THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
February 19, 2021

In the Matter of:	:	
	:	
THOMAS IAN MOIR,	:	
	:	D.C. App. No. 19-BG-1075
Respondent.	:	Board Docket No. 19-BD-068
	:	Disc. Docket No. 2019-D202
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 978531)	:	

REPORT AND RECOMMENDATION OF
THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter is before the Board on Professional Responsibility (the "Board") as a result of Respondent's guilty plea, in the United States District Court for the District of Columbia to one count of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2). Disciplinary Counsel notified the District of Columbia Court of Appeals (the "Court") of Respondent's conviction on November 14, 2019, and on November 20, 2019, the Court suspended Respondent and directed the Board to institute a formal proceeding to determine the nature of Respondent's offense and whether the crime involves moral turpitude within the meaning of D.C. Code § 11-2503(a) (2001), which mandates the disbarment of a District of Columbia Bar member who has been convicted of a crime of moral turpitude.

* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any subsequent decisions in this case.

On December 6, 2019, Disciplinary Counsel filed a statement ("ODC Statement") with the Board recommending Respondent's disbarment based on his conviction of a crime involving moral turpitude *per se*.

On February 20, 2020, the Board directed Disciplinary Counsel to file a supplemental statement addressing certain questions in order to assist the Board in determining whether the least culpable offender convicted under 18 U.S.C. § 2252(a)(2) has committed a crime of moral turpitude.

On April 22, 2020, that order was stayed due to the Covid-19 pandemic.

On September 29, 2020, the Board lifted the April 22 Order and directed Disciplinary Counsel to respond to the February 20 Order. Disciplinary Counsel filed its response. Respondent has not filed any reply thereto, the time for doing so having expired.

SUMMARY

The Court has not yet determined whether distribution of child pornography is a crime of moral turpitude *per se*. Although the very name of the crime suggests a foregone conclusion that distributing child pornography is a crime of moral turpitude *per se*, when we undertake the analysis to make such a determination – that is, would the conduct of the least culpable offender of this crime be base, vile or depraved – we conclude that it is not a crime of moral turpitude *per se*. Specifically, the least culpable offender subject to conviction for distributing child pornography is a participant in lawful sexual relations with a partner aged under eighteen, who then shares images of those lawful

sexual relations only with his or her partner. We conclude that given this scenario which is "the most benign conduct punishable under the statute" this crime is not one of moral turpitude *per se* because the least culpable offender's conduct is not base, vile or depraved, and thus, the distribution of child pornography prohibited by 18 U.S.C. § 2252(a)(2) is not a crime of moral turpitude *per se*. *See In re Shorter*, 570 A.2d 760, 765 (D.C. 1990) (per curiam); *In re Squillacote*, 790 A.2d 514, 517 (D.C. 2002) (per curiam) (appended Board Report)

However, Disciplinary Counsel has moved for summary adjudication of the moral turpitude issue pursuant to recently-enacted Board Rule 10.2. We agree with Disciplinary Counsel that the facts Respondent admitted in his guilty plea establish by clear and convincing evidence that Respondent's conduct involved moral turpitude, and thus we recommend that Respondent be disbarred.

DISCUSSION

I. The Least Culpable Offender Analysis

D.C. Code § 11-2503(a) requires the disbarment of a D.C. Bar member who has been 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, without inquiry into the specific criminal conduct in each case. *See In re Colson*, 412 A.2d 1160, 1164 (D.C. 1979) (*en banc*). Where, as here, the Court has not previously addressed the statute at issue, we

must review its elements to determine whether it is a crime of moral turpitude *per se*. This assessment is based solely on an examination of the statute, not on the respondent's conduct. *See Shorter*, 570 A.2d at 765 (citing *Colson*, 412 A.2d at 1164-67). That is, we focus "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. To constitute a crime of moral turpitude *per se*, "the statute, in all applications, [must] criminalize[] conduct that 'offends the generally accepted moral code of mankind,' 'involve[] baseness, vileness or depravity,' or offend[] universal notions of '"justice, honesty, or morality."' *In re Rohde*, 191 A.3d 1124, 1131 (D.C. 2018) (quoting *In re Tidwell*, 831 A.2d 953, 957 (D.C. 2003)). We are therefore obliged to consider whether the least culpable offender convicted under the statute necessarily engages in a crime of moral turpitude. *See In re Johnson*, 48 A.3d 170, 172-73 (D.C. 2012) (per curiam) ("part of the calculus in assessing whether a crime is one of moral turpitude *per se* is whether we can say that the least culpable offender under the terms of the statute necessarily engages in conduct involving moral turpitude"); *Squillacote*, 790 A.2d at 517 ("if the most benign conduct punishable under the statute" does not involve moral turpitude, then the crime is not one of moral turpitude *per se*); *see also Shorter*, 570 A.2d at 765.

II. Respondent was Convicted of Distributing Child Pornography

Respondent pled guilty to violating 18 U.S.C. § 2252(a)(2), which prohibits the knowing distribution or receipt of child pornography:

> (a) Any person who—
>
> > (2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if –
> >
> > (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> >
> > (B) such visual depiction is of such conduct.

A "minor" means any person under eighteen years old. 18 U.S.C. § 2256(1).

Where the offense of conviction involves a range of criminal conduct (here the distribution or receipt of child pornography), the Board may review the underlying documents from the criminal case to determine which portion of the statute was violated. *See In re Lobar*, 632 A.2d 110, 111 (D.C. 1993) (per curiam) (examining charging documents to determine that conviction was for conspiracy to defraud the United States). Based on our review of the Judgment in a Criminal Case, and the Statement of Offense attached to Disciplinary Counsel's Statement on the Issue of Moral Turpitude *Per Se*, it is

clear that Respondent pled guilty to violating the "distribution" prong of § 2252(a)(2).

III. Distribution of Child Pornography is Not a Crime of Moral Turpitude *Per Se.*

The question before the Board is whether the least culpable distributor of child pornography has engaged in a crime of moral turpitude. Disciplinary Counsel argues that Respondent was convicted of a crime of moral turpitude *per se* because child pornography itself is a visual record of child sexual abuse, the distribution of that record continues to harm the child victim, and creates an economic motive for creating additional child pornography, leading to further victimization of children. *See* ODC Statement at 6.

We agree with Disciplinary Counsel that the connection between child pornography and child sexual abuse is inarguable in the vast majority of cases, and that child sexual abuse is a crime of moral turpitude *per se. See In re Sharp*, 674 A.2d 899 (D.C. 1996). However, the requirement that we identify the "least culpable offender" leads us to a defendant who distributed images of lawful sexual relations, not images of sexual abuse. This is so because many states permit sexual relations with those under eighteen years of age, while § 2252(a)(2) prohibits images of those under eighteen engaging in sexually explicit conduct. Thus, the least culpable offender may legally have sexual relations with a minor under applicable state law, but may not record and/or transmit images of this otherwise lawful conduct.

This is not a theoretical least culpable offender hypothetical. In *United States v. Rouse*, 936 F.3d 849, 850 (8th Cir. 2019), the defendant made consensual recordings of his lawful sexual relations with a sixteen-year-old girl, and sent her the videos, but did not send them to anyone else. The Eighth Circuit held that the government may prosecute a defendant "for transmitting a visual depiction of a minor engaged in sexually explicit conduct, even though the conduct was not criminal." *Id.* at 852. Although Rouse was guilty of distributing child pornography, his sexual partner was not the victim of sexual abuse because she could lawfully consent to her sexual relations with Rouse.

Similarly, in *United States v. Rinehart*, the defendant had lawful sexual relations with two minors, one sixteen years old and the other seventeen years old, and kept images of their encounters on his computer. 2007 WL 647498 (S.D. Ind. Feb. 2, 2007). Rinehart was convicted of possessing child pornography even though the trial court observed that the sexual relations were lawful, and there was no evidence that Rinehart possessed or sought any other child pornography.

Notably, in *Rouse*, *Rinehart* and similar cases cited below where each defendant violated federal child pornography statutes, no defendant was charged with sexual abuse because the sexual conduct was permitted under relevant state law. *See, e.g.*, *United States v. Nash*, 1 F. Supp. 3d 1240, 1241-42 (N.D. Ala. 2014) (defendant possessed lewd and lascivious pictures that were taken by and sent to him by his sixteen-year-old girlfriend); *United States*

v. Ortiz-Graulau, 397 F. Supp. 2d 345, 348 (D.P.R. 2005) ("that under Puerto Rico law [the defendant] could have a [sexual] relationship with SMN without incurring in criminal conduct does not preclude his prosecution under federal law for the production and possession of the sexually explicit photographs of SMN"), *aff'd*, 526 F.3d 16 (1st Cir. 2008); *but see New York v. Ferber*, 458 U.S. 747, 758 (1982) ("[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

We were unable to locate any attorney discipline cases conducting a "least culpable offender" analysis for distributing child pornography. We decline to follow the California Supreme Court's decision in *In re Grant*, a disciplinary case that concluded that possession of child pornography constitutes moral turpitude in every case. *Grant* observed that

> The knowing possession of child pornography is "a serious breach of the duties of respect and care that all adults owe to all children, and it show[s] such a flagrant disrespect for the law and for societal norms, that continuation of [*a convicted attorney's*] State Bar membership would be likely to undermine public confidence in and respect for the legal profession."

58 Cal. 4th 469, 480-81 (2014) (alterations and emphasis in original) (quoting *In re Lesansky*, 25 Cal. 4th 11, 17 (2001)). We do not rely on *Grant* because it does not clearly conduct a "least culpable offender" analysis, and instead addresses the characteristics of the most common offender.

In a federal immigration case, the Third Circuit determined that the least culpable offender convicted under a similar Pennsylvania statute had committed a crime of moral turpitude. *Moreno v. Att'y Gen. of the United States*, 887 F.3d 160 (3d Cir. 2018). The court posited that the least culpable offender was an eighteen-year-old who possessed consensually-shared sexually explicit images of a seventeen-year-old. *Id.* at 164. After examining Pennsylvania's statutory scheme, *Moreno* concluded that the least culpable offender had engaged in a crime of moral turpitude, rejecting the notion that "society would not find sexting between an eighteen-year-old and a seventeen-year-old to be morally reprehensible." *Id*. *Moreno* found that the state had a compelling interest in protecting minors from being depicted in pornography, citing prior Pennsylvania authority that held that "no one can legally take pornographic photographs of [someone under 18], regardless of whether the child consents." *Id.* at 165 (citation and quotation marks omitted).

We decline to follow *Moreno* because the District of Columbia child pornography statute permits some sexting between minors and those a few years older. D.C. Code § 22-3102(b) prohibits a person, knowing the character and content thereof, from possessing or transmitting images of a minor engaging in sexual conduct. But this comes with important exceptions. The minor or minors depicted in the image may possess or transmit the image to others "unless at least one of the minors depicted in it does not consent to its possession or transmission." D.C. Code § 22-3102(c)(1). Also, minors who

do not appear in the image, and adults not more than four years older than the minor or minors depicted in it, may possess an image received from a minor depicted in it, unless the recipient knows that at least one of the minors depicted did not consent to its transmission. *See* D.C. Code § 22-3102(c)(2).

The legislative history of § 22-3102 shows that the Council of the District of Columbia did not intend to criminalize all sexting. The committee report provides that:

> This section is crafted to cover "sexting" but not to make all instances of sexting criminal. It is not the intent to prosecute individuals 17 and under for possessing or attending a sexual performance of a minor. This section is targeted toward pedophiles and sexual predators. Exceptions are carved out for minors who mutually consent to the transmission and/or possession of the photograph or video (including any electronic or digital representation). All of the minors depicted in the photo or video must consent. However, a person is guilty of possession if he or she is 18 years of age or older and at least 4 years older than any of the minors depicted in the photograph, even if the minor(s) consent to the person having the photograph.

D.C. Council, Report of the Committee on Public Safety and the Judiciary on Bill 18-70, March 9, 2010, at 10.[1] As D.C. criminal law permits a seventeen-year-old to distribute images of consensual sexual conduct to his or her eighteen-year-old sexual partner, we cannot conclude that it is base, vile or depraved if the sender is eighteen years old and the recipient is seventeen years old.

[1] This Report is available at http://lims.dccouncil.us/Download/22225/B18-0070-CommitteeReport1.pdf.

We conclude that the least culpable conduct prohibited by § 2252(a)(2) is not base, vile or depraved, and thus conclude that the conduct prohibited by § 2252(a)(2) is not a crime of moral turpitude *per se*.

IV. Summary Adjudication of Moral Turpitude Issues Following Guilty Pleas

Prior to recent amendments to the Board Rules, following our conclusion that the statute at issue did not involve moral turpitude *per se*, we would have referred the matter to a Hearing Committee to determine if the conduct underlying the respondent's offense involves moral turpitude within the meaning of D.C. Code Section 11-2503(a) "on the facts." *See* Board Rule 10.3; *see, e.g.*, *In re Allen*, 27 A.3d 1178, 1181 (D.C. 2011) (citation omitted). On August 4, 2020, we amended the Board Rules to add Rule 10.2, which permits the summary adjudication of the moral turpitude issue in cases arising out of a respondent's guilty plea in a criminal case:

> If respondent's conviction follows a guilty plea, along with its brief on the issue of moral turpitude per se, Disciplinary Counsel may file with the Board a motion seeking summary adjudication that the conduct underlying respondent's offense involves moral turpitude within the meaning of D.C. Code Section 11-2503(a). The Board will not consider Disciplinary Counsel's motion if it concludes that the offense involves moral turpitude per se. Disciplinary Counsel's motion must be supported by a statement of material facts that it contends are not genuinely disputed. If respondent opposes summary adjudication, respondent must file an opposition to Disciplinary Counsel's motion that identifies the material facts that respondent contends are genuinely disputed, along with a proffer of any additional facts respondent intends to present in a contested hearing; however,

> respondent may not contest any of the material facts alleged by the government in any plea agreement in the underlying criminal case.
>
> If, after viewing the record in the light most favorable to respondent, the Board determines that there is no genuine issue as to any material fact, and Disciplinary Counsel has proven by clear and convincing evidence that the conduct underlying respondent's offense involves moral turpitude, the Board shall grant Disciplinary Counsel's motion and recommend to the Court that respondent be disbarred pursuant to D.C. Code Section 11-2503(a). If the Board determines that the question of moral turpitude cannot be decided based on summary adjudication, the Board shall refer the matter to a Hearing Committee pursuant to Board Rule 10.3.

The Board added Board Rule 10.2 because

> In a significant number of cases referred to the Board under Rule XI, Section 10, the question of moral turpitude *per se*, *i.e.*, whether a hypothetical "least culpable offender" committed a crime of moral turpitude, is a difficult one, while the undisputed record clearly shows a crime of moral turpitude on the undisputed facts. In those cases, the Board, and a hearing committee if the matter must be referred to a committee for resolution, will expend significant time and resources when the undisputed facts—the facts admitted as part of the plea agreement—will resolve the matter.

D.C. Board on Professional Responsibility, Administrative Order 2020-4, at 12.

V. The Facts Admitted in Respondent's Guilty Plea Establish by Clear and Convincing Evidence that His Offense Involved Moral Turpitude on the Facts.

We have reviewed the facts set forth in the Statement of Offense attached to Disciplinary Counsel's Statement Regarding Moral Turpitude. Respondent stipulated that the facts set forth in the Statement of Offense "were true and

accurate." Also, he may not challenge those facts in this proceeding because a guilty plea represents both a conviction of a crime and an admission by the accused of the underlying facts. *In re Wolff*, 490 A.2d 1118, 1119 (D.C. 1985), *adopted en banc*, 511 A.2d 1047 (D.C. 1986) (per curiam); *Tidwell*, 831 A.2d at 960. Respondent has not responded to Disciplinary Counsel's filings on the moral turpitude issue, disputed any of its factual assertions, or otherwise opposed its argument that he should be disbarred.

We have reviewed the record in the light most favorable to Respondent, and have determined that there are no material issues in dispute. The facts admitted by Respondent show that he *intentionally* shared approximately 100 images of child pornography on a social networking service, totaling approximately 230 megabytes of files. ODC Statement, Statement of Facts at 3. These images were predominantly of pre-pubescent females with their genitalia exposed in a sexually explicit manner. *Id.* at 3-4 (including descriptions of representative images). Respondent communicated, either by typing messages or using a microphone or headphones, with other users of a social networking site. In response to posts of child pornography, Respondent and other users discussed the desired sex acts they wished to perform with the children depicted. *Id.* at 4. Respondent created a personal space on a social networking site where he hosted at least three discussions with other users about mutual masturbation while jointly viewing images of teen-aged or younger children. *Id.* at 4-5.

Clearly, Respondent was not the least culpable offender, sharing images of lawful sexual relations. He intentionally trafficked in images of child abuse, over and over again. His conduct is far more serious than that in *In re Wolff*, where the respondent "reluctantly" sold five photographs depicting minors engaged in sex acts. 490 A.2d at 1119. The Court disbarred Wolff for engaging in a crime involving moral turpitude after concluding that his desire for "gratification exceeded his ability to demonstrate a public respect and appreciation of existing societal morals and values." *Id.* at 1120 (citation omitted).[2] The same is doubtless true here, and disbarment is likewise warranted.

CONCLUSION

For the reasons set forth above, we conclude (1) that distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2) is not a crime of moral turpitude *per se*; and (2) that after considering the facts Respondent admitted in his guilty plea in the light most favorable to him, we conclude that Respondent's admitted criminal conduct involves moral turpitude.

We recommend that Respondent be disbarred. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI,

[2] We recognize that *Wolff* observed that the fact that the respondent accepted $20 for the pornographic photographs bore on the issue of moral turpitude. *Wolff*, 490 A.2d at 1120. However, we do not understand *Wolff* to hold that the distribution of child pornography is base, vile or depraved only if done for profit. Even if a respondent does not receive any financial benefit from the distribution of child pornography, trafficking in child pornography provides an economic incentive for its production, and is thus proximately related to the sexual abuse of children. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-50 (2002).

§ 14(g), and their effect on his eligibility for reinstatement, *see* D.C. Bar R. XI, § 16(c), and that Respondent's period of disbarment commence for purposes of reinstatement upon his full compliance with D.C. Bar R. XI, § 14(g).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Margaret M. Cassidy
Margaret M. Cassidy

All of the Board members concur in this Report and Recommendation, except Mr. Kaiser, who is recused.