BEFORE THE BOARD OF DISCIPLINARY APPEALS

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

RESPONDENT'S RESPONSE BRIEF TO PETITIONER'S BRIEF IN SUPPORT OF COMPULSORY DISCIPLINE

TO THE BOARD OF DISCIPLINARY APPEALS:

James Mayer Harris, Jr., Respondent, files this Response Brief to Petitioner's Brief in Support of Compulsory Discipline and respectfully shows the Board as follows:

1. Petitioner's brief in support of compulsory discipline and disbarment goes astray in two overarching ways. First, in attempting to show that the Board has jurisdiction to impose compulsory discipline, Petitioner fails to grapple solely with the elements of the offense of aggravated assault with a deadly weapon/family violence in determining whether an Intentional or Serious Crime occurred; instead, it focuses on extraneous facts and findings that go beyond an analysis of the elements of the offense. Second, in determining whether suspension and probation are appropriate, Petitioner fails to acknowledge the fact that Respondent accepted a plea deal only after the jury in his criminal trial deadlocked between convicting him of murder or acquitting him based on self-defense. The underlying facts of the criminal proceeding (which has nothing to do with how Respondent practiced law), in addition to Respondent's exemplary professional career, show that suspension and probation are appropriate in this case (if the).

IN RE LOCK ANALYSIS

2. When it comes to determination of applying standards of compulsory discipline or standard disciplinary procedures, *In re Lock* is the current precedent. *In re Lock*, 54 S.W.3d 305 (Tex. 2001). *Lock* is based on the analysis established in *Humphreys* and *Duncan*. *Id*. at 308; *see*

In the Matter of Lloyd E. Humphreys, 880 S.W.2d 402 (Tex. 1994); *Duncan v. Bd. of Disciplinary Appeals*, 898 S.W.2d 759 (Tex. 1995).

3. 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." *Id.* at 308. "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. *Id.* at 309 (emphasis supplied). "Compulsory discipline for an intentional crime turns *solely* on the record of conviction, the criminal sentence imposed, and the factual determinations that the attorney is licensed to practice law in Texas and is the party adjudged guilty." *Id*. at 306.

4. Based on the foregoing, if Harris is to be disciplined based on compulsory discipline procedures, Petitioner's continued reference to the Information or any documents other than the applicable criminal statute and Order of Deferred Adjudication should be disregarded. If Harris is to be disciplined pursuant to standard disciplinary procedures, which is what Harris argues for in contending that aggravated assault is not a crime of moral turpitude per se, then all information regarding the underlying facts and mitigating circumstances may be evaluated and considered by the Board in assessing the appropriate penalty for an attorney based on the individual facts of his case.

THE AGGRAVATED ASSAULT STATUTE

5. 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).

6. 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). Only the language of the statute forming the basis of Harris's charge and the record of conviction, in this case the Order of Deferred Adjudication, can be evaluated if compulsory discipline is the chosen route for lawyer discipline. The Information and reference to Family Code sections not referenced in § 22.01 are then irrelevant: only the actual elements of the offense are to be looked at in determining whether the crime is one of moral turpitude per se that the Board has jurisdiction to sanction through compulsory discipline..

7. Indeed, the element of recklessness in the aggravated assault statute also establishes that aggravated assault cannot be an "intentional crime." An "intentional crime" is "(1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary." TEX. R. DISCIPLINARY P. 1.06. Aggravated assault is not a crime involving money or property held as a fiduciary. It also, as defined in the statute, does not require in all instances proof of knowledge or intent as an "essential element," as it may also be committed recklessly. This further establishes that the Board is without jurisdiction to impose compulsory discipline on Respondent in the first instance.

8. The Order of Deferred Adjudication specifically states the statue for the offence is 22.02(b)(1) of the Texas Penal Code. The problem Petitioner's reliance on the affirmative finding of family violence included in the Order of Deferred Adjudication is that it is not specifically incorporated as part of § 22.02(b)(1) and that section does not specifically reference §74.001 of the Texas Family Code. Further, §71.004 only references acts that are "intended to result in physical harm" and excludes "defensive measures to protect oneself" from its definition of family violence. Finally, a finding of family violence in this context does little more than reaffirm that Harris is not to own firearms, and is akin to a modern day scarlet letter.[1]

AGGRAVATED ASSAULT IS NOT A CRIME OF MORAL TURPITUDE PER SE

9. As far back as 1948, the Texas Court of Criminal Appeals held that "assault with a deadly weapon is not ipso facto a felony" and that not all aggravated assaults involve moral turpitude. *Porter v. State*, 152 Tex. Crim. 540, 215 S.W.2d 889, 892 (1948).

8. Aggravated assault is not necessarily involve deliberate violence primarily because it can be committed recklessly. 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. *Texas Medical Board v. Naeem Ullah Khan, M.D.*, 2017 WL 840851, at *8 (2017) (Cause No. 503-15-3860.MD before the State Office of Administrative Hearings).

9. 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*,

[1] A finding of family violence has greater implications in the family law realm when it comes to custody disputes involving minor children and/or the abuse of minor children. *See* TEX. FAM. CODE §153.004 (codifying presumption that history or pattern of past or present child abuse or neglect, or physical or sexual abuse by one parent against the other or the child negates appointment of joint managing conservators).

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. The critical tension in the present case is between deliberate violence and an act of self-defense, which by nature is not premeditated, but a response to someone else's dangerous behavior.

10. 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. 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).

11. 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. Additionally, deliberate violence has not been further defined in the context of disciplinary proceedings to provide insight as to what crimes may or may not fall into that category, and certainly not in the context of when self-defense has been raised.

12. As outlined in *Khan*, dishonesty, fraud, deceit, and misrepresentation are not elements of aggravated assault, thus 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*. Lack of deceit and dishonesty affecting an attorney's practice of law and lack of intention or deliberate violence work to remove aggravated assault from being categorized as moral turpitude per se.

13. *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 which would lead to standard disciplinary review. *Id. "*Some crimes are not crimes which, *per se,* involve moral turpitude" and the Court held "aggravated assault to be one of those." *Id*. Further, the *Turton* Court expressly referenced the fact that other jurisdictions to not apply a blanket *per se* rule to assault cases and "examine the totality of the circumstances, including any mitigating circumstances, in each particular case." *Id*.

14. In line with *Turton*'s analysis, other jurisdictions similarly hold that not every aggravated assault is moral turpitude per se. In South Carolina, "the crime of assault and battery of a high and aggravated nature, does not, however, invariably constitute a crime of moral turpitude." *State v. Bailey*, 272 S.W.2d 439, 446 (S.C. 1980). In Tennessee the courts "are of the opinion that an assault to murder *may* involve moral turpitude, depending upon the facts…" *McGee v. State*, 206 Tenn. 230, 234, 332 S.W.2d 507 (Tenn. 1960) (emphasis supplied).

NOT ALL FAMILY VIOLENCE IS MORAL TURPITUDE PER SE

15. Notably, Petitioner's brief references the same caselaw, *Turton*, as Harris on the matter of aggravated assault not being a crime that is *per se* always one of moral turpitude. Petitioner also conspicuously states that "Texas courts have been reluctant to characterize violence between adult men as acts of moral turpitude." But most importantly, family violence is not an element of the underlying offense pursuant to *Lock* and should not be evaluated.

16. Notwithstanding family violence not being part of the underlying offense, it is still not a crime of moral turpitude per se. Petitioner's family violence public policy references, while naturally a matter of importance, really refer to ongoing domestic violence against a spouse or partner and minor children, not an adult with a history of volatility who was not trusted to have access to the Harrises' residence without their presence or express authorization. It is important to note that Boumans was a 25 year old adult man, not a minor child.

17. As described in Harris's prior brief, in a medical license proceeding, 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. *Texas Medical Board v. Naeem Ullah Khan, M.D.*, 2017 WL 840851, at *8-11 (2017) (Cause No. 503-15-3860.MD before the State Office of Administrative Hearings). Most importantly, the Administrative Judge did not find Dr. Khan's alleged aggravated assault to be an offense involving moral turpitude, even though it was a matter of family violence—alleged aggravated assault of his wife. *Id*. at *8. It was determined that none of the family violence allegations related to Dr. Khan's practice of medicine, just as Mr. Harris's alleged conduct is wholly unrelated to his practice of law.

18. In determining whether a crime involves moral turpitude per se, the Texas Supreme Court has also reviewed other jurisdictions determinations. *See In re Humphreys*, 880 S.W.2d 402, 407–08 (Tex. 1994). A review of other jurisdictions

19. In Oklahoma's *Lockard* case, an attorney's domestic assault and battery and public intoxication led to suspension and not disbarment. *State ex rel. Okla. Bar Assoc. v. Lockard*, 538 P.3d 871, 873 (Okla. 2023). Lockard was accused of kicking and grabbing his wife by the throat in front of their minor child while inebriated. *Id*. at 872. Because the attorney exhibited remorse, was not a repeat offender, and was actively seeking treatment, the Oklahoma Bar suspended him for six months stating that "discipline for cases of domestic violence result in suspension from the practice of law." *Id*. at 873. When compared with Texas's compulsory versus standard discipline programs, it would stand to reason that Oklahoma does not view domestic violence as a crime of moral turpitude per se if suspension is the primary discipline option.

20. In a more egregious aggravated assault involving a firearm and standoff with peace officers, a Louisiana attorney was suspended for three years rather than disbarred due to a variety of mitigating factors and that the incident had everything to do with the attorney's personal life, and not his otherwise sterling legal career. *In re Martin*, 888 So.2d 178, 178-81 (La. 2004).

21. Once a Court determines that a particular crime does not involve moral turpitude per se, including many instances of family violence, 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). Based on the foregoing, the totality of circumstances regarding Mr. Harris's situation should be evaluated because aggravated assault and family violence are not always crimes of moral turpitude per se.

CONCLUSION & PRAYER

22. What is notably different in Texas than many other jurisdictions, is that other state bar disciplinary authorities tend to look at the facts of each individual case and factors similar to the those of *Filippov* in assessing appropriate punishment for individual attorneys. *See In Re Filippov*, BODA Case No. 30611 (January 22, 2004 *aff'd*, Supreme Court of Texas No. 04-0151 (June 18, 2004)). Many other jurisdictions as detailed herein have similarly held that aggravated assault and even instances of family violence are not moral turpitude per se. Texas courts, such as *Turton,* have expressed an interest in following a fact-based analysis of an attorney's underlying offense and its surrounding circumstances outside the compulsory discipline process when confronted with the crime of aggravated assault.

23. The goal of disciplinary proceedings is to protect the public and preserve the integrity of the legal profession with the following four factors in mind: *Lockard*, 538 P.3d at 873. With this in mind, this can be accomplished in Texas, and in Harris's case, most effectively through the standard disciplinary procedure with thoughtful consideration of all relevant information and mitigating *Filippov* factors.

24. Respondent respectfully requests the Board deny and dismiss for want of jurisdiction Petitioner's request for compulsory discipline because aggravated assault is not an Intentional or Serious Crime. In the alternative, Respondent prays that if the Board grants Petitioner's request for compulsory discipline, that Respondent be suspended and any 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 24th day of October 2024, pursuant to the Texas Rules of Civil Procedure:

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