IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of	)	
	)	Case No. S197503
GARY D. GRANT,	)	
State Bar No. 173665	)	State Bar Case No. 09-C-12232
	)	
A Member of the State Bar.	)	
	)	
	)	

RESPONSE OF THE CHIEF TRIAL COUNSEL OF THE STATE BAR OF CALIFORNIA TO RESPONDENT GRANT'S OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

RESPONSE OF THE CHIEF TRIAL COUNSEL OF THE STATE BAR OF CALIFORNIA TO RESPONDENT GRANT'S OPENING BRIEF ON THE MERITS

I. THE ISSUES ON REVIEW

Respondent Gary Grant ("Grant") was convicted of felony possession of child pornography, having knowingly possessed images of a person under the age of 18 years engaging in or stimulating sexual conduct. He was required to register as a lifetime sex offender. He had two probation violations related to his criminal conviction and was consequently sentenced to additional periods of incarceration. And he was found to have intentionally misled the State Bar Court. Most revealing, Grant makes no mention in his supplemental brief of having been convicted of a felony; instead, he merely refers to his conviction for "simple possession." This omission is consistent with his ongoing effort to minimize the seriousness of his offense.

The Chief Trial Counsel of the State Bar maintains that this conduct warrants disbarment. Grant urges suspension, going so far as to argue that a mere 90-day suspension is appropriate. Given the serious nature of Grant's

criminal behavior and overall misconduct, there are two issues before the Court:

1. Whether a conviction of felony possession of child pornography involves moral turpitude per se as that standard is applied to attorney regulatory proceedings.

2. Whether the Review Department's recommended discipline of two years actual suspension with additional terms and conditions was appropriate in light of Grant's conviction of felony possession of child pornography and lifetime registration as a sex offender as well as two subsequent probation violations combined with the aggravating factor of intentionally misleading the court.

The Chief Trial Counsel respectfully submits that when an attorney is convicted of felony possession of child pornography, that act alone constitutes moral turpitude *per se* thereby warranting his summary disbarment. Moreover, the facts and circumstances surrounding Grant's conviction of felony possession of child pornography and the additional acts of misconduct clearly warrant an order of disbarment.

II. SUMMARY OF ARGUMENT

Any member who is convicted of felony possession of child pornography displays a level of moral depravity that – in every instance – demonstrates an indifference to the responsibilities of the profession which cannot be reconciled with the important and traditional notions of public trust required to ensure confidence and respect for the rule of law. The basis

of any conviction of this reprehensible crime entails the knowing possession of images featuring abused children involved in sexual acts for the purpose of sexually stimulating the viewer. Consumers of child pornography and the producers of this material are indistinguishable as they are part and parcel of a continuum of criminal behavior and synergistically connected in their mutual aim to economically sustain a commercial industry aimed at the sexual manipulation and exploitation of current and future generations of children. The physiological and psychological damage to children depicted in such prohibited images is indisputable; damage which is multiplied by recurring victimization through increasingly ready access to child pornography on the internet. Accordingly, any member convicted of felony possession of child pornography is also guilty of a crime involving moral turpitude per se. Grant offers no convincing arguments to the contrary and instead, merely succeeds in revealing his failure to appreciate the gravity of his offense.

Grant's repeated reference to his crime as one of "simple possession" is itself troubling in its lack of insight to the serious implications of his crime and the reasons why he is now a registered sex offender for life. Among other meritless arguments, he posits that "simple possession" of child pornography, a heinous offense against children, is comparable to simple possession of narcotics, a victimless crime. It is clearly not. Grant argues that not all prohibited images of post-pubescent children are patently offensive and, therefore, not every conviction of felony possession of child pornography constitutes moral turpitude per se. This argument fails to

recognize that every prohibited image of a victimized child of any age is patently offensive. Moreover, Grant clearly does not appreciate the abuse perpetuated by consumers of this material and their contribution to the continuing sexual victimization of children. His argument that persons can unknowingly come into possession of offending material ignores the simple fact that a conviction of felony possession requires proof, beyond a reasonable doubt, of the persons "knowing" possession.

Even if the Court determines that felony possession of child pornography does not constitute moral turpitude per se, the facts and circumstances surrounding his conviction establish that it involves moral turpitude and warrant disbarment. Grant was convicted of the more serious offense of felony possession, rather than a misdemeanor. And clear and convincing evidence was introduced that he possessed more than the two images of child pornography that he represented constituted the basis of his conviction. Grant himself admitted that the District Attorney provided him and his attorney with a CD containing at least 100 sexual images of children under the age of 18 retrieved from Grant's electronic media. After reviewing the CD for 15 minutes and viewing at least 100 images, Grant stopped the examination of the CD well before viewing all the compiled images. This incriminating behavior was remarked upon by the Hearing Department which correctly concluded that Grant "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." (Hearing Department Decision ("HDD"), p. 6, n. 6, [Hearing

Department Decision is attached as Appendix A to the Chief Trial Counsel's Petition for Review].) In addition, District Attorney forensic examiner Amy Wong identified numerous other images of prohibited child pornography on Grant's computers and other electronic media and found that Grant had distributed offending images to three individuals.

As a consequence of his conviction, Grant was required to register as a sex offender for life. Subsequent to his conviction, he twice violated his probation and was sentenced to periods of additional incarceration. Both the Review Department and the Hearing Department concluded that a particularly serious aggravating factor was his intentional misrepresentation to the court. Grant's mitigating circumstances were nominal and certainly neither compelling nor predominate in the face of the seriousness of his crime, ongoing and uncompleted treatment for internet sex addition and obsessive-compulsive disorder, avoidance of responsibility, and lying to the court.

Importantly, his lack of credibility, evasiveness, and blame shifting do not lend confidence to his fitness to practice or evidence his rehabilitation. The Hearing Department rightly concluded that Grant lacked credibility and specified several material aspects of his testimony as without merit or lacking in credibility, including his absurd story that he was the innocent recipient of only two images of prohibited photos which he quickly deleted but unknowingly stored on his computer. As discussed below, the Review Department erred in discounting the credibility findings of the Hearing Department. The facts and circumstances surrounding his

conviction evidence clearly involve moral turpitude.

At no time has Grant exhibited true remorse for his conduct. This fact, together with the foregoing acts, attest to the conclusion that he is no longer entitled to the privilege of membership in the Bar.

III. PROCEEDINGS BELOW

On July 23, 2008, Grant was charged with three felony counts of violating Penal Code section 311.11, subdivision (a).[1] (HDD, p. 3.) On April 8, 2009, Grant pleaded guilty to one count of felony possession of child pornography in violation of Penal Code section 311.11, subdivision (a), and 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." (State Bar Exh. 4, p. 3.). He was ordered to serve 90 days in jail and register for a lifetime as a sex offender, among

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[1] 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.

other terms and conditions. (*Id.*; State Bar Exh. 4 & Exh. 8, pp. 5-9.)

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. (HDD, pp. 1-2.)

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. (HDD, 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." (HDD, p. 9.)

The Hearing Department further found that Grant's overall testimony lacked credibility (HDD, p. 3). Specifically, the trial court determined that Grant's testimony on the following critical points was without merit or was not credible: (1) his claim that his conviction was for a misdemeanor violation of Penal Code section 311.11(a) (HDD, p. 3, n. 1); (2) his claim that he did not knowingly violate Penal Code section 311.11(a) (HDD, p. 3, n. 1); (3) his claim that he admitted culpability to both probation violations only on the advice of counsel (HDD, p. 3, n. 2); (4) his due process claim concerning his inability to view the images that formed the basis of forensic examiner Amy Wong (HDD, pp. 4-5, n. 4); (5) his testimony that he had only two images of child pornography on his computer (HDD, p. 6, n. 6); (6) his testimony as to the number of images concerning children under the age of 18 found on his computer (HDD, p. 7); (7) his testimony that his legal counsel in the Army inquiry into his criminal conviction submitted his resignation and that Grant never opened the subsequent letter from the Army notifying him of his discharge status. (HDD, p. 9, n. 8.)

Moreover, the Hearing Department determined that Grant intentionally misled the court when he testified that he resigned his military commission because he did not want to go overseas. As the Hearing Department stated, "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.'" (HDD, pp. 8-9.)

The Hearing Department also took note of the fact that Grant twice violated his probation shortly after his conviction.[2] The first violation occurred May 11, 2009 (possession of adult pornography) and the second violation occurred September 25, 2009 (sexting former girlfriends). (HDD, p. 4; Reporter's Transcript ("RT"), Vol. II, pp. 13:17-23, 14:24-15:4.) For the first violation, Grant was incarcerated for 174 days (almost twice the length of his initial sentence) (State Bar Exh. 11; RT, Vol. II, pp. 11:4-12:17) and incarcerated an additional 9 days for his second violation. (State Bar Exh. 11; RT, Vol. II, pp. 14:24-15:4; RT, Vol. II, p. 13:17-23.)

In addition, the Court heard and admitted the testimony of District Attorney Forensic Specialist Amy Wong who described numerous other images of child pornography found on Grant's computers and other electronic media owned by Grant. (See discussion, *infra*.) Wong also discovered that Grant electronically distributed to three individuals an image of two naked girls under the age of 16 in sexually suggestive poses. (HDD, p. 10; RT, Vol. I, pp. 123:25-124:25.)

In reaching its determination regarding the level of discipline, the Hearing Department found that Grant's culpability was aggravated by his "lack of candor during the hearing in this matter." (HDD at p. 11.) The Hearing Department also concluded that Grant's mitigating factors (no prior

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[2] Grant does not mention or discuss his two probation violations in his Opening Brief.

record of conviction, extreme emotional disability at the time of his misconduct, cooperation, and character evidence) were not compelling. (HDD at 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 . . ." (Review Department Opinion ("RDO"), p. 3, Review Department Opinion is attached as Appendix B to the Chief Trial Counsel's Petition for Review) and "we view possession of child pornography as serious and reprehensible misconduct" (RDO, 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*. (RDO, p. 4.) The Review Department reasoned that it "does not view possession of child pornography as a crime involving moral turpitude in every case because the circumstances surrounding the conviction may vary." (RDO, p. 3.)

In addition, the Review Department discounted the credibility findings of the Hearing Department on the ground that Hearing Department failed to identify what portion of Grant's testimony lacked credibility and why. (RDO, p. 11, n. 12.)[3]

The Review Department also rejected the Hearing Department's moral turpitude finding and determined that based on the facts and

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[3] As discussed in more detail below, the record evidences that Hearing Department was very clear about its specific credibility findings, contrary to the Review Department's contention.

circumstances Grant's misconduct did not merit disbarment. The Review Department rejected the evidence presented by forensic examiner 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. (RDO, pp. 14-15.)

On December 22, 2011, pursuant to rule 9.14, California Rules of Court, the Chief Trial Counsel filed a timely petition to review the Opinion of the Review Department. Following appropriate briefing, this Court granted review on February 22, 2012.

On January 15, 2013, the Court directed Grant to file a supplemental brief on or before February 4, 2013 and further directed the State Bar to file a responsive brief on or before February 19, 2013.

IV. FACTUAL BACKGROUND

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

As noted above, 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). (Rev. Dept. Op., p. 4; State Bar Exh. 4.)

While the circumstances leading up to Grant's arrest are unclear, Grant admits that he willfully and knowingly possessed two images that were "clearly unlawful" of "a young child" (RT, Vol. II, p. 60:19-25), i.e. "clearly someone under 18, considerably younger" (RT, Vol. II, p. 61:14-15) "exhibiting their genitals for the purpose of sexual stimulation of the viewer." (State Bar Exh. 4, p. 3.) Grant's unsubstantiated account of having received only two prohibited images was determined by the Hearing Department to lack credibility (HDD, pp. 6, n.2, p. 7), and for good reason. There was clear evidence that he was in possession of considerably more images of child pornography than he cared to disclose.

Grant testified that in preparation of his defense of the criminal matter, the District Attorney provided Grant and his attorney with a copy of forensic examiner Wong's examination report of his computers and a CD containing sexual images that the District Attorney claimed featured children under the age of 18. (RT, Vol. IV, pp. 54:22-55:25.) Grant further testified that he and his attorney spent no more than 15 minutes examining the images on the CD (Id; RT, Vol. IV, pp. 58:4– 60:11.) According to Grant, he and his attorney did not view all the images on the CD and stopped their review after Grant was able to identify one or two of the images. (Id.) Grant estimated that he viewed "maybe 100" suspect images during the 15 minutes he examined the CD and conveniently claimed ignorance of the substance of the remaining images on the CD. (Id.) As the Hearing Department plainly observed, "... 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." (HDD, p. 6, n. 6.)

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

In the summer of 2007, Grant's residence was searched and various computers owned by him and other electronic media were seized. (RT, Vol. I, pp. 32:6-10, 43:1-5; Vol. II, pp. 4:2-3, 6:18-21.) His home and the seized electronic items were searched for child pornography. (RT, Vol. IV, p. 38:12-15.) These materials were delivered to forensic examiner Wong. (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.[4] She testified that an examination of a generic PC tower revealed an active peer to peer

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[4] As discussed in more detail in the Chief Trial Counsel's Petition for Writ of Review (pp. 21-26), 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.

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. I, pp. 66:19-67:1, 68:7, 77:4-79:6; Hearing Dept. Dec., pp. 4-5.) In addition, she discovered on a generic PC tower six sexually explicit images of young girls under the age of 16. (RT, Vol. I, p. 87:18-20.) Wong's examination of Grant's Compaq computer revealed three sexually explicit images of young girls between the ages of 14 and 16. 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.)

Following her examination, Grant's electronic media was returned to agents of the Department of Homeland Security, Immigration and Customs Enforcement, the investigating agency. (RT, Vol. I, p. 18-15.)

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

Shortly after Grant's conviction on April 8, 2009, he twice

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[5] The images that Wong discovered are described in more detail in the Chief Trial Counsel's Petition for Writ of Review at pages 8-10 as well as in the Hearing Department Decision. (HDD, pp. 4-6.)

violated his probation. On May 11, 2009, Grant admitted that he violated his probation following his probation officer's discovery of prohibited adult pornography on his hard drive. He received 174 days in jail. (State Bar Exh. 11; RT, Vol. II, pp. 11:4-12:17.) Grant testified that he lacked the intent to violate the probation order because he inadvertently transferred a file containing adult pornography to his new computer. (RT, Vol. II, p. 15:2-23.)

And 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. 13:17-23, 14:24-15:4.) Grant claimed that although he did not believe sexting was a violation of his probation conditions (RT, Vol. II, p. 98:4-13), he stipulated to the violation to get out of jail sooner. (RT, Vol. II, pp. 98:19-99:10.)

V. ARGUMENT

A. A Felony Conviction Of Possession of Child Pornography Involves Moral Turpitude Per Se

The egregious and perpetual nature of Grant's sexual crime against minors is not subject to reasonable dispute. Moreover, the public's growing chorus of condemnation of this despicable crime and its increasing intolerance of child sexual exploitation at every level and, in particular, of the consumers of child pornography who through their perverse desire to possess this abusive material perpetuate further sexual crimes against

children, must render every felony conviction of this offense as one involving moral turpitude *per se*. This public view illustrates in clear terms that society has no tolerance of any crimes that profit from the commercial sexual exploitation of children.

1. The Moral Turpitude Standard

Whether a particular crime involves moral turpitude is a question of law to be determined by the Court. (*In re Higbie* (1972) 6 Cal.3d 562, 569; see also *In re Alkow* (1966) 64 Cal.2d 838, 840; *Grove v. State Bar* (1965) 63 Cal.2d 312, 315.) In the context of attorney discipline, the "moral turpitude" standard has been characterized as "elusive" (*In re Higbie*, *supra*, 6 Cal.3d at 569) and not subject to being defined "with precision" (*In re Strick* (1983) 34 Cal.3d 891; *In re Mostman*, (1989) 47 Cal.3d 725, 737 ["moral turpitude" as a concept "defies exact description"].) A commonly accepted definition of "moral turpitude" is that which was articulated by the Court in *In re Craig* (1938) 12 Cal.2d 93. In *Craig*, moral turpitude was deemed "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." (*Id.* at p. 97.) Stated another way, "[c]riminal conduct not committed in the practice of law or against a client reveals moral turpitude if it shows...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" (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) And, stated more simply, "an act of moral turpitude is one that is 'contrary to honesty and good morals. [Citations]'" *Young v. State Bar* (1990) 50 Cal.3d 1204, 1217-1218.) But, notwithstanding the somewhat wooly and unwieldy nature of the moral turpitude definition, the purpose of the standard could not be clearer. "'The paramount purpose of the 'moral turpitude' standard is not to punish practitioners but to protect the public, the courts and the profession against unsuitable practitioners. [Citations]'" (*In re Fahey* (1973) 8 Cal.3d 842, 849; see also *In re Mostman*, *supra*, 47 Cal.3d at p. 736 [the moral turpitude standard "enables us to identify those attorneys who are unfit to practice law, so that discipline can be imposed to protect the public, bench and bar from future misconduct."].)

As applied to crimes, the moral turpitude standard protects the public and preserves the quality of the bar by summarily removing those members convicted of crimes that are sufficiently morally reprehensible that they "cast discredit upon the prestige of the legal profession or interfere with the efficient administration of the law." (*In re Rothrock* (1940) 16 Cal.2d 449, 459.) Moral turpitude must be inherent in a criminal conviction as a prerequisite to summary disbarment. Thus, this Court has summarily disbarred members convicted of first degree murder (*In re Kirschke* (1976) 16 Cal.3d 902, 904) and serious sexual offenses such as an attempt to solicit a lewd act on a child. (*In re Lesansky*, *supra*; see also *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].)

In the criminal context, moral turpitude is not a static construct. Rather, in order to effectuate its purpose to protect the public, it must evolve to reflect the mores and values of contemporary society. "The concept of moral turpitude depends upon the state of public morals, and may vary according to the community or the times. [Citations] This element of moral turpitude is necessarily adaptive; for it is defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community." (*In re Hatch* (1937) 10 Cal.2d 147, 151; see also *In re Higbie*, *supra*, 6 Cal.3d at 570-72 [the concept of moral turpitude depends on the state of public morals as well as the degree of public harm produced by the act in question.

This Court has not previously determined whether a felony conviction of possession of child pornography constitutes moral turpitude *per se*. But, by every measure announced by this Court, this crime because of its lasting detrimental impact on children and its link to the wider problem of child sexual exploitation is deserving of the most severe sanction this Court can render. Indeed, possession of child pornography is a unique crime given the profound impact of its long term and lingering harm. A member suffering a conviction of felony possession of child pornography casts the profession in great disrepute whose virtue will not be so easily repaired given that his conviction and sex offender status will remain a constant and revealing reminder of his crime and lack of morality and good

judgment. (See *In re Scott* (1991) 52 Cal.3d 968, 979.)

2. The Insidious Nature Of Child Pornography And The Public Harm It Engenders

The harm caused to children depicted in pornographic photos and videos has been documented and lamented by Courts nationwide. Thus, the Supreme Court in *New York v. Ferber* (1982) 458 U.S. 747 stated that "[p]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. " (*Id.* at 759, n. 10.) The *Ferber* court further stated that "[t]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." (*Id.* at 759.) In *Osbourne 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 Ninth Circuit has also condemned the wide ranging damage caused to children caught in the cruel morass of child pornography. Thus, in *United States v. Wiegand* (9th Cir. 1987) 812 F.2d 1239, the court stated, "[t]he crime [child pornography] is the offense against the child – harm 'to the physiological, emotional, and mental health' of the child [citations], the 'psychological harm,'[citations] [and] the invasion of the child's 'vulnerability.' [citations] These harms collectively are the consequential damages that flow from the

trespass against the dignity of the child." (Id. at p. 1245.)

Perhaps the most compelling summary of the harm caused to children by consumers of pornographic material was delivered in powerful fashion by the Fifth Circuit Court of Appeals in the case of *United States v. Norris* (5th Cir. 1998) 159 F.3d 926, cert. den. (1999) 526 U.S. 1010. In *Norris*, the court considered the question of who should be considered the "victim" of the crime of receipt of child pornography for purposes of applying federal sentencing guidelines; i.e. society or the child depicted in the images. In concluding that the crime of child pornography is not a victimless crime and that the child is the clear victim in such cases, the *Norris* court stated:

> "[t]he consumer, or end recipient, of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions in three ways. . . First, the simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials [citations] . . . The consumer who 'merely' or 'passively' receives or possesses child pornography directly contributes to this continuing victimization . . . Second, the mere existence of child pornography represents an invasion of privacy of the child depicted [citations] . . .Third, the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials. [citations]."
>
> (*Id.* at 929-30.)
>
> The *Norris* court further opined that:
>
> "[t]here is no sense . . . in distinguishing, . . . between the producers and the consumers of child pornography. Neither could exist without the other. The consumers of child pornography therefore victimize

> the children depicted in child pornography by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects."

(*Id.* at 930 [emphasis added]; see also *United States v. Klein* (S.D. Ohio 2011) 829 F. Supp.2d 597, 604 [every instance of viewing child pornography is a renewed violation of the privacy of the victims and repetition of their abuse].)

Sexually abusive materials could not exist without the consumers who receive this material to satisfy their deviant sense of entertainment. With the advent of the internet, the distribution of child pornography has become ubiquitous and easily accessible in ways previously unimagined, thereby increasing in exponential terms the physiological and emotional damage of an abused child. 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."].) Thus, "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." (*New York v. Ferber*, *supra*, 458 U.S. at 757.)

Accordingly, the public harm caused by consumers of pornographic images of children is clear and unassailable thereby warranting the

designation of any felony conviction a crime involving moral turpitude per se.

3. Child Pornography Is Not A Victimless Crime

Far from being a victimless crime, child pornography depicts the actual molestation of children who have been forced or manipulated into participating in a criminal enterprise that profits from their humiliation, shame, and abuse. Grant's position that "simple possession" of child pornography is comparable to possession of narcotics because it "does not include an intent to harm, offend or corrupt another" (Grant's Opening Brief ("GOB") at pp. 2, 11-12) is nothing more than a unsubtle attempt to suggest that child pornography is a victimless crime like narcotics possession. This contention is erroneous as well as offensive.

First, as explained above, real children are being abused for the selfish desires of those who possess this material. Whether intended or not, those who possess child pornography are enabling and fueling the ongoing corruption and abuse of children now and in the future; their intent in this regard is irrelevant.

Second, the notion that the victimless crime of possession of narcotics can be equated to the crime of possession of child pornography was discussed and thoroughly dispelled by the court in *United States v. Boos* (9th Cir. 1997) 127 F.3d 1207. In *Boos*, defendant challenged the district court's refusal to "group" seven substantive counts of distribution of child pornography, which resulted in an increase of the possible sentencing

range. Defendant Boos argued that, like narcotics and immigration offenses, society in general was the primary victim of his crime (i.e. a victimless crime) and not the young girls depicted in the images. Therefore, he claimed, his substantive distribution counts should have been grouped under federal sentencing guidelines. The Ninth Circuit strongly disagreed with the notion that child pornography is a victimless crime, like drug and immigration offenses. The court concluded that the harm caused by child pornography "is visited upon a single individual or discrete group of individuals, namely, the child or children used in the production of the pornographic material. The child pornographer simply cannot be analogized to the garden-variety drug dealer convicted ... of possessing a controlled substance, who is, practically speaking, *his own* victim. The *child* pornographer victimizes not himself, but *children*." (*Id.* at 1210 [emphasis in original]; see also *Norris*, *supra*, 159 F.3d at 928.)

4. **Society Has Grown Increasingly Intolerant Of Crimes Involving The Sexual Exploitation Of Children Including The Serious Crime Of Possession of Child Pornography**

As this court acknowledged in *In re Higbie*, *supra*, the moral turpitude standard is also a product of contemporary public morals and "can vary according to the community or the time ..." (*In re Higbie*, *supra*, 6 Cal.3d at p. 570.) Since 1982 and the Supreme Court's decision in *New York v. Ferber*, *supra*, to uphold a New York law that criminalized the promotion of child pornography, the states and federal government have demonstrated their heightened resolve to eliminate the scourge of child

sexual exploitation through increased penalties and enforcement. California is no exception as evidenced by the statutory evolution of Penal Code section 311.11.

Before 1989, it was not illegal to possess child pornography in California. This gap in the ability of law enforcement to prosecute sexual crimes against minors was addressed by the introduction of Assembly Bill 2233 on March 10, 1989 ("AB 2233", also known as the "Polanco-Ferguson Anti-Child Pornography Act of 1989"). (Assem. Bill No. 2233 (1989-1990 Reg. Sess.).) AB 2233 was passed into law on September 30, 1989 and, as enacted, prohibited every person from knowingly possessing or controlling pornography which involved the use of a person under the age of 14 years. Violations of the statute were punishable as misdemeanors. (Stats. 1986, ch. 1180, § 2, p. 130880.)

On March 1, 1993, Assembly Bill 927 ("AB 927") was introduced for the primary purpose of standardizing the age limit of minors protected by various California statutes governing obscene material and child pornography. AB 927 proposed to raise the age from under 14 to under 18 in all California child pornography and sexual exploitation statutes, including Penal Code section 311.11. (Assem. Bill No. 927 (1993-1994 Reg. Sess.).) AB 927 was approved and enacted on April 26, 1994, and amended Penal Code section 311.11 to prohibit the possession of

pornographic materials depicting minors under the age of 18. (Stats. 1994, ch. 55, § 4, p. 14680.)

On November 7, 2006, Penal Code section 311.11 was further amended by passage of Proposition 83 (the "Sexual Predator Punishment and Control Act: Jessica's Law") to allow prosecutors to charge possession of child pornography cases as either felonies or misdemeanors. (Prop. 83 ["Jessica's Law"], as approved by voters, Gen. Elec. Nov. 7, 2006.)

In the face of the expanding problem of child sexual exploitation, California's Legislature and its citizens have responded by widening the protective net for children and increasing the criminal penalties against those who profit or enable such abuse.

5. Grant's Arguments In Opposition To The Contention That His Crime Warrants Summary Disbarment Are Unpersuasive

Grant's arguments in opposition to the contention that a conviction of felony possession of child pornography involves moral turpitude per se, are unpersuasive.

First, Grant's referral to his crime as "simple possession" bears noting. (See e.g., GOB, pp. 2 ["simple possession of child pornography"], 12 ["simple possession"].) There is nothing "simple" about his conviction. He pleaded guilty to a felony and stipulated to the elements of the crime. (See *In re Basinger* (1988) 45 Cal.3d 1348, 1358 [a member's conviction is conclusive evidence of guilt as to all elements of the crime].) Indeed, he

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." (State Bar Exh. 4, p.3.) This intentional avoidance and failure to appreciate the seriousness of his crime was noted by the Hearing Department (HDD, p. 11 ["respondent fails to accept full responsibility for his misconduct"]) and highlights the fact that he has not learned anything from his misconduct. (See *Weber v. State Bar* (1988) 47 Cal. 3d 492, 506 ["Absence of remorse is properly considered as an aggravating factor in deciding the appropriate discipline for an attorney."].)

Grant offers several arguments to support his claim that his crime is not moral turpitude per se: (1) his crime does not evidence a readiness to do evil (GOB, pp. 9-12); (2) pornographic images of post-pubescent minors are not patently offensive in every instance (GOB, pp. 12-13); (3) a person can unknowingly come into possession of child pornography (GOB, p. 13-14); and (4) his crime is not a serious sexual offense because certain statutes permit the expungement of his conviction and relief from his sex offender status. (GOB, p. 14-16.)

As to the first argument that his conviction does not indicate a readiness to do evil, the hollowness of this contention is addressed above. As an end consumer of degrading material, he is an admitted link in the chain of child exploitation as well as the damage it causes to the innocent. Every felony conviction carries with it the stigma of wrongfulness and the entire class of this crime involves moral turpitude.

And contrary to Grant's suggestion, the relative age of a child depicted on a prohibited image should not be a factor in determining whether a felony conviction of possession of child pornography warrants summary disbarment. Indeed, this notion reflects Grant's ongoing misunderstanding of the inherent evilness of this crime and the reasons for criminalizing the possession of child pornography. (See discussion, above.) Through passage of Penal Code section 311.11, as amended, the Legislature and the voters determined that minors under the age of 18 deserve protection from a commercial sexual industry that preys on children. Indeed, a post-pubescent child depicted in a prohibited image may have been physically or psychologically forced, drugged or manipulated to participate in the sexual conduct. The post-pubescent child may have suffered a long history of abuse and mistreatment at the hands of the cruel purveyors of this industry beginning at a pre-pubescent age. A prohibited sexual image of a pre-pubescent child versus a post-pubescent child implicates the same dangers and societal concerns and the damaging emotional and physical consequences do not vary. The consumers of this material are committing a sexual offense because they are perpetuating an industry that profits from the sexual abuse of both pre-pubescent and post-pubescent children.

Finally, Grant misreads and misapplies the ruling of the Supreme Court in *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234. (GOB, pp. 12-13). Grant claims that the Court in *Ashcroft* held that although an image of a post-pubescent child may be unlawful for purposes of pornography

laws, it does not mean the image may shock the conscience, appeal to prurient interest or be patently offensive. (GOB, p. 12.) *Ashcroft* said no such thing. In *Ashcroft*, the Supreme Court concluded that the provision of the Child Pornography Prevention Act of 1996 that banned "virtual" child pornography was an unconstitutional violation of free speech because it captured images that did not meet the obscenity test announced in *Miller v. California* (1973) 413 U.S. 15 (a work is obscene if, taken as a whole, it appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political or scientific value.) In reaching its conclusion, the Court distinguished between the proposed prohibition on "virtual" child pornography and child pornography that uses real children. As to the latter, the Court supported the holdings of *Ferber*, *supra*, and its progeny that society has a legitimate interest in prohibiting pornography that is the product of child sexual abuse. (*Ashcroft*, *supra*, 535 U.S. at 246-250.)

Grant's contention that persons can "unknowingly" violate Penal Code section 311.11 is absurd. Section 311.11 requires that the government establish beyond a reasonable doubt that the offender "knowingly" violated the statute. There is nothing in the record that establishes that district attorneys are charging inadvertent or accidental recipients of child pornography with crimes, much less convicting them of felony possession.

Finally, whether the current statutory scheme offers Grant a chance to be relieved from his lifetime registration as a sex offender or whether it provides him an opportunity to expunge his conviction at some future date

is irrelevant to the question whether his felony offense constitutes moral turpitude per se. Grant misses the point. A member who is convicted of felony possession of child pornography demonstrates his inability to conform to an acceptable social norm that in every instance is injurious to children.

Moral turpitude is inherent in any conviction of felony possession of child pornography and, therefore, a member convicted of this offense should be subject to summary disbarment.

B. Even if Grant's Felony Conviction of Possession Of Child Pornography Does Not Involve Moral Turpitude *Per Se*, The Facts and Circumstances Of This Case Establish Moral Turpitude And Warrant Disbarment

1. Grant Was Convicted Of Knowingly Possessing Child Pornography – A Felony

Grant cannot deny he is a felon convicted of possession of child pornography. Moreover, whereas Penal Code section 311.11 permits child pornography cases to be prosecuted as misdemeanors rather than felonies, in Grant's case he pleaded guilty to a felony. Felonies are reserved for the most serious crimes as evidenced by the enhanced punishment they bring and the enhanced restrictions on the rights they impose on offenders.

Nor can he deny that as a consequence of his conviction, he is and remains a registered sex offender.

Grant disputes that his conduct justifies a moral turpitude determination because he was merely an innocent and inadvertent recipient of two images of child pornography that he quickly deleted believing that these images

would not remain on his computer. Yet, he pled to knowing possession of child pornography and he is bound by that conviction. To now attempt to reconstruct the facts in an effort to avoid disbarment is disingenuous.

2. The Facts And Circumstances Surrounding His Possession Of Child Pornography Conviction Further Support A Finding Of Moral Turpitude

Grant's version of his criminal conviction is simply implausible and undermined by a number of undisputed facts. Indeed, the Hearing Department correctly concluded that "Respondent's testimony that he had knowledge of only two (2) images of child pornography on his computer is not credible." (HDD, p. 6, n. 6.)

The notion that he received only two images is contrary to his own testimony that prior to his guilty plea, he and his attorney received a CD containing at least a hundred suspect images – and no doubt many more - collected by law enforcement. (RT, Vol. IV, pp. 54:22-55:25.) According to Grant, he terminated the examination of the CD after approximately 15 minutes once he recognized one or two of the images. (*Id.*, RT, Vol. IV, pp. 58:4 – 60:11.) His behavior in this regard is highly suspect and strongly suggests an awareness and intentional avoidance of further evidence of criminality. The Hearing Department properly observed that "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." (HDD, p. 6, n. 6.)

Further, as a sophisticated user of computers, Grant's testimony that he did not realize the prohibited images would be preserved on his computer after deletion, is unbelievable. (RT, Vol. IV, pp. 34:5-10 [Grant testified he wasn't aware that deleting a file from his computer would not permanently erase it from the computer's hard drive], 35:19-24.) Grant testified that, prior to his criminal trouble; he took computer classes in the Marine Corps, was a COBOL programmer for the Marine Corps (RT, Vol. IV, pp. 28:15-25, 33:5-20) and that he himself built one of the computers seized from his home. (RT, Vol. IV, p. 33:21-34-4.) Moreover, as an admitted internet sex addict, the record is replete with testimony regarding how he retrieved, shared, downloaded and stored thousands of images of adult pornography. Without doubt, Grant knew that any deleted images of child pornography would remain stored on his computers and other electronic media.

It is also implausible that a federal agency (Department of Homeland Security) would target Grant for investigation and execute a search warrant on his home for the "simple" and inadvertent possession of two images of child pornography.

Finally, there are also the additional images identified by computer forensic examiner Amy Wong to be considered.[6] What is striking, however, is that Grant makes that the statement that even if Wong's testimony was taken into account, the additional 17 prohibited images would not have

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[6] The admissibility of these additional images, as well as their scope and relevance, was addressed in the Chief Trial Counsel's Petition for Writ of Review pages 21 to 25.

established moral turpitude. (GOB, p. 19.) While the admission of the additional images discovered by Wong are not necessary to establish moral turpitude (as discussed above), their admission would leave no room for doubt that moral turpitude exists in this case. Moreover, Grant conveniently ignores the fact that Wong not only found evidence of additional prohibited photos but also found a video with prohibited images and discovered that Grant distributed offending images to three individuals. It is also important to note that the additional offensive images found by Wong were not in deleted files that had to be forensically restored from buried or hidden cache files unknown to a casual user, but in folders on Grant's personal desktop computers for obtaining and saving files by the user and on separate CDs copied by Grant. (See RT, Vol. I, pp. 66:19-68:9, 77:4-16, 79:20-21, 84:18-85:1.)

On these undisputed facts alone, there is sufficient evidence to establish that the facts and circumstances surrounding Grant's conviction involved moral turpitude. Hence, Grant's contention that the Chief Trial Counsel introduced nothing beyond the fact of his conviction is wrong. (GOB, p. 18.)

3. Grant's Probation Violations Signal An Habitual Unwillingness Or Inability To Comply With The Law Or Conform To Professional Norms

Grant's Opening Brief is notable for the absence of any acknowledgement of or comment about his two probation violations in his Opening Brief; acts that have a direct bearing on his fitness to practice.

"Disobedience of a court order, whether as a legal representative or as a party, demonstrate a lapse of character and 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 Kelley* (1990) 52 Cal.3d 487, 495; Bus. & Prof. Code, §§ 6068, subd. (a) [it is the duty of an attorney "to support the Constitution and laws of the United States and of this state."], 6068, subd. (b) [it is the duty of an attorney "[t]o maintain the respect due to the courts of justice and judicial officers."].) Grant's probation violations reflect his ongoing disregard for the law and unwillingness to conform to societal norms or professional standards. The Superior Court was so concerned about his ongoing misconduct it imposed an additional 174 day period of incarceration (almost twice the length of his original sentence) for his first violation and imposed an additional nine days in jail for his second violation. Grant represents an ongoing threat to the public as evidenced by these violations.

4. Grant Intentionally Misled The State Bar Court

Both the Review Department and the Hearing Department agreed that Grant intentionally misled the Court regarding the reasons for his resignation from the United States Army Reserves. (HDD, p. 8, n. 7 [Grant's testimony was "intentionally misleading"]; RDO, p. 11 ["We agree and assign this factor considerable aggravating weight"]; see *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [misrepresentations to the State Bar Court may constitute a greater offense than misappropriation]; *Olguin v. State Bar*

(1980) 28 Cal.3d 195, 200 [misrepresentation to the State Bar may result in disbarment].) Grant now attacks this finding as error because the evidence of his discharge (Exhibit 15) was improperly obtained in violation of the federal Privacy Act. (GOB, pp. 36-39.) Grant does not disclose, however, that he stipulated to the admission of Exhibit 15 thereby waiving any objections. (RT, Vol. IV, pp. 69-70.) Moreover, the contention that his lack of candor lacked relevance because it related to events that occurred after his conviction (GOB, p. 40) is also meritless and reflects his lack of insight into the seriousness of this misconduct.

5. Grant Continues To Display A Pattern Of Denial, Blame Shifting And Minimization Of His Misconduct

A particularly troubling sign of Grant's lack of fitness to practice is his continuing evasiveness and failure to appreciate his wrongdoing. (*Alberton v. State Bar* (1984) 37 Cal.3d 1, 16 [a failure to acknowledge any wrongdoing and an absence of remorse may properly be considered when deciding on the appropriate sanction].) This pattern of denial and blame shifting evidences a pattern of knowing disregard of his duties as an attorney and does not promote confidence that he will be able to practice without further endangering the public and profession. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317 [aggravating circumstance that respondent was "evasiveness and showed a lack of candor" at his disciplinary hearing].) For example, in connection with his first probation

violation for possessing forbidden 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) because he inadvertently downloaded this material from an old computer file onto his new computer. (RT, Vol. II, pp. 15:8-23, 17:3-11.) This denial of responsibility is worrisome and not at all aberrational.

Grant also excused his second probation violation by contending that he didn't believe sexting his girlfriend was a violation of his probation (RT, Vol. II, pp. 98-4-99:10) and targets his girlfriends for blame as the initiators of the offending texts. (RT, Vol. II, pp. 13:19-14:12, 95:15-98:3.)

Regarding his plea to felony possession of child pornography, he blames his attorney's misreading of case law (*Tecklenberg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402) as the reason he agreed to the stipulation. (See e.g. GOB, pp. 5-6.)

As a further example of Grant's blame shifting, he castigates the State Bar Court by unfairly accusing it of bias in reaching a credibility finding. (GOB, p. 40.) (*Maltaman v. State Bar*, *supra*, 43 Cal. 3d at 958 ["... a failure to appreciate the gravity of conduct which is conceded, and a contemptuous attitude toward the disciplinary proceedings, are matters relevant to the appropriate sanction. [Citations.]".) He refers to his crime as "simple possession" as a way of minimizing the seriousness of his crime

(e.g. GOB, pp. 2, 3) and compares this crime to the victimless offense of simple possession of narcotics (GOB, pp. 11-12). And, in his Opening Brief, Grant fails to remark at all about his probation violations. These examples of Grant's evasiveness and denial reveal that he remains a threat to the public and profession. (See *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 451 [failure to appreciate seriousness of the charges and attitude toward the disciplinary process are aggravating factors].)

C. The Hearing Department's Credibility Findings Are Amply Justified And Are Entitled To Great Weight

The Review Department's apparent disregard for the well-grounded credibility determinations of the Hearing Department was error and an abuse of discretion. The Review Department observed – incorrectly - that the Hearing Department did not identify what portion of Grant's testimony lacked credibility and why. (RDO, p. 11.) In fact, not only did the Hearing Department find that Grant's overall testimony lacked credibility (HDD, p. 3), the trial court also specifically identified seven instances of significantly questionable testimony and explained the reasons for its findings. This failure to properly consider Grant's lack of credibility on material issues impacted the proper disposition of this matter. As a consequence, the Review Department failed to appropriately consider the totality of Grant's culpability and failed to apply the correct weight to his mitigating and aggravating factors.

It is a well-regarded principle of jurisprudence that "the weight and

credibility of the evidence is the special province of the trier or fact." (*Inwood Labs, Inc. v. Ives Labs, Inc.* (1982) 456 U.S. 844, 856.) This legal standard is fully applicable to State Bar Court disciplinary proceedings. Thus, the California Supreme Court in *Toll v. State Bar* (1974) 12 Cal.3d 824 ruled that "[i]n view of the greater opportunity of the committee [hearing judge] to observe and judge the credibility of the attorney charged with misconduct, great weight must be given to their findings." (*Id.* at 831; *Jones v. State Bar* (1989) 49 Cal.3d 272, 289 [trial judge is in a superior position with the witnesses before her to judge credibility and evaluate the character of the witnesses]; Rules Proc. of State Bar, rule 5.155(A).) To promote finality and the efficiency of the disciplinary process, the presumption should be in favor of the Hearing Department's factual and credibility findings. In the event, the Review Department is compelled to reconsider the trial judge's findings, an adequate and well-reasoned basis for its position should be provided, particularly where, as here, the Hearing Department's findings were fully supported by the record. In this case, the Review Department abused its discretion by discounting the Hearing Department's credibility findings without justification.

The Hearing Department's adverse credibility rulings were based on clearly meritless testimony offered by Grant at trial; testimony that was contradicted by his own testimony or other contradictory evidence or was transparently dubious. Grant testified that he was convicted of a misdemeanor (RT, Vol. II, pp. 10:19-11:2) but abruptly changed his testimony when faced with compelling and contradictory evidence. (RT,

Vol. IV, pp. 45:18-46:19; HDD, p.3.) His claim that he did not "knowingly" violate Penal Code section 311.11, subd. (a), was directly contradicted by his own plea agreement and the fact of his conviction. (HDD, p. 3, n. 1). Grant's testimony that he was not provided an opportunity to view the images that formed the basis of forensic examiner Wong's testimony was refuted by the Hearing Department, which criticized Grant for not taking affirmative steps in discovery and sitting "on his hands before trial." (HDD, pp. 4-5, n. 4.) And rather than admit to the validity of his probation violations he unconvincingly claimed that he admitted culpability to both probation violations only on the advice of counsel (HDD, p. 3, n. 2). In addition, his testimony that he had only two images of child pornography on his computer clearly lacked credibility for good reason, as discussed above. (HDD, p. 6, n. 6; p. 7.). And finally, his testimony that his legal counsel in the Army inquiry into his criminal conviction submitted his resignation and that Grant never opened the subsequent letter from the Army notifying him of his discharge status was facially dubious. (HDD, p. 9, n. 8.)

The Hearing Department had ample justification for its credibility findings. In the absence of any clear and reasonable basis for rejecting or discounting these findings, the Review Department should not have reassessed the Hearing Department's credibility findings and instead, should have accorded its findings the "great weight" to which they were entitled.

D. Only Grant's Disbarment Will Protect The Public And Promote Confidence In The Legal Profession

Only Grant's disbarment will adequately protect the public and maintain public confidence in the profession. While Grant may claim there is nothing on the record to support his disbarment, the record itself conclusively demonstrates otherwise.

The ultimate purpose of disciplinary proceedings is "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 profession." (*In re Billings* (1990) 50 Cal.3d 358, 365.) Disbarment is the appropriate sanction where there is no evidence a sanction short of disbarment is adequate to deter future misconduct and protect the public. (See *Maltaman v. State Bar*, *supra*, 43 Cal.3d at 958.) Grant's misconduct is serious and involves moral turpitude as appropriately determined by the Hearing Department, thus requiring his disbarment pursuant to Standard 3.2 of the Standards for Attorney Sanctions for Professional Misconduct. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 3.2).[7] Standard 3.2, provides that "[o]nly if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed." (See also *Chang v. State Bar* (1989) 49 Cal.3d 114, 128; *In re Basinger* (1988) 45 Cal.3d 1348, 1358.)

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[7] All further references to the Standards for Attorney Sanctions for Professional Misconduct will be noted as "standards" or "std."

1. Grant Has Not Demonstrated Mitigation Sufficient To Overcome A Disbarment Recommendation

As the Hearing Department concluded, Grant's disbarment is warranted in light of his underlying misconduct and less than compelling mitigation coupled with serious aggravation for lying to the State Bar Court. Grant's crime of felony possession of child pornography is a heinous offense and he was required to register as a sex offender for life. Shortly after he was convicted he violated his probation, not once but twice. His testimony was frequently evasive and lacked credibility. Indeed, as explained above, his story that he was the inadvertent recipient of only two images of child pornography that he quickly deleted is implausible. In fact, his entire testimony is replete with excuses and blame shifting and a complete failure to admit and accept responsibility for his misconduct. The Hearing Department recognized Grant's efforts at avoidance by correctly concluding that his testimony lacked credibility and further finding that due to his failure to accept responsibility for his misconduct, he was not entitled to mitigation for remorse. (HDD, p. 11.) As long as Grant fails to grasp the gravity of his offense and fails to publicly recognize his wrongdoing, he is not fit to practice.

2. Grant Has Not Produced The Most Compelling Mitigation That Clearly Predominates To Avoid Disbarment

There is no basis to conclude Grant has produced the "most compelling mitigating circumstances" that "clearly predominate." (Std. 3.2.) Quite the opposite, Grant's mitigation is nominal. The Hearing Department and the

Review Department agreed on the mitigation findings. (HDD, p. 10-11, RDO, p. 11-12.)[8] Grant was given credit for having no prior record of discipline. (HDD, p. 10.) But this is not a significant factor given the seriousness of his crime. (*In re Utz* (1989) 48 Cal.3d 468, 485.) His emotional disability was considered mitigating but was diminished by the fact that "there was insufficient evidence presented to show that [Grant] no longer suffers from his disability [internet sex addiction]." (See also RT, Vol. II, p. 119:3-19 [testimony of therapist Hughes that Grant still has a lot of anxiety and stress and "I don't believe he's, ... there yet, in terms of dealing with, ..., the chronic excessive anxiety and obsessiveness."].) Grant was given some mitigation credit for cooperation, which was diminished by his lack of candor, and his character evidence was considered mitigating. This mitigation does not amount to a compelling demonstration of mitigation.

Grant posits that his character evidence alone is sufficient to overcome any recommendation of disbarment and proves he can be trusted and that his disbarment is unnecessary to protect the public. (GOB, pp. 32-35.) In the face of his reprehensible misconduct, evasive and misleading testimony, subsequent law-breaking, and continuing denial of responsibility, his

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[8] The Review Department and Hearing Department disagreed on the weight to be applied to Grant's mitigation. The Hearing Department believed that the mitigating factors were not compelling (HDD, p. 12) while the Review Department concluded that Grant's evidence in mitigation "minimally" outweighed his "sole, yet serious factor in aggravation." (RDO, p. 12.)

character evidence is not persuasive and fails to be determinative of either his rehabilitation or fitness to practice.

3. Grant's Argument In Favor Of A Nominal Sanction Is Unconvincing

There is no merit to Grant's contention that a mere 90-day actual suspension is warranted in this case. (GOB, p. 31.) Grant's reliance on two references to stipulated conviction referral matters involving convictions of misdemeanor child pornography possession (*In re Bornstein & In re Fetterman*), provide no guidance on the issue of the appropriate sanction in this case. (GOB, pp. 28-29.) Nor are the two factually dissimilar stipulated matters of *In re Kaye* and *In re Patterson* of any relevance. (GOB, p. 30.) Moreover, Grant's reliance on the criminal referral matter of *In re Stocker* (State Bar Court No. 08-C-14308) is curious. Grant contends that "an appropriate discipline for Respondent would be an actual suspension equivalent to that imposed on Stocker." (GOB, p. 30.) Stocker, convicted of misdemeanor possession of child pornography pursuant to Penal Code section 311.11, subdivision (a), was allowed to participate in the State Bar's Alternative Discipline Program ("ADP") with a stipulated disposition of 30 days actual suspension upon his successful completion of the ADP. The State Bar petitioned for review of the stipulation and recommended discipline. On March 21, 2012, the State Bar's petition for review was

rejected but with instructions from this Court that the recommended discipline be rejected and the matter remanded for a standard disciplinary proceeding. Subsequently, Stocker stipulated to disbarment. This Court removed him from the rolls of attorneys on November 19, 2012. (Supreme Court Case No. S20511.) Grant should likewise be disbarred.

VI. CONCLUSION

A conclusion that in every instance a conviction of felony possession of child pornography – where there is knowing possession - requires summary disbarment. This result will contribute to society's ongoing efforts to protect present and future generations of child victims from the abuse that is facilitated by the proliferation of the child exploitation industry and the damaging materials this industry produces. The public, members of the bar and the judiciary are entitled to protection from members who are convicted of crimes that are integral to the commercial sexual exploitation of children. The public's confidence in the profession will erode if Grant, a registered sex offender, who, even today, expresses no regret for his actions, is permitted to practice. A conviction of felony possession of child pornography is not compatible with professional notions of trustworthiness and, in every instance, evidences moral turpitude. Summary disbarment in this case is necessary to protect the public, promote

confidence in the profession and to maintain high professional standards.

Even if the offense of felony possession of child pornography is not considered a crime eligible for summary disbarment, Grant's misconduct, his pattern of denying responsibility together with his subsequent probation violations and aggravating factor of intentionally misleading the court, demand his disbarment.

Dated: February 15, 2013

Respectfully submitted,

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By: _____
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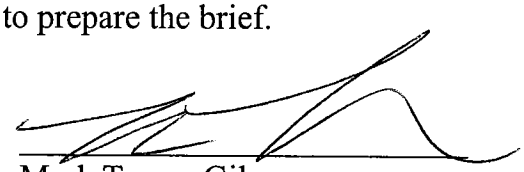
The Chief Trial Counsel of
The State Bar of California

WORD COUNT CERTIFICATE PURSUANT TO CALIFORNIA RULE OF COURT 8.520(c)(1)

Pursuant to rule 8.520(c) of the California Rules of Court, I hereby certify that this brief contains 12,091 words. I have relied on the word count of the computer program used to prepare the brief.

Dated: February 15, 2013



Mark Torres-Gil

PROOF OF SERVICE BY MAIL

I, Carla Ramos, 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 February 15, 2013, 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, a copy of **Response of Chief Trial Counsel of The State Bar of California to Respondent Grant's Opening Brief on the Merits** in an envelope addressed as follows:

Gary D. Grant
55 Bluff Cove Drive
Aliso Viejo, CA 92656

Michael G. York, Esq.
Law Offices of Michael G. York
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Newport Beach, CA 92660

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 in San Francisco, California this 15th day of February, 2013.

CARLA RAMOS