

THE SUPREME COURT OF OHIO

Disciplinary Counsel,

Relator,

v.

**Charles D. Cotton, a.k.a. Prince Charles
Cotten,**

Respondent.

CASE NO. 2004-1130

UPL NO. 03-07

RESPONDENT COTTON'S OBJECTIONS TO THE BOARD'S FINAL REPORT

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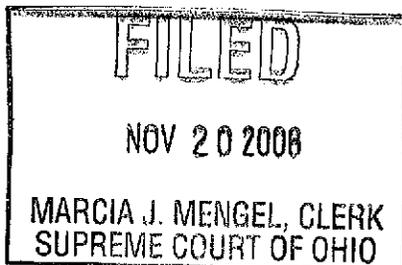


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INTRODUCTION

Respondent Charles D. Cotton (“Cotton”) is an inmate at the London Correctional Institute (“LoCI”). During his time at LoCI, Cotton assisted other largely illiterate inmates with the preparation of their court filings. Cotton did so based on his belief that under *Johnson v. Avery* (1969), 393 U.S. 483, inmates may assist other inmates unless the state provides a reasonable alternative in order for inmates to have their constitutionally-recognized reasonable access to the court system. The State of Ohio’s reasonable alternative is to put in place inmate clerks who perform the *exact same function* as Cotton, yet the State only selectively prosecutes Cotton here. This is not merely Cotton’s claim. The three Inmate Legal Clerks, by their own admission, have stated that they perform the exact same function as Cotton—yet Disciplinary Counsel has singled out only Cotton for prosecution. As one Inmate Legal Clerk confessed: “Only thing different is that I ha[ve] a title in the law library and that [i]s it.” Deposition of Price (“Price”) at 63. Put another way, if the State were to prohibit all inmates from doing what Cotton is being prosecuted for, practicing law without a license, then the State would fail in its constitutional obligation to provide reasonable access to the courts under *Johnson v. Avery*.

The Board on the Unauthorized Practice of Law (the “Board”) permitted Disciplinary Counsel to proceed solely against Cotton, while recognizing that Cotton’s “conduct appears to encompass certain activities in which the inmate legal assistants also engage (properly or otherwise).” Final Report on Remand, Finding of Fact 11. This is so because the Board, like Disciplinary Counsel, relied upon the Inmate Legal Clerks’ assistance—the very same conduct for which Cotton is charged with the unauthorized practice of law—in determining that a reasonable alternative to the assistance provided by Cotton exists at LoCI. This conclusion

cannot stand. Accordingly, Cotton objects to the Final Report on Remand and the Board's recommendations.

Specifically, Cotton objects:

(1) To the Board's determination that "meaningful access to the courts is provided when inmates have access to a prison library that contains legal materials needed to attack sentences and challenge confinement, and that the adequacy of such conditions may be challenged by the inmate only upon a showing of actual injury," Final Report on Remand at 6;

(2) To the Board's apparent belief that Cotton must "establish proof that any specific LoCI inmate was denied his constitutional right of access to the courts in a specific case" before he can raise the defense that no reasonable alternative to his and other inmates' assistance exists, Final Report on Remand, Finding of Fact 32;

(3) To the Board's finding that "Reasonable alternatives exist in the Ohio prison system and at LoCI to assist inmates in the preparation of petitions for post-conviction relief, and to have access to the courts, as mandated by *Johnson v. Avery* and later U.S. Supreme Court decisions," Final Report on Remand, Finding of Fact 72;

(4) To the Board's determination that "Inmates at LoCI have sufficient capability to pursue actionable, civil rights or post-conviction claims through the combination of legal assistance and access to legal materials and/or a law library provided by the state of Ohio," Final Report on Remand, Conclusion of Law 6; and

(5) To the Board's recommendation that this Court issue an order finding that he engaged in the unauthorized practice of law and enjoining him from continuing with the assistance to other inmates that forms the basis of this finding.

Now, Cotton asks this Court to dismiss the charge against him because Disciplinary Counsel, on behalf of the State, cannot prosecute Cotton for his assistance to other inmates where the State has not provided a reasonable alternative.

STATEMENT OF THE CASE

This matter was heard by the Board on January 21, 2004. On July 13, 2004 the Board issued its first Final Report, recommending that the Ohio Supreme Court issue an order finding that Cotton had engaged in the unauthorized practice of law and prohibiting him from doing so in the future.

The matter was then heard by the Ohio Supreme Court, as required by Gov. Bar. R. VII. The Supreme Court did not accept the Board's recommendations, but instead remanded the matter to the Board "for further consideration, including findings on whether reasonable alternatives now exist in the Ohio prison system to assist inmates in the preparation of petitions for post-conviction relief as described in *Johnson v. Avery* (1969), 393 U.S. 483." Supreme Court Order, June 30, 2005. At that point, the Board appointed undersigned counsel for Cotton and ordered briefing pursuant to the Supreme Court's remand order.

After additional discovery on this question and briefing by both parties, on August 29, 2006, the Board issued its Final Report on Remand. This second report recommended that the Ohio Supreme Court issue an order finding that Cotton engaged in the unauthorized practice of law and enjoining Cotton from engaging in the unauthorized practice of law in the future. Final Report on Remand, Board Recommendation. On September 28, 2006, Respondent filed a Motion for Leave to File Objections to the Final Report on Remand, which the Court granted.

STATEMENT OF FACTS

Cotton is an inmate at LoCI who has assisted other inmates with their court filings. Disciplinary Counsel has brought this action against Cotton alleging that he has engaged in the

unauthorized practice of law based on a notation Cotton placed on pleadings filed by other inmates. Pursuant to the Department of Rehabilitation and Correction's Policy 59-LEG-01 ("Policy"), which permits assistance between inmates for legal work, Cotton assisted other inmates with the preparation of their pleadings. Deposition of Cotton ("Cotton") at 16-17, 54, 65 (Hearing Ex. 2). Cotton indicated his assistance by noting on the filing that he had "Drafted, Revised, and Prepared" the documents as "PRO SE ASSISTANCE." *See, e.g.*, Hearing Ex. 6. Cotton explained that "Drafted" meant that he made a carbon copy, "Revised" meant if it was spelled wrong he fixed it, and "Prepare" meant rewriting. Cotton at 36. At no time, however, has Cotton held himself out as a lawyer. *See* Letter from Cheryl Jorgensen-Martinez, Ohio Dep't of Rehab. and Corr. ("Jorgensen-Martinez Letter"); Cotton at 88; Deposition of Hurwood ("Hurwood") at 65; Deposition of Deavors ("Deavors") at 60-61; Deposition of Barnett ("Barnett") at 28; Price at 62; Deposition of Jasper ("Jasper") at 25.

LoCI's Policy and Implementation

The Department of Rehabilitation and Correction has enacted a policy regarding the preparation of court filings and access to the courts. *See* Policy 59-LEG-01. The Policy provides two things: (1) a law library, and (2) Inmate Legal Clerks to work in the law library. *See generally* Policy. The Policy also permits inmates to assist other inmates "in the preparation and filing of legal documents or other legal matters." Policy at VI.F.

The Inmate Legal Clerks work in the law library "to assist inmates in the use of legal materials, to maintain the library collection, for typing and other clerical duties." Policy at VI.B.1. The Inmate Legal Clerk Position has a written job description that includes such tasks as providing "assistance to inmates in the preparation of legal documents," which "entails finding passages in the library's law books or on microfiche that pertain to specific cases or legal issues and dispensing such information to inmates for use in the law library." Dep. Ex. J at 5. The

Inmate Legal Clerks are also responsible for inventory, shelving, sign in/pass procedures, stamping books, and maintaining forms and typewriters for use by the inmates. *Id.*

The Inmate Legal Clerks receive no legal training from an attorney, and neither the librarian nor his assistant have any legal training. Hurwood at 12-13, 21; Deposition of Duru (“Duru”) at 18, 31; Barnett at 15. Indeed, one library staff member admitted that she would not be able to answer an inmate’s question, such as which legal form to use, if an Inmate Legal Clerk could not help that inmate. Duru at 35-36.

A large percentage of inmates at LoCI are illiterate according to the literacy standards set in the Policy. According to a prison official, 90 to 95 percent of LoCI inmates have a reading level that classifies them as illiterate. Deposition of Mack (“Mack”) at 20, 38-39.

Approximately 60 to 70 percent of LoCI inmates do not have a high school education. *Id.* at 31, 38. This is important because a law library without more is of no assistance to the 90 to 95 percent illiterate inmate population. The Policy does, however, have a special section directed towards illiterate inmates which allows them to “request assistance in preparing their initial pleadings to be filed with a court.” Policy at VI.C.1. The staff member designated by the Warden to implement the Policy regarding requesting assistance was unaware that he is the staff member designated to implement the Policy and has never received a single request for assistance. Mack at 20, 22-23, 27; Warden at 18-19, 24. Furthermore, there is no specific instruction, oral or written, regarding the availability of assistance for illiterate inmates or to whom inmates might go to request such assistance. *See* Inmate Orientation Handbook at 34-35; *see also* Hurwood at 34-35 (referring to the Inmate Orientation Handbook). In short, without Inmate Legal Clerks and people like Cotton, illiterate inmates only have a law library filled with books.

While the Board found that credible testimony demonstrates that the policies are implemented and are working at LoCI, even the Board recognized that there are “several actual or arguable shortcomings in the system.” Final Report on Remand, Finding of Fact 32.

Assistance by Inmates

Each day anywhere from 30 to 200 inmates visit the law library with anywhere from 20 to 80 visiting at one time. Duru at 61; Price at 35. Although there are four Inmate Legal Clerks, only two are scheduled to work on weekday shifts and only one is scheduled on weekend shifts. Relator’s Brief, Sept. 8, 2005, Ex. D; Price at 30. At times, so many inmates need legal assistance that the Inmate Legal Clerks either tell the inmates to come back later or refer them to other inmates, such as Cotton, for help. Price at 40; Deavors at 24, 35-37, 59-60; *see also* Barnett at 18-19, 25. In addition to Cotton, there are other inmates who are not Inmate Legal Clerks who assist inmates with the preparation of legal documents. Price at 21; Barnett at 24; Deavors at 26 (estimating that there are between 4 and 10 inmates who come to the library to assist other inmates, as well as some 20 to 25 inmates who do not come to the library but assist other inmates).

The Inmate Legal Clerks are often in the library beyond their scheduled shifts, and during this time they voluntarily assist other inmates, Price at 29-30, 37, 40-41; Jasper at 11-12; Barnett at 43-44; *see also* Deavors at 8, including performing tasks that go well beyond their written job description. *See* Deavors at 17-19; Barnett at 8, 21, 43-44; Price at 10-11, 37, 41. Only one Inmate Legal Clerk limits his activities and assistance in the law library to the assigned duties, and this is because he admittedly does not have the necessary knowledge, training, or experience to perform other assistance. *See* Jasper at 9-10.

Several of the current Inmate Legal Clerks testified that Cotton does not do anything different than what they themselves do. Barnett at 27; Deavors at 52-53; Price at 63. Even the

Board recognized that the Inmate Legal Clerks exceed their authorized activities and perform legal research and write pleadings for other inmates. Final Report on Remand, Finding of Fact 9.

ARGUMENT

This Court should reject the Board's finding that Cotton engaged in the unauthorized practice of law based on Cotton's assistance to other inmates with their court filings. Enjoining Cotton from continuing to provide this assistance violates *Johnson v. Avery* (1969), 393 U.S. 483, which limits a state's ability to prohibit inmate assistance to other inmates. "[U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly . . . bar[] inmates from furnishing such assistance to other prisoners." *Id.* at 490. Because LoCI has not provided a reasonable alternative to the assistance provided by inmates like Cotton, the state, through Disciplinary Counsel, may not constitutionally preclude Cotton from continuing to assist other inmates.

I. THE BOARD ERRED IN FINDING THAT COTTON MUST DEMONSTRATE ACTUAL INJURY SUFFERED BY AN INMATE BEFORE HE CAN CHALLENGE THE LACK OF A REASONABLE ALTERNATIVE.

In its decision, the Board construed *Lewis v. Casey* (1996), 518 U.S. 343, as requiring an additional standing requirement for Cotton—actual injury—before he could raise the inadequate assistance defense. The Board's interpretation of *Lewis v. Casey* is incorrect, as a defendant raising a defense to a charge against him has the requisite interest in this prosecution to raise the defense of the unavailability of reasonable alternative assistance and need not demonstrate a specific injury to a specific inmate.

A. The Standing Requirement At Issue In *Lewis v. Casey* Has No Application Here.

Relying on *Lewis v. Casey*, the Board incorrectly determined that Cotton must "establish proof that a[] specific LoCI inmate was denied his constitutional right of access to the courts in a

specific case” before he can raise as a defense the lack of any reasonable alternative to the assistance he and other inmates provide. Final Report on Remand, Finding of Fact 32. This reliance on *Lewis v. Casey* is misplaced because *Lewis v. Casey* held that before a court may craft a *remedy* for alleged violations of an inmate’s right of access to the courts, the inmate must first establish actual injury. *Lewis*, 518 U.S. at 351-52. Cotton has not asked this court to provide an affirmative “remedy.” Instead, Cotton raises as a defense the constitutionality of Disciplinary Counsel’s prosecution of him, given the unavailability of a reasonable alternative to the assistance provided by him and other inmates. Accordingly, *Lewis v. Casey* has no application here.

In *Lewis v. Casey*, inmates sought systemwide relief on behalf of all prisoners within the state of Arizona. *Id.* at 346. The trial court found in favor of the inmates and granted systemwide relief that “mandated sweeping changes.” *Id.* at 347. On appeal, the United States Supreme Court disagreed with the trial court’s determination that systemwide relief was warranted and found instead that “the success of [the inmates’] systemwide challenge was dependent on their ability to show widespread actual injury, and that the court’s failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid.” *Id.* at 349.

The Court’s requirement, that before a court may grant systemwide relief it must first find systemwide actual injury, is based on the doctrine of standing. *Id.* According to the Court, “the doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches.” *Id.* In order to prevent the obliteration of this principle, an inmate must first invoke the intervention of the courts through a showing of actual injury. *Id.* at 350. The Court went on to explain: “The actual injury requirement would

hardly serve the purpose we have described above—of preventing courts from undertaking tasks assigned to the political branches—if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration.” *Id.* at 357.

The Court’s concern is justifiable and clear: before a court may remedy an alleged constitutional violation, the party seeking this remedy must establish actual injury. The *Lewis v. Casey* Court’s concern, however, is not applicable here as that Court did not address the issue of whether a state may constitutionally *prosecute* an inmate for assisting other inmates without meeting the reasonable alternative assistance requirement set forth in *Johnson v. Avery*. Cotton is not asking this Court to remedy an alleged violation, but rather, Cotton is defending against the state’s prosecution of him for assisting other inmates by arguing that the state has not satisfied the reasonable alternative assistance requirement established in *Johnson v. Avery*.

B. Cotton May Challenge The Adequacy Of LoCI’s Alternative Assistance In Defending Against This Prosecution.

Under *Johnson v. Avery*, Cotton may defend himself by challenging the adequacy of the proffered reasonable alternative assistance. In *Johnson v. Avery*, an inmate was challenging the state’s ability to preclude assistance by him and other inmates. Specifically, the inmate challenged the constitutionality of the state’s disciplinary action taken against him for providing assistance to other inmates. *Johnson v. Avery* (1969), 393 U.S. 483, 484-85. The Court not only permitted this challenge, but found that the state could not preclude the inmate from assisting other inmates unless it provided a reasonable alternative to that assistance. *Id.* at 490. At no point did the Court preclude this defense based on whether the inmate could show actual injury.

Following *Johnson v. Avery*, the Sixth Circuit held that while “there is technically no independent right to assist,” the state cannot prevent this assistance “where no reasonable

alternatives are available.” *Gibbs v. Hopkins* (6th Cir. 1993), 10 F.3d 373, 378. As in *Johnson v. Avery*, the inmate in *Gibbs* was challenging the state’s discipline of him, which he alleged was based upon his assistance of other inmates. The court allowed the inmate to raise this challenge based on *Johnson v. Avery*, even though it recognized that no independent right to assist other inmates exists. *Id.* Accordingly, an inmate may challenge the state’s prosecution based on the right of access to the courts.

Cotton’s argument fits squarely within this paradigm, as Cotton has not sought the court’s jurisdiction, rather Disciplinary Counsel invoked that jurisdiction when it charged Cotton with the unauthorized practice of law. Cotton simply challenges the constitutionality of Disciplinary Counsel’s prosecution of him for the unauthorized practice of law where LoCI has not provided a reasonable alternative to the assistance provided by inmates like Cotton.

In order to raise this defense, Cotton need only have a “direct personal interest in the litigation and [] be adversely affected by the court sustaining the act.” *Ohio v. Chipps* (3d Dist. May 17, 1983), 1983 Ohio App. LEXIS 13030, at *1. Cotton easily satisfies this requirement because a finding that he has engaged in the unauthorized practice of law would adversely affect him. He has a direct interest in defending against this prosecution by raising the defense of reasonable access to the courts under *Johnson v. Avery*. Consequently, the Board’s determination that Cotton must “establish proof that any specific LoCI inmate was denied his constitutional right of access to the courts in a specific case” should be rejected.

II. THE BOARD’S RECOMMENDATION CANNOT BE ACCEPTED BECAUSE IT VIOLATES *JOHNSON V. AVERY*.

Upon consideration of Cotton’s defense, this Court should find that it may not prohibit Cotton from assisting other inmates and reject the Board’s conclusion that LoCI provides

adequate access to the courts because, the Board's conclusion was based on two fundamental errors:

First, the Board applied the incorrect standard for determining whether a reasonable alternative exists. Contrary to the Board's determination, the provision of a law library is not *per se* reasonable alternative assistance. Moreover, here the provision of a law library and the minimal clerical assistance of the staff does not satisfy the reasonable alternative requirement.

Second, the Board improperly relied upon conduct that is virtually identical to the conduct for which Disciplinary Counsel has brought this action against Cotton and for which the Board determined that Cotton had engaged in the unauthorized practice of law. The Board cannot fairly claim to meet its constitutional obligations of supplying reasonable access to the court system by relying on inmates performing the same job for which Cotton is being prosecuted.

A. A Law Library Is Not A Reasonable Alternative To Assistance By Inmates Like Cotton.

The Board did not apply the correct legal standard in determining whether reasonable alternatives to inmate assistance existed such that Cotton can be prohibited from assisting other inmates. The Board, relying on a misapplication of *Bounds v. Smith* (1977), 430 U.S. 817, determined that "meaningful access to the courts is provided when inmates have access to a prison library that contains legal materials needed to attack sentences and challenge confinement." Final Report on Remand at 6. This is not the correct legal standard, nor can it be with an illiterate inmate population of 90 to 95 percent. And this standard is directly at odds with the Sixth Circuit in *Knop v. Johnson* (6th Cir. 1992), 977 F.2d 996, 1005-06, wherein the Court found that a law library alone *is not sufficient* for uneducated or illiterate inmates.

In *Bounds v. Smith*, inmates brought an action alleging that the state denied their right of access to the courts by not providing them with sufficient legal research facilities. *Bounds v. Smith*, 430 U.S. at 818. At the trial court level, the state was ordered to submit a plan for providing the inmates with adequate legal research facilities. *Smith v. Bounds* (4th Cir. 1975), 538 F.2d 541, 542. The state submitted a plan for a law library that included provisions for inmate typists and inmates trained to assist others with legal research questions. *Id.* at 544 n.1. This plan also permitted inmates to assist illiterate inmates. *Id.* The plan placed two restrictions on this inmate assistance: that the inmate could not charge a fee and that the inmate could not hold himself out as a lawyer. *Id.* The trial court affirmed this plan. The state appealed the court's determination that it must submit and implement any such plan, and the inmates appealed the lack of a legal defenders' program as a supplement to the library plan. *Id.* at 542.

On appeal, both the Fourth Circuit and the United States Supreme Court upheld the plan approved by the trial court, including inmate assistance, which was permitted so long as the inmates did not hold themselves out as lawyers or charge a fee. In doing so, the Court determined that the plan was an adequate provision of legal research facilities, but rejected the inmates' proposed supplement of legal services by persons trained in the law. *Id.* at 544; *Bounds v. Smith*, 430 U.S. at 828. It was within this context that the United States Supreme Court held that either an adequate law library or adequate assistance from persons trained in the law was sufficient. The Court did not, however, address whether the state could prohibit assistance by other inmates. On the contrary, the plan approved by the trial court and affirmed at all levels included assistance by inmates working in the law library and, most significantly, allowed inmates to assist each other so long as no fees were charged and the assisting inmate did not hold himself out as a lawyer. *Smith v. Bounds*, 538 F.2d at 544.

In interpreting *Bounds v. Smith* as defining reasonable alternative assistance as the provision solely of a law library, the Board relied on one federal district court case, *Sizemore v. Lee* (W.D. Va. 1998), 20 F. Supp. 2d 956, that is in contradiction with numerous courts, including the Sixth Circuit Court of Appeals. See e.g., *Knop*, 977 F.2d at 1005-06 (finding that a law library is not sufficient for uneducated or illiterate inmates and requiring that if the needs of such inmates cannot be met by “inmate writ-writers, or jailhouse lawyers” the state must provide the functional equivalent through persons with some legal training); *Canterino v. Wilson* (6th Cir. 1989), 1989 U.S. App. LEXIS 4789, at *7 (concluding that under *Bounds v. Smith* an adequate law library “does not per se eliminate the necessity for further measures to protect the right of access to the courts”); *Wetmore v. Fields* (W.D. Wis. 1978), 458 F. Supp. 1131, 1142-3 (holding that a state may only restrict assistance by inmates where the state provides “adequate assistance from persons trained in the law” and not simply where the prison provides “an adequate law library”); see also *Sattler v. Curren* (4th Dist. June 4, 1986), 1986 Ohio App. LEXIS 6970, at *2-3 (noting that *Bounds v. Smith* expanded upon *Johnson v. Avery* by requiring the additional element of a law library and assistance with drafting meaningful legal papers). Under the great weight of this contrary authority, the Board’s reliance on *Sizemore* is unreasonable and should not be accepted by this Court. Accordingly, *Sizemore*’s misapplication of *Bounds v. Smith* should be rejected.

Consequently, the Board’s determination that “meaningful access to the courts is provided when inmates have access to a prison library that contains legal materials needed to attack sentences and challenge confinement” should be rejected. The “existence of a law library, however adequate, does not per se eliminate the necessity for further measures to protect the right of access to the courts.” *Canterino*, 1989 U.S. App. LEXIS 4789, at *7. This is

particularly true for illiterate or poorly educated inmates because “[s]tanding alone, law libraries that are adequate for prisoners who know how to use them . . . are not adequate for prisoners who cannot read and write English, or who lack the intelligence necessary to prepare coherent pleadings.” *Knop*, 977 F.2d at 1005. Or as one court stated even more succinctly: “[t]hat books would be of no use to the illiterate needs no discussion.” *Hooks v. Wainwright* (11th Cir. 1985), 775 F.2d 1433, 1436.

Instead, the State must provide additional assistance in the form of adequately trained persons capable of assisting illiterate inmates with legal research and with drafting pleadings before it may prohibit inmate assistance. *See Wetmore*, 458 F. Supp. at 1142-43 (where no adequate assistance from persons trained in the law is provided, then both inmate assistance and the provision of a law library is required). Library staff not trained in the law or able to assist with legal research and preparation of pleadings is insufficient. *Knop*, 977 F.2d at 1002-08 (assistance lacking where librarians were not competent to perform legal research). Accordingly, the Board cannot prohibit inmate assistance like Cotton’s on the basis of a law library alone.

B. No Reasonable Alternative To The Assistance Provided By Inmates Like Cotton Exists.

The only alternative to inmate assistance that is available at LoCI consists of a law library and four Inmate Legal Clerks. Neither the library’s physical facilities nor its limited staff of four Inmate Legal Clerks (particularly if they are all deemed to be practicing law without a license) satisfies the reasonable alternative assistance requirement.

This is particularly true as LoCI does not provide either the staff or the Inmate Legal Clerks with any legal training. *See Hurwood* at 12-13, 21; *Duru* at 18; *Barnett* at 15. For Inmate Legal Clerks, the only “training,” when provided, included being shown a prisoner self-help litigation manual, policies and administrative regulations, a book of legal forms, and training on

library inventory and the use of typewriters. Dep. Ex. J at 4; *see* Jasper at 9; Price at 13. This was not training as much as it was a tour of the law library. And the library staff does not have the sufficient training or ability to answer questions that the Inmate Legal Clerks cannot. Duru at 35-36 (testifying that if an Inmate Legal Clerk could not answer a question for an inmate, for example, which legal form to use, she would not be able to answer that question).

This system of assistance is inadequate to fill the needs of the hundreds of illiterate and undereducated inmates at LoCI. It needs no discussion that the law library standing alone is of no use to inmates “who cannot read and write English, or who lack the intelligence necessary to prepare coherent pleadings.” *Knop*, 977 F.2d at 1005; *see also* *Hooks*, 775 F.2d at 1436 (“That books would be of no use to the illiterate needs no discussion.”). Similarly, merely directing illiterate or undereducated inmates to paragraphs or pages in books or on microfiche, the assistance prescribed by the Inmate Legal Clerks’ job description, “would be of no use” to these inmates. *See Hooks*, 775 F.2d at 1436. Where the only assistance consists of a law library and its poorly trained and limited staff, no reasonable alternative to the assistance provided by inmates like Cotton exists.

Accordingly, Disciplinary Counsel cannot prosecute Cotton for engaging in the unauthorized practice of law based on this assistance. For this reason, the Court should reject the Board’s recommendation that Cotton be enjoined from continuing to engage in this assistance.

III. IT IS UNFAIR FOR THE BOARD TO CONDEMN COTTON’S CONDUCT WHILE RELYING ON VIRTUALLY IDENTICAL CONDUCT TO FIND THAT REASONABLE ALTERNATIVES EXIST AT LOCI

Even if Cotton’s activities when assisting other inmates were found to be within the scope of the unauthorized practice of law, it is unfair for Disciplinary Counsel and the Board to seek to prohibit this conduct by relying upon virtually identical conduct of the Inmate Legal Clerks to determine that a reasonable alternative as required by *Johnson v. Avery* exists.

Johnson v. Avery requires that the State provide reasonable alternative assistance to inmates before it may prohibit the assistance of inmates like Cotton. The burden is on Disciplinary Counsel to prove that LoCI has provided reasonable alternative assistance to inmates before it may prosecute Cotton for providing assistance to other inmates. *See Novak v. Beto* (5th Dist. 1971), 453 F.2d 661, 664 (relying on *Johnson v. Avery* as placing on the state the burden of justifying a prohibition or regulation against inmate assistance by proving that reasonable alternative assistance exists); *Sostre v. McGinnis* (2nd Cir. 1971), 442 F.2d 178, 201 (noting that absent a sufficient showing by the state of reasonable alternative assistance, the state must permit inmate assistance). Similarly, the Board could not find that Cotton engaged in the unauthorized practice of law unless Disciplinary Counsel fulfilled this burden.

In the Final Report on Remand, the Board found that “reasonable alternatives exist in the Ohio prison system and at LoCI to assist inmates in the preparation of petitions for post-conviction relief, and to have access to the courts as mandated by *Johnson v. Avery* and later U.S. Supreme Court decisions.” Final Report on Remand, Finding of Fact 72. In coming to that conclusion, the Board relied substantially on the assistance of Inmate Legal Clerks. Final Report on Remand, Finding of Fact 52-59. Specifically the Board found that the Inmate Legal Clerks “exceed . . . authorized activities and perform legal research and write pleadings for other inmates.” Final Report on Remand, Finding of Fact 9. This is the same conduct that the Board subsequently found Cotton engaged in.

According to the Board, Cotton “conducted legal research, provided legal advice and ‘drafted, revised and prepared’ legal pleadings on behalf on numerous other inmates” Final Report on Remand, Finding of Fact 13. The only difference that the Board points out is that Cotton signed some pleadings as “pro se assistance.” Final Report on Remand, Finding of Fact

11, 14-15. However, all agreed that Cotton never held himself out as a lawyer, and Cotton himself testified that he simply placed these notations on pleadings to inform the Court that he assisted that inmate in preparing that pleading. *See* Jorgensen-Martinez Letter; Cotton at 88; Hurwood at 65; Deavors at 60-61; Barnett at 28; Price at 62; Jasper at 25.

The assistance provided by the Inmate Legal Clerks is not alternative assistance—it is in fact the very assistance that Disciplinary Counsel seeks to prohibit. Indeed, the Inmate Legal Clerks themselves testified that Cotton assisted inmates in the same manner as they did:

Inmate Legal Clerk Jerome Edward Barnett:

“Q. Let me ask you this, is Mr. Cotton doing anything different than what you do on a daily basis as a clerk?

A. No.” Barnett at 27

Inmate Legal Clerk Joe Lebron Deavors:

“Q. Okay. Can you tell me what the difference is between what you do and what Mr. Cotton does that makes you in these different categories?

A. Because I do what I do as a job assignment, and he do what he do because he just like helping people....” Deavors at 52-53.

Inmate Legal Clerk Benjamin Tyrone Price:

“Q. In your observation of what Mr. Cotton did to help people, and based on your experience in helping people, is there anything different about what he did for inmates compared to what you do for inmates to assist them?

A. Nothing different. Only thing different is that I had a title in the law library and that was it.” Price at 63.

Yet, the Board relied upon this assistance by the Inmate Legal Clerks—assistance that is admittedly the same as Cotton’s—in making its finding that reasonable alternatives exist at LoCI. Final Report on Remand, Finding of Fact 52-29. It is unreasonable for the State to say that the

unauthorized practice of law is justified and acceptable when done by one party but illegal when done by another.

The Board determined, however, that it is “within Relator’s discretion to charge a particular individual and not another with an unauthorized practice of law violation.” Final Report on Remand, Finding of Fact 10. While the State retains broad discretion as to whom to prosecute, prosecutorial discretion is not unfettered. *Wayte v. United States* (1985), 470 U.S. 598, 607. Surely it is unfair for Disciplinary Counsel to prosecute one person for conduct which Disciplinary Counsel, and ultimately the Board, relies upon to satisfy constitutional requirements.

Moreover, using the Inmate Legal Clerks’ assistance to justify Cotton’s prosecution runs afoul of traditional notions of justice and fair play. Individuals must be protected against arbitrary action by the government. *See Wolff v. McDonnell* (1974), 418 U.S. 539, 558 (“The touchstone of due process is protection of the individual against arbitrary actions of government.”). Furthermore, state action that offends a “sense of justice” cannot be sanctioned. *See Rochin v. California* (1952), 342 U.S. 165, 169 (holding that due process requires a court to look at the whole proceeding to determine if it offends traditional notions of decency and fairness). Prosecutions by the state should not be conducted by methods which offend this sense of justice. *See Ohio v. Scarlett* (2nd Dist. 1987), 1987 Ohio App. LEXIS 8585, at *19 (“While the exact contours of the due process right are not definable with precision, the right, as restated in *Rochin v. California*, is one that assures that convictions cannot be brought about in criminal cases by methods which offend a sense of justice.”). This “sense of justice” is to be measured by “the community’s sense of fair play and decency” and by “those cannons of decency and fairness which express [our] notions of justice.” *Rochin* at 175-176 (Black, J. concurring).

It is unjust for Disciplinary Counsel and the Board to have it both ways—the Board cannot condemn with one hand what it upholds with the other. This double standard does not live up to the “the community’s sense of fair play and decency.” The Board cannot prohibit Cotton from engaging in the very conduct that it relies upon to determine that the constitutional requirements of *Johnson v. Avery* are met without violating our “sense of justice.” Consequently, its recommendations should be rejected.

CONCLUSION

For the foregoing reasons, Respondent Cotton respectfully requests that this Court reject the Board’s recommendations and instead dismiss this charge of unauthorized practice of law brought against him for assisting other inmates.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 20, 2006, a true and accurate copy of the foregoing Respondent Cotton's Objections to the Board's Final Report was served upon the following via facsimile and by regular United States mail:

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