question by the Petitioner, the Petitioner's trial counsel instructed the Petitioner that an indeterminate trial sentence of from 10 to 25 years would, with programs, amount to no more than 4 years of incarceration; and, further, the Petitioner relied on this instruction in making his decision to enter a plea of guilty to all charges. (Ann. Ref. 37 at p. 4)

#### **Rules of Law: 5th Amendment, U.S. Constitution**

- (1) No person accused of crime shall be compelled to be a witness against himself.
- (2) No person accused of crime shall be deprived of life, liberty or property without due process of law.

#### **The Petitioner asserts:**

That the Due Process Clause of the 5th Amendment requires proof of guilt beyond a reasonable doubt, without the aid of the defendant's testimony; since, with no independent proof of guilt, such testimony amounts to compelling the accused to testify against himself, and

That there was no corroboration for any of the claims made against the Petitioner sufficient to sustain an independent finding of guilt in either of the cases of record.

In the instant appeal, he thereby presents the following facts:

In the first case, the complaining party (mother of the alleged victim) was not an eye-witness and her claims were unsubstantiated. In fact, there was evidence that this plaintiff had formerly made similar claims against a third party. (Ann. Ref. 15 at p. 2 [claims unsubstantiated], Ann. Ref. 16 at p. 4 [complaining party was not an eye witness], Ann. Ref. 20 at pp. 37 & 39 [no physical evidence])

In the second case, the State produced no proof of any of the crimes the Petitioner was alleged to have committed. The State's primary evidence consisted of statements prepared by a third party reporter, statements that were allegedly made by the two alleged victims, the Petitioner's minor sons. This reporter did not witness any of the alleged acts. Moreover, in times past, the Petitioner's sons had repeatedly denied that they had, at any time, been sexually abused by the Petitioner, their natural father.

Documents containing evidence of their denials was not produced at the Petitioner's trial, despite the fact that the Petitioner, himself, had subpoenaed these documents (not knowing they contained denials, which would have been exculpatory) (Ann. Ref. 15 at pp. 1 and 2 [no corroboration], Ann. Ref. 20 at p. 27 [subject of exculpatory records never revisited], Ann. Ref. 20 at p. 55 [no physical findings], Ann. Ref. 26 at p. 1 [exculpatory documents were not reviewed prior to the Petitioner's plea], See Exhibits B & C).

**Rule of Law:** Due Process Clause, 5th Amendment, U.S. Constitution (Id.)

**Claim 3:** His present confinement is due to a failure of due process.

**Supporting Facts:** The trial court did not sustain its burden of proving the Petitioner's guilt. Instead, it relied on hearsay evidence and false statements that were used to coerce the Petitioner into a plea bargain in which he seemingly had no alternative but to plead guilty to all of the charges.

(Ann. Ref. 15 at pp. 1 and 2 [no corroboration], Ann. Ref. Ann. Ref. 4 at p. 1 [results of examination conducted 4 days after alleged incident were admitted into evidence], Ann. Ref. 5 at p.2 [negative test results served as basis for speculative finding]).

**The Petitioner asserts:**

That, in any criminal prosecution, the state has the burden of producing sufficient evidence of guilt to sustain an indictment that is reasonable on its face.

**Rule of Law:** Due Process Clause, 5th Amendment, U.S. Constitution (Id.)

**Claim 4:** The instant Petition is not barred as a second or successive petition because it alleges and proves newly discovered facts which justify the Petitioner's demand for relief.

**Supporting Facts:** The Petitioner was overwhelmed with charges the State was in no position to prove. The State leveled these charges against the Petitioner, as part of a strategy to trick the Petitioner into a plea bargain agreement whereby he, ostensibly, had no choice but to plead guilty to all of the charges. (Ann. Ref. 31 at p. 2)

In the instant Petition, the Petitioner has marshalled evidence to show that the trial court's indictment was unsustainable, being based on hearsay evidence and a false premise; to wit, that he had to enter a guilty plea to avoid a life sentence. (Ann. Ref. 15 at pp. 1 and 2; Ann. Ref. 37 at pp. 4, bottom and 5, top)

The Petitioner has also shown that his trial counsel gave him false information, to the effect that an indeterminate sentence of from 10 to 25 years would be commuted to a term of no more than 4 years. (Ann. Ref. 37 at pp. 4, bottom and 5, top) Thus, he has shown by the evidence that he is entitled to relief. This evidence is newly discovered, in that it was not known at the time the Petitioner entered his plea.

**Rule of Law:** The AEDPA - The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No.104-132, 110 Stat. 1214 (1996)("AEDPA") governs the standard of review for state court decisions.

As amended by the AEDPA, section 2255 provides in relevant part as follows:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain --

(1) Newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense.

## **II. Article VI - 6th Amendment to the U.S. Constitution**

The 6th Amendment to the U.S. Constitution stipulates, inter-alia, that:

In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defense.

The Petitioner asserts that, throughout the course of his trial, his defense counsel did not, in fact, come to his defense.

He therefore makes the following claims:

**Claim 5:** His defense counsel was not prepared to assist with his defense.

**Supporting Facts:** In a sworn affidavit, Attorney Zena, the Petitioner's trial counsel, admitted he was not prepared to defend Petitioner against the charges made in the second case of record. Collectively, these charges carried a maximum sentence of up to 25 years. (Ann. Ref. 29 at p. 5; Ann. Ref. 31 at p. 2)

The case was tried without waiting for exculpatory records that had been subpoenaed by the Petitioner. These records contained statements by the alleged victims that the Petitioner had NOT in fact committed the acts complained of (Ann. Ref. 20 at p. 45)

### **Rules of Law:**

5th Amendment, U.S. Constitution - No person accused of crime shall be deprived of life, liberty or property without due process of law.

6th Amendment, U.S. Constitution - In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defense.

**Claim 6:** He was misinformed by his defense counsel concerning material facts; and, as a result, entered a plea he would not have entered but for the misinformation.

In response to the Petitioner's inquiry concerning the length of time he would have to serve if he entered a plea of guilty as to all charges against him, his trial counsel informed him that with programs he would not have to serve any longer than 4 years. (Ann. Ref. 27 at p. 1 [trial counsel had not properly evaluated the charges against the Petitioner], Id. at p. 11 [incorrect legal advice], Ann. Ref. 37 at pp. 4 and 5)

### **Rule of Law:**

Where it is manifest that the plea is premised upon incorrect legal advice, the plea is in violation of the defendant's right to due process and is not voluntary. *State v. Mikulic* (1996), 116 Ohio App 3d 787

**Claim 7:** The time that elapsed from the time Petitioner filed his plea till the time he discovered material misinformation was reasonable in view of the facts. Therefore, the instant Petition is not barred by the Statute of Limitations.

**Supporting Facts:** The Petitioner had no reasonable means of apprehending that the information received from his trial counsel just prior to his plea; to wit, that his sentence would be commuted to a term of no more than 4 years, was based on his trial counsel's failure to properly evaluate the gravity of a guilty plea in view of charges facing the Petitioner. (Ann. Ref. 27 at p. 1, Ann. Ref. 37 at pp. 4 & 5)

Thus, under the facts of this case, it is reasonable to assume that the Petitioner's suspicions would not have been roused until sometime after he had served four years of his sentence.

**Rule of Law:**

The statute of limitations does not prevent a Court from granting relief in cases involving equitable tolling. See *Dunlap v. United States*, 250 F.3d 1001, 1008 (6th Cir. 2001). In determining if equitable tolling is appropriate, the 6th Circuit considers the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim. See *id.*

## **CASE HISTORY**

### **Charges & Sentencing**

In the Court of Common Pleas, Trumbull County Ohio

**1st Indictment**

Counts 1 & 2 - Gross Sexual Imposition (F3); Count 3 - Kidnapping (Agg. F2)

November 17, 1995

**2nd Indictment**

Crim. Rule 6, 7 - 96-CR-599

Rape (Life) - Three Counts

Gross Sexual Imposition - Three Counts

September 27, 1996

On December 6, 1996, Judge John Stuard sentenced Cioffi to one year on the gross sexual imposition count and three to fifteen years on the kidnapping count from the first indictment. Judge Stuard also sentenced Cioffi to ten to twenty-five years on the three rape charges and one year on the three gross sexual imposition counts from the second indictment. As the sentences were to run concurrently, Cioffi faced 10 to 25 years of imprisonment. (Ann. Ref 31 at p. 2)



## PREVIOUS OR PENDING ACTIONS

Exhaustion of Petitioner's State Court remedies occurred on September 10, 2003, pursuant to an order of the Ohio Supreme Court.

## DEMANDS FOR RELIEF

### Preamble

The facts of this case reveal:

That on December 6, 1996, Anthony Cioffi, Jr., the Petitioner herein, was unlawfully convicted,

That the Petitioner's conviction was in violation his rights under the 5th and 6th Amendments to the U.S. Constitution,

That the Petitioner was deprived of his liberty without due process of law, and

That, in view of said violation and deprivation, the Petitioner is entitled to the following relief:

- A. An Order granting Petitioner a Writ of Habeas Corpus,
- B. An Order vacating and holding for naught Petitioner's prior pleas to the state court's charges,
- C. An Order vacating Petitioner's state court convictions,
- D. An Order that the Petitioner be immediately released from state custody and enjoining respondent and/or the State of Ohio from restraining, inhibiting or impairing Petitioner's liberty or personal freedom, now or in the future, based upon the unconstitutionally obtained state court convictions, and
- E. An Order providing that the Petitioner be granted all other relief to which he is entitled at Law or in Equity.

BE IT SO HELD.

## VERIFICATION

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AS I VERILY BELIEVE.

Date

Anthony Cioffi, Jr.

*Anthony Cioffi, Jr.*

## **EXHIBIT A**

### **Impossibility**

## **LINCOLN'S MOST FAMOUS CASE**

### **Moonlight Over Mason County**

Without doubt, Lincoln's most famous case in popular history was his successful defense of William "Duff" Armstrong for the murder of James Metzker. Known generally as the "Almanac Trial," this case featured Lincoln's use of an almanac to discredit the testimony of a prosecution witness.

Astronomers as well as historians and lawyers continue to be drawn to this case. Two Texas physicists, Russell Doescher and Donald Olson, have performed astronomical calculations that support Lincoln's assertion that the moon was too low in the sky on August 29, 1857 for the eye-witness to have precisely observed the camp meeting altercation that ended later in James Metzker's death.

Thus, Lincoln showed his client was innocent because it would have been impossible for him to have committed the crime.

**D & E COUNSELING CENTER***"The Youth and Family Specialists"*

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HARVEY KAYNE, Ph.D.  
Clinical DirectorWILLIAM P. FIKTER, M.D.  
Medical DirectorGREGORY CVETKOVIC, M.A.  
Executive Director**SERVICES**

- Youth & Family Counseling
- Community Support
- 24-Hour Crisis Stabilization
- Psychiatric/ Psychological Evaluation
- Therapeutic Recreation
- Pre-Hospitalization Screening

**SERVICE LOCATIONS**

**AUSTINTOWN**  
142 Javit Court  
Yo., OH 44515  
(330) 793-2487  
Fax (330) 793-4559

**YOUNGSTOWN**  
Outpatient Care  
711 Belmont Avenue  
Yo., OH 44502  
(330) 743-4716  
Fax (330) 743-5748

24-Hour Crisis  
Stabilization Unit  
713 Belmont Avenue  
Yo., OH 44502  
(330) 744-5544  
Fax (330) 744-5582

**CAMP CHALLENGE**  
Therapeutic  
Recreation  
39 Wilkinson Avenue  
Yo., OH 44509  
(330) 793-2487

Accessible to  
the Deaf and  
Hearing Impaired  
TDD  
(330) 793-0996

October 1, 1996

Thomas C. Wrenn  
Chief Counsel - Child Assault Div.  
Trumbull County Prosecutor's Office  
3rd Floor Administration Building  
160 High Street North West  
Warren, Ohio 44481-1092

RE: Anthony Cioffi  
Matthew Cioffi

Dear Mr. Wrenn;

Matthew Cioffi was seen for initial assessment on 4/21/95 by Ms. Meg Harris, M.S.Ed., L.P.C. following his discharge from the Youth Services Unit of Tod's Hospital. Although Matthew's mother, Lisa Phillips, reported initially that Matthew "may have been sexually molested by their (biological) father"; there was nothing in the extensive information received from the hospital (including a psychological evaluation) that suggested corroborative findings and/or treatment for abuse. In fact, there is specific reference to Matthew denying being a victim of sexual abuse. Matthew was admitted to the hospital on 3/30/95 with a diagnosis of Major Depression after a suicide attempt. A psychological evaluation suggested a diagnosis of Adjustment Disorder with Depressed Mood and a rule-out of Attention Deficit Hyperactivity Disorder.

The clinical service plan developed by the primary Therapist, Dave Tamaro, L.S.W. on 5/11/95 and signed by Matthew's mother targeted disruptive behaviors as the problem. In total, Matthew and/or his mother were seen in three sessions by Mr. Tamaro. There were no reference to allegations or reports of sexual abuse in any of the Therapist's progress notes.

## SERVICES SUPPORTED BY:

 THE MAHONING COUNTY MENTAL HEALTH BOARD  THE CHILDREN'S CIRCLE OF FRIENDS FOUNDATION