ALAN WILSON
ATTORNEY GENERAL

December 2, 2016

Gwendolyn Fuller McGriff, Esq.
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South Carolina Department of Insurance
PO Box 100105
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Dear Ms. McGriff:

Attorney General Alan Wilson has referred your letter dated September 29, 2016 to the Opinions section regarding whether a former official who pled guilty to the common law offense of misconduct in office has been conviction of a crime of moral turpitude. The indictment, which is a public record, states as follows:

> [The Official] did willfully and unlawfully breach the duty of accountability to the public by failing to properly and faithfully discharge the duties of his office, in that while effecting the arrest of an individual,... he willfully and unlawfully used deadly force, to wit: shooting and killing [said individual], when the use of deadly force was not necessary, thereby violating the Common Law of the State of South Carolina.

The sentence sheet indicates that the official pled guilty to the charges as indicted.

Law/Analysis

As noted in your letter, this Office has issued several opinions on whether certain crimes are considered crimes of moral turpitude. We have previously described how our state courts define the term as follows:

> A crime of moral turpitude is defined by the Supreme Court of South Carolina as:
>
> > . . . an act of baseness, vileness or depravity in the private and social duties that 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.
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> State v. Smith, 194 S.C. 247, 259, 9 S.E.2d 584 (1940); State v. Horton, 271 S.C. 413, 238 S.E.2d 263 (1978); State v. Lilly, Supreme Court of South Carolina, Op.No. 21840 (January 4, 1983). Usually, a crime of moral turpitude is an offense mala in se, i.e., 'immoral in itself', as opposed to one which is mala prohibitum, prohibited by law. State v. Horton, supra; Op.Atty.Gen. (March 18, 1983, letter to the Honorable Richard W. Riley).

Op. S.C. Atty. Gen., 1983 WL 181876 (May 5, 1983). The Supreme Court of South Carolina has said that the common law offense of "[m]isconduct in office occurs when duties imposed by law have not been properly and faithfully discharged." State v. Hess, 279 S.C. 14, 20, 301 S.E.2d 547, 550 (1983). And further, such conduct must be done willfully and dishonestly. Id.

This Office has opined that both the statutory and common law offences of misconduct in office may constitute a crime of moral turpitude. Ops. S.C. Atty. Gen., 2014 WL 2538230 (May 12, 2014) (examining S.C. Code Ann. § 8-1-80); 2004 WL 736932 (March 16, 2004) (examining the common law offense of misconduct in office). The determination of whether misconduct in office is a crime of moral turpitude will depend on whether the violation of the official's duties is an offense mala in se or mala prohibitum. See Op. S.C. Atty. Gen., 1983 WL 181876 (May 5, 1983). Therefore, we will look to the facts alleged in the indictment to determine if the subject misconduct constitutes an offense involving moral turpitude. Id.

It is this Office's opinion that the unlawful use of deadly force sufficient to constitute misconduct in office would constitute a crime of moral turpitude. As quoted above, the indictment states that the official "willfully and unlawfully used deadly force, to wit: shooting and killing [said individual], when the use of deadly force was not necessary." In Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), the Supreme Court of the United States considered whether a police officer's use of deadly force on an unarmed fleeing suspect was a violation of the Fourth Amendment of the Constitution of the United States. In balancing the reasonableness of the use of deadly force against competing interests in effective law enforcement, the Court stated:

> The use of deadly force... frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.... [It] is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion.

Garner, 471 U.S. at 10. As in Garner, the facts described in the subject indictment demonstrate that the official's actions frustrated society's interest in a judicial determination of the individual's guilt.

In addition to violating the duty owed to society, the official violated a duty owed to the individual who he shot and killed. In Matter of McGrath, 98 Wash. 2d 337, 655 P.2d 232 (1982), reinstatement granted, 112 Wash. 2d 481, 772 P.2d 502 (1989), the Supreme Court of Washington found that knowingly firing a weapon and seriously wounding an individual was a crime of moral turpitude. McGrath was an attorney who pled guilty under a Washington statute to the crime of assault in the second degree. The statute states that second degree assault is committed when one:

> (b) Shall knowingly inflict grievous bodily harm upon another with or without a weapon; or
> (c) Shall knowingly assault another with a weapon or other instrument or thing likely to produce bodily harm;

RCW 9A.36.0202(b) and (c). The opinion states that McGrath assaulted an individual with a gun, shooting and seriously wounding him. The Court found that McGrath's conduct constituted a crime of moral turpitude in part because "it was an unjustifiable act of violence against another human being. Such violence has never been condoned under any legal system, ancient or modern." McGrath, 98 Wash. 2d at

342. The Supreme Court of South Carolina has likewise found crimes with similar elements to constitute crimes of moral turpitude. See Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991) (assault and battery with intent to kill is classified as a crime of moral turpitude); Op. S.C. Atty. Gen., 1980 WL 81989 (December 29, 1980) (opining assault with intent to kill where a firearm was pointed at an individual constitutes a crime of moral turpitude).

The facts in the indictment show that the Official, in violating his duties to the public and the individual he shot and killed, committed an act which is "contrary to the accepted and customary rule of right and duty between man and man." Smith, 194 S.C. at 259. To be clear, it is not the opinion of this Office that a police officer commits a crime of moral turpitude in every circumstance where he shoots an unarmed suspect. However, it is the opinion of this Office that a court would likely find the official, by his willful and unlawful use of deadly force sufficient to constitute misconduct in office, committed a crime of moral turpitude.

Conclusion

We hope that the guidance provided above will assist you and the South Carolina Department of Insurance in making its decision regarding the official's application for an insurance license. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any further questions or issues, please let us know.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General