

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Richard Lee Austin, Jr., M.D.

Physician's and Surgeon's
Certificate No. G 85946

Respondent.

Case No. 800-2020-072426

DECISION

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on December 29, 2023.

IT IS SO ORDERED November 30, 2023.

MEDICAL BOARD OF CALIFORNIA



Laurie Rose Lubiano, J.D., Chair
Panel A

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

RICHARD LEE AUSTIN, JR., M.D.

Physician's and Surgeon's Certificate No. G 85946

Respondent.

Agency Case No. 800-2020-072426

OAH No. 2023080355

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on October 9, 2023, by videoconference.

Giovanni F. Mejia, Deputy Attorney General, represented complainant William Prasifka, Executive Director, Medical Board of California (board), Department of Consumer Affairs, State of California.

Karen Mazzocco, Attorney at Law, represented respondent Richard Lee Austin, Jr., M.D., who did not appear.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on October 9, 2023.

FACTUAL FINDINGS

Jurisdiction and Background

1. On November 16, 2000, the board issued Physician's and Surgeon's Certificate number G 85946 (license) to respondent. Respondent's license expired on March 31, 2018. The board retains jurisdiction to commence disciplinary proceedings against an expired license pursuant to Business and Professions Code section 2220.

2. There is no prior history of discipline against respondent's license.

3. Respondent sustained three convictions on March 21, 2018 (two felonies and one misdemeanor), and one conviction on September 2, 2020 (one felony). Respondent was incarcerated following his conviction and remains incarcerated as of the date of this hearing.

4. On March 19, 2021, respondent was sentenced to total prison time of life plus one year in state prison, with the possibility of parole, and remanded to the custody of the Sheriff for transfer to the California Department of Corrections and Rehabilitation, Soledad (CDCR Soledad).

5. After reviewing a certified copy of the convictions and confirming respondent's incarceration, the board, on August 26, 2022, automatically suspended respondent's license pursuant to Business and Professions Code section 2236.1.

6. On March 4, 2021, complainant, in his official capacity as Executive Director for the board, signed an accusation against respondent alleging two causes for discipline, stemming from the convictions. As the two causes for discipline are based on the convictions, the earliest being March 21, 2018, the accusation is within the statutory time for the filing of accusations as set forth in Business and Professions Code section 2230.5, and as addressed in an OAH's August 28, 2023, Order.¹

7. Complainant filed the request to set the matter with OAH on August 11, 2023. On August 14, 2023, OAH issued a Notice of Assigned Hearing Dates setting the matter for October 9, 2023, at 9:00 a.m., to take place via videoconference and telephone. The Notice of Assigned Hearing Dates also included Case Center instructions for the filing of electronic exhibits. The Notice of Assigned Hearing Dates was sent to respondent's counsel on August 14, 2023.

¹ Respondent filed a prehearing motion to dismiss the accusation alleging complainant did not file the accusation within three years of discovery of the act or omission alleged as the grounds for disciplinary actions set forth in Business and Professions Code section 2230.5, subdivision (a). Respondent based his motion on the assertion that a staff member of the Medical Board appeared at a court hearing during the criminal case that led to respondent's convictions on June 29, 2017, and because the accusation was not filed within three years of that date, the statute of limitations had lapsed. However, as this accusation is based on respondent's *convictions*, the statute of limitations began the date of the earliest *conviction*, which was March 21, 2018. The accusation, filed on March 8, 2021, was timely.

8. On August 16, 2023, complainant issued a Notice of Hearing with the correct date and time set for this hearing, and also indicated that the hearing would be held virtually (telephonic and/or video). The Notice of Hearing was served on respondent at the institution where he is incarcerated (CDCR Soledad) and his attorney of record in this matter.

9. Respondent filed several prehearing motions requesting a continuance, among other things, all of which were denied in multiple prehearing orders. Notably, respondent requested a continuance because CDCR Soledad did not have the ability to conduct hearings via the videoconferencing platform used by OAH (Zoom). Respondent was given the opportunity to appear telephonically instead, as permitted by Government Code sections 11508 and 11440.30, and OAH personnel worked extensively with personnel at CDCR Soledad to ensure respondent could appear telephonically. On the date of the hearing, however, respondent elected not to appear. No adverse inferences were made based on respondent's choice to forgo appearance.

Respondent's Convictions

10. On September 8, 2017, in the case entitled *People of the State of California v. Richard Lee Austin Jr.*, Case No. 17HF0498, in the Superior Court of California, County of Orange, the Orange County District Attorney (OCDA) filed an Information against respondent alleging the following: Count 1) Penal Code sections 664, subdivision (a)/187, subdivision (a) (attempted murder), a felony; Count 2) Penal Code sections 664, subdivision (a)/207, subdivision (a) (attempted kidnapping), a felony; Count 3) Penal Code section 646.9, subdivision (a) (stalking), a felony; Count 4) Penal Code section 245, subdivision (a)(1) (assault with a deadly weapon), a felony; and Count 5) Vehicle Code section 10852 (unlawful tampering with vehicle), a misdemeanor.

On March 21, 2018, respondent was convicted by a jury of attempted kidnapping, stalking, and unlawful tampering with a vehicle. The jury also found true that in the commission of the attempted kidnapping and stalking, respondent used a firearm within the meaning of Penal Code section 12022, subdivision (a)(1). The jury found respondent not guilty on Count 4, assault with a deadly weapon, and was unable to reach a verdict on Count 1, attempted murder. The Court declared a mistrial as to Count 1.

11. The OCDA retried respondent on Count 1, attempted murder. The jury failed to reach a verdict, and the court declared a mistrial. The OCDA retried respondent on Count 1 a third time, and, on September 2, 2020, following the jury trial, respondent was convicted of attempted murder. The jury also found true that respondent used a firearm within the meaning of Penal Code section 12022, subdivision (a)(1).

12. On March 19, 2021, the Court sentenced respondent. Prior to imposing sentence, the Court found:

The crime involved the threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. The defendant was armed with or used a weapon at the time of the commission of the crime. The victim was particularly vulnerable. The manner in which the crime was carried out indicated planning, sophistication, or professionalism. The defendant was engaged in violent conduct that indicates a serious danger to society.

The court then imposed the following sentence: Count 1, life in prison with the possibility of parole; Count 2, four years in prison, and on the firearm enhancement, the court imposed one year, stayed; Count 3, three years in prison, imposed concurrently with Count 1, and on the firearm enhancement, the court imposed one year, stayed; and on Count 5, the court stayed the imposition of sentence. The total prison time imposed was therefore life in prison plus one year.

13. Respondent appealed his convictions to the California Court of Appeal, Fourth Appellate District, Division Three. On July 15, 2022, in Case No. G060071, the Court of Appeal upheld respondent's convictions.

14. The facts underlying the conviction, which may be used to determine the appropriate discipline, as determined in the Court of Appeal decision, are:

In 2017, attorney L.L. worked in a law firm housed on two floors of a large office building in Newport Beach. L.L. was out of the office on Friday, March 31, 2017, when the firm's receptionist, B.M., received a phone call from [respondent], who was in Albuquerque, New Mexico. [Respondent] gave a false name, Robert Brown, and asked when L.L. would be in the office. He said he was a Chicago attorney and wanted to meet with L.L. to talk to her about working on a high profile case with him in California. When B.M. offered to transfer the call to L.L.'s secretary, he declined the offer. He said he was in a hurry and hung up without leaving any contact information. B.M. sent L.L. an e-mail recounting the phone call. She indicated she told the caller to try again the next business day.

Anticipating L.L. would be in the office the following week, [respondent] traveled to California with a pistol registered to him and zip ties large enough to restrain a person, which he purchased before leaving New Mexico. He rented a car in Los Angeles on April 1, 2017. Later that day, he checked into a hotel in Costa Mesa.

The next day, [respondent] surveilled L.L.'s office building and went to a shooting range in Mission Viejo.

On Monday, April 3, 2017, L.L. was again out of the office. B.M. received another phone call from [respondent], who again falsely identified himself as Robert Brown. He gave her the same story about being an attorney and needing to meet with L.L. to discuss a case. He wanted to know if L.L. would be in the office the following day and became irritated when B.M. did not know. [Respondent] did not want to speak to L.L.'s secretary and refused to leave his contact information. Instead, he hung up. B.M. sent L.L. an e-mail chronicling this phone call.

On Monday, [respondent] purchased a gas can and a lighter. He checked out of his hotel about 3:00 a.m. on April 4th.

Shortly after 7:30 a.m. on April 4, 2017, [respondent] entered the office building where L.L.'s law firm was located. He was wearing a disguise wig and big black sunglasses. He

sat in a chair in the lobby. He had his face behind a newspaper, but would glance surreptitiously at people entering the building, especially women. He had a briefcase and a black bag with him.

One building tenant found [respondent]'s appearance and behavior to be very suspicious. She notified building security and called the police department's nonemergency line to report a suspicious man in the lobby. Building security contacted [respondent] in the lobby and [respondent] said he was waiting for an attorney. About 9:30 a.m., nearly two hours after he entered the building, security escorted [respondent] from the property because of multiple tenant complaints about his presence.

L.L. arrived at the office later that morning and parked in the building's attached parking structure. That afternoon, [respondent] called L.L.'s firm and asked if she was in the office. [Respondent] did not identify himself, but B.M. recognized his voice as that of the man who had previously identified himself as Robert Brown. After B.M. indicated L.L. was in the office, [respondent] hung up.

B.M. had an uneasy feeling and went to talk to L.L. about the phone calls she had received. B.M. explained she suspected Robert Brown was not who he said he was. She relayed his most recent call, in which he had said he just wanted to make sure L.L. was in and then hung up. At L.L.'s

request, B.M. checked the phone's caller identification. She informed L.L. it showed the caller was Richard Austin, Jr.

L.L. immediately recognized the name and became frightened. She had been involved in litigation in four prior civil cases involving [respondent] and his wife and their insurance company. L.L. had represented the interests of the insurance company in these cases. One of the cases went to trial and L.L. obtained a money judgment in favor of the insurance company, which was subsequently upheld on appeal. [Respondent]'s behavior during the litigation alarmed L.L. Once after a settlement conference, [respondent] got "in her face" and yelled at her. [Respondent]'s attorney ushered him out of the courtroom, and the bailiff escorted L.L. out through the back of the courthouse. During the appeal, [respondent] wrote letters with derogatory statements about L.L. and sent them to partners at the law firm where she was working at that time. L.L. had not heard from [respondent] once the litigation ended around April 2016.

As a result of the past contact, L.L. instructed B.M. to lock their office suite door and call building security. L.L. contacted the insurance company and learned [respondent] was now living in New Mexico. B.M. checked the caller identification for Monday's call and discovered the call came from a nearby hotel. When B.M. called the hotel, she

was informed a man named Richard Austin had checked out of the hotel earlier that day. L.L. was terrified as she believed [respondent] was coming for her.

Shortly after 4:00 p.m., L.L. was escorted to her car by four men from her office, including Nathaniel P. (Nathaniel) and Matthew R. (Matthew). They accompanied her in the elevator down from their office and through the building lobby to the parking garage. At the parking garage, one of the men climbed the stairs to the second floor, while the rest took the elevator to the second floor where L.L.'s car was parked. As Nathaniel exited the elevator with L.L. and the others, he saw [respondent] standing by the stairwell. [Respondent] was wearing a blue jacket, a baseball cap, and sunglasses. His hands were not visible as he had what appeared to be blue medical scrubs draped over them. When Nathaniel looked at [respondent], [respondent] turned away and pulled down his cap to cover his face.

As the group walked with L.L. toward her car and away from the stairwell, Nathaniel fell back and walked toward the stairwell. [Respondent] remained standing by the stairwell, looking in the direction L.L. and her escorts had walked. Nathaniel noticed [respondent] was fidgeting with his hands underneath the scrubs. As Nathaniel approached him, [respondent] turned away. Nathaniel started walking back to the group, while keeping an eye on [respondent].

When he saw [respondent] peek around the corner in L.L.'s direction, Nathaniel shouted, "That's him."

[Respondent] turned and ran down the stairwell. Nathaniel and Matthew chased after him. [Respondent] got into a car parked on the first floor of the parking structure and drove toward the exit. At the exit, he drove through the parking gate arm and broke it. Nathaniel ran after the car and was able to obtain the license plate number, which he later gave to the police.

Sergeant Vincelet with the Newport Beach Police Department was assigned to the case and obtained [respondent]'s cell phone records, as well as information from the car rental agency, the hotel in Costa Mesa, and the shooting range. [Respondent]'s rental car was similar to the one seen at L.L.'s office building, except for the license plate number. The license plate number provided by Nathaniel was not the same as that on the car when [respondent] rented it on April 1st or drove it on April 2nd. The license plate on [respondent]'s rental car when he sped away from L.L.'s office building on April 4th, had been reported stolen from a car at the Orange County airport that day.

[Respondent]'s cell phone records showed after the incident at L.L.'s office, he returned to Albuquerque. Vincelet obtained a warrant for [respondent]'s arrest and traveled to Albuquerque on April 17th. Once there, with the assistance

of Albuquerque law enforcement, he searched [respondent]'s residence pursuant to a search warrant. In conducting the search, police discovered a .45-caliber handgun registered to [respondent] in the master bedroom. The gun was loaded and another magazine loaded with ammunition was next to it inside a gun case. They also found a briefcase that matched the one [respondent] was seen with at L.L.'s office building. In the briefcase, they found the owner's manual for [respondent]'s handgun, a box of ammunition, packages of large zip ties, and a police scanner. A Los Angeles area newspaper dated April 4, 2017, was also found in the briefcase, further evidence [respondent] had the briefcase with him on his trip.

Additional evidence was found in the search of [respondent]'s residence. In his wallet, [respondent] had a handwritten note with the phone number for a wig shop. The police also discovered a receipt for the purchase of the zip ties and duct tape in Albuquerque on March 31, 2017, and a receipt for the purchase of a gas can and a lighter in Costa Mesa on April 3, 2017. Clothes and shoes matching those [respondent] was wearing on April 4th were also obtained.

[Respondent] was arrested on April 20, 2017, following the search of his residence, and he remained in custody in New Mexico until he was extradited to California in late May.

While he was in custody in New Mexico, he placed numerous telephone calls to his wife from the jail. The prosecution played recordings of three phone conversations between [respondent] and his wife. At the beginning of each call was an advisement the call was "subject to recording and monitoring."

In a call on April 22, [respondent] told his wife about his police interview and the police theory he intended to kill L.L. [Respondent] stated he blamed L.L. and another woman for his pancreatic cancer. He accused them of killing him with their lies. He claimed he was falsely arrested in 2008 and this caused him to drink more, resulting in his pancreatic cancer. He stated the justice system was broken and "you have to take justice into your own hands sometimes." [Respondent] said he did not care who was listening to their conversation. He expressed hope their conversation would be played in court and then he made a derogatory comment directly at L.L. He commented, "Shakespeare had it right. First thing we do is kill all the attorneys."

In the call on April 25, [respondent] told his wife about the evidence they had against him before stating his case was "unwinnable." In the call on May 18, [respondent] stated he messed up, continuing: "when I saw those five people I should have, I should have just said, to hell, to hell with the

little boys and the fathers, I'm gonna shoot them up. Ya know, I should have . . . I . . . that's what I should have done. But I had a moment of conscience, okay. And, ya know, gee all these innocent people that are standing around, I'm not really after them."

Respondent's Evidence

15. As noted earlier, respondent did not appear. However, respondent's counsel filed a trial brief and also uploaded a PowerPoint presentation (in PDF format) to OAH's secure e-file system, that counsel utilized in her presentation of the case. The presentation was extracted from the secure e-file system and added to respondent's evidence as Exhibit B.

16. The information contained in the PowerPoint presentation, however, was of little value. It merely set forth family history and personal background information, but did not address either the subject matter of this proceeding (the convictions) or the issue of rehabilitation. Moreover, although there was a "biographical sketch" that read as if respondent typed it, the document was not signed by respondent. As such, it is hearsay, and does not supplement or explain any other evidence under Government Code section 11513, subdivision (d), as none was offered by respondent.

17. Moreover, in the trial brief, respondent raised several arguments with respect to complainant not meeting the burden of proof, the substantial relationship criteria not being met, and costs not being established, among others. Because it is determined for the reasons discussed below in Legal Conclusions that complainant met his burden to establish both cause for discipline and that revocation is appropriate, respondent's arguments are rejected. Finally, with respect to respondent's

constitutional claims set forth in the trial brief², they are collateral attacks on the conviction itself, and not appropriate for this hearing. The court records admitted in this proceeding are conclusive evidence of the convictions, and they may not be collaterally attacked. (Bus. & Prof. Code, § 2236, subd. (a); *Arneson v. Fox* (1980) 28 Cal.3d 440, 452.)

Costs of Investigation and Enforcement

18. Business and Professions Code section 125.3 authorizes complainant to seek recovery of the reasonable costs of its investigation and enforcement in disciplinary matters. Complainant submitted a certification of costs for work performed by the Office of the Attorney General. The certification reflects work completed from 2021 to 2023. Attached to that certification is a form entitled, "Matter Time Activity By Professional Type." The attachment contains a general description of the tasks performed, the time spent on the tasks, and the hourly rate charged for the work of each employee (\$220 per hour for attorneys). The certification of costs submitted in this matter established that the Department of Justice billed \$25,150 for 115.50 hours expended on the case.

19. Typically, a case involving a conviction matter is a relatively simple case, often involving only court conviction records and perhaps reviewing rehabilitation

² Respondent argued that his convictions were the result of improper use of a jailhouse informant; improper police interrogation without the benefit of counsel; improper use of attorney-client privileged phone calls; and that he is still permitted to appeal his convictions to federal court based on these constitutional claims. None of these arguments, however, pertain to the limited issue in this administrative hearing.

evidence. In this case, however, there were substantial court documents that included both Superior Court and Court of Appeal documents. Moreover, there were substantial prehearing motions filed by respondent that complainant needed to address, settlement discussions, and countless e-mail communications that were exchanged back and forth between the parties. For that reason, there was a substantial amount of time spent on case management, client communication, communication with respondent's counsel, and preparing/analyzing the case for hearing. Consequently, while the hours spent and amount spent on this case is abnormally high given the relative simplicity of conviction matters in general, in this case, the costs incurred were supported by the documentary evidence.

20. The certification satisfied the requirements of California Code of Regulations, title 1, section 1042, subdivision (b), and supports a finding that costs in the amount of \$25,150 are reasonable in both the nature and extent of the work performed.

LEGAL CONCLUSIONS

Applicable Law

1. This matter arises under the Medical Practice Act, contained at Business and Professions Code section 2000 et seq., and regulations promulgated thereto.

2. Protection of the public shall be the highest priority for the board in exercising its licensing, regulatory, and disciplinary functions. (Bus. & Prof. Code, § 2001.1.) Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (*Ibid.*)

3. Business and Professions Code section 2227, provides:
 - (a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the board, may, in accordance with the provisions of this chapter:
 - (1) Have his or her license revoked upon order of the board.
 - (2) Have his or her right to practice suspended for a period not to exceed one year upon order of the board.
 - (3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the board.
 - (4) Be publicly reprimanded by the board. The public reprimand may include a requirement that the licensee complete relevant educational courses approved by the board.
 - (5) Have any other action taken in relation to discipline as part of an order of probation, as the board or an administrative law judge may deem proper. . . .
4. Business and Professions Code, section 490, provides:

(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

(b) Notwithstanding any other provision of law, a board may exercise any authority to discipline a licensee for conviction of a crime that is independent of the authority granted under subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the licensee's license was issued.

(c) A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. An action that a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code.

(d) The Legislature hereby finds and declares that the application of this section has been made unclear by the holding in *Petropoulos v. Department of Real Estate* (2006)

142 Cal.App.4th 554, and that the holding in that case has placed a significant number of statutes and regulations in question, resulting in potential harm to the consumers of California from licensees who have been convicted of crimes. Therefore, the Legislature finds and declares that this section establishes an independent basis for a board to impose discipline upon a licensee, and that the amendments to this section made by Chapter 33 of the Statutes of 2008 do not constitute a change to, but rather are declaratory of, existing law.

5. Business and Professions Code section 2234 authorizes the board to take disciplinary action against a licensee for unprofessional conduct. Any violation of the Medical Practice Act constitutes unprofessional conduct. (Bus. & Prof. Code, § 2234, subd. (a).)

6. Business and Professions Code section 2236, subdivision (a), provides the conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred. (*Ibid.*)

7. A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of Business and Professions Code sections 2236 and 2236.1. (Bus. & Prof. Code, § 2236, subd. (d).) The record of conviction shall be conclusive evidence of the fact that the conviction occurred. (*Ibid.*)

8. In making the substantial relationship determination, the board may inquire into the circumstances surrounding the commission of a crime to fix the degree of discipline or to determine if the conviction is of an offense substantially related to the qualifications, functions, or duties of a physician and surgeon. (Bus. & Prof. Code, § 2236, subd. (c).) Additionally, California Code of Regulations, title 16, section 1360, provides:

(a) For the purposes of denial, suspension or revocation of a license . . . a crime, professional misconduct, or act shall be considered to be substantially related to the qualifications, functions or duties of a person holding a license if to a substantial degree it evidences present or potential unfitness of a person holding a license to perform the functions authorized by the license in a manner consistent with the public health, safety or welfare. Such crimes, professional misconduct, or acts shall include but not be limited to the following: Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of state or federal law governing the applicant's or licensee's professional practice.

(b) In making the substantial relationship determination required under subdivision (a) for a crime, the board shall consider the following criteria:

(1) The nature and gravity of the crime;

(2) The number of years elapsed since the date of the crime;
and

(3) The nature and duties of the profession.

9. Complainant bears the burden of proving the allegations by "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

Evaluation

CAUSE EXISTS TO IMPOSE DISCIPLINE AGAINST RESPONDENT'S LICENSE

10. Respondent sustained four very serious convictions on March 21, 2018, (attempted kidnapping, stalking, and unlawful tampering with a vehicle, as well the enhancement of using a firearm) and September 2, 2020, (attempted murder, as well the enhancement of using a firearm). In total, respondent sustained three felony convictions and one misdemeanor.

11. The nature and gravity of the crimes, as recounted by the Court of Appeal, as well as the types of crimes respondent committed, are appalling. Respondent's crimes overall exhibited significant planning, sophistication, and calculation. As the sentencing judge observed, respondent "engaged in violent conduct that indicates a serious danger to society." The convictions are all recent, having occurred within the last five years, and respondent is in prison for life (with the possibility of parole).

12. A licensed physician must act in a manner that reflects good judgment at all times. A licensed professional demonstrates unprofessional conduct where he or she "has shown dishonesty, poor character, a lack of integrity, and an inability or

unwillingness to follow the law. . . " (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 771-772.) Respondent's felonious crimes did not demonstrate that he had any concern for the health and welfare of his victim. The convictions are substantially related to the qualifications, functions and duties of a physician within the meaning of California Code of Regulations, title 16, section 1360. Respondent's convictions evidence a present or potential unfitness to practice medicine in a manner consistent with the public health, safety, or welfare.

13. Complainant established by clear and convincing evidence that cause exists to impose discipline against respondent's license pursuant to Business and Professions Code sections 490, 2227, 2234, 2236, and California Code of Regulations, title 16, section 1360, as alleged in the first cause for discipline.

14. Complainant established by clear and convincing evidence that cause exists to impose discipline against respondent's license pursuant to Business and Professions Code sections 2234, subdivision (a), and 2237, as alleged in the second cause for discipline.

REVOCATION IS THE ONLY APPROPRIATE DISCIPLINE

15. Grounds for discipline having been established, the issue becomes one of appropriate license discipline. The board has developed disciplinary guidelines, entitled "Manual of Model Disciplinary Orders and Guidelines (12th Edition, 2016)" (Disciplinary Guidelines) which are incorporated by reference into California Code of Regulations, title 16 section 1361, subdivision (a). The Disciplinary Guidelines provide guidance for what the disciplinary response should be for violations of the Medical Practice Act. The board expects that administrative law judges will follow the

Disciplinary Guidelines, and any proposed decision that departs from the Disciplinary Guidelines must identify the departures and facts that support the departure.

16. Regarding the statutes that form the basis for discipline in this case, the Disciplinary Guidelines recommend discipline ranging from stayed revocation with five years of probation to a maximum discipline of revocation.

17. The Disciplinary Guidelines recommend a minimum discipline of stayed revocation and seven years of probation, with standard terms and conditions and certain optional conditions, depending on the misconduct. Respondent (who did not appear) did not provide any evidence showing he took responsibility for his convictions and provided no evidence of rehabilitation.³ Even if he did, given that he is currently incarcerated, any rehabilitation would be afforded little weight because those under the supervision of correctional authorities are expected to behave in an exemplary manner. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.) Given the serious nature of respondent's multiple felony convictions and one misdemeanor conviction, the recent nature of the convictions, and respondent's lack of rehabilitation evidence, revocation is the only appropriate measure of discipline that will protect the public.

³ Respondent argued that to require him to establish rehabilitation is to shift the burden of proof from complainant to respondent. That is not the case. Complainant only has the burden to prove cause for discipline exists; complainant did that. Complainant is then free to take a position on the appropriate discipline based on the evidence and Disciplinary Guidelines. If respondent desires to argue for a minimal or lesser degree of discipline, it is respondent's burden to produce evidence and make that argument.

Costs of Investigation and Enforcement

18. Business and Professions Code section 125.3, subdivision (a), authorizes an administrative law judge to direct a licensee who has violated the applicable licensing act to pay a sum not to exceed the reasonable costs of investigation and prosecution. The reasonable costs in this matter were \$25,150.

19. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court set forth five factors to be considered in determining whether a particular licensee should be ordered to pay the reasonable costs of investigation and prosecution under statutes like Business and Professions Code section 125.3. Those factors are: whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Ibid.*)

20. Applying the *Zuckerman* factors to this case leads to the following conclusions: respondent was not successful in getting the charges dismissed or reduced; although incorrect, respondent had a subjective good faith belief in the merits of his position; respondent did not raise a colorable challenge to the proposed discipline; respondent does not have the financial ability to pay costs as he is currently incarcerated; and the scope of the investigation was appropriate in light of the alleged misconduct and nature of the prehearing activities.

21. Respondent shall pay costs in the amount of \$25,150 to the board. However, due to respondent's inability to pay due to his incarceration, payment is stayed unless and until respondent's Physician's and Surgeon's Certificate is reinstated.

If respondent seeks reinstatement and reinstatement is granted, respondent shall be permitted to pay the costs pursuant to a payment plan, if requested.

ORDER

Physician's and Surgeon's Certificate Number G 85946, issued to respondent Richard Lee Austin, Jr. M.D., is revoked. Respondent is ordered to pay costs of investigation and enforcement in the amount of \$25,150, however, the costs are stayed. If respondent seeks reinstatement, and if reinstatement is granted, respondent shall be permitted to pay the costs pursuant to a payment plan, if requested.

DATE: November 2, 2023

Kimberly J. Belvedere

KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings