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U.S. DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF OHIO
 EASTERN DIVISION

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF OHIO
 EASTERN DIVISION**

ANTHONY CIOFFI, JR.
 Inmate #332-078
 Trumbull Correctional Institution
 5701 Burnett Road
 Leavittsburg, Ohio 44430-0901

 Petitioner

CASE NO: 4:04CV1837

JUDGE: JAMES GWIN
 Magistrate Judge George J. Limbert

vs.

DAVID BOBBY, Warden
 Trumbull Correctional Institution
 5701 Burnett Road
 Leavittsburg, Ohio 44430-0901

 Respondent

**MOTION TO AMEND OR
 ALTER JUDGMENT OR IN
 THE ALTERNATIVE FOR
 CERTIFICATION OF
 APPEALABILITY**

I. PROCEDURAL BACKGROUND

On September 10, 2004, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. 2254. Respondent Bobby subsequently filed a motion to dismiss plaintiff's complaint. In support of his motion, Respondent asserted that he was entitled to dismissal under Fed. R. Civ. P. 12(b)(6) on the ground that plaintiff's claims in this action are time barred under 28

U.S.C. 2244(d)(1). The Magistrate Judge agreed with Respondent's position and recommended that the Motion to Dismiss be granted. Petitioner filed Objections to the Magistrate's Recommendations, which the Court overruled.

March 3, 2005, this Court filed a judgment granting Respondent Bobby's motion to. The Court on the same date also filed a Memorandum Opinion and Order. Petitioner will establish below that this court should alter and amend its judgment and order dismissing plaintiff's complaint or, at a minimum, grant Petitioner a certificate of appealability.

II. STATEMENT OF FACTS

In its memorandum opinion and order, the Court relies upon documents filed in the proceedings before the state common pleas court and appellate court, as well as the pleadings themselves. The Court also adopts, in full, the Magistrate Judge's Report and Recommendation. (Opinion and Memorandum at 9). In doing so, the 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. Petitioner maintains that the motion to alter and amend should be granted, in light of all pertinent legal authority.

III. LAW AND ARGUMENT

A MOTION TO ALTER OR AMEND A JUDGMENT UNDER FED. R. CIV. P. 59(e) SHOULD BE GRANTED TO CORRECT A CLEAR ERROR OF LAW.

(A) Purposes of Rule 59(e) And Grounds For Relief Under Rule

The purpose of a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e) is to allow a court to reconsider matters encompassed in a decision on the merits. See, e.g., decision in *Sherwood v. Royal Ins. Co. of America*, 290 F. Supp. 2d 856, 858 (N.D. Ohio 2003), citing *Osterneck v. Ernest and Whitney*, 489 U.S. 169, 174, 109 S. Ct. 987 (1989). The rule gives a district court the power to rectify its own mistakes in the period immediately following the entry of judgment. *Id.*, citing and quoting *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 450, 102 S. Ct. 1162 (1962).

A motion to amend and alter under Rule 59(E) will generally be granted if the district court has made a clear error of law, if there is an intervening change in controlling law, or if granting the motion will prevent manifest injustice. *Dow Chemical Co. & Subsidiaries v. U.S.*, 278 F. Supp. 2d 844, 847, citing *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F. 3d 804, 834, (6th Cir. 1999). Once a timely motion under 59(e) has been filed, the district court has the discretion to reconsider any part of its final opinion and judgment, not only those sought to be corrected by the moving party. See *Dow Chemical Co.*, citing *EEOC v. United Ass'n of Journeymen & Apprentices*, 235 F. 3d 244, 250 (6th Cir. 2000).

Rule 59(e) has also been recognized as serving the purpose of sparing the parties and the appellate courts of the burden of unnecessary appellate proceedings. *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F. 3d 396, 403 (4th Cir. 1998), citing and quoting *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F. 3d 746, 749 (7th Cir. 1995). Petitioner will establish that in light of

the purposes of Rule 59(e) and the grounds for relief under that rule, this Court should grant the motion to amend and alter its judgment on the ground that there has been a clear error of law.

(B) 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 Magistrate Judge failed to apply the foregoing standard in arriving at the Report and Recommendation, which this Court has adopted into its judgment.

In his prior memoranda, petitioner'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 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 was required to do when addressing the 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, as adopted by the Court, construes the factual assertions of the petition against petitioner -- 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 petitioner with the obligation 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, no further response or evidence in support of the petition is required, necessary or appropriate 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 shifted to 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, yet nonetheless appears to have applied a "summary judgment" standard when reviewing this case and 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 this court took no affirmative action to convert respondent'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 petitioner and giving petitioner the benefit of all reasonable inferences.

In his verified petition, petitioner Cloffi 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 Cloffi, this court was bound by law to accept, for the purposes of ruling upon a motion to dismiss, that Anthony Cloffi:

- 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 Court'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 could make no other determination on a motion to dismiss, absent a clear error of law, than to find that petitioner 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.

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