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February 12, 1991

Robert M. Stewart, Chief
South Carolina Law
Enforcement Division
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Dear Chief Stewart:

You have requested an opinion as to whether the offenses of pointing a firearm and resisting arrest are crimes of moral turpitude. In reference to the offense of pointing a firearm, S.C. Code Ann. § 16-23-410 provides that

> (i)t shall be unlawful for any person to present or point at any other person any loaded or unloaded firearm and, upon conviction therefor, any such person shall be punished by fine or imprisonment, in the discretion of the court. Nothing contained herein shall be construed to abridge the right of self-defense or to apply to theatricals or like performances.

Moral turpitude is defined as:

> ... an act of baseness, vileness, or depravity in the private and social duties 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. Yates, 280 S.C. 29, 310 S.E.2d 805, 810 (1982), citing State v. Horton, 271 S.C. 413, 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). See also Ops. Atty. Gen. March 6, 1990, June 13, 1989, and March 11, 1988.

In determining whether a crime involves moral turpitude, one looks, not to instances involving self-destructive behavior but, rather, instances where

> the duty to society and fellow man ... is breached by the commission of the crime ...

State v. Ball, 292 S.C. 71, 73, 354 S.E.2d 908 (1987). This Office has previously opined that a

> decision on if a specific offense involves moral turpitude is not made by deciding if the offense is a felony or a misdemeanor or even a crime, as an act may involve moral turpitude even if not a crime. 58 C.J.S. Moral p. 1203. The decision is based on if the offense is "...immoral in itself, without reference to any legal prohibition." 21 AM. JUR. 2d Criminal Law, §24.

While there appears to be no South Carolina authority as to whether pointing a firearm is a crime of moral turpitude, there is authority finding that similar offenses are not. See Taylor v. State, 258 S.C. 369, 188 S.E.2d 850 (Possession of unlawful weapon is not a crime of moral turpitude); State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980) (Possession of unlawful weapon is not a crime of moral turpitude); State v. Spinks, 260 S.C. 404, 196 S.E.2d 313 (1973), (Carrying a pistol is not crime of moral turpitude). This question, however, was addressed in Mississippi where it was determined not to be a crime involving moral turpitude. The Mississippi Court found that pointing a firearm was not naturally evil but was prohibited by statute in order to prevent an act which may be dangerous. Barnes v. State, 249 So.2d 383 (Miss. 1971). The offense of pointing a firearm described in S.C. Code Ann. § 16-23-410 is not per se immoral. It is the opinion of this Office that it is not a crime of moral turpitude.

You also ask whether the offense of resisting arrest is a crime of moral turpitude. S.C. Code Ann. § 16-9-320 provides that

> Any person who knowingly and wilfully:
>
> (a) Opposes or resists any law enforcement officer in serving, executing or attempting to serve or execute any legal writ or process or who resists any lawful arrest, whether under process or not, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than five hundred dollars nor more than one thousand dollars or imprisoned not more than one year, or both;

> (b) Assaults, beats or wounds any law enforcement officer engaged in serving, executing or attempting to serve or execute any legal writ or process or who assaults, beats or wounds such officer when such person is resisting any lawful arrest, whether under process or not, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one thousand dollars nor more than ten thousand dollars or imprisoned for not more than ten years, or both.

The statute clearly distinguishes in the penalty provisions between "non-violent resistance" and use of force against a law enforcement officer. McAninch and Fairey, The Criminal Law of South Carolina (2d ed. 1989), p. 450. The use of force was not a requisite element of the common law offense of resisting arrest, however, "'a momentary delay in responding to [an] officer's command' is not sufficient. City of Columbia v. Bouie, 239 S.C. 570, 574, 124 S.E.2d 332, 333 (1962), rev'd on other grounds, 378 U.S. 347 (1964)." Id. The statutory distinction in the use or nonuse of violence indicates that the nature and circumstances surrounding an assault offense may be important in a determination of whether an offense involves moral turpitude. State v. Bailey, 275 S.C. 444, 272 S.E.2d 439 (1980) (Whether assault and battery of a high and aggravated nature is a crime of moral turpitude depends upon the facts of the case).

> ... (T)he 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. The authority from other jurisdictions seems to indicate that a battery upon the officer is necessary prior to concluding that the crime involves moral turpitude. See Matter v. Vainio, 787 P.2d 744 (Mont. 1989) (Attorney disciplined where he was convicted of aggravated resisting of arrest requiring the physical restraint of three officers); People v. Lindsay, 257 Cal. Rptr. 529, 209 Cal. App. 3d 849 (1989) (Battery upon a peace officer is a crime of moral turpitude); See In re Frick, 694 S.W.2d 473 (Mo. banc. 1985) (Attorney who pointed and discharged weapon at security patrol is disciplined).

The only authority found in this state concerned a judicial disciplinary proceeding. In the decision, the South Carolina Supreme Court found that an arrestee's refusal to vacate an automobile

upon request which required the forcible removal by officers, the arrestee's refusal to submit to a breathalyzer, and refusal to sign an implied consent form, although a violation of the judicial canons, did not involve moral turpitude. Matter of Bradley, 278 S.C. 426, 297 S.E.2d 797 (1982). See also Spronken v. City Court of the City of Tucson, 633 P.2d 1055 (Ariz. App. 1981); McGovern v. State, 205 So.2d 247 (Ala. App. 1967). Taking into consideration the direction of the Supreme Court in Matter of Bradley, supra, it is the opinion of this Office that a conviction of S.C. Code Ann. § 16-9-320(a), which concerns non-violent resistance, does not constitute a crime of moral turpitude. It is also our opinion that in a § 16-9-320 (b) conviction, which requires use of force, a review of the surrounding facts will be necessary in order to determine whether moral turpitude is involved. This inquiry is similar to that required prior to determining whether a particular conviction for assault and battery of a high and aggravated nature constitutes a crime of moral turpitude. See State v. Bailey, supra.

We would caution, however, that the opinions regarding these offenses are not free from doubt as the issues have not been addressed by any state appellate court.

Sincerely,

Salley W. Elliott

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REVIEWED AND APPROVED BY:

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