

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

**ANTHONY CIOFFI, JR.**  
Inmate #332-078  
Trumbull Correctional Institution  
5701 Burnett Road  
Leavittsburg, Ohio 44430-0901

Petitioner

vs.

**DAVID BOBBY, Warden**  
Trumbull Correctional Institution  
5701 Burnett Road  
Leavittsburg, Ohio 44430-0901

Respondent

CASE NO: 4:04CV1836

JUDGE: PETER ECONOMUS  
Magistrate Judge Gallas

MOTION FOR  
DEFAULT JUDGMENT

Now comes petitioner, Anthony Cioffi, Jr., who moves this Court for an entry of Judgment by default in Petitioner's favor.

For cause, Petitioner says that Respondent was served with Summons and Complaint in the within matter in September, 2004. Respondent has failed to move, plead or otherwise respond to the Complaint within the time period allowed under the Federal Rules of Civil Procedure.

WHEREFORE, Petitioner is entitled to judgment upon the petition in his favor and for the relief requested in the petition as well as all other relief to which he is entitled in law or equity.

**INSTRUCTIONS FOR SERVICE**

**Please issue summons along with a copy of the Petition to Respondent at the address noted in the caption via certified U.S. Mail, return receipt requested, all pursuant to Fed. R.Civ.P. 4.**



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**Jeffrey V. Goodman (0055566)**

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Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Motion has been forwarded to all counsel of record and to all unrepresented parties via regular U.S. Mail this 29 day of March, 2006.



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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

ANTHONY CIOFFI, JR.,	)	Case No. 4:04 CV 1836
	)	
Petitioner,	)	Judge Peter C. Economus
	)	
vs.	)	INTERIM REPORT AND
	)	RECOMMENDATION
DAVID BOBBY, WARDEN,	)	(Regarding Docket No. 7)
	)	
Respondent.	)	Magistrate Judge James S. Gallas
	)	

Petitioner Anthony Cioffi, Jr. assisted by counsel has moved for default judgment (Docket No. 7). The docket indicates that the application for federal habeas corpus was served on October 4, 2004 and respondent was ordered to move or answer the petition within 40 days. Respondent has not timely answered. Petitioner's motion for default judgment cannot be granted, however, because "the failure of State officials to file a timely return does not relieve the prisoner of his burden of proof," under 28 U.S.C. § 2241(c)(3). See *Allen v. Perini*, 424 F.3d 134, 138 (6<sup>th</sup> Cir. 1970), *cert. denied*, 400 U.S. 906 (1970); *Watnuff v. Perini*, 427 F.2d 527, 528 (6<sup>th</sup> Cir. 1970).

Pursuant to Sixth Circuit precedent, an evidentiary hearing would normally be held. However, the undersigned notes that respondent has filed a motion for leave to file a motion to dismiss (Docket No. 8). Leave has been granted for respondent to file its motion concerning dismissal of a companion habeas application in Case 4:04 CV 1837, due to untimeliness, and the undersigned believes that

respondent's request for consolidation of this case with its closed companion case is not a proper resolution of this matter.

Nevertheless, it may become unnecessary to address respondent's motion to dismiss and consolidate due to the existence of a companion habeas application. This raises a separate question concerning the district court's retention of jurisdiction under Rule 9 of the Rules Governing §2254 cases and 28 U.S.C. §2244(b) for this potentially second or successive habeas application.

#### **CONCLUSION AND RECOMMENDATION**

It is recommended that petitioner's motion for default judgment be denied since FED. R. CIV. P. 55 relief is unavailable to petitioner according to precedent of the Sixth Circuit Court of Appeals. However at this time the undersigned has no recommendation concerning the disposition of the case on its merits and resolution of this issue may be unnecessary depending upon a future determination whether this matter has become a second or successive habeas filing.

s/James S. Gallas  
United States Magistrate Judge

Dated: May 10, 2005

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of mailing of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See, United States v. Walters*, 638 F.2d 947 (6<sup>th</sup> Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985)