ALAN WILSON
ATTORNEY GENERAL

March 16, 2016

Holly G. Pisarik, Chief Legal Counsel
State of South Carolina, Office of the Governor
1205 Pendleton Street
Columbia, SC 29201

Dear: Ms. Pisarik:

You seek an opinion regarding the Governor's authority as it relates to two specific situations. Your question is whether the Governor possesses the authority to suspend or remove individuals from office in these circumstances. By way of background, you state the following:

> **Situation One**
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> On Tuesday, March 1, 2016, our office received a sentencing sheet (attached) indicating that Richland County Councilman Kelvin E. Washington waived indictment and pled guilty to three counts of failure to file a tax return in violation of Section 12-54-44(B)(3). It has also come to our attention that he has recently been charged with felony driving under the influence with bodily injury.
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> As you are aware, pursuant to Article VI, Section 8 of the South Carolina Constitution, the Governor may suspend an officer of a political subdivision who has been indicted by a grand jury for a crime involving moral turpitude or who has waived such indictment. Further, in the case of conviction, the office shall be declared vacant and the vacancy filled as may be provided by law.
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> Specifically, we are asking whether three counts of failure to file a tax return is a crime of moral turpitude. It is our understanding that if three counts of failure to file a tax return are found to be a crime of moral turpitude and because Mr. Washington has already pled guilty, the Governor would have the mandatory duty to declare Mr. Washington's county council seat vacant to allow for a special election to fill his seat.
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> Further, we are asking whether felony driving under the influence with bodily injury is a crime of moral turpitude. We acknowledge that if it is determined that felony driving under the influence with bodily injury is a crime of moral turpitude, the Governor would not have the authority to suspend Mr.

Washington for this charge until an indictment is issued or until Mr. Washington waives indictment.

Situation Two

It has come to our attention that Lexington County Solicitor Donnie Myers was recently arrested and charged with driving under the influence and was reportedly charged previously for the same offense in 2005.

As previously stated, pursuant to Article VI, Section 8 of the South Carolina Constitution, the Governor may suspend an officer of a political subdivision who has been indicted by a grand jury for a crime involving moral turpitude or who has waived such indictment.

Specifically, we are asking whether driving under the influence in either one or two instances is a crime involving moral turpitude. We acknowledge that if it is determined that driving under the influence is a crime of moral turpitude, the Governor would not have the authority to suspend Mr. Myers for this charge until an indictment is issued or until Mr. Myers waives indictment.

Law/Analysis

In a prior opinion of this Office, we stated the following:

> [a]s our Supreme Court long ago stated: "[t]he power of removal from office ... is not an incident of the executive office, and it exists only where it is conferred by the Constitution or by the statute law, or is implied from the conferring of the power of appointment." State ex rel. Lyon v. Rhame, 925 S.C. 455, 75 S.E. 881, 882 (1912). If an officer holds office for a fixed term, summary removal is not authorized, State v. Wannamaker, 213 S.C. 1, 48 S.E.2d 601 (1948). The right to hold an office during a fixed term unless removed for cause may be overcome only by an unequivocal grant of power from the Legislature to remove at pleasure. . . .
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> Moreover, the Governor possesses no inherent power to remove or suspend from office. The Chief Executive may not remove or suspend a public officer unless the power to do so is conferred by the Constitution or statute. Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997). The power to suspend from office stands separate and apart from the power to remove and must itself be found in statutory or constitutional authority. . . .

Op. S.C. Att'y Gen., 2005 WL 1609288 (June 27, 2005).

Article VI, § 8 of the South Carolina Constitution provides in pertinent part as follows:

> [a]ny officer of the State or its political subdivisions, except members and officers of the Legislative and Judicial Branches, who has been indicted by a grand jury for a crime involving moral turpitude or who has waived such indictment if permitted by law may be suspended by the Governor until he shall have been acquitted. In case of conviction the office shall be declared vacant and the vacancy filled as may be provided by law.

In the above-referenced June 27, 2005 opinion, we summarized Art. VI, § 8 as follows:

> . . . Article VI, § 8 authorizes the Governor to suspend and remove only for crimes involving "moral turpitude." A crime of moral turpitude has been defined by our Supreme Court as ". . . an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or society, in general, contrary to the accepted and customary right and duty between man and man. . . ." State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980). As the Court noted in LaBarge, "[w]hile all crimes involve some degree of social irresponsibility, all crimes do not involve moral turpitude." 275 S.C. at 172. Most offenses involving moral turpitude ". . . seem to include some sort of dishonest behavior." McAninch and Fairey, The Criminal Law of South Carolina, 49 (2d ed. 1989).

Further, as you indicate in your letter, an arrest is insufficient for purposes of Art. VI, § 8. In Op. S.C. Att'y Gen., 2015 WL 3533905 (January 14, 2015), we explained:

> [i]n our prior opinion [June 27, 2005, supra], we determined that pursuant to Article VI, Section 8, the Governor could not suspend the school board member because she had only been arrested, she had not been indicted. The Governor could not remove her because she had not been convicted. Our understanding from your letter is that the Clarendon School District Two trustee has been arrested for petit larceny and impersonating a police officer but he has not been indicted or convicted. Therefore, we believe that he could not be suspended or removed by the Governor.

Our courts, as well as this Office, have concluded that driving under the influence (DUI) is not a crime of moral turpitude. We have also so advised with respect to Art. VI, § 8. In Op. S.C. Att'y Gen., 1984 WL 159906 (Op. No. 84-99) (August 14, 1984), for example, we concluded:

> [o]ur Supreme Court has said that a crime of moral turpitude is usually mala in se, i.e. immoral in itself as opposed to one which is mala prohibition prohibited by law. State v. Horton, supra.

> Based upon this reasoning a number of courts in other jurisdictions have concluded that driving under the influence is not a crime of moral turpitude. Diamond v. State, (Ala.) 268 So.2d 850 (1970); Traders and General Ins. Co. v. Russell, Tex. Civ. App. 99 S.W.2d 1079 (1936); Groves v. State, 175 Ga. 37, 184 S.E. 822 (1932); Flowers v. Barton County Beer Bd., (Tenn.), 302 S.W.2d 335 (1967).... As was said in the Flowers case,
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> > Driving an automobile while under the influence . . . is denounced by the statute. But it is not an act involving moral turpitude.
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> 302 S.W.2d at 339. Language in Diamond v. State, supra, is substantially similar. 268 So.2d at 853. In Diamond, the Court reasoned that since public drunkenness had been held in a previous Texas case not to constitute a crime of moral turpitude, driving under the influence was likewise not such an offense. Similarly, public drunkenness has already been expressly held by the South Carolina Supreme Court not to be a crime of moral turpitude. State v. LaBarge, supra. Thus, we believe a South Carolina court would also so conclude with respect to the crime of driving under the influence.

Indeed, the South Carolina Court of Appeals subsequently so held. In State v. Hall, 306 S.C. 293, 411 S.E.2d 441 (Ct. App. 1991), the Court, citing numerous cases, concluded that

> [i]n our view, first offense driving under the influence, although not to be condoned, cannot, be necessarily characterized as "an act of baseness, vileness or depravity in the private and social duties which man owes to his fellow man or to society in general, contrary to the customary and accepted rule of right and duty between man and man." [citing authorities]. . . . In reaching this conclusion, we note our Supreme Court has already held that public drunkenness is not a crime of moral turpitude and that the Attorney General has expressed his opinion that even third offense driving under the influence does not constitute a crime of moral turpitude. State v. LaBarge, [supra]; 1984 S.C. Atty. Gen. Op. No. 84-99 at 232.

306 S.C. at 294, 411 S.E.2d at 442 (emphasis added).

On the other hand, neither our prior opinions, nor decisions of our appellate courts, have addressed the issue of felony DUI causing great bodily injury and whether such offense is a crime of moral turpitude. The offense of felony DUI causing great bodily injury is codified at § 56-5-2945 of the Code. Such provision states in pertinent part that:

> (A) A person who, while under the influence of alcohol, drugs or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty

> imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to another person is guilty of the offense of driving under the influence, and upon conviction, must be punished . . .

The Section defines "great bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Our Supreme Court has recognized in State v. Easler, 327 S.C. 121, 133,489 S.E.2d 617, 624 (1997) that the elements of felony DUI causing great bodily injury are proof that (1) the individual drove a vehicle while under the influence of drugs or alcohol, (2) he/she did an act forbidden by law or neglected a duty imposed by law, and (3) the act proximately caused great bodily injury to another.

There is some authority which suggests that felony DUI may be different from DUI for purposes of characterization as a crime of moral turpitude. In Knapik v. Ashcroft, 354 F.3d 84 (3d Cir. 2004), an alien was convicted of the crime of attempted reckless endangerment. The Board of Immigration Appeals (BIA) concluded that such constituted a crime of moral turpitude, thereby subjecting the alien to removal. The Third Circuit reversed.

The facts in Knapik involved a guilty plea to the attempt offense arising from driving while intoxicated "at an excessive rate of speed against the flow of traffic on the Staten Island Expressway." 384 F.3d at 86. The offense of "reckless endangerment" in New York is defined as "evincing a depraved endangerment to human life, [the person] recklessly engages in conduct which creates a grave risk of death to another person." The Third Circuit, while concluding that an attempted reckless endangerment was not necessarily a crime of moral turpitude, stated the following regarding reckless endangerment:

> [w]e hold that the BIA did not act unreasonably in concluding New York's first degree reckless endangerment statute is a crime involving moral turpitude. First degree reckless endangerment is a much more severe offense than drunk driving which almost certainly does not involve moral turpitude. See Matter of Lopez-Meza, 22 I.E.N. Dec. 1188 (BIA 1999) (expressing opinion that a "simple DUI offense will almost never rise to the level of moral turpitude) cf. Dalton v. Ashcroft, 257 F.3d 200, 205-06 (2d Cir. 2001) (concluding that New York's "driving while intoxicated" statute does not constitute a "crime of violence" under the INA). New York Penal Law 120.25 contains aggravating factors, requiring that a dependent create a "grave risk of death to another person" under circumstances evincing depraved indifference to human life." In this context, the BIA could reasonably conclude that the elements of depravity, recklessness and grave risk of death, when considered together implicate accepted rules of morality and the duties owed to society. Cf. Franklin, 72 F.3d at 573 ("In the framework of our deferential review, we cannot say the BIA has gone beyond the bounds of

> reasonableness in finding that an alien who recklessly causes the death of her child by consciously disregarding a substantial and unjustifiable risk to life has committed a crime of moral turpitude.").

384 F.3d at 90.

As noted above, one of the elements of felony DUI causing great bodily injury is that "he/she did an act forbidden by law or neglected a duty imposed by law. . . ." Thus, consistent with the Court's analysis in Knapik, and depending upon the particular facts involved, a court could determine that felony DUI causing great bodily injury, unlike DUI, is a crime of moral turpitude. Based upon the particular facts, the "act forbidden by law" or the neglect "of duty imposed by law" could rise to the level of an "'act of baseness, vileness or depravity in the private and social duties which man owes to his fellow man or to society in general, contrary to the customary and accepted rule of right and duty between man and man.'" State v. Hall, supra. See also Franklin v. Immigration and Naturalization Service, 72 F.3d 571, 573 (8th Cir. 1995) ["Indeed, two other federal circuits have accepted the BIA's finding of moral turpitude in criminally reckless conduct that is defined as the conscious disregard of a substantial and unjustifiable risk."] Based upon the elements of felony DUI causing great bodily injury and depending upon the facts, we believe a court could determine that felony DUI constitutes a crime of moral turpitude.

Because this question remains unsettled, we need not base our conclusion herein upon this reasoning, however. You also note in your letter that Mr. Washington has already pled guilty to failure to file tax returns for three consecutive years. Based upon our reasoning and authorities below, we conclude that such offense is a crime of moral turpitude and that conviction for such offenses results in vacation of the office of Mr. Washington from the Richland County Council.

The offense of failure to file a tax return, for which Mr. Washington was convicted, is set forth at § 12-54-44(B)(3) and provides as follows:

> [a] person required under any provision of law administered by the department, and who willfully fails to pay any estimated tax or tax, or who is required by any provision of law or by any regulation and who willfully fails to make a return, keep records, or supply information, at the time or times required by law or regulation, in addition to other penalties provided by law, is guilty of a misdemeanor and, upon conviction, must be fined not more than ten thousand dollars, or imprisoned not more than one year, or both, together with the cost of prosecution.

Our prior opinions conclude that the offense of failure to file a tax return constitutes moral turpitude. In Op. S.C. Att'y Gen., 1998 WL 115498 (February 3, 1998), we addressed a virtually identical predecessor provision to § 12-54-44(B)(3) [§ 12-54-40(b)(6)(c)] as follows:

> [i]n Op. Att'y Gen. 80-18 (February 6, 1980) Attorney General Daniel R. McLeod addressed the Governor's authority to declare a vacancy in the case of a county coroner who had been convicted in federal court under 26 U.S.C. 7203, which closely parallels S.C. Code Ann. Section 12-54-40(b)(6)(c). Therein, Attorney General McLeod concluded, "the conviction of a public officer of such a crime automatically creates a vacancy in the office. Moreover, while there appears to be a division of authority, many courts have similarly held that convictions for failing to file income tax returns involved moral turpitude. Under nearly identical statutes, see, e.g. In re Lambert, 47 Ill.2d 223, 265 N.E.2d 101 (1970), In re Bass, 49 Ill.2d 269, 274 N.E.2d 6 (1971), In re Chester, 117 N.J. 360, 567 A.2d 1008 (1989), In re Des Brisay, 288 Or. 625, 606 P.2d 1148 (1980). But see In Re Fahey, 8 Cal.3d 842, 106 Cal. Reptr. 313, 505 P.2d 1369 (1973).
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> Therefore, consistent with both Attorney General McLeod's earlier opinion and the authorities cited above, a conviction for violation of § 12-54-40(b)(6)(c) appears to involve a crime of moral turpitude. Accordingly, it is my opinion that the Governor is authorized to declare the office vacant pursuant to Article VI, Section 8 of the South Carolina Constitution (1895 as amended) and South Carolina Code Ann. Section 8-1-100 (1995 Supp.).

As noted in Op. S.C. Att'y Gen., 1980 WL 81902 (No. 80-18) (February 6, 1980), former Attorney General McLeod concluded that conviction (by way of guilty plea) of failure to file a return for the years 1974, 1975 and 1976, pursuant to 26 U.S.C. 7203 – a virtually identical federal provision to § 12-54-44(B)(3) constituted a crime of moral turpitude for purposes of Art. VI, § 8. Attorney General McLeod wrote:

> . . . the precise language of the Constitution requires that the office be declared vacant in the case of conviction . . .
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> In my opinion, while the Governor may not suspend a public officer who has been charged by information rather than by indictment with a crime involving moral turpitude, upon conviction of such officer, the office shall be declared vacant.

In General McLeod's view, conviction for such offense "automatically creates a vacancy in the office [of coroner]."

Moreover, in In the Matter of Chastain, 327 S.C. 173, 488 S.E.2d 878 (1997), the Supreme Court affirmed a retroactive suspension from the practice of law for an attorney who had "pled guilty to three counts of failure to make an file a South Carolina Income Tax Return for tax years 1989, 1990 and 1993 in violation of S.C. Ann. § 12-54-40(b)(6)(c) (Supp. 1996)." There, the Court stated:

> [t]he failure to file a tax return is a serious crime as set forth in Paragraph 2(P) of the Rule on Disciplinary Procedure, former Rule 413, SCACR. By his conduct, respondent has violated Rule 8.4 of the Rules of Professional Conduct. Rule 4.7, SCACR, by committing a criminal act that reflects adversely upon his honesty, trustworthiness and fitness as a lawyer. . . .

327 S.C. at 174, 488 S.E.2d at 878 (emphasis added). Thus in Chastain, even though the case involved a lawyer, the Court concluded that failure to make and file a tax return reflects upon one's "honesty [and] trustworthiness." Dishonesty is, of course, the hallmark of a crime of moral turpitude.

Based upon the prior opinions discussed above, which we reaffirm today, as well as our Supreme Court's decision in Chastain, which concluded that failure to file a tax return reflects upon a person's honesty and trustworthiness, we conclude that conviction for failure to file tax returns serves to vacate the office pursuant to Art. VI, § 8 of the South Carolina Constitution. While the offense of failure to file a return has been codified in a different Code Section since our opinions were written and Chastain decided, the substance of the offense is the same.

Conclusion

1. Article VI, § 8 of the South Carolina Constitution authorizes the Governor to suspend any officer of the State or its political subdivision (except officers of the Legislative and Judicial Branches) who is indicted (or waives indictment) for a crime of moral turpitude. If such officer is convicted of a crime of moral turpitude, the office is declared vacant and the vacancy is filled as provided by law.

2. Our prior opinions, as well as South Carolina decisions, conclude that the offense of Driving Under the Influence is not a crime of moral turpitude. This would be the same whether the offense is a first offense DUI or subsequent DUI offenses. Thus, Solicitor Myers cannot be suspended or removed pursuant to Article VI, § 8.

3. Neither our courts nor opinions of this Office have ever addressed the issue of whether felony DUI causing great bodily injury is a crime of moral turpitude. However, the elements of felony DUI causing great bodily injury are different from DUI and we have referenced herein decisions where, depending upon the facts, such offense may well constitute a crime of moral turpitude. Typically, the conduct must rise to the level of extreme recklessness or intentional infliction of harm to constitute moral turpitude in such instances. Thus, in Mr. Washington's case, if indicted for felony DUI causing great bodily injury, any conclusion regarding whether such is a crime of moral turpitude would depend upon the particular facts.

4. Because this question remains unsettled, we need not speculate as to how our courts would decide the question of whether a felony DUI causing great bodily injury is a

crime of moral turpitude. The question is answered by an already existing conviction for three counts of failure to file tax returns. Former Attorney General McLeod concluded in 1980 that a guilty plea for violation of the virtually identical federal statute regarding failure to file a tax return for three consecutive years is a conviction for a crime of moral turpitude and "automatically creates a vacancy in the office [of coroner]." We reaffirmed General McLeod's opinion in 1998 as it applies to the failure to file a State tax return. Clearly, therefore, our prior opinions conclude that failure to make and file tax returns is a crime of moral turpitude. And, in Chastain, our Supreme Court has concluded that a failure to file reflects upon "honesty" and "trustworthiness". Dishonest conduct is the hallmark of a crime of moral turpitude. Further, case law in other jurisdictions strongly supports this conclusion. See, e.g. Maga v. Ohio Med. Bd., 2012 WL 1383120 (Ct. App. 2012) (unpublished decision) [convictions pursuant to 26 U.S.C. 7203 constituted convictions for crimes of moral turpitude].

5. Today, we once more reaffirm these prior opinions regarding the failure to make and file tax returns. It is our opinion that such offense constitutes a crime of moral turpitude. The Chastain decision strongly supports this conclusion.

6. Mr. Washington has pled guilty to three counts of failure to file a tax return. Thus, according to General McLeod, such conviction "automatically creates a vacancy in the office." Our prior opinions indicate that the Office would be filled by special election pursuant to § 4-9-90. See e.g., Op. S.C. Att'y Gen., 1979 WL 42870 (March 16, 1979); Op. S.C. Att'y Gen., 1990 WL 482428 (No. 90-41) (June 5, 1990). The Governor may thus proceed pursuant to her constitutional power afforded thereby.

Sincerely,

Robert D. Cook
Solicitor General