IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

2005 FEB -3 PM 3:08

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: 4:04CV1837** **JUDGE: JAMES GWIN** Magistrate Judge George J. Limbert **OBJECTIONS TO MAGISTRATE'S PROPOSED FINDINGS AND RECOMENDATION**

Now comes petitioner, Anthony Cioffi, Jr., who objects to the Report and Recommendations of the Magistrate Judge on the following basis:

The Magistrate Judge's Report and Recommendation is contrary to law and fails to correctly apply the well established standards for ruling upon a motion to dismiss.

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)).

In the present action, the Magistrate Judge failed to apply the foregoing standard in arriving at the Report and Recommendation.

Initially, it is noteworthy that the Magistrate Judge's Report incorrectly states that "Petitioner presents the following *sole* ground for relief: "*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 counsel.*" (italics added). The Report and recommendation thereafter completely ignores the rather extensive factual basis set forth in the petition, all of which was verified under oath by petitioner Anthony Cioffi.

In these objections, 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). In the Report and Recommendation, the Magistrate Judge correctly notes that 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." *Report and Recommendations* at 8. 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.

The Report and Recommendation of the Magistrate Judge makes repeated reference to the fact that petitioner did not file a response to Respondent's Motion to Dismiss. However, 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. As such, in the absence of a need to correct pleading deficiencies, no further response to a motion to dismiss is required or necessary from petitioner, unless the court takes affirmative action to convert the motion to dismiss into a motion for summary judgment. Had the court taken affirmative action to treat respondent's motion as a motion for summary judgment, the burden would have been on petitioner to come forward with some affirmative evidence to support the factual allegations of the pleadings and demonstrate a genuine issue of material fact. The court took no such action.

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. Swedberg, supra.

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 include or exclude those materials either at a hearing on the motion or in a written order. Quoting North Star, supra.the 9th Circuit wrote: "[A] 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. The Jackson court held that the district

court had not expressly 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). Concluding 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." Jackson, supra.

In Finley Linbes Joint Protective Board Unit 200 v. Norfolk Southern Corporation, 96-1517 (4th Cir. 1997) the court 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)

Because this court took no affirmative action to convert respondent's motion to dismiss into a motion for summary judgment, 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 Magistrate Judge's factual finding 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, 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 two of the three victims involved the charges against petitioner.*** (emphasis added)

Here again, the Report and Recommendation of the Magistrate Judge completely ignores petitioner's direct, credible and compelling claim of actual innocence. There is perhaps no more persuasive evidence of actual innocence than recantation by the alleged victims of the crime. In spite of the foregoing, and in spite of the 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, the Report and Recommendation quickly glosses over petitioner's actual innocence claim by noting: "Petitioner presents no argument relating to his actual innocence." *Report and Recommendation* at 11.

It is clear from the Magistrate Judge's Report and Recommendation that the Court views petitioner's claims with skepticism. However, established law dictates that such a view must be reserved for a point in the litigation where the weight and credibility of the evidence is at play – not just 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 complaint's allegations under which Miller would be entitled to relief for intentional infliction of emotional distress, the claim should not have been dismissed under Fed.R.Civ.P. 12(b)(6)." Miller v. Currie, supra.

CONCLUSION

Viewing the facts set forth in the pleadings in a light most favorable to petitioner and 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 sustain petitioner's objections to the Magistrate Judge's Report and Recommendation, 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 Objections has been forwarded to all counsel of record and to all unrepresented parties via regular U.S. Mail this 3 day of February, 2005.

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