UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTHONY CIOFFI, #332-078, **Petitioner,**	:	**Case No. 4:04 CV 1837**
	:	**Judge Gwin**
v.	:	**Magistrate Judge Limbert**
DAVID BOBBY, Warden, **Respondent.**	:	**(HABEAS CORPUS)**

RESPONDENT BOBBY'S MOTION TO DISMISS CIOFFI'S PETITION FOR WRIT OF HABEAS CORPUS

The respondent denies each of the allegations made by the petitioner except those expressly admitted herein. Petitioner, Anthony Cioffi [hereinafter, Cioffi or Petitioner], is state prisoner #332-078 at Trumbull Correctional Institution in Leavittsburg, Ohio. Respondent is Warden at that institution. Petitioner, through counsel, has brought this action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Hereinafter, the respondent shows cause why the petition should be dismissed as time-barred.

Respectfully submitted,

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MEMORANDUM

I. STATEMENT OF FACTS; TRIAL COURT PROCEDURAL HISTORY

The Court of Appeals, Eleventh Appellate District, Trumbull County, Ohio set forth the facts of this case on appeal from the denial of Cioffi's post-sentence motion to withdraw guilty plea.[1] These binding factual findings "shall be presumed to be correct," and petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1); *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998), *cert. denied*, 527 U.S. 1040 (1999); *Mitzel v. Tate*, 267 F.3d 524, 537 (6th Cir. 2001), *cert. denied*, 535 U.S. 966 (2002).

Respondent's statement of general facts and trial court procedural history pertaining to petitioner's guilty plea conviction (for one count each of Gross Sexual Imposition and Kidnapping involving his girlfriend's nine-year-old daughter [see first indictment], and three counts each of Rape and Gross Sexual Imposition involving two of his then pre-teen sons [see second indictment])[2] is adopted from the denial of withdrawal of plea appeal opinion rendered by the Eleventh District Court of Appeals, see Exhibit 1, *State v. Cioffi* (May 9, 2003), Trumbull App. Nos. 2002-T-0037 and 2002-T-0039, 2003-Ohio-2374 at ¶ 1-6, 2003 Ohio App. LEXIS 2199, *leave to appeal denied*, 99 Ohio St.3d 1546, 2003-Ohio-4671, 2003 Ohio LEXIS 2345, which states in pertinent part the following:

> Anthony Cioffi, Jr. ("appellant") appeals the March 11, 2002 decision of the Trumbull County Common Pleas Court. In that decision, the trial court denied appellant's "Motion to Set Aside Judgment of Conviction and to Withdraw Pleas of Guilty", made pursuant to Crim.R. 32.1. For the following reasons, we affirm the decision of the trial court in this matter.
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> On November 17, 1995, the Trumbull County Grand Jury indicted appellant on two counts of Gross Sexual Imposition, felonies of the third degree, in violation of R.C. 2907.05(A)(4), and one count of Kidnapping, an aggravated felony of the second degree, in violation of R.C. 2905.01(A)(2). The charges against appellant stemmed from an allegation

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[1] Petitioner did not file a direct appeal in the state courts from his guilty plea convictions and sentence, and has not yet pursued a delayed direct appeal.

[2] The original indictment in the second indictment, to-wit, 96-CR-599, was amended to reflect the two sibling brothers as victims. See Exhibit 22, Docket, CCP 96-CR-599 at entry for 11/26/96.

that appellant had fondled the genitalia of his girlfriend's nine-year old daughter. The case was assigned to the docket of Judge John Stuard.

While that case was pending, appellant was indicted for a second time on September 27, 1996. In that indictment, appellant was charged with three counts of Rape, aggravated felonies of the first degree (with life specifications), in violation of R.C. 2907.02(A)(1)(b)(2), and three counts of Gross Sexual Imposition, in violation of R.C. 2907.05(A)(4). The charges contained in the second indictment stemmed from allegations that appellant had engaged in sexual activity with two of his biological children years prior to the allegations contained in the first indictment. This case was assigned to the docket of Judge Mitchell Shaker.

On December 3, 1996, as appellant was preparing to proceed with a jury trial on the first indictment, appellant decided to enter into a plea agreement covering both indictments. At the request of appellant's trial counsel, the second case was transferred to Judge Stuard prior to appellant entering his plea. In exchange for appellee's request to dismiss the life sentencing specifications, appellant agreed to plead guilty to one count of Gross Sexual Imposition and one count of Kidnapping on the first indictment. Appellant also agreed to plead guilty to three counts of Rape (without life specifications) and three counts of Gross Sexual Imposition on the second indictment.

On December 6, 1996, appellant was sentenced to one year on the Gross Sexual Imposition count and three to fifteen years on the Kidnapping count contained in the first indictment. On the second indictment, the trial court sentenced appellant to ten to twenty five years on the three Rape counts and one year on the three counts of Gross Sexual Imposition. All sentences were set to run concurrently, meaning appellant was faced with ten to twenty-five years of imprisonment.

On March 16, 2001, almost four and a half years after his sentencing, appellant filed a "Motion to Set Aside Judgment of Conviction and to Withdraw Pleas of Guilty." The trial court held an evidentiary hearing on January 31, 2002. The trial court denied appellant's motion in a judgment entry dated March 11, 2002.[3] (Footnote added.)

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[3] *Also see*: Exhibit 2, Indictment (11/17/95), assigned Trumbull County Court of Common Pleas Case No. 95-CR-696; Exhibit 3, Indictment (9/27/96), assigned Trumbull County Court of Common Pleas Case No. 96-CR-599; Exhibit 4, Judgment Entries (12/9/96, Sentencing), CCP 95-CR-696 and 96-CR-599; Exhibit 5, Motion to Set Aside Judgment of Conviction and to Withdraw Guilty Pleas (3/16/01), CCP 95-CR-696 and 96-CR-599; Exhibit 6, Docket, CCP 95-CR-696; Exhibit 7, Opposition to Withdrawal of Plea (3/22/01), CCP 95-CR-696 and 96-CR-599; Exhibit 8, Supplemental Opposition to Withdrawal of Plea (7/6/01), CCP 95-CR-696 and 96-CR-599; Exhibit 9, Transcript (Withdrawal of Plea Hearing), CCP 95-CR-696 and 96-CR-599; Exhibit 10, State's Post-Hearing Brief re Withdrawal of Plea (2/15/02), CCP 95-CR-696 and 96-CR-599; Exhibit 11, Judgment Entry (3/11/02, Denying Withdrawal of Pleas), CCP 95-CR-696 and 96-

II. APPEAL FROM DENIAL OF POST-SENTENCE WITHDRAWAL OF GUILTY PLEAS

A. Petitioner's timely direct appeal to the Eleventh District Court of Appeals, Trumbull County, Ohio from the trial court's denial of plea withdrawal – COA 02-TR-37 and 02-TR-39.

Petitioner, through counsel (attorney Mark Marein), filed a timely notice of appeal on March 26, 2002, from the trial court's denial of withdrawal of guilty pleas. (Exhibit 12, Notices of Appeal, assigned Eleventh District COA Case Nos. 02-TR-37 and 02-TR-39.) These appeals were ordered consolidated on April 1, 2002. (Exhibit 13, Judgment Entry, COA 02-TR-37 and 02-TR-39.)

On July 30, 2002, petitioner, through counsel, filed his appellant's brief stating therein the following lone assignment of error:

> 1. The trial court erred in overruling Defendant-Appellant's motion to set aside judgments of conviction and to withdraw pleas of guilty.

(Exhibit 14, Appellant's Brief, COA 02-TR-37 and 02-TR-39, at p. I; Exhibit 15, Docket, COA 02-TR-37.)

The State filed its appellee's brief on August 14, 2002, opposing the assignment raised by petitioner. (Exhibit 16, Appellee's Brief, COA 02-TR-37 and 02-TR-39.)

CR-599. Petitioner was represented in the trial court through sentencing by attorney Thomas Zena. See Exhibit 5 at p. 3. Petitioner was represented during withdrawal of plea efforts by attorneys Mark Marein and Steven Bradley. See Exhibit 5 at p. 1. AEDPA was enacted on April 24, 1996, two-hundred-and-twenty-nine (229) days prior to the journalization of the sentencing order herein. Because the instant petition was filed after AEDPA's effective date, AEDPA's provisions apply to the review of this petition. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Mason v. Mitchell*, 320 F.3d 604, 613 (6th Cir. 2003).

On May 12, 2003, the Eleventh District affirmed the judgment of the trial court denying withdrawal of the guilty pleas. (See Exhibit 1; *also see*, Exhibit 17, Journal Entry and Opinion, COA 02-TR-37 and 02-TR-39.)

B. Petitioner's timely appeal of COA 02-TR-37 and 02-TR-39's appeal affirmance to the Ohio Supreme Court – OSC 03-1097.

On June 23, 2003, petitioner, through counsel (attorney Mark Marein), filed a timely (1) notice of appeal and (2) jurisdictional memorandum in the Ohio Supreme Court from the Eleventh District's affirmance of the denial of withdrawal of pleas. (Exhibit 18, Notice of Appeal, assigned OSC Case No. 03-1097; Exhibit 19, Jurisdiction Memorandum, OSC 03-1097.) The argument contained in petitioner's lone proposition of law stated the following:

> PROPOSITION OF LAW NO. 1: 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 depends upon the advice and counsel of his attorney when the attorney has not evaluated the State's case prior to counseling the accused relative to acceptance or rejection of the plea proposal.

(Exhibit 19, Jurisdiction Memorandum, OSC 03-1097, at p. 1.)

On July 18, 2003, the prosecutor filed a jurisdiction response. (Exhibit 20, Jurisdiction Response, OSC 03-1097.)

On September 10, 2003, the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (Exhibit 21, Order, OSC 03-1097, further reported at 99 Ohio St.3d 1546, 2003-Ohio-4671, 795 N.E.2d 684, 2003 Ohio LEXIS 2345.) There was no further appeal from this decision.

C. Federal Action – Untimely Petition for Writ of Habeas Corpus

On September 10, 2004, petitioner, through new counsel (attorney Jeffrey Goodman), filed the instant petition for writ of habeas corpus, stating the following lone claim for relief:

> GROUND FOR RELIEF NO. 1: Federal law and the Sixth Amendment to the United States Constitution provide a defendant with the right to effective counsel. Petitioner was denied his constitutional right to effective [trial] counsel. [Explanation added.]

(Doc. 1, Petition, at ¶ 12.)

This claim, that Cioffi's guilty pleas were invalidly entered as a result of the ineffective assistance of trial counsel, was presented in the state courts within the post-sentence motion to withdraw guilty pleas and the appeals that flowed from the trial court's denial of that motion.

Pursuant to this Court's Show Cause Order of September 15, 2004, see Doc. 4, and the Rules governing Section 2254 cases, respondent respectfully submits the following:

III. TRUE CAUSE OF DETENTION

The true cause of petitioner's detention, the trial court's judgment entries of conviction and sentence, are attached as respondent's Exhibit 4.

IV. PREVIOUS FEDERAL PETITION

To the best of respondent's knowledge, petitioner has not previously filed any other federal petitions for habeas corpus relief pertaining to the conviction, which is the subject of this habeas proceeding.

V. STATUTE OF LIMITATIONS

Petitioner filed the instant habeas petition long after the expiration of the one-year period of limitation for filing a petition under 28 U.S.C. 2244(d). As such, this petition must be dismissed with prejudice.

A one-year statute of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. 28 U.S.C. 2244(d). This section is as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

A state prisoner has one year from the conclusion of direct review or the expiration of the time for seeking such review, whichever is later, to file for federal habeas relief. The Sixth Circuit has decided that, under 2244(d)(1)(A), the one-year

statute of limitation does not begin to run until the time for filing a petition for a writ of certiorari for direct review in the United States Supreme Court has expired. *Isham v. Randle*, 226 F.3d 691, 694-95 (6th Cir. 2000). A criminal defendant has only ninety days following the entry of judgment by the "state court of last resort" in which to file a petition for a writ of certiorari. Sup. Ct. R. 13. In addition, the United States Supreme Court has held that direct review is generally considered to include the ninety-day period for seeking certiorari. *Penry v.* Lynaugh, 492 U.S. 302, 314 (1989). However, a motion for leave to file a delayed appeal does not postpone the start of the limitations period. It would effectively eviscerate the AEDPA's statute of limitations if, by merely delaying his motion for leave to file a delayed appeal, a petitioner could indefinitely extend the time for seeking federal habeas relief. *Raynor v. Dufrain*, 28 F. Supp.2d 896 (S.D.N.Y. 1998). Although a motion for delayed appeal may toll the running of the one-year statute, it shall not cause the statute to begin anew upon its denial. *Searcy v. Carter*, 246 F.3d 515 (6th Cir. 2001).

The one-year period of limitation is tolled for that amount of time in which "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. 2244(d)(2). An application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. *Artuz v. Bennett*, 121 S. Ct. 361 (2000). Specifically, such procedural rules include the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. *Id.* Additionally, following review by the state's highest court, the tolling period for state collateral review now includes time for filing a petition for certiorari in the United States

Supreme Court. *Abela v. Martin*, 348 F.3d 164, 172-73 (6th Cir. 2003) (*en banc*).

Further, the tolling provision does not "revive" the limitations period, i.e., restart the clock at zero. It can only serve to pause a clock that has not yet fully expired. *Rashid v. Khulmann*, 991 F. Supp. 254, 259 (S.D.N.Y. 1998); and *Webster v. Moore*, 199 F.3d 1256 (11th Cir. 2000) (state court petition filed after the expiration of the habeas limitations period cannot toll that period because there is no period remaining to be tolled). Once the limitation period is expired, state collateral review proceedings can no longer serve to avoid the statute of limitation bar. *Rashid v. Khulmann,* 991 F.Supp. at 259.

Whether successful or unsuccessful, neither a delayed application to re-open nor a delayed appeal of an adverse decision will re-start the statutory time limitation. *Searcy v. Carter*, 246 F.3d 515 (6th Cir. 2001), (holding that a delayed appeal to the Ohio Supreme Court does not re-start but only tolls for the time pending).

A previously filed federal habeas petition does not toll the limitation period under the habeas corpus statute. The United States Supreme Court decided this question as an issue of first impression. The Court held that the limitation period governing state prisoner's petitions for federal habeas corpus relief is not tolled during the pendency of prior federal habeas petitions. *Duncan v. Walker*, 533 U.S. 167, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001).

Application

Petitioner was sentenced on Monday, December 9, 1996. (Exhibit 4.) His conviction became final for habeas purposes thirty days later, on Wednesday, January 8, 1997, when he failed to file a timely notice of appeal in the state appellate court. The

habeas limitations period commenced running the next day on Thursday, January 9, 1997, and **expired on January 8, 1998.** Petitioner filed his motion to withdraw pleas **1,163 days** later on Friday, March 16, 2001. Because the habeas limitations period had long since expired by that point, the motion to withdraw guilty pleas did not serve to toll the running of the limitations period; there was no time left to toll. *Rashid v. Khulmann,* 991 F. Supp. 254, 259 (S.D.N.Y. 1998); and *Webster v. Moore*, 199 F.3d 1256 (11th Cir. 2000). Thus an additional **1,274 days** accrued between Friday, March 16, 2001 (the date the motion to withdraw guilty pleas was filed) to September 10, 2004 (when petitioner filed the instant habeas petition).

A review of the foregoing sequence of events indicates that **a total of 2,437 days (1,163 + 1,274 = 2,437) elapsed since the expiration of the habeas limitations period on January 8, 1998.** Respondent submits that the instant petition was eminently time-barred at the time the motion to withdraw guilty pleas was filed in the trial court, let alone by the time the instant habeas petition was filed in this Court.

Petitioner has not alleged or shown that: (1) the State unconstitutionally or in violation of federal law prevented him from timely filing his habeas corpus petition, and that the impediment was removed within the past year; (2) his claims are based on a constitutional right newly recognized by the United States Supreme Court within the past year and made retroactive to cases on collateral review; or (3) through the exercise of due diligence, he could only have discovered the factual bases for his claims within the past one year. Therefore, petitioner's habeas corpus petition is barred from further judicial review by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d), as amended by § 101 of the AEDPA.

VI. EVIDENTIARY HEARING

Evidentiary hearings are not ordinarily held on habeas corpus review, in part, because state factual determinations are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1). Under Section 104 of AEDPA, petitioner has the burden of rebutting the presumption by clear and convincing evidence. Pursuant to 28 U.S.C. § 2254(e), no further hearing should be necessary since the case can be decided from the record. *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

VII. CONCLUSION

In view of the foregoing law and argument, respondent respectfully submits that the petition for writ of habeas corpus should be dismissed as time-barred. Respondent submits, without waiving the issue, that an evidentiary hearing on the petition is not warranted or needed as the matter can be decided from the record, *see Keeney v. Tamayo-Reyes, supra.* Finally, respondent requests that a Certificate of Appealability not be issued.

Respectfully submitted,

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Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that this *Motion to Dismiss* was filed electronically with the Court on December 10, 2004. A copy of the foregoing is available to petitioner's counsel, Jeffrey V. Goodman, Esq., 252 Seneca Avenue, Warren, OH 44481, through the Court's ECF notification of filing.

/s/GREGORY T. HARTKE
GREGORY T. HARTKE (0024781)
Assistant Attorney General

APPENDIX

Exhibit

1. *State v. Cioffi* (May 9, 2003), Trumbull App. Nos. 2002-T-0037 and 2002-T-0039, 2003-Ohio-2374, 2003 Ohio App. LEXIS 2199 (denial of withdrawal of pleas affirmed), *leave to appeal denied*, 99 Ohio St.3d 1546, 2003-Ohio-4671, 2003 Ohio LEXIS 2345;

2. Indictment (11/17/95), assigned Trumbull County Court of Common Pleas Case No. 95-CR-696;

3. Indictment (9/27/96), assigned Trumbull County Court of Common Pleas Case No. 96-CR-599;

4. Judgment Entries (12/9/96, Sentencing), CCP 95-CR-696 and 96-CR-599;

5. Motion to Set Aside Judgment of Conviction and to Withdraw Guilty Pleas (3/16/01), CCP 95-CR-696 and 96-CR-599;

6. Docket, CCP 95-CR-696;

7. Opposition to Withdrawal of Plea (3/22/01), CCP 95-CR-696 and 96-CR-599;

8. Supplemental Opposition to Withdrawal of Plea (7/6/01), CCP 95-CR-696 and 96-CR-599;

9. Transcript (Withdrawal of Plea Hearing), CCP 95-CR-696 and 96-CR-599;

10. State's Post-Hearing Brief re Withdrawal of Plea (2/15/02), CCP 95-CR-696 and 96-CR-599;

11. Judgment Entry (3/11/02, Denying Withdrawal of Pleas), CCP 95-CR-696 and 96-CR-599;

12. Notices of Appeal, assigned Eleventh District COA Case Nos. 02-TR-37 and 02-TR-39;

13. Judgment Entry (4/1/02, Consolidating Appeals), COA 02-TR-37 and 02-TR-39;

14. Appellant's Brief, COA 02-TR-37 and 02-TR-39;

15. Docket, COA 02-TR-37;

16. Appellee's Brief (8/14/02), COA 02-TR-37 and 02-TR-39;

17. Journal Entry and Opinion (5/12/03, Denial of Plea Withdrawal Affirmed), COA 02-TR-37 and 02-TR-39;

18. Notice of Appeal (6/23/03), assigned OSC Case No. 03-1097;

19. Jurisdiction Memorandum (6/23/03), OSC 03-1097;

20. Jurisdiction Response (7/18/03), OSC 03-1097;

21. Order (9/10/03), OSC 03-1097, further reported at 99 Ohio St.3d 1546, 2003-Ohio-4671, 795 N.E.2d 684, 2003 Ohio LEXIS 2345;

22. Exhibit 22, Docket, CCP 96-CR-599.