DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
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MICAH JARED SMITH,	:	
	:	D.C. App. No. 17-BG-881
Respondent.	:	Board Docket No. 17-BD-067
	:	Bar Docket No. 2017-D201
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 1002861)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This matter is before the Board on Professional Responsibility (the "Board") pursuant to an order of the District of Columbia Court of Appeals (the "Court") directing the Board to institute a formal proceeding to determine the nature of the final discipline to be imposed, based on Respondent's felony convictions in Delaware of Continuous Sexual Abuse of a Child, Sexual Abuse of a Child by a Person in a Position of Trust, and Unlawful Sexual Contact First Degree. Specifically, the Board is to determine whether Respondent has been convicted of a crime involving moral turpitude within the meaning of D.C. Code § 11-2503(a). For the reasons that follow, the Board concludes that at least one of Respondent's crimes involves moral turpitude *per se* and recommends that he should be disbarred.

BACKGROUND

Respondent was admitted on motion to the District of Columbia Bar on August 8, 2011. On May 17, 2017, Respondent was convicted in the Superior Court of Delaware of one count of Continuous Sexual Abuse of a Child, in violation of 11 Del. C. § 776; one count of Sexual Abuse of a Child by a Person in a Position of Trust, in violation of 11 Del. C. § 778A; and three counts of Unlawful Sexual Contact First Degree, in violation of 11 Del. C. § 769. Each of these offenses is a felony.

Respondent did not report his criminal convictions to the Court and the Board as required by D.C. Bar R. XI, § 10(a). On August 4, 2017, after being advised of the convictions by Delaware Disciplinary Counsel, Disciplinary Counsel filed with the Court a certified copy of the criminal judgment. The certified copy of the judgment of conviction is conclusive evidence of Respondent's commission of the crimes. D.C. Bar R. XI, § 10(f). On September 18, 2017, the Court temporarily suspended Respondent pursuant to D.C. Bar R. XI, § 10(c) and directed the Board to institute formal proceedings to determine the nature of Respondent's offenses and whether they involve moral turpitude within the meaning of D.C. Code § 11-2503(a). Order, *In re Smith*, No. 17-BG-881 (D.C. Sept. 18, 2017).

On September 21, 2017, the Board directed the parties to file briefs addressing whether Respondent's crimes involve moral turpitude *per se*. On October 11, 2017, Disciplinary Counsel filed with the Board a statement contending that Respondent's crimes involve moral turpitude *per se* and recommending Respondent's disbarment.

Respondent did not file a brief. On November 20, 2017, Respondent filed with the Court an affidavit pursuant to D.C. Bar R. XI, § 14.

ANALYSIS

D.C. Code § 11-2503(a) provides for the mandatory disbarment of a member of the District of Columbia Bar convicted of a crime of moral turpitude. Once the Court determines that a particular crime involves moral turpitude *per se*, disbarment is the mandated sanction. *See In re Colson*, 412 A.2d 1160, 1164 (D.C. 1979) (en banc). Because the Court has not previously determined whether the crimes at issue here involve moral turpitude, the Board must review the elements of the crimes to consider whether any of these crimes is one of moral turpitude *per se*. *See id*.

The legal standard for moral turpitude was established in *Colson*. The Court held that a crime involves moral turpitude if "the act denounced by the statute offends the generally accepted moral code of mankind[,]" if it involves "baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man[,]" or if the act is "contrary to justice, honesty, modesty, or good morals." *Id.* at 1168 (citations omitted). The Court revisited the definition of moral turpitude in *In re McBride*, 602 A.2d 626 (D.C. 1992) (en banc) (*McBride II*), stating that "the idea of moral turpitude incorporates a revulsion of society toward conduct deeply offending the general moral sense of right and wrong." *Id*. at 632-33. "Under the *Colson* and *McBride II* analysis of whether a crime or offense is one of moral turpitude, then, we examine whether the prohibited

conduct is base, vile or depraved, or whether society manifests a revulsion toward such conduct because it offends generally accepted morals." *In re Sims*, 844 A.2d 353, 361-362 (D.C. 2004).

The Board's determination whether a crime involves moral turpitude *per se* is based solely on an examination of the elements of the statutory offense, not the respondent's conduct. *See In re Shorter*, 570 A.2d 760, 765 (D.C. 1990) (per curiam) (citing *Colson*, 412 A.2d at 1164-67). The Court has stated that "[t]he threshold focus of the statute . . . is on the type of crime committed rather than on the factual context surrounding the actual commission of the offense." *Colson*, 412 A.2d at 1164. In examining the statutory elements, the Board must consider whether the least culpable offender under the statute necessarily engages in a crime of moral turpitude. *See Shorter*, 570 A.2d at 765. If the Board determines that the offense does not involve moral turpitude *per se*, the matter is referred to a Hearing Committee to determine whether the underlying facts of Respondent's criminal conduct involve moral turpitude. *Id*.

The Court has not previously addressed any of the statutes at issue here. Disciplinary Counsel argues that Respondent was convicted of a crime of moral turpitude, pointing to two prior cases in which the Court determined that a respondent's conviction under child abuse statutes involved moral turpitude *per se*. In *In re Sharp*, 674 A.2d 899, 903-4 (D.C. 1996), the Court determined that a respondent's conviction under a Virginia child molestation statute (Va. Code Ann.

§ 18.2-370.1 (1950))[1] involved moral turpitude *per se*. The Court reasoned that the very "definition of a crime involving moral turpitude *per se* . . . was satisfied [by the respondent's] conviction for sexually abusing someone over whom he exercised authority." In *In re Wortzel*, 698 A.2d 429 (D.C. 1997), the Court considered a Maryland child abuse statute (Md. Code Ann. Art. 27, § 35C) and, relying on its decision in *Sharp* as well as the respondent's failure to take a position on the issue, determined that the respondent's conviction under that statute involved moral turpitude *per se*.[2]

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[1] Va. Code Ann. § 18.2-370.1 provided:

> Any person eighteen years of age or older who maintains a custodial or supervisory relationship over a child under the age of eighteen, including but not limited to the parent, step-parent, grandparent, step-grandparent, or stands in loco parentis with respect to such child and is not legally married to such child, and who, with lascivious intent, knowingly and intentionally (i) proposes that any such child feel or fondle the sexual or genital parts of such person or that such person feel or handle the sexual or genital parts of the child, or (ii) proposes to such child the performance of an act of sexual intercourse or any act constituting an offense under section 18.2-361, or (iii) exposes his or her sexual or genital parts to such child, or (iv) proposes that any such child exposes his or her sexual or genital parts to such person, or (v) proposes to the child that the child engage in sexual intercourse, sodomy or fondling of sexual or genital parts with another person, or (vi) sexually abuses the child as defined in section 18.2-67.10(6), shall be guilty of a Class 6 felony.

[2] Md.Code Ann. Art. 27, § 35C provided, in pertinent part:

> A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a child or a household or family member who causes abuse to the child is guilty of a felony and on conviction is subject to imprisonment in the penitentiary for not more than 15 years.

Under this section, "[a]buse" is defined as:

> (i) The sustaining of physical injury by a child as a result of cruel or inhumane treatment or as a result of a malicious act by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member, under circumstances that indicate that the child's health or welfare is harmed or threatened thereby; or
>
> (ii) Sexual abuse of a child, whether physical injuries are sustained or not.

Footnote cont'd. on following page

One of the statutes at issue here, 11 Del. C. § 778A(1), is closely analogous to the statute at issue in *Sharp*, as both involve the sexual abuse of a child over whom the defendant exercised authority.[3] It is also analogous to the statute at issue in *Wortzel*, which covers "child abuse" more broadly. The least culpable offender convicted under 11 Del. C. § 778A(1) has necessarily engaged in intentional sexual contact with a child under his or her supervision. Thus, following the Court's

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[3] 11 Del.C. § 778A provides:

> A person is guilty of sexual abuse of a child by a person in a position of trust, authority or supervision in the second degree when the person:
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> (1) Intentionally has sexual contact with a child who has not yet reached that child's sixteenth birthday or causes the child to have sexual contact with the person or a third person and the person stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.
> (2)a. Is a male who intentionally exposes his genitals or buttocks to a child who has not yet reached that child's sixteenth birthday under circumstances in which he knows his conduct is likely to cause annoyance, affront, offense or alarm when the person is at least 4 years older than the child and he stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.
> b. Is a female who intentionally exposes her genitals, breast or buttocks to a child who has not yet reached that child's sixteenth birthday under circumstances in which she knows her conduct is likely to cause annoyance, affront, offense or alarm when the person is at least 4 years older than the child and she stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.
> (3) Suggests, solicits, requests, commands, importunes or otherwise attempts to induce a child who has not yet reached that child's sixteenth birthday to have sexual contact or sexual intercourse or unlawful sexual penetration with the person or a third person, knowing that the person is thereby likely to cause annoyance, affront, offense or alarm to the child or another when the person is at least 4 years older than the child and the person stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

decisions in *Sharp* and *Wortzel*, the least culpable offender has committed a crime of moral turpitude.

The Indictment and Verdict Form do not identify the particular subsection of § 778A under which Respondent was convicted and, therefore, the Board has examined the record to determine whether there is clear and convincing evidence that Respondent was convicted under § 778A(1). We find that there is. We looked to the language in the Indictment to attempt to identify the precise subsection under which Respondent was charged and convicted, and did *not* examine the conduct at issue. Count II of the Indictment charges that Respondent

> did intentionally have sexual contact involving act of Unlawful Sexual Contact [sic] by having the victim touch his penis and by touching the breasts, buttocks and vagina of K.S., a child who was 8 to 9 years old, a child who had not yet reached that child's sixteenth birthday, caused the child to have sexual contact with the defendant and that defendant stood in a position of trust, authority or supervision over the child.

This conduct is covered by § 778A(1) only. It is not covered by § 778A(2) or § 778A(3). The jury returned a guilty verdict on Count II, and thus, we conclude that Respondent was convicted under § 778A(1).

Having concluded that a conviction under § 778A(1) inherently involves moral turpitude, that Respondent was convicted under § 778A(1), and taking into account Respondent's failure to submit any statement on the issue, the Board agrees with Disciplinary Counsel that Respondent's conviction for intentional sexual contact with someone over whom he exercised authority is a crime involving moral turpitude *per se* and that he should be disbarred. Because at least one of

Respondent's crimes involve moral turpitude *per se*, the Court need not determine whether Respondent's convictions under §§ 769 and 776 involve moral turpitude *per se* because disbarment is mandated by D.C. Code § 11-2503(a) when any one of the convictions involves moral turpitude *per se*. *In re Lipari*, 704 A.2d 851, 852 (D.C. 1997).

CONCLUSION

Accordingly, for the reasons set forth above, the Board finds that Respondent's conviction under 11 Del. C. 778A(1) involved moral turpitude *per se*. Accordingly, the Board recommends that Respondent be disbarred pursuant to D.C. Code § 11- 2503(a).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /DB/
David Bernstein

All members of the Board concur in this report and recommendation, except and Mr. Carter, who is recused.