***People v. Matthew Samuel Smith*. 18PDJ050. April 9, 2019.**

Following a sanctions hearing, the Presiding Disciplinary Judge suspended Matthew Samuel Smith (attorney registration number 22681) for three years. The suspension took effect May 14, 2019. To be reinstated, Smith will bear the burden of proving by clear and convincing evidence that he has been rehabilitated, has complied with disciplinary orders and rules, and is fit to practice law.

In September 2016, Smith failed to yield while making a left-hand turn in his minivan and was struck by a motorcycle carrying two people. Both people died. A jury convicted Smith of vehicular homicide and reckless manslaughter. He was sentenced to twelve years in the custody of the Department of Corrections and five years of mandatory parole.

Through this criminal conduct, Smith violated Colo. RPC 8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects).

The case file is public per C.R.C.P. 251.31. Please see the full opinion below.

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1300 BROADWAY, SUITE 250 DENVER, CO 80203	
Complainant: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** MATTHEW SAMUEL SMITH, #22681	Case Number: **18PDJ050**
OPINION AND DECISION IMPOSING SANCTIONS UNDER C.R.C.P. 251.19(c)	

In September 2016, Matthew Samuel Smith ("Respondent") failed to yield while making a left-hand turn in his minivan from South Parker Road and was struck by a motorcycle carrying two people. Both people died. A jury convicted Respondent of vehicular homicide and reckless manslaughter. He was sentenced to twelve years in the custody of the Department of Corrections ("DOC") and five years of mandatory parole. Given the seriousness of the criminal conviction, the magnitude of the injury, and the preponderance of aggravating over mitigating factors, Respondent's conduct in violation of Colo. RPC 8.4(b) warrants a three-year suspension.

I. PROCEDURAL HISTORY

On August 13, 2018, Geanne R. Moroye, Office of Attorney Regulation Counsel ("the People"), filed a complaint with the Presiding Disciplinary Judge ("the Court"). The same day, the People sent copies of the complaint to Respondent via certified mail to his registered home address of 10150 East Virginia Avenue, Building 4 #301, Denver, Colorado 80247. They also mailed the citation and complaint to his father's address in Centennial, Colorado.

When Respondent did not answer the complaint, the People moved for default. The Court granted that motion on October 25, 2018. Upon the entry of default, the Court deemed all facts set forth in the complaint admitted and all rule violations established by clear and convincing evidence.[1] A sanctions hearing was then set for February 12, 2019.

In January 2019, Respondent moved to continue the sanctions hearing, arguing that the People's disciplinary complaint is premised on his criminal conviction and that he is

[1] *See* C.R.C.P. 251.15(b); *People v. Richards*, 748 P.2d 341, 346 (Colo. 1987).

currently appealing the conviction on at least six separate grounds. The Court denied Respondent's request and instructed him to notify the Court whether he wished to participate by telephone in the sanctions hearing. The People later reported that Respondent had conveyed to them his desire to participate in the hearing; they moved the Court to permit Respondent to offer absentee testimony, and they made arrangements for him to testify by telephone.

At the sanctions hearing, Respondent orally moved for reconsideration of the Court's decision not to continue the hearing. The Court denied this request. Respondent also alleged that he never received a copy of the complaint.[2] The Court allowed Respondent to make a record on this issue and paused the hearing to fax a copy of the complaint to Respondent. But the Court declined to grant what it interpreted as Respondent's oral motion to set aside the default, reasoning that service was proper under C.R.C.P. 251.32(b)[3] and that Respondent had not raised this issue during his several communications with the People and with the Court after default had been entered.

Also at the sanctions hearing, the People's exhibits 1-5 were admitted into evidence, and the Court heard testimony from Brian Sugiako and Laurie Ann Seab. Respondent chose not to testify.

II. ESTABLISHED FACTS AND RULE VIOLATIONS

Respondent took the oath of admission and was admitted to practice law in Colorado on May 13, 1993, under attorney registration number 22681. He is thus subject to the Court's jurisdiction in this disciplinary proceeding.[4]

On September 5, 2016, around 11:00 p.m., Respondent was driving southbound on South Parker Road. As he turned left at East Temple Drive, he failed to yield to oncoming traffic, and his minivan was struck by a northbound-traveling motorcycle carrying two people: Brandon Dobson, the driver, and Breona Knight, the passenger.

The collision ripped the front tire off the motorcycle. Dobson was thrown from the motorcycle, landing on the road not far from the collision site. Knight was launched over the minivan. She landed further north along the roadway. Aurora police officers responded to the collision scene and began CPR on Dobson and Knight. Both were transported emergently to a hospital, where they were pronounced dead at 11:36 p.m. and 11:42 p.m., respectively.

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[2] Respondent assailed the People's decision to mail the complaint to his father's address. But Laurie Ann Seab, an investigator for the People, testified that shortly before the People filed the complaint Respondent had directed them not to send the complaint to his DOC address and instead to use his father's address. The Court credits Seab's testimony, not only because it was convincing but also because Respondent appeared to backtrack later in the hearing, when he instructed the Court to mail this opinion to his father's address.

[3] *See* Ex. 1 (showing Respondent's registered home address).

[4] *See* C.R.C.P. 251.1(b).

An officer on the scene reported that he smelled alcohol on Respondent's breath, and he described Respondent's eyes as glassy, watery, and bloodshot. Respondent was asked to submit to voluntary roadside maneuvers. He declined. He was also asked if he had taken any drugs; he answered in the negative.

Respondent consented to a blood draw at 12:35 a.m. on September 6, 2016. The results of that blood sample showed that Respondent's blood alcohol content ("BAC") was 0.054 grams of ethyl alcohol per 100 ml of blood. The results also revealed the presence of 20-50 nanograms of cocaine per 100 ml of blood. At the time of the crash, Respondent's driver's license was under suspension, as it had been since September 21, 2014.

Sarah S. Urfer, an expert in forensic toxicology and the laboratory director for ChemaTox Laboratory, Inc., authored in December 2016 an expert report in which she explained that alcohol acts as a central nervous system depressant and that cocaine is a central nervous system stimulant. Urfer opined that alcohol and cocaine had affected Respondent's central nervous system, working in tandem to increase the overall impairing effects on his system. She stated that she would expect that the combination of ethyl alcohol and cocaine would cause impairment. Urfer concluded, to a reasonable degree of scientific certainty, that a person under the influence of alcohol and cocaine as described would be incapable of properly and safely operating a motor vehicle.

On December 28, 2016, the Arapahoe County District Attorney charged Respondent in case number 16CR3613 with two counts of vehicular homicide, both class-three felonies; a misdemeanor offense of driving under restraint; and a traffic violation of failure to yield right of way.[5] On July 11, 2017, the district attorney added two new counts of vehicular homicide, both class-four felonies.[6] Respondent pleaded not guilty to the charges.

A jury trial began on May 5, 2018. The district attorney agreed to bifurcate the trial and separately prosecute count 3 (driving under restraint). Three days later, the jury returned with verdicts finding Respondent guilty on all counts (counts 1, 2, 4, 5, and 6). In addition, the jury returned guilty verdicts on two late-added counts of reckless

[5] *See* Ex. 3.

[6] The charges read:

Counts 1 and 2: Vehicular Homicide, C.R.S. section 18-3-106(1). Class 3 felonies. [Respondent] unlawfully and feloniously operated or drove a motor vehicle while under the influence of alcohol, one or more drugs, or a combination of both alcohol and one or more drugs, and the conduct was the proximate cause of the death of Breona Knight (count 1) and Brandon Dobson (count 2).

Count 3: Driving Under Restraint, C.R.S. section 42-4-702. Unspecified misdemeanor. [Respondent] unlawfully operated or drove a motor vehicle upon a highway with knowledge that his license or driving privilege was under restraint.

Count 4: Failure to Yield Right of Way, C.R.S. section 42-4-702. Traffic offense. [Respondent] drove a vehicle upon a highway, intending to turn to the left within an intersection or onto an alley, private road or driveway, and unlawfully failed to yield the right of way to a vehicle approaching from the opposite direction and which was within the intersection or so close thereto as to constitute an immediate hazard.

Counts 5 and 6: Vehicular Homicide, C.R.S. section 18-3-106(1)(a). Class 4 felonies. [Respondent] unlawfully and feloniously operated or drove a motor vehicle in a reckless manner, and the conduct was the proximate cause of death of Breona Knight (count 5) and Brandon Dobson (count 6).

manslaughter, which charged Respondent with recklessly causing the deaths of Breona Knight (count 7) and Brandon Dobson (count 8).[7] Given the jury's verdicts, the district attorney dismissed count 3. On July 23, 2018, Respondent was sentenced to twelve years in the custody of the Department of Corrections ("DOC"), with five years of mandatory parole.[8]

Respondent's criminal conduct violated C.R.C.P. 251.5(b), which states that any criminal act that reflects adversely on a lawyer's fitness to practice is grounds for discipline, and Colo. RPC 8.4(b), which states that it is professional misconduct for a lawyer to commit any criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*")[9] and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.[10] When imposing a sanction after a finding of lawyer misconduct, the Court must consider the duty violated, the lawyer's mental state, and the actual or potential injury caused by the misconduct. These three variables yield a presumptive sanction that may be adjusted based on aggravating and mitigating factors.

ABA *Standard* 3.0 – Duty, Mental State, and Injury

Duty: Respondent violated his duty to the public to abide by the criminal laws of the state and to maintain standards of personal integrity when he recklessly drove his minivan while under the influence of drugs and alcohol, causing the death of two people.[11]

Mental State: Respondent was convicted of recklessly causing the deaths of Knight and Dobson. The Court cannot look behind that finding. Accordingly, it adopts the finding here, while adding that Respondent knowingly created the circumstances that resulted in this tragedy.

Injury: Because of Respondent's conduct, Knight and Dobson—both in their early twenties at the time of the crash—died untimely and horrific deaths. Brian Sugioka, Chief

[7] These class-four felonies were charged under C.R.S. section 18-3-104(1)(a).

[8] *See* Ex. 2 Respondent was sentenced as follows: Count 1 – Vehicular Homicide DUI: 6 years in DOC with 5 years of mandatory parole. Count 2 – Vehicular Homicide DUI: 6 years in DOC with 5 years mandatory parole. Sentence is consecutive to count 1. Count 4 – Failure to Yield Right of Way: $100.00 fine. Count 5 – Vehicular Homicide Reckless Driving: 6 years in DOC. Sentence is concurrent to count 1. Count 6 – Vehicular Homicide: 6 years in DOC. Sentence is concurrent to count 1. Added count 7 – Manslaughter Reckless: 6 years in DOC. Sentence is concurrent to count 1. Added count 8 – Manslaughter Reckless: 6 years in DOC. Sentence is concurrent to count 1.

[9] Found in ABA Annotated Standards for Imposing Lawyer Sanctions (2015).

[10] *See In re Roose,* 69 P.3d 43, 46-47 (Colo. 2003).

[11] *See In re Curran*, 801 P.2d 962, 969 (Wash. 1990) (commenting that lawyers convicted of crimes involving the violent death of victims brings disrepute to the bar that "undermines the respect for legal institutions which undergirds voluntary compliance with the law").

Deputy District Attorney in the 18th Judicial District and lead prosecutor in Respondent's case, testified about the crushing, long-lasting emotional impact of Respondent's actions on Dobson's and Knight's family members. According to Sugioka, who has kept in contact with the families of these victims, Knight's death has been "utterly devastating" to members of her family; he observed that it is "obvious this event weighs on them every second of every day." Sugioka also attested to the number of times Dobson's family, who were vocal, proactive, and present for almost every significant legal milestone in Respondent's criminal case, "shed tears" in his presence. Although their deep religious faith has helped them to find "some degree of peace," he remarked, they have lost their son—a wrong that can never be made right.

ABA *Standards* 4.0-7.0 – Presumptive Sanction

The ABA *Standards* do not squarely address the conduct at issue in this case. Though two standards arguably could be applicable, neither is an unimpeachable fit.

ABA *Standard* 5.12 states that suspension is generally warranted when a lawyer knowingly engages in criminal conduct that does not involve the elements listed in ABA *Standard* 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.[12] Although the People declare, without additional discussion, that the presumptive sanction here is suspension under ABA *Standard* 5.12, offenses involving driving while impaired—even when those offenses result in serious bodily injury—have not in the past been deemed in Colorado to "seriously" adversely reflect on a lawyer's fitness to practice law. For example, in *In re Kearns*, the Colorado Supreme Court agreed with a hearing board's finding that, given the pertinent facts in that case, a lawyer's conduct—striking a motorcyclist while driving with a BAC of 0.161, causing the motorcyclist life-threatening injuries and leading to convictions of DUI and felony vehicular assault—adversely (but not seriously adversely) reflected on the lawyer's fitness to practice.[13]

ABA *Standard* 5.13, on the other hand, provides that public censure is the presumptive sanction when a lawyer knowingly engages in other conduct that does not contain the elements listed in ABA *Standard* 5.11 yet that involves dishonesty, fraud, deceit, or misrepresentation, and that adversely reflects on the lawyer's fitness to practice. In this case, however, dishonesty, fraud, deceit, or misrepresentation are not present.

The Court follows *Kearns* and concludes that Respondent's criminal conduct and conviction adversely—but not *seriously* adversely—reflect on his fitness to practice law. But that does not end the inquiry. Though the *Kearns* court abstained from characterizing the criminal conduct in that case as a seriously adverse reflection on the lawyer's fitness, neither

[12] The elements listed in *Standard* 5.11 include dishonesty, theft, sale of controlled substances, intentional killing, and other elements that do not apply here.

[13] 991 P.2d 824, 826 (Colo. 1999); *see also People* v. *Fahselt,* 807 P.2d 586, 588 (Colo. 1991) (stating that a lawyer's decision to operate a vehicle without insurance while intoxicated, injuring innocent parties, "reflects upon the [lawyer's] fitness to practice law").

did it explicitly identify a presumptive standard for substance-related vehicular assaults, signaling that it had not necessarily pegged such offenses to any particular *Standard*. *Kearns* elided fixing a presumptive sanction, instead arriving at its ultimate sanctions decision by focusing on the compelling mitigation and the fact that the crimes at issue were strict liability offenses devoid of a culpable mental state.[14] This Court thus interprets *Kearns* as affording it latitude to choose between ABA *Standards* 5.12 and 5.13 as to driving-related criminal offense cases, while giving particular consideration to the nature of the criminal conviction.

As between ABA *Standards* 5.12 and 5.13, the Court chooses ABA *Standard* 5.12 to begin its analysis in this case, for four reasons. First, unlike in *Kearns*, some counts of which Respondent was convicted were not strict liability offenses—they carried a culpable mental state of recklessness. Second, motley annotations to the ABA *Standards* provide no compelling reason to select ABA *Standard* 5.13 in this instance.[15] Third, the Court is swayed by a line of cases in some sister jurisdictions identifying suspension as a starting point in sanctions analyses in vehicular assault cases.[16] And fourth, reliance on ABA *Standard* 5.12 best harmonizes the selection of a presumptive sanction with rules governing the treatment of felonies in the Colorado disciplinary system.[17]

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[14] *In re Kearns*, 991 P.2d at 827.

[15] *Compare Annotated Standards for Imposing Lawyer Sanctions* at 258 (responding to the inexact correspondence between these ABA *Standards* and various types of criminal conduct by noting that "[i]f the criminal misconduct [at issue] is deemed to only 'adversely' reflect on fitness to practice law and not 'seriously adversely' reflect on fitness, courts may apply a [standard other than *Standard* 5.12]—often *Standard* 5.13.") *with Annotated Standards for Imposing Lawyer Sanctions* at 262 ("Some courts draw a distinction between *Standard* 5.12 and 5.13 by interpreting the term 'other conduct' in *Standard* 5.13 to mean noncriminal conduct.").

[16] *See, e.g., In re Steiner*, 817 A.2d 793, 797 (Del. 2003) (where a lawyer knowingly drove a car while intoxicated, causing significant injuries to two people, and pleaded guilty to misdemeanor offenses of second-degree vehicular assault and DUI, holding that "[u]nder the circumstances, ABA *Standard* 5.12 mandates a period of suspension"); *Ky. Bar Ass'n v. Jones*, 759 S.W.2d 61, 62 (Ky. 1988) (suspending a lawyer for two years for conduct adversely reflecting on fitness to practice when the lawyer was convicted of felony reckless homicides after driving drunk); *Office of Disciplinary Counsel v. Michaels*, 527 N.E.2d 299, 299-301 (Ohio 1988) (suspending a lawyer for eighteen months for engaging in conduct adversely reflecting on fitness to practice by causing an automobile accident with a BAC of 0.212, resulting in several serious injuries, one fatal); *In re Curran*, 801 P.2d at 974 (collecting cases and commenting that "[b]ecause every court which has considered the matter under rules similar to ours in the array of sanctions available for felonies has suspended an attorney for vehicular homicide, we hold that this is the appropriate sanction for every vehicular homicide").

[17] As alluded to above, the ABA *Standard* 5.1 series fails to provide an adequate framework to identify a presumptive sanction for felonies not adjudged to seriously reflect on a lawyer's fitness to practice law, which could lead a court to begin with a presumptive sanction of public censure for such felonies. But existing Colorado disciplinary rules deem all felonies a "serious crime," and current disciplinary procedure mandates that the People report to the Colorado Supreme Court any lawyer who has been convicted of a felony, triggering automatic immediate suspension procedures. *See* C.R.C.P. 251.20(d)-(e); *accord* ABA *Model Rules of Disciplinary Enforcement* Rule 19(B)-(C). As the Court sees it, these two authorities working in tandem could create a disconnect in outcomes, whereby a lawyer convicted of a certain type of felony could face immediate suspension, only later to be effectively reinstated and publicly censured for the same misconduct. For this reason, it may be that felony conduct not captured by *Standard* 5.11—regardless of how the felony reflects on the lawyer's fitness to practice—generally should be met with a presumptive sanction of suspension.

ABA *Standard* 9.0 – Aggravating and Mitigating Factors

Aggravating circumstances include any considerations or factors that may justify an increase in the degree of the presumptive sanction to be imposed, while mitigating circumstances may warrant a reduction in the severity of the sanction.[18] Three aggravating factors, one of which is accorded great weight, applies here, though the People have urged—and the Court has declined—application of several other aggravating factors, as discussed below. One significant mitigating factor is present.

Aggravating Factors

Prior Disciplinary Offenses – 9.22(a): Respondent has a lengthy and serious disciplinary history. The Court gives significant aggravating weight to this history, not because it is akin to Respondent's misconduct in this case but because it evidences Respondent's cavalier attitude toward observing legal rules and norms.

In an investigatory matter, Respondent was privately admonished in December 2003 for failing to keep records of items deposited in his trust account. In case number 02PDJ084 (consolidated with case numbers 03PDJ092, 04PDJ038, and seven separate matters under investigation), Respondent was suspended for one year and one day, effective July 31, 2004. Respondent was disciplined for, among other things, neglect of client matters, failure to communicate, incompetence, trust account violations, failure to adequately supervise a nonlawyer, and failure to take steps to preserve client interests upon termination.[19] In case number 04PDJ018 (consolidated with case numbers 04PDJ119, 05PDJ016, 05PDJ033, and 05PDJ037), Respondent was suspended for a period of three years, effective July 7, 2006, for wide-ranging misconduct in fourteen separate client matters.[20] Respondent stipulated that he neglected client matters, failed to communicate with clients, failed to keep his property separate from the funds of others, failed to take steps to preserve client interests on termination, practiced law in violation of his suspension order, and acted dishonestly.[21] Respondent's law license has remained suspended since July 31, 2004. He has not sought reinstatement to the practice of law.

Intentional Failure to Comply with Rules of the Disciplinary Agency – 9.22(e): Respondent failed to notify the People of his conviction, a fact the Court gives moderate aggravating weight.

Refusal to Acknowledge Wrongful Nature of Conduct – 9.22(g): The People argue that because Respondent has repeatedly asserted he is not legally at fault for Knight and Dobson's deaths, he should be deemed to have refused to acknowledge the wrongful

[18] *See* ABA *Standards* 9.21 & 9.31.
[19] *See* Ex. 4.
[20] *See* Ex. 5.
[21] *See* Ex. 5.

nature of his conduct. During argument at the sanctions hearing, Respondent expressed "outrage[]" that the People would accuse him of lacking remorse, insisting that he "think[s] about it [seeing two people die in front of him] day and night." He draws the distinction, however, between regretting Dobson's and Knight's deaths and accepting legal responsibility for that outcome, arguing that he was convicted based on faulty evidence and procedure, grounds on which he is currently appealing. The Court declines to apply this aggravator. Respondent is entitled to make legal arguments in support of his appeal and should not be penalized for exercising his right to do so.[22]

Vulnerability of Victim – 9.22(h): The People advance the argument that Knight and Dobson were vulnerable because they were unable to protect or defend themselves against Respondent's misconduct. But the People do not shoulder their burden of showing why this aggravator should apply; they provide no argument and cite no case law. Nor did they elicit testimony or offer evidence to show that these two victims fall into any of the traditional categories of vulnerability: the elderly or children, those facing an unequal power relationship, those who suffer from an physical or mental disability or impairment, or those who lack sophistication.[23] The Court will not consider this a factor in aggravation.

Substantial Experience in the Practice of Law – 9.22(i): Respondent was admitted as a Colorado lawyer in 1993 and practiced until 2004. At the time of the crash, Respondent's law license had been suspended for about twelve years—longer than the length of time he held an active Colorado license. Given this, and given that Respondent's criminal conviction shares no meaningful nexus here with his legal acumen or experience, this factor is irrelevant to his violation of Colo. RPC 8.4(b).[24]

Indifference to Making Restitution – 9.22(j): The People seek to apply this aggravator because Respondent fought the payment of restitution in his criminal matter. The Court will not apply this factor in aggravation. Respondent should be free to vigorously litigate his criminal case without fearing adverse consequences in his disciplinary proceeding.

Illegal Conduct – 9.22(k): That Respondent's conduct was illegal merits weight in aggravation.

Mitigating Factors

Imposition of Other Penalties or Sanctions – 9.32(k): Respondent has been sentenced to twelve years in the custody of the DOC and another five on mandatory parole. This

[22] Though the Court will not apply this aggravator, it likewise refuses to credit Respondent with the antipodal mitigator of remorse, as he has not supplied evidence or testimony to support its use.
[23] *Annotated Standards for Imposing Lawyer Sanctions* at 437-42.
[24] *See In re Hickox*, 57 P.3d 403, 407 (Colo. 2002) (agreeing with a hearing board in a domestic violence case that the respondent's substantial experience in the practice of law was "not relevant since greater or lesser experience would not necessarily make the misconduct at issue . . . less likely").

lengthy prison sentence, coupled with Respondent's "disqualification from practicing law during his incarceration," is a mitigating factor that merits significant weight.[25]

Analysis Under ABA *Standards* and Colorado Case Law

The Court recognizes the Colorado Supreme Court's directive to exercise discretion in imposing a sanction and to carefully apply aggravating and mitigating factors,[26] mindful that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[27] Though prior cases can be instructive, the Court is charged with determining the appropriate sanction for a lawyer's misconduct on a case-by-case basis.

Beginning with a presumptive sanction of suspension under ABA *Standard* 5.12, the People ask the Court to disbar Respondent, citing a considerable preponderance of aggravating over mitigating factors to justify an upward deviation from that presumption. At the hearing, Respondent chose not to engage as to the question of sanctions, instead criticizing the handling of the underlying criminal trial and, by extension, his conviction.

The Colorado Supreme Court has publicly censured lawyers, such as in *Kearns* and *Fahselt*, who have seriously injured others while driving under the influence.[28] In *Kearns*, a lawyer who was driving with a BAC of 0.161 failed to obey a stop sign at an intersection and struck a motorcyclist with his truck, leaving the motorcyclist with life-threatening injuries and a permanent speech impediment.[29] Kearns was convicted of a class-four felony of vehicular assault and two counts of DUI; he was sentenced to three years in prison and two years of mandatory parole.[30] The Colorado Supreme Court deemed Kearns's misconduct "very serious" but concluded that significant mitigation—at least five enumerated factors and no aggravators—made public censure appropriate.[31] At least one member of the *Kearns* court, however, would have imposed a more severe sanction.[32]

In *Fahselt*, the Colorado Supreme Court likewise approved a sanction of public censure where Fahselt, who was driving without automobile insurance but with a BAC of 0.122, struck another vehicle, severely injuring Fahselt's two passengers and injuring the driver of the other vehicle.[33] Fahselt was convicted of a class-five felony of vehicular assault,

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[25] *In re Kearns*, 991 P.2d at 827.
[26] *See In re Attorney F.*, 2012 CO 57, ¶ 15; *In re Fischer*, 89 P.3d 817, 822 (Colo. 2004) (finding that a hearing board had overemphasized the presumptive sanction and undervalued the importance of mitigating factors in determining the needs of the public).
[27] *In re Attorney F.*, ¶ 20 (quoting *In re Rosen*, 198 P.3d 116, 121 (Colo. 2008)).
[28] *In re Kearns*, 991 P.2d at 825-26; *Fahselt*, 807 P.2d at 586-87. The People cited neither of these cases in their hearing brief. Notably, in a different case on default, the Colorado Supreme Court suspended a lawyer for one year and one day who drove with a BAC of 0.117 but caused no injury, and who later failed to appear in county court on a charge of DUI. *People v. Myers*, 969 P.2d 701, 702 (Colo. 1998).
[29] *In re Kearns*, 991 P.2d at 825.
[30] *Id.*
[31] *Id.* at 825-26.
[32] *Id.* at 826.
[33] *Fahselt*, 807 P.2d at 586-87.

a misdemeanor offense of DUI, a class-two traffic offense of reckless driving, and a charge of failure to maintain compulsory insurance.[34] Fahselt was sentenced to a several-year period of probation with conditions, a suspended sentence of five days in county jail, and 304 hours of community service.[35] The *Fahselt* majority concluded that at least six mitigating factors but no aggravating factors pertained, and it deemed public censure appropriate.[36] The dissent opined that a suspension for two to three years would have been warranted but for the overwhelming number of aggravators, which justified reducing the sanction to a suspension of one year.[37]

Finally, the Court notes that a Colorado hearing board suspended a lawyer for two years after the lawyer killed a motorcyclist while driving drunk, even though the hearing board applied just one aggravating factor and seven mitigating factors.[38] While this hearing board opinion is by no means precedential, the Court considers it for purposes of proportionality in levying a sanction here.

In this case, Respondent committed serious criminal misconduct and killed two young people. He has been sentenced to twelve years in the custody of the DOC—a testament to the opprobrium with which the criminal justice system views his misconduct. Unlike in *Kearns* and *Fahselt*, aggravating factors predominate in this case, most notably Respondent's extensive prior discipline, from which he has not sought to reinstate his law license. With these considerations, the Court concludes that a three-year period of suspension is warranted.

III. CONCLUSION

Respondent was convicted of causing two fatalities, an outgrowth of his decision to drive under the influence of a combination of alcohol and drugs. His law license will be suspended for a period of three years.

IV. ORDER

The Court therefore **ORDERS**:

1. **MATTHEW SAMUEL SMITH**, attorney registration number **22681**, will be **SUSPENDED** from the practice of law for a period of **THREE YEARS**. The

[34] *Id.* at 587.
[35] *Id.*
[36] *Id.* at 588.
[37] *Id.* at 589.
[38] *People v. Miranda*, 168 P.3d 11, 13-15 (Colo. O.P.D.J. 2007).

suspension **SHALL** take effect only upon issuance of an "Order and Notice of Suspension."[39]

2. To the extent applicable, Respondent **SHALL** promptly comply with C.R.C.P. 251.28(a)-(c), concerning winding up of affairs, notice to parties in pending matters, and notice to parties in litigation.

3. Respondent also **SHALL** file with the Court, within fourteen days of issuance of the "Order and Notice of Suspension," an affidavit complying with C.R.C.P. 251.28(d), requiring an attorney to file an affidavit with the Court setting forth pending matters and attesting, *inter alia*, to notification of clients and other jurisdictions where the attorney is licensed.

4. The parties **MUST** file any posthearing motions **on or before Tuesday, April 23, 2019**. Any response thereto **MUST** be filed within seven days.

5. The parties **MUST** file any application for stay pending appeal **on or before Tuesday, April 30, 2019**. Any response thereto **MUST** be filed within seven days.

6. Respondent **SHALL** pay the costs of this proceeding. The People **SHALL** file a statement of costs **on or before Tuesday, April 23, 2019**. Any response thereto **MUST** be filed within seven days.

DATED THIS 9th DAY OF APRIL, 2019.

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WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

Copies to:

Geanne R. Moroye Office of Attorney Regulation Counsel	Via Email g.moroye@csc.state.co.us
Matthew Samuel Smith Respondent DOC Number 181486 Crowley County Correctional Facility P.O. Box 100 Olney Springs, CO 81062	Via First-Class Mail

[39] In general, an order and notice of sanction will issue thirty-five days after a decision is entered under C.R.C.P. 251.19(b) or (c). In some instances, the order and notice may issue later than thirty-five days by operation of C.R.C.P. 251.27(h), C.R.C.P. 59, or other applicable rules.

Matthew Samuel Smith
6936 S. Franklin Street
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Cheryl Stevens
Colorado Supreme Court

Via Hand Delivery