



BEFORE THE BOARD OF DISCIPLINARY APPEALS

IN THE MATTER OF	§	
JAMES MAYER HARRIS, JR.	§	CAUSE NO. 69950
STATE BAR CARD NO. 09065800	§	

RESPONDENT’S BRIEF AGAINST A FINDING OF MORAL TURPITUDE PER SE

TO THE BOARD OF DISCIPLINARY APPEALS:

James Mayer Harris, Jr., Respondent, files this Brief Against a Finding of Moral Turpitude Per Se and respectfully shows the Board as follows:

MORAL TURPITUDE

1. “Moral turpitude is a nebulous concept.” *Turton v. State Bar of Texas*, 775 S.W.2d 712, 717 (Tex. App—San Antonio 1989). There is room for interpretation in terms of which crimes qualify as crimes of moral turpitude and those that do not, or do not qualify on a case-by-case basis.

2. It has been consistently “held that the question of whether a particular crime involves moral turpitude is a question of law and “is to be determined by a consideration of the nature of the offense as it bears on the attorney's moral fitness to continue in the practice of law.” *In the Matter of Lloyd E. Humphreys*, 880 S.W.2d 402, 407 (Tex. 1994), *cert. denied*, 513 U.S. 964 (1994) (quoting *State Bar of Texas v. Heard*, 603 S.W.2d 829, 835 (Tex. 1980).

3. “Conviction of some crimes, particularly those involving intentional dishonesty for personal gain, establishes moral turpitude on its face.” *Turton v. State Bar of Texas*, 775 S.W.2d 712, 717 (Tex. App—San Antonio 1989). “Crimes involving moral turpitude are those that involve dishonesty, fraud, deceit, misrepresentation, *deliberate* violence, or that reflect adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.” *Duncan v. Bd. of*

Disciplinary Appeals, 898 S.W.2d 759, 761 (Tex. 1995)(emphasis supplied). Nothing about the crime for which Mr. Harris was convicted involved dishonesty for personal gain or was related to his clients. Further, it did not involve *deliberate* violence. As stated herein below, Mr. Harris’s alleged crime related solely to a personal matter outside his legal practice.

4. Moral turpitude has also “been defined as ‘[t]he quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory *mala prohibita*.’” *Hardeman v. State*, 868 S.W.2d 404, 405 (Tex. App.—Austin 1993, pet. dismissed) (quoting Black's Law Dictionary 1008–09 (6th ed. 1990)). Simply because an act is statutorily prohibited it does not make that act inherently immoral or wrong. For example, a claim of aggravated assault does not on its face consider circumstances surrounding an alleged assault, or any mitigating factors such as self-defense, which would likely make an aggravated assault allegation more acceptable and unintentional in nature.

5. In similar proceedings regarding licenses to practice medicine in the State of Texas, the Texas Medical Board has faced similar questions with regard to moral turpitude and aggravated assault pleas or convictions. “The Board's rules go on to specify that “[m]isdemeanors involving moral turpitude, within the meaning of the Act, are those that involve dishonesty, fraud, deceit, misrepresentation, deliberate violence, or that reflect adversely on a licensee's honesty, trustworthiness, or fitness to practice under the scope of the person's license.” *Texas Medical Board v. Naeem Ullah Khan, M.D.*, 2017 WL 840851, at *1 (2017) (Cause No. 503-15-3860.MD before the State Office of Administrative Hearings). This is directly in line with caselaw analysis regarding attorney disciplinary proceedings.

6. In the medical licensing proceeding against Dr. Khan, Dr. Khan was accused of aggravated assault against his wife. The Medical Board considered factors similar to those in the

in the number of cases on attorney disciplinary proceedings cited herein. *Id.* at *8-11. The Medical Board did consider Dr. Khan and his wife’s history though, including finding that she previously made false reports of domestic violence and that the jury verdict in the divorce for custody of the children reflected no finding of family violence against Dr. Khan. *Id.* at *11-12. The Administrative Law Judge held that the Medical Board had not carried its burden of proof that Dr. Khan had “committed an act constituting unprofessional or dishonorable conduct for which he is subject to discipline by the Board.” *Id.* at *9. Further, the Administrative Judge did not find Dr. Khan’s alleged aggravated assault to be an offense involving moral turpitude. *Id.* at *8. It was determined that none of the allegations related to Dr. Khan’s practice of medicine, just as Mr. Harris’s alleged conduct is wholly unrelated to his practice of law.

AGGRAVATED ASSAULT

7. The Texas Penal Code first defines an assault offense as one in which the person “intentionally, knowingly, or *recklessly* causes bodily injury to another, including the person’s spouse.” TEX. PENAL CODE § 22.01(a)(1) (emphasis added).

8. First degree felony aggravated assault is then defined when “the actor uses a deadly weapon during the commission of the assault and causes:”

- (A) serious bodily injury to a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; or
- (B) a traumatic brain or spine injury to another that results in a persistent vegetative state or irreversible paralysis.

TEX. PENAL CODE § 22.02(b)(1).

9. Aggravated assault is not necessarily deliberate violence primarily because it can be committed recklessly. In *Khan*, the Administrative Judge highlighted that deliberate violence is not a required element of aggravated assault, “either expressly or implicitly, particularly because

the offense could be committed” recklessly, which is by definition unintentional. *Khan*, 2017 WL 840851, at *8.

10. While aggravated assault is not to be taken lightly, and Mr. Harris certainly does not take this proceeding lightly, due to the extenuating circumstances surrounding the alleged assault it should not call into question 40 years of dutiful service to his clients or continued ability to serve his clients. Aggravated assault is not a question of honesty, fraud, deceit, misrepresentation or anything that impacts Mr. Harris’s ability to practice law.

AGGRAVATED ASSAULT IS NOT PER SE A CRIME OF MORAL TURPITUDE

11. The Supreme Court has held that to determine whether a crime is one of moral turpitude for lawyer-disciplinary purposes, courts must “look solely to the elements of [the lawyer’s] crime to determine if those elements involve any of the kinds of acts or characteristics encompassed within [the Court’s] definition of moral turpitude.” *In re Lock*, 54 S.W.3d 305, 308 (Tex. 2001); *see also id.* at 309 (“We are simply not permitted under our current rules to consider any underlying facts or mitigating circumstances in a compulsory discipline proceeding” to determine whether a crime is one of moral turpitude under the disciplinary rules). The Court has stated that “[g]enerally, moral turpitude is implicated by crimes that involve dishonesty, fraud, deceit, misrepresentation, deliberate violence, or that reflect adversely on a lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” *In re Humphreys*, 880 S.W.2d 402, 408 (Tex. 1994). The Court did not say that crimes involving those factors always constitute a crime of moral turpitude, but that such crimes “generally” are implicated by those factors.

12. When the Supreme Court adopted its “implicating moral turpitude” factors, it did not discuss or apply the “deliberate violence” factor to determine whether a crime may be considered one of moral turpitude and it was not at issue in the case. *See In re Humphreys*, 880

S.W.2d at 408 (holding violation of federal tax evasion statute is a crime of moral turpitude because involves intentional dishonesty for purposes of personal gain). The Supreme Court has never applied the “deliberate violence” factor. Given (1) that the Court was not concerned in *Humphreys* with whether the crime of tax evasion was one involving “deliberate violence,” (2) that the only citation for the standard came from the comments to the ABA model rules, which do not include “deliberate violence,” and (3) that the Court has never applied the “deliberate violence” factor, the “deliberate violence” factor itself is obiter dictum that need not be followed. *See Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 399 (Tex. 2016) (defining dictum as “[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication; ... an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point).

13. But assuming that the inclusion of “deliberate violence” as part of the general definition is not obiter dictum, aggravated assault is not always per se a crime of moral turpitude.

14. Due to the fact, as outlined in *Khan*, that dishonesty, fraud, deceit, and misrepresentation are not elements of aggravated assault, the offense does not reflect adversely on a person's honesty or trustworthiness in their profession. *Texas Medical Board v. Naeem Ullah Khan, M.D.*, 2017 WL 840851, at *8 (2017). Because aggravated assault can also be committed recklessly, deliberate violence is not a required element. *Id.* These two factors—lack of deceit and dishonesty affecting the practice of law and lack of intention or deliberate violence—work to remove aggravated assault from the extremes of per se moral turpitude.

15. *Turton* is a pivotal case regarding aggravated assault in attorney disciplinary actions and is instructive in this matter. *Turton*, like *Khan*, reiterated that commission of some crimes, standing alone, does not implicate an attorney's fitness to practice law. *Turton v. State Bar of Texas*,

775 S.W.2d 712, 717 (Tex. App—San Antonio 1989). In such case moral turpitude cannot be imputed from the conviction alone and inquiry must be made into the circumstances surrounding the commission of the crime. *Id.* “Some crimes are not crimes which, *per se*, involve moral turpitude” and the Court held “aggravated assault to be one of those.” *Turton v. State Bar of Texas*, 775 S.W.2d 712, 717 (Tex. App—San Antonio 1989). Further, the *Turton* Court held as expressly as follows:

We decline to adopt an inflexible, *per se* rule by thus characterizing aggravated assault with serious bodily injury in attorney disciplinary actions. We can find no apposite case from another jurisdiction which applies the *per se* rule in assault cases. We believe that in this kind of case involving disciplinary action, the trier of fact should examine the totality of the circumstances, including any mitigating circumstances, in each particular case.

Turton v. State Bar of Texas, 775 S.W.2d 712, 717 (Tex. App—San Antonio 1989). Based on the foregoing holding, the totality of circumstances regarding Mr. Harris’s situation should be evaluated before arriving at disciplinary decision.

16. *Lock* is an example of a disciplinary proceeding where the attorney’s crime was possession of a controlled substance, which was determined not to be a crime of moral turpitude *per se*. *In re Lock*, 54 S.W.3d 305, 311 (Tex. 2001). The Court distinguished between a compulsory hearing where underlying facts and evidence could not be evaluated and held that it needed to look to the underlying facts to determine “whether Lock’s fitness to practice law is implicated by her crime.” *Id.* at 310. Similar to the analysis in *Turton* that not all aggravated assault is a crime of moral turpitude, the *Lock* Court held that “possession of a controlled substance may or may not be a crime of moral turpitude, depending on the circumstances.” *Id.* at 310-11.

17. Mr. Harris denies that he pled guilty to a “Serious Crime” as defined by Rule 1.06 (GG) of the Texas Rules of Disciplinary Procedure. As a consequence, Mr. Harris denies that Compulsory Discipline is appropriate under the circumstances of his case due to the *Turton*

holding. Once a Court determines that a particular crime does not involve moral turpitude per se, the Office of Chief Disciplinary Counsel may pursue discipline based on the underlying facts of the attorney's conduct. *Duncan v. Bd. of Disciplinary Appeals*, 898 S.W.2d 759, 760 (Tex. 1995) (attorney convicted of misprision of felony not subject to compulsory discipline because Board could not determine if attorney committed an intentional crime without looking to the underlying facts).

MITIGATING FACTORS

18. “Nevertheless, when both suspension and disbarment are available as sanctions, [the Board] may consider evidence of the underlying facts in mitigation or aggravation of the sanction to be imposed.” *In Re Filippov*, BODA Case No. 30611 (January 22, 2004 *aff'd*, Supreme Court of Texas No. 04-0151 (June 18, 2004)). “To this end, [the Board] also may consider such factors as whether the crime was directly related to the lawyer's practice of law; the conduct of the attorney during the compulsory proceeding; whether the attorney has complied with the terms and conditions of his probation; the attorney's efforts at rehabilitation; the attorney's credibility under oath; whether the attorney accepts responsibility for his past conduct; and any prior discipline imposed on the attorney.” *Id.*

19. Application of the Board’s *Filippov* factors is appropriate in this instance and demonstrates clearly that Mr. Harris’s actions were not taken in relation to legal career. In applying the *Filippov* factors, Mr. Harris states the following:

- a) **Whether the crime was directly related to the attorney’s practice of law:** The crime the subject of Petitioner’s allegations is not directly or indirectly related to Mr. Harris’s law practice.

b) **The conduct of the attorney during the compulsory proceeding:** Mr. Harris has a life-long record of service to the legal community and has always comported himself professionally, which is anticipated to continue during any proceedings before the Board.

c) **Whether the attorney has complied with the terms and conditions of his probation:** Mr. Harris has complied with the terms of his deferred adjudication the subject of Petitioner's allegations. Mr. Harris, during his 40 years of law practice, has no history of prior grievances and no prior criminal history; he is committed to faithfully complying with the terms of the deferred adjudication the subject of the Petitioner's allegations.

d) **The attorney's efforts at rehabilitation:** Mr. Harris's credibility was such that the conduct the subject of Petitioner's allegation, when first tried to a Llano County jury resulted in a hung jury (we believe in his favor); after the mistrial, the State presented Mr. Harris with a substantially reduced plea offer, the subject of Petitioner's allegations. He continues to be close to his children (by his first marriage) and has close family and friends for support.

e) **The attorney's credibility under oath:** After 40 years of law practice, Mr. Harris has never been subject to sanctions or contempt for lack of credibility under oath.

f) **Whether the attorney accepts responsibility for his past actions:** Mr. Harris has accepted responsibility for his past actions.

g) **Any prior discipline imposed on the attorney:** In his 40 years as an attorney, Mr. Harris has had no prior discipline.

h) **Seriousness of and circumstances surrounding the attorney's conduct:** The conduct that underlies the Petitioner's allegations are tragic. It involves Mr. Harris's

attempts to defend himself while in his own home against a deadly attack by his adult step-son. The attack led to the death of the step-son. Mr. Harris's step-son had a history of severe anger issues compounded by drug abuse and mental illness. Mr. Harris defended against the murder charges, the subject of the trial, on the basis of self-defense. The trial resulted in a hung jury and the district attorney later presented Mr. Harris with a plea bargain for aggravated assault with ten-years deferred adjudication. Mr. Harris well understands the seriousness of the underlying conduct. It has cost him his wife, part of his family, and his reputation in his community.

i) **The loss or damage to clients:** No clients were harmed by Mr. Harris's conduct.

j) **Damage to the profession:** The damage here is to Mr. Harris personally. While he understands that a criminal action against a member of the legal profession diminishes the profession as a whole, Mr. Harris was faced with a horrible dilemma that called for him to protect himself or harm his wife's son. He has done all possible to take responsibility and persevere.

k) **Assurance that those seeking legal services in the future will be insulated from this type of misconduct:** As demonstrated above, this conduct involved personal, not professional, dilemmas. In his 40 years as a lawyer, Mr. Harris never harmed a client and will never do so in the future.

l) **Avoidance of repetition:** Mr. Harris's 40-year exemplary history as well as his history of compliance indicates that this will not be a factor.

m) **The deterrent effect on others:** The personal nature of the conduct in question does not lend itself to this factor.

n) **The maintenance of respect for the legal profession:** The personal nature of the conduct in question does not call into question respect for the legal profession. Mr. Harris's conduct does not demonstrate a lack of respect for the legal profession. This illustrates the fact that the charge, the subject of the petition, does not involve "moral turpitude."

CONCLUSION AND PRAYER

20. Mr. Harris respectfully requests the Board deny Petitioner's request for compulsory discipline because not every aggravated assault is a crime of moral turpitude per se, which the case law from other disciplinary proceedings reflects. A sweeping interpretation that all aggravated assaults should be treated as crimes of moral turpitude per se would be a disservice to Mr. Harris because not all assaults are committed under the same circumstances or even with intent. If the Board were to evaluate the underlying evidence, it would be able to yield the appropriate sanction.

21. In the alternative, Respondent prays that if the Board grants Petitioner's request for compulsory discipline, that Respondent's suspension be probated and grant such relief as he may be justly entitled to receive.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do certify that the foregoing Answer was served on the following via email on this 15th day of October 2024, pursuant to the Texas Rules of Civil Procedure:

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