FILED
2005 MAY 27 PM 2: 13

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: 4:04 CV 1836

JUDGE PETER C. ECONOMUS

PETITIONER'S RESPONSE TO *SHOW CAUSE* ORDER
(Second or Successive Petition)

Now comes petitioner, Anthony Cioffi, Jr., who for his response to this court's May 10, 2005 Order to Show Cause submits the following:

FACTUAL BACKROUND

On December 4, 1996, in the Trumbull County Court of Common Pleas, Trumbull County, Ohio, Petitioner was found guilty, upon *Plea to Amended Indictment*, of one count of Gross Sexual Imposition in violation of Ohio Revised Code Sec. 2907.05(A)(4) and one count of Kidnapping in violation of Ohio Revised Code Sec. 2905.01(A)(2).

Petitioner was ordered confined to the Ohio Department of Corrections, pursuant to an *Entry on Sentence* order issued by the Trumbull County Court of Common Pleas, Trumbull County, Ohio, on December 11, 1996. The case number assigned to Petitioner's state court case was 95-CR-696, assigned to the docket of the Trumbull County, Ohio, Court of Common Pleas.

Petitioner filed two habeas corpus petitions, Case No. 4:04 CV 1836 and Case No. 4:04 CV 1837, arising out of two similar but separate state court convictions (different victims, different facts) under two separate cases in the same county. The cases were litigated in state court at the same time, but under different case numbers on different dockets. The SECOND habeas petition, Case No. 4:04 CV 1837, was ultimately dismissed by the Federal District Court for the Northern District of Ohio on the theory that Petitioner Cioffi was not entitled to equitable tolling of the statute of limitations. The FIRST habeas petition, Case No. 4:04 CV 1836, the instant matter, was never responded to by Respondent or his counsel until Petitioner Cioffi filed a Motion to Dismiss arising out of Respondent's failure to answer and show cause. Ironically, Respondent sought relief from this court stating that the first petition was received but misplaced in the Ohio State Attorney General's Office and sought leave to answer or otherwise respond, which was granted. This Court subsequently issued the May 10, 2005, show cause order requiring Petitioner to explain why this first petition is not "second or successive."

LAW AND ARGUMENT

Petitions are not "second or successive" if they do not attack the same criminal judgment. This is true even if the basis for relief asserted against the two separate judgments is the same. See, Harris v. Wainwright, 470 F.3d 190, 191 (CA5 1972).

In the present action, petitioner's two habeas petitions arise from separate cases involving distinctly different charges and victims. Far from being second, successive or repetitive by filing separate petitions, petitioner was utterly correct and indeed required under existing federal law to file separate petitions.

As amended by 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 light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255.

As amended by AEDPA, section 2244 reads in pertinent part as follows:

"(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." 28 U.S.C. § 2244(b). Second or Successive" under AEDPA.

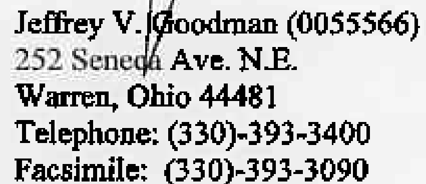
Petitioner Cioffi's filings meet none of the criteria of a "second or successive" petition.

In Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998), and Slack v. McDaniel, 120 S.Ct. ____, 2000 WL 478879 (US) (April 26, 2000), the United States Supreme Court held that "a motion is not "second or successive" under AEDPA merely because it is numerically a second (or subsequent) motion. See id. at 1621-22. Martinez-Villareal filed a federal habeas petition, raising several claims including a Ford claim.(fn9) See id. at 1620. The Ford claim was dismissed without prejudice as premature, because an execution date had not yet been set. See id. After his other grounds for habeas relief were adjudicated and denied, Martinez-Villareal later refiled the Ford claim. See id. The Court held the refiled motion was not "second or successive" under AEDPA, because "[t]o hold otherwise would mean the dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." Id. at 1622. The Court noted that AEDPA's "'restrictions on successive petitions constitute a modified res judicata rule, a restraint on what used to be called in habeas corpus practice "abuse of the writ."'" Id. (quoting Felker v. Turpin, 116 S.Ct. 2333, 2340 (1996)). See also United States v. Barrett, 178 F.3d 34, 44 (1st Cir. 1999), cert. denied, 120 S.Ct. 1208 (2000) ("The core of AEDPA restrictions on second or successive § 2255 petitions is related to the longstanding judicial and statutory restrictions embodied in the form of res judicata known as the 'abuse of the writ' doctrine."). Because Martinez-Villareal's Ford claim was not ripe for disposition until his most recent motion was filed, the Court ruled that the claim "would not be barred under any form of res judicata" and, therefore, was not "second or successive" under AEDPA. Id.(fn10)" Orozco v. INS, 911 F. 2d 539, 541 (CA11 1990).

Likewise, petitioner Cioffi's petition in the instant case does not constitute an "abuse of the writ." Indeed, the matter at issue and presently before this court arises from the FIRST habeas petition filed by Cioffi. It comes to this court now as a subsequent matter only due to Respondent's dilatory conduct in failing to respond.

For all of the reasons and upon the authorities cited above, Petitioner Cioffi's habeas corpus petition in the instant matter is neither second or successive, nor an abuse of the writ, and should accordingly proceed upon its merits.

Respectfully submitted,



Jeffrey V. Goodman (0055566)
252 Seneca Ave. N.E.
Warren, Ohio 44481
Telephone: (330)-393-3400
Facsimile: (330)-393-3090

e-mail: sevenfold@aol.com

CERTIFICATION OF SERVICE

A copy of the has been served upon all counsel of record and upon all unrepresented parties via regular U.S. Mail this 27 day of May, 2005.

Jeffrey V. Goodman (0055566)

252 Seneca Ave. N.E.

Warren, Ohio 44481

Telephone: (330)-393-3400

Facsimile: (330)-393-3090

e-mail: sevenfold@aol.com