IN THE SUPREME COURT OF OHIO
CASE NO:

STATE OF OHIO,
Plaintiff-Appellee,

v.

ANTHONY CIOFFI, JR.,
Defendant-Appellant

ON APPEAL FROM THE COURT OF APPEALS FOR TRUMBULL COUNTY, OHIO
CASE NOS. 2002-T-0037 (Consolidated)
2002-T-0039

NOTICE OF APPEAL OF APPELLANT ANTHONY CIOFFI, JR.

DENNIS WATKINS
Trumbull County Prosecutor
Administration Building
Fourth Floor
160 High Street, N.W.
Warren, Ohio 44481-1092

FOR THE PLAINTIFF-APPELLEE

MARK B. MAREIN (0008118)
STEVEN L. BRADLEY (0046622)
Marein & Bradley
526 Superior Avenue, Suite 222
Cleveland, Ohio 44114
(216) 781-0722

FOR THE DEFENDANT-APPELLANT

NOTICE OF APPEAL

Appellant, Anthony Cioffi, Jr., hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Trumbull County Court of Appeals, Eleventh Appellate District, entered in the Court of Appeals case Nos. 2002-T-0037 and 2002-T-0039 (consolidated) on May 12, 2003.

This case raises a substantial constitutional question and is one of public or great general interest, and involves a felony.

Respectfully submitted,

MARK B. MAREIN (0008118)
STEVEN L. BRADLEY (046622)
Marein & Bradley
222 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114
(216) 781-0722

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

A Copy of the foregoing *Notice of Appeal* was sent by regular U.S. Mail on this 20th day of June, 2003 to Dennis Watkins, Trumbull County Prosecuting Attorney, 160 High Street, N.W., Third Floor, Administration Building, Warren, Ohio 44481.

MARK B. MAREIN
STEVEN L. BRADLEY

IN THE SUPREME COURT OF OHIO
CASE NO:

STATE OF OHIO,
Plaintiff-Appellee,

v.

ANTHONY CIOFFI, JR.,
Defendant-Appellant

ON APPEAL FROM THE COURT OF APPEALS FOR TRUMBULL COUNTY, OHIO
CASE NOS. 2002-T-0037 (Consolidated)
2002-T-0039

MEMORANDUM IN SUPPORT OF JURISDICTION

DENNIS WATKINS
Trumbull County Prosecutor
Administration Building
Fourth Floor
160 High Street, N.W.
Warren, Ohio 44481-1092

FOR THE PLAINTIFF-APPELLEE

MARK B. MAREIN (0008118)
STEVEN L. BRADLEY (0046622)
Marein & Bradley
526 Superior Avenue, Suite 222
Cleveland, Ohio 44114
(216) 781-0722

FOR THE DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

I. WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR IS ONE OF PUBLIC OR GREAT GENERAL INTEREST

Contrary to the analysis of the Courts below this case is not one predicated on ineffective assistance of counsel. This case presents an extremely unique set of circumstances and implicates the dependence of the mentally challenged accused on his criminal defense attorney. The narrow question presented here is as follows:

> Whether a mentally challenged accused knowingly, voluntarily and intelligently waived his constitutional trial rights and entered valid guilty pleas, when his attorney, who he depended upon for advice and counsel, had not even evaluated the State's case prior to counseling the accused relative to acceptance or rejection of the plea proposal.

In this case Defendant-Appellant Anthony Cioffi, Jr. (hereinafter "Appellant") was charged in two unrelated criminal cases in the Trumbull County Court of Common Pleas with sex offense conduct involving minor children. On the morning that trial was to commence in one of the cases, Appellant, with the questionable "assistance" of his attorney, choose to accept plea resolution in both cases. It is undisputed that in connection with the second case, which was scheduled for trial immediately after conclusion of the first case, Appellant's attorney was not in a state of "trial preparedness" as he had not even evaluated the strengths and weaknesses of the State's case. Yet, in spite of Appellant's questionable cognitive abilities, his documented dependence on the advice and counsel of his criminal defense attorney, and his attorney's admitted state of "unpreparedness" relative to the second case, both the Common Pleas and Appellate Courts have rejected Appellant's challenges to the constitutionality of his pleas. As such, Appellant presents this unique case to this Court and urges that jurisdiction be exercised for a

full review on the merits. The magnitude of this case on the inter-play of the mentally challenged accused and his counsel defense attorney cannot be overstated.

II. STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION

Appellant is presently serving a ten to twenty-five year prison sentence at the Trumbull Correctional Institution pursuant to judgments of conviction issued by the Trumbull County Court of Common Pleas.

In the Courts below, Appellant sought relief from his sentence pursuant to Crim. R. 32.1. After an evidentiary hearing in the trial court, Appellant's request for relief was overruled. The Court of Appeals affirmed that decision on May 12, 2003.

B. PROCEDURAL POSTURE

On November 17, 1995, an indictment in Case No. 95-CR-696 was returned by the Trumbull County Grand Jury charging Appellant with two counts of Gross Sexual Imposition, R.C. 2907.05(A)(4), felonies of the third degree and one count of Kidnapping, R.C. 2905.01(A)(2), an aggravated felony of the second degree.

The offense conduct in that case involved Appellant's former girlfriend and her minor daughter.

Appellant secured the services of Attorney Thomas E. Zena (hereinafter referred to as "Attorney Zena") to defend him.

While Case No. 95-CR-696 was pending, a second indictment, Case No. 96-CR-599, was returned by the Trumbull County Grand Jury on September 27, 1996, charging Appellant with three (3) counts of Rape, R.C. 2907.02(A)(1)(b)(2),

aggravated felonies of the first degree (with life specifications), and three (3) counts of Gross Sexual Imposition, R.C. 2907.05(A)(4), felonies of the third degree.

The offense conduct in that case involved Appellant's minor children, allegedly occurring years prior to the allegations at issue in Case No. 95-CR-696.

Again, Attorney Zena entered his appearance as counsel for the Appellant.

In connection with pretrial preparation of the second case Attorney Zena discharged his obligations to Appellant by doing almost next to nothing and admitted he had not yet properly evaluated the State's case even though trial has been scheduled on the court's docket.

On December 3, 1996, Appellant was scheduled to proceed with trial by jury on the first indictment, Case No. 95-CR-696. On that date and prior to jury selection, Attorney Zena offered counsel to the Appellant relative to plea resolution involving both of the pending cases. Attorney Zena rendered his advice and professional opinion notwithstanding the fact that he had failed, by his own admission, to conduct even a minimal investigation or trial preparation on the case involving the allegations lodged by Appellant's minor children. The Appellant nonetheless relied upon the advice and professional opinions of his attorney in entering into the following plea agreement on that date:

Case No. 95-CR-696: Pleas of guilty to Count One (1), Gross Sexual Imposition and to Count Three (3), Kidnapping. One (1) year imprisonment on Count One (1) to run concurrent to three (3) to fifteen (15) years of imprisonment on Count Three (3). Sentences to run concurrent to sentence imposed in Case No. 96-CR-599.

Case No. 96-CR-599: Pleas of guilty to Counts One (1) through Three (3), Rape without life specification and to Counts Four (4) through Six (6) Gross Sexual Imposition. Ten (10) to Twenty-Five (25) years of imprisonment on the first three (3) counts to run concurrently with each other and to run concurrently with one (1)

year imprisonment on counts Four (4) through Six (6) which were to run concurrently with each other.

After accepting Appellant's pleas, the trial court imposed sentence on Appellant on December 6, 1996. Appellant has been incarcerated since that time.

While serving his sentence, Appellant secured the services of independent counsel to examine these cases and the representation and counseling provided by Attorney Zena.

On October 12, 1998, a sworn statement of Attorney Zena was taken. That statement was attached to Appellant's Motion To Set aside Judgment of Conviction and To Withdraw Pleas of Guilty and is part of the record below.

An evidentiary hearing on Appellant's motion was held on January 31, 2002. Appellant's motion was overruled March 11, 2002.

Appellant timely appealed to the Trumbull County Court of Appeals. That Court affirmed the decision of the trial court on May 12, 2003, by analyzing the case on ineffective of assistance grounds.

C. STATEMENT OF FACTS

At the trial court level, Appellant relied upon the skill, insight and expertise of his retained trial counsel, as he should have. This was particularly true given the fact that Appellant is a man of low intelligence having been classified as developmentally disabled and only nominally literate.

At the evidentiary hearing held in the trial court, licensed psychologist, Thomas Walter, testified on behalf of the Appellant. Mr. Walter, who has completed between 15,000-16,000 psychological evaluations in his twenty-seven year career, testified relative to his findings having tested Appellant approximately eight months

prior to the December 3, 1996, plea. Mr. Walter's significant findings can be summarized as follows: Appellant was found to be "catastrophically reactive" to stressful situations; Appellant was found to have border line intelligence such that Mr. Walter found "substantial cognitive limitation in this man"; academically Appellant was placed in the moderately retarded range; and, finally, Appellant was found to experience great difficulty in his decision making ability. As a consequence of these psychological findings, Mr. Walter opined that Apellant, on December 3, 1996, was a person who was totally dependent upon the advice and counseling of his criminal defense attorney in deciding whether to go forward with trial or to accept or reject plea resolution.

Appellant's trial counsel, Thomas Zena testified at the evidentiary hearing. Mr. Zena, admitted that when he offered counsel to Appellant at the December 3, 1996, plea hearing, he was not a state of "trial preparedness" relative to the rape case involving Appellant's minor children. Moreover, Mr. Zena stated that he had not seen, nor shared with Appellant, a letter from the a psychologist for the State who advised an Assistant Prosecuting Attorney that Appellant's children had previously and repeatedly denied that Appellant had sexually molested them; that Appellant's former wife appeared to be lodging unsubstantiated accusations in the past; that Appellant's children were "troubled, maladjusted and developmentally impaired".

Considering that Attorney Zena was in no position to evaluate Appellant's exposure in the second case, Appellant relied upon the advice of his attorney when

called upon to make an "informed" decision relative to plea resolution-- a decision which would have a profound effect on the next twenty-five years of his life![1]

II. LAW AND ARGUMENT

Proposition of law:

A Motion to Set Aside Judgments of Conviction and To Withdraw Guilty Pleas is the proper vehicle to attack the validity of guilty pleas entered by a mentally challenged accused who depended upon the advice and counsel of his attorney when the attorney had not evaluated the State's case prior to counseling the accused relative to acceptance or rejection of the plea proposal.

The issue presented in this case is whether Appellant, who is mentally challenged, could have knowingly, voluntarily and intelligently waived his trial rights and entered pleas of guilty to certain serious offenses when his trial counsel, upon whom he was relying for insight and guidance, had not, at the time of the plea, evaluated the strengths and weaknesses of at least one of the cases upon which Appellant was resolving. The issue is not one based on ineffective assistance, but instead on the dependence of this mentally challenged Appellant on his attorney who was ill prepared to render counsel to Appellant. As such the issue in this case relates to the validity of the pleas entered by the Appellant.

A. CRIMINAL RULE 32.1 PERMITS AN INDIVIDUAL TO WITHDRAW A PLEA POST - SENTENCE TO CORRECT A MANIFEST INJUSTICE

A motion to withdraw a plea of guilty is governed by the standards set forth in Crim. R. 32.1 which states as follows:

[1] Had Appellant proceeded to trial in Case No. 95-CR-696, been found guilty and been sentenced to maximum consecutive sentences, his term of incarceration would have been 12-15 years. By pleading in Case No. 96-CR-599, as a package plea resolution, his sentence was increased by 10 years on the maximum end. Appellant's decision on December 3, 1996, therefore warranted careful and thoughtful analysis relative to Case No. 96-CR-599.

> A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended, but to correct manifest injustice the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

It is Appellant's contention that the unique record of this case supports a finding of "manifest justice" as required by Crim. R. 32.1 given Appellant's limited cognitive abilities, his dependence on his attorney and his attorney's lack of meaningful insight at the time he counseled Appellant. As such a motion pursuant to Crim. R. 32.1 was the proper vehicle to attack Appellant's guilty pleas.

B. APPELLANT'S GUILTY PLEAS CANNOT BE DEEMED TO HAVE BEEN KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE INSOFAR AS HIS ATTORNEY COMPLETELY FAILED TO INVESTIGATE AND EVALUATE AT LEAST ONE OF APPELLANT'S CASES.

For a waiver of constitutional rights to be valid under the Due Process Clause, there must be an intentional relinquishment or abandonment of a known right or privilege. State v. Buchanan (1974), 43 Ohio App. 2d 93, 96. In Buchanan, supra, the Court of Appeals stated:

> The waiver must be voluntarily, intelligently and knowingly made and the defendant must understand the nature of the charges against him and the consequences of his plea of guilty. Otherwise it is in violation of due process and is therefore void.

Id. at 96. Accord State v. Kelley (1991), 57 Ohio St. 3d 127, 129.

In State v. Mikulic (1996), 116 Ohio App 3d 787, the Court considered the issue of whether failure to advise a defendant about the general defense of insanity precluded a knowing, voluntary and intelligent guilty plea to a robbery charge. The Mikulic Court in deciding that the defendant's plea was not knowingly, voluntarily or intelligently made noted that:

> [w]here 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.

In Mikulic the Court proceeded to explain the basis for its conclusion in stating:

> In this instance, the record compels the conclusion that defendant did not knowingly, voluntarily, and intelligently plead guilty to the robbery charges, since he was not given correct information regarding the defense of insanity. That is, although the defense attorney and the trial court correctly noted that, for an otherwise sane individual, the voluntary ingestion of drugs did not give rise to the defense of insanity, see, e.g., State v. Wolons (1989), 44 Ohio St. 3d 64, 68, 541 N.E. 2d 443, 446-447, there is a general defense of insanity that defendant was not advised upon.
>
> * * *
>
> This omission, coupled with defendant's extensive psychiatric history, including psychiatric hospitalizations within days of the alleged offenses, compel us to conclude that under the facts of this mater, defendant's guilty pleas were not knowingly, intelligently, and voluntarily made.

Id. at 790-791.

Appellant respectfully submits that his case is legally analogous to Mikulic and that Appellant's guilty pleas, and waivers of trial rights, likewise cannot possibly be deemed to have been knowingly, voluntarily and intelligently made. However, Appellant submits that the circumstances existing in his case are far more egregious. This contention is premised upon the fact that whereas Mikulic was merely not advised of the "general defense of insanity", Appellant was not counseled relative to the strengths or weaknesses of a very serious criminal case in a meaningful sense. Attorney Zena's failure to advise Appellant of defense/trial strategies or of his evaluation of at least one of the cases was attributable to the fact that Attorney Zena did no pretrial investigation or preparation. As such, Attorney Zena was nothing more than a warm body standing next to his client at the podium, incapable of

appropriate counsel for a person totally dependant upon him. Hence, Appellant's pleas could not have been knowingly, voluntarily and intelligently entered.

C. WHILE MENTAL DEFECTS DO NOT RENDER AN ACCUSED INCAPABLE OF WAIVING RIGHTS, SUCH WAIVERS MUST BE THE PRODUCT OF RATIONALE CHOICE AS KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE.

As this Court noted in State v. Berry (1997), 80 Ohio St. 3d 371, a mental disorder does not necessarily preclude an individual from considering options relative to important litigation decisions. In that case this Court recognized that Berry's decision to forgo further legal proceedings in his capital case was the product of rational choice and was voluntarily, knowingly and intelligently made. That finding was predicated on the opinions generated by medical professionals on that issue. As Berry was deemed competent and capable of rationale choices, this Court recognized "the right of the defendant to be treated with dignity as a human being [and] the right of the [defendant] to decide what is in his own best interest". Berry at 386.

In spite of this Court's ruling which permitted Berry to forgo further challenges to his death sentence, this Court satisfied itself that Berry's mental capacity was not an impediment to his choice and that his choice was knowing, voluntary, and intelligent.

In the case before this Court, the Counts below appear to have disregarded the only testimony relative to Appellant's cognitive abilities; or more appropriately stated, his lack thereof; have placed great emphasis on the fact that Appellant insisted on plea resolution; and have decided this case as if it was predicated on ineffective assistance of counsel. What differentiates Appellant's choice from

Berry's is that Appellant's counsel, upon who he was wholly dependant, was incapable, due to his own lack of insight on the merits, to have meaningfully counseled Appellant relative to making a "rational choice". As such, Appellant was never in a position to make a rational choice, due to both his cognitive limitations and his attorney's failure to have a grasp on Appellant's real exposure and best litigation strategy. To permit this injustice to stand flies in the face of this Court's decision in Berry and trivializes the limitations of the mentally challenged offender.

III. CONCLUSION

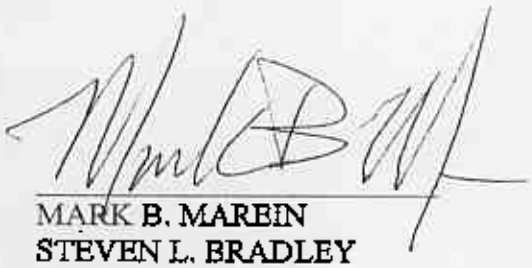
When Appellant entered pleas before the trial court, he did so based on limited information. As a practical manner, while he stood before the Court with Attorney Zena on the date of trial, he lacked a meaningful understanding of his cases, defenses, strategies and options due to no fault of his own. The fact is, mentally challenged Anthony Cioffi, Jr. never was in a position to waive his rights and enter guilty pleas within the meaning and spirit of Due Process considerations due to no fault of his own. This case presents a great injustice to Anthony Cioffi, Jr. and has great impact on the mentally challenged accused. A review on the merits is therefore respectfully requested.

Respectfully submitted,

MARK B. MAREIN (0008118)
STEVEN L. BRADLEY (0046622)
Marein & Bradley
526 Superior Avenue, Suite 222
Cleveland, Ohio 44114
(216) 781-0722

CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support* was sent by regular U.S. mail this 20 day of June, 2003 to Dennis Watkins, Trumbull County Prosecuting Attorney, 160 High Street, N.W., Third Floor, Administration Building, Warren, Ohio 44481.



MARK B. MAREIN
STEVEN L. BRADLEY

The Supreme Court of Ohio

State of Ohio,
Appellee,

v.

Anthony Cioffi, Jr.,
Appellant.

Case No. 03-1097

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Mark B. Marein, Esq.

(Trumbull County Court of Appeals; Nos. 2002T0037 & 2002T0039)

THOMAS J. MOYER
Chief Justice

0005r091003