THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
July 18, 2022

In the Matter of:	:	
	:	
STEVEN B. FABRIZIO,	:	
	:	D.C. App. No. 21-BG-0831
Respondent.	:	Board Docket No. 21-BD-056
	:	Disc. Docket No. 2021-D152
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 436482)	:	

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 third degree sexual abuse in violation of D.C. Code § 22-3004(1) and one count of blackmail in violation of D.C. Code § 22-3252(a)(2). On December 2, 2021, the Court suspended Respondent and directed the Board to institute a formal proceeding to determine the nature of Respondent's offense and whether the crimes involve moral turpitude within the meaning of D.C. Code § 11-2503(a), which mandates the disbarment of a District of Columbia Bar member who has been convicted of a crime of moral turpitude.

On December 22, 2021, 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*. Respondent has not filed a

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

response, the time for doing so having expired. On January 10, 2022, Disciplinary Counsel informed the Board that Respondent had been sentenced on January 7, 2022.

I. The Moral Turpitude *Per Se* Inquiry

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).

Here, the Court hasn't previously addressed the statutes at issue. Thus the Board must review the elements of each to determine whether either is a crime of moral turpitude *per se*. This assessment is based solely on an examination of the statute, not on Respondent's conduct. *See In re Shorter*, 570 A.2d 760, 765 (D.C. 1990) (per curiam) (citing *Colson*, 412 A.2d at 1164-67). That is, the Board focuses "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,' 'involves baseness, vileness or depravity,' or offends 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)). The Board must 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" (internal quotations omitted)); *In re Squillacote*, 790 A.2d 514, 517 (D.C. 2002) (per curiam) ("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. The Moral Turpitude *Per Se* Analysis

Third Degree Sexual Abuse – Respondent pled guilty to violating D.C. Code § 22-3004(1), which prohibits (1) sexual contact with another person by (2) using force against that other person.

> "Sexual contact" means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

D.C. Code § 22-3001(9). "'Force' means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim." D.C. Code § 22-3001(5); *see Cardozo v. United States*, 255 A.3d 979, 982, 984 (D.C. 2021) (brief "bear hug" from behind was sufficient force to overcome resistance and restrain the victim, affirming conviction for third degree sexual abuse under D.C. Code § 22-3004(1)), *reh'g en banc granted*, 268

A.3d 862 (D.C. 2022) (per curiam) (vacating judgment affirming kidnapping conviction, and section of panel opinion discussing kidnapping conviction). The offender need not touch the "genitalia, anus, groin, breast, inner thigh, or buttocks" of another person. It is sufficient to violate the statute that the offender touch his or her "genitalia, anus, groin, breast, inner thigh, or buttocks" to the victim. *See, e.g.*, *Pinckney v. United States*, 906 A.2d 301, 306 (D.C. 2006) (the defendant engaged in sexual contact when the victim felt his penis pressed against her while he was hugging her).

We agree with Disciplinary Counsel that there is little disciplinary caselaw involving criminal sexual contact, and none involving felonies of the type at issue here.

In arguing that a violation of D.C. Code § 22-3004(1) constitutes a crime of moral turpitude, Disciplinary Counsel emphasizes that the statute prohibits non-consensual sexual contacts. But the absence of consent doesn't make this a crime of moral turpitude *per se*. All prohibited "sexual contacts," including the misdemeanor in *Harkins* discussed below, involve non-consensual touching. *See* D.C. Code § 22-3007 ("Consent by the victim is a defense to a prosecution under §§ 22-3002 to 22-3006 . . . ."). *In re Harkins*, 899 A.2d 755 (D.C. 2006), the most factually analogous precedent, followed a misdemeanor conviction for Harkins' non-consensual sexual contact with another passenger on a Metro train.[1] Disciplinary Counsel did not argue

[1] Because Harkins was convicted of a misdemeanor, the Board did not consider whether the conduct proscribed by the statute constituted moral turpitude *per se*.

— and the Court did not conclude — that the non-consensual misdemeanor sexual contact was a crime of moral turpitude on the facts.[2] The Court suspended Harkins for 30 days for violating Rule 8.4(b), finding that the "sexually abusive contact, because of its inherently violent nature, calls into question one's fitness as a lawyer . . . ." 899 A.2d at 760-62.

Respondent and Harkins were convicted under different subsections of Chapter 30 of Title 22 of the D.C. Code. Respondent was convicted under § 3004(1) (third degree sexual abuse) and Harkins was convicted under § 3006 (misdemeanor sexual abuse). Both sections prohibit non-consensual "sexual contact," as defined in § 3001(9) and quoted above. The key difference between the two statutes for purposes of our moral turpitude *per se* analysis is that a conviction under § 3004(1) requires that the defendant used "force," while a conviction under § 3006 does not. The sexual touching at issue under § 3004(1) is not just unwelcome, it is accomplished by threats sufficient to compel compliance, or force sufficient to restrain the victim. Thus, we must determine whether the additional element of force means that the least culpable offender convicted under § 3004(1) has committed a crime of moral turpitude. We conclude that it does.

We begin our least culpable offender analysis by noting that, despite the name of the statute at issue, the offense is not limited solely to an intent to "arouse or gratify the sexual desire of any person." *See United States v. Bear*, No. CR.08-50021-AWB, 2008 WL 4186194, at *2 (D.S.D. Sept. 9, 2008) (identical definition

[2] Disciplinary Counsel doesn't address *Harkins* in its statement on moral turpitude.

of "sexual contact" in 18 U.S.C. § 2246(3) "involves distinct acts of touching with a distinct purpose behind each action, i.e. to abuse, humiliate, harass, degrade, arouse or gratify"). The lack of such a limitation on the required intent is relevant to this analysis because the Court has held that a crime involves moral turpitude where "[t]he participant's desire for . . . gratification [exceeded] his ability to demonstrate a public respect and appreciation of existing societal morals and values." *In re Wolff*, 490 A.2d 1118, 1120 (D.C. 1985) (internal quotations and citation omitted) (second and third alterations in original), *adopted en banc*, 511 A.2d 1047 (D.C. 1986) (per curiam). Thus, the least culpable offender convicted under § 3004(1) wouldn't have engaged in the criminal conduct to gratify his or her sexual desire. Instead, the least culpable offender must have engaged in the prohibited touching "to abuse, humiliate, harass, [or] degrade" the victim. Few cases have construed the meaning of "to abuse, humiliate, harass, degrade," or similar statutes in the District of Columbia. However, it seems clear that these words mean more than mere embarrassment, and that the conduct involved does not include merely boorish behavior or horseplay. *See, e.g.*, *State ex rel. B.P.C.*, 23 A.3d 937, 945-46 (N.J. Super. Ct. App. Div. 2011) (distinguishing between "inappropriate horseplay" and criminal behavior).

Thus, we conclude that the least culpable offender may be a man who hugs another for the purpose of overcoming the victim's resistance, enabling the offender to touch his clothed penis against the victim, or a woman who hugs another for the purpose of overcoming the victim's resistance, enabling the offender to touch her clothed breasts against the victim, where each offender has the intent to abuse,

humiliate, harass or degrade. We further conclude that the use of force to abuse, humiliate, harass or degrade another through sexual contact "offends the generally accepted moral code of mankind," and thus, the least culpable offender convicted under § 3004(1) has committed a crime of moral turpitude *per se*.

Blackmail – Respondent was also convicted of blackmail under D.C. Code § 22-3252(a)(2):

> A person commits the offense of blackmail when that person, with intent to obtain property of another or to cause another to do or refrain from doing any act, threatens to: . . . (2) Expose a secret or publicize an asserted fact, whether true or false, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation . . . .

Disciplinary Counsel argues that blackmail is a crime of moral turpitude because it is analogous to felony theft and similar to extortion, bribery or witness tampering. None of these arguments purport to identify the least culpable offender, as we are required to do here. Disciplinary Counsel's final argument, that blackmail constitutes moral turpitude *per se* because it "necessarily involves corrupt and dishonest intent," appears on its face to be a least culpable offender argument, but it is not supported by the plain language of the statute.

The only intent required to violate § 22-3252(a)(2) is the intent to take property from another, or cause the other to do something or refrain from doing something. The latter, at least, is not inherently corrupt or dishonest. For example, a parent who tells a teen to clean their room or else the parent will disclose an embarrassing fact to the teen's friends has violated the plain language of the statute, without being dishonest or corrupt. We do not expect that the parent in this example

would ever be prosecuted, but unfortunately, the least culpable offender analysis does not permit us to consider only conduct that we would reasonably expect to be prosecuted. And that is with good reason, because once the Court determines that a crime involves moral turpitude *per se*, the discipline system never again considers the actual facts of the respondent's offense. In such a system, we should not try to predict whether prosecutors would ever charge certain conduct as a crime, and we should limit our analysis to the hypothetical least culpable offender who could be convicted under the plain language of the statute at issue. We conclude that the least culpable offender who may be convicted under § 22-3252(a)(2) has not engaged in conduct that is base, vile or depraved.

III. Summary Adjudication of Moral Turpitude Issues Following Guilty Pleas

Prior to the 2020 amendments to the Board Rules, following our conclusion that one of the statutes at issue involve moral turpitude *per se*, we would end our analysis. 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. We apply Board Rule 10.2 even though we have found that D.C. Code § 22-3004(1) is a crime of moral turpitude *per se* because this is the first case to consider this issue under this statute, and there is little disciplinary caselaw involving criminal sexual misconduct generally, and thus the Court may disagree with our foregoing analysis.

IV. 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 Proffer of Facts incorporated into Respondent's Plea Agreement, attached to Disciplinary Counsel's Statement Regarding Moral Turpitude. Respondent agreed that the Proffer of Facts was "true and correct." 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. *Wolff*, 490 A.2d at 1119; *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, after engaging in consensual sexual relations with his victim, and paying her $400 in cash (as previously agreed), Respondent coerced her to engage in further sexual relations by threatening to tell her employer and landlord that she had engaged in sexual relations for money. The following text exemplifies Respondent's blackmail of his victim:

> I know where you live. I know where you work. Don't think [your employer] would be happy to know that it's [*sic*] young [employees] are having sexual [*sic*] for money. Same for your landlord. Once more tomorrow morning. The. [*sic*] I'll never bother you again. Be there at 11.

Proffer at 5 (alterations in original). This is simply a single example in Respondent's protracted campaign to coerce his victim to submit to further sexual relations. After Respondent's threats, his victim submitted to another sexual encounter.

As discussed above, in *Wolff* the Court determined that the respondent (who pled guilty to the distribution of child pornography) had engaged in conduct involving moral turpitude because his criminal conduct reflected that his desire for "gratification exceeded his ability to demonstrate a public respect and appreciation of existing societal morals and values." 490 A.2d at 1120 (internal quotations and citation omitted). Our review of Respondent's graphic threats against his victim, which he does not contest, leaves no question that the same is certainly true here, and disbarment is likewise warranted.

CONCLUSION

For the reasons set forth above, we conclude (1) a respondent who has been convicted under D.C. Code § 22-3004(1), has been convicted of a crime of moral turpitude *per* se; (2) a respondent who has been convicted under D.C. Code § 22-3252(a)(2), has not been convicted of a crime of moral turpitude *per* se; and, (3) in the event that the Court disagrees with (1) above, 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, § 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: Matt G. Kaiser
Matthew G. Kaiser, Chair

All of the Board members concur in this Report and Recommendation.