

The sole issue in this case is whether a felony conviction for possession of cocaine is a crime of moral turpitude. If it is, then Lock is subject to compulsory discipline. That is because our rules require that a lawyer convicted of or placed on probation for an “Intentional Crime” with or without an adjudication of guilt will have his or her license suspended during any full probation or probation through deferred adjudication.² If probation is not granted or if probation is revoked, the attorney must be disbarred.³ An “Intentional Crime” includes “any Serious Crime that requires proof of knowledge or intent as an essential element.”⁴ A “Serious Crime” includes “any felony involving moral turpitude.”⁵

The disciplinary rules were adopted by a referendum vote of the Texas bar in 1990. This Court implemented those rules in an order creating the Commission for Lawyer Discipline and the Board of Disciplinary Appeals.⁶ Our task today is to determine what the bar and this Court meant when they said that compulsory discipline applies when a lawyer commits a felony involving moral turpitude.

The concept of “moral turpitude” is not unique to Texas law and did not originate in our disciplinary rules. It has appeared in laws and rules across the country for many years. Ordinarily, when a commonly found term is used in a statute or rule, this Court would look to its generally accepted meaning when the statute or rule was promulgated and give effect to that meaning. But the Court refuses to do so in this case.

When our Rules of Disciplinary Procedure were implemented, there was a consensus among the courts that had confronted the issue that a conviction for felony possession of illegal drugs, or in some cases

² *See id.* at 8.01 to 8.05.

³ *See id.* at 8.05, 8.06.

⁴ *Id.* at 1.06(O).

⁵ *Id.* at 1.06(U).

⁶ Texas Supreme Court, *Order for Implementation of the Texas Rules of Disciplinary Procedure*, Misc. Docket No. 91-0016 (Feb. 26, 1991), *reprinted in* TEXAS RULES OF COURT 451 (West 2001).

mere possession, was a crime involving moral turpitude. The highest courts in at least five states (Florida, Indiana, Oklahoma, South Carolina, and South Dakota) had so held.⁷

Several of these courts had also held that possession of or conviction for the possession of cocaine reflected unfitness to practice law.⁸ The New Jersey Supreme Court had also held that a felony or even misdemeanor conviction for possession of cocaine adversely reflected on the fitness of an attorney to practice law and warranted discipline.⁹ A New York court had similarly held that a guilty plea to a misdemeanor charge for possession of marijuana did not involve moral turpitude.¹⁰ But it nevertheless concluded that such a crime “necessarily reflects adversely upon the legal profession in the public view and on [the lawyer’s] own fitness to practice law.”¹¹ That court did so in spite of the fact that “[a]t no time did [the lawyer’s] crime disadvantage a client, or impede or impair the quality, competence, reliability and trustworthiness of his professional conduct and the fulfillment of his professional obligations.”¹²

The South Carolina Supreme Court had concluded that “because any involvement with cocaine contributes to the destruction of ordered society, . . . mere possession of cocaine is a crime of moral turpitude.”¹³ Similarly, in *West*, the Supreme Court of Florida approved a referee’s findings that possession of cocaine constituted 1) engaging in illegal conduct involving moral turpitude, 2) engaging in conduct that

⁷ See *Florida Bar v. West*, 550 So. 2d 462, 463 (Fla. 1989); *Florida Bar v. Kaufman*, 531 So. 2d 152, 153 (Fla. 1988); *Oklahoma Bar Ass’n v. Denton*, 598 P.2d 663, 665 (Okla. 1979); *In re Gibson*, 393 S.E.2d 184 (S.C. 1990); *State v. Major*, 391 S.E.2d 235, 237 (S.C. 1990); *In re Hopp*, 376 N.W.2d 816, 818 (S.D. 1985); *In re Willis*, 371 N.W.2d 794, 796 (S.D. 1985); see also *In re Thomas*, 472 N.E.2d 609, 610 (Ind. 1985) (holding that felony possession of marijuana was a crime involving moral turpitude).

⁸ See *West*, 550 So. 2d at 463; *Kaufman*, 531 So. 2d at 153; *Thomas*, 472 N.E.2d at 610.

⁹ See *In re Pleva*, 525 A.2d 1104, 1106-07 (N.J. 1987); *In re Kinnear*, 522 A.2d 414, 416-17 (N.J. 1987); see also *Oklahoma Bar Ass’n v. Wright*, 792 P.2d 1171 (Okla. 1990) (holding that conviction for distributing cocaine to two friends in a social setting demonstrated an attorney’s unfitness to practice law).

¹⁰ *In re Higgins*, 480 N.Y.S.2d 257 (N.Y. App. Div. 1984).

¹¹ *Id.* at 258.

¹² *Id.*

¹³ *Major*, 391 S.E.2d at 237.

adversely reflected on one's fitness to practice law, and 3) an act contrary to honesty, justice, or good morals.¹⁴ In *Hopp*, the Supreme Court of South Dakota approved a referee's findings that a lawyer who had never practiced law "fail[ed] to maintain the integrity and competence of the legal profession and [engaged] in illegal conduct involving moral turpitude" when he possessed cocaine.¹⁵ Finally, in *Thomas*, the Indiana Supreme Court had held that although "questions of fitness and moral turpitude involve an examination of the [lawyer's] conduct in toto," misdemeanor possession of marijuana was "illegal conduct involving moral turpitude which adversely reflects on [a lawyer's] fitness to practice law."¹⁶

Only one decision had suggested that the felony possession of a controlled substance was not a crime involving moral turpitude.¹⁷ That decision, dealing with the license of a real estate agent, not a lawyer, was from an intermediate appellate court and had been effectively overruled by the Florida Supreme Court in *West* by 1989. The Supreme Court of Oregon and an intermediate appellate court in New York had held that the misdemeanor possession or attempted possession of a controlled substance was not a crime involving moral turpitude.¹⁸ But when our rules of discipline were promulgated, no court of which I am aware had then held or has since held that a felony conviction for possession of cocaine does not involve moral turpitude. And no court of which I am aware had then held or has since held that such a crime calls for discipline less severe than disbarment or suspension.

Since the time that the Texas disciplinary rules were implemented, courts of last resort in three other states (Colorado, Missouri, and Vermont) have held that a felony conviction for possession of cocaine is

¹⁴ 550 So. 2d at 463.

¹⁵ 376 N.W.2d at 818.

¹⁶ 472 N.E.2d at 610; *see also Denton*, 598 P.2d at 665 (holding that misdemeanor possession of marijuana is a crime of moral turpitude).

¹⁷ *See Pearl v. Florida Bd. of Real Estate*, 394 So. 2d 189, 190 (Fla. Dist. Ct. App. 1981).

¹⁸ *See In re Chase*, 702 P.2d 1082, 1090 (Or. 1985); *In re Drakulich*, 702 P.2d 1097, 1098 (Or. 1985); *Higgins*, 480 N.Y.S.2d at 257.

a crime involving moral turpitude.¹⁹ The Supreme Court of Missouri held that “[m]oral turpitude means acts which are contrary to justice, honesty, modesty or good morals, or involving baseness, vileness or depravity.”²⁰ It, like the South Carolina court in *Major*, recognized the toll that even the consumption of cocaine has taken on society and explained why an attorney’s use of cocaine is “morally reprehensible”:

In recent years illicit drug traffic has reached epidemic proportions. It threatens not only users with addiction but has blighted entire communities with death and violence. For an attorney who fully comprehends the nature and consequences of his conduct to become a participant in felony drug trafficking, even as a consumer, is morally reprehensible.

In our society, lawyers hold a place of special responsibility as advisors and counselors in the law. A judicial admission that a lawyer possessed cocaine, a felony, is a matter of grave consequence. Such conduct not only brings the lawyer’s judgment and honesty into question but erodes public confidence in lawyers and the courts in general. For that reason, nearly every court that has addressed the question has concluded that a felony conviction for possession of narcotics is a crime of moral turpitude justifying disbarment or other disciplinary action against an attorney. Kristine C. Karnezis, Annotation, *Narcotic Conviction as Crime of Moral Turpitude Justifying Disbarment or Other Disciplinary Action Against Attorney*, 99 A.L.R.3d 288 (1980). We agree.²¹

A number of other cases have since reconfirmed that felony possession of cocaine or other controlled substances is either a crime involving moral turpitude or that it adversely reflects on the lawyer’s ability to practice law.²²

¹⁹ See *People v. Stauffer*, 858 P.2d 694, 695 (Colo. 1993); *In re Shunk*, 847 S.W.2d 789, 791 (Mo. 1993); *In re Berk*, 602 A.2d 946, 948 (Vt. 1991).

²⁰ *Shunk*, 847 S.W.2d at 791.

²¹ *Id.* at 791-92.

²² See *In re Stults*, 644 N.E.2d 1239, 1241 (Ind. 1994) (holding that attorney convicted for felony possession of cocaine was not fit to practice law even though no harm came to a client); *In re Floyd*, 492 S.E.2d 791, 792 (S.C. 1997) (holding that possession of heroin is a crime involving moral turpitude); *In re Holt*, 451 S.E.2d 884, 885 (S.C. 1994) (holding that possession and use of cocaine are acts involving moral turpitude even when there was no conviction); *In re Jeffries*, 500 N.W.2d 220, 225-26 (S.D. 1993) (holding that lawyer who had a misdemeanor conviction for possession of cocaine and admitted to “recreational use” of cocaine was unfit to practice law even though there was no evidence that the public had been harmed by his drug use); see also *In re Rivkind*, 791 P.2d 1037, 1040 (Ariz. 1990) (holding that attorney’s conviction for felony attempted possession of cocaine “[w]ithout doubt . . . places in question his ability to respect and uphold the law”).

The Court does not dispute the fact that it is reversing the long-standing position of the Board of Disciplinary Appeals, reversing itself,²³ and doing so without the support of even one other case in an American jurisdiction. The Court simply asserts that cases from any other jurisdiction are “inapposite” because our state’s compulsory discipline rule is unique.²⁴ But that is no answer to the only issue in this case, which is whether felony possession of cocaine is a crime involving moral turpitude. Words have meaning. Since our disciplinary rules were implemented in 1991, they have used the words “felony involving moral turpitude.” The consequences that flow from committing a felony have no bearing on whether the crime involves moral turpitude.

The Court says that other jurisdictions “engage in review of the underlying facts and other collateral matters to determine the appropriate sanction” for possession of cocaine.²⁵ That is true for the most part, but irrelevant. The clear consensus among courts of last resort in other states is that a felony conviction for possession of cocaine is a crime involving moral turpitude, *regardless of mitigating circumstances in any particular case*. The mitigating circumstances that courts have considered bore only on the nature and duration of discipline, not whether the crime was one involving moral turpitude. The fact that our disciplinary rules foreclose any discretion in the nature and duration of discipline has nothing to do with the threshold question of whether the elements necessary to establish a crime necessarily involve moral turpitude. The Court cannot legitimately look first to the *consequences* of imposing compulsory discipline before deciding whether compulsory discipline applies.

I note, although it is immaterial to whether a crime involves moral turpitude, that in a few of the decisions that hold possession of cocaine involves moral turpitude, there was a compulsory aspect to attorney discipline. In some cases, there was an automatic suspension of the attorney’s license when he

²³ See *Santos v. Bd. of Disciplinary Appeals*, No. D-3523, 36 Tex. Sup. Ct. J. 1000 (June 16, 1993).

²⁴ See ___ S.W.3d at ___.

²⁵ *Id.* at ___.

or she was convicted of possession of a controlled substance, with further sanctions to be determined at a later time.²⁶

In sum, every court to address the issue has said that felony possession is either a crime involving moral turpitude or that the lawyer is unfit to practice law even if there was no actual harm to a client. That was the law when the Texas bar adopted the disciplinary rules, and the bar and this Court understood that to be the law. The Court today nevertheless turns a blind eye to all precedent, including its own.

This Court issued an order eight years ago in *Santos v. Board of Disciplinary Appeals* affirming compulsory discipline of a lawyer convicted of felony possession of cocaine.²⁷ That interpretation was authoritative. The rules have not changed since that decision.²⁸ In *Santos*, a lawyer had been sentenced by a criminal court to two years probation without adjudication of guilt for felony possession of cocaine. The Board of Disciplinary Appeals then held that the lawyer's license must be suspended until he completed probation. This Court affirmed that determination on its merits, although it did so without an opinion. The Court thus construed the disciplinary rules to mean that felony possession of cocaine was a crime to which compulsory discipline applied. The issue in *Santos* was the same as the issue presented

²⁶ See, e.g., *Rivkind*, 791 P.2d at 1039 (reflecting interim suspension by the Supreme Court of Arizona under Ariz. R. Sup. Ct. 57(b), even though “nothing in the record showed [the lawyer’s] professional performance had been adversely affected”); *West*, 550 So. 2d at 463 (reflecting that the lawyer “was automatically suspended from the practice of law for a period of three years,” and that the lawyer then filed a petition to modify or terminate the suspension); *Kaufman*, 531 So. 2d at 154 (reflecting temporary suspension upon conviction of a felony that remained in effect for seventeen months, until final disposition of disciplinary action); *Gibson*, 393 S.E.2d at 184 (reflecting temporary suspension).

²⁷ See *Santos*, No. D-3523, 36 Tex. Sup. Ct. J. 1000 (June 16, 1993).

²⁸ The compulsory discipline rule provided then as now:

When an attorney licensed to practice law in Texas has been convicted of an Intentional Crime or has been placed on probation for an Intentional Crime with or without an adjudication of guilt, the Chief Disciplinary Counsel shall initiate a Disciplinary Action seeking compulsory discipline pursuant to this part. The completion or termination of any term of incarceration, probation, parole, or any similar court ordered supervised period does not bar action under Part VIII of these rules as hereinafter provided. Proceedings under this part are not exclusive in that an attorney may be disciplined as a result of the underlying facts as well as being disciplined upon the conviction or probation through deferred adjudication.

by Lock’s appeal in this case: whether a felony conviction for possession of cocaine is an “Intentional Crime” and a “felony involving moral turpitude.”²⁹

II

When the issue is moral turpitude, we look at the elements necessary to establish the crime for which an attorney has been convicted or placed on probation to see if that crime necessarily involves moral turpitude.³⁰ We do not engage in a “subjective judgment of character of the particular lawyer convicted.”³¹ We explained in *In re Thacker* why we look at the crime itself, not mitigating factors in any particular case:

[W]e classify the crime, not the lawyer. To try to determine whether a crime is one involving moral turpitude by attempting to distinguish between lawyers of “good” character who happen to have been convicted of a particular criminal offense, and lawyers of “bad” character whose conviction of a crime is indicative of their lack of fitness to practice law, would be a hopelessly confusing—and entirely subjective—task. That process would also entail looking behind a conviction in a way *not* sanctioned by the Texas Rules of Disciplinary Procedure.³²

Lock concedes that the crime for which she was convicted is an “Intentional Crime,” which “requires proof of knowledge or intent as an essential element.”³³ Lock was convicted under section 481.115(c) of the Health and Safety Code, which makes the knowing or intentional possession of one gram

²⁹ *Id.* at 1.06(O), 1.06(U).

³⁰ *In re Thacker*, 881 S.W.2d 307, 309 (Tex. 1994).

³¹ *Id.*

³² *Id.* (emphasis in original).

³³ TEX. R. DISCIPLINARY P. 1.06(O).

or more but less than four grams of cocaine a third-degree felony.³⁴ The sole point in dispute is whether a felony conviction for the knowing and intentional possession of cocaine involves moral turpitude.

This Court has said repeatedly that whether a particular crime involves moral turpitude is a question of law that “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.”³⁵ The question, therefore, is not just whether an attorney has the skills and mental fitness to represent clients in the practice of law, but whether the attorney also has the *moral* fitness that our disciplinary rules demand.

We have had no difficulty in concluding that crimes such as tax evasion and conspiring to defraud the United States are crimes involving dishonesty, fraud, deceit, or misrepresentation, or are crimes that reflect adversely on a lawyer’s honesty or trustworthiness, and therefore are crimes involving moral turpitude.³⁶ But moral fitness is not limited to refraining from dishonest acts, misrepresentation, or deliberate violence. At least two of this Court’s decisions reflect that the concept of *moral fitness* is not nearly so constrained. Moral fitness takes into account the broader implications of the crime and the interests of society at large, not just the implications for a lawyer’s clients.

³⁴ Section 481.115 provides:

§ 481.115. Offense: Possession of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

* * *

(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.

TEX. HEALTH & SAFETY CODE § 481.115(a), (c). Cocaine is a controlled substance listed in Penalty Group 1 under the Health and Safety Code. *Id.* § 481.102(3)(D) (listing cocaine).

³⁵ *In re Humphreys*, 880 S.W.2d 402, 407 (Tex. 1994) (quoting *State Bar v. Heard*, 603 S.W.2d 829, 835 (Tex. 1980)) (emphasis added); *see also Duncan v. Bd. of Disciplinary Appeals*, 898 S.W.2d 759, 761 (Tex. 1995); *Thacker*, 881 S.W.2d at 309.

³⁶ *See Humphreys*, 880 S.W.2d at 408; *In re Birdwell*, 20 S.W.3d 685, 689 (Tex. 2000).

One of those decisions is *Duncan*.³⁷ In that case, an attorney pled guilty to and was placed on probation for misprision of felony, a crime defined by section 4 of Title 18 of the United States Code. That federal law provided that any person who had knowledge of the actual commission of a federal felony also committed a crime if he or she concealed the commission of the felony and did not report it to a judge or other person in civil or military authority.³⁸ This Court held that misprision of felony did not involve moral turpitude *per se* “[b]ecause a conviction for misprision of felony could conceivably be based upon an attorney’s refusal to divulge privileged information.”³⁹ The Court concluded that an attorney convicted for misprision of felony by honoring “a solemn obligation not to reveal privileged and other confidential client information, except as permitted or required in certain limited circumstances as provided in [Texas disciplinary rule 1.05]” would not have committed a crime involving moral turpitude.⁴⁰

The rationale in *Duncan* that is particularly significant to the case before us today is that while “the refusal to divulge privileged information is an entirely different matter,” a “willful concealment of non-confidential information would involve moral turpitude.”⁴¹ This Court thus concluded that the only time when misprision of felony would not be a crime of moral turpitude is when information is withheld pursuant to a privilege imposed by law. Accordingly, a lawyer commits a crime involving moral turpitude if, for example, he or she is convicted of withholding information from investigating authorities about a federal felony that the lawyer knows was committed by his or her son, daughter, or other close relative, who is not

³⁷ 898 S.W.2d 759.

³⁸ The federal statute under consideration provided:

Misprision of Felony: Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than \$500 or imprisoned not more than three years, or both.

18 U.S.C. § 4 (1948), *amended by* 18 U.S.C. § 4 (1994).

³⁹ *Duncan*, 898 S.W.2d at 761.

⁴⁰ *Id.* at 761-62.

⁴¹ *Id.* at 761.

the lawyer's client. A lawyer's decision to withhold information about a crime committed by a loved one is an intensely personal one that would not ordinarily impact clients or diminish that lawyer's ability to practice law. But under *Duncan*, this Court would say that a crime involving moral turpitude has been committed and that the lawyer is morally unfit to practice law because of the implications for society at large. I can see no reasoned basis for concluding that a lawyer who is convicted for withholding information about a loved one's federal felony is subject to compulsory discipline, but that a lawyer convicted of a felony for knowingly and intentionally possessing cocaine is not.

Another decision of this Court in which we considered the implications for society at large in deciding if a crime involved moral turpitude is *Thacker*.⁴² In that case, Thacker, a lawyer, was convicted of accepting or agreeing to accept "a thing of value for the delivery of [a] child to another or for the possession of the child by another for purposes of adoption."⁴³ Thacker arranged the adoption of a

⁴² 881 S.W.2d 307.

⁴³ Thacker was convicted under former section 25.11 of the Texas Penal Code, which provided:

§ 25.11. Sale or Purchase of Child

(a) A person commits an offense if he:

(1) possesses a child or has the custody, conservatorship, or guardianship of a child, whether or not he has actual possession of the child, and he offers to accept, agrees to accept, or accepts a thing of value for the delivery of the child to another or for the possession of the child by another for purposes of adoption; or

(2) offers to give, agrees to give, or gives a thing of value to another for acquiring or maintaining the possession of a child for the purpose of adoption.

(b) It is an exception to the application of this section that the thing of value is:

(1) a fee paid to a child-placing agency as authorized by law;

(2) a fee paid to an attorney or physician for services rendered in the usual course of legal or medical practice; or

(3) a reimbursement of legal or medical expenses incurred by a person for the benefit of the child.

(c) An offense under this section is a felony of the third degree unless the actor has been convicted previously under this section, in which event the offense is a felony of the second degree.

Former TEX. PEN. CODE § 25.11, *renumbered as* § 25.08 and *amended by* Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3628.

mother's three children and unborn twins, and the transaction did not fall within any of the statutory exceptions. We recognized that Thacker's motives in the transaction might have been pure.⁴⁴ But the Legislature had adopted a statute to curb "the *potentially* coercive effect of payments to expectant mothers," and the statute was "calculated to protect the interests of the birth father, the adoptive parents, and the interests of society at large."⁴⁵ We held that Thacker committed a crime involving moral turpitude and that compulsory discipline therefore applied even though the Penal Code did not require a finding of coercion or an adverse affect on the interests of the child, mother, father, or adoptive parents. The "interests of society at large" and the *potential* for "evils inherent in baby-bartering" were paramount in determining if the crime was one involving moral turpitude.⁴⁶ Mitigating circumstances that might exist in a particular case were irrelevant.

Although in *Santos* this Court upheld the compulsory discipline of a lawyer sentenced to probation without adjudication of guilt for possession of cocaine, it did not explain in a written opinion why a conviction for possession of cocaine is a crime involving moral turpitude. But courts in other jurisdictions have. The South Carolina Supreme Court has held that "[o]ne who possesses this controlled substance, even for his own use, fosters the prosperity of the lucrative and destructive industry of illicit cocaine manufacture and trafficking."⁴⁷ That court explained at some length why it was reversing its prior decision in *State v. Ball* that possession of cocaine primarily involved self-destructive behavior and therefore was not a crime of moral turpitude:

The drug "cocaine" has torn at the very fabric of our nation. Families have been ripped apart, minds have been ruined, and lives have been lost. It is common knowledge that the drug is highly addictive and potentially fatal. The addictive nature of the drug, combined

⁴⁴ *Thacker*, 881 S.W.2d at 310 (noting "regardless of Thacker's motives, the effect is the same").

⁴⁵ *Id.* at 309-10 (emphasis added).

⁴⁶ *Id.* at 310.

⁴⁷ *State v. Major*, 391 S.E.2d 235, 237 (S.C. 1990) (quoting *State v. Ball*, 354 S.E.2d 906, 909 (S.C. 1987) (Gregory, C.J., dissenting)).

with its expense, has caused our prisons to swell with those who have been motivated to support their drug habit through criminal acts. In some areas of the world, entire governments have been undermined by the cocaine industry.⁴⁸

The South Carolina Supreme Court then concluded that “because any involvement with cocaine contributes to the destruction of ordered society, we hold that mere possession of cocaine is a crime of moral turpitude.”⁴⁹

I would hold that a felony conviction for possession of cocaine is a “Serious Crime” within the meaning of our disciplinary rules because it involves moral turpitude and implicates the attorney’s moral fitness to practice law.

III

The Court’s decision today has removed any element of *moral* fitness from the determination of whether a crime involves moral turpitude. In doing so, the Court has overruled our prior case law *sub silentio*. Instead of citing the Rules of Disciplinary Procedure,⁵⁰ which govern the discipline of lawyers, and our decisions interpreting what moral turpitude means under those rules, the Court turns to the State Bar Rules of Professional Conduct,⁵¹ and plucks out the definition of “fitness” found in the “Terminology” section of the State Bar Rules of Professional Conduct.⁵² The Court then uses that definition to eliminate *moral* fitness from the analysis of whether a crime involves moral turpitude.⁵³

But the State Bar Rules of Professional Conduct do not support this evisceration of the Disciplinary Rules. Although the Court quotes from comments 4 and 5 to State Bar Rule of Professional Conduct 8.04,

⁴⁸ *Major*, 391 S.E.2d at 237.

⁴⁹ *Id.*

⁵⁰ TEX. R. DISCIPLINARY P., *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 1998).

⁵¹ TEX. DISCIPLINARY R. PROF’L CONDUCT, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

⁵² ___ S.W.3d at ___ (citing TEX. DISCIPLINARY R. PROF’L CONDUCT terminology).

⁵³ *See* ___ S.W.3d at ___.

it refuses to give any real meaning to them. Comment 5 says: “A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations that legitimately could call a lawyer’s overall fitness to practice into question.”⁵⁴ If minor offenses can indicate “indifference to legal obligations,” then surely a felony conviction for possession of cocaine demonstrates an “indifference to legal obligations” that “call[s] a lawyer’s overall fitness to practice into question.” But the Court eliminates any consideration of “indifference to legal obligations” in deciding if a crime involves moral turpitude.

The breadth of the Court’s change in the law governing lawyers is significant. The Court says that “crimes of moral turpitude must involve dishonesty, fraud, deceit, misrepresentation, or deliberate violence, or must reflect adversely on an attorney’s honesty, trustworthiness, or fitness as an attorney.”⁵⁵ The Court recognizes that “barratry [or] a misdemeanor involving theft, embezzlement, or misappropriation of money or other property” is a “Serious Crime” to which compulsory discipline would apply.⁵⁶ When it comes to fitness, however, the Court says that in every case, “[w]e simply cannot determine whether an attorney’s conduct reveals ‘a persistent inability to discharge, or unreliability in carrying out, significant obligations’ without looking to the facts of the case.”⁵⁷ Accordingly, unless a lawyer commits a crime that involves some element of deceit or deliberate violence, he or she is not subject to compulsory discipline, no matter how serious the crime might otherwise be.

Under the Court’s newly fashioned and limited formulation of what fitness means in the context of moral turpitude, a conviction for a murder that was not “deliberate” would not per se implicate fitness for

⁵⁴ TEX. DISCIPLINARY R. PROF’L CONDUCT 8.04 cmt. 5.

⁵⁵ ___ S.W.3d at ___.

⁵⁶ *Id.* at ___.

⁵⁷ *Id.* at ___.

the practice of law. The Court says fitness is limited to mental and physical fitness, to the exclusion of moral fitness. The Court says fitness is only

those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally, a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.⁵⁸

A lawyer convicted of any one of a host of felonies could satisfy the Court's new test for fitness and thus be exempt from compulsory discipline.

Today's decision significantly distorts the compulsory discipline scheme. Now, an attorney convicted for stealing a magazine or cigarette lighter from a grocery store is subject to compulsory discipline, while an attorney convicted of possession of cocaine is not. A theft conviction reflects adversely on an attorney's fitness to practice because it poses the possibility that the attorney will not be faithful with a client's funds. But a felony conviction for possession of narcotics is no less disturbing because it shows a profound disrespect for the law. Today's decision leaves the impression that the Court does not view an attorney's possession of a controlled substance as a very serious offense — that it falls in a category far removed from offenses such as shoplifting.

In deciding today that a felony conviction for possession of cocaine is not a crime involving moral turpitude, the Supreme Court of our State has failed to faithfully apply the principles articulated in its prior decisions. It has also failed to apply traditional principles for construing statutes and rules.

IV

The Court argues that to impose compulsory discipline on an attorney convicted of possession of narcotics would be inconsistent with the Texas Lawyers' Assistance Program sponsored by the State Bar of Texas to help rehabilitate lawyers impaired by chemical dependency. The argument has at least three flaws. First, the Court itself suggests that discipline might well be warranted in some circumstances, but it cannot explain why compulsory discipline is inconsistent with rehabilitation programs while non-

⁵⁸ *Id.* at __ (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT terminology).

compulsory discipline is not. Second, compulsory discipline is not imposed for impairment due to a chemical dependency; it is imposed for a felony conviction or probation with or without an adjudication of guilt. There is no inconsistency in the bar's trying to help its members escape chemical dependency and yet disciplining those who actually stand convicted of or sentenced for a felony.

Finally, the Lawyer's Assistance program essentially extends the traditional attorney-client privilege to lawyers who are addicted. If a lawyer who has committed a crime seeks legal counsel from another lawyer, the lawyer whose advice is sought is not required to, and indeed cannot, report that crime to law enforcement authorities.⁵⁹ By the same token, an addicted lawyer may seek help from another lawyer and the State Bar. But the fact that he or she seeks help does not shield the lawyer from independent criminal prosecution and should not shield the lawyer from the consequences of that prosecution under the rules governing lawyer discipline. No court in the country has indicated that anything short of suspension or disbarment would be an appropriate sanction for a felony conviction of a controlled substance. The consequences in other jurisdictions for felony possession of a controlled substance have been suspension for a significant period of time or disbarment, not a lesser sanction such as public or private reprimand.⁶⁰ Yet, after today, Texas stands as the lone state that permits a lesser sanction, including a private reprimand, to suffice.

⁵⁹ See TEX. R. EVID. 503(b)(2):

(2) *Special Rule of Privilege in Criminal Cases.* In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship. (emphasis in original)

⁶⁰ See *Rivkind*, 791 P.2d at 1044 (two-year suspension); *Stauffer*, 858 P.2d at 699 (disbarment for felony conviction of cocaine where there were other disciplinary problems); *West*, 550 So. 2d at 463 (automatic suspension of three years reduced to eighteen months); *Shunk*, 847 S.W.2d at 792 (indefinite suspension with leave to apply for reinstatement within six months even though the attorney had already been discharged from his criminal probation); *Gibson*, 393 S.E.2d at 184 (disbarment); see also *Thomas*, 472 N.E.2d at 610 (three-year suspension for misdemeanor possession of marijuana); *Denton*, 598 P.2d at 665 (suspension during probation period for misdemeanor possession of marijuana); *Holt*, 451 S.E.2d at 885 (indefinite suspension for possession of cocaine even though there was no conviction).

There is no inconsistency between the existence of the Texas Lawyer's Assistance Program and holding that a felony involving moral turpitude includes a felony conviction for possession of cocaine. But there is an inconsistency between this Court's rules governing admission to the bar in Texas and the Court's refusal today to consider moral fitness and moral character in deciding whether a felony conviction for possession of cocaine is a crime involving moral turpitude. Our rules governing admission to the bar require prospective lawyers to possess good moral character because that "is a functional assessment of character and fitness of a prospective lawyer."⁶¹ A person convicted of a felony is conclusively deemed not to have good character or moral fitness to practice law for at least five years after the completion of a sentence or probation.⁶² Compulsory discipline differs slightly from the bar admission rules because under *Duncan* and *Humphreys*, we have recognized that there are rare instances in which a felony will not necessarily involve moral turpitude; the underlying facts must be considered. But what the Court now refuses to acknowledge is that moral turpitude necessarily embodies the concept of moral fitness and that many crimes demonstrate a lack of *moral fitness* per se. Every other court in the country to decide the issue has said that a felony

⁶¹ Section (b) of Rule IV of the Rules Governing Admission to the Bar provides in its entirety:

(b) Good moral character is a functional assessment of character and fitness of a prospective lawyer. The purpose of requiring an Applicant to possess present good moral character is to exclude from the practice of law those persons possessing character traits that are likely to result in injury to future clients, in the obstruction of the administration of justice, or in a violation of the Texas Disciplinary Rules of Professional Conduct. These character traits usually involve either dishonesty or lack of trustworthiness in carrying out responsibilities. There may be other character traits that are relevant in the admission process, but such traits must have a rational connection with the Applicant's present fitness or capacity to practice law and accordingly must relate to the legitimate interests of Texas in protecting prospective clients and in safeguarding the system of justice within Texas.

TEX. R. GOVERN. BAR ADM'N IV(b) (West 2001).

⁶² Rule IV(d)(2) provides:

(2) An individual guilty of a felony under this rule is conclusively deemed not to have present good moral character and fitness and shall not be permitted to file a Declaration of Intention to Study Law or an Application for a period of five years after the completion of the sentence and/or period of probation.

Id. Rule IV(d)(2).

conviction for possession of cocaine is a crime involving moral turpitude or that such a conviction means that the lawyer is unfit to practice law without regard to the facts of the particular case.

V

This case is about the moral standards for fitness to practice law — what a cynical public regards as an oxymoron. It is very difficult to defend the integrity and stature of the legal profession to its many critics when the Supreme Court of a major state reverses its own agency for lawyer grievances and holds, without authority, that there may well be nothing inconsistent with being convicted of felony possession of a controlled substance and being fit to practice law. The fact that such a conviction automatically results in the loss of the right to vote⁶³ but not suspension of a license to practice law implies that the Court thinks there is a higher moral standard for voting than for practicing law.

The United States Supreme Court has observed, “Of all classes and professions, the lawyer is most sacredly bound to uphold the laws.”⁶⁴ Not so in Texas. The public’s natural suspicions of a profession that regulates and disciplines itself will, regrettably, be heightened by today’s decision, and the public’s estimation of the legal profession further diminished.

* * * * *

This and other cases that have come before this Court convince me that our disciplinary rules need revision. But an opinion of this Court is not the vehicle to make those revisions. The rules currently require compulsory discipline of a lawyer convicted of a felony for possession of cocaine. Because the Court holds otherwise, I dissent.

Priscilla R. Owen

⁶³ TEX. ELEC. CODE § 11.002(4).

⁶⁴ *Ex parte Wall*, 107 U.S. 265, 274 (1882).

Justice

OPINION DELIVERED: June 21, 2001