REDACTED

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

In the Matter of the Accusation Against:	)	
	)	
	)	
THOMAS A. GIONIS, M.D.	)	File No: 04-92-18443
	)	
Physician's and Surgeon's	)	
Certificate #C-39248	)	OAH No: L-9506028
	)	
	)	
Respondent.	)	

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Medical Board of California, Department of Consumer Affairs, State of California as its Decision in the above-entitled matter.

This Decision shall become effective on June 11, 1998.

DATED May 12, 1998

DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA

Ira Lubell, M.D., President
Division of Medical Quality

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

In the Matter of the Accusation Against:	No. D-4802
	OAH No. L-9506028
THOMAS A. GIONIS, M.D. 6693 Golfcrest Dr. San Diego, CA 92119	
Physician and Surgeon's Certificate No. C39248 Respondent.	

PROPOSED DECISION

On February 26, 1997 and November 12, 1997, in Los Angeles, California, Stephen E. Hjelt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Steven V. Adler, Deputy Attorney General, represented the complainant.

Respondent, Thomas A. Gionis, M.D., was present on November 12, 1997 and represented on both hearing dates by Harland W. Braun, Esquire.

Evidence was received, the record was held open for the filing of post hearing written argument. On December 9, 1997 complainant filed its written argument which was marked for identification as exhibit 6. On December 11, 1997 respondent filed its written argument which was marked for identification as exhibit F. On December 11, 1997 the record was closed and the matter was submitted for decision.

FINDINGS OF FACT

I

This Accusation was filed by Kenneth Wagstaff in his official capacity as the Executive Director of the Medical Board of california, and not otherwise.

II

On or about June 16, 1980, the Medical Board of California issued Certificate No. C 39248 to respondent which authorized him to act as a physician in the State of California. At all times relevant to the Determination of Issues herein, this certificate was in full force and effect.

There is no prior history of discipline to respondent's license save for the automatic suspension of respondent's license which accompanied his incarceration in state prison under Business and Professions Code section 2236.1. Respondent remains suspended from the practice of medicine pending the decision in this administrative hearing.

III

The Accusation generally charged respondent with violations of the Medical Practice Act relating to a criminal conviction that he sustained and for which he was ultimately imprisoned. The procedural history of the criminal conviction is long and convoluted as is the dispute between complainant and respondent as to what the operative facts in this case are. Evidentiary rulings were made at trial which precluded respondent from presenting what he felt was reliable, admissible and persuasive proof of his lack of culpability. These rulings will be discussed in more detail below. Furthermore, evidentiary rulings were made regarding complainant's request that the administrative law judge take judicial notice of the recitation of facts by the California Supreme Court in the case of People v. Gionis (9 Cal.4th 1196; 40 Cal.Rptr.2d 456; 892 P.2d 1199 (May 1995). This request for judicial notice is denied and the ruling, likewise, will be discussed in more detail below.

IV

Respondent, Thomas Gionis, M.D., is before this administrative tribunal as a result of actions that took place in 1988. Almost ten years later, he faces the loss of his medical license. Much is riding on the decision in this Accusation hearing. The people of the State of California are entitled to the assurance that physicians unworthy of public trust be removed from practice. At the same time, a physician guilty of misconduct at some point in the past is not required to wear the proverbial Scarlett Letter in perpetuity.

This long and winding road began as a custody dispute in a divorce proceeding between respondent and his wife. At the time respondent was a successful doctor married to the daughter of J[redacted] W[redacted] and living in Orange County. At the time of separation, their daughter, A[redacted], was three months old. She is now ten. It is an understatement to say that the divorce and

custody dispute was acrimonious. Respondent hired numerous investigators in an attempt to convince the family law judge that his estranged wife was not spending time with the child.

On October 3, 1988 A[redacted] M[redacted] W[redacted] and a male friend were attacked and beaten by two men. During the attack, the achilles tendon of the man was cut and severed and W[redacted] was beaten. Ultimately, respondent was arrested and charged with crimes stemming from this attack.

V

Respondent was tried by jury which resulted in a hung jury. After a second jury trial, respondent was found guilty of 1) conspiracy to commit an assault, 2) conspiracy to commit a trespass, 3) assault with a deadly weapon on the male companion and, 4) assault with a firearm on W[redacted].

Respondent appealed his conviction and the Court of Appeal reversed his conviction on the basis of the trial court's erroneous admission of defendant's statements to an attorney in violation of the attorney-client privilege and prosecutorial misconduct.

The People petitioned for review of the Court of Appeal decision. The California Supreme Court, in May 1995, reversed the judgment of the Court of Appeal and remanded it to the lower court for further proceedings. Finally, respondent was sentenced to State Prison pursuant to the criminal conviction. He served 30 months and was released in October, 1997.

VI

Much has been made of who the parties to this original ugly disagreement were. Does it matter that the victim was the daughter of J[redacted] W[redacted] and that the trial took place in Orange County where he is viewed as an icon. The truth is that it matters for some purposes and not others. This case is not a dispute between disembodied abstractions. It is a dispute between very real people about what really happened ten years ago, what has happened in the intervening ten years, and what should be done with this doctor who steadfastly denies that he was guilty of these crimes.

Facts are not found in a vacuum. Facts are found within a context that is created by people and events and the ambiguities and uncertainties that are ever present in determining issues of causation and moral agency. The facts found to be true in this administrative hearing are likewise the product of context.

Context is determined, in legal proceedings, by the application of the rules of evidence. The application of the rules of evidence determines how narrow or broad the context is. Ultimately, if the context created is too broad, then the trier of fact is burdened with the extraneous, the irrelevant, the confusing and the prejudicial. If the context is too narrow then the trier of fact lacks sufficient reliable and important data from which to draw necessary inferences from the facts. Without enough "good" information the trier of fact engaged not in fact finding but in speculation. Speculation is the shared enemy of all litigants.

VII

Four evidentiary rulings limited and defined the factual context in this case. These rulings are as follows:

1. Judicial notice of the California Supreme Court statement of facts in the case of People v. Gionis (1995) 9 Cal.4th 1196, was requested by complainant. This request was denied.

2. Complainant sought to use a copy of the transcript of the sentencing of defendant to prove facts tending to show respondent's active hand in the planning of this attack and the slashing of the victim's achilles tendon. This request was denied.

3. At trial, respondent sought to elicit testimony which he argued would show the facts and circumstances surrounding the disputed attack and demonstrated his innocence. This line of questioning was objected to by the attorney general and the objection was sustained. The court ruled that this constituted an attempt to relitigate the conviction and was impermissible under Arneson v. Fox (1980) 28 Cal.3d 440.

4. Respondent offered in evidence a transcript of the testimony of J[redacted] L[redacted] H[redacted] in his own criminal case, which respondent argued, demonstrated that the attack by H[redacted] on victim Mr. L[redacted] was H[redacted]'s alone and in no way came from respondent. Complainant objected and ruling was deferred until the time that the proposed decision was submitted. Complainant's objection is sustained.

It is unquestioned that the evidentiary rulings made by the administrative law judge in a significant way impacted the factual context of this case. Both parties feel aggrieved. Both parties no doubt have grist to fill the appellate mill.

Respondent denies that he is guilty of these crimes and seeks to show that there is evidence from which a reasonable inference can be drawn that he is not guilty.

Complainant argues that there is inculpatory evidence tending to show the facts and circumstances behind the conviction which indicate a high likelihood that respondent was the sinister mastermind of the plot to do grievous harm. Complainant argues this is contained in documentary evidence which was excluded and in statements by the high court of this state, which were not judicially noticed.

Both parties, for the most obvious reasons, want to fashion a factual reality that suits their theory of the case. However, they lose sight of the most fundamental fact and that is the criminal conviction, final after appeal, establishes conclusively all the elements of the crimes for which respondent has been convicted. Respondent is legally guilty of the crime and must be treated as such irrespective of the possibility that he is factually innocent.

This distinction matters, particularly in a time where forensic science (for example DNA evidence) demonstrates clearly that there are defendants, determined by our legal system to be legally guilty, who were convicted and sentenced to prison wrongly.

This administrative hearing was convened, not to test whether respondent's criminal conviction was valid, but to determine what the legal significance of the conviction is in the administrative process. Once again, both parties fight the wrong battle. Respondent argues that there is no nexus or substantial relationship between these criminal convictions and respondent's fitness to practice medicine. Further, he argues that unless additional facts are established by complainant tending to show his direct connection to the commission of theses crimes that no substantial relationship is proved.

Respondent is simply wrong in his analysis. Crimes that involve plans and actions that do physical and psychological violence to innocent people are inherently in conflict with the oath each physician takes. They are, without doubt, substantially related to the duties, functions and qualifications of a doctor.

What the parties are really arguing about is, in effect, just "how" guilty is respondent. Respondent claims he is not guilty at all, although he acknowledges the reality of his conviction and has served his time in prison. Complainant argues that he is much more guilty than the mere abstract recitation of the elements of the crime, that he fails to take responsibility for his wrongdoing and poses an immediate threat to the public because of his terribly flawed judgment.

VIII

A[redacted] W[redacted] testified under oath on behalf of Dr. Gionis. She was the victim of this assault and cannot by any stretch of the imagination be considered respondent's friend. Her appearance, under any circumstance, is unusual. Even more unusual is the fact that she is a criminal prosecutor for the Los Angeles City Attorney's office. She prosecutes criminals and has been doing so for the last two and one half years.

She has, at once, a unique and valuable frame of reference. She has been the victim of a violent crime. She prosecutes criminals and sees daily the pain caused to the victims of crime. She has seen crime and punishment from all sides.

Of all the people who might have insight into the mind and habits and inadequacies of Dr. Gionis one would assume a wife who bore him a daughter, divorced him and was the victim of a savage attack for which respondent was convicted and sentenced to prison might qualify. Particularly when the ex-wife clearly understands the issue of public protection by virtue of her role as a prosecutor.

She helped Dr. Gionis run a medical clinic before she became a lawyer. She remembers him as dedicated and competent, a doctor who cares about his patients. Despite the animosity she acknowledges, she would want her daughter to be treated by him. She is convinced, in light of everything she knows about him, that he poses no threat to patients and there is no danger of reoccurrence.

Also testifying on respondent's behalf was a Deputy Sheriff for the County of Los Angeles. He is well aware that respondent is a convicted felon. His own bias in favor of respondent is palpable. He testified on behalf of respondent during the criminal case. He had many professional dealings with respondent while respondent was practicing medicine and felt that respondent was an exceptional physician. Officer N[redacted]' testimony, while sincere and well-intentioned, did not add to the factual record.

IX

Respondent has denied his guilt from day one. He asserts his innocence of the charge in his testimony. He fails to demonstrate the remorse that is typically expected as the necessary condition precedent to demonstrating rehabilitation. However the requirement of a demonstration of remorse, despite its general applicability, does not always provide the most useful tool to evaluating the claims made by a respondent.

The law is clear and settled that the administrative process is not meant to be punitive, but rather focuses on the protection of the public and, where possible, the rehabilitation of errant licensees. Despite our interest in promoting good and fuzzy feelings, the Medical Board is not in the business of disciplining people who have a bad attitude, are spiteful, mean spirited or have a terrible bed side manner. These interpersonal warts are best left to the operation of the marketplace.

What the California Medical Board cares about, in carrying out its mission of public protection, is conduct. What it cares about in Dr. Gionis' case is whether public protection requires outright revocation of his license. The answer to this question is neither simple nor easy. It does require an assessment that goes beyond simple formulas and superficial analysis.

It is clear that respondent is extremely bright. His early academic accomplishment demonstrate his extraordinary intellectual skills and zeal for hard work. It would be very easy for him, it would seem, to come to court and say those words that he should say, "I did it, I'm sorry, I did harm. It was wrong, and I accept responsibility for my actions." Well, respondent didn't do this. He came to court and said in effect, "I did not do what I was convicted of; I disputed it at every step of the way; I lost this legal battle and served the sentence the People of the State of California imposed; I paid the price of this conviction; Do not penalize me further for a failure to exhibit mock remorse."

The California Supreme Court has given us some guidance on how to evaluate claims such as respondent's. A certain Mr. Hall was denied admission to the practice of law because the Committee of Bar Examiners determined that he lacked the good moral character required. Before he had sought admission to the bar, Hall had worked in a capacity that required a license by a state agency. That state agency disciplined his license by suspending it for a 20 day period. Hall disputed the charges at the original license discipline hearing and disputed the Bar's finding that his lack of remorse reflected an absence of respect for the judicial process or an unwillingness to conform his conduct to professional standards of ethics.

The Supreme Court found as follows:

> "We find. . . that the attitude which the Committee perceived as a "lack of remorse" reflected his good faith belief in his innocence as to the Bureau's charges rather than any absence of respect for the judicial process. Nothing in the record suggests that Hall did not accept the binding effect of the

Bureau's determination;
". . . Hall's consistent refusal to retract his claims of innocence and make a showing of repentance appears to reinforce rather than undercut his showing of good character. Precisely because the Committee made clear that Hall's chance for admission would be improved if he demonstrated remorse, we find his refusal to do so indicative of good character rather than the contrary: Hall refused, in effect, to become the fraudulent penitent for his own advantage." 25 Cal.3d 730 at 743, 744; 159 Cal.Rptr. 848, 602 P.2d. 768 (1979).

The Supreme Court was careful to note that it would not and could not relitigate the original license discipline. It was final, as is the judgement in the Gionis case. However, the Supreme Court concluded that "Mr. Hall should not be denied the opportunity to practice law because he is unwilling to perform an artificial act of contrition." (p. 745.)

X

Respondent is 44 years old and recently released from serving his prison term. But for the forced inactivity since May 1995 he practiced medicine continuously since June 1980. His academic career is indicative of a high achiever who loves challenges and thrives on hard work. He graduated from high school at 16, completed all undergraduate college work in less than two years, entered medical school at the Medical University of South Carolina in 1971 and graduated in 1975 at the age of 21. He was the chief resident in surgery at Tulane Medical Center in 1979-80 as well as the Chief Cardiothoracic Resident in Thoracic Surgery from 1980-1982.

After the completion of his two residencies, he practiced medicine in Houston, Texas and then moved to Pomona, California. He has been involved in many aspects of health care in southern California from 1984 until his automatic suspension from practice in early May, 1995. He acted as a general and vascular surgeon as well as ran an industrial medicine clinic which included dealing with forensic issues as well. His work in the industrial medicine field led to an interest in applying scientific methods to the evaluation of injured workers to facilitate more accurate assessments of disability.

Respondent was also very interested in all aspects of Advanced Trauma Life Support (ATLS) and lectured frequently at Harvard University, UCLA and other institutions in the 1990's before his incarceration and suspension.

From 1988 until his imprisonment and automatic license suspension he practiced medicine without restriction. At the time he was imprisoned he was the Director of the Department of Emergency Medical and Trauma Services, as well as the Medical Director of Coast Plaza Doctors Hospital in Norwalk, California.

Respondent is currently enrolled in two graduate programs. One is at Pepperdine University in the Doctorate of Education Program in Institutional Management. The other is at Columbia Pacific University in the Ph.D. program in International Business Law.

The weight of the evidence establishes that respondent is a prodigious worker with a huge appetite for intellectual challenges. His intellectual gifts and his bountiful energy do not guarantee that the exercise of his judgment is flawless, however. Respondent's judgment was certainly not flawless in 1988 at a time when he was under extreme pressure. Respondent feels that he has paid the price society has exacted by his suspension and incarceration and that he should be allowed to practice medicine again without restriction.

Respondent has "paid the price" exacted by society as a result of the crime. However, the issue of public protection as it relates to physicians is another matter. The fact that respondent is smart and has a Curriculum Vitae big enough to choke a horse does not establish his present fitness to practice medicine nor do the laudatory letters submitted on his behalf. Respondent should have no trouble taking the preliminary steps necessary to begin his probationary period. However, public protection requires that these objective requirements be satisfied.

DETERMINATION OF ISSUES

I

Cause was established to imposed discipline on respondent for violation of Business and Professions Code section 2234(a) in that he was convicted of crimes that were substantially related to the duties functions and responsibilities of a physician. This is, by definition, a violation of the Medical Practice Act.

II

Cause was established to impose discipline on respondent for violation of Business and Professions Code section 2236 in that he was convicted of crimes that are substantially related to the duties functions and qualifications of a physician.

III

Respondent's conduct as a physician can only be the subject of discipline if he has engaged in acts which are defined as "unprofessional conduct." Unprofessional conduct in the administrative discipline context refers to the conviction of any offense substantially related to the qualifications, functions or duties of a physician and surgeon.

In this administrative proceeding the complainant has the burden of proof. The term burden of proof has been used in two different contexts. It has been used to refer to the burden of initially producing or going forward with the evidence. It has also been used to mean the burden of proving the issues of the case. It is this second meaning, i.e., the burden of proving the issues of the case that this term is properly used here. Some commentators and experts in the field have suggested substituting the term "burden of persuasion" for the traditional term "burden of proof." Irrespective of the term of art used, this burden means "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." California Evidence Code section 114. Evidence Code section 115 further provides that, unless a different degree of proof is required, "a preponderance of evidence is sufficient."

Administrative proceedings are civil in nature and in most situations the standard of proof used is a preponderance of the evidence. Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 124 Cal.Rptr. 14; Perales v. Department of Human Resources Development (1973) 32 Cal.App.3d 332, 108 Cal.Rptr. 167.

However, in proceedings that involve the revocation or suspension of professional licenses, a higher degree of proof is required. This higher degree of proof is "clear and convincing proof to a reasonable certainty." Furman v. State Bar (1938) 12 Cal.2d 212, 229, 83 Pac.2d 12, 21; Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App.3d 853, 185 Cal.Rptr. 601. The application of this higher standard of proof is justified in cases where vested rights are at stake (the revocation or suspension of existing professional licenses). Clear and convincing evidence is a higher standard than "preponderance of the evidence" but a lower one than "beyond a reasonable doubt." See, Evidence Code section 502. "Clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind." In re David C. (1984) 152 Cal.App.3d 1189, 1208, 200 Cal.Rptr. 115, 127.

A party to an action meets or establishes its burden of proof by producing evidence. Evidence is defined in California Evidence Code section 140 as follows: "Evidence means the testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Evidence may be either direct or circumstantial. Direct evidence proves a fact without an inference and, if true, conclusively establishes that fact. Circumstantial evidence proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may be logically and reasonably drawn from another fact or group of facts.

There is no distinction in the law between direct and circumstantial evidence as to the degree of proof required; each is a reasonable method of proof. Each is respected for such convincing force as it may carry. BAJI 7th Ed. No. 2.00; Witkin California Evidence 3d Ed. section 284.

Although application of the technical rules of evidence is somewhat relaxed in an administrative proceeding, there are still substantial fundamental requirements. Government Code section 11513(c) provides in relevant part:

> "The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admissions of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded."

Relevant evidence is that evidence which has any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. Evidence Code section 210. Taken together, the Government Code and the

Evidence Code create a standard of admissibility that requires the information to be 1) factually important to the determination of a disputed issue; and 2) reliable and trustworthy information that a reasonable person would use in situations where serious decisions were being made.

The Court, as the trier of fact, must weigh conflicting testimony. As BAJI 7th Ed. No. 2.01 points out, "The testimony of one witness worthy of belief is sufficient to prove any fact . . . The test is not the number of witnesses, but the convincing force of the evidence." See, Evidence Code section 411.

The Court has considered, relied upon, and applied the law above cited in determining the issues in this case.

IV

All evidence of extenuation, mitigation, and aggravation has been considered in fashioning the disciplinary order below. The administrative law judge has read, considered and applied Business and Professions Code section 2229 in fashioning this disciplinary order. This section established that "Protection of the public shall be the highest priority for the Division of Medical Quality...and administrative law judges of the Medical Quality Hearing Panel in exercising their disciplinary authority." Paragraph (b) of this section instructs the administrative law judge, "In exercising his or her disciplinary authority an administrative law judge...shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of continuing education or other reasons, restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence." Paragraph (c) further instructs the administrative law judge that "It is the intent of the Legislature that the Division...and the enforcement program shall seek out those licensees who have demonstrated deficiencies in competency and then take those actions as are indicated, with priority given to those measures, including further education, restrictions from practice, or other means, that will remove those deficiencies."

However, the above notions regarding rehabilitation of practitioners, and by implication, entering disciplinary orders that are less than outright revocation, are conditioned by the last sentence of section 2229(c), which reads, "Where rehabilitation and protection are inconsistent, protection shall be paramount."

The conduct of ordinary affairs demands that there be a certain amount of reliable predictability about future conduct. We learn to make decisions based upon expectations of others behavior. This is how the world operates. We are entitled to

expect, and do in fact rely on, that others driving cars will stop for a red light. This is a reasonable expectation even though some people occasionally do not act as expected.

The conduct of a system of licensure operates similarly, although there are different public policy considerations involved. Decisions about whether to revoke a license, or impose a lesser discipline, rest on a determination of reasonable expectations of future conduct. Is the offending conduct likely to reoccur? This is the basic question that must be answered. Knowing full well that there is no crystal ball available, licensing boards, and the administrative law judges that hear cases for them are required to exercise an institutional judgment about fitness to practice the profession.

In this case, respondent was convicted of a most serious antisocial act that took place almost ten years ago. It took place in the context of a bitter divorce. This is not to excuse it; it is simply to place it in some framework for understanding. As such it is far more likely to be situational rather than characterological. As counsel for respondent argued, the criminal process sees the worst of people dressed up at trial to look their best. And in the divorce realm, we frequently see the best of people acting at their worst.

It is significant, in determining the penalty, that the crimes respondent was convicted of did not involve the practice of medicine or treatment of patients. This would alter the penalty landscape dramatically. Rather, we have a respondent who has fought to overturn his conviction, but, once it became final, paid his price in prison and in license suspension. He may not express the remorse we want to hear, but he has accepted the rule of the conviction and served his almost three years in prison. He has also been suspended from the practice of medicine for 34 months.

Furthermore, respondent practiced medicine from 1988 until 1995 when he was imprisoned without incident. Indeed, but for this one ugly and shameful incident, there is nothing in his history that raises any concern about his ability to render medical care to the consuming public in a way consistent with the Hippocratic Oath and the standard of care. In fact, the only evidence presented at trial regarding respondent's judgment and ability as a physician was extremely favorable. His actions in rendering emergency medical care to accident victims on the freeway in the midst of his criminal case was testified to persuasively by attorney Catherine Vincent. Also, while incarcerated, respondent took courageous steps, at the risk of his own life and safety, to save the life of an inmate. It is clear that even the Department of Corrections has acknowledged respondent's courageous actions. (See Exhibit F in evidence.)

The weight of the credible evidence supports a finding that respondent's behavior is unlikely to reoccur. Also, society has exercised its collective will by imprisoning respondent and suspending his license. No clearer statement of public disapproval need be made. The punitive function of the criminal sanction has been satisfied. Respondent can hardly be said to have avoided paying a very high price already.

Society speaks through a jury when it finds guilt or innocence. Society also speaks through witnesses who testify about what they know regarding people and events. Aissa Wayne has a perspective few of us have. She has no reason whatsoever to do respondent any favors. In addition, her role as a victim of violent crime and her position as a prosecutor make her testimony worth listening to. She without hesitation feels that respondent should be allowed to devote his skills as a physician to the public.

Counsel for the complainant argues that public protection demands revocation of respondent's license and that public protection means protecting against the possibility of this ever happening again. If this were truly the standard by which we insure public protection then revocation would be an inadequate remedy. The only guaranteed way to protect against any possibility that this might happen again is to place respondent in solitary confinement for the rest of his life. This is obviously not what is contemplated by the notion of public protection.

V

A. Complainant seeks to rely on a copy of the California Supreme Court opinion in People v. Gionis (1995) 9 Cal.4th 1996, to prove the details of the conduct that resulted in the conviction. The Supreme Court opinion with its recitation of facts certainly provides some context for the conviction. However, the Supreme Court was not sitting as a fact finder, nor, in this case, was the reversal of the appellate court dismissal dependent on fact finding. The two issues that were the crux of the Supreme Court opinion were legal issues, not factual ones.

Without more, the Supreme Court recitation of facts does not constitute evidence sufficient to prove respondent's conduct, for the purpose of making findings in aggravation or extenuation or mitigation of charges in this administrative hearing. The Supreme Court decision does establish, incontrovertibly, that respondent suffered convictions of four felonies and judicial notice of this is properly taken. The California Supreme Court was not sitting as a fact finder when it issued its opinion nor was its function to evaluate the evidence at trial to determine if it s clear and convincing to a reasonable certainty.

People v. Harbolt (1997) 56 Cal.App.4th 294, cited by complainant, does not stand for the proposition that the complainant asserts. It established that the factual recitations such as are found in the Gionis opinion, are not what is contemplated when Judicial Notice is taken of "Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." Evidence Code section 452 (d).

In Harbolt, the defendant was convicted of a felony. The trial court then conducted a hearing and determined there were prior felony convictions under the 3 Strike Law (Penal Code section 667) and sentenced defendant accordingly.

Section 667(a)(1) provides for enhanced punishment if a person convicted of a serious felony has a prior conviction for a serious felony.

The trial court was asked to take judicial notice of the United States Court of Appeals opinion to determine there had been a prior conviction of a serious felony. Defendant Harbolt objected on the grounds of hearsay and over objection, the trial judge admitted the opinion into evidence. The trial judge stated at the time the clear and appropriate use for this opinion. He said, "...as to the opinion now marked People's 22, I will take judicial notice of the charges alleged and that the fact that that conviction was affirmed. I am not taking judicial notice of representations of fact made in that opinion because I don't think I can."

The issue in the Harbolt case was over a very narrow question which was whether the appellate opinion could be considered a part of the record of conviction since, technically, it was prepared after the judgment in the case for the purpose of determining what constitutes a qualifying strike.

While allowing judicial notice of the appellate opinion, the Harbolt court clearly acknowledged that the factual recitation in the appellate opinion was not the proper subject of judicial notice. "Noticing the appellate opinion for the limited purpose of proving the existence (emphasis added) of the 1973 convictions certainly does not require consideration of facts beyond those necessarily adjudicated in the prior proceedings....we conclude that the court properly took judicial notice pursuant to Evidence Code section 452, subdivision (d) of the opinion entitled United States v. Harbolt, supra, 491 F.2d. 78, as proof of the fact defendant had suffered the 1973 federal convictions and that these convictions had been affirmed on appeal." (p. 299.)

Judicial notice can therefore properly be taken of People v. Gionis for the purpose of establishing the finality of the convictions and nothing more. The statement of facts in the Gionis opinion is NOT evidence and does not establish proof of any disputed fact.

B. Complainant sought to introduce into evidence a copy of the transcript of the sentencing hearing in which the trial judge made various comments about his opinion of the guilt of respondent. This is objectionable hearsay and properly excluded. The trial judge is certainly entitled to his opinion, but for many of the same reasons outlined above, his comments are not findings of fact from which judicial notice can be found.

The trial judge's comments do not establish or prove any fact that is in dispute in this case. In the same way the testimony of the sheriff deputy on behalf of Dr. Gionis to the effect that in all of his years in law enforcement he had never seen a more blatant example of bias on the part of a judicial officer (referring to the trial court proceedings against Dr. Gionis) is impermissible opinion. It does not establish or prove any fact that is in dispute in this case.

C. Respondent sought to introduce a transcript of the direct and cross examination of J[redacted] L[redacted] H[redacted] in his criminal trial stemming from the same incidents that formed the basis of the criminal trial against Dr. Gionis. Complainant objected on the basis of Evidence Code section 1291 (a) (2) and also on basis of Government Code section 11513 (c). Respondent asserted that the transcript, although a hearsay document, is corroborative hearsay, is relevant and reliable. He argues that it corroborates the respondent's testimony that he is not guilty because H[redacted] clearly testifies that the injuries inflicted on the victims were his idea and were not at the suggestion of anyone else.

Complainant's objection is sustained. This use of the transcript is an impermissible attempt to relitigate that which has been finally adjudicated. It is an attempt to corroborate that which cannot, by definition, be corroborated namely respondent's legal guilt.

This skirmish is also about the issue, alluded to above, about just how guilty is respondent. Complainant wants to establish that he is <u>really</u>, <u>really</u> guilty and <u>really</u>, <u>really</u> bad because he was the mastermind of everything and that his medical knowledge and nefarious ill will was the source of the idea to sever the achilles tendon of one of the victims. Complainant seeks to rely on the Supreme Court opinion and the opinions of the sentencing judge to demonstrate this. Respondent seeks to counter this by offering the testimony of defendant H[redacted] to the effect that doing violence to these two victims was his

idea alone. On the surface this would seem to be a statement against Hintergardt's own penal interest since a self-interested defendant would probably want to point the finger elsewhere. However, we need not consider this since the dominant thrust of this testimony is to distance respondent from the actions which form the basis of his convictions and in effect are an attempt to relitigate the matter.

ORDER

I

Certificate No. C-39248 issued to respondent Thomas A. Gionis, M.D. is revoked. However, revocation is stayed and respondent is placed on probation for three years upon the following terms and conditions. The three year probationary period shall commence following the completion of the conditions precedent identified below. Within fifteen days of the effective date of this decision the respondent shall provide the Division, or its designee, proof of service that respondent has served a true copy of this decision on the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership were extended to respondent or where respondent was employed to practice medicine and on the Chief Executive Officer at every insurance carrier where malpractice insurance coverage is extended to respondent.

As part of probation, respondent is suspended from the practice of medicine until he satisfactorily completes those conditions precedent (A and B) to his resumption of practice which are specified herein. The cost of A and B shall be respondent's responsibility.

A. Within 30 days of the effective date of this decision, respondent shall enroll in the Physician Assessment and Clinical Evaluation (PACE) program at the University of California at San Diego, School of Medicine (UCSD). The Physician Assessment Program shall include the measurement of medical skills and knowledge and an appraisal of respondent's health and psychological functioning. After this assessment, the PACE Evaluation Committee shall review all results and tailor a clinical training program to the needs of respondent. The content of the program shall be based on the fact that respondent, although bright and skilled, has not practiced medicine since May, 1995. The exact number of hours and specific content of any program shall be determined by the PACE program. Respondent shall successfully complete the training program, and may be required to pass an examination administered by the PACE program related to the program's contents.

B. As soon as practicable respondent shall take and pass the SPEX exam.

1. Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California, and remain in full compliance with any court ordered criminal probation, payments and other orders.

2. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, stating whether there has been compliance with all the conditions of probation.

3. Respondent shall comply with the Division's probation surveillance program. Respondent shall, at all times, keep the Division informed of his or her addresses of business and residence which shall both serve as addresses of record. Changes of such addresses shall be immediately communicate in writing to the Division. Under no circumstances shall a post office box serve as an address of record. Respondent shall also immediately inform the Division, in writing, of any travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) days.

4. Respondent shall appear in person for interviews with the Division, its designee or its designated physician upon request at various intervals and with reasonable notice.

5. In the event respondent should leave California to reside or to practice outside the State of California or for any reason should respondent stop practicing medicine in California, respondent shall notify the Division or its designee in writing within ten days of the dates of departure and return or the dates of non-practice within California. Non-practice is defined as any period of time exceeding thirty days in which respondent is not engaging in any activities defined in Section 2051 and 2052 of the Business and Professions Code. All time spent in an intensive training program approved by the Division or its designee shall be considered as time spent in the practice of medicine. Periods of temporary or permanent residence or practice outside California or of non-practice within California, as defined in this condition will not apply to the reduction of the probationary period.

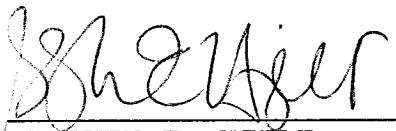
6. Upon successful completion of probation, respondent's certificate shall be fully restored.

7. If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

8. Following the effective date of this decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may voluntarily tender his certificate to the Board. The Division reserves the right to evaluate the respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered license, respondent will no longer be subject to the terms and conditions of probation.

9. Respondent shall pay the costs associated with probation monitoring each and every year of probation. Such costs shall be payable to the Division at the end of each fiscal year. Failure to pay such costs shall be considered a violation of probation.

Dated: March 26, 1998



STEPHEN E. HJELT
Administrative Law Judge
Office of Administrative Hearings

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BEFORE THE DIVISION OF MEDICAL QUALITY

MEDICAL BOARD OF CALIFORNIA

DEPARTMENT OF CONSUMER AFFAIRS

STATE OF CALIFORNIA

In the Matter of the Accusation Against: THOMAS A. GIONIS. M.D., 6693 Golfcrest Dr. San Diego, CA 92119 California Physician's and Surgeon's Certificate No. C 39248 Respondent.	Case No. D-4802 ACCUSATION

COMES NOW Complainant Kenneth J. Wagstaff, who as cause for disciplinary action against the above-named Respondent, charges and alleges as follows:

1. Complainant is the Executive Director of the Medical Board of California, Department of Consumer Affairs, State of California (hereafter the "Board"), and makes and files this Accusation solely in his official capacity.

2. *License Status.* On or about June 16, 1980, THOMAS A. GIONIS, M.D., hereafter referred to as "Respondent," was issued Physician's and Surgeon's Certificate No. C 39248 by the Board, authorizing him to practice medicine in the State of California. At all times relevant said Certificate was, and now is, in full force and effect. Respondent

was authorized to supervise physician assistants, but his supervisor license No. SA 14504 is in delinquent status, having expired on May 31, 1986.

3. *Jurisdiction*. Section 2220 of California's Business and Professions Code [hereafter, "the Code"] provides, in pertinent part, that the Division of Medical Quality may take action against all persons guilty of violating any of the provisions of the Medical Practice Act (Chapter 5 of Division 2 of the Code). Section 2227 of the Code provides that a licensee whose matter has been heard by the Division of Medical Quality, by a medical quality review committee or a panel of such committee, or by an administrative law judge, or whose default has been entered, and who is found guilty may: (1) have his certificate revoked upon order of the division; (2) have his right to practice suspended for a period not to exceed one year upon order of the division or a committee or panel thereof; (3) be placed on probation upon order of the division or a committee or panel thereof; (4) be publicly reprimanded by the division or a committee or panel thereof; and/or (5) have such other action taken in relation to discipline as the division, a committee or panel thereof, or an administrative law judge may deem proper.

4. *Summary of Allegations*. This Accusation is brought, and Respondent is subject to disciplinary action, pursuant to the following sections of the Medical Practice Act: (1) Section 726 (sexual abuse or misconduct with a patient) (2) section 2236 (conviction of any offense substantially related to the qualifications, functions, or duties of a physician).

ALLEGATIONS

Facts

5. *Victims A[redacted] W. and R[redacted] L.*

6. During the period August 1988 and October 1988 entered into a conspiracy with J[redacted] L[redacted] H[redacted] and O[redacted] D[redacted] G[redacted] for the purposes of carrying out an assault upon A.W. and R.L. Respondent paid in August 1988 $26,000 and in September 1988 $17,000 to O[redacted] D[redacted] G[redacted] for the purpose of carrying out the assault.

In September 1988, O[redacted] D[redacted] G[redacted] held a meeting with H[redacted] and J[redacted] K[redacted] B[redacted] for purposes of carrying out the assault.

7. On October 3, 1988, at the direction of Respondent, J[redacted] L[redacted] H[redacted] and J[redacted] K[redacted] B[redacted] entered the residence of A.W. while armed with handguns. They put a handgun at R.L.'s head, forced him to the pavement, smashed his head on the pavement and with a sharp cutting instrument, severed R.L.'s Achilles' tendons.

8. J[redacted] L[redacted] H[redacted] and J[redacted] K[redacted] B[redacted] pointed another handgun at A.W., then handcuffed A.W.'s hands and feet and smashed her head against the pavement.

9. O[redacted] D[redacted] G[redacted] then reported to Respondent the assault had been carried out.

10. These assaults and false imprisonments were carried out for the purpose of obstruction of justice to prevent and dissuade A.W. from attending and giving testimony at a trial or proceeding authorized by law, *to wit:* hearing(s) concerned with the custody of the children of A.W. and Respondent.

11. On or about May 11, 1992, Respondent was convicted in Orange County Superior Court of four public offenses, as follows: (a) Penal Code section 182.1 (Conspiracy to commit assault, a felony); (b) Penal Code section 182.1 (Conspiracy to commit residential trespass, a felony); (c) Penal Code section 245 (a)(1) (Assault with a deadly weapon, a felony); (d) Penal Code section 245 (a)(2) (Assault with a firearm, a felony).

12. *Patient R.J.*

13. R.J. became the patient of Respondent at Respondent's office in Upland, California, in or about 1987–1988 for treatment of the effects of an automobile accident. R.J. at the time was at the time approximately 19 years of age.

14. R.J. would normally see Respondent on a biweekly basis for follow-up office visits. On several occasions during these visits, Respondent stated that R.J. was

very pretty and ask why a pretty girl like her was not married yet. On or about May 16, 1986, Respondent carried out a physical examination of R.J. Respondent asked R.J. to disrobe completely from the waist up, something he had never previously requested. He then left the examining room while R.J. undressed. Respondent returned to the examining room with a bottle of oil. Using the oil, Respondent leaned against the examining table and gave a back and shoulder massage to R.J. Then Respondent stood beside her, put his hands on her shoulder and continued to massage her. R.J. then felt what she believed to be his erect penis against the small of her back. He continued to rub his body against her back. She could feel the skin of his penis running against her. Both of his hands were on her shoulders massaging and pulling himself close to her. She then felt him ejaculate on her back.

15. She told him she "had enough of this," got up and put on her clothes. Following a short conversation in his office, she left for home.

16. Respondent called R.J. at her apartment, to ask if he could come over to visit her. R.J. refused the request.

Unprofessional Conduct

17. Business and Professions Code section 2234 provides that the Division of Medical Quality shall take action against any licensee who is guilty of unprofessional conduct.

Sexual Misconduct

18. Business and Professions Code section 726 provides the commission of any act of sexual abuse or misconduct with a patient in the course of one's practice constitutes unprofessional conduct and grounds for disciplinary action against a physician.[1/]

19. Respondent is subject to disciplinary action pursuant to sections 726 and 2234, subdivision (a), because the matters set forth at paragraphs 14–16, show that he has

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1. Section 726 reads as follows: "The commission of any act of sexual abuse, misconduct, or relations with a patient, . . . which is substantially related to the . . . functions or duties of the occupation for which a license was issued constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under [division 2 of the Code] . . . ." Respondent is licensed under Division 2.

committed an act of sexual abuse and misconduct against a patient in the course of his practice. Particularly, and without limitation, the following aspects of Respondent's actions constitute sexual abuse and/or sexual misconduct:

a. Causing a patient to partially disrobe without medical indication therefor.

b. Carrying out a massage for purposes of sexual gratification.

c. Placing his penis against the body of a patient.

d. Rubbing his penis against her body for purposes of gratification and ejaculation.

e. Using his physician–patient relationship in order to obtain a sexual relationship.

Conviction of an Offense

20. Business and Professions Code section 2236 defines as unprofessional conduct "[t]he conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon . . . ."

21. Respondent is also to disciplinary action for unprofessional conduct pursuant to section 2234, subdivision (a), and section 2236 in that the matters alleged above at paragraph 11 show that he was convicted of offenses, as follows:

a. Penal Code section 182.1 (Conspiracy to commit assault, a felony);

b. Penal Code section 182.1 (Conspiracy to commit residential trespass, a felony);

c. Penal Code section 245 (a)(1) (Assault with a deadly weapon, a felony);

d. Penal Code section 245 (a)(2) (Assault with a firearm, a felony).

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WHEREFORE, Complainant requests that a hearing be held on the matters alleged herein, and that following said hearing, the Board issue a decision:

1. Revoking or suspending Physician's and Surgeon's Certificate No. C 39248 issued to respondent THOMAS A. GIONIS, M.D.; and/or

2. Taking such other and further action as the Board deems appropriate.

DATED: June 26, 1992

for KENNETH J. WAGSTAFF
Executive Director
Medical Board of California

Complainant

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1633, Jun 25, '92 (Thu)
1530, Jun 26, '92 (Fri)