LIU, J.

15

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of GARY D. GRANT, State Bar No. 173665 A Member of the State Bar.	Case No. S 197503 State Bar Case No. 09-C-12232

PETITION OF THE CHIEF TRIAL COUNSEL OF THE STATE BAR OF CALIFORNIA FOR WRIT OF REVIEW OF THE DECISION OF THE STATE BAR COURT

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

TABLE OF AUTHORITIES

Pages

Cases

Rules

Statutes

TABLE OF AUTHORITIES

Pages

Statutes

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I. PRELIMINARY STATEMENT

Gary Douglass Grant, an attorney and officer of the court who has been practicing law in California since 1994, was convicted of possession of child pornography – a felony. Grant specifically admitted that he "willfully, unlawfully and knowingly possessed *images of minors under the age of 18 years old exhibiting their genitals for the purpose of sexual stimulation of the viewer*." (Emphasis added.) (State Bar Exh. 4, p. 3.) Based on his conviction, Grant was sentenced to serve jail time and ordered to register for life as a sex offender.

The State Bar Court Hearing Judge correctly concluded that Grant's conduct involved moral turpitude and recommended that he be disbarred. Yet, despite the prurient and morally void nature of Grant's actions, the Review Department erred in finding that this conduct did not involve moral turpitude, either on its face or based on the circumstances surrounding the crime. To compound its error, the Review Department concluded that Grant should only face suspension even though he admitted that he possessed images of young children to sexually stimulate himself, twice violated the conditions of his probation shortly after his conviction, and lied to the State Bar Court

during his disciplinary proceeding.[1]

The Chief Trial Counsel submits that the record in this case demonstrates conclusively that if the high standards of the legal profession are to be maintained and the public confidence in the profession upheld, Grant must be disbarred. It is entirely incompatible with the standards of our profession to permit an officer of this court who has willingly participated in the child pornography market and who is publicly registered as a sex offender to serve as a member of the State Bar of California.

But on a more far reaching level, this case invites a primary and fundamental question of first impression regarding whether an attorney convicted of possession of child pornography in violation of Penal Code section 311.11, subdivision (a), should be summarily disbarred. The Chief Trial Counsel contends that any offense by an attorney that supports a despicable industry that profits on child abuse involves moral turpitude *per se* and meets the standard for summary disbarment. Both decisional law and expert commentary support the notion that possession of child pornography is a greater threat to children than sexual abuse or prostitution because it is the lifelong recordation of the sexual degradation of a child. The Review Department's conclusion that possession of child pornography does not automatically involve moral turpitude because the

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[1] The Review Department failed to give proper weight to Grant's continuing obstructions of the law in the form of two probation violations. The Review Department also failed to properly weigh and consider numerous instances of evasive testimony by Grant. While the Review Department factored into its decision one instance where Grant testified falsely, it wrongly disregarded many other credibility findings of the Hearing Department. Moreover, both the Hearing Department and Review Department failed to consider Grant's misleading testimony that he has no sexual interest in children. (RT, Vol. II, pp. 62:24-63:1.) This testimony was directly contradicted by his confession in the criminal proceeding where he stated he viewed child pornography for his "sexual stimulation." (State Bar Exh. 4, p. 3.) Finally, the Review Department erred in rejecting testimony of a forensic specialist who described additional images of child pornography discovered on Grant's computers.

circumstances may vary is simply wrong. Possession of child pornography is an ongoing sexual crime against children, and attorneys should not be willing participants in this criminal market. The Chief Trial Counsel respectfully submits that any member convicted of this offense has automatically forfeited the right to practice law in this state.

Even if the Court determines that these cases do not involve moral turpitude *per se*, review is also necessary to ensure consistency in how child pornography possession cases are treated by the State Bar Court. Presently, disciplinary recommendations in these types of cases can vary significantly. This Court recently rejected several resignations from attorneys with disciplinary charges pending for their child pornography convictions. These cases ultimately resulted in disbarment.[2] But in this case, suspension was the recommended discipline. In the parallel petition filed by the Chief Trial Counsel in *In the Matter of Frederick Stocker*, the Chief Trial Counsel also challenges a disciplinary proceeding where an attorney convicted of possession of child pornography was permitted to enroll in the Alternate Discipline Program and received a recommended discipline of a mere thirty days actual suspension. Disbarment is the appropriate sanction for any attorney convicted of this crime. Anything less than disbarment will erode public

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[2] (See Peter Chamberlain [membership number 53281; resignation case numbers S175875 and 09-Q-10329; conviction referral case number 08-C-14462, disbarred by stipulation, effective July 11, 2011] and Robert Wayne Wiley [membership number 64883; resignation case numbers S178003 and 09-Q-14034; conviction referral case number 08-C-13011; disbarred by stipulation, effective July 6, 2011], both for felony convictions of Penal Code section 311.11, subd. (a), and Thomas Henry Merdzinski [member number 152148; resignation case numbers S175875 and 09-Q-10661; conviction referral case number 08-C-13180; disbarred by stipulation, effective June 25, 2011] for a federal child pornography conviction under Title 18 United States Code section 2252A(a)(5)(B), and Eric Borgerson [member number 177943; resignation case numbers S177186 and 08-Q-13151; conviction referral number 08-C-12600; summarily disbarred, effective June 25, 2011] for a federal conviction of distribution of child pornography conviction under a title 18 United States Code section 2252A(a)(2).)

confidence and undermine the integrity of the legal profession.

Accordingly, the Chief Trial Counsel respectfully requests that this Court grant review in this matter to address these important issues or in the alternative, remand the matter back to the State Bar Court to reinstate the Hearing Department's findings and disbarment recommendation.

II. ISSUES PRESENTED

1. Does a felony conviction of possession of child pornography involve moral turpitude *per se*?

2. Is the State Bar Court Review Department's recommended discipline of two years actual suspension with additional terms and conditions appropriate in light of Grant's felony conviction of possession of child pornography with other aggravating factors?

III. GROUNDS FOR REVIEW OF STATE BAR COURT DECISION

A petition before this Court is appropriate at this time, as review within the State Bar Court has been exhausted. (Cal. Rules of Ct., rule 9.13(e)(1).) Moreover, review is necessary to settle important questions of law (Cal. Rules of Ct., rule 9.16(a)(1)), the State Bar Court decision is not supported by the weight of the evidence (Cal. Rules of Ct., rule 9.16(a)(4)), and the recommended discipline is not appropriate in light of the record as a whole. (Cal. Rules of Ct., rule 9.16(a)(5).)

IV. STATEMENT OF PROCEDURE

On April 8, 2009, Grant was convicted of one count of felony possession of child pornography in violation of Penal Code section 311.11, subdivision (a). (State Bar Exh. 4, p. 4 & Exh. 8, p. 5.)

On September 30, 2009, the Office of the Chief Trial Counsel transmitted Grant's record of conviction to the State Bar Court with a brief in support of the Chief Trial

Counsel's contention that Grant's crime involved moral turpitude *per se*.

On October 28, 2009, pursuant to Business and Professions Code section 6102, the Review Department of the State Bar Court placed Grant on interim suspension effective November 20, 2009. (Hearing Department Decision ("Hearing Dept. Dec."), pp. 1-2, attached as Appendix A.)

On December 29, 2009, the Review Department determined that "a violation of Penal Code section 311.11, subdivision (a) (possession of child pornography), of which Gary Douglass Grant was convicted, is a crime which may or may not involve moral turpitude." The Review Department referred the matter to the Hearing Department for hearing and decision recommending the discipline to be imposed if the court found that the facts and circumstances surrounding the violation involved moral turpitude or other misconduct warranting discipline. (Hearing Dept. Dec., p. 2.)

On October 1, 2010, following a four-day trial, the Hearing Department issued its Decision and concluded that the facts and circumstances surrounding Grant's conviction involved moral turpitude and recommended that Grant be disbarred. The Hearing Department found that Grant's criminal conviction involved "a serious breach of duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession, and is, therefore, a conviction of a crime involving moral turpitude." (Hearing Dept. Dec., p. 9.)

The Hearing Department further found that Grant's testimony lacked credibility (Hearing Dept. Dec., p. 3) and that he twice violated his probation shortly after his conviction. (Hearing Dept. Dec., p. 4.) In addition, the Court heard and admitted the testimony of a District Attorney Forensic Specialist who described numerous other

images of child pornography found on Grant's computers and other electronic media owned by Grant.[3] The Hearing Department also concluded that Grant's mitigating factors (no prior record of conviction, extreme emotional disability at the time of his misconduct, cooperation, and character evidence) were not compelling. (Hearing Dept. Dec., p. 12.)

On September 12, 2011, the Review Department filed its Opinion and Order. Although stating that ". . . possession of child pornography is a reprehensible crime . . ." (Rev. Dept. Op., p. 3) and "we view possession of child pornography as serious and reprehensible misconduct" (Rev. Dept. Op., p. 13), the Review Department concluded that, as a case of first impression in California, felony possession of child pornography does not involve moral turpitude *per se*.

In addition, the Review Department also rejected the Hearing Department's moral turpitude finding and determined that based on the facts and circumstances Grant's misconduct did not merit disbarment. The Review Department rejected the evidence presented by forensic specialist Wong of additional images of child pornography found on Grant's computers and further concluded that Grant's evidence in mitigation minimally outweighed the single factor in aggravation (lack of candor at trial and misleading the court). The Review Department suspended Grant for two years actual and placed him on probation for three years with various other conditions, including compliance with rule 9.20 of the California Rules of Court. (Review Department Opinion ("Rev. Dept. Op."), pp. 14-15, attached as Appendix B.)

Pursuant to rule 9.14, California Rules of Court, the Chief Trial Counsel now seeks review of the Opinion of the Review Department.

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[3] The Forensic Specialist, Amy Wong, testified as a lay witness as to the ages of children depicted on the pornographic images found on Grant's computers.

V. STATEMENT OF FACTS

The following summary of facts reflects that Grant's misconduct is simply too egregious to warrant his continued membership and that a suspension, however lengthy, is insufficient.

A. Grant's Felony Conviction For Possession Of Child Pornography

On April 8, 2009, Grant pleaded guilty and was convicted in Orange County Superior Court of one count of felony possession of child pornography in violation of Penal Code, section 311.11, subdivision (a).[4] (Rev. Dept. Op., p. 4; State Bar Exh. 4.) Grant offered the following factual basis for his guilty plea: "7-28-07, I willfully, unlawfully and knowingly possessed *images of minors under the age of 18 years old exhibiting their genitals for the purpose of sexual stimulation of the viewer*." (Emphasis added.) (State Bar Exh. 4, p. 3.) Grant was sentenced to 90 days in jail, three years' probation and ordered to register for life as a sex offender, among other terms and conditions. (Hearing Dept. Dec., p. 3.)

While the circumstances leading up to Grant's arrest are unclear, Grant admitted that he possessed two images that were "clearly unlawful" of "a young child" (Reporter's

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[4] Penal Code section 311.11, subdivision (a) reads:

> (a) Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a felony and shall be punished by imprisonment in the state prison, or a county jail for up to one year, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both the fine and imprisonment.

Transcript ("RT"), Vol. II, p. 60:19-25), i.e. "clearly someone under 18, considerably younger" (RT, Vol. II, p. 61:14-15) that depicted their genitals and which he possessed for his sexual stimulation. (State Bar Exh. 4, p. 3.)

B. A Forensic Examination Of Grant's Computers Revealed Additional Child Pornography

At the time of his arrest, Grant's residence was searched and various computers owned by him (RT, Vol. 1, p. 32:6-10; RT, Vol. II, p. 6:18-21) and other electronic media were seized. (RT, Vol. I, p. 43:1-5.) These materials were delivered to Amy Wong, a computer forensic examiner for the Orange County District Attorney's Office. (RT, Vol. I, p. 9:17-20.) Wong conducted a forensic examination of these computers and the other electronic media taken from Grant's residence. (RT, Vol. I, pp. 21-24.) It was also her job to bookmark images of suspected child pornography (RT, Vol. I, p. 116:14-17). And, although she was not an "expert" in identifying children's ages (RT, Vol. I, p. 116:23-25; p. 119:16-18), she felt "comfortable" estimating the ages of children appearing in these images. (RT, Vol. I, p. 116:18-23.) Wong's forensic examination discovered numerous pornographic images featuring children under 18 on Grant's computers that she described as follows:[5]

1) An examination of a generic PC tower revealed a peer to peer file sharing program named "Grokster" that contained a video entitled "r@ygoldthreerussianpreteens.mpg" that showed three girls under the age of 14 naked from the waist down and urinating on the floor. (RT, Vol. 1, pp. 77:4-79:6; Hearing Dept. Dec., pp. 4-5.)

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[5] As discussed in more detail below, the Chief Trial Counsel did not introduce the actual images of suspected child pornography that Wong discovered on the basis that both federal and state law prohibit non-law enforcement entities from possessing this material.

2) Also found on the generic PC tower were six other pornographic images of girls under the age of 16 (RT, Vol. I, p. 87:18-20):

a) "byriver.jpg" features two girls under the age of 14 exposing their bare breasts and genitals (RT, Vol. I, pp. 87:25-88:4);

b) "whitpanties.jpg" shows a girl under the age of 16 in panties (RT, Vol. I, p. 88:5-8);

c) "02.jpg" shows two nude girls under the age of 16 exposing their breasts and genitals (RT, Vol. I, p. 88:9-13);

d) "2Fems.jpg" features two girls between the ages of 14 and 16 exposing their breasts (RT, Vol. I, p. 88:14-19);

e) "13Gir-1.jpg" shows a nude girl under the age of 16 exposing her breasts and genitals (RT, Vol. I, p. 88:20-25); and,

f) "Friends-12.jpg" shows two nude girls under the age of 16 exposing their genitals and touching themselves in the crotch area. (RT, Vol. I, p. 89:2-7.)

3) Wong's examination of Grant's Compaq computer revealed the following pornographic images:

a) "38.jpg" shows a nude girl between the ages of 14 and 16 exposing her breasts (RT, Vol. I, p. 90:3-8);

b) "39.jpg" shows a nude girl between the ages of 14 and 16 exposing her breasts and genitals (RT, Vol. I, p. 91:11-14); and,

c) "riverma118.jpg" shows a nude girl under the age of 16 standing in a river exposing her breasts and genitals.

4) Wong also examined six CDs seized from Grant's residence. One CD contained nine images of nude or partially clothed girls under the age of 16 and in

sexually suggested poses. (RT, Vol. I, p. 81:23-25; RT, Vol. I, pp. 118:18-119:2 [here Wong corrects the number of images she bookmarked]; RT, Vol. I, pp. 83:17-84:13.)

5) Wong also discovered that on June 28, 2004, Grant emailed to three individuals an image of two girls under the age of 16 naked in bed and touching their crotch area. (RT, Vol. I, pp. 123:25-124:9.)

C. Grant Violated His Probation On Two Occasions Shortly After His Conviction

Shortly after Grant's conviction on April 8, 2009, he twice violated his probation. On May 11, 2009, Grant admitted that he violated his probation following his probation officer's discovery of adult pornography on his hard drive. He received 174 days in jail. (State Bar Exh. 11; RT, Vol. II, pp. 11:4-12:17.) And then again, on September 18, 2009, Grant admitted to violating probation by texting two girlfriends for sexual purposes ("sex-texting" or "sexting") and received an additional nine days in jail. (State Bar Exh. 11; RT, Vol. II, pp. 14:24-15:4; RT, Vol. II, p. 13:17-23.)

D. Grant Misled The State Bar Court And His Testimony Lacked Credibility

The Hearing Department's conclusion that Grant lacked credibility and candor was well founded. (Hearing Dept. Dec., p. 3.) The Hearing Department found Grant's testimony not credible on a number of points:

- "Respondent's claim that his conviction was for a misdemeanor violation of Penal Code section 311.11, subdivision (a) is without merit." (Hearing Dept. Dec., p. 3, n. 1);

- "Respondent's claim that he did not knowingly violate Penal Code section 311.11, subdivision (a) is without merit." (Hearing Dept. Dec., p. 3, n. 2);

- "Respondent's claim that he admitted culpability to both probation violations only on advice of counsel is without merit." (Hearing Dept. Dec., p. 4, n. 3);

- "Respondent's Due Process claim concerning his inability to view the images that formed the basis of Wong's testimony is without merit." (Hearing Dept. Dec., pp. 4-5, n. 4.);

- "Respondent's testimony that he had knowledge of only two (2) images of child pornography on his computer is not credible." (Hearing Dept. Dec., p. 6, n. 6);

- ". . . the court does not find respondent's testimony credible as to the number of images containing girls under the age of eighteen (18) found on his computers . . ." (Hearing Dept. Dec., p. 7);

- "Respondent testified that he resigned his [military] commission because he did not want to go overseas and he was getting older. Respondent's testimony was intentionally misleading. [Emphasis added.] In fact, the United States Army had taken action against respondent based on respondent's criminal conviction, which action may have led to respondent's involuntary separation from service. Based on his resignation from the service, respondent was discharged from the United States Army Reserves with the status of 'other than honorable discharge.'" (Hearing Dept. Dec., pp. 8-9);

- "Respondent's testimony that his legal counsel in the United States Army inquiry into his criminal conviction matter submitted respondent's resignation and that respondent later never opened the mail from the United State [sic] Army indicating his discharge status lacks credibility." (Hearing Dept. Dec., p. 9, n. 8.)

This Court may also take note of the following additional misleading testimony. Grant testified that he does not find child pornography "sexually stimulating" (RT, Vol. II, pp. 62:24-63:1), that he finds such images "repugnant" (RT, Vol. II, p. 187:14-15) and "instantly deleted" these images. (RT, Vol. II, p. 61:15.) This testimony is belied by his confession in support of his guilty plea in which he admitted that "7-28-07, I willfully,

unlawfully and knowingly possessed *images of minors under the age of 18 years old exhibiting their genitals for the purpose of sexual stimulation of the viewer*." (Emphasis added.) (State Bar Exh. 4, p. 3.) These words are Grant's words declared under penalty of perjury after acknowledging that he had "read, understood, and personally initialed each numbered item above, and I have discussed them with my attorney." (State Bar Exh. 4, p. 4.) This confession directly contradicts Grant's trial testimony and cannot be reconciled.

VI. ARGUMENT

A. Review Is Necessary To Establish Consistency Within The State Bar Court On Recommendations Involving Convictions For Possession Of Child Pornography

Presently, there are no reported cases from this Court that discuss the proper sanction to impose on attorneys convicted of this particular offense. Present disciplinary recommendations by the State Bar Court vary greatly, ranging from disbarment to thirty days actual suspension. (See footnote 2, *supra*, re disbarment for possession of child pornography following rejection by this Court of tendered resignations with charges pending; in *In the Matter of Frederick Stocker*, filed in this Court as a companion case, an attorney was convicted of possession of child pornography, stipulated to moral turpitude, was permitted to enroll in the Alternate Discipline Program and received a recommended discipline of a mere thirty days of actual suspension.) The Chief Trial Counsel respectfully submits that allowing Grant (or any other attorney convicted of possession of child pornography) to practice while also a registered sex offender will erode the public's confidence in the profession. Accordingly, review and direction are requested regarding the appropriate sanction to be imposed on attorneys convicted of felony possession of child pornography.

B. As An Issue Of First Impression, This Court Should Consider Whether A Felony Conviction Of Possession Of Child Pornography Involves Moral Turpitude *Per Se*

Possession of child pornography is morally reprehensible and intrinsically wrong in every instance. The evils inherent in child pornography are well understood. Any person convicted of possessing child pornography is an admitted link in the chain of a criminal enterprise that knowingly degrades and damages children. While the Review Department conceded that possession of child pornography is a "serious and reprehensible" crime (Rev. Dept. Op., p. 13), it failed to conclude that conviction of felony possession of child pornography involves moral turpitude *per se*. The Review Department stated that "[w]e do not view possession of child pornography as a crime involving moral turpitude in every case because the circumstances may vary" and because "not every violation of Penal Code section 311.11, subdivision (a), necessarily involves such readiness to commit a sex offense against a child." (Review Dept. Op., p. 3.) The Chief Trial Counsel respectfully submits that the Review Department's analysis and conclusion are incorrect and that moral turpitude is inherent in any felony conviction of this offense.[6] Attorneys must be held to the highest standards of conduct and disbarment is the only appropriate sanction for members who willingly participate in child pornography industry.

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[6] In order to be convicted of violating Section 311.11, subdivision (a), a person must "knowingly" possess or control any image "knowing" that the image depicts a person under the age of 18 years personally engaging in or simulating sexual conduct. (Pen. Code, § 311.11, subd. (a).) As defined by Penal Code section 311, subdivision (e), "knowingly" means "being aware of the character of the matter or live conduct." That is, any conviction of possession of child pornography requires a deliberate act with full awareness of the offensiveness of the content of the banned material. This content will necessarily depict children engaging in "sexual conduct" as that term is defined in Penal Code section 311.4, subdivision (d)(1). Any attorney who satisfies the elements of the crime of possession of child pornography also satisfies the standard for summary disbarment.

A member of the Bar who is convicted of a felony is subject to summary disbarment "if the offense is a felony . . . and an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or involved moral turpitude." (Bus. & Prof. Code, § 6102, subd. (c).) There are no reported California cases concluding that felony possession of child pornography constitutes moral turpitude.[7] This issue is of particular importance in the attorney context where the public's trust in the legal profession rests in great part on the outcome of its disciplinary proceedings. Thus, this issue is ripe for consideration by this Court.

Moral turpitude is an "act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 Cal.2d 93, 97; *In re Lesansky* (2001) 25 Cal.4th 11, 17 ["In the attorney discipline context, the term 'moral turpitude' includes 'particular crimes that are extremely repugnant to accepted moral standards such as . . . serious sexual offenses [citation]."].) Moral turpitude must be inherent in a criminal conviction as a prerequisite to summary disbarment. That is, "[a]n offense *necessarily* involves moral turpitude if the conviction would *in every case* evidence bad moral character." (*In re Lesansky, supra*, 25 Cal.4th at p. 16; *In re Hallinan* (1954) 43 Cal.2d 243, 248.) Possession of child pornography is not a simple victimless crime. Quite the contrary, it is the lifelong recordation of the sexual abuse and degradation of a child. As the Supreme Court stated in *New York v. Ferber* (1982) 458 U.S. 747:

"As one authority has explained:

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[7] Possession of child pornography has been found to constitute moral turpitude for immigration purposes. (See *U. S. v. Santacruz* (9th Cir. 2009) 563 F.3d 894, 896-97 [possession of child pornography violates societal moral standards]; *In re Olquin-Rufino* (BIA 2006) 23 I & N Dec. 896, 898.)

> '[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.' Shouvlin, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981)"

(*Id.* at p. 759, n. 10.)

In *Osborne v. Ohio* (1990) 495 U.S. 103, the Supreme Court elaborated on the *Ferber* holding and stated that "pornography's continued existence causes the child victims continuing harm by haunting the children in years to come." (*Id.* at p. 111.)

The practice of law requires good moral character and any attorney convicted of possession of child pornography, particularly a felony conviction, demonstrates his bad moral character and his unfitness to practice law in this state. Possession of child pornography is, in fact, a sexual offense involving minors as it is less about "pornography" than it is about the sexual predation and abuse of children. (See *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244 ["The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of decent people."].) To underscore the seriousness of this crime, those found culpable of this crime must register for life as sex offenders. (Pen. Code, § 290; see *In re Alva* (2004) 33 Cal.4th 254 [upholding sex offender registration as applied to even a misdemeanor conviction of possession of child pornography].)

The sexual exploitation of children cannot be categorized by degrees of harm as suggested by the Review Department. Rather, the legal profession is better served by condemning this crime without equivocation and subjecting any attorney convicted of this crime to summary disbarment. (See *In re Higbie* (1972) 6 Cal.3d 562, 570 [the

"moral turpitude" standard exists "to ensure that the public, the courts, and the professions are protected against unsuitable legal practitioners."].)

C. Even If Grant's Felony Conviction Does Not Constitute Moral Turpitude *Per Se*, The Acts Constituting The Offense Involve Moral Turpitude

The facts surrounding Grant's felony conviction – to which he pleaded guilty – clearly involve moral turpitude and no reasonable argument can be made countering the depravity of his crime. The record also establishes that Grant maintained numerous other images of child pornography on his computers, further establishing that his crime involves moral turpitude.

1. Grant's Offense Involves Moral Turpitude

Grant pleaded guilty to felony possession of child pornography in violation of Penal Code, section 311.11, subdivision (a), and, as a consequence, he was required to register for life as a sex offender. Grant further admitted that he used images of young children depicting their genitals for his sexual arousal and gratification. This conduct is particularly repugnant and reveals a deeply troubling aspect of his character that Grant is unwilling to confront.

Grant's acts are certainly no less a serious sexual offense than a conviction for indecent exposure which this court has found constitutes moral turpitude. (See *In Re Boyd, Jr.* (1957) 48 Cal.2d 69, 70 [a member's conviction of misdemeanor indecent exposure is "conduct ... unworthy of a member of the legal profession" and involves moral turpitude].) Although Grant would like this Court to believe that his crime resulted from the simple and inadvertent receipt of child pornography, his confession, however, signals he was fully aware of his acts and ready to exploit images of child pornography for his own disturbed purposes. Grant pleaded guilty to a reprehensible crime that was compounded by the manner in which he utilized these materials.

Unfortunately, the Review Department did not consider at all the repercussions of Grant's confession that he uses pornographic images of young children for his "sexual stimulation." Had the Review Department properly considered this evidence it most certainly would have found that Grant's conduct involved moral turpitude. By completely ignoring this evidence, the Review Department fully accepted Grant's misleading testimony that he has no interest in child pornography which, puzzlingly, was corroborated by Grant's therapist. The fact that Grant enjoys child pornography also weakens the credibility of his claims that he never actively searched for child pornography or visited child pornography web sites. (RT, Vol. II, pp. 67:10-15; 67:25-68:1; 187:7-15.)

In addition, Grant maintained numerous other images of child pornography on his computer as described by forensic specialist Amy Wong (see discussion, below). The preclusion of testimony describing this evidence, however, is not necessary to conclude that Grant's crime involved moral turpitude. As established below, the Review Department improperly precluded the admission of critical testimony describing the ages of the subjects depicted in these images.

2. **Grant's Probation Violations Signal an Habitual Unwillingness or Inability to Comply with the Law or Conform to Professional Norms**

Grant was convicted in April 2009 and within a matter of months violated his probation twice. "Disobedience of a court order, whether as a legal representative or as a party, demonstrates a lapse of character and a disrespect for the legal system that directly relate to an attorney's fitness to practice law and serve as an officer of the court." (*In re Kelly* (1990) 52 Cal.3d 487, 495; Bus. & Prof. Code, § 6068, subd. (a) [it is the duty of an attorney "[t]o support the Constitution and laws of the United States and of this state"] and § 6068, subd. (b) [it is the duty of an attorney "[t]o maintain the respect due to the

courts of justice and judicial officers."].) Although the Review Department identified Grant's probation violations as a factor in the determination of discipline (Rev. Dept. Op., p. 13), the Review Department failed to give proper weight to Grant's continuing obstructions of justice and their bearing on his fitness to practice.

Grant's violations reflect his ongoing disregard for the law and his willingness to jeopardize the safety of the public. Moreover, rather than acknowledge his misconduct, Grant attempted to explain away and minimize the seriousness of these offenses. In connection with his first probation violation for possessing adult pornography, he testified that while he believed the facts demonstrated a violation he didn't think he "had the intent to violate the order." (RT, Vol. II, p. 15:204.) He then explained that he inadvertently downloaded adult pornography from an old hard drive onto his new computer. (RT, Vol. II, p. 15:8-23; p. 17:3-11.) This explanation is entirely implausible. Grant's lackadaisical and incautious downloading of computer files is particularly alarming in light of the requirements imposed by the terms of his probation. The Superior Court did not tolerate his violation of its orders as reflected by the fact that he was sentenced to 174 days in jail. (State Bar Exh. 11, p. 2.) Grant's excuse-making testimony is disturbing and does not give one confidence that he has learned anything from his misconduct.

Grant's second violation occurred in September 2009 a mere four months after his first violation. In that case, Grant admitted violating his probation for sexting two girlfriends. Again, he refuses to accept responsibility for his misconduct. He excuses his actions by contending that he didn't believe sexting his girlfriends was a violation of his probation[8] (RT, Vol. II, pp. 98:4-99:10) and targets his girlfriends for blame as the

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[8] The terms of Grant's probation included a provision prohibiting the use of "any sexually oriented telephone services." (State Bar Exh. 6, p. 3.)

initiators of the offending texts. (RT, Vol. II, p. 13:19-23; p. 13:24-14:12; pp. 95:15-98:3.)

Grant continues to represent a threat of harm to the public as evidenced by his willful probation violations and the lack of any understanding of the gravity of his actions.

3. The Review Department Did Not Properly Weigh the Mitigating and Aggravating Circumstances

The Hearing Department was not impressed with Grant's offer of mitigating circumstances in light of his overarching lack of candor at trial. (Hearing Dept. Dec., p. 12 ["Taken as a whole, the mitigating factors are not compelling".].) The Review Department, however, concluded that "[o]n balance, Grant's evidence in mitigation minimally outweighs his sole yet serious factor in aggravation [lack of candor]." (Rev. Dept. Op., p. 12.) The Review Department failed to consider the Hearing Department's findings that Grant lacked credibility in many other aspects of his testimony and offered disingenuous explanations of his conduct in other instances. In light of the record, the aggravating circumstances present here greatly outweigh any evidence offered in mitigation.

"We have held that fraudulent and contrived misrepresentations to the State Bar may perhaps constitute a greater offense than misappropriation." (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [finding that respondent's misrepresentation to a State Bar investigator delayed its investigation and that his evasiveness before the hearing panel hindered the court's fact-finding function.]; *Olguin v. State Bar* (1980) 28 Cal.3d 195, 200 [misrepresentation to the State Bar may result in disbarment].) As the Hearing Department found, Grant's testimony was replete with less than believable testimony in a number of particulars (see discussion, above, pp. 11-13) and he intentionally lied to the

court about the reasons why he resigned his commission with the U.S. Army Reserve.

There is also a strong inference that Grant testified falsely when he said that he does not find child pornography "sexually stimulating" (RT, Vol. II, pp. 62:24-63:1), that he finds such images "repugnant" (RT, Vol. II, p. 187:14-15) and "instantly deleted" these images. (RT, Vol. II, p. 61:15.) He confessed that he knowingly possessed child pornography for the express purpose of his "sexual stimulation." (State Bar Exh. 4, p. 3.) His testimony before the State Bar Court is contradicted by his own confession.[9]

The Review Department disregarded the Hearing Department's determination that Grant lacked credibility explaining that the hearing judge "never provided the important analysis identifying what portion of Grant's testimony lacked credibility and why." (Rev. Dept. Op., p. 11, n. 12.) To the contrary, the Hearing Department expressly noted numerous instances where Grant's testimony lacked credibility and one instance where Grant intentionally misled the court. "We give great weight to the findings of a referee [trial judge], particularly as to the credibility of witnesses." (*Blair v. State Bar* (1989) 49 Cal.3d 762, 775; see *In re Utz* (1989) 48 Cal.3d 468, 480 [the court is reluctant to reverse credibility findings of the hearing department which had the opportunity to observe the demeanor of witnesses].) The Review Department failed to consider the totality of Grant's evasive testimony and his overall lack of credibility, thus failing to properly weigh the aggravating circumstances. Grant's lack of candor manifests disrespect to the court and increases the risk that Grant will engage in other misconduct if he is allowed to practice law.

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[9] Grant's therapist testified that Grant was not a pedophile, has no interest in child pornography and poses no danger to the public or children. (RT, Vol. II, p. 113:6-16.) On the other hand, Grant's admission that he views child pornography to sexually pleasure himself weakens the force of the therapist's opinions and confirms that he is and remains a danger to children.

The Hearing Department also properly concluded that "[s]ince respondent fails to accept full responsibility for his misconduct, he is not eligible for the mitigating factor of remorse." Indeed, Grant has failed to show remorse or accept any responsibility for his conduct. (See *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 958 ["though lack of remorse is not an aggravating factor when based upon an honest belief in innocence . . . a failure to appreciate the gravity of conduct which is conceded, and a contemptuous attitude toward the disciplinary proceeding, are matters relevant to the appropriate sanction."].)

The fact that Grant has no prior record of discipline is not a significant mitigating factor given the seriousness of his crime. (*In re Utz*, *supra*, 48 Cal.3d at p. 485.) Likewise, Grant's cooperation with the State Bar's investigation is subject to minimal weight given his lack of candor. (Hearing Dept. Dec., p. 10.) And, as correctly stated by the Hearing Department, the mitigation value of his extreme emotional disability is "lessened because there was insufficient evidence presented to show that respondent no longer suffers from the disability." (Hearing Dept. Dec., p. 10.) Grant's character witnesses are entitled to some mitigating weight, but this evidence does not overcome the seriousness of his offense or the aggravating circumstances clearly evident and on the record.

4. **The Review Department Erred in Rejecting the Testimony of the Forensic Examiner Regarding Additional Images of Child Pornography on Grant's Computers.**

The Review Department's rejection of forensic specialist Wong's testimony concerning images of additional child pornography discovered on Grant's computers was an abuse of discretion.

Wong testified she found additional child pornography on Grant's computers and

CD's and described the contents of several images of child pornography and the contents of a video entitled *r@ygoldthreerussianpreteens.mpg*. She testified about the approximate ages of the subjects depicted on these materials and bookmarked them for further evaluation by a District Attorney investigator. The actual photos and video were not introduced into evidence because the Chief Trial Counsel believed they were legally unavailable in that both federal and state law prohibit anyone other than law enforcement from possessing such materials. Without addressing the merits of the Chief Trial Counsel's contention, the Review Department precluded the admission of Wong's testimony describing the images. The Review Department concluded that Wong's testimony violated the secondary evidence rule because the Chief Trial Counsel did not establish that the images at issue could not be reasonably procured and, in any case, Wong's testimony about the approximate ages of the victims constituted improper lay witness testimony.

a) The secondary evidence rule did not bar the admission of oral testimony describing images of additional child pornography

The Evidence Code provides that oral testimony concerning the contents of a writing (a "writing" includes photographic images [Evid. Code, § 250]) is not made inadmissible if the proponent does not have possession of the original or a copy of the writing, and the writing is not reasonably procurable by use of the court's process or by other available means. (Evid. Code, § 1523, subd. (c)(1).) Contrary to the Review Department's finding, the Chief Trial Counsel satisfied this test.

First, it is undisputed that the Chief Trial Counsel never possessed or controlled the images at issue here. Second, the images were not reasonably procurable because both federal and state laws restrict the handling and distribution of such material without any apparent exemption for the prosecution of administrative actions such as

disciplinary proceedings.

The prosecutor assigned to this matter explained her reasons, in detail, for not offering the actual images of child pornography into evidence in her Supplemental Pretrial Statement. The Deputy Trial Counsel summarized her position as follows:

> "Federal law restricts lawful possession of child pornography to law enforcement and the courts for use in criminal proceedings only; while state law restricts possession of such material to law enforcement and for legitimate medical, scientific or educational activities only. The primary rationale behind this and other statutory restrictions on use of this material is to protect the privacy of the child victims. There appears to be no statute that expressly or impliedly permits either state or federal law enforcement to share such material with a non-law enforcement public entity for use in licensure proceedings. The risk of unlawfully possessing such images is severe and includes both criminal and monetary penalties as well as the possibility of civil litigation filed by child victims whose names or images are unlawfully disclosed."

("State Bar's Supplemental Pretrial Statement", p. 2:3-12.)

The Review Department did not address this legal reasoning and concluded only that the prosecutor made no effort to use the court's process to obtain the images for trial and, therefore, did not establish the exception to the secondary evidence rule. (Rev. Dept. Op., pp. 8-9.) The Review Department failed to grasp that if these images could not lawfully be possessed or shared with the prosecutor then they were also not "reasonably procurable by use of the court's process." (Evid. Code, § 1523, subd. (c).)[10] There appears to be no case law addressing the issue of whether evidence that is "legally unavailable" satisfies the test that it is also not "reasonably procurable." But reason and common sense dictate that such secondary evidence be allowed in the same vein that

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[10] The fact that the District Attorney had at one point agreed to share the images subject to the Superior Court's modification of a protective order does nothing to dispel or minimize the well-grounded analysis offered by the prosecutor establishing that the State Bar was prohibited from acquiring these items.

secondary evidence is allowed to be admitted to prove the contents of a lost or missing document. (See *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1071 [allowing the use of secondary evidence to prove the contents of a lost insurance policy].)

Accordingly, because the unavailability of the images was established, competent oral testimony was admissible to prove the contents of these images.

b) Oral testimony regarding the ages of subjects appearing in pornographic images found on Grant's computers did not amount to improper lay witness testimony

The Review Department also erred in excluding Wong's testimony about the approximate ages of the subjects depicted on the pornographic images found on Grant's computer as improper lay witness testimony. (Rev. Dept. Op., pp. 9-10.) Wong testified as a non-expert regarding the approximate ages of the girls featured in the photos and the video. Evidence Code section 800 allows a lay witness to testify to an opinion if it is rationally based on the witness' perception and helpful to a clear understanding of her testimony. (See *People v. Farmham* (2002) 28 Cal.4th 107, 153 [lay witness testimony regarding defendant's aggressive posture was admissible].) Wong's testimony was clearly rationally based as it was based on her personal knowledge of the contents of the photos and the video. In addition, it isWong's job as a forensic analyst is to identify the approximate ages of children in pornographic images. Thus, she testified that "[m]y job at the DA's office is just – for child porn cases, my job is to bookmark what appears to me to be under 18, and it was the case agent's job to identify that." (RT, Vol. I, p. 116:14-17.)

And, contrary to the Review Department's assessment that Wong's testimony was "tentative" (Rev. Dept. Op., p. 9), Wong testified that while she is not an expert in

identifying ages she was comfortable in estimating the ages of children. Thus, she testified "... Ms. Warren did ask me what, if any, I'd be comfortable in telling you as far as what ages of the pictures appears to be, and I looked through the images again, and that's why I narrowed down to what I am comfortable with." (RT, Vol. I, p. 116:19-24; RT, Vol. I, p. 119:14-18 ["Q: And upon closer examination over the weekend, you believed nine of them were under the age of 16? A: That I am comfortable with in saying. Again, I am not an expert in identifying ages of the pictures. So, for the testimony today, that's what I'm comfortable with."].) Moreover, there can be no reasonable dispute that Wong's testimony was helpful to a clear understanding of her testimony. Thus, Wong's testimony about the ages of children was rationally based and must be admitted and given weight by the trier of fact.

The Review Department's observation that "Perceptions regarding the exact age of teenagers are not within common experience" (Rev. Dept. Op., p. 9) is not particularly helpful here. As a non-expert, Wong was testifying not about any "exact" ages but, rather, about the approximate or estimated ages of children. (See, *People v. Caldwell* (2002) 28 Cal.4th 107, 153 [while it is settled that a witness may give his opinion as to the age of a person who is the subject of judicial inquiry, "[w]here the ascertainment of ***exact*** age is necessary a sterner test is generally applied." [Emphasis added].) While expert testimony regarding the ages of these individuals would have been relevant, as noted by the Review Department, there is no bar to lay witness testimony about the age of children so long as that testimony is rationally based.

Accordingly, sufficient secondary evidence was introduced to establish that Grant possessed significantly more child pornography than he cared to admit to at trial.

5. Disbarment Is the Only Outcome Sufficient to Maintain the Public's Confidence in the Legal Profession

Grant's felony possession of child pornography for the purpose of his personal sexual stimulation is a serious breach of the duties of respect and care that adults owe to all children. Indeed, his criminal offense constitutes such a flagrant disrespect for the law and for societal norms that his misconduct unquestionably involves moral turpitude. Thus, his continued State Bar membership would likely undermine public confidence in and respect for the legal profession. (See *Lesansky*, *supra*, 25 Cal.4th at p. 17.) Here, Grant was convicted of a serious crime that damages the most vulnerable of society's citizens, its children. His offense was compounded by the discovery of a significant number of other images of child pornography and a prohibited video on his computers. Moreover, the evidence showed that he shared at least two images of child pornography with others. Even if the Court agrees with the Review Department's decision to reject the forensic testimony revealing other child pornography on Grant's computers, there is more than sufficient other evidence to support his disbarment.

After his conviction, he proceeded to violate his probation not once, but twice, without any indication that he either recognizes the seriousness of his conduct or accepts responsibility for his transgressions. Rather, he rejects any demonstration of remorse and minimizes his conduct by offering excuses. Then, at his disciplinary hearing, he proceeded to intentionally mislead the State Bar Court and offer other evasive testimony.

VII. CONCLUSION

The record in this proceeding shows that Grant is unsuited to be entrusted with the privileges and duties of the legal profession. He was convicted of a serious crime against children, forced to register for life as sex offender, repeatedly violated the law following his conviction and lied to the Court. Such conduct is inconsistent with the high standards

of trust and fidelity to which all members of the Bar must comply. In light of the serious nature of his misconduct and the balance of mitigating and aggravating circumstances, disbarment is the only recourse to adequately protect the public. (See *Blair v. State Bar*, *supra*, 49 Cal.3d at p. 776 ["Although we accord great weight to the review department's recommendation, the ultimate decision rests with this court, and we have not hesitated to impose a harsher sanction than recommended by the department."].)

Dated: December 22, 2011

Respectfully submitted,

STARR BABCOCK
RICHARD J. ZANASSI
MARK TORRES-GIL

By: _____
Mark Torres-Gil

Attorneys for Petitioner
The Chief Trial Counsel of The State Bar
of California

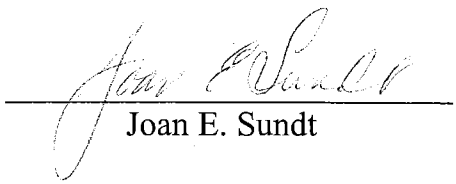
WORD COUNT CERTIFICATE PURSUANT TO CALIFORNIA RULE OF COURT 8.504(d)(1)

I, Joan E. Sundt, state as follows:

I. I am the secretary to counsel for real party of interest The State Bar of California in the above-entitled action.

II. I certify that the word count of the computer software program used to prepare this document is 8,098 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 21, 2011, at San Francisco, California.



Joan E. Sundt

APPENDIX A

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **GARY DOUGLASS GRANT,** **Member No. 173665,** A Member of the State Bar.	Case No. **09-C-12232-RAP** **DECISION INCLUDING DISBARMENT RECOMMENDATION AND ORDER OF INACTIVE ENROLLMENT**

I. Introduction

This contested conviction referral proceeding is based upon respondent **GARY DOUGLASS GRANT's** felony conviction for violating Penal Code section 311.11 subdivision (a), possession of child pornography.

After having thoroughly reviewed the record, the court finds that the facts and circumstances surrounding respondent's conviction of Penal Code section 311.11, subdivision (a), involves moral turpitude and recommends that respondent be disbarred from the practice of law.

II. Procedural History

On April 8, 2009, respondent was convicted on one felony count of possession of child pornography. (Orange County Superior Court case no. 08HF1375.)

On October 28, 2009, the Review Department of the State Bar Court issued an

order placing respondent on interim suspension effective November 20, 2009.

On December 29, 2009, the Review Department issued an order referring this matter to the Hearing Department for a hearing and decision recommending the discipline to be imposed if the Hearing Department found that the facts and circumstances surrounding respondent's criminal violation involved moral turpitude or other misconduct warranting discipline.

On January 14, 2010, the State Bar Court issued and properly served a Notice of Hearing on Conviction on respondent. Respondent filed a response on February 26, 2010. (Rules Proc. of State Bar, rule 601.)

Trial was held on July 6, 7, 8 and 13, 2010. Respondent was represented by attorney William Suojanen. Deputy Trial Counsel Margaret Warren represented the Office of the Chief Trial Counsel of the State Bar of California (State Bar).

This matter was submitted for decision on July 13, 2010.

III. Findings of Fact and Conclusions of Law

Respondent is conclusively presumed, by the record of his conviction in this proceeding, to have committed all of the elements of the crime of which he was convicted. (Bus. & Prof. Code, § 6101, subd. (a); *In re Crooks* (1990) 51 Cal.3d 1090, 1097; *In re Duggan* (1976) 17 Cal.3d 416, 423; and *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.) However, "[w]hether those acts amount to professional misconduct . . . is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction." (*In the Matter of Respondent O, supra,* 2 Cal. State Bar Ct. Rptr. 581, 589, fn. 6.)

A. Credibility Determinations

After carefully considering, inter alia, each witness's demeanor while testifying; the manner in which each witness testified; the character of each witness's testimony; each witness's

interest in the outcome in this proceeding, if any; and each witness's capacity to perceive, recollect, and communicate the matters on which he or she testified, the court finds the testimony of all the witnesses to be credible, except for respondent, whose testimony was not credible, and at times lacked candor.

B. Jurisdiction

Respondent was admitted to the practice of law in California on December 7, 1994, and has been a member of the State Bar at all times since.

C. Findings of Fact

On July 23, 2008, respondent was charged in a felony complaint with three counts of violating of Penal Code section 311.11, subdivision (a). Respondent pleaded not guilty to all counts. Respondent eventually entered into a guilty plea to count one after counts two and three had been dismissed by the prosecutor's office. Respondent pleaded guilty to and was convicted of one felony count for violation of Penal Code section 311.11, subdivision (a)[1], in that respondent "did knowingly[2] and unlawfully possess and control matter, knowing the matter depicted a person under the age of eighteen (18) years personally engaging and personally simulating sexual conduct, as defined in Penal Code section 311.14, subdivision (d). The court placed respondent on three (3) years formal probation on terms and conditions that included, among other things, that he: serve 90 days in jail; register for lifetime as a sex offender; obey all laws, orders, rules, and regulations of the court, jail and probation; not associate with minors; and cooperate in any plan for psychiatric, psychological, alcohol and/or drug treatment or counseling.

[1] Respondent's claim that his conviction was for a misdemeanor violation of Penal Code section 311.11, subdivision (a) is without merit.

[2] Respondent's claim that he did not knowingly violate Penal Code section 311.11, subdivision (a) is without merit.

On May 11, 2009, the superior court found respondent in violation of his court-ordered terms of probation. Respondent's probation officer searched respondent's computer located in respondent's residence and found on the hard drive adult pornographic images. Respondent admitted culpability to the violation.

On September 25, 2009, the superior court found respondent in violation of his court-ordered terms of probation. Respondent had "sex-texted" a message to a former girlfriend using his cell phone. Respondent admitted culpability to the violation.

Respondent has taken affirmative steps so the probation violations will not reoccur.

Respondent admitted culpability[3] to the probation violations and cannot now attempt to cast doubt as to their validity. Respondent's has taken steps so that the violation will not reoccur, but he must accept responsibility for the violations.

Amy Wong, Senior Systems Forensic Specialist, High Technology Crime Unit, Orange County District Attorney's Office, performed a forensic examination of three computers seized by law enforcement from respondent's residence. Wong examined the computers, a Compaq, a Dell, and a generic PC model Tower computer; seven floppy discs; and six CDs. Respondent was the registered owner of the Compaq and generic Tower computers. The Dell computer was registered to a "Marie".

During the examination of the generic Tower computer , Wong discovered a peer to peer file sharing program named "Grokster". Users of Grokster can share files while not needing a server. The Grokster file on respondent's computer was an active file, not a deleted file.

One video[4] found in the file, entitled r@ygold three russian preteens.mpg, shows three girls under the age of eighteen (18)[5] either naked and/or involved in sexual activity and/or poses.

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[3] Respondent's claim that he admitted culpability to both probation violations only on advice of counsel is without merit.

[4] Respondent's Due Process claim concerning his inability to view the images that

In another video, two girls, fourteen (14).years of age, are seen urinating on the floor while either being topless or bottomless of their clothing.

Also found on the generic Tower PC were six (6) images of girls under the age of sixteen (16) that were downloaded from AOL.

File !!!!!by river.jpg shows two (2) girls under the age of sixteen (16);

File !!!!!whitpanties.jpg shows a girl under the age of sixteen (16) ;

File 02.jpg shows two (2) girls under the age of 16;

File 2Fems.jpg shows two (2) girls between the ages of fourteen (14) to sixteen (16);

File _13Gir-1.jpg shows one (1) girl under the age of sixteen (16); and

File Friends-12.jpg shows two (2) girls under the age of 16.

All the images depicted on the above files depict minors either naked and/or involved in sexual activities and/or suggestive poses.

An examination of the Compaq computer revealed three (3) images of girls under the age of eighteen (18):

File 38.jpg shows one (1) girl between the ages of fourteen (14) to sixteen (16) year of age.

File 39.jpg shows one (1) girl between the ages of fourteen (14) and sixteen

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formed the basis of Wong's testimony is without merit. The superior court in respondent's criminal matter issued a protective order blocking the release of the images. The State Bar viewed those images but never possessed or controlled a copy of the images. After being notified of his State Bar proceeding, respondent never filed a motion with the superior court to modify the protective order. Respondent also failed to serve discovery on the State Bar. In effect, respondent sat on his hands before trial in this matter. The State Bar did not violate the terms of the protective order by meeting with Wong and viewing the images taken from respondent's computers. Any claimed disadvantage to respondent by his inability to view the images was caused by respondent's inaction.

[5] Wong testified to the ages of the girls depicted on the images as a lay witness under Evidence Code section 800. Since respondent has been convicted for violation of Penal Code section 311.11, subdivision (a), the court accepts Wong's testimony as to the ages of the girls depicted in the listed images as it was rationally based on the perception of the witness and helpful to a clear understanding of her testimony.

(16) years of age naked in bed.

File !!!!!riverma118.jpg shows one (1) girl under the age of sixteen (16) standing in a river.

Each image depicted minors either naked and/or involved in sexual activities and/or suggestive poses.

The seized six (6) CDs were examined and marked CD001 – 006. CD001 contained over 3,000 images. Fourteen (14) of these images were girls who appear to be under the age of 16, who were topless, bottomless, or completely naked. The images depicted the girls in some form of sexual activity and/or suggestive poses.

On June 28, 2004, respondent e-mailed to another an image of two (2) naked girls under the age of sixteen (16). The images depicted the girls in some form of sexual activity and/or suggestive poses.

Wong bookmarked all of the above listed images and sent her report to the assigned law enforcement agency.

Respondent claims that he is aware of only two (2) images depicting minors in the thousands of images of adult pornography on his computers.[6] Respondent testified that the images must have been embedded in other files he received by e-mail. Immediately upon receiving the two images by unsolicited e-mails, he immediately deleted the images from his computer because he is not interested in child pornography and finds it repugnant. Respondent

[6] Respondent's testimony that he had knowledge of only two (2) images of child pornography on his computer is not credible. Respondent and his criminal attorney met and started to review the evidence in his criminal matter. After reviewing some of the evidence for about 30 minutes, respondent discontinued his review. Therefore, respondent either intentionally failed to review all the images because he was aware of their content, or intentionally ceased viewing the images because he did not want to know their content. Either way, his testimony is not credible.

admits to being addicted to internet adult pornography and addicted to masturbating while viewing those images.

Respondent testified that there may have been about 100,000 pornographic images of adult women on his computer as compared to the two images of girls under the age of eighteen (18) as proof that he was not interested in child pornography. First, the court does not find respondent's testimony credible as to the number of images containing girls under the age of eighteen (18) found on his computers, and secondly, the number of images of adult females found on respondent's computers and loose media is irrelevant to the number of images found of girls under the age of eighteen (18). Respondent was knowingly in possession of child pornography. There is not a magic formula or percentage of images containing adult pornography versus child pornography to determine whether or not respondent's criminal conviction involves moral turpitude. Respondent argues that his collection of pornographic images is so heavily weighted in favor of possession of adult female pornography as evidence that he did not knowingly possess child pornography. This argument is without merit. At best, it can be argued that respondent preferred pornographic images of adult women, not that he did not knowingly possess the proscribed images.

Respondent testified that he was unaware that he sent an e-mail to anyone that included images of minors. Respondent believes that the images must have been embedded in the file when he sent the file.

Respondent has been treating with James Hughes, a professional state-licensed LMFT psychotherapist; a certified clinical hypnotherapist; certified domestic violence counselor; an alcohol and drug counselor and addictions therapist. Hughes diagnosed respondent as suffering from an obsessive/compulsive disorder; an impulse control disorder; a mild post-traumatic stress disorder; and an avoidant personality disorder, which led respondent to excessive masturbation

while viewing internet pornography. Hughes does not believe respondent to be a pedophile or have any sexual interest in children.

Respondent told Hughes that his criminal conviction was based on two (2) images imbedded in his e-mails that were later found on his computer. Respondent told Hughes that he immediately deleted the images after viewing them.

Hughes testified that respondent's treatment consists of his 12-step program; cognitive behavior treatment; and reading selected materials as instructed by Hughes. Respondent has been compliant with his treatment. Hughes would like to see more from respondent because he is not there yet, and would like respondent to treat for stress management, and undergo anxiety therapy, and hydro therapy. Respondent was prescribed Zoloft by his medical doctor.

According to Hughes, respondent has come quite a way since he started treating. His behavior has changed; his anxiety has been reduced; and his obsessive/compulsion behavior has been lessened, but respondent needs to keep working at it. Respondent has achieved sobriety in a large measure and is on the right track. Hughes' prognosis for respondent is termed as optimistic and very good.

Respondent spent eight (8) years in the United State Army Reserves as a JAG officer, handling legal in matters involving reservists. Respondent testified he resigned his commission because he did not want to go overseas and he was getting older. Respondent's testimony was intentionally misleading.[7] In fact, the United States Army had taken action against respondent based on respondent's criminal conviction, which action may have led to respondent's involuntary separation from service. Based on his resignation from the service, respondent was

[7] Respondent's testimony regarding the reasons for his resignation from the United States Army Reserves lacked candor.

discharged from the United States Army Reserves with the status of "other than honorable discharge."[8]

The term moral turpitude is defined broadly. (*Baker v. State Bar* (1989) 49 Cal.3d 804, 815, fn. 3.) An act of moral turpitude is any "act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. [Citation.]" (*In re Craig* (1938) 12 Cal.2d 93, 97.) "Although an evil intent is not necessary for moral turpitude [citations], some level of guilty knowledge or [moral culpability] is required. [Citation.]" (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 384.)

As the Supreme Court stated in *In re Lesansky* (2001) 25 Cal.4th 11, 16:

> [W]e can provide this guidance: Criminal conduct not committed in the practice of law or against a client reveals moral turpitude if it shows a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession.

Respondent's criminal conviction for knowingly violating Penal Code section 311.11, subdivision (a) involves a serious breach of duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession, and is, therefore, a conviction of crime involving moral turpitude.

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[8] Respondent's testimony that his legal counsel in the United States Army inquiry into his criminal conviction matter submitted respondent's resignation and that respondent later never opened the mail from the United State Army indicating his discharge status lacks credibility.

IV. Level of Discipline

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b) and (e).)[9]

A. Mitigation

Respondent has no prior record of discipline. (Std. 1.2(e)(i).)

Respondent has presented competent medical evidence that at the time of his misconduct he was suffering from an extreme emotional disability. However, the mitigation is lessened because there was insufficient evidence presented to show that respondent no longer suffers from the disability. (Std. 1.2(e)(iv).)

Respondent was cooperative with State Bar in the investigation of this matter. However, respondent's lack of candor clearly outweighs any mitigation for his cooperation. (Std. 1.2(e)(v).)

Respondent presented the testimony of seven (7) witnesses who testified to his good character for honesty and fairness. Three (3) of these witnesses are attorneys licensed to practice law in California and their testimony is given great weight because "[t]hese witnesses have a strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.) The witnesses were familiar with the facts and circumstances surrounding respondent's conviction based on information provided by the respondent and testified that respondent was remorseful for his misconduct. They believed that respondent is not a danger to the public, especially children, and should be allowed to continue to practice law.

Respondent also presented the declarations of four (4) witnesses who attested to

[9]All further references to standards or std. are to this source.

respondent's honesty and ability as an attorney, and that he should be able to continue to practice law. (Std. 1.2(e)(vi).)

Since respondent fails to accept full responsibility for his misconduct, he is not eligible for the mitigating factor of remorse. (Std. 1.2(e)(vii).)

B. Aggravation

Respondent displayed a lack of candor during the hearing in this matter. (Std. 1.2(b)(ii).)

V. Discussion

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

Standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

The State Bar urges that respondent be disbarred under standard 3.2. Respondent urges that respondent's criminal conviction falls under standard 3.4 and requests a suspension for 90 days.

Standard 3.2 provides: "Final conviction of a member of a crime which involves moral turpitude, either inherently or in the facts and circumstances surrounding the crime's commission shall result in disbarment. Only if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a two-year actual suspension, prospective to any interim suspension imposed, irrespective of mitigating circumstances."

Standard 3.4 provides that the final conviction of a member of a crime which does not involve moral turpitude but which does involve other misconduct warranting discipline shall result in a sanction that is appropriate to the nature and extent of the misconduct found to have been committed by the member. (*In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 108, 118; *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.)

The court recognizes that "disbarments, and not suspensions, have been the rule rather than the exception in cases of serious crimes involving moral turpitude." (*In re Crooks, supra,* (1990) 51 Cal.3d 1090, 1101.)

"[I]n the final analysis, as the Supreme Court has made clear, our consideration of the Standards cannot yield a recommendation which, on the record, is arbitrary or rigid [citation], or about which 'grave doubts' exist as to the recommendation's propriety. [Citation.] Moreover, the weight to be accorded the standards will depend on the degree to which they are apt to the case at bench." (*In the Matter of Oheb, supra,* 4 Cal. State Bar Ct. Rptr. 920, 940.)

In this case, respondent was convicted of a felony for possession of child pornography, a serious offense. The surrounding facts and circumstances of respondent's criminal conviction clearly evince an act or acts constituting moral turpitude. Accordingly, the proper standard that governs this matter is standard 3.2, which calls for disbarment for the final conviction for a crime that involves moral turpitude, either inherently or in the facts and circumstances surrounding the crime's commission. Only if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less that a two-year actual suspension, irrespective of mitigating circumstances.

Taken as a whole, the mitigating factors are not compelling. In light of the standards and case law, and after balancing all relevant factors, including the underlying misconduct,

aggravating factors and mitigating circumstances, the court recommends that respondent be disbarred from the practice of law. .

VI. Discipline Recommendation

A. Discipline

Accordingly, the court hereby recommends that respondent **GARY DOUGLASS GRANT** be disbarred from the practice of law in California, and that his name be stricken from the roll of attorneys in this State.

It is not recommended that respondent be ordered to comply with California Rules of Court, rule 9.20 because he did so on December 30, 2009 in connection with his interim suspension and has not been entitled to practice law since.

B. Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VII. Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive status pursuant to section 6007, subdivision (c)(4). The inactive enrollment will be effective three days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, as provided for by rule 490(b) of the Rules of Procedure of the State Bar of California, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: October 1, 2010.

RICHARD A. PLATEL
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on October 1, 2010, I deposited a true copy of the following document(s):

DECISION INCLUDING DISBARMENT RECOMMENDATION AND ORDER OF INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

WAYNE W SUOJANEN
SUOJANEN LAW OFC
26895 ALISO CREEK RD, STE B-440
ALISO VIEJO, CA 92656

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

MARGARET WARREN, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on October 1, 2010.

Angela Carpenter
Case Administrator
State Bar Court

APPENDIX B

PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	Case No. 09-C-12232
GARY DOUGLASS GRANT,	OPINION AND ORDER
A Member of the State Bar, No. 173665.	

I. SUMMARY

In 2009, respondent Gary Douglass Grant pled guilty to one count of possession of child pornography as a felony.[1] We have classified this crime in discipline proceedings as one that does not inherently involve moral turpitude in every case, but may depending on the facts and circumstances surrounding the conviction.[2] The hearing judge found that the facts and circumstances of Grant's conviction involved moral turpitude and he recommended that Grant be disbarred. Grant seeks review, disputing the moral turpitude finding and requesting a maximum 90-day suspension as discipline for his felony conviction. The Office of the Chief Trial Counsel of the State Bar (State Bar) support's the hearing judge's decision.

[1] As a result of his felony conviction, we placed Grant on interim suspension, effective November 20, 2009, and he has remained suspended since that time. (Bus. & Prof. Code, § 6102, subd. (a).)

[2] Crimes that inherently involve moral turpitude in every case will also be referenced as crimes involving moral turpitude per se.

After independent review of the record (Cal. Rules of Court, rule 9.12), we reverse the hearing judge's moral turpitude finding based on the limited trial evidence, which did not include the alleged child pornographic images and established little more than the conviction itself. However, Grant's misconduct is serious and warrants significant discipline. We recommend that he be suspended for two years and until he shows proof of rehabilitation, fitness to practice and learning and ability in the law according to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.[3]

II. GRANT'S CONVICTION DOES NOT INVOLVE MORAL TURPITUDE PER SE

Grant was convicted of possession of child pornography in violation of Penal Code section 311.11, subdivision (a).[4] The State Bar asserts that his conviction involves moral turpitude per se because, among other things, it represents morally reprehensible conduct that generally harms children and requires lifetime registration as a sex offender. Since no California decision addresses classification of this crime for attorney discipline purposes, we look to the definition of moral turpitude, its general application to criminal sexual offenses in California discipline cases, and decisional law in other jurisdictions. We conclude that although possession

[3] Unless otherwise noted, all further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

[4] Section 311.11, subdivision (a) states in part: "Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a felony and shall be punished by imprisonment in the state prison, or a county jail for up to one year, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both the fine and imprisonment."

of child pornography is a reprehensible crime, it does not, *in every instance*, involve moral turpitude.

" 'Moral turpitude' is an elusive concept incapable of precise general definition." (*In re Higbie* (1972) 6 Cal.3d 562, 569.) It has been described as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. [Citation.]" (*In re Craig* (1938) 12 Cal.2d 93, 97.) Some criminal convictions constitute moral turpitude per se because they are extremely repugnant to accepted moral standards (*In re Fahey* (1973) 8 Cal.3d. 842, 849), such as murder (*In re Rothrock* (1940) 16 Cal.2d 449, 454) or serious sexual offenses against children. (See *In the Matter of Meza* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 608, 611 [felony conviction for engaging in three or more acts of substantial sexual conduct with child under age of 14 moral turpitude per se]; compare *In re Safran* (1976) 18 Cal.3d 134 [misdemeanor conviction for annoying or molesting child under 18 not moral turpitude per se].)

We do not view possession of child pornography as a crime involving moral turpitude in every case because the circumstances surrounding the conviction may vary. For example, actively searching for child pornography on the Internet, accessing it and then perusing and manipulating electronic images may constitute moral turpitude, while merely possessing child pornography after receiving it from an unsolicited source may not. A crime such as attempted child molestation clearly involves moral turpitude in every case because it demonstrates a "readiness to engage in a serious sexual offense likely to result in harm to a child," such that the conduct is " 'extremely repugnant to accepted moral standards'. . . [Citations]." (*In re Lesansky* (2001) 25 Cal.4th 11, 17.) However, not every violation of Penal Code section 311.11, subdivision (a), necessarily involves such readiness to commit a sex offense against a child,

particularly since the statute prohibits "the act of possessing child pornography, not the act of abusing or exploiting children." (*People v. Hertzig* (2007) 156 Cal.App.4th 398, 403.)

Even with serious criminal offenses such as possession of child pornography, attorney discipline is not intended as punishment for wrongdoing – that is left to the criminal courts. We note that out-of-state discipline cases do not classify possession of child pornography convictions as crimes involving moral turpitude per se, but instead look to the underlying facts and circumstances.[5] Guided by these authorities and our reasoning above, we affirm our prior classification that criminal possession of child pornography does not involve moral turpitude in every discipline case, but may depending on the facts and circumstances surrounding the conviction.

III. FINDINGS OF FACT

A. GRANT'S CONVICTION CONCLUSIVELY PROVES HIS GUILT

On April 8, 2009, Grant pled guilty to and was sentenced on one felony count of possession of child pornography, in violation of Penal Code section 311.11, subdivision (a). Grant concedes that he possessed two unsolicited electronic images of child pornography, and the criminal conviction conclusively proves his guilt. (Bus. & Prof. Code, § 6101, subd. (a); *In re Utz* (1989) 48 Cal.3d 468, 480 [conviction record is conclusive evidence of guilt].) The superior court ordered that Grant serve 90 days in jail, register as a sex offender for life and complete three years' probation with specific sex offender conditions. Grant did not appeal his conviction or sentence.

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[5] See *In the Matter of Wolff* (D.C. 1985) 490 A.2d 1118, 1119, vacated 494 A.2d 932, aff'd. (en banc) 511 A.2d 1047 (distribution of child pornography "not *per se* [crime] of moral turpitude"); *Matter of Disciplinary Proceedings Against Bruckner* (Wis. 1991) 467 N.W.2d 780 (based on facts and circumstances, importation and trading of child pornography involved moral turpitude); compare *United States v. Santacruz* (9th Cir. 2009) 563 F.3d 894, 897 (for purposes of immigration, possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) involves moral turpitude).

Shortly after his sentencing, Grant twice violated the sex offender terms of his probation. In May 2009, he possessed adult pornography on his computer and a few months later, in September, he sent a "sex-text" from his cell phone to two women he had previously dated.

We placed Grant on interim suspension and referred his conviction to the hearing department to determine if the surrounding facts and circumstances involved moral turpitude or other misconduct warranting discipline. (Bus. & Prof. Code, § 6102, subd. (e).) A four-day trial was held in July 2010.

B. THE STATE BAR'S TRIAL EVIDENCE

The State Bar sought to prove that Grant's conviction involved moral turpitude by showing that he actively sought out child pornography, stored it in different media locations, and emailed it to other email accounts. The State Bar did not present the subject images at trial but instead offered a single witness who had viewed them – a forensic computer analyst from the Orange County District Attorney's Office (OCDA) – to establish the images as child pornography. Grant's counsel objected to the analyst's testimony on several grounds, including hearsay, improper lay opinion, oral testimony about a writing (secondary evidence rule) and due process because he could not effectively cross-examine the analyst, having never reviewed the photographs that were the very subject of her testimony. The hearing judge overruled the objections and admitted the analyst's testimony.

The analyst examined items seized from Grant's home during the criminal investigation, including a Compaq Presario Laptop, a Dell Laptop and a generic PC tower computer along with seven floppy discs and six (compact discs) CD's. The analyst found thousands of *adult* pornography images. The analyst also bookmarked 19 separate images and one videotape for the Department of Homeland Security, Immigration and Custom Enforcement (ICE) investigator to confirm the subjects' ages, referencing these images as involving "possibly minors." When the

ICE investigator did not appear at Grant's discipline trial to testify to the ages of the subjects in the images, the State Bar prosecutor asked the analyst to testify. The analyst reluctantly agreed, but cautioned: "I'm not an expert in identifying the ages of the children. That's not my job." Her testimony about the alleged child pornographic images is summarized below.

The analyst examined a video showing three females, two of whom were naked below the waist and engaged in a pornographic pose. She testified that both girls "looked like they were under 14 years of age." The analyst also viewed six images from Grant's PC tower computer of females that she thought "appeared" to be under 16 years old. These subjects were either naked or partially clothed, exposing their underwear, breasts or pubic area. The analyst found three images stored on Grant's Compaq laptop of females who were partially clothed or naked. She testified that the subjects in the first image "appear[ed] to be about 14 to 16," in the second image "appear[ed] to be about 14 to 16" and in the third image "appear[ed] to be under 16 years of age." The analyst found approximately 4,000 adult pornographic images on Grant's CDs, and testified that nine images depicted female subjects who "appear to me to be under 16 years of age." Finally, the analyst identified a photo Grant had emailed to other AOL e-mail accounts showing two naked females in pornographic poses. The analyst opined that these subjects were under 16 years old. Throughout her testimony, the analyst repeated that she lacked any expertise to identify the ages of the subjects in the images.

C. GRANT'S TRIAL EVIDENCE

Grant testified that he is a recovering "sex and love addict." He admitted to excessively viewing adult Internet pornography for purposes of sexual arousal. Grant confessed that at the height of his obsession, he viewed adult pornography for several hours a day. Between 2001 and 2007, he collected over 100,000 adult pornographic images on each of his computers. Grant has always maintained that he received only two *unsolicited* child pornographic images when he was

using his e-mail account to gather thousands of adult pornography images. He claims he "instantly deleted" the child pornography images because he found them repugnant, but pled guilty to the criminal charge of possession of child pornography because, technically, he temporarily possessed those two images.

Grant has undergone extensive therapy since his conviction. He currently sees four mental health professionals, adheres to a psychotropic medication program, regularly participates in weekly Sex and Love Addicts Anonymous meetings and attends group therapy offered through the Lawyer Assistance Program.

Since September 2008, Grant has received cognitive behavioral therapy from James Hughes, a clinical therapist.[6] Hughes testified that Grant suffers from a serious problem with obsessive-compulsive and impulse-control behavior related to his sexuality. Hughes opined that Grant does not fit the profile of a pedophile, has no interest in child pornography and poses no danger to the public or to children. Hughes believes that Grant has "come quite a way" since he began treatment but would like to see him continue as he is "not there yet" in dealing with his chronic anxiety and obsessive behavior. Overall, Hughes described Grant's prognosis as "very optimistic" and "very good."

IV. CONCLUSIONS OF LAW

A. THE ANALYST'S TESTIMONY ABOUT THE IMAGES WAS INADMISSIBLE

The hearing judge erred by permitting the analyst to testify about the alleged child pornographic images for two reasons. First, the analyst's oral testimony was not admissible to prove the contents of the images under the secondary evidence rule. Second, the analyst's

[6] Hughes is a licensed marriage, family and child therapist, a clinical hypnotherapist, an American Psychotherapy Association Board-certified professional counselor and a sex therapist.

testimony about the subject's ages in the images was not admissible because it amounted to an improper lay opinion.

As to the secondary evidence rule, "[o]ral testimony is [generally] not admissible to prove the content of a writing" (Evid. Code, § 1523, subd. (a)[7]), since it is typically less reliable than other proof. (Cal. Law Revision Com. com., West's Ann. Evid. Code (2011 ed.), foll. § 1523, p. 1903.)[8] But by statutory exception, oral testimony is permitted "if the proponent does not have possession or control of the original or a copy of the writing and . . . [n]either the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means."[9] (Evid. Code, § 1523, subd. (c)(1).) We conclude, for reasons detailed below, that the State Bar did not prove it met this exception.

The State Bar prosecutor initially represented that she would offer the alleged child pornographic images at trial. The OCDA had custody of the images and agreed to submit them to the State Bar Court subject to a protective order. On June 21, 2010, two weeks before trial, the prosecutor filed a Pretrial Statement stating that she would seek to seal the images that would become part of the trial record. But the following day, the prosecutor filed a Supplemental Pretrial Statement stating that it was the State Bar's position that federal and state law restricted use of the images to criminal proceedings. The prosecutor made no effort to use the court's process, such as issuing a subpoena duces tecum, petitioning the appropriate state or federal

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[7] Writings include photographic images (Evid. Code § 250; *People v. Beckley* (2010) 185 Cal.App.4th 509, 514) and computer records (*Aguimatang v. State Lottery* (1991) 234 Cal.App.3d 769, 798).

[8] The rules of evidence are applicable in State Bar Court proceedings. (Rules Proc. of State Bar, former rule 214.) Although the Rules of Procedure of the State Bar were amended effective January 1, 2011, the former rules apply to this proceeding as request for review was filed prior to the effective date. (Rules Proc. of State Bar (eff. Jan. 1, 2011), Preface, item 2.)

[9] The "court's process" includes a subpoena duces tecum for the production of writings at trial. (Code Civ. Proc., § 1985; Rules Proc. of State Bar, former rule 152(e).)

court or other means to obtain the images for trial. Without making such efforts, the State Bar did not establish the exception to the secondary evidence rule that would permit the analyst to testify about the images without also submitting them at trial.

Regarding the analyst's opinion about the age of the subjects, a lay witness may testify to an opinion if it is rationally based on the witness's perception and it is helpful to a clear understanding of the testimony. (Evid. Code, § 800; e.g., *People v. Caldwell* (1921) 55 Cal.App. 280, 296 [lay opinion as to age generally received if opinion includes description of or acquaintance with subject].) The analyst admitted that she had no expertise to evaluate age beyond her common knowledge or experience. Perceptions regarding the exact age of teenagers at or near 18 years old are not within common experience, as evidenced by the analyst's tentative and unconvincing testimony. Moreover, the analyst did not describe the subjects or confirm that they were children or pre-pubescent.

Under these circumstances, reasonable minds could differ on whether the subjects in the images were actually under 18 years old, particularly since the analyst did not testify that the subjects were obviously minors. (See *People v. Kurey* (2001) 88 Cal.App.4th 840, 846-847 [expert testimony relevant to material fact of minority]; *United States v. X-Citement Video, Inc.* (1994) 513 U.S. 64, 72, fn. 2 ["opportunity for reasonable mistake as to age increases significantly" when subjects in photos unavailable for questioning]; *United States v. Katz* (5th Cir. 1999) 178 F.3d 368, 373 [expert testimony may be necessary to prove minority when

individual is post-puberty but appears young].) We conclude that the analyst's testimony about the age of the subjects lacked a rational basis and was inadmissible as improper lay opinion.[10]

B. GRANT'S MISCONDUCT WARRANTS DISCIPLINE, BUT THE STATE BAR FAILED TO PROVE THAT IT INVOLVED MORAL TURPITUDE

The hearing judge summarily found that the facts and circumstances surrounding Grant's conviction "clearly evince an act or acts constituting moral turpitude." Indeed, if the State Bar had proven that Grant sought out, collected and stored 19 images and a video of children in pornographic poses, we would agree that Grant's conviction may involve moral turpitude. But it failed in the first instance to prove that the alleged child pornographic images actually depict subjects under 18 years old. It therefore did not establish that such images were of *child* pornography. Because the analyst's testimony on the issue of age is inadmissible or not persuasive, the State Bar failed to make this preliminary showing.[11]

The remaining trial evidence consisted only of Grant's criminal conviction and his concession that he possessed two child pornographic images and twice violated probation. The State Bar never proved the specific content of those two images or where they were found in Grant's home. Nor did the State Bar prove that Grant actively searched the Internet for child

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[10] Even if we found the analyst's tentative testimony to be admissible, it does not clearly and convincingly establish that the subjects in the images were under 18 years old. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind]; see *Ballard v. State Bar* (1983) 35 Cal.3d 274, 291[all reasonable doubts resolved in favor of attorney].)

[11] Since the analyst's testimony on age was not considered, we do not address Grant's constitutional claim that he was denied due process because his attorney was unable to effectively cross-examine the analyst about the age of the subjects in the images without access to them. (See *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230 [courts " ' "will not decide constitutional questions where other grounds are available and dispositive of the issues of the case" ' "]; *Lyng v. Northwest Indian Cemetery Protective Ass'n.* (1988) 485 U.S. 439, 445 ["A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them. [Citations.]"].)

pornography, visited child pornography web sites or joined a child pornography network, which would suggest misconduct involving moral turpitude. To the contrary, Grant claimed he did not solicit or attempt to save the two child pornography images he admits he possessed. He also denied any interest in child pornography, which was corroborated by his therapist. The hearing judge's broad finding that Grant's testimony lacked credibility does not create affirmative evidence that Grant had an interest in child pornography or sought it on the Internet. (*Edmonson v. State Bar* (1981) 29 Cal.3d 339, 343 [rejection of evidence does not create affirmative contrary evidence].)[12] We conclude that the State Bar failed to prove by clear and convincing evidence that the circumstances surrounding Grant's conviction involved moral turpitude.

V. AGGRAVATION AND MITIGATION

The State Bar must establish aggravating circumstances by clear and convincing evidence while Grant has the same burden of proving mitigating circumstances. (Stds. 1.2(b) and (e).)

In aggravation, the hearing judge found that Grant lacked candor at trial because he misled the court about his dishonorable discharge from the Army in 2009. (Std. 1.2(b)(vi).) We agree and assign this factor considerable aggravating weight. (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282 [great weight given to hearing judge's findings on candor]; see *Olguin v. State Bar* (1980) 28 Cal.3d 195, 200 [misrepresentation to State Bar may constitute greater offense than misappropriation].)

We adopt the three mitigating factors that the hearing judge found: (1) ongoing recovery from extreme emotional and mental health difficulties (std. 1.2(e)(iv)); (2) no prior record of discipline since admission to practice law in 1994 (std. 1.2(e)(i); *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [over 10 years of practice before first act of misconduct given significant

[12] At the outset of the decision below, the hearing judge found that Grant's testimony regarding his conviction "was not credible, and at times lacked candor," but never provided the important analysis identifying what portion of Grant's testimony lacked credibility and why.

mitigating weight]); and (3) good character evidence from 10 witnesses. (Std. 1.2(e)(vi).) Grant's character witnesses were generally familiar with his conviction and spoke highly of his competency, honesty and integrity. Five of the 10 witnesses are California attorneys, whose testimony we weigh heavily since they "have a strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.) On balance, Grant's evidence in mitigation minimally outweighs his sole yet serious factor in aggravation.

VI. LEVEL OF DISCIPLINE

The State Bar proved only that Grant possessed two unspecified child pornographic images, without establishing how he received them or where he kept them. Absent proof that Grant sought out child pornographic images, displayed sexual interest in children, or otherwise intended to harm a minor, we do not believe the facts and circumstances surrounding his conviction support a moral turpitude finding.

Nonetheless, Grant's conviction constitutes other serious misconduct for which he should receive significant discipline. (See *In re Rohan* (1978) 21 Cal.3d 195, 203-204 [other misconduct warranting discipline includes conviction that demeans integrity of legal profession and constitutes breach of attorney's responsibility to society].) The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession. To determine the proper discipline, the Supreme Court has instructed that we follow the standards "whenever possible" (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11) because they promote "' "the consistent and uniform application of disciplinary measures." ' [Citation.]" (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

Standards 3.4 and 2.6 apply here. When an attorney's criminal conviction does not involve moral turpitude but does involve misconduct warranting discipline, standard 3.4 requires

that we look to other standards for comparable misconduct. We find standard 2.6(a) is most relevant: failing to uphold the law "shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim . . . ."

In light of the broad range of discipline under these standards, we look to comparable case law. (*In re Brown* (1995) 12 Cal.4th 205, 220-221.) Since California law does not provide guidance for cases involving simple possession of child pornography, we examine discipline for other sexual offense convictions in California. These cases reveal a broad range of discipline from reproval to disbarment, depending on the circumstances surrounding the crime, such as whether it was a felony or misdemeanor, whether the victim was a child, or whether the attorney participated in therapy.[13]

Viewing the facts and circumstances unique to Grant's conviction, and considering his mitigation evidence, we recommend a lengthy suspension and reinstatement proceeding rather than disbarment. We wish to be clear – we view possession of child pornography as serious and reprehensible misconduct. However, as discussed, the State Bar did not prove that the facts and circumstances surrounding Grant's criminal offense for possessing two child pornographic images involved moral turpitude. Grant was duly punished by the criminal court for his wrongdoing and we believe he should receive significant attorney discipline, particularly since he twice violated his criminal probation and demonstrated a lack of candor in these proceedings. We therefore recommend that to protect the public and the profession Grant be actually suspended from the practice of law for two years and reinstated only if he establishes his

[13] See e.g., *In the Matter of Buckley* (Review Dept. 1990) 1 Cal. Bar Ct. Rptr. 201 (public reproval for misdemeanor solicitation of lewd act in public); *In re Safran, supra,* 18 Cal.3d 134 (three-year stayed suspension for two counts of misdemeanor annoying or molesting a child under 18 involving moral turpitude based on facts and circumstances and where attorney participated in psychiatric treatment making recurrence of misconduct remote); *In re Lesansky, supra,* 25 Cal.4th 11 (summary disbarment for felony lewd act on child involving moral turpitude per se since it demonstrated readiness to engage in serious sexual offense likely to harm child).

rehabilitation, fitness to practice, and learning and ability in the law, as required in a standard 1.4(c)(ii) proceeding.

VII. RECOMMENDATION

We recommend that Gary Douglass Grant be suspended from the practice of law for three years, that execution of that suspension be stayed, and that Grant be placed on probation for three years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first two years of his probation with credit given for the period of interim suspension that commenced on November 20, 2009, and remain suspended until he provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of this probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office of the State Bar Office of Probation.

4. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

6. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he will not receive MCLE credit for attending Ethics School.

7. He must obtain psychiatric or psychological treatment from a duly licensed psychiatrist, psychologist or clinical social worker, at his own expense, a minimum of twice per month

and must furnish evidence of his compliance to the Office of Probation with each quarterly report. Treatment should commence immediately and, in any event, no later than 30 days after the effective date of the Supreme Court's final disciplinary order in this proceeding. Treatment must continue for the period of probation or until a motion to modify this condition is granted and that ruling becomes final. If the treating psychiatrist, psychologist or clinical social worker determines that there has been a substantial change in Grant's condition, Grant or the State Bar may file a motion for modification of this condition with the State Bar Court Hearing Department pursuant to rule 5.300 of the Rules of Procedure. The motion must be supported by a written statement from the psychiatrist, psychologist or clinical social worker, by affidavit or under penalty of perjury, in support of the proposed modification.

8. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the three-year period of stayed suspension will be satisfied and that suspension will be terminated.

VIII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Gary Douglass Grant be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

IX. RULE 9.20

We further recommend that Gary Douglass Grant be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

X. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

XI. ORDER

Since we do not adopt the hearing judge's disbarment recommendation, we order that Grant's involuntary inactive enrollment under Business and Professions Code section 6007, subdivision (c)(4), be terminated, effective upon service of this order. However, pursuant to our October 28, 2009 interim suspension order, effective November 20, 2009, Grant remains suspended and not entitled to practice law pending final disposition of this proceeding.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on September 12, 2011, I deposited a true copy of the following document(s):

OPINION AND ORDER FILED SEPTEMBER 12, 2011

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

WAYNE W. SUOJANEN
SUOJANEN LAW OFC
26895 ALISO CREEK RD STE B-440
ALISO VIEJO, CA 92656

MICHAEL GORDON YORK
1301 DOVE ST #1000
NEWPORT BEACH, CA 92660

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Kimberly G. Anderson, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on September 12, 2011.

Milagro del R. Salmeron
Case Administrator
State Bar Court

PROOF OF SERVICE BY MAIL

I, Joan Sundt, hereby declare: that I am over the age of eighteen years and am not a party to the within above-entitled action, that I am employed in the City and County of San Francisco, that my business address is The State Bar of California, 180 Howard Street, San Francisco, California 94105.

On December 22, 2011, following ordinary business practice, I placed for collection for mailing at the offices of the State Bar of California, 180 Howard Street, San Francisco, California 94105, three copies of PETITION OF THE CHIEF TRIAL COUNSEL OF THE STATE BAR OF CALIFORNIA FOR WRIT OF REVIEW OF THE DECISION OF THE STATE BAR COURT in an envelope addressed as follows:

Wayne W. Suojanen
Suojanen Law Office
26895 Aliso Creek Rd, Ste. B-440
Aliso Viejo, CA 92656

Michael Gordon York
1301 Dove St. #1000
Newport Beach, CA 92660

Colin P. Wong
Chief Administrative Officer, State Bar Court
The State Bar of California
180 Howard Street
San Francisco, CA 94105

I am readily familiar with the State Bar of California's practice for collection and processing correspondence for mailing with the U.S. Postal Service and, in the ordinary course of business, the correspondence would be deposited with the U.S. Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California this 22nd day of December, 2011.

Joan Sundt