IN THE

SUPREME COURT OF OHIO

Charles D. Cotton a.k.a. **Prince Charles Cotton** Inmate No. 146-490 London Correctional Institute P.O. Box 69 London, OH 43140 Respondent	:	
	:	**CASE NO. 2004-1130**
Disciplinary Counsel 250 Civic Center Drive, Suite 325 Columbus, OH 43215-7411 Relator	:	**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' REPORT AND RECOMMENDATIONS**

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

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Respondent

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Disciplinary Counsel	:	
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	:	

Now comes relator, Disciplinary Counsel, and hereby submits this answer to respondent's objections to the Final Report on Remand filed by the Board of Commissioners on the Unauthorized Practice of Law (Board).

FACTS

On August 20, 2006, the Board's final report on remand was filed with this Court and this report included 13-pages of findings of fact. Relator relies on the Board's statement of facts with the following additional clarifications. First, respondent makes several misstatements regarding the alleged illiteracy of the inmates to whom the respondent provided legal assistance and the inmate population in general. Respondent's brief asserts that the respondent "assisted other largely illiterate inmates" and further that 90-95 percent of the inmates at London Correctional

Institute (LoCI) are illiterate. [Respondent's Brief at 1, 5] The Board found otherwise and held that "there is no evidence in the record supporting this assertion except respondent's own unsupported statements." [Report at 9] The Board further considered the evidence in the record regarding the rate of illiteracy at LoCI and found that respondent's "claim is contradicted by the LoCI school administrator, who testified that the number of illiterate inmates is 60 or 70 percent, while others estimate the total between 20 and 40 percent." [Report at 19; Deposition of Mack at 31:5; Deposition of Price at 18:11; Deposition of Barnett at 20:24]

Second, respondent asserts that he has "at no time . . . held himself out as a lawyer." [Respondent's Brief at 4] But respondent's prior actions directly contradict this spurious claim. The Board found that respondent "signed five . . . legal pleadings as if he were acting as legal counsel for the inmate-defendant." [Report at 10] The Board further noted that every pleading respondent drafted for another inmate contained the following statement on the bottom of the initial page: "Drafted, revised and prepared by Prince Charles Cotten, Sr." [Report at 10] Further, respondent falsely testified under oath at his deposition that he had graduated from law school magna cum laude. [Report at 13] Finally, respondent has a reputation within the prison for knowing the law and providing legal services to other inmates. [Report at 11]

Third, respondent makes several false claims regarding the extent of legal assistance available to inmates. Respondent claims that illiterate inmates are given no instruction on how to obtain assistance and also suggests that less than four inmate clerks work in the library during the week and on the weekend. [Respondent's Brief at 5, 6] The Board found and the record shows that "all inmates are informed verbally and in writing of the literacy programming and law

library services during inmate orientation" and that "all four inmate clerks are available to provide inmate assistance every hour the library is open." [Report at 18, 19; Deposition of Deavors at 55:3; Deposition of Jasper at 11:14; Deposition of Price at 30:2, 30:13, 37:2 Deposition of Barnett at 43:20]

Finally, respondent asserts that the services that he provides inmates are the "exact same" services as provided by the inmate library clerks. [Respondent's brief at 1, 6] The Board examined this claim and found that "respondent's conduct exceeds that (of the inmate clerks due to respondent's) level of participation and control." [Report at 10] This finding was supported by the evidence showing that respondent regularly conducts legal research, provides legal advice, drafts, revises and prepares legal pleadings, signs legal pleadings as if he were acting as legal counsel, and places a notation on each pleading that it was him who drafted, revised and prepared the pleading. [Report at 10, 11, 12] Further, the inmate clerks all understood that respondent's assistance exceeded the services that they provided and what was allowed by prison regulations. [Report at 11; Deposition of Deavors at 45:16, 46:21, 47:2, 48:11, 48:22, 49:16, 50:4; Deposition of Price 14:16, 51:12, 52:12; Deposition of Barnett at 40:2; Deposition of Hurwood at 67:23; Deposition of Duru at 59:13]

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

I.

THE BOARD PROPERLY AND ACCURATELY INTERPRETED AND APPLIED THE PERTINENT U. S. SUPREME COURT CASE LAW

Respondent's first and second propositions of law assert the same argument --that the Board misinterpreted and misapplied U.S. Supreme Court case law. As such, respondent's first two propositions will be addressed together.

On June 30, 2005 this Court remanded the present 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, 89 S.Ct. 747, 21 L.Ed.2d 718."

As a result, the Board issued an order for the parties to submit briefs on this issue. Respondent also submitted the deposition testimony of LoCI Warden Deb Timmerman Cooper, Librarian Gilbert Hurwood, Assistant Librarian Toni Duru, School Administrator Ernest Mack, and inmate legal clerks Jerome Barnett, Benjamin Price, Paul Jasper and Joe Deavors. Relator had previously submitted the deposition testimony of the respondent and both parties also entered substantial documentation into evidence. [Report at 3]

After completing a detailed review of the briefs and evidence submitted by the parties, the Board filed a 22-page report that concluded "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." [Report at 20]

A.

THE BOARD DID NOT IMPROPERLY APPLY

AN "ACTUAL INJURY" STANDARD

Respondent asserts that "the Board erred in finding that [the respondent] must demonstrate actual injury suffered by an inmate before he can challenge the lack of a reasonable alternative." [Respondent's Brief at 7] But the Board's report makes no such finding and applies no such requirement. Therefore, the respondent has either misstated or misunderstood the actual findings of the Board. Further, other courts have explicitly applied an actual injury standard or other standing requirements in cases involving "jailhouse lawyers" and as such, application of such a standard is not improper or unlawful.

Following the instructions in this Court's remand order, the Board first reviewed *Johnson v. Avery* and all subsequent U.S. Supreme Court cases dealing with the constitutional guarantees of access to the courts for inmates. The Board also reviewed other related state and federal case law. An outline of this review was included in the Board's report and was entitled "Applicable Law Relating to Inmate-Right-Of Access To The Courts." In this review the Board recounted the holdings of each case including the most recent on this topic, *Lewis v. Casey* (1996), 518

U.S. 343, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606. In *Casey*, the Board noted that the U.S. Supreme Court held that "the right to meaningful access to the courts belongs to the aggrieved inmate, not to a 'jailhouse lawyer' representing that inmate or otherwise advocating his or her cause" and further that the aggrieved inmate must demonstrate actual injury to pursue such a claim. [Report at 5, 6]

After completing a review of the case law, the Board next turned its attention to the evidence. In its careful and painstaking review, the Board created 13-pages of factual findings. One of the Board's 73 findings stated in part that respondent's criticisms of the prison system "do not establish proof that any specific LoCI inmate was denied his constitutional right of access to the courts in a specific case." [Report at 14] It appears that based upon the Board's general outline of the case law and this one partial sentence, respondent has concluded that the Board imposed a standing requirement on the respondent. This assumption or inference is not correct. The Board's report makes clear that it did not view respondent's position as a bar to full consideration of whether or not the reasonable alternatives mandated by *Johnson* were present at LoCI. This is demonstrated by the totality of the Board's findings of fact and conclusions of law and by the detailed factual findings regarding the services provided to inmates to promote access to the courts.

It is clear that the Board made the finding (which respondent finds objectionable) as part of its comprehensive review of all of the evidence submitted. At no point in its findings of fact or conclusions of law does the Board specifically state that the respondent was required to prove

actual injury. Further, the Board makes no such finding or reaches no such legal conclusion that respondent's argument failed because he was unable to prove actual injury.

Instead, the Board's report focuses several pages of findings on the specific issue that was identified by this Court in the remand. In great detail the Board recounts extensive facts regarding the resources made available to inmates. It was only after this review that the Board found 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." [Report at 21] This finding (as well as the nature of the respondent's conduct) was then the basis for the Board's conclusion that the respondent engaged in the unauthorized practice of law. And this conclusion was reached based upon the evidence submitted regarding the respondent's conduct and the legal resources provided to inmates by the prison, not based upon the presence or lack of any "actual injury."

Finally, despite respondent's protestations otherwise, at least one federal court has found the standing requirements and other holdings in *Casey* permit a prison to prohibit a "jailhouse lawyer" from assisting other inmates. *Sizemore v. Lee* (W.D. Va 1998) 20 F. Supp.2d 956. [Report at 6-8] In Ohio, other courts have placed similar limits on "jailhouse lawyers" and the inmates that use their assistance. See *Murr v. Ebin* (May 6, 1997), 10th Dist. No. 96APE10-1406, 1997 WL 235160 ["jailhouse lawyer" lacked standing to assert legal claim that he had a right to assist other inmates with their legal matters], *Perotti v. ODRC* (1989), 61 Ohio App.3d 86, 572 N.E.2d 172 [inmate is not entitled to the assistance of another inmate at a trial], *State v. Fair* (July 6, 1991), 10th Dist. No. 90AP-363, 1991 WL 127281 [communications between

inmate and "jailhouse lawyer" are not protected by attorney-client privilege]. See also *State v. Sanford* (July 6, 2001), 12th Dist. No. CA2000-12-249, 2001 WL 877306 and *State v. Dallas* (March 21, 2001), 9th Dist. No. 00CA007636, 2001 WL 276341.

As such, respondent's assertions that a standing requirement was improperly applied to him must fail for two reasons. First, no such standard was the controlling and decisive factor in the Board's determination that the respondent engaged in the unauthorized practice of law. And second, other courts historically have applied a similar standing requirement and/or other limits on "jailhouse lawyers."

B.

THE BOARD PROPERLY FOUND THAT THE TOTALITY OF SERVICES PROVIDED TO INMATES CONSTITUTE A REASONABLE ALTERNATIVE

Respondent asserts that the Board incorrectly concluded that a library containing legal texts is all that is necessary for LoCI to meet the U.S. Supreme Court requirement for ensuring inmate access to the courts. But respondent's assertion is incorrect and a mischaracterization of the actual findings and conclusions of the Board.

The Board makes no such finding that the LoCI law library alone meets the constitutional mandate to provide inmates with access to the courts. Instead, the Board report spends six pages detailing the wide variety of resources and services that are available to inmates to meet the constitutional obligation to provide access to the courts. And these resources go well beyond a library. The factual findings by the Board recount facilities for meeting with legal counsel, an

over 3,000 volume law library which is open seven days per week, two librarians, typewriters, four inmate clerks, special assistance and programming for illiterate inmates, 36 sample pleadings, interpreters and a free legal kit. [Report at 13-20]

It was after consideration of all of these services that the Board concluded that LoCI "has implemented a comprehensive system to ensure that inmates are provided adequate access to the courts . . . and that system is available to inmates." [Report at 14] As such, it is clear that the Board considered the totality of services provided by Ohio's prisons in finding that reasonable alternatives now exist in the Ohio prison system.

Respondent makes repeated assertions that the current system to provide inmates access to the courts is inadequate. Respondent advances this argument to support his claim that the prison system therefore needs the respondent to provide services to inmates to make up for the shortfall. But respondent's bald assertions are not supported by any specific, credible or substantial facts. Further, these claims are in direct contradiction to the findings by the Board, which reviewed of all of respondent's evidence. As such, this Court should disregard respondent's assertions as rhetoric and not actual fact.

Finally, U.S. Supreme Court Justice Byron White envisioned the problem created by "jailhouse lawyers" in his dissent in *Johnson v. Avery* when he observed that "many assert that the aim of the jailhouse lawyer is not the service of truth and justice, but rather self-aggrandizement, profit and power." *Johnson v. Avery* (1969), 393 U.S. 483, 499, 89 S.Ct. 747, 21 L.Ed.2d 718. White further points out that "unless the help the indigent [inmate] gets from

other inmates is reasonably adequate for the task, he will be as surely and effectively barred from the courts as if he were accorded no help at all." *Id.* at 499. Finally, White notes that "I doubt that the problem of the indigent convict will be solved by subjecting him to the false hopes, dominance, and inept representation of the average unsupervised jailhouse lawyer." *Id.* at 501.

II.

RESPONDENT'S CONDUCT EXCEEDS THAT OF THE INMATE LEGAL CLERKS

Respondent claims that his actions are the "exact same" as the inmate legal clerks. [Respondent's brief at 1, 6] The evidence of respondent's conduct and reputation indicates otherwise. The Board examined respondent's claim and concluded that "respondent's conduct exceeds that (of the inmate clerks due to respondent's) level of participation and control." [Report at 10] In support of this conclusion, the Board found that respondent regularly conducts legal research, provides legal advice, and drafts, revises and prepares legal pleadings and otherwise acts as if he were legal counsel for inmates. [Report at 10, 11, 12] The Board's determination is clearly supported by the evidence in several ways.

First, the Board found that the respondent prepared over 30 pleadings for other inmates and placed his name on all of those pleadings. [Report at 10; Relator's Hearing Ex. 5-42] Accompanying respondent's name was a notation indicating that the respondent had drafted and prepared each pleading. [Report at 10; Relator's Hearing Ex. 5-42] Further, the Board found that respondent signed five of these same pleadings as if he were legal counsel. [Report at 10;

Relator's Hearing Ex. 38-42] Placing your name on and/or signing a legal document has but one purpose, to identify your role as an advocate in the proceedings.

The evidence further shows that none inmate clerks placed their name on any legal pleadings or signed their name on any legal pleadings. [Report at 11; Deposition of Deavors at 48:22, 49:16, 50:4; Deposition of Price 14:16, 51:12, 52:12; Deposition of Barnett at 40:2; Deposition of Hurwood at 67:23; Deposition of Duru at 59:13] Further, the Board concluded that the inmate clerks understood that signing or placing their name on another inmate's court pleading is a violation of prison policy because by doing so would be holding yourself out as an attorney [Report at 11; Deposition of Deavors at 48:22, 49:16, 50:4; Deposition of Price 14:16, 51:12, 52:12; Deposition of Barnett at 40:2; Deposition of Hurwood at 67:23; Deposition of Duru at 59:13] And respondent was advised by at least one inmate clerk that he should not sign or place his name on another inmate's pleadings [Report at 12; Deposition of Deavors at 45:16, 47:2, 48:11, 48:22]

Second, the Board found that respondent's actions encompassed more than simple assistance, typing and making spelling corrections. [Report at 12] Respondent met with inmates, read and reviewed legal books, located legal precedent and forms, advised on litigation strategy and prepared pleadings by copying information from various legal texts. [Report at 12; Relator's Hearing Ex. 2 at 25:9, 26:4, 26:24, 27:5, 27:9, 27:12, 27:16, 28:22, 29:6, 30:6, 31:10, 31:19, 33:22, 34:8, 38:13, 42:3, 42:16, 52:14]

Third, respondent has an established reputation for providing legal services and "knowing" the law [Report at 11; Deposition of Mack at 36:14; Deposition of Deavors at 26:17, 35:9; Deposition of Barnett at 18:18; Relator's Brief Ex. E] The Board further noted that the respondent provides services "for the experience" and does not hesitate to take credit when his efforts are successful. [Report at 12; Relator's Hearing Ex. 2 at 103:5, 52:8]

Respondent attempts to explain away these facts, but it is worth noting that the Board questioned the respondent's credibility. The Board noted that the respondent testified that he graduated from law school magna cum laude, but that he was unable to remember the name or location of the law school. [Report at 13; Relator's Hearing Ex. 2 at 14-15] The Board also pointed out that the respondent testified that as of December 2003, he was no longer assisting inmates with legal problems, but the record shows that the respondent continued to assist multiple inmates as recently as 2005 [Report at 13; Relator's Hearing Ex. 2 at 103:10; Deposition of Benjamin Price at 53:23] Additionally, the respondent has a reputation for flouting the rules, filing grievances and lawsuits and clashing with the prison administration. [Report at 12-13; Deposition of Hurwood at 60:22, 63:6, 64:9, 64:21; Deposition of Mack at 36:19; Deposition of Deavors at 35:21, 44:20, 62:12; Deposition of Barnett at 35:14]

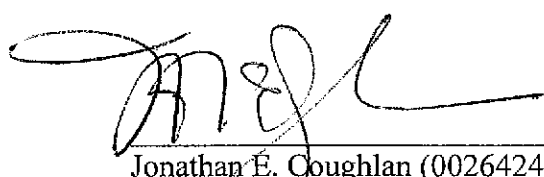
Finally, respondent cites 15 federal court cases -- six U.S. Supreme Court cases, seven U.S. Court of Appeals cases and two U.S. District Court cases. But several important factors limit the actual usefulness of these decisions. Other than *Casey* and *Sizemore* (both cited approvingly by the Board and relator), all of these cases date prior to the 1996 *Casey* decision and 10 are more than 20 years old. As such, the text and holdings must be analyzed against and

limited by the far reaching holdings of *Casey*. Finally, respondent's case citations are frequently not the primary case holdings, but merely references to bits and pieces of dicta strung together to create an argument. As such, the case law relied upon by respondent is irrelevant, out of date and not controlling.

CONCLUSION

For the foregoing reasons, relator requests this Court adopt the Findings of Fact, Conclusions of Law and Recommendation in the final report on remand by the Board of Commissioners on the Unauthorized Practice of Law and further find that reasonable alternatives now exist in the Ohio Prison system to assist inmates in the preparation of petitions for post-conviction relief, that respondent's actions constitute the unauthorized practice of law, and to order that the respondent be permanently enjoined from engaging in this activity in the future.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent, Charles D. Cotton a.k.a. Prince Charles Cotten, Sr., #146-490, London Correctional Institute, P.O. Box 69, London, OH 43140, Counsel of Record for Respondent Shawn Joseph Organ, Jones Day, P.O. Box 165017, Columbus, OH 43216-5017; Counsel for Respondent Kerstin Elisabet Sjoberg-Witt, Jones Day, P.O. Box 165017, Columbus, OH 43216-5017 and upon D. Allan Asbury, Secretary, Board of Commissioners on the Unauthorized Practice of Law, 65 South Front Street, 5th Floor, Columbus, Ohio 43215-3431 this 1st day of December, 2006.

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Counsel for Relator