

IN THE SUPREME COURT OF OHIO

Case No. 2014-1555

In re: :
Application of :
Joseph Victor Libretti, Jr. :

BRIEF OF AMICI CURIAE
ROBERT L. TOBIK, JOHN T. MARTIN, ERIKA CUNLIFFE, JEFFREY M. GAMSO,
LINDA HRICKO, PAUL KUZMINS, CHRISTOPHER SCOTT MAHER,
AND CULLEN SWEENEY
IN SUPPORT OF APPLICANT JOSEPH V. LIBRETTI, JR.

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INTERESTS OF AMICI CURIAE

The undersigned are all attorneys with the Cuyahoga County Public Defender's Office. That Office operates as legal counsel to more than one-third of all indigent persons indicted in Cuyahoga County and provides appellate representation for indigent persons represented in the trial court by attorneys outside the office. The Office is the largest single source of legal representation for criminal defendants in Cuyahoga County and among the three largest in the State of Ohio. Undersigned counsel are all admitted to the bar of this state and collectively represent many years of experience as criminal defense practitioners in this state and in other jurisdictions.¹ In addition, one of the undersigned, John Martin, practiced as an Assistant United States Attorney before joining this Office.

The Applicant has been an intern at the Public Defender's Office for the past 18 months. While there, he has worked in every division, most recently in the Appellate Division. Each of the undersigned has directly supervised the Applicant's work product during his internship here. All of us have been thoroughly impressed with Applicant's judgment, work ethic, ability to accept and make good use of constructive criticism, and his overall enthusiasm for the work that we, as public defenders, do.

The undersigned are aware of the Applicant's criminal history, as well as his more recent difficulties. The undersigned have read the pleadings before this Court; reviewed

¹ The Amici seek to file their amicus brief in their personal capacities; they are not acting on behalf of the Cuyahoga County Public Defender's Office. However, their experience with the Applicant derives from the time he has spent under their supervision at that Office.

a transcript of proceedings before the Board panel; and are cognizant of the Board's concerns about the Applicant. The Board's concerns are understandable. Nevertheless, having worked closely with this Applicant, the undersigned believe that the Applicant is capable of changing. Indeed he has already demonstrated a capacity for such transformation, improving as a legal intern and as a friend and colleague. The very fact that he has asked to withdraw his application is evidence of such a capacity. While the Applicant may not be ready to practice law now, he has demonstrated to the undersigned that he may be a suitable candidate in the future. Under the circumstances, the undersigned believe it would be a mistake for this Court to tie its own hands and forever bar the Applicant from sitting for the Ohio Bar. Accordingly, Amici write asking this Court to allow Applicant to withdraw his application and permit him leave to file in the future.

ARGUMENT

This Court should allow Mr. Libretti to withdraw his bar application and seek admission at a later date.

Amici do not take issue with the Board's conclusion that Mr. Libretti should not sit for the bar now. We do, however, part with the Board's contention that Mr. Libretti – whether in four or forty years – will never be a suitable bar candidate. While the undersigned recognize the Board's concerns, its conclusion that those concerns necessitate a finding that this Applicant is irredeemable, reflects a lack of familiarity with the Applicant. It is this day-to-day familiarity from which the undersigned uniquely benefit. As Mr. Libretti's direct supervisors, Amici have witnessed his impressive personal and professional growth. Undersigned have also had an opportunity to observe Mr. Libretti as he has dealt with this application process. With this Brief, Amici provide their experiences with and observations of Mr. Libretti's character.

1. Mr. Libretti has shown tremendous personal and professional growth and exhibited a capacity for change.

From Amici's perspective, Mr. Libretti's recent development has been notable. Mr. Libretti is extremely bright, but more so, he is capable of processing criticism and learning from his mistakes. We believe his recent actions illustrate those qualities. In making this observation, Amici are fully aware of Mr. Libretti's criminal history, his 1992 guilty plea, the time he spent in prison, his supervised release, spice distribution, and the Board's evident frustration with what it saw as a lack of candor on Mr. Libretti's part. None of those concerns, however, prove that Libretti is incapable of positive change. Amici believe the opposite is true, and, in particular, throughout this

application process Libretti has shown himself to be capable of positive change.

In fact, Amici venture that the arduous and evidently confrontational bar application process Libretti underwent has contributed to his positive development. Certainly, it has improved his insight into past behavior and his ability to respond to criticisms about his past conduct and current work product. During this process, Amici have noted that Mr. Libretti's tone has evolved. His more circumspect reply brief to this court is clear evidence of that change. Along that line, Mr. Libretti's request to withdraw his bar application for the time-being reflects a growing understanding that he is not presently ready to apply for the Ohio bar. Mr. Libretti has also sought to drop an appeal to the Sixth Circuit, which challenged the dismissal of a lawsuit he filed over the seizure of his property following the June 2010 search. See, *Libretti v. Woodson*, No. 14-3266 (6th Cir.). This development, as well, demonstrates that Mr. Libretti is looking to abandon misplaced old battles and focus on the future anew.

In seeking to withdraw his application, Mr. Libretti takes ownership of the fact that he has not met his burden of proof in this regard. But Libretti is a work in progress. Amici believe that he has and will continue to transform. The Board's opposition to Mr. Libretti's motion to withdraw the application, on the other hand, fails to acknowledge that Libretti has made any progress at all. The Board, instead, has frozen Mr. Libretti in time - complaining 1) that Libretti's conduct since his release from prison rebuts the idea that he has made substantial strides toward his rehabilitation; 2) that the Board has spent too much time vetting Libretti as it is and shouldn't have to repeat the process; and 3) that no matter how much time passes Libretti will never be a suitable candidate to sit for the Ohio bar exam.

2. Mr. Libretti's initial combativeness before the Board and apparent lack of candor is not a fixed quality of his personality and must be understood in the context of his lengthy prior incarceration.

Like Mr. Libretti, many of our clients have served or are currently serving lengthy prison sentences. Our interactions with those clients have shown us over and over again that prison changes people – sometimes permanently. Prison can be dangerous and adapting to it requires the inmate to maintain a strong and capable façade, avoid showing fear and avoid showing emotion of any kind. Inmates trust no one, let alone each other; they do not share personal information. Returning to society successfully requires that same inmate to abandon his prison persona. Even for the best of us, that kind of adaptation would not be easy. Mr. Libretti's challenge was no different. See, Karp, *Unlocking Men, Unblocking Masculinities: Doing Men's Work in Prison*, The Journal of Men's Studies, Vol. 18 No. 1, 66, 67 (Winter 2010).

Citing this very study, the Ohio Justice and Policy Center (OJPC), writing to the Board as Amicus for Applicant, similarly reflected on the difficulties former inmates undergo as they transition back into the community. The Board rejects OJPC's observations almost out of hand, classifying them as merely "academic." In the collective experience of the undersigned, however, OJPC's point is not only valid and practical, but fundamental to understanding Mr. Libretti's development after serving his prison term. Our clients with a history of incarceration are often slow to register emotion or provide personal information, even when doing so would benefit their litigation. Indeed, it is clear that part of the Board's frustration with Mr. Libretti was his failure to be completely forthcoming. But Libretti came by that reticence after serving more than a decade in prison. Having spent nearly 17 years operating in that environment, Libretti

has needed, and perhaps continues to need, time to adjust. A wealth of social science research, some of which OJPC pointed to in its brief, as well as the experience of the undersigned, indicates that Libretti's failure to be completely open about himself is not unusual given his past.

3. Mr. Libretti's academic and professional success is a testament to the positive aspects of his character.

The Board also contends that Mr. Libretti's academic success is irrelevant to the question of whether he should ever be able to practice law. Amici recognize that intelligence is not an absolute gauge of one's ability to successfully practice law and provides virtually no insight into one's ethical or moral character. But, Mr. Libretti's remarkable academic accomplishments reflect more about him than mere intelligence. The Board's insistence that these accomplishments are irrelevant is based on the mistaken perception that academic success can indicate nothing about the character of the person who achieves it. To the contrary, academic success is reflective of diligence and perseverance. Amici's experience and interaction with Mr. Libretti reveal that these qualities, combined with his intelligence, has helped him undertake and complete the projects we have assigned him competently and confidently.

For example, Mr. Libretti assisted Linda Hricko, an assistant in the Office's Felony Division, in litigating a motion to suppress. At the time Mr. Libretti was permitted to practice law under supervision pursuant to Gov. Bar R. II. Ms. Hricko was struck by his detail-oriented preparation in advance of the hearing, as well as his conduct during the hearing itself, which he largely handled. When the trial court granted the motion, the State of Ohio took an appeal, and Mr. Libretti assisted Assistant Public Defender Cullen Sweeney with drafting the appellee's brief. Mr. Libretti's work

product at this stage was also exemplary. Even when prepared by well-seasoned lawyers, appellate briefs are not always persuasive or well-written. Mr. Libretti has demonstrated himself to be a solid legal writer.

Mr. Libretti has functioned well repeatedly. In another case, the Office had received a letter from an inmate who, as a result of complicated sentencing issues involving four separate cases, had not received 111 days of jail-time credit. Although the law was somewhat ambiguous in this area, Mr. Libretti took up this prisoner's cause, advocated for him within the office, and then crafted a well-researched, persuasive brief, arguing, among other things, that the improper calculation of jail credit constituted a violation of the inmate's Equal Protection rights. Had it not been for Libretti's strong sense of justice and his diligent efforts, this man would have remained unjustly incarcerated for an extra 111 days, his constitutional rights violated.

In still another example, one of the undersigned tasked Mr. Libretti with litigating, under supervision, a motion to suppress. He handled the hearing on the motion in the trial court and prevailed. The State appealed and Erika Cunliffe, an Assistant Public Defender in the Appeals Division, supervised Mr. Libretti's work on the appeal. Mr. Libretti completed the brief and argued the matter in the Court of Appeals. Mr. Libretti prepared extensively for that argument – practicing it for various lawyers in the office, and submitting to a full “moot court” before the entire appeals division. Mr. Libretti took the advice offered, gracefully accepting criticism. During the actual argument, when it became clear that he needed to adjust the position he had originally planned to take, Mr. Libretti did so, quickly and smoothly. Mr. Libretti's work on that case not only impressed the undersigned, but also opposing counsel, and the three judge

panel before whom he argued. Mr. Libretti's intelligence – as his outstanding academic work confirms – figured prominently in Libretti's work on that case.

More importantly in this context, Mr. Libretti demonstrated, in his preparation for the argument and in the argument itself, that he is capable of exactly the sort of self-awareness and growth the Board declared him incapable of accomplishing. He demonstrated this by taking criticism from undersigned counsel and learning from it, by shifting gears appropriately when the argument itself did not proceed according to his expectations, and by his deference to and respect for the tribunal.

The undersigned practitioners respect the Board's position and its concerns. They are legitimate. Attorneys in Ohio should strive for the moral, ethical and professional best in ourselves and in each other. Amici work hard to maintain this benchmark every day. The law clerks with whom we work are vetted and rigorously supervised and Mr. Libretti was no exception. Public Defenders have a unique function in the criminal justice system. Amici represent indigent defendants at the trial, appeal and post-conviction level.

Mr. Libretti has functioned at a high level in virtually every task we asked of him. Libretti has and continues to develop his skills – including client communication, case investigation, trial/hearing preparation, and crafting clear and persuasive oral and written arguments. This work has helped his rehabilitation. If this Court were to grant the Board's request, and forever bar his aspirations to the practice of law, it would simultaneously damage that rehabilitation process and hurt our clients.

CONCLUSION

Mr. Libretti has made serious mistakes in his life, but he is likely to make a positive contribution to our profession if given more time to develop. This Court does not find bar applicants permanently unsuitable lightly. That it does so rarely is an implicit recognition that permanent disqualification is, in effect, a death sentence. Amici do not dispute that there may be some persons for whom that sentence is appropriate. Based on their collective decades working with the criminally accused and convicted, and in particular based on months working closely with, supervising, and getting to know Mr. Libretti, they are convinced that permanent disqualification is not appropriate in this case. Indeed, the Office has agreed to continue supervising Mr. Libretti as a law clerk, both to help our clients and to oversee his professional development.

Undersigned Amici agree with the Board, and with Mr. Libretti himself, that he should not now be allowed to sit for the Ohio bar exam. We firmly believe, however, that he has shown positive growth. That growth continues, in part, because Mr. Libretti retains hope that someday he will be able to practice law. A permanent bar would squelch that hope. Cf., *Graham v. Florida*, 560 U.S. 48, 74, 130 S. Ct. 2011, 2030, 176 L. Ed. 2d 825 (2010) (The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society). Given time, we believe he may well become a suitable candidate to sit for the Ohio bar and, in turn, an outstanding member of the Ohio legal community.

For these reasons, Amici urge this Court to allow Mr. Libretti the opportunity to withdraw his application and given him leave to resubmit it at some future time.

Respectfully submitted,

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PROOF OF SERVICE

I certify that a copy of this brief was served by ordinary mail, on this 27th day of January, 2015, upon the following:

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