SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-456

IN THE MATTER OF

JAMES W. KENNEDY

AN ATTORNEY AT LAW

Decision

Argued: February 6, 2003

Decided: April 8, 2003

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

David H. Duggan, III appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us based on a motion for final discipline filed by the Office of Attorney Ethics ("OAE"), following respondent's guilty plea to one count of the fourth degree crime of endangering the welfare of a child (possession of child pornography), in violation of *N.J.S.A.* 2C:24-4b(5)(b).

Respondent was admitted to the New Jersey bar in 1983. He has no disciplinary history.

On August 19, 2002 respondent pleaded guilty to a one-count accusation charging him with possession of child pornography. During the plea hearing, respondent admitted that (1) he had downloaded from the internet images of children engaged in sexual acts and (2) of the 20,000 to 30,000 pornographic images that he maintained on his computer, several hundred depicted children below the age of sixteen engaged in sexual acts. The images were discovered by the manager of a store that was repairing his computer. The manager notified the police.

Respondent was sentenced to a three-year probation term, a $5,000 fine and 500 hours of community service. As conditions of probation, respondent was directed to receive counseling and was prohibited from having unsupervised contact with children below the age of sixteen, excluding family members. Two psychologists, one selected by the prosecutor in the criminal proceeding and one by respondent, issued reports indicating that respondent did not present a risk to the community and that his retention of the pornographic images was partially the result of his compulsive personality, which compelled him to collect and hoard a variety of items. Respondent also submitted numerous letters from individuals attesting to his good character and professionalism.

Relying on *In re McBroom*, 158 *N.J.* 258 (1999), the OAE urged us to impose a one-year suspension.

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Following a review of the full record, we determined to grant the OAE's motion for final discipline.

The existence of a criminal conviction is conclusive evidence of respondent's guilt. *R.*1:20-13(c)(1); *In re Gipson*, 103 *N.J.* 75, 77 (1986). Respondent's guilty plea to one count of possession of child pornography constituted a violation of *RPC* 8.4(b) (commission of a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer). Only the quantum of discipline to be imposed remains at issue. *R.*1:20-13(c)(2); *In re Lunetta,* 118 *N.J.* 443, 445 (1989).

The level of discipline imposed in disciplinary matters involving the commission of a crime depends on numerous factors, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such as respondent's reputation, his prior trustworthy conduct, and general good conduct." *In re Lunetta, supra,* 118 *N.J.* at 445-46. Discipline is imposed even when the attorney's offense is not related to the practice of law. *In re Kinnear*, 105 *N.J.* 391 (1987).

In cases involving sexual misconduct by attorneys, the discipline has ranged from a reprimand to disbarment. Reprimand cases include *In re Gilligan*, 147 *N.J.* 268 (1997) (conviction of lewdness for exposing and fondling genitals for sexual gratification in front of three individuals, two of whom were children under the age of thirteen) and *In re Pierce*, 139 *N.J.* 533 (1995) (conviction of lewdness for exposing genitals to a twelve-year old girl). Suspension cases include *In re Ferraiolo*, 170 *N.J.* 600 (2002) (one-year

suspension for attorney who pleaded guilty to the third-degree offense of attempting to endanger the welfare of a child; the attorney, who had communicated in an internet chat room with someone whom he believed to be a fourteen-year old boy, was arrested after he arranged to meet the "boy" for the purpose of engaging in sexual acts; the "boy" was a law enforcement officer); *In re Gernert*, 147 *N.J.* 289 (1997) (one-year suspension for attorney who pleaded guilty to the petty disorderly offense of harassment by offensive touching; the victim was the attorney's teenage client); *In re Ruddy*, 130 *N.J.* 85 (1992) (two-year suspension for attorney who pleaded guilty to four counts of endangering the welfare of a child, a third-degree offense, for fondling several young boys); *In re Herman*, 108 *N.J.* 66 (1987) (three-year suspension for attorney who pleaded guilty to the second degree offense of sexual assault for touching the buttocks of a ten-year old boy). The most serious cases involving sexual misconduct have resulted in disbarment. *In re Wright*, 152 *N.J.* 35 (1997) (attorney was convicted of aggravated sexual assault); *In re Palmer*, 147 *N.J.* 312 (1997) (attorney pleaded guilty to seven counts of third-degree aggravated criminal sexual contact and one count of fourth-degree criminal sexual contact); *In re X*, 120 *N.J.* 459 (1990) (attorney pleaded guilty to three counts of second-degree sexual assault; the victims were his three daughters).

Conduct more analogous to that of respondent's occurred in *McBroom, supra*, 158 *N.J.* 258, where the attorney pleaded guilty to a violation of 18 *U.S.C.A.* 2252(a)(4), a federal statute prohibiting possession of child pornography obtained through interstate commerce. McBroom downloaded from the internet images of minors engaged in

sexually explicit conduct. He was suspended for two years, retroactively to the date of his temporary suspension. At the time that the order of suspension was entered, McBroom had already been temporarily suspended for more than three years. In effect, thus, the suspension was for "time served."

We recently considered two similar cases in which attorneys downloaded child pornography from the internet. In *In the Matter of James I. Peck IV*, Docket No. DRB 02-342 (2003), the attorney was sentenced to a fifteen-month prison term after he pleaded guilty to one count of possession of child pornography, in violation of 18 *U.S.C.A.* 2252(1)(4)(B). Peck admitted possession of at least three magazines depicting minors engaged in sexually explicit conduct. We determined to suspend him for one year. In *In the Matter of Donald Rosanelli*, Docket No. DRB 02-357 (2003), the attorney pleaded guilty to an accusation charging him with a violation of the same statute implicated in this case. Rosanelli acknowledged possessing twenty-three pictures of children engaged in various sexual acts. He was admitted into the pre-trial intervention program. We determined to suspend Rosanelli for six months. Those matters are pending with the Court.

Respondent's misconduct in this matter was serious. In our view, however, because his actions were limited to possession of pornographic materials, it was not as serious as that of the attorneys who had direct contact with their victims and placed them in fear. By no means do we intend to trivialize respondent's transgressions. We recognize that his actions were harmful to children, in that he perpetuated the child pornography

trade.[1] Nonetheless, we cannot ignore that, unlike the attorneys in some of the above cases, respondent did not expose himself to children or inappropriately touch them. His wrongdoing, while reprehensible and criminal, was passive in nature. We also took into account the psychological reports and "character" letters submitted on his behalf, as well as his previously unblemished legal career of twenty years.

Based on the foregoing, a seven-member majority determined to suspend respondent for three months. One member dissented, voting for a two-year suspension. In that member's view, more severe discipline is warranted for respondent's support of the child pornography industry, which exploits and demeans children. One member did not participate.

We further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

By: _____
ROCKY L. PETERSON
Chair
Disciplinary Review Board

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[1] Respondent argued that, because he did not pay for the images that he downloaded, he did not perpetuate the trade. Many websites, however, base their advertising rates on the number of users who visit their internet pages. Respondent, thus, indirectly conferred a financial benefit on those responsible for child pornography.

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of James W. Kennedy
Docket No. DRB 02-456

Argued: February 6, 2003

Decided: April 8, 2003

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Two-year suspension	Dismiss	Disqualified	Did not participate
Peterson		X					
Maudsley		X					
Boylan		X					
Brody		X					
Lollá							X
O'Shaughnessy		X					
Pashman		X					
Schwartz				X			
Wissinger		X					
Total:		7		1			1

Robyn M. Hill 4/9/03
Robyn M. Hill
Chief Counsel