

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

In the Matter of the Petition for  
Reinstatement of Revoked Certificate of:

ZACHARY COSGROVE,

Petitioner.

Case No. 8002014009262

OAH No. 2015070112

**DECISION AFTER NON-ADOPTION**

Howard W. Cohen, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on August 31, 2015, in Los Angeles, California.

Edward O. Lear, Attorney at Law, represented petitioner Zachary Cosgrove.

Robert McKim Bell, Supervising Deputy Attorney General, appeared under Government Code section 11522.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 31, 2015.

A Proposed Decision was issued on September 30, 2015. On November 6, 2015, Panel A of the Board issued an Order of Non-Adoption of Proposed Decision. Oral argument on the matter was heard on January 21, 2016. Panel A, having read and considered the entire record, including the transcripts and the exhibits, and having considered the written and oral arguments presented by petitioner and the Supervising Deputy Attorney General, hereby makes and enters this decision on the matter.

**FACTUAL FINDINGS**

1. Petitioner filed a Petition for Penalty Relief, Reinstatement of Revoked/Suspended Certificate, on October 1, 2014 (2014 Petition).
2. The Medical Board (Board) issued Physician and Surgeon's Certificate Number A 70710 to petitioner on January 21, 2000. Petitioner obtained his medical degree from Ross University School of Medicine in the Commonwealth of Dominica, West Indies, in 1997. After

completing his residency in family practice at Kern County Medical Center in 2001 and being board certified, petitioner worked at a community health clinic in Bakersfield, California.

3. On April 23, 2007, the Board's Executive Director filed an Accusation against petitioner. The Accusation alleged that, beginning in July 2002, the year after petitioner began his practice at the clinic, through March 2006, petitioner had sexual relationships with three of his patients. When the first patient threatened to report petitioner to his employer, he physically assaulted her. He physically assaulted the second patient as well. When the third patient reported petitioner to his clinic, petitioner threatened her. He was convicted of a misdemeanor violation of Penal Code section 136.1, subdivision (a)(1) (dissuading a witness); the conviction has been expunged. The Accusation included causes for discipline involving petitioner's sexual misconduct with or abuse of the three patients, unprofessional conduct/gross negligence, repeated negligent acts, unprofessional conduct/incompetence, conviction of a substantially related crime, and a statutory drug violation.<sup>1</sup>

4. The Board revoked petitioner's certificate by a Decision, effective February 19, 2008, adopting petitioner's Stipulation for Surrender of License (Stipulation). The Stipulation provides that "Respondent agrees that if he ever applies for re-licensure or petitions for reinstatement as a physician and surgeon in California all of the charges and allegations contained in Accusation number 08-2006-175288 shall be deemed true, correct, and fully admitted by respondent for purposes of that proceeding or any other licensing proceeding involving Respondent in the state of California." (Ex. 3.)

5. On March 30, 2011, petitioner signed a Petition for Penalty Relief, Reinstatement of Revoked Certificate (2011 Petition), which he filed with the Board. Effective August 17, 2012, the Board adopted as the Decision and Order of the Board a Proposed Decision issued by Administrative Law Judge Ruth S. Astle on July 5, 2012, denying the 2011 Petition. The Decision and Order concludes that "petitioner has not fully demonstrated good cause to grant his petition for penalty relief – reinstatement of revoked certificate under Business and Professions Code section 2307 and Government Code section 11522, in that he has not fully demonstrated that he is safe to practice medicine." (Ex. 4.) The Decision and Order recites the following findings:

3. Petitioner moved from California to Texas about the same time as his certificate was surrendered. He has been employed in various capacities including as a sales consultant for Advent Resource Management. This job was paid by commission only and petitioner was not successful. However, his employer testified at the hearing that petitioner was a good employee and that he trusts him.

4. Petitioner has been participating in individual counseling since August 2010. His counselor wrote a letter dated January 31, 2011, stating that petitioner has been honest about his problems in

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<sup>1</sup> When petitioner was arrested for his actions involving his third patient, investigators found a marijuana pipe in his home.

his sessions with her, including his problems with substance abuse. Petitioner does not submit a report from a psychiatrist stating whether or not he is safe to practice medicine.

5. It has been over four years since petitioner surrendered his certificate. He has attended numerous continuing education programs. He also attended a Profession Renewal in Medicine through Ethics Course. He successfully completed this course November 21, 2010.

6. Petitioner expresses remorse for his actions that resulted in the loss of his certificate. However, he has not presented any evidence that he has undergone a psychiatric evaluation that would address his substance abuse in the past. He has not undergone an evaluation of whether or not he is competent to practice or safe to practice.

7. Petitioner presented many letters of recommendation, including one from Carlos Alvarez, M.D., Medical Director of Valley Medical Group of Kern Internal Medicine; and a number of letters from community members, including two from church pastors. They are aware of the circumstances of petitioner's loss of his medical certificate, but short on details. They support petitioner's reinstatement.

8. Petitioner's wife testified at the hearing. She stated that she and petitioner were going through a bad time in their marriage. They were living together, but separated. She got involved with drugs and went through rehabilitation to save their family. She believes things have changed and wants her husband's certificate to be reinstated.

Petitioner's friend and colleague Michael Komin, M.D. testified at the hearing. He is willing to open a clinic for petitioner and supervise him. He has seen a change in petitioner. He finds petitioner to be more humble.

Petitioner's father-in-law testified at the hearing. He is a physician in Kansas. Petitioner shadowed him in his practice. He has noticed a positive change in petitioner and believes petitioner can be a caring physician.

A close family friend testified at the hearing. Petitioner worked on and off for his company from 2007 to 2010. Petitioner was a good employee.

Another friend of the family testified at the hearing. He knows petitioner through petitioner's wife. Their families socialize.

Petitioner is easy to be around. He is a good guy and a kind and gentle person.

Petitioner's 18 year old son testified at the hearing. His father is teaching him the difference between right and wrong.

9. Petitioner wants to reinstate his certificate so that he can practice medicine in California. He is willing to come to California if he is reinstated.

10. Petitioner has made significant and sincere efforts toward rehabilitation. However, there are some deficiencies that must be addressed before reinstatement. Petitioner needs to be evaluated concerning his alcohol and drug use, his mental and emotional health, and his present competence to practice medicine. Without further information, it would not be in the public interest to reinstate petitioner's certificate at this time. (Ex. 4.)

6. In his 2014 Petition, petitioner disclosed that he suffered from a crystal methamphetamine addiction during the period in question. Petitioner testified that, at the hearing on the 2011 Petition, he did not disclose to the Board that he was addicted to crystal methamphetamine when he committed the acts for which his certificate was revoked, because he was ashamed to reveal it. In his 2014 Petition, petitioner writes that "[a]lthough I believe it explains my inappropriate behavior during those years, nobody ever knew of my amphetamine use during those days and I was never charged with any violations with regard to amphetamine use."

7. Petitioner testified that his methamphetamine use caused him to engage in the misconduct for which his physician's and surgeon's certificate was revoked, and that because he stopped abusing methamphetamine he no longer has boundary issues and will no longer pose a threat to patients. Petitioner maintains that when he committed his offenses he was in a "self-focused state of amphetamine disinhibition and hypersexuality" (Ex. 8, Tab A, p. 2), and that he "has addressed the root problem of his misconduct which was his amphetamine abuse." (Ex. C.)

8. In support of his Petition for Reinstatement, petitioner offered a letter from psychiatrist Christopher B. Ticknor, M.D., dated September 15, 2014. Dr. Ticknor signed the letter under penalty of perjury, but did not appear at the hearing. In the letter, Dr. Ticknor wrote that he has seen petitioner once per month since conducting an initial two-hour evaluation of petitioner on April 15, 2013.<sup>2</sup> Petitioner testified that he visits Dr. Ticknor for 15 to 30 minutes, once per month.

9. In his letter, Dr. Ticknor wrote that he examined, among other things, records of petitioner's drug test results, which were negative, and a summary of psychological care provided to petitioner by Sharon Benner, M.Ed., LPC, a psychotherapist in San Antonio, Texas, who

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<sup>2</sup> This letter was admitted under Government Code section 11513, subdivision (d), relating to hearsay evidence. It may be used to supplement or explain other admissible evidence; it may not be used, by itself, to support a finding of fact where, as here, an objection was timely made.

treated petitioner from August 2010 through 2011. Dr. Ticknor wrote that the records reflect that petitioner has complied with Benner's treatment recommendations. He concluded that petitioner is not a danger to the public and should be licensed on the condition that he continue to participate in a monitoring program to ensure that he remains alcohol-and drug-free. Dr. Ticknor wrote that, based on his initial review of petitioner, the subsequent monthly visits, and his review of the records, petitioner "is a successfully recovering former addict. . . . There is no reason to believe at this time that drug dependency is an active problem" for petitioner. (Ex. 8, Tab C.)

10. As to the issue of whether petitioner is safe to return to practice, Dr. Ticknor opined that petitioner "has become fully aware of the necessity of observing professional boundaries," based on petitioner's attendance at ethics programs and conferences, letters of support, and successful participation in counseling therapy about his boundary violations. (Ex. 8, Tab C.) Dr. Ticknor further wrote that petitioner "understands the relationship between his drug abuse history and his taking advantage of several patients in his medical care," he also wrote that petitioner "understands that independently and together, under no circumstances can he relapse in either area." (Ex. 8, Tab C).

11. Testifying for petitioner were his friend, Michael Komin, M.D.; his brother, Daniel Cosgrove, M.D., and his father-in-law, Roger Evans, M.D.. Petitioner's friend, Kelly Scherbenske, CRNA, also testified. These witnesses all testified that they were informed of petitioner's extreme boundary violations and drug use leading to the surrender of his medical license, but they see no evidence of similar behavior now. Dr. Komin, Dr. Cosgrove, and Dr. Evans testified that petitioner has spent time shadowing them in their practices. All three of them testified that petitioner has gone through a positive transformation over the years since he surrendered his license, and they have no hesitation in supporting his reinstatement. Significantly, both Dr. Komin and Dr. Cosgrove practice medicine in California and testified that they have invited petitioner to join their practices upon reinstatement of his license.

12. Petitioner submitted numerous reference letters attesting to his good character, community leadership, volunteerism, and sincere remorse for his past violations. Other letters and documentary evidence establish petitioner's completion of medical ethics courses, courses on professional boundaries, and other continuing medical education courses. Evidence was presented showing compliance with drug testing and negative test results, and petitioner's sustained and active participation in Narcotics Anonymous. The evidence petitioner has submitted to demonstrate that he has been clean and sober since December 7, 2006, over nine years ago, is persuasive.

13. Petitioner testified that he is remorseful for his severe misconduct and breach of patient trust, and is committed to not failing again if he ever regains the opportunity to practice medicine. The Board found his testimony and evidence regarding rehabilitation persuasive.

## LEGAL CONCLUSIONS

1. A person whose certificate has been revoked may petition the Board for reinstatement. "The petition shall state any facts as may be required by the board. The petition shall be accompanied by at least two verified recommendations from physicians and surgeons certificated in any state who have personal knowledge of the activities of the petitioner since the disciplinary penalty was imposed." (Bus. & Prof. Code, § 2307, subd. (c).)

2. Pursuant to Business and Professions Code section 2307, a Petition for Reinstatement shall be evaluated by considering: (a) all activities of the petitioner since the disciplinary action was taken; (b) the offense for which the petitioner was disciplined; (c) a petitioner's activities during the time the certificate was in good standing; (d) the petitioner's rehabilitative efforts; (e) his reputation for truth; and (f) his professional ability.

3. A further list of rehabilitation criteria for someone seeking reinstatement of a license is found in the California Code of Regulations, Title 16, section 1360.2, and 1360.1 which provides that the Board shall evaluate evidence of rehabilitation submitted by the petitioner considering the following criteria in sum: (a) the nature and severity of the acts or crimes; (b) evidence of any subsequent acts or crimes which would be a basis for denial of licensure; (c) the time that has elapsed since commission of the acts or crimes; (d) the total criminal record, compliance with terms of probation, and evidence of expungement under Penal Code section 1203.4; and (e) evidence of rehabilitation.

4. In a proceeding to reinstate a revoked certificate, the burden rests on the petitioner to prove that he has rehabilitated himself and that he is entitled to have his certificate restored. (*Flanzer v. Bd. of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.) A person seeking reinstatement must present strong proof of rehabilitation and a sufficient showing of rehabilitation to overcome the Board's former adverse determination. (*Hippard v. State Bar of California* (1989) 49 Cal.3d 1084, 1092-1093.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Id.*; *Housman v. Bd. of Medical Examiners* (1948) 84 Cal.App.2d 308.)

5. Protection of the public "shall be the highest priority" for the Board and administrative law judges in exercising their disciplinary authority. (Bus. & Prof. Code, § 2229.) The Board "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." (Bus. & Prof. Code, § 2229, subd. (b).) "Where rehabilitation and protection are inconsistent, protection shall be paramount." (Bus. & Prof. Code, § 2229, subd. (c).)

6. Petitioner has demonstrated sustained and substantial accomplishments in the various criteria used as indicators for reinstatement: acceptance of responsibility; showing of remorse; rehabilitation from substance abuse; a change in attitude; strong support from family, colleagues, and treating professionals; documentation of continuing medical education; volunteer work; random urine testing; completion of professional boundaries and ethics courses, expungement of his criminal convictions, and no further evidence of subsequent acts or crimes which would be a basis for the denial of his license.

7. By reason of Factual Findings 7 through 13, and with due consideration for the public safety, cause was established pursuant to Business and Professions Code section 2307 to reinstate petitioner's physician's and surgeon's certificate, provided that reinstatement is accompanied by a seven-year period of probation with terms and conditions, including requiring petitioner to undergo a psychiatric evaluation and a clinical training program as conditions precedent to returning to the practice of medicine. The psychiatric evaluation is necessary as a condition precedent to verify that petitioner is mentally fit to practice medicine safely. The clinical training program is necessary as a condition precedent to ensure that petitioner is clinically competent in light of the many years that he has been out of practice. The additional

terms and conditions of probation imposed upon petitioner to ensure public protection include psychotherapy; professionalism program (ethics); professional boundaries program; third party chaperone; controlled substances – abstain from use; alcohol – abstain from use; biological fluid testing; solo practice prohibition; monitoring – practice; and all standard terms and conditions.

## ORDER

The petition of Zachary Cosgrove for reinstatement of his physician's and surgeon's certificate is granted.

Petitioner's Physician's and Surgeon's Certificate No. A70710 is hereby reinstated, however, the certificate shall be immediately revoked, the revocation stayed, and petitioner's certificate placed on probation for seven (7) years from the effective date of this Decision on the following terms and conditions:

### **1. Clinical Training Program**

Within 60 calendar days of the effective date of this Decision, petitioner shall enroll in a clinical training or educational program equivalent to the Physician Assessment and Clinical Education Program (PACE) offered at the University of California - San Diego School of Medicine ("Program"). Petitioner shall successfully complete the Program not later than six (6) months after petitioner's initial enrollment unless the Board or its designee agrees in writing to an extension of that time.

The Program shall consist of a Comprehensive Assessment program comprised of a two-day assessment of petitioner's physical and mental health; basic clinical and communication skills common to all clinicians; and medical knowledge, skill and judgment pertaining to petitioner's area of practice in which petitioner was alleged to be deficient, and at minimum, a 40 hour program of clinical education in the area of practice in which petitioner was alleged to be deficient and which takes into account data obtained from the assessment, Decision(s), Accusation(s), and any other information that the Board or its designee deems relevant. Petitioner shall pay all expenses associated with the clinical training program.

Based on petitioner's performance and test results in the assessment and clinical education, the Program will advise the Board or its designee of its recommendation(s) for the scope and length of any additional educational or clinical training, treatment for any medical condition, treatment for any psychological condition, or anything else affecting petitioner's practice of medicine. Petitioner shall comply with Program recommendations.

At the completion of any additional educational or clinical training, petitioner shall submit to and pass an examination. Determination as to whether petitioner successfully completed the examination or successfully completed the program is solely within the program's jurisdiction.

**Petitioner shall not practice medicine until petitioner has successfully completed the Program and has been so notified by the Board or its designee in writing, except that**

petitioner may practice in a clinical training program approved by the Board or its designee. Petitioner's practice of medicine shall be restricted only to that which is required by the approved training program.

## **2. Psychiatric Evaluation**

Within 30 calendar days of the effective date of this Decision, and on whatever periodic basis thereafter may be required by the Board or its designee, Petitioner shall undergo and complete a psychiatric evaluation (and psychological testing, if deemed necessary) by a Board-appointed board certified psychiatrist, who shall consider any information provided by the Board or designee and any other information the psychiatrist deems relevant, and shall furnish a written evaluation report to the Board or its designee. Psychiatric evaluations conducted prior to the effective date of the Decision shall not be accepted towards the fulfillment of this requirement. Petitioner shall pay the cost of all psychiatric evaluations and psychological testing.

Petitioner shall comply with all restrictions or conditions recommended by the evaluating psychiatrist within 15 calendar days after being notified by the Board or its designee.

**Petitioner shall not engage in the practice of medicine until notified by the Board or its designee that petitioner is mentally fit to practice medicine safely.** The period of time that petitioner is not practicing medicine shall not be counted toward completion of the term of probation.

## **3. Psychotherapy**

Within 60 calendar days of the effective date of this Decision, petitioner shall submit to the Board or its designee for prior approval the name and qualifications of a California-licensed board certified psychiatrist or a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders. Upon approval, petitioner shall undergo and continue psychotherapy treatment, including any modifications to the frequency of psychotherapy, until the Board or its designee deems that no further psychotherapy is necessary.

The psychotherapist shall consider any information provided by the Board or its designee and any other information the psychotherapist deems relevant and shall furnish a written evaluation report to the Board or its designee. Petitioner shall cooperate in providing the psychotherapist any information and documents that the psychotherapist may deem pertinent.

Petitioner shall have the treating psychotherapist submit quarterly status reports to the Board or its designee. The Board or its designee may require petitioner to undergo psychiatric evaluations by a Board-appointed board certified psychiatrist. If, prior to the completion of probation, petitioner is found to be mentally unfit to resume the practice of medicine without restrictions, the Board shall retain continuing jurisdiction over petitioner's license and the period of probation shall be extended until the Board determines that petitioner is mentally fit to resume the practice of medicine without restrictions.

Petitioner shall pay the cost of all psychotherapy and psychiatric evaluations.

#### **4. Professionalism Program (Ethics Course)**

Within 60 calendar days of the effective date of this Decision, petitioner shall enroll in a professionalism program, that meets the requirements of Title 16, California Code of Regulations (CCR) section 1358. Petitioner shall participate in and successfully complete that program. Petitioner shall provide any information and documents that the program may deem pertinent. Petitioner shall successfully complete the classroom component of the program not later than six (6) months after petitioner's initial enrollment, and the longitudinal component of the program not later than the time specified by the program, but no later than one (1) year after attending the classroom component. The professionalism program shall be at petitioner's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

A professionalism program taken after the acts that gave rise to the charges in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board or its designee, be accepted towards the fulfillment of this condition if the program would have been approved by the Board or its designee had the program been taken after the effective date of this Decision.

Petitioner shall submit a certification of successful completion to the Board or its designee not later than 15 calendar days after successfully completing the program or not later than 15 calendar days after the effective date of the Decision, whichever is later.

#### **5. Professional Boundaries Program**

Within 60 calendar days from the effective date of this Decision, petitioner shall enroll in a professional boundaries program equivalent to the Professional Boundaries Program offered by the Physician Assessment and Clinical Education Program at the University of California, San Diego School of Medicine ("Program"). Petitioner, at the Program's discretion, shall undergo and complete the Program's assessment of petitioner's competency, mental health and/or neuropsychological performance, and at minimum, a 24 hour program of interactive education and training in the area of boundaries, which takes into account data obtained from the assessment and from the Decision(s), Accusation(s) and any other information that the Board or its designee deems relevant. The Program shall evaluate petitioner at the end of the training and the Program shall provide any data from the assessment and training as well as the results of the evaluation to the Board or its designee.

Failure to complete the entire Program not later than six (6) months after petitioner's initial enrollment shall constitute a violation of probation unless the Board or its designee agrees in writing to a later time for completion. Based on petitioner's performance in and evaluations from the assessment, education, and training, the Program shall advise the Board or its designee of its recommendation(s) for additional education, training, psychotherapy and other measures necessary to ensure that petitioner can practice medicine safely. Petitioner shall comply with Program recommendations. At the completion of the Program, petitioner shall submit to a final evaluation. The Program shall provide the results of the evaluation to the Board or its designee. The professional boundaries program shall be at petitioner's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

The Program has the authority to determine whether or not Petitioner successfully completed the Program.

A professional boundaries course taken after the acts that gave rise to the charges in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board or its designee, be accepted towards the fulfillment of this condition if the course would have been approved by the Board or its designee had the course been taken after the effective date of this Decision.

## **6. Third Party Chaperone**

During probation, petitioner shall have a third party chaperone present while consulting, examining or treating female patients. Petitioner shall, within 30 calendar days of the effective date of the Decision, submit to the Board or its designee for prior approval name(s) of persons who will act as the third party chaperone.

If petitioner fails to obtain approval of a third party chaperone within 60 calendar days of the effective date of this Decision, petitioner shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Petitioner shall cease the practice of medicine until a chaperone is approved to provide monitoring responsibility.

Each third party chaperone shall sign (in ink or electronically) and date each patient medical record at the time the chaperone's services are provided. Each third party chaperone shall read the Decision(s) and the Accusation(s), and fully understand the role of the third party chaperone.

Petitioner shall maintain a log of all patients seen for whom a third party chaperone is required. The log shall contain the: 1) patient initials, address and telephone number; 2) medical record number; and 3) date of service. Petitioner shall keep this log in a separate file or ledger, in chronological order, shall make the log available for immediate inspection and copying on the premises at all times during business hours by the Board or its designee, and shall retain the log for the entire term of probation.

Petitioner is prohibited from terminating employment of a Board-approved third party chaperone solely because that person provided information as required to the Board or its designee.

If the third party chaperone resigns or is no longer available, petitioner shall, within 5 calendar days of such resignation or unavailability, submit to the Board or its designee, for prior approval, the name of the person(s) who will act as the third party chaperone. If petitioner fails to obtain approval of a replacement chaperone within 60 calendar days of the resignation or unavailability of the chaperone, petitioner shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Petitioner shall cease the practice of medicine until a replacement chaperone is approved and assumes monitoring responsibility.

Petitioner shall provide written notification to petitioner's patients that a third party chaperone shall be present during all consultations, examination, or treatment with female patients. Petitioner shall maintain in the patient's file a copy of the written notification, shall make the notification available for immediate inspection and copying on the premises at all times during business hours by the Board or its designee, and shall retain the notification for the entire term of probation.

#### **7. Controlled Substances - Abstain From Use**

Petitioner shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act, dangerous drugs as defined by Business and Professions Code section 4022, and any drugs requiring a prescription. This prohibition does not apply to medications lawfully prescribed to petitioner by another practitioner for a bona fide illness or condition.

Within 15 calendar days of receiving any lawfully prescribed medications, petitioner shall notify the Board or its designee of the: issuing practitioner's name, address, and telephone number; medication name, strength, and quantity; and issuing pharmacy name, address, and telephone number.

If petitioner has a confirmed positive biological fluid test for any substance (whether or not legally prescribed) and has not reported the use to the Board or its designee, petitioner shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The petitioner shall not resume the practice of medicine until final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 days of the notification to cease practice. If the petitioner requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the petitioner with a hearing within 30 days of the request, unless the petitioner stipulates to a later hearing. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within 15 days of the issuance of the notification to cease practice or does not provide petitioner with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

#### **8. Alcohol - Abstain From Use**

Petitioner shall abstain completely from the use of products or beverages containing alcohol.

If petitioner has a confirmed positive biological fluid test for alcohol, petitioner shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The petitioner shall not resume the practice of medicine until final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 days of the notification to cease practice. If the

petitioner requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the petitioner with a hearing within 30 days of the request, unless the petitioner stipulates to a later hearing. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within 15 days of the issuance of the notification to cease practice or does not provide petitioner with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

#### **9. Biological Fluid Testing**

Petitioner shall immediately submit to biological fluid testing, at petitioner's expense, upon request of the Board or its designee. "Biological fluid testing" may include, but is not limited to, urine, blood, breathalyzer, hair follicle testing, or similar drug screening approved by the Board or its designee. Prior to practicing medicine, petitioner shall contract with a laboratory or service approved in advance by the Board or its designee that will conduct random, unannounced, observed, biological fluid testing. The contract shall require results of the tests to be transmitted by the laboratory or service directly to the Board or its designee within four hours of the results becoming available. Petitioner shall maintain this laboratory or service contract during the period of probation.

A certified copy of any laboratory test result may be received in evidence in any proceedings between the Board and petitioner.

If petitioner fails to cooperate in a random biological fluid testing program within the specified time frame, petitioner shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The petitioner shall not resume the practice of medicine until final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 days of the notification to cease practice. If the petitioner requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the petitioner with a hearing within 30 days of the request, unless the petitioner stipulates to a later hearing. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within 15 days of the issuance of the notification to cease practice or does not provide petitioner with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

#### **10. Solo Practice Prohibition**

Petitioner is prohibited from engaging in the solo practice of medicine. Prohibited solo practice includes, but is not limited to, a practice where: 1) Petitioner merely shares office space with another physician but is not affiliated for purposes of providing patient care, or 2) Petitioner is the sole physician practitioner at that location.

If petitioner fails to establish a practice with another physician or secure employment in an appropriate practice setting within 60 calendar days of the effective date of this Decision, petitioner shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. The petitioner shall not resume practice until an appropriate practice setting is established.

If, during the course of the probation, the petitioner's practice setting changes and the petitioner is no longer practicing in a setting in compliance with this Decision, the petitioner shall notify the Board or its designee within 5 calendar days of the practice setting change. If petitioner fails to establish a practice with another physician or secure employment in an appropriate practice setting within 60 calendar days of the practice setting change, petitioner shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. The petitioner shall not resume practice until an appropriate practice setting is established.

#### **11. Monitoring -Practice**

Within 30 calendar days of the effective date of this Decision, petitioner shall submit to the Board or its designee for prior approval as a practice monitor, the name and qualifications of one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified. A monitor shall have no prior or current business or personal relationship with petitioner, or other relationship that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the Board, including but not limited to any form of bartering, shall be in petitioner's field of practice, and must agree to serve as petitioner's monitor. Petitioner shall pay all monitoring costs.

The Board or its designee shall provide the approved monitor with copies of the Decision(s) and Accusation(s), and a proposed monitoring plan. Within 15 calendar days of receipt of the Decision(s), Accusation(s), and proposed monitoring plan, the monitor shall submit a signed statement that the monitor has read the Decision(s) and Accusation(s), fully understands the role of a monitor, and agrees or disagrees with the proposed monitoring plan. If the monitor disagrees with the proposed monitoring plan, the monitor shall submit a revised monitoring plan with the signed statement for approval by the Board or its designee.

Within 60 calendar days of the effective date of this Decision, and continuing throughout probation, petitioner's practice shall be monitored by the approved monitor. Petitioner shall make all records available for immediate inspection and copying on the premises by the monitor at all times during business hours and shall retain the records for the entire term of probation. If petitioner fails to obtain approval of a monitor within 60 calendar days of the effective date of this Decision, petitioner shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Petitioner shall cease the practice of medicine until a monitor is approved to provide monitoring responsibility.

The monitor shall submit a quarterly written report to the Board or its designee which includes an evaluation of petitioner's performance, indicating whether petitioner's practices are

within the standards of practice of medicine, and whether petitioner is practicing medicine safely. It shall be the sole responsibility of petitioner to ensure that the monitor submits the quarterly written reports to the Board or its designee within 10 calendar days after the end of the preceding quarter.

If the monitor resigns or is no longer available, petitioner shall, within 5 calendar days of such resignation or unavailability, submit to the Board or its designee, for prior approval, the name and qualifications of a replacement monitor who will be assuming that responsibility within 15 calendar days. If petitioner fails to obtain approval of a replacement monitor within 60 days of the resignation or unavailability of the monitor, petitioner shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Petitioner shall cease the practice of medicine until a replacement monitor is approved and assumes monitoring responsibility.

In lieu of a monitor, petitioner may participate in a professional enhancement program equivalent to the one offered by the Physician Assessment and Clinical Education Program at the University of California, San Diego School of Medicine, that includes, at minimum, quarterly chart review, semi-annual practice assessment, and semi-annual review of professional growth and education. Petitioner shall participate in the professional enhancement program at petitioner's expense during the term of probation.

## **12. Notification**

Within seven (7) days of the effective date of this Decision, the petitioner shall provide a true copy of this Decision and Accusation to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to petitioner, at any other facility where petitioner engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to petitioner. Petitioner shall submit proof of compliance to the Board or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

## **13. Supervision of Physician Assistants**

During probation, petitioner is prohibited from supervising physician assistants.

## **14. Obey All Laws**

Petitioner 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.

## **15. Quarterly Declarations**

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

Petitioner shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

#### **16. General Probation Requirements**

##### Compliance with Probation Unit

Petitioner shall comply with the Board's probation unit and all terms and conditions of this Decision.

##### Address Changes

Petitioner shall, at all times, keep the Board informed of Petitioner's business and residence addresses, email address (if available), and telephone number. Changes of such addresses shall be immediately communicated in writing to the Board or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b).

##### Place of Practice

Petitioner shall not engage in the practice of medicine in petitioner's or patient's place of residence, unless the patient resides in a skilled nursing facility or other similar licensed facility.

##### License Renewal

Petitioner shall maintain a current and renewed California physician's and surgeon's license.

##### Travel or Residence Outside California

Petitioner shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

In the event petitioner should leave the State of California to reside or to practice petitioner shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return.

#### **17. Interview with the Board or its Designee**

Petitioner shall be available in person upon request for interviews either at petitioner's place of business or at the probation unit office, with or without prior notice throughout the term of probation.

#### **18. Non-practice While on Probation**

Petitioner shall notify the Board or its designee in writing within 15 calendar days of any periods of non-practice lasting more than 30 calendar days and within 15 calendar days of petitioner's return to practice. Non-practice is defined as any period of time petitioner is not practicing medicine in California as defined in Business and Professions Code sections 2051 and 2052 for at least 40 hours in a calendar month in direct patient care, clinical activity or teaching, or other activity as approved by the Board. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice. Practicing medicine in another state of the United States or Federal jurisdiction while on probation with the medical licensing authority of that state or jurisdiction shall not be considered non-practice. A Board-ordered suspension of practice shall not be considered as a period of non-practice.

In the event petitioner's period of non-practice while on probation exceeds 18 calendar months, petitioner shall successfully complete a clinical training program that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model Disciplinary Orders and Disciplinary Guidelines" prior to resuming the practice of medicine.

Petitioner's period of non-practice while on probation shall not exceed two (2) years.

Periods of non-practice will not apply to the reduction of the probationary term.

Periods of non-practice will relieve petitioner of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; and General Probation Requirements.

#### **19. Completion of Probation**

Petitioner shall comply with all financial obligations (e.g., restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, petitioner's certificate shall be fully restored.

#### **20. Violation of Probation**

Failure to fully comply with any term or condition of probation is a violation of probation. If petitioner violates probation in any respect, the Board, after giving petitioner 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, or an Interim Suspension Order is filed against petitioner during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

#### **21. License Surrender**

Following the effective date of this Decision, if petitioner ceases practicing due to retirement or health reasons or is otherwise unable to satisfy the terms and conditions of probation, petitioner may request to surrender his or her license. The Board reserves the right to evaluate petitioner's request and to exercise its discretion in determining whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the

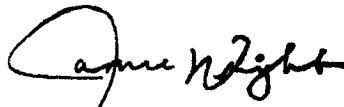
circumstances. Upon formal acceptance of the surrender, petitioner shall within 15 calendar days deliver petitioner's wallet and wall certificate to the Board or its designee and petitioner shall no longer practice medicine. Petitioner will no longer be subject to the terms and conditions of probation. If petitioner re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

**22. Probation Monitoring Costs**

Petitioner shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Board or its designee no later than January 31 of each calendar year.

This Decision shall become effective at 5:00 pm on March 11, 2016 .

IT IS SO ORDERED February 10, 2016 .

A handwritten signature in black ink, appearing to read "Jamie Wright", is written over a horizontal line.

JAMIE WRIGHT, JD, CHAIR  
PANEL A

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

In the Matter of the Petition for Reinstatement )  
of Revoked Certificate of: )

ZACHARY COSGROVE )

Petitioner. )  
\_\_\_\_\_) )

Case No.: 8002014009262

OAH No.: 2015070112

**ORDER OF NON-ADOPTION  
OF PROPOSED DECISION**

The Proposed Decision of the Administrative Law Judge in the above-entitled matter has been **non-adopted**. A panel of the Medical Board of California (Board) will decide the case upon the record, including the transcript and exhibits of the hearing, and upon such written argument as the parties may wish to submit directed to the question of whether the proposed order should be modified. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

To order a copy of the transcript, please contact Kennedy Court Reporters, 920 West 17th Street, 2nd Floor, Santa Ana, CA 92706. The telephone number is (800) 231-2682.

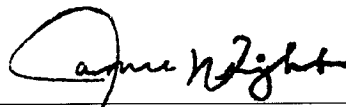
To order a copy of the exhibits, please submit a written request to this Board.

**In addition, oral argument will only be scheduled if a party files a request for oral argument with the Board within 20 days from the date of this notice.** If a timely request is filed, the Board will serve all parties with written notice of the time, date and place for oral argument. Oral argument shall be directed only to the question of whether the proposed order should be modified. Please do not attach to your written argument or any documents that are not part of the record as they cannot be considered by the Panel. The Board directs the parties' attention to Title 16 of the California Code of Regulations, sections 1364.30 and 1364.32 for additional requirements regarding the submission of oral and written argument.

Please remember to serve the opposing party with a copy of your written argument and any other papers you might file with the Board. The mailing address of the Board is as follows:

MEDICAL BOARD OF CALIFORNIA  
2005 Evergreen Street, Suite 1200  
Sacramento, CA 95815-3831  
(916) 263-6668  
Attention: Michelle Solario

Date: November 6, 2015

  
\_\_\_\_\_  
Jamie Wright, J.D.  
Chair, Panel A

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

In the Matter of the Petition for Reinstatement of  
Revoked Certificate of:

ZACHARY COSGROVE,

Petitioner.

Case No. 800-2014-009262

OAH Case No. 2015070112

**PROPOSED DECISION**

Howard W. Cohen, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on August 31, 2015, in Los Angeles, California.

Edward O. Lear, Attorney at Law, represented petitioner Zachary Cosgrove.

Robert McKim Bell, Supervising Deputy Attorney General, appeared under Government Code section 11522.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 31, 2015.

**FACTUAL FINDINGS**

1. Petitioner filed a Petition for Penalty Relief, Reinstatement of Revoked/Suspended Certificate, on October 1, 2014 (2014 Petition).

2. The Medical Board (Board) issued Physician and Surgeon's Certificate Number A 70710 to petitioner on January 21, 2000. Petitioner obtained his medical degree from Ross University School of Medicine in the Commonwealth of Dominica, West Indies, in 1997. After completing his residency in family practice at Kern County Medical Center in 2001 and being board certified, petitioner worked at a community health clinic in Bakersfield, California.

3. On April 23, 2007, the Board's Executive Director filed an Accusation against respondent. The Accusation alleged that, beginning in July 2002, the year after petitioner began his practice at the clinic, through March 2006, petitioner had sexual relationships with three of his patients. When the first patient threatened to report petitioner to his employer, he physically assaulted her. He physically assaulted the second patient as well. When the third patient reported

petitioner to his clinic, petitioner threatened her. He was convicted of a misdemeanor violation of Penal Code section 136.1, subdivision (a)(1) (dissuading a witness); the conviction has been expunged. The Accusation included causes for discipline involving petitioner's sexual misconduct with or abuse of the three patients, unprofessional conduct/gross negligence, repeated negligent acts, unprofessional conduct/incompetence, conviction of a substantially related crime, and a statutory drug violation.<sup>1</sup>

4. The Board revoked petitioner's certificate by a Decision, effective February 19, 2008, adopting petitioner's Stipulation for Surrender of License (Stipulation). The Stipulation provides that "Respondent agrees that if he ever applies for re-licensure or petitions for reinstatement as a physician and surgeon in California all of the charges and allegations contained in Accusation number 08-2006-175288 shall be deemed true, correct, and fully admitted by respondent for purposes of that proceeding or any other licensing proceeding involving Respondent in the state of California." (Ex. 3.)

5. On March 30, 2011, petitioner signed a Petition for Penalty Relief, Reinstatement of Revoked Certificate (2011 Petition), which he filed with the Board. Effective August 17, 2012, the Board adopted as the Decision and Order of the Board a Proposed Decision issued by Administrative Law Judge Ruth S. Astle on July 5, 2012, denying the 2011 Petition. The Decision and Order concludes that "petitioner has not fully demonstrated good cause to grant his petition for penalty relief – reinstatement of revoked certificate under Business and Professions Code section 2307 and Government Code section 11522, in that he has not fully demonstrated that he is safe to practice medicine." (Ex. 4.) The Decision and Order recites the following findings:

3. Petitioner moved from California to Texas about the same time as his certificate was surrendered. He has been employed in various capacities including as a sales consultant for Advent Resource Management. This job was paid by commission only and petitioner was not successful. However, his employer testified at the hearing that petitioner was a good employee and that he trusts him.

4. Petitioner has been participating in individual counseling since August 2010. His counselor wrote a letter dated January 31, 2011, stating that petitioner has been honest about his problems in his sessions with her, including his problems with substance abuse. Petitioner does not submit a report from a psychiatrist stating whether or not he is safe to practice medicine.

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<sup>1</sup> When petitioner was arrested for his actions involving his third patient, investigators found a marijuana pipe in his home.

5. It has been over four years since petitioner surrendered his certificate. He has attended numerous continuing education programs. He also attended a Profession Renewal in Medicine through Ethics Course. He successfully completed this course November 21, 2010.

6. Petitioner expresses remorse for his actions that resulted in the loss of his certificate. *However, he has not presented any evidence that he has undergone a psychiatric evaluation that would address his substance abuse in the past. He has not undergone an evaluation of whether or not he is competent to practice or safe to practice.*

7. Petitioner presented many letters of recommendation, including one from Carlos Alvarez, M.D., Medical Director of Valley Medical Group of Kern Internal Medicine; and a number of letters from community members, including two from church pastors. They are aware of the circumstances of petitioner's loss of his medical certificate, but short on details. They support petitioner's reinstatement.

8. Petitioner's wife testified at the hearing. She stated that she and petitioner were going through a bad time in their marriage. They were living together, but separated. She got involved with drugs and went through rehabilitation to save their family. She believes things have changed and wants her husband's certificate to be reinstated.

Petitioner's friend and colleague Michael Komin, M.D. testified at the hearing. He is willing to open a clinic for petitioner and supervise him. He has seen a change in petitioner. He finds petitioner to be more humble.

Petitioner's father-in-law testified at the hearing. He is a physician in Kansas. Petitioner shadowed him in his practice. He has noticed a positive change in petitioner and believes petitioner can be a caring physician.

A close family friend testified at the hearing. Petitioner worked on and off for his company from 2007 to 2010. Petitioner was a good employee.

Another friend of the family testified at the hearing. He knows petitioner through petitioner's wife. Their families socialize. Petitioner is easy to be around. He is a good guy and a kind and gentle person.

Petitioner's 18 year old son testified at the hearing. His father is teaching him the difference between right and wrong.

9. Petitioner wants to reinstate his certificate so that he can practice medicine in California. He is willing to come to California if he is reinstated.

10. Petitioner has made significant and sincere efforts toward rehabilitation. However, there are some deficiencies that must be addressed before reinstatement. *Petitioner needs to be evaluated concerning his alcohol and drug use, his mental and emotional health, and his present competence to practice medicine. Without further information, it would not be in the public interest to reinstate petitioner's certificate at this time.* (Ex. 4, italics added.)

6. Petitioner has not overcome the evidentiary deficiencies for which the Board denied his 2011 Petition. Those deficiencies must now be expanded to apply to petitioner's newly-disclosed crystal methamphetamine addiction, as well as to petitioner's failure to disclose the addiction at the hearing on the 2011 Petition.

7. Petitioner testified that, at the hearing on the 2011 Petition, he did not disclose to the Board that he was addicted to crystal methamphetamine when he committed the acts for which his certificate was revoked, because he was ashamed to reveal it. In his 2014 Petition, Petitioner writes that "[a]lthough I believe it explains my inappropriate behavior during those years, nobody ever knew of my amphetamine use during those days and I was never charged with any violations with regard to amphetamine use."

8. Petitioner testified that his methamphetamine use caused him to engage in the misconduct for which his physician's and surgeon's certificate was revoked, and that because he stopped abusing methamphetamine he no longer has boundary issues and will no longer pose a threat to patients. Petitioner maintains that when he committed his offenses he was in a "self-focused state of amphetamine disinhibition and hypersexuality" (Ex. 8, Tab A, p. 2), and that he "has addressed the root problem of his misconduct which was his amphetamine abuse." (Ex. C.)

9. Petitioner's contention, however, is not supported by evidence sufficient to warrant granting his petition. Whether petitioner is safe to practice medicine depends at least in part on whether his prior acts of misconduct, for which his certificate was revoked, were due to petitioner's substance abuse. If they were, the evidence on this record of petitioner's sobriety since

2006 might, in combination with other evidence of rehabilitation, be sufficient to warrant granting the 2014 Petition. But there is no unequivocal evidence to support the argument that petitioner's drug use was a cause, let alone the sole cause, of his improper acts.

10. To support his contention, petitioner offered only a letter from psychiatrist Christopher B. Ticknor, M.D., dated September 15, 2014. Dr. Ticknor did not appear at the hearing. In the letter, Dr. Ticknor wrote that he has seen petitioner once per month since conducting an initial two-hour evaluation of petitioner on April 15, 2013.<sup>2</sup> Petitioner testified that he visits Dr. Ticknor for 15 to 30 minutes, once per month.

11. In his letter, Dr. Ticknor wrote that he examined, among other things, records of petitioner's drug test results, which were negative, and a summary of psychological care provided to petitioner by Sharon Benner, M.Ed., LPC, a psychotherapist in San Antonio, Texas, who treated petitioner from August 2010 through 2011. Dr. Ticknor wrote that the records reflect that petitioner has complied with Benner's treatment recommendations. He concluded that petitioner is not a danger to the public and should be licensed on the condition that he continue to participate in a monitoring program to ensure that he remains alcohol- and drug-free. Dr. Ticknor wrote that, based on his initial review of petitioner, the subsequent monthly visits, and his review of the records, petitioner "is a successfully recovering former addict. . . . There is no reason to believe at this time that drug dependency is an active problem" for petitioner. (Ex. 8, Tab C.)

12. As to the issue of whether petitioner's drug abuse was the cause of petitioner's misconduct, however, Dr. Ticknor does not provide a clear answer. Dr. Ticknor opined that petitioner "has become fully aware of the necessity of observing professional boundaries," based on petitioner's attendance at ethics programs and conferences, letters of support, and successful participation in counseling therapy about his boundary violations. (Ex. 8, Tab C.) This appears to imply that the lessons about professional boundaries are the result of a deficiency in ethics training, and were addressed in ethics courses and in therapy, and were not the result of methamphetamine use.

13. Dr. Ticknor did not in his letter profess to be knowledgeable about the effects of methamphetamine use on a medical professional's boundary violations. Instead, he wrote that petitioner provided him with several articles on cocaine and methamphetamine addiction and with a chapter, from an unstated source, on certain drugs and sex and the disinhibiting effect of stimulants on drug abusers. Although Dr. Ticknor wrote that petitioner "understands the relationship between his drug abuse history and his taking advantage of several patients in his medical care," he also wrote that petitioner "understands that *independently* and together, under no

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<sup>2</sup> This letter was admitted under Government Code section 11513, subdivision (d), relating to hearsay evidence. It may be used to supplement or explain other admissible evidence; it may not be used, by itself, to support a finding of fact where, as here, an objection was timely made.

circumstances can he relapse in *either area*.” (Ex. 8, Tab C, italics added.) This language is at best ambiguous about whether methamphetamine abuse caused, or was even a contributing cause of, petitioner’s misconduct. Indeed, Dr. Ticknor’s letter might reasonably be read to indicate that petitioner’s misconduct had causes independent of his methamphetamine abuse.

14. Petitioner’s own non-expert testimony about the cause of his misconduct, supported only by Dr. Ticknor’s ambiguous opinions and conclusions, does not establish that petitioner has met his burden by clear and convincing evidence.

15. As at the hearing on the 2011 Petition, petitioner testified that he is remorseful about his misconduct. Testifying again for petitioner were Dr. Komin and petitioner’s father-in-law; also testifying were petitioner’s friend, Kelly Scherbenske, CRNA, and petitioner’s brother, Daniel Cosgrove, M.D. Petitioner again submitted numerous reference letters attesting to his character. Other letters and documentary evidence establish petitioner’s completion of medical ethics courses, courses on professional boundaries, and other continuing medical education courses, compliance with drug testing and negative test results, and participation in Narcotics Anonymous. The evidence petitioner has submitted to demonstrate that he has not used methamphetamine since December 7, 2006, nearly nine years ago, is persuasive.

## LEGAL CONCLUSIONS

1. A person whose certificate has been revoked may petition the Board for reinstatement. “The petition shall state any facts as may be required by the board. The petition shall be accompanied by at least two verified recommendations from physicians and surgeons certificated in any state who have personal knowledge of the activities of the petitioner since the disciplinary penalty was imposed.” (Bus. & Prof. Code, § 2307, subd. (c).)

2. The administrative law judge hearing the petition “may consider all activities of the petitioner since the disciplinary action was taken, the offense for which the petitioner was disciplined, the petitioner’s activities during the time the certificate was in good standing, and the petitioner’s rehabilitative efforts, general reputation for truth, and professional ability.” (Bus. & Prof. Code, § 2307, subd. (e).) The administrative law judge may recommend reinstating a certificate and imposing probationary terms and conditions. (Bus. & Prof. Code, § 2307, subd. (f).)

In a proceeding to reinstate a revoked certificate, the burden rests on the petitioner to prove that he has rehabilitated himself and that he is entitled to have his certificate restored. (*Flanzer v. Bd. of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.) A person seeking reinstatement must present strong proof of rehabilitation and a sufficient showing of rehabilitation to overcome the Board’s former adverse determination. (*Hippard v. State Bar of California* (1989) 49 Cal.3d 1084, 1092-1093.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Id.*; *Housman v. Bd. of Medical Examiners* (1948) 84 Cal.App.2d 308.)

3. Protection of the public “shall be the highest priority” for the Board and administrative law judges in exercising their disciplinary authority. (Bus. & Prof. Code, § 2229.) 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.” (Bus. & Prof. Code, § 2229, subd. (b).) “Where rehabilitation and protection are inconsistent, protection shall be paramount.” (Bus. & Prof. Code, § 2229, subd. (c).)

4. Cause does not exist under Business and Professions Code section 2307 to grant petitioner’s request for reinstatement of his certificate, based on Factual Findings 1 through 15.

5. Petitioner failed to make the required showing of rehabilitation. Although petitioner submitted a good deal of evidence to show that he has been drug-free since 2006, he did not provide competent medical or psychiatric evidence showing that his methamphetamine use caused the behavior that led to the revocation of his certificate, and that absent such drug use there are no triggers likely to occasion similar misconduct. Nor did petitioner’s evidence adequately address petitioner’s failure to disclose his methamphetamine use to the Board until very recently. He did not disclose it when he last petitioned for reinstatement in 2011, or indeed, at any time from 2002 through the filing of the 2014 Petition. The evidence on the record as a whole fails to demonstrate, by clear and convincing evidence, that petitioner is safe to practice medicine.

#### ORDER

The petition of Zachary Cosgrove for reinstatement of his physician’s and surgeon’s certificate is denied.

DATED: September 30, 2015

DocuSigned by:  
*Howard W. Cohen*  
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HOWARD W. COHEN  
Administrative Law Judge  
Office of Administrative Hearings