FILED MAY 6, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **JAMES MICHAEL KUMMERER,** **Member No. 50944,** **A Member of the State Bar.**	)	Case No. **08-C-11750-PEM** **DECISION**

I. Introduction

In this default conviction referral matter, respondent **James Michael Kummerer** was convicted of one felony count of possession of cocaine (Indiana Code § 35-48-4-6(a)). He was sentenced to eight years in prison, suspended, with eight years' probation.

Based on clear and convincing evidence, this court finds that the facts and circumstances surrounding respondent's conviction involved moral turpitude and recommends, among other things, that he be suspended from the practice of law for four years, that execution of that period of suspension be stayed, and that respondent be suspended from the practice of law for a minimum of two years and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law.

II. Pertinent Procedural History

On January 7, 2008, respondent appeared in the Bartholomew Circuit Court in the State of Indiana and entered a guilty plea to a felony charge of possession of cocaine. On February 1, 2008, respondent was sentenced to eight years in the Indiana Department of Corrections, suspended, with eight years' probation.

On May 6, 2008, the Office of Chief Trial Counsel of the State Bar of California ("State Bar") transmitted a certified copy of respondent's record of conviction to the State Bar Court pursuant to Business and Professions Code sections 6101 - 6102 and California Rules of Court, rule 9.5, et seq. On July 17, 2008, the Review Department of the State Bar Court issued an order referring the present matter to the Hearing Department for a hearing and decision recommending the discipline to be imposed in the event that the facts and circumstances surrounding respondent's conviction are found to involve moral turpitude or other misconduct warranting discipline.[1]

On August 1, 2008, the State Bar Court issued and properly served a Notice of Hearing on Conviction on respondent. Respondent did not file an answer. However, on August 11, 2008, respondent filed a notice of change of address with the court.

Following respondent's failure to appear at two properly noticed status conferences, the State Bar, on November 24, 2008, filed a motion for entry of default pursuant to rules 200 and 602 of the Rules of Procedure of the State Bar of California ("Rules of Procedure").[2] Respondent's default was entered on January 26, 2009. The order of entry of default was sent to

[1] The Review Department further ordered that respondent be suspended from the practice of law, effective August 18, 2008, pending final disposition of this proceeding.

[2] Rules 600 - 605 of the Rules of Procedure were revised on January 1, 2009. The State Bar's motion for entry of default was properly filed on November 24, 2008, pursuant to the then-existing Rules of Procedure.

respondent's official address by certified mail, return receipt requested. The mailing was not returned to the State Bar Court as undeliverable or for any other reason.

Respondent was enrolled as an inactive member under Business and Professions Code section 6007, subdivision (e), on January 29, 2009. This court took the matter under submission on February 23, 2009, following the filing of the State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

Respondent is conclusively presumed, by the record of his conviction in this proceeding, to have committed all of the elements of the crime of which he was convicted. (Bus. & Prof. Code, § 6101, subd. (a); *In re Crooks* (1990) 51 Cal.3d 1090, 1097; *In re Duggan* (1976) 17 Cal.3d 416, 423; *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.)

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on January 5, 1972, and has been a member at all times since that date.

B. Conviction

On or about April 2007, a confidential informant ("CI") advised Investigator Jason Christophel ("Christophel") of the Columbus Police Department that she had reason to believe that her attorney, respondent, would accept cocaine in payment for his legal services. The CI went on to tell Christophel that she had scheduled an April 10, 2007 appointment with respondent to discuss an upcoming hearing in Johnson County.

On April 10, 2007, the CI was equipped with electronic monitoring equipment which would allow the Columbus Police Department to hear her conversation with respondent. During their conversation, the CI explained to respondent that she currently did not have the money to pay him for his legal representation. The CI told respondent that she might be able to get the

money in the near future. Respondent told the CI that she currently owed him $175. Respondent indicated to the CI that he would be willing to accept an "eight-ball" from the CI and would consider that her bill with him was then paid in full.[3] Respondent went on to tell the CI "you understand we don't want to fuck with one another in a bad way." Respondent and the CI agreed that she would call him on the following day when she was able to retrieve the drug. The CI inquired whether respondent would continue her up-coming hearing. Respondent indicated that he'd have to see.

On April 11, 2007, the CI again met with members of the Columbus Police Department. The CI made a telephone call to respondent in their presence. After an exchange of phone calls, the CI and respondent spoke and discussed the anticipated delivery of the cocaine. Respondent asked the CI where she was going to be. The CI told him that she would be at Kroger's. Respondent initially indicated that he would meet her there, but then told that they should instead meet in the parking lot by the Sirloin Stockade Restaurant because the Kroger store had surveillance cameras.

The Columbus Police Department supplied the CI with a plastic bag containing over three grams of crack cocaine from the Columbus Police Department property room. The eight-ball, which respondent requested, refers to an amount of cocaine weighing 3.5 grams. The CI was again equipped with an electronic monitoring devise so that members of the Columbus Police Department could overhear her conversation with respondent. The CI's vehicle was also equipped with a concealed surveillance camera.

The CI pulled her vehicle alongside respondent's car, which was already parked near the Sirloin Stockade and Sylvan Learning Center. Respondent entered the CI's vehicle. Respondent complained that the crack cocaine weighed only 3.3 grams and that it was short. Respondent

[3] Based on Christophel's experience as a narcotics officer, he understands an "eight-ball" to be an eighth ounce of cocaine.

then made a joking comment about whether he should beat the CI for shorting him. However, he then indicated that it would be alright if the cocaine was "fire."[4] Respondent also alluded to the fact that at least it was crack rather than powder cocaine. Respondent then returned to his car, started the engine, and placed the car in reverse. Columbus Police Department detectives then approached respondent and directed him to stop. The crack cocaine was recovered from respondent's pocket and he was arrested.

On January 7, 2008, respondent appeared in the Bartholomew Circuit Court in the State of Indiana and entered a guilty plea to a felony charge of possession of cocaine. On February 1, 2008, respondent was sentenced to eight years in the Indiana Department of Corrections, suspended, with eight years' probation.

C. Conclusions of Law

The Review Department referred the present matter to the Hearing Department for a hearing on the issues of whether the facts and circumstances surrounding respondent's criminal conviction involved moral turpitude or other misconduct warranting discipline and, if so, for a recommendation as to the discipline to be imposed.

Although the term "moral turpitude" defies precise definition, it has been described as 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. (See *In re Craig* (1938) 12 Cal.2d 93, 97.) It has also been described as any crime or misconduct without excuse (*In re Hallinan* (1954) 43 Cal.2d 243, 251) or any dishonest or immoral act. Crimes which necessarily involve an intent to defraud, or dishonesty for personal gain, such as perjury (*In re Kristovich* (1976) 18 Cal.3d 468, 472),

[4] According to Christophel, the term "fire" refers to good quality cocaine.

grand theft (*In re Basinger* (1988) 45 Cal.3d 1348, 1358) and embezzlement (*In re Ford* (1988) 44 Cal.3d 810, 813) involve moral turpitude.

Most drug possession crimes, such as the present matter, do not inherently involve an element of moral turpitude. Therefore, the impetus is on the court to examine whether the surrounding facts and circumstances rise to the level of moral turpitude. After examining the surrounding facts and circumstances, the court finds that respondent's conduct constitutes moral turpitude. This conclusion is based on several factors including the proximity between respondent's criminal misconduct and his practice of law, respondent's dereliction of his ethical and moral duties owed to his client, and his awareness and understanding of the illegality of his actions.

IV. Level of Discipline

The parties bear the burden of proving mitigating and aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, stds. 1.2(b) and (e).)[5]

A. Mitigation

No mitigating factors were submitted into evidence. (Std. 1.2(e).) Respondent, however, has no prior record of discipline in 35 years of practice prior to engaging in his first act of misconduct in the current proceeding.[6] Practicing law for 35 years before committing misconduct constitutes an important and significant mitigating circumstance. (See *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 225.)

[5] All further references to standard(s) are to this source.

[6] Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of respondent's membership records.

B. Aggravation

In aggravation, respondent failed to participate in these proceedings prior to the entry of his default. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.)

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) However, the standards are not mandatory; they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 3.2 provides that a final conviction of an attorney of a crime which involves moral turpitude, either inherently or in the facts and circumstances surrounding the crime's commission must result in disbarment. Only if the most compelling mitigating circumstances clearly predominate, will disbarment not be imposed. In those latter cases, the discipline shall

not be less than a two-year actual suspension, prospective to any interim suspension imposed, irrespective of mitigating circumstances.[7]

The State Bar recommends, among other things, that respondent be suspended from the practice of law for a minimum of two years. The court agrees.

The court is guided by *In the Matter of Deierling* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 552. In *Deierling*, the attorney was arrested while tending to some 25 marijuana plants. Upon arrest, a loaded revolver was found in the attorney's possession. A subsequent search of the attorney's house revealed marijuana paraphernalia and several firearms. The attorney pled to one count of possession of marijuana for sale. Noting the attorney's role as a principal, his motive of potential financial gain and his awareness of the illegality of his actions, the Review Department found that the circumstances surrounding his conviction involved moral turpitude. In mitigation, the attorney was found to be successfully dealing with his long time addiction to marijuana. The Review Department recommended that the attorney be suspended from the practice of law for four years, stayed, with four years' probation including a 30-month actual suspension.

The present matter is less egregious than *Deierling*, however, unlike *Deierling*, respondent's criminal misconduct was directly connected to the practice of law. After weighing the present mitigation and aggravation, the court finds a level of discipline similar to *Deierling* to be appropriate.

Therefore, the court recommends, among other things, that respondent be suspended from the practice of law for four years, that execution of that period of suspension be stayed, and that respondent be suspended from the practice of law for a minimum of two years and until he

[7] The California Supreme Court has effectively modified standard 3.2 by rejecting the requirement that the suspension be automatically prospective. (*In re Young* (1989) 49 Cal.3d 257, 268.)

provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law.

VI. Recommendations

The court recommends that James Michael Kummerer, State Bar Number 50944, be suspended from the practice of law in California for four years, execution of that period of suspension to be stayed subject to the following conditions:

1. James Michael Kummerer is suspended from the practice of law for a minimum of two years, and he will remain suspended until the following requirements are satisfied:
   i. The State Bar Court grants a motion to terminate his suspension pursuant to rule 205 of the Rules of Procedure of the State Bar. James Michael Kummerer must comply with the conditions of probation, if any, imposed by the State Bar Court as a condition for terminating his suspension; and
   ii. James Michael Kummerer must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)
2. James Michael Kummerer is given credit towards the two year suspension for the period of interim suspension which commenced on August 18, 2008.

The court also recommends that James Michael Kummerer be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[8] Failure to do so may result in disbarment or suspension.

[8] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

It is further recommended that James Michael Kummerer be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners and provide proof of passage to the Office of Probation during the period of his actual suspension. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VII. Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: May _____, 2009

PAT McELROY
Judge of the State Bar Court