

COPY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO
CASE NO. 95-CR-696
CASE NO. 96-CR-599

STATE OF OHIO)
)
Plaintiff) HEARING ON MOTION TO
)
-vs-) VACATE JUDGMENT OF CONVICTION
)
ANTHONY CIOFFI, JR.) AND TO WITHDRAW GUILTY PLEA
)
Defendant)

BE IT REMEMBERED, that on Thursday, January 31,
2002, these proceedings came on to be heard before
one of the Judges of this Court, John M. Stuard,
in Courtroom No. 2, on High Street, Warren, Ohio,
before the case heretofore filed herein.

Mary Ann Mills, RPR
Official Court Reporter
Trumbull County, Ohio

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

A P P E A R A N C E S

On Behalf of The State of Ohio:
Thomas Wrenn, Ass't. Prosecuting Attorney
Charles Morrow, Ass't. Prosecuting Attorney

On Behalf of the Defendant:
Mark B. Marein, Attorney at Law
Steven L. Bradley, Attorney at Law

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

I N D E X

| <u>WITNESSES:</u> | <u>PAGE NO</u> |
|---|----------------|
| OPENING STATEMENT BY MR. BRADLEY | 4 |
| OPENING STATEMENT BY MR. MORROW | 11 |
| <u>ATTORNEY TOM ZENA:</u> | |
| Direct Examination by Mr. Bradley | 14 |
| Continuing Direct Examination by Mr. Marein | 74 |
| Cross Examination by Mr. Morrow | 81 |
| EXAMINATION BY THE COURT | |
| | 111 |
| <u>THOMAS WALTER</u> | |
| Direct Examination by Mr. Marein | 119 |
| Cross Examination by Mr. Wrenn | 144 |
| CLOSING ARGUMENT BY MR. BRADLEY | |
| | 159 |
| CLOSING ARGUMENT BY MR. MORROW | |
| | 162 |
| STATE'S EXHIBIT No. 1 MARKED FOR I.D. | |
| | 91 |
| STATE'S EXHIBIT No. 2 MARKED FOR I.D. | |
| | 95 |
| STATE'S EXHIBIT No. 3 MARKED FOR I.D. | |
| | 106 |

1 Thursday, January 31, 2002 at 1:20 p.m.:
2 Hearing to Vacate Judgment of Conviction and
3 to Withdraw Guilty Plea:

4 THE COURT: We're here today on
5 motion to withdraw plea of guilty and to set aside
6 judgment. Are there any opening remarks before you
7 present your evidence?

8 OPENING STATEMENT BY MR. BRADLEY:

9 MR. BRADLEY: Actually, yes, on
10 behalf of the defense. We have obviously filed a
11 written motion that I think sets forth our position
12 quite clearly, but I would like to take a few
13 minutes and summarize our position.

14 We have filed a motion to vacate the
15 judgment of conviction and withdraw the guilty
16 pleas in two cases that were resolved in December
17 of 1996. The basis of our motion is that the
18 Defendant at the time, Anthony Cioffi, Junior, did
19 not have the information available to him
20 concerning the evidence available from the
21 prosecution, and the evidence available to
22 formulate a defense. He did not have that

1 information available to him at any time prior to
2 him entering a guilty plea. Let me put it in
3 context if I can. There's two cases here. One is
4 the 1995 case number, that was actually on your
5 docket and scheduled for trial on December 3. A
6 second case was the 1996 case number, was scheduled
7 for trial in Judge Shaker's Court, piggybacked
8 right after yours. Scheduled where the case on
9 your docket would proceed and whenever it was
10 concluded, the parties were scheduled to proceed
11 right into trial on the second case. Mr. Cioffi at
12 the time was represented by Attorney Tom Zena in
13 both cases. Mr. Zena had engaged in considerable
14 pre-trial discovery, primarily with respect to the
15 1995 case that was scheduled for trial on your
16 docket. We expect and intend to present the
17 testimony of Mr. Zena here today, what you will
18 essentially hear from him is that regarding the
19 second case that was piggybacked, the 1996 case
20 number that was scheduled in Judge Shaker's, he was
21 not prepared to proceed to trial. And he will also
22 tell you that he had not had an adequate

1 opportunity to evaluate the merits of the State's
2 case, nor had he had the opportunity to evaluate
3 the merits of any potential defense. And
4 specifically, and what is most significant here,
5 and essentially why we believe that there's a
6 manifest injustice here is that there were records
7 provided to Mr. Zena through the discovery process
8 from the Prosecutor, family counseling records
9 essentially, that Mr. Zena never reviewed, and in
10 fact, at the time I entered the plea, wasn't even
11 aware that he had them in his custody and
12 possession.

13 The accusations, without going too deep
14 into the nature of the accusations in the case that
15 was before Judge Shaker was essentially that
16 Mr. Cioffi had sexually molested and raped his two
17 young minor children, and these records contain
18 extensive information, suggesting -- not
19 suggesting, point blank stating that these are
20 enormously troubled and emotionally and mentally
21 handicapped children that were interviewed on a
22 number of occasions, by various agencies, and that

1 the records are clear that they had for years
2 repeatedly been interviewed and had repeatedly and
3 consistently denied that there was any sexual
4 activity that ever took place involving their
5 father. They denied all of that. So, Mr. Zena
6 never had the opportunity to put himself in a
7 position of trial preparation, and never had the
8 chance to review all of these records, and
9 consequently, could not have been in the position
10 to evaluate the merits of the defense, particularly
11 as it relates to case number two.

12 And when they show up for trial on
13 December 3, in case number one, Mr. Cioffi, I'm
14 sure you are going to hear testimony, summoned his
15 attorney, who was meeting in your chambers to
16 address some pre-trial matters, and indicated that
17 he was desirous of entertaining the possibility of
18 a plea to resolve both cases. Because he was
19 scared to death at the thought that if he was
20 convicted in case number two, he could face a
21 potential life imprisonment sentence. And Mr. Zena
22 and Mr. Cioffi had some opportunity to discuss the

1 terms of the proposed plea, and after somewhere
2 between 30 to 60 minutes, a decision was made to
3 enter into a plea agreement to resolve both cases.

4 The first case was resolved with a plea
5 to the primary offense of a felony of the second
6 degree, a kidnapping charge that carried a maximum
7 term of 15 years. The second case was resolved
8 also with an indefinite sentence that had a maximum
9 term incarceration of 25 years.

10 THE COURT: Had he gone to trial, he
11 would have been facing a life term, is that right?
12 That was a plea bargained from the life?

13 MR. BRADLEY: That is correct. In a
14 nutshell, this is our position. Tony Cioffi had no
15 idea that there existed reams of paper that were in
16 the custody of the Prosecutor's office, that were
17 generated by various family counseling service
18 agencies that contained information where these
19 children, Mr. Cioffi's own children denied that
20 there was any, ever any improper sexual activity,
21 and that these records documented that these
22 children have enormous mental and emotional

1 problems, and as a consequence, without that
2 information available to him, or quite frankly,
3 without even his attorney even considering that
4 information, it is our position that it was a
5 practical impossibility for Tony Cioffi to stand in
6 front of a judge, and indicate that he was prepared
7 to tender a knowing, voluntary and intelligent
8 plea.

9 Now, if you review the transcript from
10 the plea hearing, you will see that lip service is
11 given to the notion that, yes, is this a knowing,
12 voluntary and intelligent plea. Yes, but it is
13 just lip service, because the fact of the matter is
14 that he plead himself to a 25 year prison sentence,
15 without knowing all of the information contained in
16 these records, and by definition, it can't be a
17 knowing and intelligent decision to enter a plea of
18 guilty.

19 That is essentially our position and what
20 we expect to present to you, will be the testimony
21 of his Attorney, Tom Zena, that essentially, I'll
22 paraphrase and keep this moving, he's going to tell

1 you that he's known Tony Cioffi and represented him
2 prior to these two cases. He's had interaction
3 with him. And he will tell you that particularly
4 as it relates to case number one, he met with the
5 Prosecutor on countless times and he met with Tony
6 Cioffi on countless times. He's going to tell you
7 all of that. And he's also going to tell you that
8 all of these records that I am referancing in
9 regard to case number two, he never looked at. And
10 obviously never had the opportunity to share all of
11 that with his client.

12 We're also, besides the testimony of Mr.
13 Zena, we're going to present the testimony of a
14 licensed psychologist that within a year or so of
15 these guilty pleas being entered, he interviewed,
16 subjected Mr. Cioffi to a number of battery of
17 psychological tests, and his psychologist will
18 testify and explain to you that Tony Cioffi is a
19 man of extremely limited cognitive abilities. That
20 he has organic brain disorders that put him in a
21 position where he more than anybody, more than just
22 your average defendant in a criminal case, needs to

1 rely heavily upon his Attorney to guide him in the
2 decision making process. And that coupled with his
3 limited cognitive abilities, coupled with his
4 complete lack of understanding of what information
5 was out there available to help him defend this
6 case, forms the predicate for our assertion that he
7 could not have tendered a knowing voluntary and
8 intelligent plea, and that is why we're asking that
9 the Court recognize that, and allow us to vacate
10 the judgment of convictions, withdraw his pleas of
11 guilty, and essentially put us back to square one
12 where we can then utilize these records and
13 information to defend this man against both of
14 these charges. Thank you.

15 THE COURT: Thank you.

16 OPENING STATEMENT BY MR. MORROW:

17 MR. MORROW: Just briefly. What is
18 of interest is that we sit here nearly five years
19 after the fact in this matter, and given enough
20 time, and given sufficient resources and sufficient
21 access to any number of records, it is easy to look
22 back in hindsight and pick out little things that

1 five years later could be magnified and
2 intensified.

3 As we sit here and review this and as the
4 Court takes that into consideration, that is one of
5 the actions that the Court of Appeals often
6 discusses is that no case is perfect. And I can
7 dare say that there's any attorney that can tell
8 you that they have ever tried a perfect case, that
9 they have ever done absolutely everything humanly
10 possible in order to prepare a case for trial.
11 They work within the limits of the time
12 constraints. They work within the limits imposed
13 by speedy trial. They work within the time limits
14 imposed by the Court. And taking all of those
15 items into consideration, they do the best that
16 they can. But most importantly, they work within
17 the dictates of what their clients are instructing
18 them to do. And when directed by a client
19 undertaking certain actions, which they may feel is
20 not in the best interest of their clients, which
21 they may feel they haven't had an opportunity to
22 fully develop, is nonetheless the wishes of the

1 clients, and that is who the attorney is ultimately
2 responsible to representing that client. And in
3 those situations where as the client, that that
4 demands something proceed forward, the attorney is
5 obligated to accept that client's wishes. And I
6 think what you are going to find out is in this
7 indication, that Mr. Cioffi made the decision to go
8 forward with the plea in both cases. One on the
9 day of trial, as this case was proceeding, and
10 second, to preclude Judge Shaker from hearing his
11 other case. And I think what you are going to find
12 out is that Mr. Zena did what his client wanted to
13 do and that was to plead him to a substantially
14 reduced, to substantially reduced charges and
15 substantially reduced sentencing, consequently had
16 he been convicted, to say that other witnesses may
17 have come forward and to say that other matters
18 should have been looked at, beliees what Mr. Cioffi
19 wanted to have done in this case.

20 THE COURT: Thank you. Do you want
21 to call your first witness?
22

ATTORNEY TOM ZENA

1
2 being duly sworn according to law, on his oath,
3 testified as follows:

DIRECT EXAMINATION BY MR. BRADLEY:

4 Q. Good afternoon, Mr. Zena.

5 A. Good afternoon.

6 Q. It is my intention to quite frankly cut right
7 to the heart of this matter, but before I
8 do so, it obviously is necessary to
9 create a record and establish a little
10 basic foundational information. If you
11 haven't already done so, would you state
12 your full name for the record?
13

14 A. Thomas Zena.

15 Q. And what is it that you do for a living?

16 A. Practice law.

17 Q. And could you briefly describe to the Court
18 your educational background?

19 A. I am a graduate of Ursuline High School,
20 Youngstown State University and Case
21 Western University School of Law.

22 Q. And when did you graduate from Case?

1 A. 1973, 1972 or 1973.

2 Q. And did you immediately then take the Bar exam
3 and passed the Bar and begin practicing
4 law?

5 A. I took the Bar exam in November -- I'm sorry,
6 July of the year I graduated, passed the
7 Bar exam, that Bar exam and practiced law
8 in Cleveland before I came back home with
9 the law firm I was with through law
10 school.

11 Q. A lot of years going back from 1973, if you
12 could give us some idea of your
13 professional experience since you passed
14 the Bar?

15 A. I was a public defender in a very small
16 misdemeanor public defender program in
17 Mahoning County, which only lasted a
18 couple of years. I also practiced law
19 while I was doing that. That was a
20 part-time position. I then became a
21 part-time Mahoning County Prosecutor in
22 the felony division where I did that for

1 I'm going to say seven years. Also
2 practicing law, having a full private
3 practice on the outside, except for
4 criminal. Since that time, I have been
5 in the private practice of law
6 exclusively, so I have always had a
7 private law practice, but those are the
8 only two jobs I had, except a short
9 Magistrate, as a domestic Magistrate,
10 when one of them passed on and they
11 needed someone to fill in for 90 days and
12 I did it as a favor.

13 Q. How long have you been practicing law
14 exclusively without being employed as a
15 Prosecutor?

16 A. I think I stopped the prosecution in 1984 or
17 1985.

18 Q. So, roughly 17 years?

19 A. Since then --

20 Q. Over the last 17 years, what is the general
21 nature of your practice?

22 A. I do some bankruptcy, criminal, both felony

1 and misdemeanor, personal injury, and I
2 do domestic relations, quite a bit more
3 of that now than before.

4 Q. Looking back say over the last say, we'll go
5 back to roughly 1994, eight years or so,
6 which would take us immediately before
7 you undertook the representation in the
8 two cases we're here for, has the nature
9 of your practice changed or stayed pretty
10 much consistent with what you described?

11 A. I think the domestic end of my practice has
12 gotten significantly larger. That would
13 be the only significant change I could
14 tell.

15 Q. Back in the relevant time period that we're
16 dealing with here, where you were
17 defending Tony Cioffi in the two cases,
18 can you give us an approximation in terms
19 of what percentage of your practice was
20 devoted to criminal defense?

21 A. At all levels, I would say I would be
22 comfortable with somewhere around let's

1 say 35 in that range.

2 Q. Percent?

3 A. Yes.

4 Q. Roughly one-third of your practice was devoted
5 to criminal defense?

6 A. I would say so.

7 Q. And did you, I presume over the course of your
8 career you have had the opportunity to
9 represent criminal defendants that would
10 proceed through verdict in a Jury trial?

11 A. Correct.

12 Q. And can you give us an approximate idea of the
13 number of Jury trials you have tried
14 criminally throughout the course of your
15 career?

16 A. I would honestly tell you it would be a guess,
17 six or seven death penalty, maybe eight
18 or nine death penalty, plus I don't know,
19 50, 100 felonies. I'm just throwing a
20 figure out there. Several.

21 Q. A substantial number?

22 A. Yes.

1 Q. And besides those clients that you have
2 represented through the conclusion of a
3 trial, you have obviously represented
4 probably an expeditiously greater number
5 of people that resolve their case by a
6 plea or something short of a trial?

7 A. Far greater number.

8 Q. And I take it then you have, over the course
9 of your experience, represented people
10 that were accused of crime, you have run
11 across the wide spectrum of people in
12 terms of their level of intelligence and
13 things like that?

14 A. Yes, I would say that is a fair statement.

15 Q. And have you ever represented anybody that was
16 found to be incompetent to proceed to
17 trial?

18 A. Yes, Sir.

19 Q. And has it been your experience that every
20 defendant is unusual and he brings his
21 own life experience and intelligence to
22 the table?

1 A. Yes, Sir.

2 Q. And when you are dealing with somebody that
3 you have recognized to be of less than
4 average intelligence, I'll call it, do
5 you approach that situation any different
6 than where versus a situation where you
7 have got a rather intelligent, articulate
8 client?

9 A. If I find somebody that I recognize to be --
10 well, I think the spectrum goes a little
11 deeper than less than average
12 intelligence. It would have to be
13 somebody that is inhibited above the
14 level of retardation, not that I
15 qualitatively look at that, yes, I would
16 say, we all should, yes.

17 Q. Here's my point. If you are dealing with
18 somebody that you found is of less than
19 average intelligence, are you going to
20 spend more time?

21 A. Yes, I might have somebody else there for a
22 lot of things.

1 Q. Do you know Anthony Cioffi, Junior?

2 A. I knew Anthony Cioffi, Junior.

3 THE COURT: Let me stop at this
4 point. I notice from the deposition that was
5 previously taken by counsel of Mr. Zena, which is
6 attached to the motion and also from conversation
7 with both sides in-chambers, up to this point,
8 earlier, that there was, it is accepted as fact by
9 all parties that there was a release given
10 concerning any ethical problems of divulging
11 confidential information. Is that correct?

12 MR. BRADLEY: That is accurate.

13 THE COURT: I further understand
14 that that actual written release that was --
15 there's testimony in the deposition was delivered
16 to Mr. Zena has been lost with the entire file
17 while down in Columbus; is that correct? Anyone
18 disagree with that?

19 MR. MAREIN: I do not disagree with
20 that and if I may supplement what was just stated
21 on the record, my understanding is that Mr. Cioffi
22 sent Mr. Zena an authorization to release

1 information, particularly the file, and to
2 cooperate with me relative to investigating the
3 background and the resolution of these files. It
4 is my representation for the record that I do not
5 personally have that authorization, because I
6 believe the original was sent to Mr. Zena, but I do
7 know and I think Mr. Zena will verify this, that
8 the file itself, the Tony Cioffi file that was in
9 possession of Mr. Zena, from what Mr. Zena could
10 best recollect, was misplaced. It could have been
11 in Columbus, could have been in his office. He
12 can't find it. He can't locate the authorization,
13 but I can as an officer of the Court, respectfully
14 state to the Court that I have personally spoken to
15 my client, Mr. Cioffi, that I have countless
16 letters from Mr. Cioffi wherein he indicates that I
17 am authorized to speak to Mr. Zena, relative to the
18 circumstances of Mr. Zena's representation, and
19 that Mr. Zena is in point of fact authorized to
20 answer in Court relative thereto. So just so the
21 record is clear, nobody would be suggestive that
22 there's anything unethical or subjecting one to

1 some disciplinary action by virtue of the answering
2 of counsel's inquiry here today.

3 THE COURT: I thank you for that.

4 THE WITNESS: Thank you.

5 THE COURT: Let's proceed.

6 Q. (By Mr. Bradley) Do you know Anthony Cioffi,
7 Junior?

8 A. I knew him. I haven't seen Anthony for years,
9 but yes, I knew him.

10 Q. Can you tell the Judge basically how it is
11 that you first came to be introduced to
12 him?

13 A. Anthony saw me for legal matters prior to the
14 legal matters that we're here about
15 today. When, where, I don't know, but it
16 was some years before.

17 Q. Besides the matters that we're talking about
18 here today, you have represented his
19 legal interests in some matter that you
20 have no specific recall about?

21 A. I think there may have been a misdemeanor
22 matter and I know there was at least one

1 small civil matter.

2 Q. And if we're talking about the cases that
3 we're here on today, in 1995, can you
4 tell us approximately when you originally
5 came to know Tony?

6 A. I would say maybe -- maybe three years prior
7 to these matters, maybe a few more years
8 prior, I don't know.

9 Q. And during the course of that representation
10 that we're talking about, did you have an
11 opportunity to interact often or
12 frequently with Tony?

13 A. I really don't believe so, because I believe
14 those matters were handled quickly. They
15 were not real significant and they were
16 resolved, but I did interact with him to
17 the extent necessary, but not over an
18 extended period of time in those matters.

19 Q. And there came a time again where you
20 represented his legal interests in
21 connection with a criminal matter; is
22 that correct?

1 A. These matters, yes, Sir.

2 Q. And can you tell us the circumstances of how
3 that came about?

4 A. Well, I was originally contacted and again I'm
5 not running behind a tree here, I am
6 relying on memory. And if you have
7 documents, of course, I would be glad to
8 look at those since I don't have the
9 file. I believe I was originally
10 contacted about the matter relating to
11 the issue of the young lady whose child
12 was making complaints, a former
13 girlfriend that he had lived with.
14 During the course of that representation,
15 I believe, is when the other matter
16 involving his own children came to light.
17 I believe they were staggered. They did
18 not start together, and I believe the one
19 happened in Niles, I believe was first --
20 or Girard.

21 Q. And was this a situation where he picked up
22 the telephone and called and said, "I

1 have been charged with a crime, I want
2 you to represent me"?

3 A. He may have talked to me, he may have made an
4 appointment. He may have called me to
5 get him out of jail. I don't remember.
6 I was contacted.

7 Q. At some point, you were retained to represent
8 his legal interests in connection with
9 that?

10 A. Yes.

11 Q. And it is your recollection that the first
12 matter, that initial matter, was the
13 matter that was the subject of his
14 live-in girlfriend and the live-in
15 girlfriend's child?

16 A. That is my recollection.

17 Q. And if I indicated to you that that was the
18 matter that was the subject of criminal
19 case number 95-CR-696 you would have no
20 recollection to believe that was not
21 accurate?

22 A. I have no reason to think that wasn't true.

1 Q. Can you very briefly describe for the Court
2 your best recollection, just about the
3 general nature of the accusations?

4 A. I believe she accused Anthony of being, of
5 committing acts that were in the nature
6 of gross sexual imposition or thereof,
7 with her daughter. Something about the
8 daughter sleeping downstairs, Anthony
9 coming in late, she came downstairs and
10 caught them, caught Anthony hovering over
11 her, doing something to her. Argument
12 ensues, police come, Anthony may have
13 left before the police came, may not
14 have. That is what comes to my mind.

15 Q. And can you very briefly describe what you did
16 in the defense of those accusations in
17 terms of pre-trial discovery, meeting
18 with the Prosecutor?

19 A. Pre-trial discovery, went to the Prosecutor's
20 office to the felony division, was given
21 pre-trial discovery. Made at least one
22 attempt, I don't know if I was successful

1 in talking to the mother of the child.
2 Talked to Anthony. Anthony was compliant
3 and always appearing at the office,
4 either by his own volition, sometimes
5 unannounced, sometimes by appointment.
6 If you ever needed Anthony, he was
7 there -- police reports, all of those
8 kinds of things. As I remember, there
9 was really no physical evidence as we see
10 sometime in those type of cases, evidence
11 of combat. DNA was not prevalent during
12 that time. Evidence of sperm -- it
13 wasn't one of those kinds of cases. It
14 was as I described. That is the best I
15 can do.

16 Q. You received a formal written discovery
17 response from the Prosecutor's office?

18 A. If I didn't do that, I went over to the
19 Prosecutor's office and reviewed
20 discovery, which I have done in several
21 cases in the Trumbull County Prosecutor's
22 office, by making personal trips there.

1 Q. And you spoke directly to an Assistant
2 Prosecutor handling that specific trial?

3 A. Yes, I have. That was Tom Wrenn, but I do not
4 know if that was him from the beginning.
5 Tom Wrenn took over this case somewhere
6 along. If he wasn't there from the
7 beginning, for the purposes as we
8 proceeded to trial. Tom Wrenn was
9 involved.

10 Q. And did you in fact talk with and/or meet with
11 Mr. Wrenn on more than several occasions
12 regarding the case, the 1995 case number,
13 the one you were just referencing?

14 A. I think there were pre-trials where Mr. Wrenn
15 and I would talk. I am really not
16 sure -- Mr. Wrenn was the first lawyer on
17 it -- I don't recall if anybody else was.
18 Mr. Wrenn and I would talk at pre-trials.
19 I know for a fact, I met with Mr. Wrenn
20 at least once at the Prosecutor's office,
21 because I went there especially when the
22 other case broke. That is the best I can

1 do.

2 Q. And you indicated that you met with Tony, your
3 client on a number of occasions?

4 A. Several.

5 Q. Throughout the course of time, I take it then
6 you shared with him the information that
7 was learned by you through pre-trial
8 discovery including your conversation
9 with the Prosecutor?

10 A. Yes, Sir.

11 Q. Now, there came a time when a second
12 indictment was returned by the Grand
13 Jury, naming Anthony Cioffi, Junior as a
14 Defendant, correct?

15 A. Yes, Sir.

16 Q. And did you represent his legal interests in
17 connection with that matter?

18 A. Yes, Sir.

19 Q. Do you know when in relation to the time of
20 the first indictment was returned,
21 approximately when the second indictment
22 was returned?

- 1 A. No, Sir, but I would not disagree with any
2 documentation you had on that. It was
3 definitely before we were called to trial
4 on the first one and the second one was
5 assigned to a different Court.
- 6 Q. The first case was assigned to Judge Stuard?
- 7 A. Yes.
- 8 Q. And the second case was assigned to?
- 9 A. Mitchell Shaker.
- 10 Q. Now, if I told you that the trial in the first
11 case before Judge Stuard's docket was
12 scheduled for December 3 of 1996, would
13 that be consistent with your recall?
- 14 A. No, but I would not contest it. I have no
15 recall of the date.
- 16 Q. Do you recall how long you represented
17 Mr. Cioffi in the second case prior to
18 your being scheduled for trial in the
19 first case?
- 20 A. No, Sir, I do not.
- 21 Q. Do you recall the very general nature of the
22 accusations regarding the second case?

1 A. If I'm not mistaken, of course, everything
2 precludes that. It was a much more
3 serious case. I believe it was rape. I
4 believe it was a life offense, because of
5 the age of the child. I think.

6 Q. I don't know if you said this or not, the
7 nature of the charges were rape?

8 A. I said I believe it was a rape.

9 Q. And in fact, there were two named victims in
10 that indictment?

11 A. I believe his children.

12 Q. And meaning Tony Cioffi's minor children?

13 A. That is correct.

14 Q. And can you briefly describe what efforts you
15 made in terms of the preparation of the
16 defense in connection with that second
17 case?

18 A. At least one attempt that Tony arranged
19 through somebody else to talk to the
20 mother of the children, was not
21 successful in doing that. At least one
22 on my own to do that, and very similar to

1 the previous comments that I had
2 regarding the first case along the very
3 same lines. Concern was evident in this
4 case and it may be somewhat unresponsive,
5 but it had to do with the preparation.
6 If I recall, the cases were piggy backed.
7 One was to finish and Judge Shaker was to
8 start thereafter by his own proclamation.

9 Q. You are referencing the trials?

10 A. Yes, that is right.

11 Q. Was there ever any -- and I'm not talking
12 about the date of trial, which would have
13 been December 3, 1996. Prior to that
14 date, was there ever any discussion
15 between your client at the time and
16 yourself regarding plea bargain
17 agreements?

18 A. Yes.

19 Q. Could you describe when those conversations
20 took place?

21 A. No, but there were more than a couple. I
22 don't want to mislead you. You spoke in

1 terms of the general term plea
2 bargaining, there are discussions of
3 those sometimes initiated by me on any
4 case.

5 Q. And what was Tony Cioffi's position regarding
6 those plea bargain discussions?

7 A. Well, I always -- this has to be answered more
8 in the sense of what I would do at the
9 time. I like to let people know what the
10 options are. If they are going to trial,
11 they have got to know the best thing they
12 are turning down. So, I would have
13 discussed the possibility with Tony
14 Cioffi of entering into a plea bargain,
15 does he want to, what are his concerns,
16 those kinds of things. It is my belief
17 in these cases that Tony Cioffi was not
18 interested in entering into a plea
19 bargain. That was my general feeling
20 even though those discussions were had.
21 Sometimes I tell clients, you may not
22 want to, but I want you to just listen to

1 what is being offered, because you have
2 to know choices, and then we move on from
3 there.

4 Q. Would I be correct that in this case and all
5 cases where you are representing
6 criminally accused, that it is certainly
7 one of your many functions, however, to
8 ensure that those decisions that are made
9 by your clients regarding plea bargain
10 agreements or anything of that nature,
11 any decision in regard to a criminal
12 case, it is your job to see that it is a
13 well informed decision; is it not?

14 A. I like it to be, sure. I think that is
15 important, sure.

16 Q. It is certainly your function as a criminal
17 defense lawyer, to share with your
18 client, all of the information that you
19 have learned and received through
20 pre-trial discovery, correct?

21 A. Yes.

22 Q. And you would strongly discourage a client

1 making a meaningful decision in
2 connection with his criminal case without
3 having critical information regarding
4 either the nature of the State's case
5 or --

6 MR. MORROW: At this point, I'm
7 going to object. We're getting to the point that
8 defense counsel is now testifying for Mr. Zena. I
9 don't mind some degree of leading, but at a point
10 in time where he wants to testify --

11 THE COURT: It is a rather rotund
12 question, but I think it is proper. He's not
13 testifying. He's suggesting things that Mr. Zena
14 can agree or disagree with. Go ahead.

15 Q. In the course of your representing persons
16 accused of crimes, certainly it is your
17 responsibility to share with them all of
18 the information that you have available
19 to you regarding the merits of any
20 defense or the strengths of the State's
21 case against that person, fair to say?

22 A. Yes.

1 Q. And certainly you would not -- for example,
2 you would strongly discourage any clients
3 making a decision regarding the
4 disposition of a criminal case without
5 that client being fully informed because
6 of the relevant information about that
7 case, correct?

8 A. I would discourage anybody from making a
9 decision that didn't know everything that
10 I knew about the case. There may be
11 things a Defendant knows that I don't
12 know, but yes, at least what I know.

13 Q. Now, I would like to hand you what has been
14 marked for purposes of identification as
15 Defendant's Exhibit A. I would ask that
16 you take a moment, read through that. It
17 is three pages of a letter from the D & E
18 Counseling Center. If you could take a
19 minute and read through that. This is an
20 identical copy so you can follow along
21 through that.

22 MR. MORROW: What is your date on

1 that?

2 MR. BRADLEY: October 1, 1996.

3 THE COURT: Have you seen this
4 letter before?

5 A. I don't recall that I had. If I have, my
6 client would have a copy of it. That is
7 my standard practice.

8 Q. As you sit here today, do you have any
9 specific recollection of having seen that
10 letter before today?

11 A. No, Sir.

12 Q. And you have had an opportunity to review the
13 letter?

14 A. I have reviewed Defendant's Exhibit A.

15 Q. Could you essentially summarize for me what is
16 in the letter?

17 A. The letter would deeply call into question any
18 issues related to the allegations of the
19 children of Anthony Cioffi or Matthew
20 Cioffi regarding their father.

21 Q. And that would have been, when you reference
22 Matthew and Anthony Cioffi, those were

1 the two alleged victims that were the
2 subject of the case that was pending
3 before Judge Shaker's docket, is that
4 correct?

5 A. That is correct.

6 Q. And it is those two individuals that were the
7 alleged victims of the rape that carried
8 with it the life specification?

9 A. That is correct.

10 Q. Now, you had been representing Mr. Cioffi for
11 some considerable period of time with
12 respect to the case pending before Judge
13 Stuard's docket prior to trial?

14 A. Well, prior to the trial of that case, sure.

15 Q. You testified you had the opportunity to
16 engage in discovery and have
17 conversations with the Prosecutor and
18 discuss this matter with your client?

19 A. Sure.

20 Q. And the record would reflect that that case
21 was scheduled to proceed for trial on
22 December 3 of 1996. Were you in your

1 mind prepared to go forward with the
2 trial regarding the case pending on Judge
3 Stuard's docket?

4 A. Yes. Well, there were some unresolved issues
5 that we were resolving that morning, but
6 based on what I had from the information
7 I had ascertained, yes. But we were in
8 the process that morning of going over
9 issues related to records from Children
10 Services, and any other records involving
11 that case or anything related to that
12 child.

13 Q. And those records were not yet available to
14 either you or the Court, that particular
15 morning of trial, is that right?

16 A. My understanding is they were either here and
17 about to be reviewed or on their way.

18 Q. But regardless of which alternative it was,
19 you had not personally reviewed them and
20 to the best of your knowledge --

21 A. I had not seen them.

22 Q. And to the best of your knowledge, the Court

1 had not reviewed them either?

2 A. I don't know that.

3 Q. Now regarding the second case that was I think
4 you testified was scheduled to piggy
5 back; in other words, once the trial was
6 concluded with respect to the case in
7 Judge Stuard's docket, you were to
8 immediately roll into the trial that was
9 on the docket of Judge Shaker, is that
10 correct?

11 A. Yes, that is what the intention was of that
12 Judge.

13 Q. Scheduled. And regarding that particular
14 case, the case on Judge Shaker's docket,
15 were you prepared to go to trial?

16 A. No. I don't think so. There would have been
17 more things I wanted to do. I think I
18 even mentioned to my client that whatever
19 it took, I would not have allowed that to
20 happen, even if it involved me
21 personally.

22 Q. I'm not following you.

1 A. The piggy backing of that case allowed Judge
2 Shaker to call that case to trial in that
3 amount of time, up to the point where I
4 would have stood, made tremendous
5 objections in the record, even calling
6 into question the representation during
7 the trial. I told Tony that. I made
8 that clear. We had known what we were
9 going to say if we went into the
10 Courtroom.

11 Q. What were you going to say?

12 A. I was going to stand up and tell the Judge
13 that I needed more time to investigate
14 that case. I needed more time involved
15 in that case. That was a very serious
16 accusation and I had just got done
17 preparing for one and proceeding with
18 that case and that I would have needed
19 more time. Judge Shaker was fairly
20 insistent at the last pre-trial, that he
21 was going to proceed with that case. I
22 was fairly insistent that he was not.

1 Q. And in addition to what you just described
2 regarding your state of unpreparedness,
3 you also have no recollection of ever
4 receiving Defendant's Exhibit A as part
5 of a discovery, written discovery
6 response provided by the Prosecutor's
7 office?

8 A. No. And again, I'm trying to be as honest and
9 open as I can in answer to these
10 questions. That letter seems to be
11 significant. Obviously, when I get
12 information like that in any case from
13 any outside source, I have worn out more
14 client's copy stamps than anybody. I
15 stamp it, I hand it to the client. I
16 give it to the client. I don't recall
17 reading that. I don't recall seeing it.
18 If I would have, Tony would have a copy
19 of it. As I sit here today, I do not
20 recall that.

21 Q. Besides that, do you have any recollection of
22 discussing with Tony Cioffi the contents

1 of this particular letter, namely that is
2 identified as Defendant's Exhibit A?

3 A. Well, the content of the letter itself, no.
4 Tony's allegations that the children were
5 making up anything they said about him,
6 yes, but it wouldn't be arising out of
7 this letter.

8 Q. Specifically, for example, in basically the
9 middle of the first paragraph, this is a
10 just, if I can describe for the record --

11 A. I think I can tell you nothing that is
12 specifically drawn to this letter would
13 have been discussed with Tony. I have no
14 recollection doing that.

15 Q. So, for example, things like the letter
16 writer's statement, in fact, there's
17 specific reference to Matt denying being
18 a victim of sexual abuse. You have no
19 recollection of having that information
20 or sharing that with Tony?

21 A. Nothing within this letter at all from
22 beginning to end.

1 Q. I would like to hand you Defendant's Exhibits
2 B and C. If you could just review those
3 and then describe for the record what it
4 is those Exhibits are?

5 A. Okay.

6 Q. With respect to Defendant's Exhibit B, could
7 you -- the Judge does not have a copy of
8 that, could you briefly describe to him
9 what that reflects?

10 A. It is a psychological consultation report of
11 the Western Reserve Care System, done by
12 a Ph.D. in psychology on a referral for
13 Matthew Cioffi, 3-31-95, is either the
14 dictation or the date of the test. It
15 doesn't say in the body of the letter.
16 And well -- no, the dictation date is
17 4-3-95, so the test date must have been I
18 think 3-31-95.

19 Q. Have you ever seen that particular document?

20 A. I have no recall of seeing this document
21 before.

22 Q. Do you have any recollection of ever

1 discussing with Tony Cioffi at any point
2 in time, the contents of this particular
3 Exhibit?

4 A. No, Sir.

5 Q. Could you describe for the Court, basically
6 just read to him the last sentence on the
7 first page?

8 A. "Matthew describes possible physical abuse by
9 a babysitter in the past, but denies
10 being a victim of sexual abuse."

11 Q. Referencing, and I take it then that is
12 nothing that you ever shared with Tony
13 Cioffi to the best of your recollection?

14 A. It is nothing I have seen to the best of my
15 recollection and likewise did not share.

16 Q. Referencing Defendant's Exhibit C, have you
17 had an opportunity to review that?

18 A. I scanned it, sure, just now.

19 Q. Could you just briefly describe for the
20 Court's benefit what Defendant's Exhibit
21 C is?

22 A. It appears to be a letter signed by Louis

1 Wainwright, the supervisor of the case
2 unit, Lanore Blanton, who I know to be
3 members of the Mahoning County Children
4 Services, directed to the Trumbull County
5 Children Services regarding Lisa Cioffi,
6 Anthony Cioffi and Matthew Cioffi, and it
7 is a letter directed specifically to
8 Darlene Shope, whoever she was at the
9 time and I don't know.

10 MR. MAREIN: May I interrupt? I am
11 sitting here, I'm concentrating on what the witness
12 is saying, and I understand that people have to
13 interact. Could you please advise the people in
14 the back of the Courtroom not to talk? I can't
15 hear.

16 THE COURT: I would ask anyone who
17 is observing these proceedings to please not
18 interrupt in any way. That is not proper to do
19 that.

20 MR. MAREIN: Thank you.

21 Q. Have you ever seen before today the letter
22 that is identified as Defendant's Exhibit

1 C?

2 A. I have no recollection of seeing this letter
3 in the past. And therefore, I would have
4 no recollection of ever discussing it at
5 all with Mr. Cioffi.

6 Q. The letter, as you can see, references that
7 Anthony and Matthew were interviewed on
8 two occasions regarding these
9 allegations, March 15 of 1991 and March
10 22, 1991. Do you see that there?

11 A. Yes.

12 Q. And I take it that your having never seen this
13 letter before today, you took no action
14 to secure the records that relate to the
15 March 15 and March 22, 1991 interviews of
16 the two victims or alleged victims
17 regarding the accusations that were the
18 subject of the 1996 case?

19 A. Not up until then. But I wouldn't have known
20 about it because I didn't see the letter,
21 and especially, would give the client a
22 copy of a letter that had any direct

1 accusation against him as this letter
2 does.

3 Q. So besides the records that you currently have
4 in front of you, there's referenced in
5 those records, additional records that
6 were generated by the Mahoning County
7 Children Services that would contain
8 information regarding interviews
9 conducted with the two children, Matthew
10 and Anthony, regarding the specific
11 accusations?

12 A. That is correct. Well, I mean that is what it
13 says.

14 Q. And you never had the opportunity to secure
15 those records, learn what was in those
16 records and share what was in those
17 records with Tony?

18 A. No.

19 THE COURT: Thomas, may I see those?

20 THE WITNESS: Yes, Your Honor.

21 Q. (By Mr. Bradley) So, if I can just take you
22 back now to the date of the scheduled

1 trial regarding the case pending before
2 Judge Stuard's docket?

3 A. Yes.

4 Q. And see if I can create a little bit of mental
5 picture and see if it is accurate based
6 upon your recollection?

7 A. Yes.

8 Q. You are there in Judge Stuard's chambers
9 discussing some pre-trial issues and
10 ready to proceed to trial, and you feel
11 you are prepared to proceed to trial with
12 respect to that case on Judge Stuard's
13 docket, correct?

14 A. Yes.

15 Q. And at least --

16 A. I'm sorry. Now understand we were about to
17 face some issues related to records that
18 I had not seen yet so, to that extent,
19 yes.

20 Q. Which may have contained information that was
21 potentially exculpatory that would
22 potentially require you to ask for a

1 continuance to explore that?

2 A. I would hope that if I had information that
3 was exculpatory that other people had
4 been seen that it would have been turned
5 over to me pursuant to the rules that
6 apply, yes.

7 Q. The point is, other than those records that
8 you had not yet had the opportunity to
9 review, in your own mind, based upon your
10 experience as a criminal defense
11 attorney, you felt prepared to proceed to
12 trial with respect to the case in Judge
13 Stuard's Court?

14 A. Yes.

15 Q. And with respect to the second case that
16 carried the possible life imprisonment
17 sentence, it is your position that you
18 were not in a state of trial
19 preparedness?

20 A. Yes.

21 Q. And what exactly does that mean? Not in a
22 state of trial preparedness?