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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 27, 1998

Adelaide D. Kline, Esquire
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SC Department of Insurance
Post Office Box 100105
Columbia, South Carolina 29202-3105

Re: Informal Opinion

Dear Ms. Kline:

You have asked for an opinion as to whether indecent exposure is a crime of moral turpitude.

Law / Analysis

Moral turpitude is defined by the South Carolina Supreme Court as

> an act of baseness, vileness, or depravity which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

State v. Horton, 271 S.C. 413, 414, 248 S.E.2d 263 (1978); see also, State v. Morris, 289 S.C. 294, 345 S.E.2d 477 (1986); State v. Drakeford, 290 S.C. 338, 350 S.E.2d 391 (1986); State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982). See also, Ops. Atty. Gen., March 20, 1991, January 23, 1991, March 6, 1990, June 13, 1989 and March 11, 1988. Moral turpitude is adaptive to the public morals at a give time, 58 C.J.S. Moral, p. 1201 and "implies something immoral in itself, regardless of whether it is punishable by law as a crime." State v. Horton, supra, 248 S.E.2d at 263 (1978). In State v. Bailey, 275 S.C. 444, 272 S.E.2d 439 (1980), the South Carolina Supreme Court noted that the crime

Request Letter.

of assault and battery "... does not ... invariably constitute a crime of moral turpitude, since that determination depends on the facts of each particular case." 275 S.C. at 446. This is consistent with the general law that

> ... the question of moral turpitude depends not only on the nature of the offense, but also on the attendant circumstances. The standard is public sentiment, and this may change as the moral views and opinions of the public change.

21 Am.Jur.2d, Criminal Law, § 23, p. 138.

Courts which have examined the question of whether the crime of indecent exposure constitutes moral turpitude have split on the issue. Compare, Chrisman v. Com., 3 Va. App. 89, 348 S.E.2d 399 (1986) [not moral turpitude]; Ricketts v. State, 291 Md. 701, 436 A.2d 906 (1981) [not moral turpitude] with Polk v. State, 865 S.W.2d 627 (Tex. Ct. App. 1993) [moral turpitude]; People v. Ballard, 13 Cal. App. 4th 687, 16 Cal. Reptr. 2d 624 (1993) [moral turpitude]; Brun v. Lazzell, 172 Md. 314, 191 A. 240, 243, 109 A.L.R. 1453 [moral turpitude]; Kravis v. Hock, 135 N.J.L. 259, 51 A.2d 441, 442 [moral turpitude].

In Polk, the Court offered the following rationale for its conclusion that indecent exposure constituted a crime of moral turpitude:

> [m]oral turpitude has been defined to include acts which are base, vile or depraved. See Searcy v. State Bar of Texas, 604 S.W.2d 256, 258 (Tex. Civ. App. - San Antonio 1980, writ ref'd n.r.e.). This definition does not cover all instances of one publicly exposing his anus or genitals. ... However, one guilty of indecent exposure, by his intent to sexually arouse either himself or another, acts upon motives of baseness, vileness or depravity. We hold the "intent to arouse or gratify sexual desire of any person" is the element which makes the offense of indecent exposure one of moral turpitude.

865 S.W.2d at 629.

Likewise, in Ballard the California Court distinguished the Virginia case of Chrisman.

> [a]ppellant wrongly relies upon a decision by the Court of Appeals of Virginia. ... Chrisman did not deal with impeachment for a felony requiring proof of lewdness and intentional exposure to others for the purpose of arousal; it dealt instead with a Virginia misdemeanor which apparently criminalized mere public nudity, since the court observed that Lady Godiva could have been convicted of this misdemeanor for riding through Coventry clad only in her hair--even though her motives were chaste and pure, since she did so as a form of medieval charitable fund raising. (Id., 348 S.E.2d at 404.) Appellant, however, is clearly no Lady Godiva.

13 Cal. App. 4th at 695.

The cases from Maryland are somewhat inconsistent. The Court in Ricketts distinguished the Lazzell decision as follows:

> [i]n Lazzell a dentist contested the revocation of his license to practice dentistry by the Board of Dental Examiners on the basis of three prior convictions of indecent exposure. The Board based its action on a statute allowing it to cancel the registration and certificate of a dentist upon a showing that he was convicted of a crime involving moral turpitude. The dentist alleged that indecent exposure was not a crime of moral turpitude and that, therefore, the Board's action was illegal.
>
> The Lazzell Court first noted that while moral turpitude may not be hard to define, characterizing offenses as involving moral turpitude was a different matter. After listing a compendium of cases where offenses were adjudged as involving moral turpitude the Court said that "it has been decided that moral turpitude is not involved in a charge unless it is intentional or not innocent in its purpose, or not accidental (citations omitted)." 172 Md. at 322, 191 A. 240. The Court then found that the facts showed that the dentist's conduct had been public and intentional and that "it require(d) no discussion to argue or prove that the offense (indecent exposure) is so base, vile, and shameful as to leave the

offender not wanting in depravity, which the words 'moral turpitude' imply." 172 Md. at 321, 191 A. 240.

The first and most fundamental distinction we note between Lazzell and the case at bar is that the Court in Lazzell was assessing the propriety of a licensing board's determinations whereas here we are concerned with the cross-examination of a defendant in a criminal trial. In Lazzell the question was whether a dentist had violated the ethical standards of his profession. In the case sub judice the question is whether the conviction was relevant to an assessment of the credibility of a criminal defendant. Therefore, the light under which the conviction is examined as well as the effect it would produce on the examiners is drastically different. A second basic difference is that the Board of Examiners in Lazzell was apprised of the circumstances attending Lazzell's conviction. In the instant case there is no such factual background. Because of these differences and because of the unique aspects of the criminal trial process, we decline to apply the holding of Lazzell to the instant circumstances. However, while Lazzell may not be a controlling precedent in our present inquiry, the case is instructive.

The Lazzell Court found that conduct must be "intentional" and "not accidental" to constitute moral turpitude. 172 Md. at 322, 191 A. 240. We agree. Accidental or negligent conduct cannot be perceived as indicating the requisite depravity and baseness normally associated with the term of moral turpitude. Since in a criminal proceeding the jury is not allowed to investigate into the circumstances of a conviction, merely referring to a prior indecent exposure conviction does not tell them how socially reprehensible the conduct is.

At this point, then, our conclusion is obvious. Indecent exposure is a general intent crime that includes within its scope an innumerable variety of offenses, including acts that are reckless or negligent. As such its meaning is entirely too

> unspecific to warrant the appellation of a crime of moral turpitude, at least in the context with which we are concerned.

436 A.2d at 911-912.

In Privitera v. Town of Phelps, 79 A.D.2d 1, 435 N.Y.S.2d 402 (1981), the Court noted that indecent exposure was a good example of a crime of moral turpitude "suggesting general public condemnation regardless of the term of imprisonment involved." 435 N.Y.S.2d at 404, n. 1.

In South Carolina, S.C. Code Ann. Sec. 16-15-130 codifies the common law crime of indecent exposure. Such Section provides that

> [i]t is unlawful for a person to willfully, maliciously or indecently expose his person in a public place, on property of others, or to the view of any person on a street or highway.
>
> Any person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than three years, or both.

As was stated in an Opinion of this Office, dated September 22, 1975, "[s]ince this section uses the terms 'wilful and malicious,' it is questionable whether the courts would consider nude bathing or sunbathing as violative of the law." Moreover, we recognized in Op. Atty. Gen., Op. No. 3165 (August 12, 1971) that the phrase "indecent exposure" has

> through usage developed a traditional and well settled meaning as being
>
> > ... the exhibition of those private parts of the person which instinctive modesty, human decency or self respect requires shall be customarily kept covered in the presence of others. 67 C.J.S. Obscenity, Sec. 5.

Based upon these authorities, I believe those cases which conclude that indecent exposure is a crime of moral turpitude would be controlling here. As this Office has recognized, in South Carolina, the offense of indecent exposure is not designed to cover nudity per se, but instead willful and malicious exposure of one's person in any public

place. Moreover, this Office has previously adopted a definition of indecent exposure based upon "the exhibition of those private parts of the person which instinctive modesty, human decency or self respect requires shall be customarily kept covered in the presence of others." Thus, it would appear that those cases which conclude that indecent exposure is not a crime of moral turpitude are distinguishable from the South Carolina definition. Instead, those cases which conclude that indecent exposure is an offense involving moral turpitude are, in my view, more in line with South Carolina. Accordingly, it is my opinion that our courts would conclude that indecent exposure is a crime of moral turpitude.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an