IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

STATE OF OHIO, Plaintiff -vs- ANTHONY CIOFFI, JR., Defendant	)	CASE NO. 95-CR-696 96-CR-599 JUDGE JOHN M. STUARD STATE'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO WITHDRAW PLEA AND VACATE SENTENCE

Now comes the Plaintiff, State of Ohio, by and through the Prosecuting Attorney of Trumbull County, Ohio, and hereby files its *Response to Defendant's Motion to Vacate Plea.* The Defendant was indicted in 1995 in Case No. 95-CR-696 on two(2) Counts of Gross Sexual Imposition, felonies of the third degree and one count of Kidnaping, an aggravated felony of the second degree.

Before this first case was resolved, the Defendant was indicted a second time in Case No. 96-CR-599 charging him with three (3) counts of Rape (Life) and three (3) counts of Gross Sexual Imposition, felonies of the fourth degree. This latter case was assigned to Judge Mitchell F. Shaker.

As counsel for the State and the Defendant were in the chambers of Judge Stuard, preparing to begin jury selection for the first case, the Defendant's Attorney, Thomas Zena, was summoned by the Defendant. When he returned, he indicated to the Court and to the Attorneys for the State, that his client wanted to plead, not only to the case at hand but also, the second case before Judge Shaker.

Counsel for both sides met with Judge Shaker to seek his approval for a plea on the second case. He transferred the matter to Judge Stuard to facilitate the dual plea.

The Defendant, within a relatively short period of time, then appeared before Judge Stuard. He was advised of his rights on the first case. He acknowledge that he understood his rights including the right to a jury trial and that he was voluntarily waiving those rights. He then pleaded guilty on the amended indictment to the first case.

Judge Stuard then repeated the procedure for the second case. The Defendant, again, acknowledged that he understood his rights and was waiving them and freely and voluntarily.

It should be noted that this defendant was not a neophyte in the criminal justice system when he made these pleas He had served time in Florida for a sex crime and had been arrested on several other occasions.

In the first case, he was sentenced to one year imprisonment on the Gross Sexual Imposition to run concurrent to three to fifteen years of imprisonment on Kidnaping. The second count of Gross Sexual Imposition was dismissed. These sentences were to run concurrent to the sentence in 96 CR 599.

In the second case, the Life specification on the first three counts was dismissed. The defendant then pleaded guilty to all six counts. He was sentenced to 10 to 25 years on each of the three Rape counts to run concurrently with each other and to run concurrently with one year imprisonment on the three counts of Gross Sexual Imposition to run concurrently with each other.

Therefore, without good counsel, he could have been serving three life sentences ,

plus three to fifteen on the kidnap and five years or more for the five Gross Sexual Impositions.

The Defendant now claims that his Attorney, Thomas Zena did not spend much time on his cases. The records, however, indicate that in Case 1, Atty. Zena appeared in Court on his behalf nine times and on the second case, he was present four times (in the three month following arraignment). He filed numerous motions in each case and came to the Prosecutor's office several times to discuss the case.

Defendant further states that there are three facts upon which "there is no dispute". In fact, he is wrong on all three.

1. No physical evidence existed to support the allegations of sexual abuse. Contrary to his belief, there was a medical examination by Dr. W. B. Dodgson, indicating sexual abuse to the victim in the first case.

2. Information existed that the first victim and her mother had lodged similar unfounded allegations in the past against other third parties and that same had been the subject of an investigation by Trumbull CSB. There is nothing in the case files nor the record to indicate that this fact existed anywhere except the Defendant's mind.

3. The victim and mother in the first case had been previously counseled by mental health care professionals for emotional problems. They did go to counseling to deal with the break up of the parents and the father's drinking problem.

The Defendant continues that Attorney Zena failed to inspect CSB records when, in fact, the records were submitted to the Court for an in camera inspection and only exculpatory information would have been presented to counsel.

Defendant further stated that in his Oral Examination Exhibit 3 (attached to his motion to vacate), that there is a statement by the victim that she had denied ever having been touched "in a bad way" in the past. In reality, she was asked "Have you ever had a bad touch before?" and she responded, "Yeh, with Tony, my mom's old boy friend, {the Defendant) that's why we're here, right?" And, "Has anyone else ever touched you in a bad way?" "NO"

WITHDRAWAL OF PLEA

The withdrawal of a guilty plea after sentencing is controlled by Crim.R. 32.1 which states that a motion to withdraw a plea of guilty can only be made before sentencing unless it is "to correct manifest injustice".

In *State v. Perry*, 1997 WL 269202 (Ohio App. 11 Dist. 1997), the court held "in moving to withdraw a plea after sentencing, a defendant has the burden of demonstrating the existence of such an injustice. (Also see *State v. Peterseim* (1980), 68 Ohio App.2d 211; *State v. Blatnik, (1984), 17 Ohio App.3d 201*)

In *State v. Smith*, (1977), 49 Ohio St.2d 261, the Ohio Supreme Court held that the burden of demonstrating a manifest injustice required by Crim.R. 32.1 permits a court to allow a withdraw of a guilty plea only in "extraordinary cases". The burden of demonstrating the extraordinary case and the "manifest injustice" rests with the defendant.

The rationale for this high standard was announced in *Peterseim*, supra, wherein the court noted "if a plea of guilty could be retracted with ease after sentence had been imposed, the accused might be encouraged to plead guilty to test the weight of potential

punishment, and withdraw the plea if the sentence were unexpectedly severe***." *Id.* at 213. (Citations omitted).

While there does not appear to be a definitive understanding of the term "manifest injustice," one appellate court has attempted to provide some guidance. In *State v. Padgett*, (July 1, 1993), Cuyahoga App. No. 641846, unreported, the court stated

> "Manifest injustice is determined by examining the totality of the circumstances surrounding the guilty plea. Paramount in this determination is the trial court's compliance with Crim.R. 11(C), evidence of which must show in the record that the accused understood his rights accordingly." *Id.* at 1.

Furthermore, in *State v. Taylor* (June 15, 1989), Montgomery App. No. 11220 unreported, the court held:

> "Crim.R. 11(C) requires the trial court to conduct a specific inquiry to determine that pleas of guilty or no contest are made freely and intelligently. A meticulous procedure is required not only because a defendant thereby subjects himself to penalties but also, and most importantly, because he thereby waives his constitutionally guaranteed right to trial by jury."

As noted above, the court did conduct a specific inquiry of the defendant according to Crim.R. 11(C), not only once, but twice.

The State of Ohio respectfully submits that this Defendant has shown only that he does not like being in prison. He has shown no manifest injustice. In fact, he had been sentenced in court before this occasion, he sought out his attorney to plead rather go to trial and wanted both cases plead at once because he was afraid of Judge Shaker. He was advised twice of his rights and waived them That is not a manifest injustice and his motion

should be dismissed without hearing.

Respectfully submitted,

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CERTIFICATION

This is to certify that a copy of the foregoing *State's Response to Defendant's Motion to Withdraw Guilty Plea* was mailed to counsel for the Defendant at his office on this 22nd day of March, 2001.

Thomas C. Wrenn #0051952
Assistant Prosecuting Attorney