SUPREME COURT
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Deputy

Supreme Court Case No. S 197503

**IN THE SUPREME COURT**

**OF THE STATE OF CALIFORNIA**

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In the Matter of

**GARY DOUGLASS GRANT**

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After an Opinion and Order by the Review Department Reversing in Part
a Recommendation of the State Bar Court's Hearing Department
State Bar Case No. 09-C-12232
Honorable Richard A. Platel, Presiding

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# REPLY BRIEF ON THE MERITS OF RESPONDENT GARY DOUGLASS GRANT ON THE DECISION OF THE STATE BAR COURT

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*In Pro Per and Attorney for Respondent*

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*In Pro Per and Attorney for Respondent*

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## REPLY BRIEF

## I. INTRODUCTION

The State Bar argues that a violation of Penal Code section 311.11(a) involves moral turpitude *per se*; that even if this Court does not so characterize a violation of section 311.11(a), that Respondent's conduct involved moral turpitude; that there is a factor in aggravation; and that the discipline imposed on Respondent should not be an actual suspension as the Review Department recommended, but disbarment. The State Bar is wrong in all respects. In actuality, as the Review Department ruled, a violation of section 311.11(a) is a crime which may *or* may not involve moral turpitude, and the State Bar did not prove that the facts and circumstances surrounding Respondent's conduct involved moral turpitude. Further, the finding and conclusion concerning the purported factor in aggravation is unsupported and erroneous as a matter of law. Thus, an actual suspension of some period is the appropriate discipline in this matter. For the reasons discussed below, that period should be a 90-day actual suspension.

## II. A VIOLATION OF SECTION 311.11(a) DOES NOT INVOLVE MORAL TURPITUDE PER SE

The first issue before the Court is whether a violation of Penal Code section 311.11(a) involves moral turpitude *per se*. The State Bar argues that all sexual offenses related to the exploitation of children are offensive to societal norms and no longer countenanced by society in general. (State Bar Brief ("SBB"), at pp. 16-25.) Thus, the State Bar insists that Respondent's offense must be deemed a crime that involves moral turpitude *per se*.

There is no debate that the exploitation of children, in any capacity, is wrong and that society as a whole has a duty to protect children. In this, the

State Bar and Respondent agree. Society's interest in protecting children, however, does not mean that a violation of section 311.11(a) constitutes moral turpitude *per se*. Rather, as a military appellate court observed, "There is no question that sexual crimes against minors and the area of child pornography encompass a variety of despicable crimes for which society has justifiably proscribed serious penalties. We should not, however, allow our disgust [as to the nature of defendant's] actions color our judgment in evaluating the legal sufficiency of the charges." *U.S. v. Navrestad*, 66 M.J. 262, 268 fn. 13 (U.S.Ct.App. Armed Forces 2008) (remanding conviction for violating Child Pornography Prevention Act, 18 U.S.C. § 2251-2260), quoting *U.S. v. Hays*, 62 M.J. 158, 170 (C.A.A.F. 2005) (concurring & dissenting opn.).

In making the argument that a violation of section 311.11(a) involves moral turpitude *per se*, the State Bar gives too little weight to *In re Lesansky* (2001) 25 Cal.4th 11 and *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234. These cases, however, are central to how the Court should evaluate Respondent's offense. In attorney discipline matters, this Court has held an offense "necessarily involves moral turpitude if the conviction would *in every case*" evidence bad moral character. (*Lesansky*, supra, citing *In re Hallinan* (1954) 43 Cal. 2d 243, 249.) As set forth in Respondent's Opening Brief, pp. 12-14, there are at least two scenarios wherein a person could be convicted under section 311.11(a) and the individual's conduct would not evidence bad moral character. The State Bar's brief did *not* address either scenario.

An individual could unknowingly come into possession of an unlawful image. The State Bar argues that Respondent makes light of the "knowing" element of section 311.11(a). This is incorrect, in that the State Bar conflates two distinct issues. Section 311.11(a) requires that an

individual "knowingly" possess or control an image unlawful under 311.4(d); a violation of this section does *not*, however, require that an individual knowingly take affirmative action to come into possession of a proscribed image. Thus, one could *unknowingly* come into possession of the image, whether by opening an unsolicited e-mail that unbeknownst to the recipient had included an unlawful image, or otherwise, and thereafter knowingly possess it.

As to knowing the age of the person depicted, when an image depicts an individual on the cusp of majority, the potential for mistake exists (and why expert testimony is required, which was not offered in this proceeding). (See *United States v. X-Citenaent 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* ($5^{th}$ Cir, 1999) 178 F.3d 368, 373 [expert testimony may be necessary to prove minority when individual is post-puberty but appears young]; and *People v. Kurey* (2001) 88 Cal.App.4th 840, 846-847 [expert testimony relevant to material fact of minority].)

The State Bar also argues that Respondent misread and misapplied the United States Supreme Court's ruling in *Ashcroft v. Free Speech Coalition.* (SBB, pp. 27-28.) Respondent argued that *Ashcroft* stands for the proposition that an image could be unlawful for purposes of a child pornography law, but that it does not necessary mean the image may shock the conscience, appeal to prurient interest or be patently offensive. By contrast, the State Bar contends that *Ashcroft* does not so hold. (GOB, p. 12; SBB, pp. 27-28.)

The State Bar's contention lacks merit insofar as Respondent's characterization is asserted more than once in *Ashcroft*. The Supreme Court noted "the apparent age of persons engaged in sexual conduct is relevant to

whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, *or perhaps even older adolescents*, would not." (*Ashcroft v. Free Speech Coalition*, supra, 535 U.S. at 240 [emphasis added].) The Supreme Court was not endorsing the possession or manufacture of child pornography, and Respondent does not so argue; however, the Supreme Court was noting that there is a difference between the depiction of younger adolescents and older adolescents as it pertains to community standards, a distinction the State Bar overlooks. This observation by the Court was not simply dicta, in that the Court reiterated this point. Specifically, the Court observed: "Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards." (*Id.*, at 246.)

In summary, it is possible to come into possession of an image, unintentionally or otherwise, which may or may not violate community standards.[1] The fact that the possibility exists of these different scenarios

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[1] The United States Supreme Court impliedly supports Respondent's argument, in that it struck down section 2256(8)(D) of the federal Child Pornography Act. It noted that "This provision prevents child pornographers and pedophiles from exploiting prurient interests in child sexuality and sexual activity through the production or distribution of pornographic material which is intentionally pandered as child pornography." It further noted, that the statute was not so limited in its reach, however, "as it punishes even those possessors who took no part in pandering." Once a work has been described as child pornography, the taint remains on . . . subsequent possessors . . ." (*Id.*, at 243 [emphasis added].) It is not difficult to see that the Supreme Court realized that there is a difference between the manufacturer of child pornography and the possessor of it, and the initial possessor and subsequent possessor. Again, the State Bar overlooks this distinction.

The Supreme Court's decision also supports Respondent's argument that one can unknowingly be in possession of a questionable image. In *Ashcroft*, the Supreme Court noted: "Where the defendant is *not* the producer of the work, he may have no way of establishing the identity, or even the existence, of the

means that *not* every instance of a violation of section 311.11(a) involves moral turpitude. Thus, under *Lesansky* and *Hallinan*, supra, 43 Cal. 2d at 249, a violation of section 311.11(a) should not be deemed a crime that involves moral turpitude *per se*.

Seemingly aware of the fact that *Lesansky* and *Ashcroft* lead to the conclusion that violation of section 311.11(a) is a crime which may or may not involve moral turpitude, the State Bar turns to federal law, specifically, *United States v. Norris* (5th Cr. 1998) 159 F.3d 926, cert. den. (1999) 526 U.S. 1010, for the proposition that there is no distinction between the production and possession of child pornography, thus requiring a finding that violation of section 311.11(a) is a crime which involves moral turpitude *per se*. (SBB, pp. 20-21.) The failing of the State Bar's argument is that federal criminal statutes *do* distinguish between production and possession, both in the elements of the crime and in the prescribed mandatory punishments. Under federal law, production and possession are not one and the same crime.[2] Federal law even goes further and distinguishes between knowingly *receiving* child pornography (18 U.S.C. § 2252(a)(2)) and knowingly *possessing* it (18 U.S.C. §2252(a)(5)).

As to punishment, federal law imposes a 5-year mandatory minimum sentence for possession, whereas it imposes a 15-year mandatory minimum sentence for production. (18 U.S.C. §§ 2151, 2252.) Moreover, federal law provides an affirmative defense to a defendant that possesses a limited

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actors. If the evidentiary issue is a serious problem for the Government . . . it will be at least as difficult for the innocent possessor." (*Id.*, at 255-256 [emphasis added].)

[2] Federal child pornography statutes are codified at 18 U.S.C. §§ 2551-2660.

number of unlawful images and in good faith destroys the images or reports the images to a law enforcement agency. (See 18 U.S.C. § 2252A(d).) Thus, to the extent the State Bar would have this Court look to federal law, it actually codifies the distinction between the manufacture of child pornography and its possession. For all of the foregoing reasons, as more fully discussed in Respondent's Opening Brief, a violation of section 311.11(a) should be deemed as an offense which may *or* may not involve moral turpitude.

## III. <u>THE STATE BAR DID NOT PROVE THAT RESPONDENT'S CONDUCT INVOLVED MORAL TURPITUDE</u>

The second issue before this Court is whether the Review Department's recommended discipline of an actual suspension was appropriate. To the extent that a violation of section 311.11(a) does not involve moral turpitude *per se*, a determination that some period of actual suspension was not appropriate would require a finding that Respondent's conduct nonetheless involved moral turpitude. Contrary to the State Bar's argument that the facts and circumstances surrounding Respondent's conduct established moral turpitude, SBB, at 29-36, the record does not support the State Bar's argument.

To prove Respondent's conduct involved moral turpitude, the State Bar would have to prove that his conduct involved a desire to corrupt, harm or offend others. (*People v. Castro* (1985) 38 Cal.3d 301, 315.)[3] The

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[3] Insofar as the State Bar believes federal law should provide guidance, see *Marmolejo-Campos v. Holder* (9th Cir. 2008) 558 F.3d 903, which held that "to establish a uniform framework for the determination of crimes involving moral turpitude, the Attorney General [] decreed that a finding of moral turpitude [] requires that a perpetrator have committed a reprehensible act with some form of *scienter*."). (*Id.*, at 905 [internal quotations and citations

undisputed evidence in the record, however, does not support a finding that Respondent took any steps to obtain proscribed images, let alone a desire to corrupt, harm or offend others. According to the State Bar's witness (the forensic examiner) and the stipulation of Trial Counsel, there was *no* evidence Respondent downloaded any images from a website dedicated to or known for child pornography, RT, Vol. I, pp. 99:25-100:3; there was *no* evidence that Respondent posted any images onto a public bulletin board, *id.*, at 117:17-20; there was *no* evidence that Respondent shared any images using a peer-to-peer program, *id.*, at 122:20-123:3; and there was *no* evidence that Respondent communicated with minors in any capacity, *id.*, at 117:1-15. In short, the State Bar did not prove - by any standard of evidence - that Respondent took any affirmative steps to come into possession of any proscribed images.[4] Absent such evidence, it would be improper to find that the facts and circumstances surrounding Respondent's conduct involved moral turpitude.

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omitted].) As set forth in Respondent's Opening Brief and as the record shows, there is no evidence of scienter on Respondent's part.

[4] The State Bar belittles Respondent's use of the term "simple possession" in Respondent's Opening Brief, arguing that Respondent seeks to deny the gravity of the crime. (SBB, p. 3.) At no time has Respondent challenged the elements of his conviction, or the seriousness of any exploitation of children, sexual or otherwise. In Respondent's Opening Brief, Respondent uses the term "simple possession" in the narrow legal sense it is used in case law such as *People v. Castro* (1985) 38 Cal.3d 301; that is, to distinguish between the possession of an item from its manufacture or distribution. Moreover, to the extent that the simple possession analogy breaks down as the State Bar suggests, the State Bar has it backwards. Anyone who is in possession of drugs knows that he is in possession of drugs, and is likely to use them, or the individual would promptly get rid of the drugs. Conversely, it is possible that one, such as Respondent, could come into possession of unlawful images unintentionally, promptly delete the images, but yet be in violation of Section 311.11(a) because the images remain somewhere in the recesses of the user's computer.

In addition, the evidence at trial was disputed. Respondent testified that he received two images that he believed may have depicted a minor and which he immediately deleted, whereas the State Bar's computer technician testified that she believed 17 images may possibly have depicted a minor. The State Bar contends that the "additional images" are not necessary to establish moral turpitude, but that "their admission would leave no room for doubt that moral turpitude exists." (SBB, p. 32.) The State Bar does not, however, explain how there would be no doubt if their witness' unqualified testimony were accepted, which testimony the Review Department excluded; one can only reach the same conclusion as the State Bar if one ignores logical inferences which require a different conclusion.

All reasonable doubts are to be resolved in favor of the accused and if equally reasonable inferences may be drawn from a proven fact, the inference which leads to a conclusion of innocence rather than one leading to a conclusion of guilt is to be accepted. (*Himmel v. State Bar* (1971) 4 Cal.3d 786, 793-794; *Ashe v. State Bar* (1969) 71 Cal.2d 123, 133.)[5] The record is that Respondent had over 100,000 *adult* images on his computer. (RDD, p. 6.) If, as the Review Department ruled, and Respondent's testimony were accepted, then 0.00002% of the images in Respondent's possession may have depicted a minor; conversely, if the technician's unqualified testimony were accepted, then 0.00017% of the images may have depicted a minor. Based on the sheer volume of *adult* images in

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[5] See also *Aguilar v. Atlantic Richfield Company* (2001) 25 Cal. 4th 826 (ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible conduct as with unlawful conduct does not allow a trier of fact so to find that the moving party carried its burden proving unlawful conduct).

Respondent's possession, and the minute[6] percentage of images which possibly depicted a minor, the reasonable inference is that Respondent sought out adult pornography, *not* child pornography. Moreover, one could reasonably infer based on the based on the percentage of potentially unlawful images that Respondent's possession of the proscribed images was unintentional. Contrary to the State Bar's argument that there is no doubt as to Respondent's alleged moral turpitude, there *is* doubt as to whether any moral turpitude can be attributed to Respondent's conduct, and the Review Department so found. Thus, the State Bar did not present evidence "sufficiently strong to command the unhesitating assent of every reasonable mind." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919 [internal quotations omitted].) In summary, the State Bar did not prove Respondent's conduct involved moral turpitude.

## IV. THE FACTORS IN MITIGATION OUTWEIGH THE SINGLE FACTOR IN AGGRAVATION, WHICH IN ANY EVENT SHOULD BE REJECTED

### A. Respondent's Testimony Regarding His Military Separation Did Not Display a Lack of Candor.

As if acknowledging that the record does not support a finding of moral turpitude, the State Bar argues that Respondent's testimony during the trial, years *after* his conviction, warrants disbarment. The State Bar's

[6] As stated elsewhere in the Opening Brief and this Reply, in using the phrase "the minute percentage of images which possibly depict a minor," Respondent does *not* challenge his conviction or in any way minimize the gravity of any exploitation of children; rather, the phrase is used solely to point out the statistical disparity between the percentage of adult images (99.99983%) and the percentage of potentially unlawful images (0.00017%) [assuming *arguendo* the number of images testified to by the forensic examiner].

argument is without merit. In actuality, Respondent did not show a lack of candor and the evidence should be rejected.[7]

The hearing department found that Respondent's testimony concerning his discharge from the Army lacked candor and concluded it was a factor in aggravation. The State Bar cites to *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 and *Olguin v. State Bar* (1980) 28 Cal.3d 195, 200 for the proposition that a member's lack of candor can be worse than the misconduct and thus grounds for disbarment. (SBB, pp. 33, 34, 39.) These two cases and the authority cited therein are readily distinguishable. In said cases, the members intentionally and consciously misrepresented facts directly related to their misconduct, which misrepresentations impeded the State Bar's investigations. In none of these cases did the purported misrepresentations relate to testimony concerning conduct *years* after the misconduct the subject of the investigation nor was it regarding a subject which was not proven by

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[7] In a further attempt to direct this Court's focus away from the State Bar's failure to prove Respondent's conduct involved moral turpitude, the State Bar argues that Respondent lacked remorse; ostensibly, because he has continued to maintain that he only received 2 images that he believed may have depicted a minor, and which he immediately deleted. It is axiomatic that a respondent in an administrative proceeding is entitled to defend himself to the fullest, and the fact that the prosecuting agency is unable to carry its burden should not be seen as a lack of remorse on the part of the defendant or respondent. Remorse is shown, inter alia, by proactive efforts on the part of a defendant or respondent to address the situation that resulted in the proceeding, which may include paying restitution, see *Rhodes v. State Bar* (1989) 49 Cal. 3d 50, or getting involved in a 12-Step program, *Waysman v. State Bar* (1986) 41 Cal.3d 452, 457, or seeking psychological counseling, commencing treatment, or getting involved in a 12-Step program. (*In re Nadrich* (1988) 44 Cal.3d 271, and citations therein.) As both the hearing department and Review Department acknowledged, Respondent took a number of steps to address the issues or conduct which led to conviction, including, but not limited to, commencing therapy, attending a 12-Step group, and participating in the State Bar's Alternative Discipline Program (ADP). (HDD, pp. 7-8; RDD, pp. 7.) Thus, the State Bar's argument is unfounded.

clear and convincing evidence and which was erroneous as a matter of law. For these reasons as discussed below, all of the testimony concerning Respondent's discharge should be excluded as well as all findings or conclusions therefrom.

On a procedural note, the testimony concerning Respondent's discharge should never have been admitted because it was not germane to the proceeding. Respondent's discharge from the military occurred in 2009, whereas the misconduct the subject of this proceeding took place in 2007; thus, the discharge was 2 years *after* the focus of this proceeding. Moreover, the discharge was not mentioned in the State Bar's Pre-Trial Statement,[8] either as a disputed issue or in any other capacity.

The omissions in the State Bar's brief concerning Respondent's discharge are telling. The State Bar's brief failed to address why the State Bar obtained Respondent's military records informally, through back channels, rather than pursuant to the Rules of Procedure of the State Bar of California. The only reasonable inference is that the State Bar did not want Respondent to know it had obtained his Military Personnel File (MPF) in

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[8] The State Bar's Pre-Trial Statement listed one disputed issue - the date of Respondent's arrest. One may infer that the State Bar presumed a violation of section 311.11(a) involved moral turpitude *per se*, notwithstanding the Review Department's charge to the Hearing Department that it was a crime "which may or may not involve moral turpitude" and, therefore, why the case was "referred to the hearing department under the authority of rule 9.10(a), California Rules of Court, for a hearing and decision recommending the discipline to be imposed if the hearing department finds that the facts and circumstances surrounding the violation involved moral turpitude or other misconduct warranting discipline." In other words, the State Bar did not believe it had to put on a case other than to prove Respondent's conviction. This erroneous presumption is revealing. It accounts for the State Bar's entire handling of this proceeding – its failure to conduct discovery, why it violated a court-imposed Protective Order, and why it violated the federal Privacy Act.

violation of the federal Privacy Act. Insofar as Respondent's discharge was not mentioned in the State Bar's Pre-Trial Statement and the State Bar did not use lawful processes to obtain the records, either of which would have provided Respondent with notice concerning this issue, Respondent was in essence denied due process concerning all aspects of his discharge.

The State Bar's brief also failed to address why Trial Counsel did not examine the four Army officers who testified during the trial on the process for resignation, the process for administrative discharges as opposed to the process for punitive discharges, the standards for administrative discharges, or whether any of the officers were involved in any capacity with CPT Grant's resignation. Likewise, the State Bar's brief failed to address why Trial Counsel did not introduce all of Respondent's Military Personnel File (MPF), including, but not limited to, CPT Grant's resignation package. Absent evidence, either testimony from the four Army officers or military officers or lawyers put on by the State Bar, or documentary evidence providing a thorough framework for military separation proceedings, military discharges and military courts-martial, the Hearing Department was unable to make informed findings on the issue, and the Hearing Department and Review Department were unable to make reasoned conclusions from the limited evidence that came in.

It bears repeating that "conjecture, surmise and speculation do not constitute 'evidence.'" (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205-1206.) The hearing department's decision expressly demonstrates its speculation: "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." (HDD, p. 8 [emphasis added].) As the very language of this statement points out by its use of the conditional "*may*," the Hearing Department did not understand the process

by which a military officer resigns or may be administratively discharged, or whether Respondent's conviction would in fact have resulted in his separation from the military.

The Review Department's conclusion concerning Respondent's testimony about his discharge is similarly based on a misunderstanding. As more fully developed in Respondent's Opening Brief, the Review Department's observation that "Grant lacked candor at trial because he misled the court about his *dishonorable discharge*" is erroneous because commissioned officers, such as Captain Grant, *cannot* receive a dishonorable discharge. (Army Reg. 135-175, 2-1 *et seq.*; *cf.*, AR 635-200, 15-180.) Absent the proper framework, the hearing department speculated as to the military process that was the subject of Respondent's testimony and from there it made erroneous findings and conclusions, which in part the Review Department repeated. For these reasons, the findings concerning Respondent's discharge from the military and the conclusion that lack of candor was a factor in aggravation should be rejected.

### B. <u>The Hearing Department Was Mistaken As To Respondent's Credibility, and Any Such Findings Are Not A Factor In Aggravation.</u>

The hearing department misunderstood Respondent's testimony or the propriety of evidence that Trial Counsel sought to admit, and the Review Department correctly discounted the hearing department's findings.

The State Bar argues that the Review Department attached insufficient weight to the hearing department's findings concerning Respondent's credibility. While the hearing department's decision raised the subject of Respondent's credibility, the Review Department correctly held that it "never provided the important analysis identifying what portion

of [Respondent's] testimony lacked credibility and why." (RDD, p. 11, fn. 12.) The State Bar nevertheless contends that the issue of Respondent's credibility is such that is should be seen as a factor in aggravation. The State Bar's argument is unfounded on many levels, intentionally misstates the record (*i.e.*, Respondent's testimony) and fails to accurately state the standard that applies in attorney disciplinary proceedings.

At trial, Respondent testified that he understood his conviction to be a misdemeanor, notwithstanding that the charging document was a Felony Complaint. (RT, Vol. II, pp. 10:19-11:2.) The court found this claim was not credible. (HDD, p. 3, fn. 1.) Specifically, Respondent testified that his understanding was a result of his criminal attorney's advice that, regardless of the caption on the complaint, any sentence less than 1 year would result in his conviction being a misdemeanor. If this is not wholly accurate, statutes and case law clearly lend themselves to this understanding.[9] Thus, even if Respondent's testimony was incorrect, Respondent's understanding that his conviction constituted a misdemeanor was reasonable (or, stated otherwise, not so specious as not to be credible). Accordingly, the hearing department's finding as to Respondent's credibility on this issue was

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[9] Section 17(b)(1) provides that: "When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a *misdemeanor* for all purposes under the following circumstances: (1) After a judgment imposing a punishment other than imprisonment in the state prison." (Emphasis added.) Section 311.11(a) is considered a "wobbler" in that it is an offense which may be charged and punished as either a felony *or* a misdemeanor. (*People v. Statum* (2002) 28 Cal.4th 682, 685; see also *People v. Superior Court* (*Alvarez*) (1997) 14 Cal. 4th 968, 974; *Davis v. Municipal Court* (1988) 46 Cal. 3d 64, 70; *People v. Holt* (1984) 37 Cal. 3d 436, 452, fn. 7.) For any punishment other than imprisonment in state prison, a conviction is that of a misdemeanor. (*Robert L. v. The Superior Court of Orange County* (2003) 30 Cal. 4th 894, fn.7; see also *League of Woman Voters v. Bruce McPherson* (2006) 145 Cal.App.4th 1469.)

unfounded.[10]

Due to page limitations, Respondent does not address the issue of the probation violations, other than that the hearing department's finding were not based on clear and convincing evidence; rather, in the absence of any witnesses put on by the State Bar relating to the violations and in the absence of any authenticated documents, the hearing department resorted to conjecture and surmise to fill in a picture it had of the violations. Whether or not the hearing department found Respondent's testimony not credible concerning the violations, its rejection of Respondent's testimony does *not* create affirmative contrary evidence. (*Edmonson v. State Bar* (1981) 29 Cal.3d 339, 343. In summary, the hearing department's findings concerning the probation violations are unsupported.

## V. <u>THE APPROPRIATE DISCIPLINE IN THIS MATTER IS AN ACTUAL SUSPENSION</u>

The State Bar fails to distinguish *Fetterman*, *Bornstein*, *Kaye* and *Patterson* as discussed in Respondent's Opening Brief, yet the discipline

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[10] On a related note, the State Bar contends that Respondent "abruptly changed his testimony [concerning whether his conviction was a misdemeanor or felony] when faced with compelling and contradictory evidence." (SBB, pp. 37-38.) Nowhere in the record does Respondent change his testimony as the State Bar contends. Rather, the State Bar is able to advance this unfounded contention only by mischaracterizing the record and referring to excerpts of Respondent's testimony, not the whole of a thought or statement. If the State Bar had cited through to page/line **46:21** of the record rather than through to page/line 46:19, see SBB, pp. 37-38, the opposite conclusion would be plain. As Respondent actually testified, he had extensive conversations with his attorney concerning the nature of his conviction and understood based on those conversations that his conviction was a misdemeanor. (RT, Vol. IV, p. 46:20-21; and Exhibit "CC.")

imposed in those matters is relevant and instructive. Moreover, the Review Department determined that the appropriate sanction for Respondent was an actual suspension, not disbarment. Respondent agrees with this conclusion; however, Respondent contends that the appropriate discipline should be a 90-day actual suspension.

The State Bar argues that Respondent is seeking a "nominal sanction." (SBB, p. 42.) This is a somewhat ironic argument insofar as Respondent has already been on interim suspension for 3 ½ years. Respondent's request that the Court impose an actual suspension of 90 days is based on a comparison to prior State Bar discipline proceedings; more specifically, in noting that other members with conduct demonstratively more egregious than Respondent's conduct had actual suspensions imposed of 3 years, 2 years, 1 year, and 30 days.

The State Bar contends that the discipline imposed on *Fetterman* (#189990) and *Bornstein* (#65256) are irrelevant to an analysis of the appropriate discipline here because those two matters were resolved through the State Bar's Alternative Discipline Program (ADP). Those proceedings nonetheless provide the best guidance of discipline in prior cases involving the same or similar offense. Moreover, the State Bar stipulated to the facts of those two cases as well as the discipline to be imposed. In doing so, the State Bar necessarily believed that the "punishment fit the crime." [11]

The State Bar further contends that *In re Kaye* [#171160] is

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[11] The only reason why the State Bar now attempts to distinguish the discipline in *Fetterman* and *Bornstein* is because those members' conduct involved affirmative steps to acquire child pornography, whereas the record shows that Respondent did *not* take any affirmative steps to procure unlawful images. (RT, Vol. I, pp. 99:25-100:3; 117:1-15; 117:17-20; 122:20-123:3.)

distinguishable and therefore irrelevant. (SBB, p. 42.) Respondent concurs with the State Bar that the matters are factually dissimilar; Respondent disagrees that they are irrelevant. *Kaye* was not a matter involving a violation of section 311.11(a), but rather involved a member convicted of multiple counts of violating section 647(j)(3)(a) (*secretly filming a person*) and multiple counts of section 647(j)(1) (*peeking through a private area*), and involved multiple factors in aggravation (multiple acts of misconduct, harm to the public, and invasion of privacy). It is clear that this member's conduct involved both affirmative acts *and* an intent to harm, offend, or corrupt others; i.e, *Castro*, supra, 38 Cal.3d at 315. Yet, the matter resulted in a 1-year actual suspension.

The same analysis applies to *In re Patterson.* That member was convicted of lewd conduct, which included willfully, unlawfully and intentionally exposing and masturbating his penis in the direct view and presence of two 14-year old girls. The State Bar stipulated to a 2-year actual suspension. By stipulating to this discipline, the State Bar impliedly deemed that a volitional act intended to offend 14-year old girls is not so egregious to warrant disbarment, and yet it seeks to argue that the facts and circumstances relating to Respondent's conduct -- where it was *not* shown that Respondent ever took affirmative action to come into possession of the images or that he intended to offend, harm, or corrupt anyone – is more egregious than Patterson's and warrants disbarment. In short, any discipline imposed on Respondent should be less than that which was imposed on Patterson.

The State Bar closes by arguing that Respondent's reference to *Stocker* is curious. (SBB, p. 42.) In fact, *Stocker* highlights the uneven application of discipline. The procedural history of *Stocker* is worth recounting. Through ADP, the State Bar and the member agreed to a

30-day actual suspension; after the member had completed his probation, the State Bar petitioned this Court to overturn his discipline and to have him summarily disbarred. Notably, this Court rejected the petition, and directed that the matter be remanded for a disciplinary proceeding. The member elected not to go through with the proceeding and stipulated to disbarment.

What is noteworthy about Stocker's ADP process is that in his stipulation, Stocker stipulated to *downloading* child pornography, and the State Bar stipulated that Stocker "*only*" downloaded images of child pornography;[12] yet the State Bar concluded it was reasonable to stipulate to a 30-day actual suspension. In short, <u>*Stocker took affirmative steps*</u>, knowingly and consciously, *to* ***obtain*** *child pornography* and Stocker stipulated to *harm* as a factor in aggravation. Further, the State Bar considered it sufficiently important to emphasize the fact that the member did not engage in any other morally turpitudinous conduct. Respondent's conduct does not equate to that of Stocker because Respondent did not intentionally/volitionally download proscribed images.[13] Thus, Stocker is

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[12] The relevant stipulated fact was as follows: "7. Respondent's misconduct involved *only* the downloading of images of child pornography from the internet. It did not involve contact with any children, either in person or on-line, or any participation in chat rooms. He did not communicate with others regarding images of child pornography. He did not purchase these images nor did he post, transmit or exchange any images." (Attachment to ADP Stipulation re: Facts and Conclusions of Law, p. 2, ¶ 7.)

[13] One may deduce that Stocker stipulated because the facts and circumstances surrounding his conduct would have led to a determination that his offense involved moral turpitude, for several reasons. First, Stocker's conduct took place at his law office; thus, it was during the course of his practice of law. Second, Stocker was charged with 55 counts of possession of child pornography. Third, Stocker stipulated to downloading child pornography; that is, he actively sought out images depicting minors. (See California Bar Journal, http://www.calbarjournal.com/February2013/AttorneyDiscipline/Disbarments.aspx.) All of these suggest conduct involving moral turpitude. None of these factors

relevant because it shows that a proceeding to determine the nature of a member's conduct is the appropriate procedure in these types of cases *and* that there is a distinction between a member such as Stocker, who took affirmative steps to obtain possession of proscribed images, and a member such as Respondent, who did not take any affirmative steps to come into possession of proscribed images.

There is no rational reason for the disparity between the discipline imposed on *Fetteman*, *Bornstein*, *Kaye* and *Patterson* and the discipline the State Bar seeks imposed on Respondent. In each of those cases, the member's conduct involved affirmative steps to corrupt, offend, or harm minors. In the case of Respondent, the record does not so show. Thus, the actual suspension imposed on Respondent should be less than that of these members. For all of the foregoing reasons, an actual suspension of 90-days is appropriate.

## VI. <u>CONCLUSION</u>

For all of the foregoing reasons, Respondent Gary Douglass Grant respectfully requests that this Court rule that a conviction for violation of section 311.11(a) does not constitute moral turpitude *per se*; that Respondent's conduct did not involve moral turpitude; that there is no factor in aggravation; and that the appropriate discipline to be imposed on Respondent is an actual suspension of 90 days, with the terms and conditions set forth by the Review Department.

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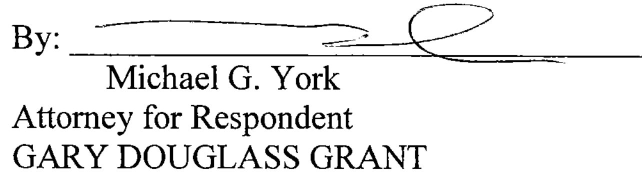
is present in Respondent's conduct.

Respectfully submitted,

Dated: February 28, 2013

LAW OFFICES OF MICHAEL G. YORK

By: 

Michael G. York
Attorney for Respondent
GARY DOUGLASS GRANT

## CERTIFICATE OF COMPLIANCE
## PURSUANT TO RULE 8.520(c), CALIFORNIA RULES OF COURT

In accordance with rule 8.520(c), California Rule of Court, the undersigned hereby certifies that this Reply Brief on the Merits contains 6,020 words, as determined by the word processing system used to prepare this brief, excluding the tables, the cover information, the signature block, and this certificate.

Respectfully submitted,

DATED: February 27, 2013

LAW OFFICES OF MICHAEL G. YORK

By: ______________________
Michael G. York
Attorney for Respondent
GARY DOUGLASS GRANT

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of eighteen and not a party to this action. I am employed in the County of Orange, State of California. My business address is 1301 Dove Street, Suite 1000, Newport Beach, California 92660.

On February 28, 2013, I served the foregoing document described as BRIEF on the interested parties:

[X] (BY MAIL): By placing [ ] the original [X] the number of true and correct copies thereof set forth on the attached list in envelopes addressed as set forth on the attached list, sealing them, and placing them for collection and mailing on that date with postage thereon fully prepaid following ordinary business practices. I am ''readily familiar'' with the business' practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service in Newport Beach, California on that same day, in the ordinary course of business. I am aware that on motion of the party served, service is invalid if postal cancellation date or postage meter date is more than (1) day after date of deposit for mailing in the affidavit.

[ ] (BY PERSONAL SERVICE): By placing a true and correct copy thereof in an envelope(s) addressed as set forth on the attached list, and sealing it. I delivered such envelope(s) by hand to the office(s) of the addressee(s).

[ ] (BY OVERNIGHT DELIVERY): By placing a true and correct copy thereof in an envelope(s) addressed as set forth on the attached list, sealing it, and placing it for collection and delivery by an express service carrier providing for overnight delivery, with delivery fees paid or provided for.

[X] (BY EMAIL): By transmitting a true and correct copy via email to the Office of General Counsel as set forth on the attached list. The transmission was reported as complete and without error.

[X] STATE - I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: February 28, 2013

MICHAEL G. YORK

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