

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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3 Electronically Filed  
4 Dec 06 2021 04:07 p.m.  
5 Elizabeth A. Brown  
6 Clerk of Supreme Court

7 In Re Discipline of: )  
8 )  
9 GARRETT TANJI OGATA, Esq. )  
10 )  
11 Bar No. 7469 )  
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Case No. 83719

19 **OPPOSITION TO GARRETT TANJI OGATA'S (1) MOTION TO**  
20 **STRIKE THE STATE BAR OF NEVADA'S SCR 111 PETITION, AND**  
21 **(2) SUBMISSION ON RESPONDENT'S REQUEST FOR STAY OF**  
22 **INTERIM SUSPENSION**

The State Bar's mandatory Petition filed November 4, 2021, sought this court's authorization to proceed with formal hearing discipline consideration on Respondent's two simultaneous, transactionally related convictions, a "non-serious" misdemeanor crime and a "serious crime" felony.<sup>1</sup> Secondly, the Petition sought this Court's imposition of temporary suspension based upon his latter serious criminal conviction, absent good cause warranting the order to be set aside. SCR 111(7). The former, the misdemeanor criminal conviction, was presented to a Disciplinary Board

<sup>1</sup> These convictions occurred via the Respondent's No Contest plea to NRS 484C.110, NRS 484C.400 (Driving Under the Influence ("DUI"), second-offense)) and his Guilty plea to NRS 484B.653 (Reckless Driving causing Substantial Bodily Harm) on January 12, 2021, in the Eighth Judicial District Court. See also, SCR 111(7), (9).

1 Screening Panel for discipline recommendations to accompany the State  
2 Bar's petition. SCR 111(4). These recommendations were provided to offer  
3 this Court information on whether to refer or decline referral of those  
4 matters to formal hearing. To be clear, the Screening Panel's  
5 recommendation was not a final recommendation for discipline imposition.<sup>2</sup>

6 Here, the Respondent was convicted of a "non-serious," second-  
7 offense misdemeanor involving alcohol. The non-serious nature of this  
8 conviction may result in this Court deciding to "decline to refer a conviction  
9 for a minor offense to the [disciplinary] board." SCR 111(9). Respondent was  
10 simultaneously "convicted" of a "serious crime." This Court must refer this  
11 offense to a disciplinary board.<sup>3</sup> This Court must elect whether to refer the  
12 matter for full disciplinary proceedings; the Screening Panel's detailed

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14 <sup>2</sup> The undersigned apologizes for the ambiguous petition prayer that caused  
15 or contributed to Respondent's misapprehension here. The State Bar  
16 concurs that Respondent should receive a formal hearing prior to the  
imposition of a suspension other than appropriate temporary suspension  
measures under SCR 111(7).

17 <sup>3</sup> "...[A] guilty plea constitutes a "conviction," regardless of whether a  
18 sentence is suspended or deferred." *In re Smith*, 2015 Nev. Unpub. LEXIS  
19 889 (July 21, 2015). The State Bar recognizes the Respondent could qualify  
20 to change his plea to a misdemeanor Reckless Driving offense under NRS  
21 484B.653 on or after January 11, 2022. This change would re-define the  
conviction as a "non-serious" crime. However, this reduction presents a  
matter of first impression, which begs the question whether the court "may  
decline" to refer the matter to a disciplinary board for a sanction  
recommendation. SCR 111(8), (9).

1 recommendation furthers that interest without due process deprivation.

2 **I. THE STATE BAR'S PETITION IS PROPER**

3 a. The State Bar properly presented the conviction matters within  
4 the meaning of SCR 111(4).

5 SCR 111(4) mandates bar counsel alert this court of most criminal  
6 convictions of attorneys.<sup>4</sup> The first sentence commands a petition for most  
7 convictions, excluding a misdemeanor traffic violation or a first-offense  
8 traffic matter involving alcohol or a controlled substance. The second  
9 sentence, added February 18, 2010 via ADKT 444, directs that in matters of  
10 second-offense misdemeanors involving alcohol or controlled substances,  
11 bar counsel is to "...investigate and present the matter to the appropriate  
12 panel..." prior to filing of the petition referenced in the first sentence. That  
13 Panel's recommendations must accompany the petition.

14 The ADKT 444 Petition filed December 3, 2009 identifies the amend-  
15 ment's purpose:

16 The supreme court has recently been presented with a number of  
17 petitions advising the court that the subject attorneys have

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18 <sup>4</sup> SCR 111(4) mandates a petition filing for a conviction of any misdemeanor  
19 (excluding traffic, or first-offense traffic matter involving alcohol or  
20 controlled substances), gross misdemeanor or felony crime conviction. A  
21 State Bar petition appears elective for a first-time conviction for a  
22 misdemeanor traffic violation involving alcohol or a controlled substance.  
*Cf., In re Armenian*, 2019 Nev. Unpub. LEXIS 453 (April 12, 2019).

1 convictions for second offense misdemeanors involving the use  
2 of alcohol or a controlled substance. In each instance, the  
3 supreme court has elected to refer to the matter to the  
4 appropriate disciplinary board pursuant to its authority under  
5 SCR 111(9). This process, however, is inefficient. A more  
6 streamlined procedure is needed, one which requires bar  
counsel, prior to submitting the petition required under SCR  
111(4), to investigate and present the matter to the appropriate  
disciplinary board for a recommendation regarding the  
appropriate disciplinary action, if any, to be imposed.

7 This added step streamlines the process by resolving non-serious  
8 criminal convictions without a formal hearing. For example, screening  
9 panels often recommend a diversion or mentoring program under SCR 105.5  
10 for a second-offense DUI. Respondents accept. There is no need for the extra  
11 procedure of a formal hearing and a second disciplinary panel. On the other  
12 hand, if the criminal matter is something other than a second-offense  
13 misdemeanor involving the use of alcohol or a controlled substance, then the  
14 State Bar petitions the Court directly. SCR 111(4). The Court *shall* refer all  
15 matters involving the conviction of a serious crime to the disciplinary board  
16 for a formal hearing. SCR 111(8). The Court *may* refer a matter involving a  
17 non-serious crime or may decline. SCR 111(9). SCR 111(4) would not create  
18 a streamlined, more efficient process if it intended to add a screening hearing  
19 and a formal hearing to every non-serious criminal conviction.

1 Bar Counsel's written comments to the proposed amendment  
2 illustrated how ADKT 444 would work in practice with a screening panel  
3 versus a formal hearing panel in "non-serious" conviction matters. Bar  
4 Counsel's written comments to the proposed amendment filed January 13,  
5 2010 state in part:

6 Under the proposed Rule change, these matters would have been  
7 presented to a Screening Panel of the appropriate disciplinary  
8 board pursuant to SCR 105(1)(a) (citation omitted) and in the  
9 interest of judicial economy, it would have saved time and  
10 resources in having the matter reviewed first before presentation  
11 to this Court. Also, under this scenario, this Court would have  
12 input from the Screening Panel which might have been helpful.  
13 In addition, the subject Respondent attorney would have the  
14 benefit of a Screening Panel's review prior to submission to this  
15 court.

16 This Court approved the screening process to speed up its  
17 consideration of criminal convictions. For example, *In re Weatherford*, 2016  
18 Nev. Unpub. LEXIS 870 (October 14, 2016), the respondent received two  
19 misdemeanor battery convictions. They involved the use of alcohol and were  
20 not first-offense convictions. The Court noted with approval that "Bar  
21 Counsel investigated and presented the matter to a screening panel as  
22 required by SCR 111(4) and the screening panel referred Weatherford for a  
formal hearing on an RPC violation based on the conviction."<sup>5</sup>

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<sup>5</sup> *Weatherford* did not identify the nature or scope of the investigation. The opinion suggests that the court believed referral was appropriate but that the

1 “For purposes of a hearing on formal charges filed as a result of a  
2 finding of guilt, a certified copy of a judgment of conviction constitutes  
3 conclusive evidence that the lawyer committed the crime, and the sole issue  
4 in any such hearing shall be the nature and extent of the discipline to be  
5 imposed.”<sup>6</sup> Therefore, even if the Court referred a criminal conviction to the  
6 disciplinary board for a formal hearing, then “the sole issue to be determined  
7 [would] be the extent of the discipline to be imposed...” *Id.*

8 Here, the Screening Panel’s review of Respondent’s conviction  
9 respected due process. Respondent did not receive notice of or appear at the  
10 screening because such notice and appearance would create an extraneous  
11 requirement.<sup>7</sup> As applied to this SCR 111 petition, Respondent received  
12 notice and a hearing to satisfy due process in the underlying criminal  
13 proceedings. Respondent received notice of the criminal proceedings and  
14 waived his right to a trial when he pleaded no contest and guilty, respectively.  
15 The criminal burden of proof is higher than that of a disciplinary hearing.

16  
17 State Bar had nonetheless already instituted those proceeding without  
18 waiting on the court’s elective jurisdiction. *In re Schwab*, 2016 Nev. Unpub.  
LEXIS 143 (May 11, 2016) affirms that referral for discipline for a non-  
serious crime is “discretionary with this court.”

19 <sup>6</sup> See Rule 19E, ABA Model Rules for Lawyer Disciplinary Enforcement, July  
20 16, 2020. See also, *In re Chung*, 2011 Nev. Unpub. LEXIS 1685, 2011 WL  
5827310 (Nov. 17, 2011).

21 <sup>7</sup> SCR 105(1)(b) provides a notice requirement to a Respondent of a Screening  
Panel’s decision.

1 Respondent received criminal convictions, which established a factual and  
2 legal basis respecting due process. Another notice and hearing are  
3 unnecessary *before* the Court considers the petition. However, Respondent  
4 did receive notice of the petition and would receive notice and an opportunity  
5 to present evidence at a formal hearing.

6 Furthermore, the State Bar investigated the matter. It investigated  
7 whether Respondent received a criminal conviction and whether the record  
8 supported due process in the underlying matter.<sup>8</sup> The State Bar could have  
9 sent Respondent a letter of investigation requesting a response.<sup>9</sup> However,  
10 Respondent could not contradict the convictions. Respondent could offer  
11 only mitigating information to the State Bar. The proper forum for  
12 mitigation is at a formal hearing not a screening. Should this court refer the  
13 matter to formal hearing, then Respondent may present mitigating evidence.

14 b. The Screening Panel's recommendation was proper.

15 The limited issue before the Screening Panel was for "a  
16 recommendation regarding the appropriate disciplinary action, if any, to be  
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18 <sup>8</sup> The record obtained by the State Bar that was attached to the Petition  
19 demonstrates Respondent suffered convictions, was represented by counsel  
20 in both matters, received detailed information on the consequences of his  
21 pleas and that a judgment of conviction record was made.

<sup>9</sup> Respondent could have supplied mitigation evidence had he self-reported.



1 imposed.” SCR 111(4). The State Bar contends that the informed and specific  
2 recommendation here was appropriate to guide this Court on whether to  
3 refer or decline to refer the matter for discipline.

4 The Screening Panel could have offered a conclusory recommendation  
5 without analysis or support to this court of “we recommend the matter be set  
6 for formal hearing proceedings.” This interpretation may comport with a  
7 strict reading of the term “disciplinary *action*.” However, the Panel offered  
8 its perspective on the ABA Discipline baseline standard<sup>10</sup> applicable for the  
9 criminal conviction matter. The Panel thereafter offered a specific  
10 recommendation based upon that standard, and observed that aggravating  
11 and mitigating factors were likely present that may adjust that baseline.<sup>11</sup>  
12 While the Panel’s finding was more specific than the express language of SCR  
13 105 and the Disciplinary Rules of Procedure, it offers foundation. Moreover,  
14 the Screening Panel’s specific recommendation here does not prejudice the  
15 Respondent in any subsequent formal hearing this court may direct.

## 16 **II. GOOD CAUSE FOR STAY OF TEMPORARY SUSPENSION**

17 Respondent has made a proffer of good cause to stay any order of  
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20 <sup>10</sup> See ABA, ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS, 2<sup>nd</sup> Ed.  
2019, Section 5.12, pp.274-277.

21 <sup>11</sup> See Pet. of Bar Counsel, filed November 4, 2021, Exhibit 3, pg. 3.



1 Temporary Suspension pursuant to SCR 111(7).<sup>12</sup> Application of this court's  
2 reasoning from *In re Discipline of Treffinger*, 133 Nev. 153, 393 P.3d 1084  
3 (2017) in conjunction with Respondent's declaration provides some support  
4 for his request for stay of suspension, irrespective of this court's decision to  
5 refer or decline referral for a formal hearing. Respondent's convictions in  
6 this matter "...[do] not inherently involve dishonesty, theft, or serious  
7 interference with the administration of justice."<sup>13</sup>

8       However, the Court should note some distinguishing facts. Unlike  
9 *Treffinger*, Respondent's convictions involved the repeated decision to drive  
10 under the influence of alcohol on public highways. This decision consciously  
11 placed the public in danger. During the collision in question, Respondent  
12 caused serious bodily harm to two members of the public. Furthermore,  
13 Respondent's conviction of reckless driving causing substantial bodily harm  
14 is a category B felony. This is the second-highest category of felony in the  
15 State of Nevada. This Court has held "that 'good cause' to relieve a lawyer  
16 from automatic interim suspension depends, first and foremost, on the  
17 danger the lawyer's crime and other established misconduct suggest he or

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19  
20 <sup>12</sup> See Res.'s Mot. to Strike and Response and Mot. for Stay, filed November  
15, 2021, Exhibit A, Declaration of Garrett Tanji Ogata of November 13, 2021.

21 <sup>13</sup> *Id.* at 158, P.2d 1088.

1 she poses to clients, the courts, *and the public.*"<sup>14</sup>

2 The State Bar asks the Court to impose a temporary suspension.

3 **III. CONCLUSION**

4 SCR 111(4)'s screening and petition process does not circumvent the  
5 Respondent's due process rights. He will receive an opportunity to present  
6 mitigation at a formal disciplinary hearing. SCR 111 does not require advance  
7 notice and solicitation of Respondent's input for a screening panel's  
8 consideration. Giving a Respondent's mitigation to a screening panel would  
9 not provide any due process protection that would not be afforded at a formal  
10 hearing, should this Court elect to refer the matter to a disciplinary board.  
11 The specificity in this Screening Panel's recommendation does not impair the  
12 Respondent's due process rights but adds meaningful information to help  
13 this Court in deciding whether to refer the matter.

14 The State Bar respectfully requests that this Court grant the Petition (i)  
15 referring the non-serious criminal conviction of second-offense Driving  
16 Under the Influence and the conviction of Reckless Driving to the  
17 disciplinary board for formal hearing and (ii) ordering the Respondent's  
18 temporary suspension at least until and unless the district court reduces  
19 Respondent's felony conviction to a misdemeanor.

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21 <sup>14</sup> *Id.* at 157, P.2d at 1088. [Emphasis added].

1 DATED this 6<sup>th</sup> day of December 2021.

2 STATE BAR OF NEVADA  
3 DANIEL M. HOOGE

4 By: Bruce Hahn

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# 2021.12.06.Opp Mtn to Strike

Final Audit Report

2021-12-06

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Dated this 6<sup>th</sup> day of December 2021.

Laura Peters

Laura Peters, an employee of  
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