

**SETTLEMENT AGREEMENT BETWEEN MISSOURI DENTAL BOARD  
AND ANTHONY R. RIZZUTI, D.D.S.**

Come now Anthony R. Rizzuti, D.D.S. ("Licensee") and the Missouri Dental Board ("Board") and enter into this settlement agreement for the purpose of resolving the question of whether Licensee's license as a dentist will be subject to discipline.

Pursuant to the terms of § 536.060, RSMo,<sup>1</sup> the parties hereto waive the right to a disciplinary hearing before the Board under § 621.110, RSMo.

Licensee acknowledges that he understands the various rights and privileges afforded him by law, including the right to a disciplinary hearing before the Board at which time he may present evidence in mitigation of discipline; and the right to recover attorney's fees incurred in defending this action against his license. Being aware of these rights provided him by operation of law, Licensee knowingly and voluntarily waives each and every one of these rights and freely enters into this settlement agreement and agrees to abide by the terms of this document, as they pertain to him.

The Board has received and reviewed the record of the proceedings before the Administrative Hearing Commission and the Decision of the Administrative Hearing Commission. The record of the Administrative Hearing Commission is incorporated herein by reference in its entirety.

For the purpose of settling this dispute, Licensee stipulates that the factual allegations contained in this settlement agreement are true and stipulates with the Board that Licensee's license, numbered 2006020656 is subject to disciplinary action by the Board in accordance with the provisions of Chapters 621 and 332, RSMo.

**Joint Stipulation of Fact and Conclusions of Law**

1. The Missouri Dental Board ("Board") is an agency of the State of Missouri created and established pursuant to § 332.021, RSMo 2000, for the purpose of executing and enforcing the provisions of Chapter 332.
2. Licensee Anthony R. Rizzuti, D.D.S. is licensed by the Board as a dentist, License No. 2006020656. Licensee's Missouri license expired due to non-renewal on November 30, 2012.

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<sup>1</sup> All statutory references are to Missouri Revised Statutes 2000, as amended, unless otherwise indicated.

3. On or about June 25, 2012, the Board filed a complaint before the Missouri Administrative Hearing Commission (AHC) seeking to discipline Licensee's license as a result of Licensee's plea of guilty to felony possession of child pornography in the United States District Court, Eastern District of Missouri. On or about August 8, 2012, the Board filed an amended complaint. Licensee filed his answer to the complaint on September 14, 2012. On or about February 26, 2013, the Board filed a motion for summary decision, accompanied by a statement of uncontested material facts and suggestions in support of the motion. On or about March 21, 2013, Licensee filed suggestions in opposition to the motion for summary decision, accompanied by affidavits from Licensee and two licensed psychologists, and a motion to strike certain statements in the Board's statement of uncontested material facts. On or about April 5, 2013, the Board filed suggestions in opposition to Licensee's motion to strike.

4. On or about May 29, 2013, the AHC issued its decision, finding cause to discipline Licensee's license pursuant to § 332.321.2(2), RSMo in *Missouri Dental Board v. Anthony Rizzuti, D.D.S.*, Case No. 12-1158 DB.

5. The Board hereby adopts and incorporates by reference the findings of fact contained in the May 29, 2013 Decision of the Administrative Hearing Commission in *Missouri Dental Board v. Anthony Rizzuti, D.D.S.*, Case No. 12-1158 DB in their entirety.

6. This Board has jurisdiction over this proceeding pursuant to §§ 621.110 and 332.321.3, RSMo.

7. The Board expressly adopts and incorporates by reference the conclusions of law contained in the Decision issued by the Administrative Hearing Commission dated May 29, 2013, in *Missouri Dental Board v. Anthony Rizzuti, D.D.S.*, Case No. 12-1158 DB, finding cause to discipline Respondent's license pursuant to § 332.321.2(2), RSMo.

8. As a result of the foregoing, and in accordance with the Administrative Hearing Commission's Decision dated May 29, 2013, Respondent's dental license is subject to disciplinary action by the Board pursuant to § 332.321.2(2), RSMo.

9. Cause exists for the Board to take disciplinary action against Licensee's license under § 332.321.2(2), RSMo, which states in pertinent part:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any permit or license required by this chapter or any

person who has failed to renew or has surrendered his or her permit or license for any one or any combination of the following causes:

(2) The person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution pursuant to the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated pursuant to this chapter, for any offense an essential element of which is fraud, dishonesty or an act of violence, or any offense involving moral turpitude, whether or not sentence is imposed[.]

10. The Board has determined that this Order is necessary to ensure the protection of the public.

#### Joint Agreed Disciplinary Order

Based upon the foregoing, the parties mutually agree and stipulate that the following shall constitute the disciplinary order entered by the Board in this matter under the authority of § 621.045.3, RSMo:

11. The terms of discipline shall include that at such time as Licensee is able to fulfill the requirement for renewal of his license of holding current certification in basic life support (BLS) or advanced cardiac life support (ACLS), or certification equivalent to BLS or ACLS, Licensee shall make application with the Board to renew his license. At such time as the Board renews Licensee's license, it shall be **SUSPENDED** for a period to end **January 16, 2016**. Immediately thereafter, Licensee's license shall be placed on **PROBATION** for a period of **FIVE (5) years**. The entire period of suspension and probation shall constitute the disciplinary period. During Licensee's probation, Licensee shall be entitled to engage in the practice of dentistry under Chapter 332, RSMo, provided he adheres to all of the terms of his Settlement Agreement.

#### I. SPECIFIC REQUIREMENTS

- A. Licensee will notify the Board of all conditions imposed under federal supervision on release.
- B. Licensee will comply with all conditions of federal supervision.
- C. Licensee will notify Board of any changes to conditions of federal supervision when they occur.
- D. Licensee will notify Board of any request by Licensee for changes to conditions of federal supervision.
- E. Licensee will notify Board of any request by Licensee for termination of federal supervision. Under current order, lifetime supervision is provided for but it may be terminated on order of court.
- F. Licensee cannot set up solo practice of dentistry.

- G. The Board will approve the dental practice/office at which Licensee will provide care. Licensee's status at dental practice (employee or contract) will be determined by the standard arrangement within that dental practice.
- H. Licensee will notify Board of intent to change dental practice and receive its approval before the change becoming effective.
- I. Approval of initial, or changes to, dental practice will not be unreasonably withheld by Board.
- J. Licensee will notify the proposed dental practice(s) of conviction, the terms of his Board probation, and the conditions of his federal supervision.
- K. The dental practice will notify Board that it agrees to Licensee practicing there; that it has been notified of Licensee's conviction, the terms of his Board probation, and the conditions of his federal supervision; and that it will monitor and enforce the terms of Board probation and conditions of federal supervision.
- L. The dental practice will appoint a mentor/monitor for Licensee who will be responsible for overseeing the practice of Licensee and his compliance with his terms of Board probation, and conditions of federal supervision. The mentor/monitor will be approved by the Board.
- M. Licensee will not treat or provide care to patients under the age of 18.
- N. Licensee will not have contact with patients or others on the premises under the age of 18. Contact does not include passing through an area of the premises where persons under the age of 18 are present, such as patient waiting rooms, treatment areas and operatories.
- O. In the event that federal supervision would allow Licensee to treat or provide care to patients under the age of 18, or to be in contact with persons under the age of 18 who are on the dental practice premises, Licensee will not treat, provide care to, or have contact with such persons without the Board specifically approving such, and imposing whatever conditions it deems necessary related to that treatment, care or contact.
- P. Licensee will obtain prior informed consent of all patients treated by him. Such consent will consist of notification of his conviction; of the patient's right to not be treated by Licensee; and that the patient can either: (i) see another practitioner in the dental practice, (ii) be referred to a dentist outside the practice or (iii) find another dentist on their own.
- Q. In treating or providing care to patients, another caregiver will be present with Licensee and the patient. Short term absences of the other caregiver from the room for purposes solely related to the care being given are allowed.
- R. Licensee will have access to a single dedicated computer which has access to the internet. If federal supervision requires monitoring of this computer, that software will be installed and the Board will not monitor the computer on its own. If Licensee receives inquiry or concern from the federal Probation Office concerning a site(s) visited by Licensee on the computer, Licensee will notify the Board of such and the resolution of the matter. If federal supervision does not require monitoring of this computer, the Board may, in its sole discretion, require monitoring or other software of its designation and have the right to monitor the internet usage of that computer.
- S. In accessing digital patient records, Licensee will only access them from a closed network on the dental practice premises which cannot access the internet. Licensee will not have access and will not make access to such records from a remote location.

T. Any monitoring software required to be installed on computers which Licensee can access will not be able to access confidential and private patient records. It is contemplated that federal monitoring software will not be installed on the access points to the closed network for digital patient records. If federal monitoring software is required to be placed on these access points, the Board will be advised of the fact and assurances provided to the Board's satisfaction that confidential and private patient information cannot be accessed through that monitoring software.

U. Licensee will comply with all federal and state sex offender statutes applicable to him. Copies of his original registration and any changes will be provided to the Board.

## II. GENERAL REQUIREMENTS

A. Licensee shall meet with the Board or its representatives at such times and places as required by the Board after notification of a required meeting.

B. Licensee shall submit reports to the Missouri Dental Board, P.O. Box 1367, Jefferson City, Missouri 65102, stating truthfully whether he has complied with all the terms and conditions of this Settlement Agreement by no later than January 1 and July 1 during each year of the disciplinary period.

C. Licensee shall keep the Board apprised of his current home and work addresses and telephone numbers. Licensee shall inform the Board within ten days of any change of home or work address and home or work telephone number.

D. Licensee shall comply with all provisions of the Dental Practice Act, Chapter 332, RSMo; all applicable federal and state drug laws, rules, and regulations; and all federal and state criminal laws. "State" here includes the state of Missouri and all other states and territories of the United States.

E. During the disciplinary period, Licensee shall timely renew his license and timely pay all fees required for licensing and comply with all other board requirements necessary to maintain Licensee's license in a current and active state.

F. If at any time during the disciplinary period, Licensee removes himself from the state of Missouri, ceases to be currently licensed under provisions of Chapter 332, or fails to advise the Board of his current place of business and residence, the time of his absence, unlicensed status, or unknown whereabouts shall not be deemed or taken as any part of the time of discipline so imposed in accordance with § 332.321.6, RSMo.

G. During the disciplinary period, Licensee shall accept and comply with unannounced visits from the Board's representatives to monitor his compliance with the terms and conditions of this Settlement Agreement.

H. If Licensee fails to comply with the terms of this Settlement Agreement, in any respect, the Board may impose such additional or other discipline that it deems appropriate, (including imposition of the revocation).

I. This Settlement Agreement does not bind the Board or restrict the remedies available to it concerning any other violation of Chapter 332, RSMo, by Licensee not specifically mentioned in this document.

## III. ADDITIONAL REQUIREMENTS

A. Licensee shall not allow his license to lapse.

B. Licensee shall notify, within 15 days of the effective date of this Settlement Agreement, all hospitals, nursing homes, out-patient centers, surgical centers, clinics, and all other facilities where Licensee practices or has privileges of Licensee's disciplinary status. Notification shall be in writing and Licensee shall, contemporaneously with the giving of such notice, submit a copy of the notice to the Board for verification by the Board or its designated representative.

12. The parties to this Agreement understand that the Missouri Dental Board will maintain this Agreement as an open record of the Board as provided in Chapters 332, 610 and 324, RSMo.

13. The terms of this settlement agreement are contractual, legally enforceable, and binding, not merely recital. Except as otherwise provided herein, neither this settlement agreement nor any of its provisions may be changed, waived, discharged, or terminated, except by an instrument in writing signed by the party against whom the enforcement of the change, waiver, discharge, or termination is sought.

14. Licensee, together with his heirs and assigns, and his attorneys, do hereby waive, release, acquit and forever discharge the Board, its respective members and any of its employees, agents, or attorneys, including any former Board members, employees, agents, and attorneys, of, or from, any liability, claim, actions, causes of action, fees, costs and expenses, and compensation, including but not limited to, any claims for attorney's fees and expenses, including any claims pursuant to § 536.087, RSMo, or any claim arising under 42 U.S.C. § 1983, which may be based upon, arise out of, or relate to any of the matters raised in this case, its settlement, or from the negotiation or execution of this settlement agreement. The parties acknowledge that this paragraph is severable from the remaining portions of this settlement agreement in that it survives in perpetuity even in the event that any court of law deems this settlement agreement or any portion thereof to be void or unenforceable.

LICENSEE

  
\_\_\_\_\_  
Anthony R. Rizzuti, D.D.S.

Date 2/3/14

BOARD

  
\_\_\_\_\_  
Brian Barnett,  
Executive Director  
Missouri Dental Board

Date 2/7/14

Before the  
Administrative Hearing Commission  
State of Missouri

MAY 3 1 2013



MISSOURI DENTAL BOARD, )  
)  
Petitioner, )  
)  
vs. ) No. 12-1158 DB  
)  
ANTHONY RIZZUTI, D.D.S., )  
)  
Respondent. )

**DECISION**

We find cause for the Missouri Dental Board (“the Board”) to discipline the license of Anthony Rizzuti.

**Procedure**

On June 25, 2012, the Board filed a complaint seeking to discipline Rizzuti’s dental license. Rizzuti’s attorney was served with a copy of the complaint and our notice of complaint/notice of hearing on July 18, 2012. The Board filed an amended complaint on August 8, 2012, and Rizzuti answered the complaint on September 14, 2012.

The Board filed a motion for summary decision (“the motion”), accompanied by a statement of uncontested material facts and suggestions in support of the motion, on February 26, 2013. Rizzuti filed suggestions in opposition to the motion and a motion to strike certain statements in the Board’s statement of uncontested material facts on March 21, 2013. The Board responded to the suggestions in opposition and motion to strike on April 5, 2013.

Pursuant to 1 CSR 15-3.446(6)(A),<sup>1</sup> we may decide a motion for summary decision if a party establishes facts that entitle that party to a favorable decision and no party genuinely disputes such facts. Those facts may be established by stipulation, pleading of the adverse party, or other evidence admissible under the law. 1 CSR 15-3.446(6)(B). The Board's motion is accompanied by certified copies of court records. Rizzuti's suggestions in opposition and motion to strike are accompanied by affidavits from himself and two licensed psychologists. We make our findings of fact from the admissible evidence submitted.

### **Findings of Fact**

1. Rizzuti was licensed by the Board as a dentist. His license was current and active at all relevant times, but expired November 30, 2012.
2. Rizzuti participated in online public chat rooms through Yahoo! Instant Messaging. The chat rooms posted rules that all participants should be 18 years of age or older.
3. During two separate online private chats, Rizzuti accepted file transfers that contained multiple nude images of children, some involving sexual activity and others of a sexually suggestive nature.
4. Rizzuti accepted the file transfer and saved it to his computer before he viewed the images. Later he opened the files and realized what the images were, but he did not delete the files. He also did not report receiving the files to the authorities.
5. Rizzuti did not request that pictures of child pornography be sent to him, visit child pornography internet sites, or purchase child pornography.
6. On January 29, 2009, Rizzuti was indicted by a grant jury in the United States District Court, Eastern District of Missouri, for possession of child pornography and another offense. He

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<sup>1</sup> All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

was also charged with two crimes in relation to the same underlying conduct in the circuit court of St. Louis County.<sup>2</sup>

7. On December 1, 2009, Rizzuti pled guilty to felony possession of child pornography in violation of 18 U.S.C. § 2252(A)(a)(5)(B).

8. On July 8, 2010, judgment was entered in Rizzuti's case in federal district court. The other federal charge against Rizzuti was dismissed.

9. Rizzuti was sentenced to 72 months in the custody of the United States Bureau of Prisons. The court also ordered that Rizzuti comply with the requirements of the Sex Offender Registration and Notification Act and participate in a sex offense-specific treatment program. Rizzuti was also placed on lifetime supervised release upon his release from imprisonment and prohibited from having contact with children under the age of 18 without the written consent of his probation officer.

10. Before he was imprisoned, Rizzuti attended counseling sessions as part of pretrial sex offender group therapy. He came to realize that keeping the photographs and not turning them over to the authorities might have allowed the abuses to continue.

11. The Board had knowledge of Rizzuti's case in 2008. It renewed Rizzuti's license in November 2010.

12. The St. Louis County Circuit Court issued a nolle prosequi order as to the charges filed in that court on November 30, 2011.

#### **Conclusions of Law**

Sections 332.321.2<sup>3</sup> and 621.045.1 provide us jurisdiction to decide this complaint. The Board has the burden of proving by a preponderance of the evidence that Rizzuti has committed

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<sup>2</sup> No date appears on the St. Louis County charging document.

<sup>3</sup> Statutory references are to the RSMo Supp. 2012 unless otherwise indicated.

an act for which the law allows discipline. *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012). A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.* at 230 (quoting *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

#### Motion to Strike

Rizzuti asks us to strike paragraphs 4, 5, and 6 of the Board’s statement of uncontested facts and the exhibits that relate to those paragraphs. He complains that those paragraphs and documents relate to the charges against him that were dismissed, and that they are “immaterial, impertinent or scandalous” and therefore subject to being stricken under Mo. R. Civ. Pro. 55.27(e).

Rule 55.27(e) is one of the Missouri Supreme Court’s rules for civil actions in circuit court. Those rules have no force of law before this Commission except as the legislature specifically incorporates them by reference. *Dillon v. Director of Revenue*, 777 S.W.2d 326, 329 (Mo. App., W.D. 1989); *Wheeler v. Board of Police Comm’rs*, 918 S.W.2d 800, 803 (Mo. App., W.D. 1996). Rule 55.27 is not so incorporated. We deny Rizzuti’s motion to strike.

Nonetheless, we agree with Rizzuti that the material that forms the subject of his motion is irrelevant in this case, because the Board has asked for discipline only under a statute that predicates a finding of cause on whether a “person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution[.]” Being charged with a crime is obviously not the same as being found guilty. Thus, in this decision, we describe only the crime to which Rizzuti pled guilty.

### Cause for Discipline

The Board argues there is cause for discipline under § 332.321.2:

The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any permit or license required by this chapter or any person who has failed to renew or has surrendered his or her permit or license for any one or any combination of the following causes:

(2) The person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution pursuant to the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated pursuant to this chapter, for any offense an essential element of which is fraud, dishonesty or an act of violence, or any offense involving moral turpitude, whether or not sentence is imposed[.]

Section 332.321.2(2) provides for discipline if Rizzuti has pled guilty to a state or federal criminal offense when that offense: (1) is “reasonably related to the qualifications, functions or duties” of a dentist; (2) has an essential element of “fraud, dishonesty or an act of violence;” or (3) involves moral turpitude. The Board argues, and we address, only the last of these.

The statute does not define “moral turpitude,” but the concept exists in other disciplinary contexts and has been examined by Missouri courts. For example, in attorney disciplinary cases, the Supreme Court has “long defined moral turpitude as ‘baseness, vileness, or depravity’ or acts ‘contrary to justice, honesty, modesty or good morals.’” *In re Duncan*, 844 S.W.3d 443, 444 (Mo. 1993)(internal citations and quotations omitted). *See also Brehe v. Mo. Dep’t of Elem. and Secondary Educ.*, 213 S.W.3d 720, 725 (Mo. App. W.D. 2007)(same definition used in discipline of teaching certificate).

Not all criminal acts are acts of moral turpitude. *Brehe*, 213 S.W.3d at 725. Missouri courts have examined several types of criminal acts in license discipline cases and held that

certain ones always constitute acts of moral turpitude, others may, and some never do. In *Brehe*, the court explained there are three categories of crimes:

1. crimes that necessarily involve moral turpitude, such as fraud (so-called “Category 1” crimes);
2. crimes “so obviously petty that conviction carries no suggestion of moral turpitude,” such as illegal parking (“Category 2” crimes); and
3. crimes that “may be saturated with moral turpitude,” yet do not necessarily involve it, such as willful failure to pay income tax or refusal to answer questions before a congressional committee (“Category 3” crimes).

213 S.W.3d at 725 (quoting *Twentieth Century Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9<sup>th</sup> Cir. 1954)). While Category 3 crimes require inquiry into the circumstances, crimes such as murder, rape, and fraud fall into Category 1 because they are invariably regarded as crimes of moral turpitude. *Brehe*, 213 S.W.3d at 725.

Although our decisions do not carry precedential authority, *Central Hardware Co. v. Director of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994), we note that this Commission has previously decided that possession of child pornography is a Category 1 crime of moral turpitude.<sup>4</sup> Rizzuti, however, contends that summary decision is inappropriate in his case because possession of child pornography is a category 3 crime. He argues that the offense is one of “situational moral turpitude,” rather than moral turpitude *per se*.

A person commits the crime of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B) if he “knowingly possesses . . . any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography.” Rizzuti argues that the history of this offense shows that possession alone, as opposed to creation of or trafficking in child pornography, is *malum prohibitum* rather than *malum in se*, and that mere

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<sup>4</sup> See *Department of Health & Senior Services v. Benson*, No. 11-1268 DH (Dec. 13, 2011); *Bacon v. Director of Department of Insurance, Financial Institutions and Professional Registration*, No. 11-1548 DI (Nov. 4, 2011); *Henley v. State Bd. of Accountancy*, No. 10-1345 AC (May 16, 2011); *Department of Health and Senior Services v. Inman*, No. 07-1552 DH (Dec. 8, 2008).

possession was not a federal criminal offense at all until 1990. He points out that courts have recognized the distinction between mere possession and knowing receipt of child pornography. See *United States v. Myers*, 355 F.3d 1040, 1042-43 (7<sup>th</sup> Cir. 2004); *United States v. Skotzke*, 2007 WL 1584219, \*4 (E.D. Mich. 2007). Rizzuti argues, therefore, that we must consider the facts and circumstances surrounding his conviction before we determine that it is for “an offense involving moral turpitude.”

Few reported cases, and no Missouri cases, directly address the issue of whether mere possession of child pornography is a crime of moral turpitude, regardless of the circumstances involved. One that does is *In Matter of Grant*, 2011 WL 9375631 (Cal.Bar Ct.2011), which articulates Rizzuti’s position:

We do not view possession of child pornography as a crime involving moral turpitude in every case because the circumstances surrounding the conviction may vary. For example, actively searching for child pornography on the Internet, accessing it and then perusing and manipulating electronic images may constitute moral turpitude, while merely possessing child pornography after receiving it from an unsolicited source may not.

*Id.* at 2.

But the weight of authority is against this position. In *United States v. Santacruz*, 563 F.3d 894 (9<sup>th</sup> Cir.2009) (per curiam), a case construing the Immigration and Nationality Act (“INA”) the court held that “possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B) is a crime involving moral turpitude,” *id.* at 897, without considering the circumstances of the crime. The 9<sup>th</sup> circuit’s decision affirmed the federal district court’s decision, which discussed the issue more fully:

Recently, the BIA has held that possession of child pornography in violation of a Florida statute is a crime of moral turpitude under the immigration statutes. *In re Olquin-Rufino*, 23 I & N Dec. 896, 898, Int. Dec. 3529 (BIA 2006). The Board reasoned that the Supreme Court’s linking of child pornography intrinsically to sexual abuse

and exploitation of children makes the very existence of child pornography an affront to the rights of that child. This affront is so pernicious that mere knowing possession of such articles is sufficient for conviction under the U.S.Code. *Id.* at 897. The BIA has not documented an opinion on whether possession of child pornography in violation of federal statutes is likewise a crime of moral turpitude.

The Court agrees with the rationale of the BIA. The Supreme Court has long exempted child pornography from the obscenity test it outlined in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1971), on the grounds that the government has a compelling interest in protecting children from the harms that flow from exploitation for pornography. *New York v. Ferber*, 458 U.S. 747, 758, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). More recently, the Supreme Court has called child pornography and its resulting exploitation to be “an act repugnant to the moral instincts of a decent people.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Furthermore, the language of 18 U.S.C. § 2252A and the Florida statute at issue in *In re Olquin-Rufino* are sufficiently analogous in that they both ban knowing possession of media depicting children in sexually explicit terms. Compare 18 U.S.C. § 2252A with Fla. Stat. § 827.071.

While 18 U.S.C. § 2252A does not require an “inherently evil” mens rea, the Court is not convinced by Santacruz’s argument that “knowing possession” is not sufficiently turpitudinous to make the BIA’s interpretation impermissible. Our society has determined that child pornography is, by its very existence, an affront to the rights of children and that possessing it encourages further exploitation. This satisfies the definition of moral turpitude required by the INA.

*U.S. v. Santacruz*, 2007 WL 2315455, 3-4 (C.D. Cal. 2007).

This treatment of the crime of possession of child pornography as a crime of moral turpitude despite no specific *mens rea* requirement is tantamount to treating it as a Category 1 crime under *Brehe*. We also find the reasoning persuasive. We conclude that possession of child pornography under either § 573.037 or 18 U.S.C. § 2252A(a)(5)(B) is a Category 1 crime of moral turpitude.

Even if we accepted Rizzuti's argument that possession of child pornography is a Category 3 crime, however, we would still grant the Board's motion. Rizzuti did not seek out images of child pornography, but once he received them, he maintained them on his computer and neither deleted them nor reported them to the authorities. We conclude that even if possession of the images is a Category 3 crime, Rizzuti's failure to delete the images or report them to the authorities makes his crime one of moral turpitude.

Rizzuti raises several other issues in his defense. He has presented affidavits from two licensed psychologists who appear to be experts in the field of treating individuals with convictions for crimes similar to his. Both opine that possession of child pornography is not an indicator that a person has or will commit a hands-on sexual offense, or that a person has deviant sexual interests in children. They also opine that persons convicted of possession of child pornography and other internet sex offenses that serve a period of incarceration, participate in a sex offender treatment program, and are subsequently supervised upon release have a very low rate of recidivism of either possession offenses or hands-on sex offenses. This evidence is appropriate for the Board to consider in determining the degree of discipline to impose on Rizzuti, but not for this Commission in determining whether cause exists to discipline his license.

#### Rizzuti's Affirmative Defenses

Rizzuti raises two affirmative defenses. The first is that the Board was aware of his conviction when he applied for renewal of his license in 2010, but renewed the license anyway. Rizzuti argues that if the Board does not address this issue, its motion should be treated as one for partial summary decision on the issue of the characterization of his offense as one of moral turpitude per se or situational moral turpitude. The Board addressed this issue in its reply suggestions, arguing that possession of child pornography is a Category 1 offense, and we have

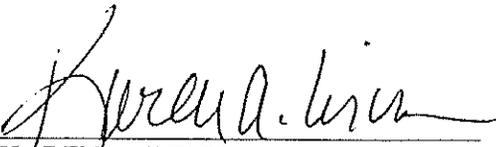
addressed it by determining that even if it is a Category 3 offense, we would still find that Rizzuti committed an offense of moral turpitude. We find that Rizzuti's assertion of this affirmative defense does not bar us from entering summary decision on the Board's motion.

Rizzuti also challenges the constitutional validity of the statutory grounds for disciplining his license under the due process clauses of the United States and Missouri constitutions. We have no authority to declare a statute unconstitutional. *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69 (Mo. banc 1982). Rizzuti acknowledges this, but expressly wishes to preserve his constitutional challenge. He has raised the issues, and they may be argued before the courts if necessary. *Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222 (Mo. App., W.D. 1993).

#### Summary

Because Rizzuti pled guilty to a crime of moral turpitude, we find cause to discipline his dental license under § 332.321.2(2).

SO ORDERED on May 29, 2013.

  
KAREN A. WINN  
Commissioner