REL:12/16/2011

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2011-2012

1091747

Albert Linch Jordan

v.

Alabama State Bar Association

(Appeal from Petition No. 06-37)

PER CURIAM.

Albert Linch Jordan appeals from an order of the Disciplinary Board ("the Board") of the Alabama State Bar Association ("the Bar")[1] determining that Jordan has been

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[1]See Rule 12(f)(1), Ala. R. Disc. P. ("The parties have a right to appeal an adverse decision of the Disciplinary Board ... to the Supreme Court of Alabama ....").

convicted of a "serious crime" for purposes of Rule 22(a)(2), Ala. R. Disc. P., which provides that the Disciplinary Commission of the Bar shall disbar or suspend a lawyer who has been convicted of a "serious crime." Specifically, Rule 22(a)(2) provides: "The Disciplinary Commission shall disbar or suspend a lawyer ... [i]f the lawyer's conviction for a 'serious crime,' as defined in Rule 8 of these Rules, has become final ... in any court of record of this state or any other state, or of the United States, or of a territory of the United States." Rule 8(c)(2), Ala. R. Disc. P., defines a "serious crime" as:

> "(A) A felony;
>
> "(B) A lesser crime involving moral turpitude;
>
> "(C) A lesser crime, a necessary element of which, as determined by the statutory or common-law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or
>
> "(D) An attempt, a conspiracy, or the solicitation of another to commit a 'serious crime.'"

Jordan seeks a reversal of the Board's determination. We affirm in part and reverse in part.

Facts and Procedural History

The present proceeding originates from a long-running dispute related to an election contest challenging the 1998 election of the Jefferson County sheriff. See, e.g., Eubanks v. Hale, 752 So. 2d 1113 (Ala. 1999). The Board's order sets out the uncontroverted material facts and the procedural history of this matter as follows:

> "Mr. Jordan was retained by Jimmy Woodward, at the time the Sheriff of Jefferson County, Alabama, to contest the results of the 1998 General Election. The basis for the contest was Sheriff Woodward's belief that felons not eligible to vote in fact voted by absentee ballot.
>
> "As a result of Mr. Jordan's representation of Sheriff Woodward, an indictment was returned in the United States District Court for the Northern District of Alabama alleging that both Mr. Jordan and Sheriff Woodward utilized employees of the Sheriff's office to access the National Crime Information Center database (NCIC), thereby obtaining criminal records of certain individuals who voted by absentee ballot in the referenced election. The indictment charged violation of 18 U.S.C. § 641 and § 371.
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> "After trial by jury, Mr. Jordan was found guilty of conspiring to violate and of violating 18 U.S.C. § 641. Mr. Jordan received a sentence of probation for six (6) months and a Five Hundred Dollar ($500.00) fine.
>
> "Mr. Jordan appealed the conviction to the Eleventh Circuit.[2] He asserted that the indictment

[2]Jordan appealed both the conviction for violating 18 U.S.C. § 641 and the conviction for violating 18 U.S.C. § 371.

> should have been dismissed, claiming that it failed to provide him with the notice necessary to enable a defense, that the evidence was insufficient to support his conviction and [that] the District Court erred by refusing to give certain jury instructions requested by Mr. Jordan. These arguments were considered and rejected by the Court resulting in Mr. Jordan's conviction being affirmed. In affirming the conviction, the Court noted since the value of the property converted was less than One Thousand Dollars ($1,000.00), the conviction was of a Class A Misdemeanor."

(Footnote omitted.)

Following the Eleventh Circuit Court of Appeals' affirmance of Jordan's convictions, the General Counsel of the Bar, on May 12, 2006, petitioned the Disciplinary Commission to suspend or disbar Jordan pursuant to Rule 22(a)(2) on the basis that he had been convicted of a "serious crime." In his answer to the Bar's petition, Jordan asserted several defenses and "denie[d] that he [had] been convicted of any 'serious offense.'" The matter then went before the Board for a determination as to whether Jordan had been convicted of a "serious crime" as that term is defined in Rule 8(c)(2). See Rule 22(a)(2) ("Whether a lawyer's conviction involves a serious crime as defined in Rule 8(c)(2)(B), (C), and (D)

The Eleventh Circuit Court of Appeals affirmed both convictions. See discussion infra.

shall be made by the Disciplinary Board upon petition by the General Counsel. The Disciplinary Board may conduct a hearing to assist it in making this determination."). Following a hearing and "extensive argument," the Board on September 16, 2010, entered an order containing a unanimous finding that "[t]he statutory definition of the conduct prohibited by § 641 clearly requires the knowing conversion of a thing of value or the receipt, concealment or retention of the same with the intent to convert" and that, correspondingly, "Jordan's conviction ... required theft or misappropriation." Based on that determination, the Board's order also included the following conclusions of law:

> "1. The subject crimes, i.e., convictions of 18 U.S.C. § 641 and § [371] do not involve moral turpitude and therefore are not serious crimes as defined by Rule 8(c)(2)(B).
>
> "2. The conviction of violating 18 U.S.C. § 641 is a serious crime as defined by Rule 8(c)(2)(C).
>
> "3. The conviction of violating 18 U.S.C. § [371] is a serious crime as defined by Rule 8(c)(2)(D)."

Jordan timely filed a notice of appeal.

Standard of Review

The parties agree that the standard of review to be applied to Jordan's appeal is a de novo review. See Alabama State Bar v. Tipler, 904 So. 2d 1237, 1240 (Ala. 2004) ("The Board of Disciplinary Appeals made legal conclusions regarding Rule 8(c)(2)(C) and Rule 22(a)(2), Ala. R. Disc. P.; therefore, we review those conclusions de novo."). See also Tipler v. Alabama State Bar, 866 So. 2d 1126, 1137 (Ala. 2003).

Discussion

On appeal, Jordan contends that, contrary to the Board's decision, his misdemeanor convictions for "conversion" are not "serious crimes." Additionally, he argues that, as used in Rule 22, "the term 'serious crime' ... [is] unconstitutionally vague." Finally, Jordan contends that the Board's decision was contrary to "precedents" established in previous disciplinary proceedings and, thus, denied him due process of law.

This is not the first time this Court has been called upon to review the issue whether "a crime less than a felony and not involving moral turpitude [may] be considered a 'serious crime'" as that term is defined in Rule 8. Tipler,

904 So. 2d at 1239. See also Alabama State Bar v. Quinn, 926 So. 2d 1018 (Ala. 2005). In Tipler, also applying Rule 22(a)(2) and Rule 8(c)(2), we stated "[t]he dispositive issue" in that case as "whether Tipler's conviction ... [was] a 'serious crime' within the meaning of Rule 8(c)(2)(C)." 904 So. 2d at 1240. In making its determination whether the crime falls within the definition of a "serious crime" found in Rule 8(c)(2)(C), Ala. R. Disc. P., the Board "is required to consider only the necessary elements of the crime." 904 So. 2d at 1241. We further explained in Tipler that a review of the plain language of the charging statute will reveal the necessary elements: "Rule 8(c)(2)... defines a crime as a 'serious crime' if the necessary elements of the statutory definition of the crime involve ['misappropriation, or theft; or ... [a]n attempt, a conspiracy, or the solicitation of another to commit a "serious crime"']."[3] Id. at 1241.

At the underlying hearing, the Bar argued, as it does on appeal, that, under the plain language of 18 U.S.C. § 641, the

[3]At the hearing conducted by the Board, the Bar indicated that it was proceeding against Jordan primarily pursuant to Rule 8(c)(2)(C) and (D), i.e., on grounds that Jordan's crimes constituted lesser crimes involving fraud, misappropriation, and/or theft, and conspiracy.

conversion underlying Jordan's conviction for violating that statute amounted to "theft" or "misappropriation" of property, which meets the definition of a "serious crime" for purposes of Rule 8(c)(2)(C). It further contended that, considering the plain language of 18 U.S.C. § 371, Jordan's conviction under that statute was a conviction for crimes involving both theft and conspiracy for purposes of Rule 8(c)(2)(C) and (D). Thus, the Bar concluded that even though the convictions were misdemeanors, the offenses, nonetheless, satisfied the "serious crime" definition in Rule 8(c)(2).

As the Bar argues, and as noted above, this Court has previously determined that neither the Board nor this Court is "free to examine the degree of 'seriousness' of the crime," but, we are, instead, "required to consider only the necessary elements of the crime when determining whether the crime falls within the definition of a 'serious crime' found in Rule 8(c)(2)(C), Ala. R. Disc. P." Tipler, 904 So. 2d at 1241. Therefore, because the elements of the charged offenses are determinative of the present appeal, we move directly to an analysis of the charging statutes.

Although the indictment charging Jordan is not included in the record on appeal, the charges were briefly explained by the United States Court of Appeals for the Eleventh Circuit in United States v. Jordan, 582 F.3d 1239 (11th Cir. 2009):

> "On June 21, 2000, a Northern District of Alabama grand jury returned an indictment charging [Jefferson County Sheriff Jimmy] Woodward and Jordan, in Count One, with conspiring, in violation of 18 U.S.C. § 371, to violate 18 U.S.C. § 641 by receiving, retaining, and converting NCIC [National Crime Information Center] records to their own use. Count Two charged Woodward with conveying the NCIC records to Jordan, and Count Three charged Jordan with receiving them, both acts in violation of § 641."

582 F.3d at 1244 (footnotes omitted; emphasis added). The Eleventh Circuit Court of Appeals further summarized the pertinent factual underpinnings of the indictment charging Jordan as follows:

> "Count one, alleging a conspiracy to violate 18 U.S.C. § 641, tracked the language of § 641 and asserted that the defendants required employees of the Sheriff's office to access the NCIC [National Crime Information Center] and ACJIS [Alabama Criminal Justice Information System] databases, obtain printouts of the criminal records of absentee voters, and then deliver the printouts, which as property of the United States had a value in excess of $1,000, to Jordan for use in Woodward's election contest. ... The overt acts committed in furtherance of the conspiracy included the November 5, 1998 telephone conversation between Fields and Jordan, the completion of the NCIC searches, the

> delivery of the information they disclosed to Jordan, and [a] meeting with District Attorney Brown .... In Counts Two and Three, respectively, the indictment alleged that Woodward conveyed to Jordan and Jordan received from Woodward a 'thing of value of the United States, that is, information contained in the NCIC records.' ..."

582 F.3d at 1246.[4]

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[4]In United States v. Jordan, 316 F.3d 1215 (11th Cir. 2003), in which the Eleventh Circuit Court of Appeals reinstated the indictment against Woodward and Jordan, which had been dismissed by the district court, the specific charges contained in the indictment were explained as follows:

> "Woodward and Jordan were each charged in three counts of the indictment. Count One alleged that both Woodward and Jordan conspired with each other to knowingly convert to their own use records and things of value of the United States of a value in excess of $1,000; to convey, without authority, records and things of value of the United States of a value in excess of $1,000; to receive and retain, with the intent to convert to their own use, records and things of value of the United States, of a value in excess of $1,000, knowing them to be converted; to knowingly engage in misleading conduct towards others with the intent to influence the testimony of persons in future official proceedings; and to defraud the United States, that is, use deceit, craft, trickery, overreaching and dishonest means to interfere with and impair lawful government functions, that is, the government's control of the NCIC records and the information contained therein, all in violation of 18 U.S.C. § 371.
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> "Count Two charged that Woodward knowingly and without authority conveyed to Jordan a thing of value of the United States (the NCIC records) knowing that he had no authority to do so, in violation of 18 U.S.C. §§ 2 & 641.

18 U.S.C. § 641 provides:

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
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> "Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--
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> "Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.
>
> "The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

Manifestly, § 641 describes different scenarios whereby an individual might be deemed guilty of a violation of the statute. Notably, the first paragraph of that section states

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> "Count Three charged that Jordan knowingly received and retained a thing of value of the United States (the NCIC records), knowing them to have been wrongfully converted, with the intent to convert them to his own use, in violation of 18 U.S.C. §§ 2 & 641."

316 F.3d at 1224 n.7.

that culpable conduct occurs whenever the offender "embezzles, steals, purloins, or knowingly converts to his use or the use of another ... any record, voucher, money, or thing of value of the United States or of any department or agency thereof," while the second paragraph is restricted to situations where an offender "receives, conceals, or retains" such an item "with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted." Thus, a comparison between paragraph one and paragraph two of § 641 leads readily to the conclusion that paragraph two does not involve the culpable conduct of actual embezzlement, stealing, purloining, or converting but, rather, involves only the culpable conduct of receiving, concealing, or retaining property known to have been embezzled, stolen, purloined, or converted with the intent thereafter to convert it to the offender's own use or gain.

It is apparent from a reading of Jordan that the Eleventh Circuit Court of Appeals deemed that Jordan's conduct and resulting convictions under count one and count three, respectively, implicated only the following portions of the first two paragraphs of § 641:

> "Whoever ... knowingly converts to his use or the use of another ... any record ... or thing of value of the United States or of any department or agency thereof ...; or
>
> "Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been ... converted."

582 F.3d at 1242 n. 1 (stating that 18 U.S.C. § 641 "states, in pertinent part"). Given the abbreviated version of paragraph two provided by the Eleventh Circuit as being that portion "pertinent" to Jordan's conviction under count three for violating § 641, the only issue relevant to his guilt under § 641 (count three) was whether he had received, concealed, or retained the NCIC information "with intent to convert it to his use or gain, knowing it to have been ... converted."[5]

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[5]We note the vagueness of the Eleventh Circuit's identification of the pertinent portions of the applicable statute in that that Court does not state, with particularity, that only a single one of the paragraphs identified as pertinent to the appeal applies to Jordan. This may be explained by the fact that the Court was often discussing the charges against Jordan and Woodward collectively. Similarly, as reflected by Jordan's brief to this Court, in which he purports to appeal from a self-styled "conversion" conviction, and by the Bar's own apparent understanding of Jordan's conviction, there appears to be some confusion as to whether Jordan was convicted of generally violating § 641 or of specifically violating only paragraph two of that section. However, upon careful review of the limited materials before us, we conclude that, from all appearances, Jordan was, in

Although the record does not contain the jury verdict returned against Jordan in the United States District Court, the resulting judgment entered by the district court on the jury's verdict reflects that Jordan was adjudged guilty of counts one and three, which "involv[ed] the [following] indicated offenses": "Conspiracy to Convert to Own Use Records and Things of Value of the United States ..." in violation of § 371 and "Receiving a Thing of Value of the United States (Wrongfully Converted NCIC Records) with the Intent to Convert to His Own Use" in violation of § 641. Similarly, the petition instituting the underlying disciplinary proceeding against Jordan asserted, with respect to Jordan's conviction under count three, that the same constitutes a "conviction of Receiving a Thing of Value of the United States (Wrongfully Converted NCIC Records) with the Intent to Convert to His Own Use."

As noted, paragraph two of § 641 -- the portion of the statute apparently underpinning the charge against Jordan in, and his conviction under, count three -- authorizes the conviction of "[w]hoever receives, conceals, or retains [in

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fact, charged only with violating paragraph two, i.e., with receiving or retaining the converted materials.

this case, the NCIC records,] with the intent to convert [them] to his use or gain, knowing [them] to have been embezzled, stolen, purloined or converted." Thus, Jordan's conviction under count three appears to have been based on his receiving the records with the intent to convert them, not his actual subsequent "use" or "conver[sion]" of them.[6]

Therefore, as best we are able to discern from Jordan and from the attachments to the petition instituting the underlying disciplinary proceeding, the elements necessary to Jordan's conviction under paragraph two of § 641 did not include as "a necessary element" the concepts of theft or of

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[6]The Bar argues in its brief that Jordan "was found guilty of receiving a thing of value and converting it to his own use." (Bar's brief, at p. 16.) A defendant's actual conversion of property to his own use is not a necessary element of paragraph two in § 641 -- the portion of the statute on which Jordan's count-three conviction was based -- and nowhere else in the record is there a formal finding with respect to count three that Jordan was guilty of "converting" the National Crime Information Center information to his own use.

We do not, however, hold that Jordan's conduct would not sustain a finding of a conversion. In fact, we note that, in rejecting Jordan's challenge to the sufficiency of the evidence sustaining his conviction, the Eleventh Circuit specifically found that the evidence established that "Jordan subsequently used some of the information the printouts disclosed to prosecute Woodward's election contest." Jordan, 582 F.3d at 1247.

"misappropriation."[7] Thus, applying Tipler, we are unable to conclude, as Rule 8(c)(2)(C) requires, that the statutory definition of the crime of which Jordan was convicted under count three, predicated as it apparently was, solely on paragraph two of § 641, involved as "a necessary element" the conduct of "misappropriation"; we are unable to conclude, therefore, that Jordan's conviction under paragraph two of § 641 was a conviction for a serious crime as that term is defined in Rule 8(c)(2)(C).

We reach a different result, however, when applying the Tipler analysis to Jordan's conviction for "conspiracy," i.e., violating 18 U.S.C. § 371, as charged in count one.

Section 371 states:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such

[7]We note, however, that had Jordan's count-three conviction been based, instead, on paragraph one of § 641, an alternative necessary element of the crime would have involved conversion, which we would have no trouble equating to "misappropriation." Similarly, had Jordan's count-three conviction been based on one or more of the other three forms of wrongful conduct addressed by paragraph one -- "embezzle[ment], steal[ing], or purloin[ment]" -- then a "serious crime" would have been established under Rule 8(c)(2)(C) with respect to not only "misappropriation" but also as to "theft."

> persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

As discussed, the Eleventh Circuit Court of Appeals stated in Jordan that count one of the indictment charged both Woodward and Jordan with conspiring to violate 18 U.S.C. § 641 "by receiving, retaining, and converting NCIC records to their own use," 582 F.3d at 1244 (emphasis added), and concluded that the evidence was sufficient to support Jordan's conviction for conspiracy under § 371.[8] Similarly, the district court's judgment reflected that Jordan's conviction under count one of the indictment was based, in pertinent part, on "Conspiracy to

[8]As with Jordan's § 641 conviction under count three, the abbreviated recitation of the applicable portion of the first paragraph of § 371, which specifically eliminates the "embezzles, steals, [or] purloins language," reflects the apparent determination by the Eleventh Circuit (having before it both the indictment and the record of that appeal, neither of which are in the appellate record before this Court) that the conspiracy count, being dependent on the § 641 offense that Woodward and Jordan were alleged to have conspired to commit, included that portion of § 641 criminalizing a defendant's knowing conversion.

Convert to Own Use Records and Things of Value of the United States ...."

Rule 8(c)(2)(D) defines a "serious crime" as including "[a]n attempt, a conspiracy, or the solicitation of another to commit a 'serious crime.'" Because Jordan was found guilty of, among other things, conspiring to convert the NCIC records, and because a conversion of those records would represent a misappropriation[9] of the same and therefore constitute a "serious crime" under Rule 8(c)(2)(C), the conclusion is inescapable that, under count one, Jordan was convicted of conspiring to commit a serious crime, which conspiracy in and of itself would constitute a serious crime under Rule 8(c)(2)(D). It necessarily follows then that Jordan's conviction for violating § 371 constitutes a

[9]The definition of "misappropriation" that the Bar relied on at the hearing, apparently from an edition of Black's Law Dictionary predating the 6th edition, provides as follows:

> "Misappropriation. The act of misappropriating or turning to a wrong purpose; wrong appropriation; a term which does not necessarily mean peculation, although it may mean that. Term may also embrace the taking and use of another's property for sole purpose of capitalizing unfairly on good will and reputation of property owner ...."

conviction for a serious crime, because that conviction is based on Jordan's alleged conspiracy with Woodward.

As to Jordan's remaining issues on appeal, this Court finds them to be without merit, to be unpreserved,[10] or to be unsupported by citation to legal authority as required by Rule 28(a)(10), Ala. R. App. P.

Conclusion

In consideration of the foregoing, we affirm the Board's finding that Jordan's conviction for violating 18 U.S.C. § 371 constituted a serious crime as defined by Rule 8(c)(2)(D), and we reverse the Board's finding that Jordan's conviction for violating 18 U.S.C. § 641 constituted such a crime.

AFFIRMED IN PART AND REVERSED IN PART.

Malone, C.J., and Main, J., and Harwood, Special Justice,* concur.

Shaw, J., concurs specially.

Stuart and Wise, JJ., concur in part and dissent in part.

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[10]See Alabama State Bar v. Hallett, 26 So. 3d 1127, 1140 (Ala. 2009), and Kyser v. Harrison, 908 So. 2d 914, 918 (Ala. 2005).

*Retired Associate Justice R. Bernard Harwood, Jr., was appointed on October 5, 2011, to serve as a Special Justice in regard to this appeal.

Parker, J., concurs in the result in part and dissents in part.

Woodall, Bolin, and Murdock, JJ., recuse themselves.

SHAW, Justice (concurring specially).

In Tipler v. Alabama State Bar, 904 So. 2d 1241 (Ala. 2004), this Court followed the "plain language" of Rule 8(c)(2)(C), Ala. R. Disc. P., which provides that, to determine if an offense is a "serious crime," one looks to see if the elements of the offense involve certain listed criteria. The doctrine of stare decisis informs this Court's decision to follow the rule announced in Tipler. Stare decisis "'is the only thing that gives form, and consistency, and stability to the body of the law. Its structural foundations, at least, ought not to be changed except for the weightiest reasons.'" Exxon Corp. v. Department of Conservation & Natural Res., 859 So. 2d 1096, 1102 (Ala. 2002) (quoting Bolden v. Sloss-Sheffield Steel & Iron Co., 215 Ala. 334, 340, 110 So. 574, 580 (1925) (Somerville, J., dissenting)). In this case, Tipler is controlling precedent, and we are not asked to abandon it. "Stare decisis commands, at a minimum, a degree of respect from this Court that makes it disinclined to overrule controlling precedent when it is not invited to do so." Moore v. Prudential Residential Servs.

Ltd. P'ship, 849 So. 2d 914, 926 (Ala. 2002). Tipler requires the analysis and result reached in this case.

STUART, Justice (concurring in part and dissenting in part).

I concur as to the main opinion's reversal of the determination of the Disciplinary Board of the Alabama State Bar that Albert Linch Jordan's conviction for violating 18 U.S.C. § 641 constituted a conviction for a "serious crime" as that term is defined in Rule 8(c)(2)(C), Ala. R. Disc. P.

I respectfully dissent from the main opinion's affirmance of the Disciplinary Board's determination that Jordan's conviction for violating 18 U.S.C. § 371 constituted a conviction for a "serious crime" as defined in Rule 8(c)(2)(D), Ala. R. Disc. P. I recognize that Tipler v. Alabama State Bar, 904 So. 2d 1237, 1241 (Ala. 2004), allows the Disciplinary Board no discretion "to examine the degree of 'seriousness' of the crime" but, instead, requires the Disciplinary Board and this Court to "consider only the necessary elements of the crime when determining whether the crime falls within the definition of a 'serious crime' as defined in Rule 8(c)(2)(C), Ala. R. Disc. P." (Emphasis added.) However, I believe this Court erred in setting forth such a broad rule in Tipler, and the facts of this case indicate that equity and fairness require that when the

Disciplinary Board or this Court considers whether a conviction constitutes a "serious crime" as defined in Rule 8(c)(2)(C) or (D), Ala. R. Disc. P., it is proper for the decision-maker to exercise discretion and to consider the facts supporting the conviction.

Wise, J., concurs.

PARKER, Justice (concurring in the result in part and dissenting in part).

I concur in the result insofar as the main opinion, pursuant to this Court's decision in Alabama State Bar v. Tipler, 904 So. 2d 1237 (Ala. 2004), reverses the determination of the Disciplinary Board of the Alabama State Bar that Albert Linch Jordan's conviction for violating 18 U.S.C. § 641 constituted a "serious crime" as that term is defined by Rule 8(c)(2)(C), Ala. R. Disc. P. I respectfully dissent from the main opinion insofar as it affirms the Disciplinary Board's determination that Jordan's conviction for violating 18 U.S.C. § 371 constituted a serious crime.

As noted in the main opinion, this Court has previously followed the rule that neither we nor the Disciplinary Board possesses the discretion "'to examine the degree of "seriousness" of the crime'" but, instead, may "'consider only the necessary elements of the crime when determining whether the crime falls within the definition of a "serious crime" found in Rule 8(c)(2)(C), Ala. R. Disc. P.'" ___ So. 3d at ____ (quoting Tipler, 904 So. 2d at 1241 (emphasis added)). I note, however, that this Court's decision in Tipler cites no

authority in support of the above-stated rule, see 904 So. 2d at 1241; that no such authority was presented in that appeal; and that this Court was not specifically asked in that appeal to adopt the above-stated rule. Moreover, neither Rule 8 nor Rule 22 of the Alabama Rules of Disciplinary Procedure limits the determination of whether an attorney has been convicted of a serious crime for purposes of a disciplinary proceeding to the narrow standard expressed in Tipler.

I find the above-stated rule to be unnecessarily rigid and without justification. Specifically, in this case, application of this inflexible rule forces the conclusion that Jordan's conviction for violating 18 U.S.C. § 371 constituted a serious crime, thus necessitating his disbarment or suspension. See Alabama State Bar v. Quinn, 926 So. 2d 1018, 1023 (Ala. 2005) ("Rule 22(a)(2), Ala. R. Disc. P., provides that the Disciplinary Commission shall disbar or suspend a lawyer if the lawyer has been convicted of a serious crime, as that term is defined in Rule 8, Ala. R. Disc. P."); Hayes v. Alabama State Bar, 719 So. 2d 787, 790 (Ala. 1998) ("The plain, express wording of Rule 22, Ala. R. Disc. P., taken in conjunction with the plain wording of Rule 8(c)(2), makes it

clear to this Court that once the Disciplinary Board has determined that an attorney has committed a felony or a 'serious crime,' a disbarment or a suspension of the attorney's right to practice law is mandatory.").

I believe a better rule is that, when determining whether an attorney has been convicted of a serious crime as that term is defined in Rule 8(c)(2), both the Disciplinary Board and, when necessary, this Court should consider whether there exist any special mitigating circumstances that would weigh in favor of a finding that the crime for which the attorney was convicted did not constitute a serious crime.[11] See generally, e.g., In re Concemi, 422 Mass. 326, 330, 662 N.E.2d 1030, 1033 (1996) ("Concemi has shown no special mitigating circumstance that would justify deviation from the usual and presumptive sanction of disbarment following conviction of a serious crime." (citing In re Alter, 389 Mass. 153, 157, 448 N.E.2d 1262, 1264 (1983), for the following proposition: "We

[11]"The purpose of attorney discipline is well settled -- to protect the public, not to punish the erring attorney. That purpose is achieved, the public is protected, when the sanctions are commensurate with the nature and gravity of the violations and the intent with which they were committed." Attorney Grievance Comm'n of Maryland v. Rees, 396 Md. 248, 254, 913 A.2d 68 (2006) (citations omitted).

emphasize the term 'special,' since it is apparent that 'typical' mitigating circumstances have not diverted the Justices from the imposition of disbarment or suspension")); In re Garber, 95 N.J. 597, 614-15, 472 A.2d 566, 576 (1984) ("In determining the appropriate sanction, '[t]he severity of discipline to be imposed must comport with the seriousness of the ethical infractions in light of all the relevant circumstances.' Occasionally, this Court has modified or rejected sanctions otherwise justified because of special mitigating circumstances." (citations omitted)); Attorney Grievance Comm'n of Maryland v. Mandel, 316 Md. 197, 201-02, 557 A.2d 1329, 1331 (1989) ("While disbarment usually follows a conviction of a crime of moral turpitude which involves fraud or dishonesty, a lesser sanction may be justified when, as here, compelling mitigating circumstances exist." (citations omitted)).[12]

[12]The cited cases address the need to consider special mitigating circumstances during the "penalty phase" of attorney disciplinary proceedings; in this case, however, we have not yet reached the penalty phase of Jordan's disciplinary proceedings. Nonetheless, I can ascertain no principled reason for limiting the consideration of special mitigating circumstances to the penalty phase of an attorney disciplinary proceeding. The same factors that are relevant in determining the penalty to be imposed are, in my view, equally as relevant in determining whether the crime for which

On April 11, 2006, the same day the jury found Jordan guilty of violating 18 U.S.C. §§ 371 and 641, the United States District Court for the Northern District of Alabama held a sentencing hearing; during that hearing, the Honorable Lacey A. Collier, Senior United States District Judge for the Northern District of Florida, sitting by designation, stated, in part:

> "[I]n assessing the seriousness of the offense, I have considered the duration and the extent of the offense, and this was an isolated crime of relatively short duration. I have considered the sophistication and the complexity of the offense. The offense involved very little planning or concealment and could have easily been discoverable by anyone. I have considered that the fact that this was not a violent crime. And, four, that there is no reported loss to the victims in this crime. The Government's system worked that very day through that very period. It works still today. It's not like where a car was stolen, and it's missing or a computer has been taken that needs to be replaced. There is nothing changed in the Government's system.
>
> "I find, quite frankly, nobody's privacy was violated in the grand sense of the word. It's interesting to note, [Jordan's counsel,] Mr. Agricola[,] points out where the Government's people ran the same tests, came up with 54 convicted felons that had voted. I'm not sure exactly what their purpose in doing that, but I don't know if that --

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the attorney has been convicted is one that should subject the offending attorney to the most severe penalties allowable -- disbarment or suspension.

> the Government would consider that to be a violation of privacy or not, but I would not.
>
> "The information is available elsewhere, maybe more difficult to get and determine, but it's certainly available. I do note that the information was not made public. It was not used to expose anyone. It was not used for blackmale [sic] or any other illicit purpose, and as I pointed out, the Government has lost nothing.
>
> "And it's interesting to note in the irony of this entire thing that had this alleged crime been successful, then it would have only guaranteed the integrity of the election. It's not like they set out to stuff the ballot box or see that somebody who did not receive the maximum number of votes, legitimate votes, got the office. Quite the contrary.
>
> "....
>
> "I do find that there's no need here to protect the public from further crimes from these two defendants. That is not in any way a likely prospect.
>
> "....
>
> "As to the history and characteristics of the defendants. It is the reputation of Mr. Jordan that no single individual has made a greater impact on the curtailment of voter fraud and establishment of honest elections in Alabama than has [Albert] Jordan."[13]

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[13]The record on appeal contains nearly 100 letters written by friends and professional colleagues of Jordan, including, among others, Congressman Spencer Bachus and former Alabama Governor Guy Hunt; each writer expresses his or her personal knowledge of Jordan's honesty, integrity, and commitment to the ethical practice of law. The thoughts expressed in those

(Emphasis added.)

I find that, under the particular facts of this case, the Disciplinary Board erroneously determined that Jordan's conviction for violating 18 U.S.C. § 371 constituted a serious crime. Specifically, I believe that there are special mitigating circumstances -- as stated so well by Judge Collier during Jordan's sentencing hearing -- that weigh in favor of a finding that Jordan's conviction for violating 18 U.S.C. § 371 did not constitute a serious crime and, thus, that Jordan should not be subject to either disbarment or suspension by the Disciplinary Commission; such a finding would prevent this State from being deprived of the services of one of its most

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letters are well summarized by the words of attorney Robert R. Riley, Jr.:

> "While I am aware that allegations were made that Mr. Jordan did something improper, and, furthermore, that he was found guilty of such, I do not believe, based on everything that I know about Mr. Jordan, that he ever would knowingly break the law. I am absolutely convinced that he would never do so. Whatever the circumstances were that led to his conviction, I know that Mr. Jordan believed that he was performing a lawful act on behalf of his client. Furthermore, Mr. Jordan's questionable activity was being monitored in the press and by the political opponent of his client. Surely no one believes that under such a microscope, Mr. Jordan would have intentionally conspired to break the law."

distinguished and accomplished attorneys. See Florida Bar v. Cox, 794 So. 2d 1278, 1286 (Fla. 2001) ("[L]awyer discipline must protect the public from unethical conduct but at the same time not deny the public the services of a qualified attorney." (citing Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970) (emphasis added))).

Based on the foregoing, I dissent from the main opinion's affirmance of the Disciplinary Board's determination that Jordan's conviction for violating 18 U.S.C. § 371 constituted a serious crime. I concur in the result reached in the main opinion that reverses the Disciplinary Board's determination that Jordan's conviction for violating 18 U.S.C. § 641 constituted a serious crime; I decline, however, to follow the rule espoused in Tipler, supra, and relied upon in the main opinion in reaching this result.

MURDOCK, Justice (statement of recusal).

I testified as a character witness on behalf of Albert Jordan in the federal proceeding out of which the present case arises. I therefore recuse myself.