BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS

IN THE MATTER OF	§	
MASON WILLIAM HERRING	§	**CAUSE NO. 69030**
STATE BAR CARD NO. 24071746	§	

PETTITIONER'S RESPONSE TO RESPONDENT'S OBJECTION AND MOTION TO STRIKE

Petitioner, the Commission for Lawyer Discipline ("CFLD"), by and through the Office of the Chief Disciplinary Counsel of the State Bar of Texas, files this Response to Respondent's Objection and Motion to Strike.

I. Arguments and Authorities

A. Respondent's brief and motion misapply the applicable law.

Respondent's motion argues that, "[p]art VIII of the Texas Rules of Disciplinary Procedure provides that only the judgment of conviction or order of deferred adjudication is required to prove that an attorney is subject to compulsory discipline. Tex. R. Disciplinary P. 8.04. Compulsory Discipline must, therefore, be based solely on the record of conviction and the criminal sentence imposed." *Respondent's Motion at* 2. The totality of Texas Rule of Disciplinary Procedure 8.04 states the following:

> The Board of Disciplinary Appeals shall hear and determine all questions of law and fact. When an attorney has been convicted of an Intentional Crime or has been placed on probation for an Intentional Crime without an adjudication of guilt, he or she shall be suspended as an attorney licensed to practice law in Texas during the appeal of the conviction or the order of deferred adjudication. Upon introduction into evidence of a certified copy of the judgment of conviction or order of deferred adjudication and a certificate of the Clerk of the Supreme Court that the attorney is licensed to practice law in Texas, the Board of Disciplinary Appeals shall

> immediately determine whether the attorney has been convicted of an Intentional Crime or granted probation without an adjudication of guilt for an Intentional Crime. Uncontroverted affidavits that the attorney is the same person as the person convicted or granted probation without an adjudication of guilt are competent and sufficient evidence of those facts. Nothing in these rules prohibits proof of the necessary elements in such Disciplinary Action by competent evidence in any other manner permitted by law. The Board of Disciplinary Appeals shall sit, hear and determine whether the attorney should be disciplined and enter judgment accordingly within forty-five days of the answer day; however, any failure to do so within the time limit will not affect its jurisdiction to act. Any suspension ordered during the appeal of a criminal conviction or probation without an adjudication of guilt is interlocutory and immediately terminates if the conviction or probation is set aside or reversed.

Tex. Rules Disciplinary P.R. 8.04

A close reading of Rule 8.04 proves that Respondent's statement is not accurate. While Rule 8.04 does state that only the judgment of conviction or order of deferred adjudication is required to prove that an attorney is subject to compulsory discipline, that rule does not even mention the "record of conviction," which Respondent appears to confuse for the judgment of conviction, or "the criminal sentence imposed." But Rule 8.04 does provide that the Board "shall hear and determine all questions of law and fact." To that end, the Board must take the "record of conviction" as conclusive evidence of an attorney's guilt of the crime charged. Tex. R. Disciplinary P. 8.02. As discussed below, the "record of conviction" includes the indictment, the judgment, and the criminal sentence imposed. But nothing in the rules or the applicable case law requires the Board to limit its analysis solely to these three documents, should more be required to establish the intent element of Respondent's crimes. Fortunately, here, the indictments suffice.

As argued in Petitioner's Brief, and against in Petitioner's Reply brief, the criminal indictment in Case No. 177210601010, for Assault of a Pregnant Person against Respondent, reads as follows: on or about March 17, 2022, [Respondent] did then and there unlawfully, ***intentionally***

and knowingly cause bodily injury to Catherine Herring. *Petitioner's EX 1 (emphasis added)*. Similarly, the criminal indictment in Case No. 179893201010, for Attempted Injury to a Child under 15 with Bodily Injury, reads: on or about March 17, 2022, [Respondent] did then and there ***unlawfully and intentionally***, with the specific intent to commit the offense of Injury to a Child Serious Bodily Injury of J. G. H…. do an act, to-wit: intentionally and knowingly attempt to cause serious bodily injury to…a child young than 15 years of age. *Petitioner's EX 2(emphasis added)*. To ignore this blatant finding of intentionality would be to allow Respondent to disingenuously argue that he did not commit these crimes intentionally and that he has not been adjudicated to have committed the crimes intentionally.

Texas courts have long considered that the record of conviction includes the indictment, the judgment of the court and the sentence. *See e.g.*, *Tex. Emp. Ins. Ass'n v. Curry*, 290 S.W.2d 767, 769 (Tex. App.—El Paso 1956, writ ref'd n.r.e.). Despite this, Respondent repeatedly cites *Duncan* and *Lock* to argue this Board should not consider the Indictment or Criminal Complaint when considering Compulsory Discipline. *Respondent's brief at 2*. However, Respondent misapplies those cases in this context. *Duncan* and *Lock* contemplate what evidence the Board may consider when determining whether a crime is one of moral turpitude—thus requiring Compulsory Discipline—in the absence of a predetermination that the crime is one of moral turpitude *per se*. Both hold that the Board must base its determination on the elements of the offense, not the underlying facts of the case. That's not the issue here. Not only has Respondent already conceded his crimes are ones of moral turpitude, the case law cited in Petitioner's brief leaves no question they are. *See Hardeman v. State,* 868 S.W.2d 404, 405–07 (Tex. App.—Austin 1993, pet. granted), *See also Lloyd v. State,* 151 Tex.Crim. 43, 204 S.W.2d 633, 634 (1947); *Stewart v. State,* 100 Tex.Crim. 566, 272 S.W. 202, 203 (1925); *Curtis v. State,* 46 Tex.Crim. 480,

81 S.W. 29, 30 (1904); *see also Crawford v. State,* 412 S.W.2d 57, 59 (Tex.Crim.App.1967). This Board is only tasked with determining if the crimes are "Intentional" and the record of Respondent's conviction—the indictment, the judgment of the court, and the sentence—are conclusive proof of his intent.

Nothing in any of the cases cited in either Respondent's or Petitioner's briefing suggests that neither the Indictment nor the Information can be used to determine Respondent's intentionality when he committed his crimes. In fact, the best way to determine Respondent's mental state and intentionality would be the Indictment, which explicitly states his intent to commit the crime, and the Information, which gives the background and facts surrounding Respondent's criminal acts. As cited above and in Petitioner's original brief, Respondent knowingly and intentionally attempted to poison Catherine Herring in an attempt to cause injury to Catherine Herring and Ms. Herring's unborn child. Any attempt by Respondent to now hide those facts from this Board should not be allowed.

II. Conclusion

Respondent's convictions are final and both Serious and Intentional Crimes, subject to Compulsory Discipline. Accordingly, and subject to all of Petitioner's arguments, Petitioner asks that Respondent be disbarred.

Respectfully submitted,

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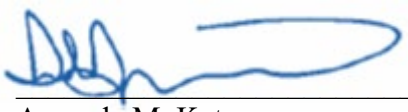
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 2024, a true and correct copy of the above document was served on Respondent through his counsel of record, Harry G. Potter III, The Potter Law Firm, PLLC, 8441 Gulf Freeway, Suite 600, Houston, Texas 77017-5066 at hpotter@thepotterlawfirm.com.



Amanda M. Kates