



F I L E D

Oct 10 2024

THE BOARD OF DISCIPLINARY APPEALS  
Appointed by the Supreme Court of Texas

THE BOARD OF DISCIPLINARY APPEALS  
SUPREME COURT OF TEXAS

IN THE MATTER OF SIDNEY  
KATHERINE POWELL  
STATE BAR NO. 16209700

§  
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§

CASE NO. 69537

SIDNEY POWELL'S MOTION TO DISMISS

Sidney Powell (“Ms. Powell”), pursuant to Tex.R.Civ.P. Rule 91a, asks the Board Of Disciplinary Proceedings (“BODA”) to dismiss the causes of action filed by Plaintiff, Commission on Lawyer Discipline (“Commission” or “Bar”), because they have no basis in law or fact.

INTRODUCTION

This is the Bar’s second attempt to frivolously seek disbarment of Ms. Powell after she filed four federal lawsuits raising federal constitutional and other issues arising from the 2020 presidential election.<sup>1</sup> The Bar has no basis to proceed here, and it knows it. It could only have deliberately elided the Georgia Court’s disposition order nunc pro tunc which the Bar attached it to its First Amended Petition. That document states that the State of Georgia and Ms. Powell agreed the six misdemeanors on which the Georgia case was resolved “are not crimes of moral turpitude.”<sup>2</sup>

The Bar continues the crusade against Ms. Powell who has dealt with unprecedented,

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<sup>1</sup>*King v. Whitmer*, 556 F. Supp. 3d 680 (E.D. Mich. 2021), aff’d in part, rev’d in part, 71 F.4th 511 (6th Cir. 2023), and aff’d in part, rev’d in part, 71 F.4th 511 (6th Cir. 2023); *Pearson v. Kemp*, 831 F.App’x 467 (11th Cir. 2020); *Bowyer v. Ducey*, 406 F.Supp.3d 699 (D. Ariz. 2020); *Feehan v. Wisconsin Elections Comm’n*, 506 F.Supp.3d 596, 600 (E.D. Wis. 2020).

<sup>2</sup>*Nunc pro tunc* Order entered on October 23, 2023, by the Honorable Scott McAfee, Judge of the Superior Court of Fulton County, Georgia that states: “STATE AND DEFENSE AGREE THAT THE SIX (6) MISDEMEANOR COUNTS PLED TO BY MS. POWELL ARE NOT CRIMES OF MORAL TURPITUDE.” See first sentence on page 002, Exhibit 4, First Amended Petition. (“Nunc Pro Tunc Order”)

politically-driven lawfare against her since early December 2020.<sup>3</sup>

The Court of Appeals wrote a significant affirmance, stating:

“Here, the summary judgment evidence does not evince or raise a fact question about a lack of honesty or integrity. . . . the absence of competent summary judgment compels our conclusion that the Bar failed to meet its summary judgment burden.”<sup>4</sup>

## BACKGROUND

On October 19, 2023, Ms. Powell entered a negotiated settlement of the charges in the Georgia Case by pleading to six minor misdemeanor offenses in Georgia, O.C.G.A. §§ 16-4-8 & 21-2-597 and pursuant to Georgia’s First Offender Act. These charges are so minor that there are no reported cases on them, and no fingerprints are required. Under the Georgia statute, there is no conviction and no judgment was entered.

On July 31, 2024, after holding the Complaints some eight months – and until after the bar lost its three-year, ill-fated, first effort to dis-bar Ms. Powell, it filed this suit. Despite plain language and law to the contrary, the bar filed the Petition alleging those charges are “Intentional” and “Serious” as provided in Part VIII, Texas Rules of Disciplinary Procedure (“Claims”). They are not. Moreover they are not crimes of moral turpitude.<sup>1</sup> The Petition is flawed on its face, and this case must be dismissed.

## ARGUMENT & AUTHORITIES

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<sup>3</sup>See The 65 Project, “Ethics Complaints,” available at <https://the65project.com/ethics-complaints/>; see also The 65 Project (@The65Project), Twitter (Mar. 7, 2022, 6:51 AM) <https://twitter.com/The65Project/status/1500801311306133512>; see also The 65 Project (@The65Project), Twitter (Aug. 31, 2022, 4:52 PM) <https://twitter.com/The65Project/status/1565080230947160065>. See AXIOS, Lachlan Markey and Jonathan Swan, Scoop: High-powered group targets Trump lawyers’ livelihoods, March 7, 2022, available at <https://tinyurl.com/5aw9kcfa>. The equally partisan group “Lawyers Defending American Democracy” distorted and misrepresented the law in their demand that the Chief Disciplinary Counsel for the State Bar of Texas disbar Powell, they even promoted that effort with a press release: <https://ldad.org/letter-briefs/ldad-calls-for-the-disbarment-of-sidney-powell>.

<sup>4</sup>*Comm’n for Law. Discipline v. Powell*, 689 S.W.3d 620, 633 (Tex. App.—Dallas 2024, no pet.).

## **A. RULE 91A**

1. Under Rule 91a of the Texas Rules of Civil Procedure, a court can and should dismiss a cause of action or lawsuit that has no basis in law or fact. All the claims and causes of action asserted in this case by the Bar have no basis in law because the pleas in the Georgia case do not rest on an Intentional Crime or a Serious Crime.<sup>5</sup>

## **B. COMPULSORY DISCIPLINE IS IMPROPER**

2. While the rules for Compulsory Discipline use the defined terms “Intentional Crime” and “Serious Crime,” the Texas Supreme Court looks at whether the crime was one involving moral turpitude.<sup>6</sup> Whether a crime is one involving moral turpitude is a question of law.<sup>7</sup> This legal question is to be resolved “by a consideration of the nature of the offense as it bears on the attorney’s moral fitness to continue in the practice of law.”<sup>8</sup>

3. “When deciding whether a crime is a “felony involving moral turpitude,” [the courts] limit [their] consideration to the nature or essence of the offense – the essential elements of the charges. The inquiry relates to the classification of the crime – not the tribunal’s subjective judgment of character of the particular lawyer. In short, [the] crime is classified not the lawyer. To try to determine whether a crime is one involving moral turpitude by attempting to distinguish between lawyers of “good” character who happen to have been convicted of a particular criminal offense, and lawyers of “bad” character whose conviction of a crime is indicative of their lack of fitness to

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<sup>5</sup>2022 WL 17331025, at \*1.

<sup>6</sup>*In re Humphreys*, 880 S.W.2d 402 (Tex.1994).

<sup>7</sup>*State Bar of Texas v. Heard*, 603 S.W.2d 829, 835 (Tex.1980).

<sup>8</sup>*In re Humphreys*, 880 S.W.2d at 407 (quoting *Heard*, 603 S.W.2d at 835)

practice law, would be a hopelessly confusing and an entirely subjective task. That process would also entail looking behind a conviction in a way not sanctioned by the Texas Rules of Disciplinary Procedure [or the courts].”<sup>9</sup>

### C. THERE IS NO BASIS IN LAW

4. BODA must dismiss the suit because the Claims have no basis in law.<sup>10</sup> A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle a plaintiff to the relief sought.<sup>11</sup> Legal conclusions alleged by the pleader should not be taken as true.<sup>12</sup>

5. Ms. Powell requests the Court to dismiss the Claims because – as a matter of law – Ms. Powell did not commit an “Intentional Crime” or a “Serious Crime”:

An “Intentional Crime” is “. . . (1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary.”<sup>13</sup>

A “Serious Crime is “. . . barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.”<sup>14</sup>

6. There was no charge of any offense involving the essential elements of misapplication of

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<sup>9</sup>*Matter of Thacker*, 881 S.W.2d 307, 309 (Tex. 1994).

<sup>10</sup>Tex. R. Civ. P. 91a.1, 91a.2.

<sup>11</sup>Tex. R. Civ. P. 91a.1; *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 654–55 (Tex. 2020); *In re Hous. Specialty Ins. Co.*, 569 S.W.3d 138, 139 n.1 (Tex. 2019); *see In re Essex Ins. Co.*, 450 S.W.3d 524, 527–28 (Tex. 2014).

<sup>12</sup>*City of Austin v. Liberty Mut. Ins. Co.*, 431 S.W.3d 817, 826 (Tex. App.–Austin 2014, no pet.).

<sup>13</sup>Tex. R. Disciplinary P. 1.06(V).

<sup>14</sup>Tex. R. Disciplinary P. 1.06(GG).

money or other property held as a fiduciary. There was no charge of barratry. There was no charge of any felony. There was no accusation or charge of a crime involving moral turpitude. There was no accusation of misdemeanors of theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit theft, embezzlement, or fraudulent or reckless misappropriation of money or other property.<sup>15</sup>

7. Moreover, Ms. Powell neither agreed nor would have agreed to a crime that requires proof of knowledge or intent as an essential element.

8. Ms. Powell pled to minor misdemeanors, charges of conspiracy to commit “interference in the performance of election duties.”<sup>16</sup> Those are not a crime of “theft, embezzlement, or misappropriation of money or other property.” Moreover, Ms. Powell did not pled to a crime “that requires proof of knowledge or intent as an essential element.”<sup>17</sup>

9. There is no conviction or judgment. There is an agreed settlement with the State of Georgia by entering a guilty plea to six misdemeanors—each of which charged a violation of the following two Georgia statutes:

Ga. Code Ann. § 16-4-8: “A person commits the offense of conspiracy to commit a crime when he together with one or more persons conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy.” and

Ga. Code Ann. § 21-2-597: “Any person who intentionally interferes with, hinders, or delays or attempts to interfere with, hinder, or delay any other person in the performance of any act or duty authorized or imposed by this chapter shall be guilty of a misdemeanor.”<sup>9</sup>

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<sup>15</sup>Page 001, Exhibit 1, First Amended Petition.

<sup>16</sup>*Matter of Thacker*, 881 S.W.2d at 309.

<sup>17</sup>*Id.*

10. “[T]o determine whether a crime is an intentional crime, [the Texas Supreme Court] look[s] solely to the elements of the crime, and not to any collateral matters, such as an attorney’s record of service and achievement, or to the underlying facts of the criminal case.”<sup>18</sup> “Intentional” is a “result of conduct” offense.<sup>19</sup> For a “result of conduct” offense, the courts look to “[w]hat matters is that the conduct (whatever it may be) is done with the required culpability to effect the result the Legislature has specified.”<sup>20</sup> The “compulsory discipline rules prohibit consideration of the circumstances.”<sup>21</sup>

11. It is plain from the face of each of the two statutes underlying the accusations in the Georgia Case, there is no essential element of “knowingly or willfully” that would render either offense a “Serious Crime.” While the statute refers to “intentionally interferes,” that means nothing more than it is not accidental. Merely agreeing or attempting to delay an election worker from entering her office by having a polite conversation rightfully could be prosecuted under the Georgia statutes.

12. There is no essential element of fraud, deceit, theft, misappropriation, or of knowing and willful conduct in the misdemeanors to which Ms. Powell pled, as there is for the element of intent in Georgia’s serious crime of election interference—its felony statutes.<sup>22</sup> In comparison, a crime like

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<sup>18</sup>*In re Lock*, 54 S.W.3d 305, 307 (Tex. 2001).

<sup>19</sup>*Martinez v. State*, 763 S.W.2d 413, 419 (Tex.Cr.App.1988); *Lugo-Lugo v. State*, 650 S.W.2d 72 (Tex. Crim. App. 1983, en banc).

<sup>20</sup>*Cook v. State*, 884 S.W.2d 485, 490 (Tex. Crim. App. 1994) (citing *Alvarado v. State*, 704 S.W.2d 36, 39 (Tex.Cr.App.1985)).

<sup>21</sup>*In re Lock*, 54 S.W.3d at 311.

<sup>22</sup>For example, Ga. Code Ann. § 21-2-566: Interference with primaries and elections plainly requires criminal intent. Any person who:

(1) Willfully prevents or attempts to prevent any poll officer from holding any primary or election under this

conspiracy to defraud the United States (section 371) is an intentional crime “because knowledge or intent is an essential element of the offense and the crime is a felony involving moral turpitude.” *In re Birdwell*, 20 S.W.3d 685, 686 (Tex. 2000). The same would be true for Georgia’s statute prohibiting “election fraud.”<sup>23</sup>

13. These offenses are so minor there are no decisions in Georgia applying the misdemeanor provisions at issue here. However, there is an official opinion from Georgia’s Office of the Attorney General which states that Ga. Code Ann. § 21-2-597 is one of the misdemeanor “offenses which do not require fingerprinting.”<sup>24</sup> The offense, in essence, is like a speeding ticket.<sup>25</sup>

14. Ms. Powell and the State of Georgia settled the matter by Ms. Powell’s pleas to six misdemeanors that did not require an essential element of knowing or willful criminal intent, and

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chapter;

- (2) Uses or threatens violence in a manner that would prevent a reasonable poll officer or actually prevents a poll officer from the execution of his or her duties or materially interrupts or improperly and materially interferes with the execution of a poll officer's duties;
- (3) Willfully blocks or attempts to block the avenue to the door of any polling place;
- (4) Uses or threatens violence in a manner that would prevent a reasonable elector from voting or actually prevents any elector from voting;
- (5) Willfully prepares or presents to any poll officer a fraudulent voter's certificate not signed by the elector whose certificate it purports to be;
- (6) Knowingly deposits fraudulent ballots in the ballot box;
- (7) Knowingly registers fraudulent votes upon any voting machine; or
- (8) Willfully tampers with any electors list, voter's certificate, numbered list of voters, ballot box, voting machine, direct recording electronic (DRE) equipment, electronic ballot marker, or tabulating machine

shall be guilty of a felony and, upon conviction thereof, shall be sentenced to imprisonment for not less than one nor more than ten years or to pay a fine not to exceed \$100,000.00, or both.

<sup>23</sup> See Conspiracy to Commit Election Fraud (Ga. Code Ann. § 21-2-603).

<sup>24</sup> 1998-99 Ga. Op. Att’y Gen. 53 (1998).

<sup>25</sup> Cf. “Official Code of Georgia Annotated § 21-2-567 makes it a misdemeanor for any person to use or threaten to use force or violence, or in any other manner to intimidate any other person to vote or refrain from voting in any election, or to vote or refrain from voting for or against a particular candidate or question, or to place or refrain from placing his or her name upon a register of electors. I hereby designate the violation of O.C.G.A. § 21-2-567 as an offense for which those charged are to be fingerprinted.” 1998-99 Ga. Op. Att’y Gen. 53 (1998).

the text of the statutes reveals there is no essential element of fraud or deceit that would implicate moral turpitude.<sup>26</sup>

15. Whether a particular crime involves moral turpitude is a question of law.<sup>27</sup> Again, BODA can consider only the elements of the offense—not the underlying facts.<sup>28</sup>

16. Notably, even the federal charge of misprision of a felony—itsself a felony requiring knowledge of the actual commission of a felony—does not involve moral turpitude *per se* and is not a “Serious Crime” under the Texas rules. The Texas Supreme Court has said: “Since misprision of felony does not involve moral turpitude *per se*, BODA is precluded from further reviewing the facts in the record to determine whether the attorney engaged in a crime involving moral turpitude.”<sup>29</sup>

17. Similarly, the Texas Supreme Court held in *In re Lock*, that felony possession of cocaine was neither an “Intentional Crime” nor one involving moral turpitude “[b]ecause the elements of this crime do not involve dishonesty, fraud, deceit, misrepresentation, deliberate violence, or reflect adversely on an attorney’s honesty or trustworthiness. . . .”<sup>30</sup>

18. In a stunning failure of candor with BODA, the Bar fails to advise BODA, that Judge McAfee *sua sponte* filed a *nunc pro tunc* order specifically stating in capital letters there was no

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<sup>26</sup>Ga. Code Ann. § 21-2-597

<sup>27</sup>See *In re Thacker*, 881 S.W.2d 307, 309 (Tex.1994); *State Bar of Tex. v. Heard*, 603 S.W.2d 829, 835 (Tex. 1980).

<sup>28</sup>*In re Lock*, 54 S.W.3d at 307.

<sup>29</sup>See *Duncan v. Bd. of Disciplinary Appeals*, 898 S.W.2d 759, 762 (Tex. 1995).

<sup>30</sup>54 S.W.3d at 308.



issue of moral turpitude.<sup>31</sup>The State of Georgia agreed that the offenses to which Ms, Powell pled guilty to do not reflect crimes of moral turpitude.<sup>32</sup> The Bar’s omission of this material fact, alone, should require dismissal of this action *instanter* and the Bar should be punished.

19. The Commission should non-suit this case as it did the 2022 case *In the Matter of Phillip Wayne Hayes*. In *Hayes* the Commission sought compulsory discipline against Hayes for pleading guilty to a misdemeanor count of soliciting prostitution in violation of Tex. Penal Code Ann. § 43.021, alleging that it was both a “Serious Crime” and an “Intentional Crime.”<sup>33</sup> The Bar non-suited that case mere days after Hayes filed his answer and motion to dismiss.<sup>34</sup> BODA immediately entered an order dismissing the case with prejudice.<sup>35</sup>

20. Accordingly, compulsory discipline is improper in this case. The offenses pled to by Ms. Powell are neither “serious” nor “intentional” crimes, and they do not involve dishonesty, fraud, deceit, misrepresentation, deliberate violence, or reflect adversely on her honesty or trustworthiness. The suit must be dismissed with prejudice by the Bar or BODA should dismiss the suit with prejudice and award Ms. Powell attorney’s fees.

Respectfully submitted,  
HOLMES LAWYER, PLLC

By:  /s/ Robert H. Holmes

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<sup>31</sup>*Nunc pro tunc* Order entered on October 23, 2023, by the Honorable Scott McAfee, Judge of the Superior Court of Fulton County, Georgia that states: “STATE AND DEFENSE AGREE THAT THE SIX (6) MISDEMEANOR COUNTS PLED TO BY MS. POWELL ARE NOT CRIMES OF MORAL TURPITUDE.” See first sentence on page 002, Exhibit 4, First Amended Petition. (“Nunc Pro Tunc Order”)

<sup>32</sup>Nunc Pro Tunc Order

<sup>33</sup>2022 WL 17331027, at \*1-2.

<sup>34</sup>2022 WL 17331026, at \*1

<sup>35</sup>2022 WL 17331025 at \*1

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been delivered, by email to BODA and the Bar on October 10, 2024.

/s/ Robert H. Holmes  
Robert H. Holmes