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-1837** **JUDGE: JAMES GWIN** **NOTICE OF APPEAL TO THE SIXTH CIRCUIT COURT OF APPEALS**

Now comes plaintiff Anthony Colffi, Jr. through undersigned counsel and respectfully gives notice to the Court and all parties of his appeal of the April 7, 2005 Judgment of the *United States District Court For The Northern District Of Ohio* (attached as Exhibit "A").

Plaintiff's appeal herein is taken to the *Sixth Circuit United States Court of Appeals.*

Plaintiff respectfully moves that this *Notice of Appeal*, and the *Memorandum in Support of Appealability*, Exhibit "B," (that Plaintiff will file upon assignment of a case/docket number by the Clerk of the Sixth Circuit Court of Appeals), be considered as plaintiff's Motion for a Certificate of Appealability, as a Certificate of Appealability was denied by the District Court.

Respectfully Submitted:

s/ Jeffrey V. Goodman
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CERTIFICATE OF SERVICE

I certify that a copy of the forgoing was issued on this 8th day of May **2005** to all counsel of record via regular U.S. Mail and via electronic filing.

s/Jeffrey V. Goodman
JEFFREY V. GOODMAN (#0055566)

EXHIBIT "A"

ECF Document: Cioffi v. Bobby *Opinion and Memorandum* filed April 7, 2005
United States District Court, Northern District of Ohio
Case No. 4:04-CV-1837

EXHIBIT "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY CIOFFI, JR. Inmate #332-078 Trumbull Correctional Institution 5701 Burnett Road Leavittsburg, Ohio 44430-0901 AppellantAppellant	)	**CASE NO:** 05-3721
vs.	)	
DAVID BOBBY, Warden **Trumbull Correctional Institution** 5701 Burnett Road Leavittsburg, Ohio 44430-0901 Appellee/Appellee	)	**MEMORANDUM IN SUPPORT OF CERTIFICATION OF APPEALABILITY**

I. PROCEDURAL BACKGROUND

On September 10, 2004, appellant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. 2254. Appellee Bobby subsequently filed a motion to dismiss appellant's complaint. In support of his motion, Appellee

asserted that he was entitled to dismissal under Fed. R. Civ. P. 12(b)(6) on the ground that appellant's claims in this action are time barred under 28 U.S.C. 2244(d)(1). The Magistrate Judge agreed with Appellee's position and recommended that the Motion to Dismiss be granted. Appellant filed Objections to the Magistrate's Recommendations, which the Court overruled.

March 3, 2005, the District Court filed a judgment granting Appellee Bobby's motion to Dismiss. Appellant filed a Motion to Alter or Amend, which the Court overruled on April 7, 2005. Appellant will establish that the District Court erred by dismissing the complaint and by refusing to grant Appellant a certificate of appealability.

II. STATEMENT OF FACTS

In its memorandum opinion and order, the District Court relied upon documents filed in the proceedings before the state common pleas court and appellate court, as well as the pleadings themselves. The District Court also adopted, in full, the Magistrate Judge's Report and Recommendation. (Opinion and Memorandum at 9). In doing so, the District Court adopted reasoning employed in the Report and Recommendation which, when viewed in light of the controlling law, is contradictory at best and which represents a clear error of law. Appellant maintains that a certificate of appealability should be granted, in light of **all** pertinent legal authority.

III. LAW AND ARGUMENT

(A) Entitlement To Relief On Ground of Clear Error of Law

Federal law sets forth a clear standard to be applied by courts faced with a FRCP 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 District Court to apply the foregoing standard in arriving at its judgment.

In his prior memoranda before the District Court, appellant's argument focused 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 noted that Appellant 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 appellant Cioffi, as the court was required to do when addressing the motion to dismiss, it is abundantly clear that appellee's Motion to Dismiss should have been denied on the basis of the petition being "time-barred" because appellant Cioffi is entitled to equitable tolling of the statute of limitations.

The District Court improperly construed the factual assertions of the petition against appellant – which is directly contrary to law. 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 burden appellant with the obligation of coming forward with factual evidence beyond the face of the pleadings. It is merely a vehicle by which appellee could seek the District Court's review of the legal sufficiency of appellant's allegations, assuming them all as true. As such, no further response or evidence in support of the petition was required, necessary or appropriate from appellant, unless the District Court took affirmative action to convert the motion to dismiss into a motion for summary judgment. Had the court taken affirmative action to treat appellee's motion as a motion for summary judgment, the burden would have shifted to appellant to come forward with some affirmative evidence to support the factual allegations of the pleadings and

demonstrate a genuine issue of material fact. The District Court took no such action, yet nonetheless applied a "summary judgment" standard when ruling upon the Motion to Dismiss.

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 noted: "[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. 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)." Jackson v. Southern California Gas Co., 881 F.2d 638 (9th Cir. 1989) 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)

Because the District Court took no affirmative action to convert appellee's motion to dismiss into a motion for summary judgment, the court was required to apply the time-honored standard of construing all of the factual allegations of the Complaint in a light most favorable to appellant and giving appellant the benefit of all reasonable inferences.

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

a. [Appellant] 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 appellant at the last moment before trial, with a jury panel literally waiting in the hall. [Appellant] can barely read, and did not understand the effect of the agreement or the waivers of constitutional rights contained therein. [Appellant]'s trial counsel did not read the plea agreement to him or review it with [appellant]. As a result, [appellant] did not knowingly, voluntarily and intelligently waive his constitutional rights and enter valid guilty pleas.

Construing the foregoing in a light most favorable to appellant Cioffi, the District Court was bound by law to 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 District Court's factual finding that appellant 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, a court following the law could make no other determination on a motion to dismiss, absent a clear error of law, than to

find that appellant was entitled to the equitable tolling provisions as a result of his mental deficiencies. See, Miller v. Runyon, 77 F.3d 189 (7th Cir. 1996). Holding otherwise at this stage of the proceedings was entirely incorrect under controlling law. Michaels Bldg. Co. v. Ameritrust Co., N.A., supra.

Appellant also alleged the following in his verified petition:

> ***b.*** Prior to entering his guilty pleas, [appellant]'s counsel did not evaluate the strengths and weaknesses of [appellant]'s case and/or the State of Ohio's case in order to effectively counsel [appellant] on acceptance or rejection of the State of Ohio's plea offer. For example, [appellant]'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 [appellant] was involved in sexually abusive activities. Significantly, [appellant]'s trial counsel did not disclose to [appellant], 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 [appellant].*** (emphasis added)

Here again, the District Court ignored appellant'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 District 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 appellant Cioffi, the District Court adopted an order which quickly glossed over appellant's actual innocence claim by noting: "Appellant presents no argument relating to his actual innocence." *Magistrate Judge Report and Recommendation* at 11.

It is clear that the District Court viewed appellant'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 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.

This controlling law, which sets the standard for ruling on a Motion to Dismiss, is not mentioned anywhere in the District Court's Memorandum and Order yet constitutes controlling legal authority, which under the undisputed status of this case establishes that a Motion to Dismiss could not be sustained without occurrence of a clear error of law.

Under the circumstances Appellant must sincerely urge this Court to issue a certification of appealability upon the issue of whether Appellant's habeas corpus petition was properly disposed of upon a Motion to Dismiss – especially where the standard applied by the District Court so clearly appears to be one more suited for a summary judgment disposition. It has been demonstrated above in this memorandum and with great clarity, and the prior memoranda submitted by appellant in the proceedings below, that it was clear error of law for the District Court to dismiss appellant's action under FRCP 12(B)(6) where the pleadings adequately set forth claims which could entitle appellant to relief. Indeed, the Magistrate Judge, at page 11 of his *Report and Recommendation*, acknowledges that, based upon the allegations and factual representations set forth in the petition, appellant "may have argued that he is entitled to equitable tolling of the AEDPA statute of limitations because his mental deficiencies and

psychological problems prevented him from timely filing his federal habeas corpus petition. (*Report and Recommendation* at 11). The mere fact that the District Court could glean that scenario from the pleadings is acute evidence that granting a motion to dismiss was inappropriate and contrary to the District Court's duty to take all factual allegations as true and to give appellant the benefit of all reasonable inferences.

The clear error of law discussed above inevitably led to the erroneous conclusion that "...an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability." (*Opinion and Memorandum* at 9).

The above conclusion by the District Court constitutes clear error of law. Appellant with great clarity and extensive recitation of controlling legal authority pointed out to the District Court the rule of law that a motion to dismiss can only be granted where, accepting all of the factual allegations of the complaint as true, and giving the non-moving party the benefit of all reasonable inferences, the non-moving party can prove no set of facts which, if believed, would support a claim. Accordingly, it was error for the District Court to issue a judgment which dismissed this petition for habeas corpus relief.

IV. CONCLUSION

Appellant has demonstrated above that based on all controlling legal authority which appears in the record that the District Court erred by dismissing

this action. The District Court also erred by finding that there is no good faith basis for an appeal of its decision to grant appellee's Motion to Dismiss.

Based on the foregoing, appellant's counsel urges this court to find that a good faith basis for appellants appeal exists and to grant Appellant leave to file his brief on the merits of this appeal. .

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CERTIFICATE OF SERVICE

I certify that a copy of the forgoing was issued on this 8 day of May **2005** to the following counsel of record via electronic filing and regular U.S. Mail:

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