

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

DRAFT

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 C. ECONOMUS
Magistrate Judge James S. Gallas

PETITIONER'S
MEMORANDUM CONTRA
RESPONDENT'S MOTION
TO DISMISS

Now comes petitioner, Anthony Cioffi, Jr., who in response to Respondent's Motion to Dismiss says as follows:

Federal law sets forth a clear standard to be applied by courts faced with a F.R.12(B)(6) motion to dismiss: "the Court must construe the complaint in the light most favorable to the plaintiff[s], accept all factual allegations as true, and determine whether the plaintiff[s] undoubtedly can prove no set of facts in support of [their] claims that would entitle [them] to relief." LRL Properties, et al., Plaintiffs-Appellants, v. Portage Metro Housing Authority, et al., Defendants-Appellees. (On Appeal from the United States District Court for the Northern District of Ohio); citing In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993); Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993).

Indeed, the 6th Circuit U.S. Court of Appeals has sagaciously held that: "A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674, 679 (6th Cir. 1988) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

The present action abounds with factual assertions in the pleadings which, if proved, entitle Petitioner to equitable tolling of the applicable statute of limitations

In this memorandum, petitioner's argument will focus upon the equitable tolling provisions of AEDPA, as recently interpreted in Souter v. Jones No. 02-00067, (6th Cir. Jan. 18, 2005), as that issue is presented a the primary focus of Respondent's motion.

Petitioner Cioffi made no filings from January 18, 1997 until March 16, 2001 when he filed a motion to set aside the judgment of his convictions and to withdraw his guilty plea, a time period during which his statute of limitations for seeking federal habeas relief ostensibly expired. It is well established that the one year statute of limitations under AEDPA is not jurisdictional and is subject to equitable tolling. See, Souter v. Jones, supra., and Allen v. Yukins, 366 F.3d 396 (6th Cir. 2004). Construing the allegations of the instant petition in a light most favorable to petitioner Cioffi, as the court is required to do when addressing a motion to dismiss, it is abundantly clear that the motion must fail and be denied on the basis of the petition being "time-barred" because petitioner Cioffi is entitled to equitable tolling of the statute of limitations.

A motion to dismiss is a vehicle to test the legal sufficiency of the pleadings, not to judge the credibility of the facts or to make determinations as a fact finder. Filing a motion to dismiss does not saddle petitioner with the burden of coming forward with

factual evidence beyond the face of the pleadings. It is merely a vehicle by which respondent seeks the Court's review of the legal sufficiency of petitioner's allegations, assuming them all as true. In Swedberg v. Marotzke No. 02-15517 D.C. No. CV-99-01977-MS, August 14, 2003, the United States District Court for the District of Arizona clearly addressed the process by which a court can convert a motion to dismiss into a motion for summary judgment:

"Our circuit has also considered the conversion of Rule 12(b)(6) motions to dismiss into summary judgment motions and essentially concluded that a district court must take some affirmative action to effectuate conversion. The first of these cases, North Star International v. Arizona Corp. Commission, 720 F.2d 578 (9th Cir. 1983), is particularly relevant. In response to the complaint, the Commission filed a Rule 12(b)(6) motion which the district court granted. On appeal, plaintiff North Star urged this court to consider additional matters because North Star had filed with the district court a trial memorandum with 48 attached exhibits, which the district court did not exclude. North Star argued that the Commission's motion to dismiss was thus converted to a motion for summary judgment. *Id.* at 581. This court reviewed the record and rejected North Star's argument, as there was no indication that the district court had relied on the extraneous material in ruling on the motion to dismiss. We held that the district court had properly treated the motion as a motion to dismiss. *Id.* at 582. Plaintiff's unilateral action was insufficient to cause a conversion.

In Jackson v. Southern California Gas Co., 881 F.2d 638 (9th Cir. 1989), the defendant filed a motion to dismiss and attached affidavits and other documents. The district court did not explicitly exclude those materials either at a hearing on the motion

or in a written order. Quoting North Star, the 9th Circuit "motion to dismiss is not automatically converted into a motion for summary judgment whenever matters outside the pleadings happen to be filed with the court and not expressly rejected by the court." *Id.* at 642 n.4. Upon review of the record, we concluded that the district court had not relied on the materials that the defendant had submitted and that the motion was properly characterized as one to dismiss under Rule 12(b)(6).

The Fourth Circuit rejected the defendant's argument and reversed. First, the court concluded that "the plain language of [Rule 12(b)(6)] does not permit conversion upon service." *Id.* The rule directs that a motion with extraneous material is to be treated as a summary judgment motion only when the material is presented to and not excluded by the district court. Were the conversion automatic upon service, the district court would not have any discretion to exclude the material. The rule's requirement that a court provide notice and an opportunity to supplement also would be negated. It also noted that its interpretation accords with "the better reasoned view" that conversion takes place at the discretion of the district court, and only when it affirmatively decides to consider the additional material. *Id.* at 996. The court also observed that no policy concerns weighed against its holding. *Id.* While recognizing that Rule 41(a)(1) is intended to allow a case to end in its early stages before the defendant has undergone significant time and effort in its defense, the court noted that the rule itself provides a simple remedy: a defendant may file an answer or move for summary judgment.

The court in Finley Linbes Joint Protective Board Unit 200 v. Norfolk Southern Corporation, 96-1517 (4th Cir. 1997) held that "a Rule 12(b)(6) motion to dismiss supported by extraneous materials cannot be regarded as one for summary judgment until

the district court acts to convert the motion by indicating that it will not exclude from its consideration of the motion the supporting extraneous materials." *Id.* at 997. First, and most obviously, the plain language of the rule does not permit conversion upon service. Rule 12(b)(6) does not provide that a motion to dismiss supported by materials outside the pleadings shall be treated as one for summary judgment when "filed" with the court or when "served" on a party. Rather, the rule expressly states that a motion to dismiss supported by such materials "shall be treated" as a summary judgment motion only when the materials are "presented to and not excluded by the district court." Fed. R. Civ. P. 12(b)(6). This language can only mean, as Professor Moore has concluded, that the "mere submission [or service] of extraneous materials does not by itself convert a Rule 12(b)(6) motion into a motion for summary judgment." 2A James Wm. Moore, *Moore's Federal Practice* ¶ 12.09[3] (2d. ed. 1996).

Moreover, holding as Norfolk urges would undermine one of the critical features of the conversion provision of Rule 12(b)(6). If a motion to dismiss supported by extraneous materials automatically converts to a summary judgment motion upon service, the discretion Rule 12(b)(6) vests in the district court to determine whether or not to "exclude" matters outside the pleadings would be eliminated. *Id.* See e.g., *Wilson-Cook*, 942 F.2d at 247; *Keeler v. Mayor & City Council of Cumberland*, 928 F. Supp. 591, 594 (D. Md. 1996); *Walker v. Tyler County Comm'n*, 886 F. Supp. 540, 542 n.1 (N.D.W. Va. 1995).

Norfolk's suggestion also conflicts with Rule 12(b)(6)'s requirement that a court provide parties with notice of its intention to treat a motion to dismiss as one for summary judgment and "a reasonable opportunity to present all material made pertinent to

such a motion by Rule 56." Fed. R. Civ. P. 12(b)(6); see also *Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1311 (4th Cir. 1995), vacated on other grounds, 116 S. Ct. 1821 (1996); *Johnson v. RAC Corp.*, 491 F.2d 510, 513-14 (4th Cir. 1974); *Gay v. Wall*, 761 F.2d 175, 177-178 (4th Cir. 1985). *Id.* at 997. Further, the Finley court opined: Additionally, our interpretation of Rule 12(b)(6) accords with the better reasoned view that "conversion takes place at the discretion of the court, and at the time the court affirmatively decides not to exclude extraneous matters." *Aamot v. Kassel*, 1 F.3d 441, 445 (6th Cir. 1993); *Manze v. State Farm Ins. Co.*, 817 F.2d 1062, 1066 (3rd Cir. 1987); 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2363, at 259 (2d. ed. 1995) ("[U]nless formally converted into a motion for summary judgment under Rule 56, a motion to dismiss under Rule 12 does not terminate the right of dismissal by notice."). See also *David v. Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996); *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996). As the First Circuit recently explained: [T]he proper approach to Rule 12(b)(6) conversion is functional rather than mechanical. A motion to dismiss is not automatically transformed into a motion for summary judgment simply because matters outside the pleadings are filed with, and not expressly rejected by, the district court. If the district court chooses to ignore the supplementary materials and determines the motion under the Rule 12(b)(6) standard, no conversion occurs. *Garita Hotel Ltd. Partnership v. Ponce Fed. Bank*, 958 F.2d 15, 18-19 (1st Cir. 1992)

This court has sagaciously taken no affirmative action to convert respondent's motion to dismiss into a motion for summary judgment, as respondent has not sought to

introduce extraneous evidentiary materials outside of the pleadings. As a result, the court is required to apply the time-honored standard of construing all of the factual allegations of the Complaint in a light most favorable to petitioner and giving petitioner the benefit of all reasonable inferences.

In his verified petition, petitioner Cioffi set forth the following factual assertions, among others:

- a. Petitioner is a mentally challenged individual who relied upon the insight and advice of his attorney in the state trial court to determine whether to accept the State of Ohio's plea offer. The offer was presented to petitioner at the last moment before trial, with a jury panel literally waiting in the hall. Petitioner can barely read, and did not understand the effect of the agreement or the waivers of constitutional rights contained therein. Petitioner's trial counsel did not read the plea agreement to him or review it with petitioner. As a result, petitioner did not knowingly, voluntarily and intelligently waive his constitutional rights and enter valid guilty pleas.

Construing the foregoing in a light most favorable to petitioner Cioffi, this court must accept, for the purposes of ruling upon a motion to dismiss, that Anthony Cioffi:

- a. Is mentally challenged;
- b. Can barely read;

- c. Does not understand the effect of the waivers of his constitutional rights.

Combining the foregoing with the fact that petitioner was unrepresented by counsel and filed no pleadings, motions or actions for four and one half years, during which time his statute of limitations for post-conviction relief ostensibly expired, in spite of the fact that his state appellate counsel inaccurately informed him of the statute of limitations requirements (Exhibit A), this court can make no other determination, on a motion to dismiss, than petitioner is entitled to the equitable tolling provisions as a result of his mental deficiencies. See, Miller v. Runyon, 77 F.3d 189 (7th Cir. 1996). To hold otherwise at this stage of the proceedings is incorrect under controlling law. Michaels Bldg. Co. v. Ameritrust Co., N.A., supra.

Petitioner also alleged the following in his verified petition:

- b. Prior to entering his guilty pleas, petitioner's counsel did not evaluate the strengths and weaknesses of petitioner's case and/or the State of Ohio's case in order to effectively counsel petitioner on acceptance or rejection of the State of Ohio's plea offer. For example, petitioner's trial counsel did not examine or evaluate the psychological records of the alleged victims which were in existence at the time and which chronicled extensive, dramatic psychological, behavioral and emotional problems of the alleged victim(s) along with denials that the petitioner was involved in sexually abusive activities. Significantly, petitioner's trial counsel did not disclose to petitioner, prior to his plea, that *the State of Ohio had disclosed exculpatory material in the form of recantations*

by some of the alleged victims involved the charges against petitioner.

(emphasis added)

There is perhaps no more persuasive evidence of actual innocence than recantation by the alleged victims of the crime. It is this court's absolute duty to take all of the factual allegations of the petition as true and to construe them in a light most favorable to petitioner Cioffi. Established law dictates that determining the weight and credibility of the evidence must be reserved for a point in the litigation where the weight and credibility of the evidence is at play – not the legal sufficiency of the pleadings. The United States Supreme Court in, Neitzke v. Williams, 490 U.S. 319 (1989), addressed this precise issue: Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957). This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding. Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," Hishon, supra, at 73, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. *What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support.* Neitzke v. Williams, 490 U.S. 319 (1989) (emphasis added). The 6th Circuit has weighed in on this issue as well. In Miller v. Currie No. 93-4378, United States Court of Appeals 6th Cir. (March 22,

1995), a case on appeal from the United States District Court for the Northern District of Ohio, the court opined: "On a Fed.R.Civ.P. 12(b)(6) motion, all of the allegations contained in the plaintiff's complaint are accepted as true, and the complaint is construed liberally in favor of the party opposing the motion. Mertik, 983 F.2d at 1356; Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976). In Scheuer v. Rhodes, the Supreme Court explained:

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Scheuer, 416 U.S. 232, 236 (1974). It is not the function of the court to weigh evidence or evaluate the credibility of witnesses, Cameron v. Seitz, 1994 WL 575446, *5 (6th Cir. 1994); instead, the court should deny the motion unless it is clear that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. Cameron, 1994 WL 575446, *5 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Because it is conceivable that a set of facts could be proved in support of the Petition under which Anthony Cioffi, Jr. would be entitled to relief, the habeas corpus petition should not be dismissed under Fed.R.Civ.P. 12(b)(6).

CONCLUSION

Viewing the facts set forth in the pleadings in this matter in a light most favorable to petitioner, giving petitioner the benefit of all reasonable inferences, it is abundantly clear that petitioner Cioffi can prove a set of facts entitling him to the equitable tolling provisions provided under law. On that basis, this Court should enter an order denying respondent's motion to dismiss and proceed with this matter upon its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been forwarded to all counsel of record and to all unrepresented parties via regular U.S. Mail this _____ day of May, 2005.

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