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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. THOMAS COOPER, JR., Circuit Court Judge

Case No.: 2017-CP-40-4534

RECEIVED
JUL 05 2018
SC Court of Appeals

Mohsen A. Baddourah, as member
of the City Council of the
City of Columbia,

Appellant,

v.

Henry McMaster, in his
capacity as Governor for the
State of South Carolina,

Respondent,

RECORD ON APPEAL

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The Supreme Court of South Carolina

Mohsen A. Baddourah, as member of the City Counsel of
the City of Columbia, Petitioner,

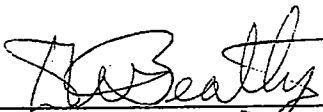
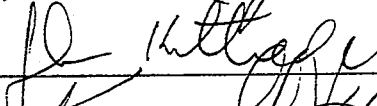
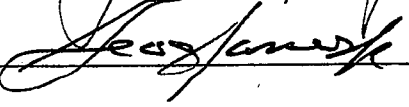
v.

Henry McMaster, in his capacity as Governor for the
State of South Carolina, Respondent.

Appellate Case No. 2017-000724

ORDER

Petitioner requests this Court entertain his declaratory judgment action in its original jurisdiction. Petitioner also moves for the issuance of a temporary injunction. The Governor consents to the request for the matter to be entertained in this Court's original jurisdiction, but opposes the motion for a temporary injunction. The petition for original jurisdiction is denied. Rule 245(a), SCACR. The motion for a temporary injunction is denied as moot.

	_____	C.J.
	_____	J.
	_____	J.
	_____	J.
	_____	J.

Columbia, South Carolina

May 25, 2017

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2017CP4004534****Moshen A Baddourah****Henry McMaster**

PLAINTIFF(S)

Governor For State Of South Carolina

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant**DISPOSITION TYPE (CHECK ONE)**

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case. Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code **2126** Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 13 day of Nov, 20 17 and a copy mailed first class or placed in the appropriate attorney's box on this 13 day of Nov, 20 17 to attorneys of record or to parties (when appearing pro se) as follows:

Tobias Gavin Ward Jr.

Richele Keel Taylor

Thomas Ashley Limehouse Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. Bride

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

MOHSEN A. BADDOURAH, as member of
the City Council of the City of Columbia,

Plaintiff,

v.

HENRY MCMASTER, in his capacity as
Governor for the State of South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2017-CP-40-04534

ORDER

FILED
2017 NOV -9 PM 1:15
JEANETTE W. MCGRIDE
C.C.P. & G.S.

This matter is before the Court on the August 30, 2017 Motion filed by Defendant Henry McMaster, in his capacity as Governor of the State of South Carolina ("Governor McMaster"), pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure, seeking to dismiss with prejudice the Complaint filed by Plaintiff Mohsen A. Baddourah, as member of the City Council of the City of Columbia ("Plaintiff"). Counsel for Governor McMaster, Thomas A. Limehouse, Jr., Esq. and Richele K. Taylor, Esq., and counsel for Plaintiff, Tobias G. Ward, Jr., Esq. and Joseph M. McCulloch, Jr., Esq., presented argument on the record during a hearing held on October 26, 2017. Based on the Motion and the argument submitted in support thereof and all matters of record, for the reasons set forth below, the undersigned hereby grants Governor McMaster's Motion.

BACKGROUND

Accepting the truth of the factual allegations in Plaintiff's Complaint and viewing all inferences in the light most favorable to Plaintiff, the relevant facts, for purposes of ruling on Defendant's Motion, are set forth herein. Plaintiff is a member of the City Council for the City of Columbia, South Carolina, and his term expires on or about December 31, 2019. (See Pl.'s Compl.

¶ 1.) Following an altercation with his wife, Plaintiff was arrested on July 2, 2016, and subsequently indicted on a charge of Domestic Violence, Second Degree. (*See id.* ¶ 3.) Governor McMaster thereafter requested and received an Attorney General's Opinion, which concluded that "the crime of domestic violence 2nd degree is a 'crime of moral turpitude' for purposes of the Governor's suspension power provided in Article VI, § 8 of the South Carolina Constitution."¹ Accordingly, on March 13, 2017, Governor McMaster issued Executive Order No. 2017-05 ("Executive Order"), suspending Plaintiff from office pursuant to article VI, section 8 of the South Carolina Constitution. (*See id.* ¶ 5.) As stated in the Executive Order, Plaintiff's temporary suspension was effective "until such time as the above-referenced charge is resolved" and "in no manner addresses the guilt or innocence of [Plaintiff] and shall not be construed as an expression of any opinion on such question." (Executive Order, at 1-2.)²

Plaintiff previously challenged Governor McMaster's Executive Order by filing in the Supreme Court of South Carolina a Petition for Original Jurisdiction, Complaint, Motion for Temporary Injunction to Stay Enforcement of Executive Order 2017-05, and other related pleadings. By way of a May 25, 2017 Order, the Supreme Court of South Carolina denied Plaintiff's Petition for Original Jurisdiction and Motion for Temporary Injunction to Stay Enforcement of Executive Order 2017-05. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 130

1. At the October 26, 2017 hearing on Governor McMaster's Motion, Plaintiff's counsel did not object to the Court taking notice of or otherwise considering the March 9, 2017 Attorney General's Opinion. *See* 2017 WL 1095385, at *1 (S.C.A.G. Mar. 9, 2017).

2. Plaintiff's Complaint cites to the Executive Order as Exhibit B and incorporates the same by reference; however, it appears Plaintiff did not attach a copy of the Executive Order as indicated. Nevertheless, the Court may take judicial notice of executive orders. *See Heyward v. Long*, 178 S.C. 351, 183 S.E. 145, 152 (1935) ("The court, of course, takes judicial notice that these commissioners, and all other commissioners composing the state highway commission, have been ousted from office by the proclamation of the Governor declaring the state highway department to be in a state of insurrection.").

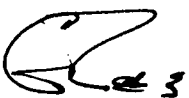
n.2, 754 S.E.2d 494, 497 n.2 (2014) (noting that the trial court's consideration of transcripts and court orders in an underlying class action did not convert a Rule 12(b)(6) motion into one for summary judgment).

On July 28, 2017, Plaintiff instituted the present action seeking, *inter alia*, a declaration that Plaintiff, "as a member of the legislative branch . . . is excepted from the Governor's suspension power under Article VI, § 8," (Pl.'s Compl. ¶ 18), and that "the Governor's Executive Order is not enforceable because the alleged crime is not a crime involving moral turpitude," (*id.* ¶ 38). In addition to his request for a declaratory judgment, Plaintiff also seeks mandatory injunctive relief staying enforcement of the Executive Order and an award of attorney's fees. (*Id.* ¶¶ 43, 46.)

LEGAL STANDARDS

I. Rule 12(b)(1) of the South Carolina Rules of Civil Procedure

Subject matter jurisdiction is the "power to hear and determine cases of the general class to which the proceedings in question belong." *Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005). "Subject matter jurisdiction is met if the case is brought in the court which has the authority and power to determine the type of action at issue." *Washington v. Whitaker*, 317 S.C. 108, 115, 451 S.E.2d 894, 898 (1994). A challenge to subject matter jurisdiction can be raised by motion to dismiss pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure. *Ballenger v. Bowen*, 313 S.C. 476, 478 n.2, 443 S.E.2d 379, 380 n.2 (1994); *Wheeler v. Morrison*, 313 S.C. 440, 442, 438 S.E.2d 264, 265 (Ct. App. 1993). By filing a Rule 12(b)(1) motion to dismiss, the movant challenges the power of the court to entertain and exercise jurisdiction over the subject matter. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). "The question of subject matter jurisdiction is a question of law



for the court.” *Id.* (quoting *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631 (Ct. App. 1993)).

II. Rule 12(b)(6) of the South Carolina Rules of Civil Procedure

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, “[a] defendant may move to dismiss the plaintiff’s complaint for ‘failure to state facts sufficient to constitute a cause of action.’” *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014). “A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true.” *Id.* (quoting *Disabato v. S.C. Ass’n of Sch. Adm’rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper.” *Id.* (quoting *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 74–75, 753 S.E.2d 846, 850 (2014)).

DISCUSSION

Having carefully considered the Parties’ arguments and the applicable case law, the Court concludes that the present action must be dismissed for want of subject matter jurisdiction. Accepting the truth of the factual allegations in Plaintiff’s Complaint and viewing all inferences in the light most favorable to Plaintiff, the Court alternatively finds that Plaintiff’s Complaint fails to state facts sufficient to constitute a cause of action. Accordingly, for the reasons outlined below, the Court grants Governor McMaster’s Motion and dismisses Plaintiff’s challenge to enforcement of the Executive Order.

Pursuant to article VI, section 8 of the South Carolina Constitution, “[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 . . . may be suspended by the Governor until he shall have been acquitted.” S.C. Const. art. VI, § 8. Therefore, the constitution vests the Governor with discretionary suspension authority in those instances where public officials, other than members of the Legislative or Judicial Branches, are indicted for a crime involving moral turpitude. By using the word “may,” this provision represents a textual commitment of the question to the Governor, in the exercise of his discretion, and makes clear that the Governor’s suspension authority is neither automatic nor ministerial. *See Fowler v. Beasley*, 322 S.C. 463, 467, 468, 472 S.E.2d 630, 633 (1996) (“This Court has jurisdiction to review the ministerial acts of the governor.” (emphasis added) (citing *Easler v. Maybank*, 191 S.C. 511, 5 S.E.2d 288 (1939))).

Where the Governor’s authority is discretionary in nature, courts may not substitute judicial discretion for that of the executive without violating the separation-of-powers provision of the South Carolina Constitution. S.C. Const. art. I, § 8; *see Rose v. Beasley*, 327 S.C. 197, 204, 489 S.E.2d 625, 628 (1997) (“A de novo hearing on appeal of an order by an executive body acting in a quasi-judicial capacity [in removing an officer] violates the separation of powers provision of our State constitution because judicial discretion cannot be substituted for that of an executive body.” (footnote omitted) (citing *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981); *Bd. of Bank Control v. Thomason*, 236 S.C. 158, 113 S.E.2d 544 (1960))). Because the Court may not substitute its own discretion or second-guess Governor McMaster’s suspension of Plaintiff pursuant to article VI, section 8, “this matter must be left to the discretion of the Governor and this Court may not review that decision.” *McConnell v. Haley*, 393 S.C. 136, 138, 711 S.E.2d 886, 887 (2011); *see also Blalock v. Johnston*, 180 S.C. 288, 185 S.E. 51, 55 (1936) (“The governor, in the exercise of the supreme executive power of the State, may, from the inherent nature of the

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authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power” (quoting *State ex rel. Whiteman v. Chase*, 5 Ohio St. 528, 535 (1856))).³ Accordingly, where it is apparent that the Court lacks subject matter jurisdiction over the present matter, Plaintiff’s Complaint must be dismissed pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure.

Since this matter may be disposed of pursuant to Rule 12(b)(1) motion, the undersigned need not decide any factual or legal question other than whether this Court has subject matter jurisdiction. *Murphy v. Owens-Corning Fiberglas Corp.*, 356 S.C. 592, 599 n.5, 590 S.E.2d 479, 482 n.5 (2003). However, in the alternative, the Court notes that, accepting Plaintiff’s factual allegations as true for purposes of this Motion, Plaintiff’s Complaint fails to allege facts sufficient to state a cause of action or claim for relief and therefore is also subject to dismissal pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Plaintiff’s claims for declaratory and injunctive relief raise purely legal questions which do not require further discovery and can be disposed of at this stage.

First, the Court need not reach or decide the question of whether Domestic Violence, Second Degree, constitutes a “crime involving moral turpitude” for purposes of article VI, section

3. See generally *Brown v. Ansel*, 82 S.C. 141, 63 S.E. 449, 449 (1909) (“Even if the Governor is subject to our writ of mandamus, a question noticed, but not decided, in *State v. Ansel*, 76 S. C. 406, 57 S. E. 185 [(1907)], it appears from the petition that the act sought to be compelled is not a plain ministerial duty, but involves the exercise of discretion, and is therefore not compellable by mandamus.”); *State v. Williams*, 10 S.C.L. (1 Nott. & McC.) 26, 28 (1817) (“The people of this state, have, by the constitution assigned to the respective branches of the government, the several powers therein specified, according to the various provisions of that instrument, and in the exercise of those powers, each must necessarily be governed by its own judgment and discretion. The governor, in the discharge of his official duties, must follow what appears to him the most correct construction of the constitution, and wherever he has by official acts given a construction to any part of it which relates to his particular department, this court will not readily interfere to arrest the progress of his measures.”).



8. Because this phrase is not defined in the text of the constitution, its application must be left to the determination of the Governor in the exercise of his discretion. *See McConnell*, 393 S.C. at 138, 711 S.E.2d at 887 (“Because there is no indication in the Constitution as to what constitutes an ‘extraordinary occasion’ to justify an extra session of the General Assembly, this matter must be left to the discretion of the Governor and this Court may not review that decision.”). Particularly where, as here, Governor McMaster requested and received an Attorney General’s Opinion further confirming his conclusion that Domestic Violence, Second Degree, is a crime involving moral turpitude, it cannot be said that Governor McMaster’s exercise of his discretion to temporarily suspend Plaintiff was arbitrary. *Cf. State ex rel. Thompson v. Seigler*, 230 S.C. 115, 123, 94 S.E.2d 231, 235 (1956).

Second, Plaintiff’s argument that he is a member of the Legislative Branch by virtue of his position on the Columbia City Council is wholly without merit. The exclusion of “members and officers of the Legislative and Judicial Branches” from section 8 of article VI is derived from the separation of powers prescribed in the Constitution of 1895. This separate, tripartite structure is expressly memorialized in article I, section 8, which mandates that “[i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.” S.C. Const. art. I, § 8. As a textual matter, by specifically referencing the “legislative, executive, and judicial powers” as functions of “one of said departments,” the framers are referring to the distinct “departments” addressed in separate articles of the constitution.⁴ Also, specifically with regard to the Legislative Branch or

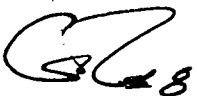
4. Indeed, by capitalizing “Legislative and Judicial Branches” in section 8 of article VI, the framers essentially employed defined terms, craving reference to their use elsewhere in the constitution—namely, in articles III and V, which address the Legislative and Judicial

Department, section 1 of article III expressly provides that “[t]he legislative power of this State shall be vested in two distinct branches, the one to be styled the ‘Senate’ and the other the ‘House of Representatives,’ and both together the ‘General Assembly of the State of South Carolina.’” S.C. Const. art. III, § 1. Thus, the relevant text is unambiguous and does not mention municipal officials or contemplate that they will be viewed as members of the Legislative Branch. Indeed, municipal government is separately addressed elsewhere in the constitution. *E.g.*, S.C. Const. art. VIII (“Local Government”).

The logical conclusion that “members and officers of the Legislative . . . Branch[]” does not include members of municipal councils is further reinforced by the text of other, unrelated constitutional provisions. By way of example, in addressing the adoption of the constitution and the terms of elected officials already serving, the framers referred to “[a]ll officers, State, executive, legislative, judicial, circuit, district, County, township and municipal” S.C. Const. art. XVII, § 11. Because the drafters were therefore capable of distinguishing, and took care to differentiate, “legislative” officers from “County, township and municipal officers,” Plaintiff’s proposed interpretation would require ignoring “the canon of construction ‘*expressio unius est exclusio alterius*’ or ‘*inclusio unius exclusio alterius*’ [which] holds that ‘to express or include one thing implies the exclusion of another, or the alternative.’” *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (quoting *State v. Bolin*, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008)).

In addition to being inconsistent with the text and context of the remainder of the constitution, Plaintiff’s proffered interpretation, if adopted, would also lead to an absurd result.

Departments, respectively. See S.C. Const. art. III (“Legislative Department”); S.C. Const. art. V (“Judicial Department”).



Assuming, *arguendo*, that Plaintiff was considered a member or officer of the Legislative Branch, his status as such would effectively render meaningless the Governor's suspension and removal authority by withdrawing a significant category of public officials from the ambit of article VI, section 8. The framers of the constitution could not have intended such a reading of article VI, section 8, and the Court should not sanction an interpretation that will necessarily lead to an absurd result. *See State v. Long*, 406 S.C. 511, 515 n.5, 753 S.E.2d 425, 427 n.5 (2014) ("This Court will construe a constitutional amendment in a similar manner as it does a statute. When construing a statute, this Court will reject a meaning when it would lead to a result so plainly absurd that it could not have possibly have been intended by the General Assembly or would defeat the plain legislative intention." (citing *Fraternal Order of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 574 S.E.2d 717 (2002); *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994))).

Aside from being untethered from the text of the constitution, Plaintiff's argument ignores longstanding precedent for governors suspending members of municipal councils, of which the Court takes judicial notice. *See, e.g.*, Executive Order No. 2017-16 (suspending member of Norway Town Council upon indictment for crime involving moral turpitude); Executive Order No. 94-05 (suspending member of Atlantic Beach Town Council upon indictment for crime involving moral turpitude). *Compare* S.C. Code Ann. § 8-13-560(1) ("A member of the General Assembly who is indicted . . . for a crime that involves moral turpitude . . . must be suspended immediately without pay by the presiding officer of the House or Senate, as appropriate.").

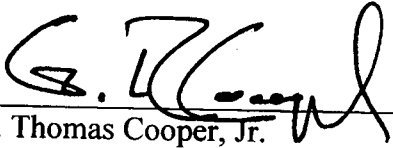
In sum, Plaintiff's Complaint fails to allege sufficient facts, which, taken as true for present purposes, state a cause of action or plausible claim for relief, whether declaratory or injunctive in

nature. Therefore, in the alternative, Plaintiff's Complaint is subject to dismissal pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, Governor McMaster's Motion is **GRANTED** and Plaintiff's Complaint is hereby **DISMISSED**.

AND IT IS SO ORDERED.



G. Thomas Cooper, Jr.
Circuit Judge

November 9, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Moe Baddourah, as Member of The City
Council of The City of Columbia,

Plaintiff,

-vs-

Henry McMaster, in his capacity as
Governor for the State of South Carolina,

Defendant.

)
) IN THE COURT OF COMMON PLEAS
)

)
) CIVIL ACTION NO.:2017-CP-40-
)

COMPLAINT

2017 JUL 28 PM 4:14
JENNIFER W. MCBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

1. Plaintiff Moe Baddourah ("Mr. Baddourah") was elected to the City Council for Columbia, South Carolina on January 1, 2016 to represent District III which includes all the neighborhoods shown on the attached Exhibit A. This is Mr. Baddourah's 2nd term which will not expire until December 31, 2019.
2. Mr. Baddourah and his wife are in the midst of a divorce and custody of their children is at issue.
3. On June 29, 2016 Mr. Baddourah was involved in an altercation with his wife, the facts of which are in dispute. His wife filed charges with the police; Mr. Baddourah was arrested on July 2, 2016 and subsequently indicted on a charge of domestic violence, second degree.
4. Mr. Baddourah has pled not guilty to the charge.
5. On March 13, 2017, the Governor issued Executive Order 2017-05 suspending Mr. Baddourah from his office pursuant to Article VI, §8 of the South Carolina Constitution. (Exhibit B)

REQUEST FOR DECLARATORY RELIEF

6. The previous allegations are re-alleged as if repeated herein.
7. This action is brought for declaratory relief pursuant to the provisions of South Carolina Code Ann. 15-53-10 et. seq.

LEGISLATIVE BRANCH EXCEPTION

8. Article VI, §8 of the South Carolina Constitution provides "Any 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."
9. Article VIII of the South Carolina Constitution, adopted in 1973 as an Amendment to the South Carolina Constitution of 1895, directed the General Assembly to implement what was popularly referred to as "home rule" by establishing the structure, organization, powers, duties, functions, and responsibilities of local governments by general law.
10. The General Assembly was required to implement home rule, and Article VIII essentially left it up to the General Assembly to decide what powers local governments should have. Acting under this authority, the General Assembly enacted various statutes regarding the powers of counties and municipalities. (See Hospitality Ass'n of South Carolina, Inc. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995)(discussing history of home rule.)
11. Among the statutes adopted to implement 'home rule' is S.C. Code Ann. §5-7-30 which provides, "Each municipality of the State, in addition to the powers

conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State."

12. The City of Columbia has a council-manager form of government. See S.C. Code Ann. §§ 5-13-10 to 100. "Unlike the mayor under other forms of government who may have mainly administrative or ceremonial duties and who may vote only in case of a tie, the mayor under the council manager form is a regular legislative member of council and has a vote the same as the other members. S.C. Code Ann. § 5-13-20." (*N.A.A.C.P., Inc. v. City of Columbia*, S.C., 850 F.Supp. 404 (1993) (emphasis added).)
13. "All legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor, to have one vote." S.C. Code Ann. §5-13-30.
14. The South Carolina legislature, consistent with Article VIII of the South Carolina Constitution, shared a portion of its legislative power with the City of Columbia, and that legislative power is exercised by members of Columbia City Council including Mr. Baddourah, a duly elected member of that council.
15. Mr. Baddourah is a member of the legislative branch exercising the legislative power shared by the South Carolina legislature pursuant to Article VIII of the South Carolina Constitution, and thus is excepted from the suspension powers of the Governor who is a member of the executive branch. (See also Article VIII, §13 providing for the "Joint administration of functions and exercise of powers between the State and its political subdivisions.")

16. To hold otherwise would be to violate the separation of powers required by Article I, §8 of the South Carolina Constitution and to ignore the plain language of Article VI, §8.
17. The court should also take note of S.C. Code Ann. §5-7-200 whereby the legislature specifically proscribed the grounds for removal of a council member including being convicted of a crime of moral turpitude.
18. This court should declare that Mr. Baddourah as a member of the legislative branch which exercises constitutionally granted legislative power is excepted from the Governor's suspension power under Article VI, §8.

NOT A CRIME OF MORAL TURPITUDE

19. The previous allegations are re-alleged as if repeated herein.
20. As previously noted, the Governor's Article VI, §8 power to suspend a public official is dependent on the crime involving 'moral turpitude' ("CIMT").
21. Historically the precedent on the meaning of "moral turpitude" comes from two sources: crimes used for impeachment prior to the adoption of the standard in Rule 609 SCRE and crimes under the immigration and Nationality Act (8U.S.C.A. § 1182(a)(9), 1251(a)(4)), and similar predecessor statutes providing for exclusion or deportation of aliens convicted of such crime.
22. Moral turpitude "is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *Medina vs. United States*, 259 F.3d 220 (4th Cir. 2001).

23. "[W]hile all crimes involve some degree of social irresponsibility, not every crime is one that involves moral turpitude." *State v. LaBarge*, 275 S.C. 168, 172, 268 S.E.2d 278, 280 (1980).
24. Perhaps because CMIT was used for impeachment, "[m]ost offenses found to involve moral turpitude seem to include some sort of dishonest behavior" McAninch and Fairey, *The Criminal Law of South Carolina*, 45 (3rd ed. 1996).
25. Offenses that are so base, vile, and depraved that they qualify as crimes of moral turpitude, for purposes of removal, even though they have no element of fraud, typically involve rather grave acts of baseness or depravity such as murder, rape, and incest. *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012).
26. In general, willfulness or "evil intent" is required in order for crime to be classified as one involving moral turpitude for purposes of Immigration and Nationality Act (INA). *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159 (9th Cir. 2006).
27. When determining whether a criminal conviction constitutes a crime of moral turpitude, corrupt scienter is the touchstone of moral turpitude. Immigration and Nationality Act, §237(a)(2)(A)(i), 8 U.S.C.A. § 1227(a)(2)(A)(i). *De Leon v. Lynch*, 808 F.3d 1224 (10th Cir. 2015).
28. Mr. Baddourah is unaware of any decisions by the courts in this state holding that domestic violence, second degree is a crime of moral turpitude.
29. The Supreme Court has addressed the issue in the context of assault and battery of a high and aggravated nature concluding that such a crime may be a crime of moral turpitude depending on the facts as particularized in the

indictment. *Matter of Lee*, 313 S.C. 142, 437 S.E.2d 85 (1993)(magistrate made improper sexual advances); cf. *State vs. Bailey*, 275 S.C. 444, 272 S.E.2d 439 (1980) (admission prejudicial since indictment was not presented) (also noteworthy, Justice Littlejohn in dissent states he would simply hold that assault and battery of a high and aggravated nature is not a crime of moral turpitude.)

30. Mr. Baddourah is informed and believes, extremely grave acts of violence and depravity are CMIT, and thus assault with intent to kill and assault with intent to rape is CMIT. *State v. Ball*, 292 S.C. 71, 354 S.E.2d 906 (1987). This would be consistent with the description of acts that shock the conscience. Perhaps a similar standard is conduct which creates liability for intentional infliction of emotional distress.

31. The Criminal Court of Appeals of Oklahoma directly addressed the issue in *Tucker vs. State*, 2016 Ok. Cr. 29 (Dec. 21, 2016). "The law does not support the State's claim that domestic violence is a crime of moral turpitude." (Copy attached as Exhibit C).

32. The *Tucker* court cited an Eighth Circuit definition which restricted moral turpitude to "the gravest offenses - felonies, infamous crimes, those that are *malum in se*", including crimes of theft, and thus show a defendant is inherently of depraved mind and unworthy of belief. *Price v. State*, 1976 OK CR 22, ¶ 12, 546 P.2d 632, 638. *Malum in se* refers to crimes which are wrongs in themselves, inherently immoral, such as murder, arson or rape. *Black's Law Dictionary* 978 (8th Ed. 2004).

33. The *Tucker* court further reasoned, "Misdemeanor domestic assault and battery would not fit within traditional definitions or the *Price* standard. Essentially, domestic assault and battery is a crime of violence against the person - like assault and battery. It is difficult to characterize domestic violence as a *malum in se* crime, or one recognized as inherently evil and immoral, given that for centuries it was not recognized as a crime at all, and only recently has our Legislature granted it felony status."
34. In this case, Mr. Baddourah was indicted on the charge of domestic violence, second degree. This offense is a lesser included offense of domestic violence first degree, which itself is a lesser included offense of domestic violence of a high and aggravated nature.
35. Per the indictment, on or about June 29, 2016 Mr. Baddourah allegedly "caused physical harm or injury to a household member, or did offer or attempt to cause physical harm or injury to a household member, with apparent present ability under circumstances reasonably creating fear of imminent peril by striking the household member with a car door an act likely to result in moderate bodily injury in violation of Section 16-25-20 (A-D), S.C. Code of Laws, 1976, as amended."
36. It is undisputed that his wife grabbed Mr. Baddourah's iPhone without permission and attempted to leave with it. Mr. Baddourah believes the evidence will show his wife was attempting to shut and lock her car door with his phone in her possession, and that Mr. Baddourah grabbed the car door to keep it from shutting. His wife claims Mr. Baddourah then shut the door

causing her to sustain injuries. Whether the alleged acts were accidental or intentional and whether injuries occurred are all in dispute.

37. As noted by the *Tucker* court, this conduct cannot be characterized as a *malum in se* crime, or one recognized as inherently evil and immoral. Nor does this show that Mr. Baddourah is of a depraved mind or that his act was an act of grave or extreme violence.

38. This court should find that domestic violence, second is not a crime involving moral turpitude, or at least not as alleged in Mr. Baddourah's indictment.

39. This court should further declare that the Governor's Executive Order is not enforceable because the alleged crime is not a crime involving moral turpitude.

INJUNCTIVE RELIEF

40. The previous allegations are realleged as if repeated herein.

41. Members of a deliberative body have a right to be present at meetings, and vote on pending matters.

42. The Governor's unconstitutional action not only affects the recognized rights of Mr. Baddourah as an officeholder, but also ignores the representational interests of the constituents Mr. Baddourah represents on council.

43. For these reasons, this court should grant Mr. Baddourah a temporary stay to the enforcement of the Executive Order of Suspension until such time as this court can review this matter.

FURTHER RELIEF REQUESTED **ATTORNEY FEES AND COSTS PURSUANT TO § 15-77-300**

44. Mr. Baddourah has incurred attorney's fees and costs contesting the actions of the Governor in unlawfully suspending him from public office and in bringing

this action to preserve the constitutional integrity of the separation of powers and the proper interpretation of the South Carolina Constitutions.

45. Should Mr. Baddourah prevail in this matter, Mr. Baddourah is informed and believes he is entitled to recover his attorneys' fees and costs in pursuing this proceeding.

46. Mr. Baddourah seeks an order of this Court awarding him attorneys' fees and costs for bringing and prosecuting this action, in such amount as the Court deems reasonable in light of the issues presented for adjudication herein.

WHEREFORE, having set forth the grounds therefore, Mr. Baddourah prays for the Court to inquire into the matters set forth herein, and to issue a Declaratory Judgment declaring and determining the rights of the parties on the issues set forth. Specifically the Plaintiff prays as follows:

A. For a temporary stay of Executive Order 2017-05 suspending Mr. Baddourah from his office pursuant to Article VI, §8 of the South Carolina Constitution;

B. For a declaration that Mr. Baddourah as a member of the legislative branch exercising the legislative power shared by the South Carolina legislature pursuant to Article VIII of the South Carolina Constitution is excepted from the suspension powers of the Governor pursuant to Article VI, §8;

C. For a declaration that the crime of domestic violence, second degree is not a crime of moral turpitude or at least not as alleged in the indictment;

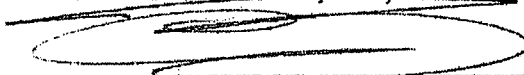
D. For a declaration that the Governor's Executive Order 2017-05 is invalid and cannot be enforced because Mr. Baddourah is a member of the legislative

branch and/or because the crime of domestic violence, second degree as alleged in the indictment is not a crime of moral turpitude;

E. For an award of attorney's fees and costs pursuant to S.C. Code Ann. §15-77-100;

F. Such other and further relief as the Court deems appropriate.

TOBIAS G. WARD, JR., PA



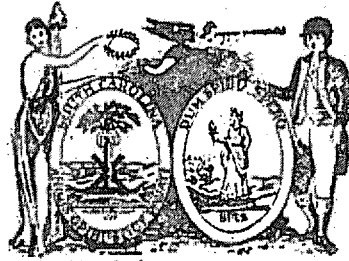
Tobias G. Ward, Jr., SC Bar No.: 5826
J. Derrick Jackson, SC Bar No.: 15192
P.O. Box 50124
Columbia, SC 29250
803-708-4200
Fax 803-403-8754
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Joseph M. McCulloch, Jr., SC Bar No.: 3760
Kathy R. Schillaci, SC Bar No. 17248
JOSEPH M. MCCULLOCH, JR.
1513 Hampton Street
Columbia, SC 29211
803-779-0005
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joe@mccullochlaw.com

District III - Councilman Moe Baddourah

Ashewood Lake
Avalon Place
Central Rosewood Neighborhood
Druid Hills Neighborhood Association
East Lake
Edisto Court Community Council
Forest Hills Neighborhood Association
Forest Hills North Neighborhood
Grove Park Neighborhood Association
Hampton Forest
Hampton's Grant
Hampton Leas
Hampton Trace
Heritage Woods
Hollywood-Rose Hill Neighborhood Association
Melrose Neighborhood Association
Midland Terrace Neighborhood
Oakwood Court Neighborhood Association
Old Shandon Neighborhood
Preston Green
Rosewood Community Council
Shandon Annex
Shandon Neighborhood Council
Sherwood Forest Neighborhood Association
Shiloh
South Kilbourne Neighborhood Association
South Meadowfield
South Waccammaw Neighborhood
The Pines
University Hill
Wales Garden Neighborhood Association
Wheeler Hill Neighborhood Association

State of South Carolina
Executive Department



FILED

MAR 13 2017

Mark Hammond
SECRETARY OF STATE

Office of the Governor

EXECUTIVE ORDER NO.

2017-05

WHEREAS, Mohsen A. Baddourah, a member of the City Council of the City of Columbia, has been indicted by a Grand Jury convened in Richland County for Domestic Violence, Second Degree, in violation of section 16-25-20 of the South Carolina Code of Laws; and

WHEREAS, Mohsen A. Baddourah, as a member of the City Council of the City of Columbia, is an officer of the State or its political subdivisions; and

WHEREAS, Article VI, Section 8 of the South Carolina Constitution provides, in relevant part, that "[a]ny officer of the State or its political subdivisions . . . who has been indicted by a grand jury for a crime involving moral turpitude . . . may be suspended by the Governor until he shall have been acquitted"; and

WHEREAS, under South Carolina law, moral turpitude "implies something immoral in itself," *State v. Horton*, 271 S.C. 413, 414, 248 S.E.2d 263, 263 (1978), and "involves an act of baseness, vileness, or depravity in the social duties which a man owes to his fellow man or society in general, contrary to the accepted and customary rule of right and duty between man and man," *State v. Major*, 301 S.C. 181, 186, 391 S.E.2d 235, 238 (1990); and

WHEREAS, Domestic Violence, Second Degree, is a crime of moral turpitude; and

WHEREAS, as Governor of the State of South Carolina, I am mindful of the duties and responsibilities vested in me by the Constitution and Laws of this State.

NOW, THEREFORE, by virtue of the aforementioned authority, and pursuant to Article VI, Section 8 of the South Carolina Constitution and the powers conferred upon me therein, I hereby Order that Mohsen A. Baddourah shall be and hereby is suspended from his office as a member of the City Council of the City of Columbia until such time as the above-referenced charge is resolved, at which time further appropriate action will be taken by the undersigned. This action

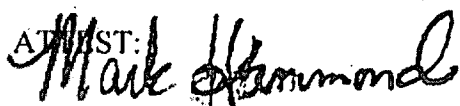
March 13, 2017

in no manner addresses the guilt or innocence of Mohsen A. Baddourah and shall not be construed as an expression of any opinion on such question. This Order is effective immediately.



GIVEN UNDER MY HAND AND THE
GREAT SEAL OF THE STATE OF
SOUTH CAROLINA, THIS
THIRTEENTH DAY OF MARCH, 2017.


HENRY MCMASTER
Governor

ATTEST:


MARK HAMMOND
Secretary of State

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2017-CP-40-04534

MOHSEN A. BADDOURAH, as member of
the City Council of the City of Columbia,

Plaintiff,

v.

HENRY MCMASTER, in his capacity as
Governor for the State of South Carolina,

Defendant.

MOTION TO DISMISS

2017 AUG 30 PM 2:16
JANETTE M. HOBBS
C.C.P. & G.S.
FILED

TO: TOBIAS G. WARD, JR., ESQUIRE; JOSEPH M. MCCULLOCH, JR., ESQUIRE;
AND KATHY R. SCHILLACI, ESQUIRE; COUNSEL FOR PLAINTIFF
MOHSEN A. BADDOURAH, AS MEMBER OF THE CITY COUNCIL OF THE
CITY OF COLUMBIA:

COMES NOW Defendant Henry McMaster, in his capacity as Governor of and for the State of South Carolina ("Governor McMaster"), by and through the undersigned counsel, and hereby moves the Court, pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure, for the entry of an Order dismissing with prejudice the Complaint filed by Plaintiff Mohsen A. Baddourah, as member of the City Council of the City of Columbia ("Plaintiff"). Governor McMaster's Motion is based on the grounds that Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action or cognizable claim for relief and that the Court lacks subject-matter jurisdiction over this action. In support of the instant Motion, and accepting the Complaint's factual allegations as true for present purposes, Governor McMaster would further show the Court, *inter alia*, as follows:

1. Article VI, section 8 of the South Carolina Constitution provides that "[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 . . . may be suspended by the Governor until he shall have been acquitted.” S.C. Const. art. VI, § 8.

2. Following Plaintiff’s indictment for Domestic Violence, Second Degree, in violation of section 16-25-20(A) of the South Carolina Code of Laws, Governor McMaster issued Executive Order No. 2017-05 temporarily suspending Plaintiff from the City Council of the City of Columbia pursuant to the Governor’s discretionary authority under article VI, section 8 of the South Carolina Constitution. S.C. Const. art. VI, § 8.

3. Domestic violence, second degree, constitutes “a crime involving moral turpitude” for purposes of Governor McMaster’s discretionary suspension authority under article VI, section 8 of the South Carolina Constitution. S.C. Const. art. VI, § 8; *see* S.C. Code Ann. § 16-25-20(A); *State v. Major*, 301 S.C. 181, 186, 391 S.E.2d 235, 238 (1990); *State v. Horton*, 271 S.C. 413, 414, 248 S.E.2d 263, 263 (1978).

4. As a matter of law, Plaintiff is not a member of the Legislative Branch, for purposes of the exception set forth in article VI, section 8, by virtue of his office as a member of the City Council of the City of Columbia. *See McConnell v. Haley*, 393 S.C. 136, 138, 711 S.E.2d 886, 887 (2011) (citing *Segars-Andrews v. Judicial Merit Selection Comm’n*, 387 S.C. 109, 691 S.E.2d 453 (2010)); *cf.* S.C. Const. art. III (“Legislative Department”); S.C. Const. art. V (“Judicial Department”).

5. The Court lacks jurisdiction to review the discretionary acts of the Governor, particularly where, as here, affording the relief requested by Plaintiff would violate the separation-of-powers clause of the South Carolina Constitution. S.C. Const. art. I, § 8; *see, e.g., McConnell*, 393 S.C. at 138, 711 S.E.2d at 887 (“Because there is no indication in the

Constitution as to what constitutes an 'extraordinary occasion' to justify an extra session of the General Assembly, this matter must be left to the discretion of the Governor and this Court may not review that decision."); *Rose v. Beasley*, 327 S.C. 197, 204, 489 S.E.2d 625, 628 (1997) ("A de novo hearing on appeal of an order by an executive body acting in a quasi-judicial capacity [in removing an officer] violates the separation of powers provision of our State constitution because judicial discretion cannot be substituted for that of an executive body." (footnote omitted) (citing *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981); *Bd. of Bank Control v. Thomason*, 236 S.C. 158, 113 S.E.2d 544 (1960))); *Fowler v. Beasley*, 322 S.C. 463, 467, 468, 472 S.E.2d 630, 633 (1996) ("This Court has jurisdiction to review the *ministerial* acts of the governor." (emphasis added) (citing *Easler v. Maybank*, 191 S.C. 511, 5 S.E.2d 288 (1939))); *Blalock v. Johnston*, 180 S.C. 288, 185 S.E. 51, 55 (1936) ("The governor, in the exercise of the supreme executive power of the State, may, from the inherent nature of the authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power" (quoting *State ex rel. Whiteman v. Chase*, 5 Ohio St. 528, 535 (1856))); *Brown v. Ansel*, 82 S.C. 141, 63 S.E. 449, 449 (1909) ("Even if the Governor is subject to our writ of mandamus, a question noticed, but not decided, in *State v. Ansel*, 76 S. C. 406, 57 S. E. 185 [(1907)], it appears from the petition that the act sought to be compelled is not a plain ministerial duty, but involves the exercise of discretion, and is therefore not compellable by mandamus."). See generally *State v. Williams*, 10 S.C.L. (1 Nott. & McC.) 26, 28 (1817) ("The people of this state, have, by the constitution assigned to the respective branches of the government, the several powers therein specified, according to the various provisions of that instrument, and in the exercise of those powers, each must necessarily be governed by its own judgment and discretion. The governor, in the discharge of his official duties, must follow what appears to him the most

correct construction of the constitution, and wherever he has by official acts given a construction to any part of it which relates to his particular department, this court will not readily interfere to arrest the progress of his measures.”).

The present Motion is based on and supported by, *inter alia*, the grounds set forth above and the records and pleadings filed in the above-captioned matter and in the action previously filed by Plaintiff in the Supreme Court of South Carolina, styled as *Baddourah v. McMaster* (Case No. 2017-000724), all applicable law, and any memorandum or other materials as may be properly submitted to the Court in advance of or in connection with any hearing in this matter.

WHEREFORE, pursuant to Rule 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure, Governor McMaster respectfully moves the Court to dismiss Plaintiff's Complaint with prejudice, tax appropriate fees and costs against Plaintiff, and provide such other and further relief as the Court deems just and proper.

Respectfully submitted,


Richele K. Taylor (S.C. Bar No. 70493)
Thomas A. Limehouse, Jr. (S.C. Bar No. 101289)
Office of the Governor
State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
*Counsel for Henry McMaster, in his capacity as
Governor for the State of South Carolina*

August 30, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

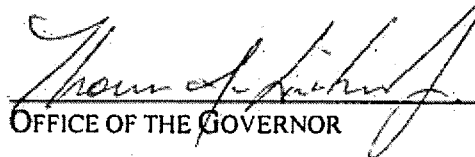
I hereby certify that the foregoing **MOTION TO DISMISS** has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Tobias G. Ward, Jr., Esq.
Post Office Box 50124
Columbia, SC 29250

Joseph M. McCulloch, Jr., Esq.
Kathy R. Schillaci, Esq.
1513 Hampton Street
Columbia, SC 29211

*Counsel for Plaintiff Mohsen A. Baddourah, as member of the
City Council of the City of Columbia*

This 30th day of August, 2017.



OFFICE OF THE GOVERNOR

RECEIVED
FILED
2017 AUG 30 PM 2:16
JEANNETTE W. BRIDGEMAN
C.C.P. & G.

Derrick Jackson

From: Derrick Jackson <dj@tobywardlaw.com>
Sent: Thursday, October 19, 2017 4:54 PM
To: 'GCooperJ@sccourts.org'; 'Cooper, G. Thomas Law Clerk (Jamie Rutkoski)'
Cc: 'Limehouse, Thomas'; 'Taylor, Richele'; tw@tobywardlaw.com;
<joe@mccullochlaw.com> (joe@mccullochlaw.com)
Subject: Motion "MDISMS-Motion to Dismiss" for Case "2017CP4004534-Moshen A
10/25/2017 at 2:00pm
Attachments: Plaintiff's Return to motion to dismiss.pdf; Tucker v. State, 2016 OK CR 29 (Okla. Crim.
App., 2016)

Judge Cooper:

Attached is a copy of the Plaintiff's Return to Motion to Dismiss which
is being filed and is scheduled before you next week on 10/25/2017 at 2:00pm.

J. Derrick Jackson
Tobias G. Ward, Jr. PA
Post Office Box 50124
Columbia, SC 29250
(803) 708-4200 (Phone)
(803) 403-8754 (Fax)
dj@tobywardlaw.com

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
Moe Baddourah, as Member of The City	)	
Council of The City of Columbia,	)	CIVIL ACTION NO.:2017-CP-40-04534
	)	
Plaintiff,	)	
	)	PLAINTIFF'S RETURN TO
-vs-	)	MOTION TO DISMISS
	)	
Henry McMaster, in his capacity as	)	
Governor for the State of South Carolina,	)	
	)	
Defendant.	)	
	)	

The Plaintiff, by way of return to the Defendant's Motion to Dismiss responds as follows:

FACTUAL/PROCEDURAL BACKGROUND

Plaintiff Moe Baddourah ("Mr. Baddourah") was elected to the City Council for Columbia, South Carolina on January 1, 2016 to represent District III. This is Mr. Baddourah's 2nd term which will not expire until December 31, 2019. Mr. Baddourah and his wife are in the midst of a divorce and custody of their children is at issue. On June 29, 2016 Mr. Baddourah was involved in an altercation with his wife, the facts of which are in dispute. His wife filed charges with the police; Mr. Baddourah was arrested on July 2, 2016 and subsequently indicted on a charge of domestic violence, second degree. It is undisputed that his wife grabbed Mr. Baddourah's iPhone without permission and attempted to leave with it. Mr. Baddourah believes the evidence will show his wife was attempting to shut and lock her car door with his phone in her possession, and that Mr. Baddourah grabbed the car door to keep it from shutting. His wife claims Mr. Baddourah then shut the door causing her to sustain injuries. Whether

the alleged acts were accidental or intentional and whether injuries occurred are all in dispute. Mr. Baddourah has pled not guilty to the charge.

On March 13, 2017, the Governor issued Executive Order 2017-05 suspending Mr. Baddourah from his office pursuant to Article VI, §8 of the South Carolina Constitution.

Mr. Baddourah filed a petition in the original jurisdiction of the South Carolina Supreme Court and a proposed complaint. The South Carolina Supreme Court declined to exercise its original jurisdiction. Mr. Baddourah then filed the present complaint seeking a declaration that as a member of the legislative branch, he is not subject to dismissal under Article VI, §8, that domestic violence, second degree is not a crime involving moral turpitude, an injunction and the costs and fees for this action.

STANDARD FOR MOTION TO DISMISS

In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

DECLARATORY JUDGMENT

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree. S.C. Code Ann. § 15-53-20

Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. S.C. Code Ann. § 15-53-30

Declaratory judgment actions are proper to determine an interpret rights under the state and federal constitutions. *Power v. McNair*, 255 S.C. 150, 177 S.E.2d 551 (1970)(declaratory judgment to determine whether simultaneous holding of office of city policeman and commission as state constable without compensation would constitute dual office holding(dismissed because there was no justiciable controversy); *Dash v. Commanding General, Fort Jackson, S. C.*, 307 F. Supp. 849 (1969)(action for declaratory judgment declaring free speech rights for servicemen).

In this case, the Plaintiff is asking the court to determine his constitutional rights under Article VI, §8. Specifically, he is asking the court to declare that he falls under the exception for members of the legislative branch and second that a charge under domestic violence, second degree is not a crime involving moral turpitude as interpreted by the courts. Unlike *Power vs. McNair*, there is a justiciable controversy as the Plaintiff has been suspended from office by executive order. This court has the jurisdiction, authority and the duty to answer these questions.

DOMESTIC VIOLENCE, SECOND DEGREE
IS NOT A CRIME OF MORAL TURPITUDE

The Governor flatly states in the motion that domestic violence, second degree is a crime involving moral turpitude (Motion to Dismiss, paragraph 3); however, he does not cite a single case where a South Carolina court has determined this. The cases cited in the motion refer to cocaine possession (a reversal from previous precedent) and “hit and run”.

Historically the precedent on the meaning of “moral turpitude” (“CIMT”) comes from two sources: crimes used for impeachment prior to the adoption of the standard in Rule 609 SCRE and crimes under the immigration and Nationality Act (8 U.S.C.A. § 1182(a)(9), 1251(a)(4)), and similar predecessor statutes providing for exclusion or deportation of aliens convicted of such crime. Moral turpitude “is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one’s fellow man or society in general.” *Medina vs. United States*, 259 F.3d 220 (4th Cir. 2001). “[W]hile all crimes involve some degree of social irresponsibility, not every crime is one that involves moral turpitude.” *State v. LaBarge*, 275 S.C. 168, 172, 268 S.E.2d 278, 280 (1980).

Perhaps because CIMT was used for impeachment, “[m]ost offenses found to involve moral turpitude seem to include some sort of dishonest behavior” McAninch and Fairey, *The Criminal Law of South Carolina*, 45 (3rd ed. 1996). Offenses that are so base, vile, and depraved that they qualify as crimes of moral turpitude, for purposes of removal, even though they have no element of fraud, typically involve rather grave acts of baseness or depravity such as murder, rape, and incest. *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012). In general, willfulness or “evil intent” is required in order for crime to be classified as one involving moral turpitude for purposes of Immigration and Nationality Act (INA). *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159 (9th Cir. 2006).

When determining whether a criminal conviction constitutes a crime of moral turpitude, corrupt scienter is the touchstone of moral turpitude. Immigration and Nationality Act, §237(a)(2)(A)(i), 8 U.S.C.A. § 1227(a)(2)(A)(i). *De Leon v. Lynch*, 808 F.3d 1224 (10th Cir. 2015).

The South Carolina Supreme Court has addressed the issue in the context of assault and battery of a high and aggravated nature concluding that such a crime may be a crime of moral turpitude depending on the facts as particularized in the indictment. *Matter of Lee*, 313 S.C. 142, 437 S.E.2d 85 (1993)(magistrate made improper sexual advances); cf. *State vs. Bailey*, 275 S.C. 444, 272 S.E.2d 439 (1980) (admission prejudicial since indictment was not presented) (also noteworthy, Justice Littlejohn in dissent states he would simply hold that assault and battery of a high and aggravated nature is not a crime of moral turpitude.)

The Plaintiff is informed and believes, extremely grave acts of violence and depravity are CIMT, and thus assault with intent to kill and assault with intent to rape is CIMT. *State v. Ball*, 292 S.C. 71, 354 S.E.2d 906 (1987). This would be consistent with the description of acts that shock the conscience. Perhaps a similar standard is conduct which creates liability for intentional infliction of emotional distress.

The Criminal Court of Appeals of Oklahoma directly addressed the issue in *Tucker vs. State*, 2016 Ok. Cr. 29 (Dec. 21, 2016). “The law does not support the State’s claim that domestic violence is a crime of moral turpitude.” (Copy attached)

The *Tucker* court cited an Eighth Circuit definition which restricted moral turpitude to “the gravest offenses – felonies, infamous crimes, those that are *malum in se*”, including crimes of theft, and thus show a defendant is inherently of depraved mind and unworthy of belief. *Price v. State*, 1976 OK CR 22, ¶ 12, 546 P.2d 632, 638. *Malum in se* refers to crimes which are wrongs in themselves, inherently immoral, such as murder, arson or rape. *Black’s Law Dictionary* 978 (8th Ed. 2004).

The *Tucker* court further reasoned, “Misdemeanor domestic assault and battery would not fit within traditional definitions or the *Price* standard. Essentially, domestic assault and battery is a crime of violence against the person – like assault and battery. It is difficult to characterize domestic violence as a *malum in se* crime, or one recognized as

inherently evil and immoral, given that for centuries it was not recognized as a crime at all, and only recently has our Legislature granted it felony status.”

In this case, Plaintiff was indicted on the charge of domestic violence, second degree. This offense is a lesser included offense of domestic violence first degree, which itself is a lesser included offense of domestic violence of a high and aggravated nature. Per the indictment, on or about June 29, 2016 Mr. Baddourah allegedly “caused physical harm or injury to a household member, or did offer or attempt to cause physical harm or injury to a household member, with apparent present ability under circumstances reasonably creating fear of imminent peril by striking the household member with a car door an act likely to result in moderate bodily injury in violation of Section 16-25-20 (A-D), S.C. Code of Laws, 1976, as amended.”

It is undisputed that his wife grabbed Mr. Baddourah’s iPhone without permission and attempted to leave with it. Mr. Baddourah believes the evidence will show his wife was attempting to shut and lock her car door with his phone in her possession, and that Mr. Baddourah grabbed the car door to keep it from shutting. His wife claims Mr. Baddourah then shut the door causing her to sustain injuries. Whether the alleged acts were accidental or intentional and whether injuries occurred are all in dispute.

As noted by the *Tucker* court, this conduct cannot be characterized as a *malum in se* crime, or one recognized as inherently evil and immoral. Nor does this show that Plaintiff is of a depraved mind or that his act was an act of grave or extreme violence.

This court should find that the Plaintiff has stated a claim that domestic violence, second degree is not a crime involving moral turpitude, or at least not as alleged in Plaintiff’s indictment.

THE PLAINTIFF IS EXCEPTED FROM DISMISSAL
AS A MEMBER OF THE LEGISLATIVE BRANCH

The Governor argues that the Plaintiff is not a member of the legislative branch as a matter of law (Motion to Dismiss, paragraph 4), but once again offers his interpretation as being tantamount to law. The only case cited¹ is inapposite. In that case, former Governor Haley attempted to call the legislature back in session. The court determined the Governor lacked constitutional authority to call extra session of General Assembly while it was already in annual session but in recess. Const. Art. 4, § 19. There was a generic reference in the case to separation of powers under Article I, § 8 but nothing that answers the question in this case “as a matter of law.”

The Governor also references the Article headings for “Legislative Department” in Article III, and Judicial Department in Article V of the constitution. However, this disproves the Governor’s interpretation. Article VI, § 8 excepts members of the Legislative and Judicial *Branches*. The drafters could have use “Department” or could have said “General Assembly” but did not, the drafters said “Branches.” A branch is an extension or subdivision of a larger whole. Since Article VI, § 8 extends the Governor’s power of suspension to “political subdivisions” it does not make logical sense to limit the legislative branch exception to the General Assembly.

Article VIII of the South Carolina Constitution, adopted in 1973 as an Amendment to the South Carolina Constitution of 1895, directed the General Assembly to implement what was popularly referred to as “home rule” by establishing the structure, organization, powers, duties, functions, and responsibilities of local governments by general law. The General Assembly was required to implement home rule, and Article VIII essentially left it up to the General Assembly to decide what powers local governments should have. Acting under this authority, the General

¹ *McConnell v. Haley*, 393 S.C. 136, 711 S.E.2d 886 (2011).

Assembly enacted various statutes regarding the powers of counties and municipalities. (See *Hospitality Ass'n of South Carolina, Inc. v. County of Charleston*, 320 S.C. 219, 464 S.E.2d 113 (1995)(discussing history of home rule.)

Among the statutes adopted to implement 'home rule' is S.C. Code Ann. §5-7-30 which provides, "Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State."

The City of Columbia has a council-manager form of government. See S.C. Code Ann. §§ 5-13-10 to 100. "Unlike the mayor under other forms of government who may have mainly administrative or ceremonial duties and who may vote only in case of a tie, the mayor under the council manager form is a regular legislative member of council and has a vote the same as the other members. S.C. Code Ann. § 5-13-20." (*N.A.A.C.P., Inc. v. City of Columbia*, S.C., 850 F.Supp. 404 (1993) (emphasis added.) "All legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor, to have one vote." S.C. Code Ann. §5-13-30.

The South Carolina legislature, consistent with Article VIII of the South Carolina Constitution, shared a portion of its legislative power with the City of Columbia, and that legislative power is exercised by members of Columbia City Council including Mr. Baddourah, a duly elected member of that council. Mr. Baddourah is a member of the legislative branch exercising the legislative power shared by the South Carolina legislature pursuant to Article VIII of the South Carolina Constitution, and thus is excepted from the suspension powers of the Governor who is a member of the executive branch. (See also Article VIII, §13 providing for the "Joint administration of functions and exercise of powers between the State and its political subdivisions.") To hold otherwise would be to violate the separation of powers required by Article I, §8 of the South Carolina Constitution and to ignore the plain language of Article VI, §8.

The court should also take note of S.C. Code Ann. §5-7-200 whereby the legislature specifically proscribed the grounds for removal of a council member including being convicted of a crime of moral turpitude.

This court should find that the Plaintiff has stated a claim that as a member of the legislative branch which exercises constitutionally granted legislative power, the Plaintiff is excepted from the Governor's suspension power under Article VI, §8.

**THIS COURT HAS JURISDICTION
TO INTERPRET THE CONSTITUTION**

The Governor's final argument in the motion to dismiss is that this court lacks jurisdiction to review "discretionary acts" of the Governor and that to do so would violate the separation of powers of Article I, §8. However, the Plaintiff contends that for the court to fail to act would be a violation of the separation of powers doctrine of Article I, §8. As previously argued, Article VI, §8 specifically exempts the legislative branch. To allow the executive to suspend a member of the legislative branch when prohibited by the constitution and then argue the court cannot review this action because it's a "discretionary act" would be a gross violation of the separation of powers. "Where there is an assertion that an act of the Executive is without, or in excess of, authority, or that it is in violation of some other applicable law, the courts have jurisdiction regardless of whether or not the act involves an exercise of so-called 'Executive discretion.'" Johnston v. United States, 175 F.2d 612, 615 (4th Cir. 1949)

"Petitioners also object that our review of this case will offend the principle of separation of powers, for the executive's responsibility to insure that the laws be faithfully executed requires the power of appointment or removal at will, unimpaired by any judicial oversight. More fundamentally, however, the answer to petitioners' objection is that there can be no impairment of executive power, whether on the state or federal level, where actions pursuant to that power are impermissible under the Constitution. Where there is no power, there can be no impairment of power. And our

determination of the limits on state executive power contained in the Constitution is in proper keeping with our primary responsibility of interpreting that document. Elrod v. Burns, 427 U.S. 347, 352–53, 96 S. Ct. 2673, 2679, 49 L. Ed. 2d 547 (1976)

Furthermore, the court is not reviewing the Governor's discretionary act but rather interpreting a provision of the South Carolina Constitution to determine its legality under the constitution. "While we have undoubted authority to judge the legality of executive action, we are on treacherous ground indeed when we attempt judgments as to its wisdom or necessity. Holtzman v. Schlesinger, 414 U.S. 1304, 1309–10, 94 S. Ct. 1, 5, 38 L. Ed. 2d 18 (1973)."

This court has jurisdiction to determine the Plaintiff's claims.

**NOVEL ISSUES SHOULD NOT BE DECIDED
BY A MOTION TO DISMISS**

To the best of Plaintiff's knowledge and that of his counsel of record, the issues raised by the complaint have not be decided by a South Carolina court and are important novel issues. Our courts have held that novel issues should not be decided on the basis of a demurrer. Important questions of novel impression should not be decided on demurrer. See *Jackson v. Atlantic Soft Drink Co.*, 286 S.C. 577, 336 S.E.2d 13 (1985).

CONCLUSION

A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. As noted above, the Plaintiff has stated valid claims for relief as to a declaration that the Governor exceeded his powers under Article VI, §8 of the South Carolina Constitution by suspending a member of the legislative branch and by construing domestic violence, second degree as a crime involving moral turpitude. This court not only has the

jurisdiction but the duty to intervene where actions pursuant to executive power are impermissible under the Constitution. For all these reasons, as set forth in the Complaint, the motion should be denied and this case allowed to proceed on the merits.

Respectfully submitted,

TOBIAS G. WARD, JR., PA

/s/ Tobias G. Ward, Jr. _____

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Attorneys for the Plaintiff

1 GOVERNOR ASKED FOR IT TO SUPPORT HIS DECISION. BUT I THINK IF
2 YOU READ THE ATTORNEY GENERAL OPINION, IT SPEAKS FOR
3 ITSELF, AND YOU CAN GIVE IT WHATEVER WEIGHT YOU BELIEVE
4 APPROPRIATE.

5 THE COURT: I THINK SO. IT ALWAYS
6 DEPENDS ON WHO WROTE IT.

7 MR. LIMEHOUSE: YES, SIR. AND AS TO THAT,
8 I WOULD JUST NOTE THE ATTORNEY GENERAL'S OPINION, LIKE THE
9 CASE LAW IN THIS AREA, ADDRESSES CRIMES OF MORAL TURPITUDE,
10 OFTEN IN THE EVIDENTIARY CONTEXT.

11 THE COURT: DO YOU WANT TO SUBMIT THE
12 ATTORNEY GENERAL'S OPINION?

13 MR. LIMEHOUSE: YES, SIR. I BELIEVE IT IS
14 PART OF THE RECORD.

15 MR. WARD: I DON'T HAVE ANY OBJECTION
16 TO IT COMING IN AND THE COURT CONSIDERING IT.

17 (PLAINTIFF'S EXHIBIT ONE MARKED AND INTRODUCED)

18 MR. LIMEHOUSE: AS I WAS SAYING, YOUR
19 HONOR, AS THE ATTORNEY GENERAL'S OPINION NOTES, THE
20 QUESTION ADDRESSED PRIMARILY AND CASE LAW SITED IN THAT
21 OPINION CONCERNS CRIMES OF MORAL TURPITUDE, AND OUR
22 SUPREME COURT IN *MCCONNELL V HALEY* SAID THAT "WHERE STATE
23 CONSTITUTIONAL PROVISIONS SHALL NOT BE CONSTRUED TO
24 IMPOSE LIMITATIONS BEYOND THEIR CLEAR MEANING, AND WHERE A
25 TERM IS NOT DEFINED, THE MATTER MUST BE LEFT TO THE



ALAN WILSON
ATTORNEY GENERAL

March 9, 2017

Thomas Limehouse, Legal Counsel
Office of the Governor
State House
1100 Gervais Street
Columbia, SC 29201

Dear Mr. Limehouse:

You have requested our opinion as to whether the crime of domestic violence 2nd degree constitutes a "crime of moral turpitude" for purposes of the Governor's suspension power pursuant to Art. VI, § 8 of the State Constitution. By way of background, you note that "this question has not been squarely addressed by the Supreme Court of South Carolina." It is our opinion that a court would most likely conclude that domestic violence 2nd degree is a crime of moral turpitude.

Law/Analysis

In Op. S.C. Att'y Gen., 2015 WL 2148106 (April 24, 2015), we discussed the question of what constitutes a "crime of moral turpitude" at some length, stating as follows:

Our Supreme Court has defined a crime of moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties that 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." Smith v. Smith, 194 S.C. 247, 9 S.E.2d 584, 589 (1940); see also State v. Drakeford, 290 S.C. 338, 340, 350 S.E.2d 391, 392 (1986); State v. Morris, 289 S.C. 294, 296, 345 S.E.2d 477, 478 (1986); State v. Yates, 280 S.C. 29, 37, 310 S.E.2d 805, 810 (1982), overruled by State v. Torrence, S.C., 280 S.C. 29, 310 S.E.2d 805 (1982); State v. Horton, 271 S.C. 413, 414, 248 S.E.2d 263, 263 (1978). Opinions of our Office on the subject of moral turpitude have consistently recognized the same. See, e.g., Op. S.C. Att'y Gen., 2014 WL 2538230 (May 12, 2014); Op. S.C. Att'y Gen., 2007 WL 655616 (Feb. 5, 2007); Op. S.C. Att'y Gen., 1998 WL 61843 (Jan. 27, 1998). Moreover, "moral turpitude implies something immoral in itself, regardless of whether it is publishable by law as a crime." State v. Horton, 271 S.C. 413, 414, 248 S.E.2d 263 (1978) (citing 58 C.J.S. Morals at 1203). Behavior that is primarily self-destructive typically does not involve moral turpitude, which requires a breach of duty to society and one's fellowman. State v. Major, 301 S.C. 181, 184, 391 S.E.2d 235, 237 (1990). Thus, it follows that while all crimes involve some degree of social irresponsibility, not every crime is one that involves moral turpitude. State v. LaBarge, 275 S.C. 168, 172, 268 S.E.2d 278, 280 (1980).

"In determining whether a crime is one involving moral turpitude, the Court focuses primarily on the duty to society and fellow man which is breached by the commission of a crime." State v. Ball, 292 S.C. 71, 73, 354 S.E.2d 906, 908 (1987), overruled on other grounds by State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990). Furthermore, it has been concluded that "[m]ost offenses found to involve moral turpitude . . . seem to include some sort of dishonest behavior" McAninch and Fairey, The Criminal Law of South Carolina, 45 (3rd ed. 1996); see also State v. Hall, 306 S.C. 293, 295, 411 S.E.2d 441, 442 (Ct. App. 1991) (quoting the above in its analysis of whether first offense driving under the influence and resisting arrest were crimes of moral turpitude).

We have not previously addressed the issue of whether an indictment for domestic violence 2nd degree constitutes a "crime of moral turpitude" for purposes of Art. VI, § 8. This provision of the State Constitution authorizes the Governor to suspend "[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 of moral turpitude. . . ." Section 16-25-20(A) makes it unlawful to:

- (1) cause physical harm or injury to a person's own household member; or
- (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

Subsection (C) further states:

(C) A person commits the offense of domestic violence in the second degree if the person violates subsection (A) and:

- (1) moderate bodily injury to the person's own household member results or the act is accomplished by means likely to result in moderate bodily injury to the person's own household member;
- (2) the person violates a protection order and in the process of violating the order commits domestic violence in the third degree;
- (3) the person has one prior conviction for domestic violence in the past ten years from the current offense; or
- (4) in the process of committing domestic violence in the third degree one of the following also results:
 - (a) the offense is committed in the presence of, or while being perceived by, a minor;

- (b) the offense is committed against a person known, or who reasonably should have been known, by the offender to be pregnant;
- (c) the offense is committed during the commission of a robbery, burglary, kidnapping, or theft;
- (d) the offense is committed by impeding the victim's breathing or air flow; or
- (e) the offense is committed using physical force or the threatened use of force against another to block that person's access to any cell phone, telephone, or electronic communication device with the purpose of preventing, obstructing, or interfering with:
 - (i) the report of any criminal offense, bodily injury, or property damage to a law enforcement agency; or
 - (ii) a request for an ambulance or emergency medical assistance to any law enforcement agency or emergency medical provider.

A person who violates this subsection is guilty of a misdemeanor and, upon conviction, must be fined not less than two thousand five hundred dollars nor more than five thousand dollars or imprisoned for not more than three years, or both.

Domestic violence in the second degree is a lesser-included offense of domestic violence in the first degree, as defined in subsection (B), and domestic violence of a high and aggravated nature, as defined in Section 16-25-65.

Assault and battery in the second degree pursuant to Section 16-3-600 (D) is a lesser-included offense of domestic violence in the second degree as defined in this subsection.

Domestic violence 2nd degree is an offense within the jurisdiction of the Court of General Sessions. Based upon the Indictment, it appears that the Defendant is alleged to fall within §16-25-20(A) [cause physical harm or injury to household member] and § 16-25-20(C)(1) [moderate bodily injury to person's household member]. The term "household member" is defined in § 16-25-10(3) to include a spouse, former spouse, persons who have a child in common or a male or female who are cohabiting or formerly have cohabited.

While our opinions have not yet addressed the question of whether the crime of domestic violence 2nd degree constitutes a crime of moral turpitude, a number of other jurisdictions have dealt with the question generally. In Morelli v. Ashcroft, 100 Fed. Appx. 620, 621-22 (9th Cir.

2014), for example, the Ninth Circuit concluded that "... we agree with the district court that the BIA (Board of Immigration Appeals) did not err when it treated a crime of domestic violence against a cohabitant as a crime of moral turpitude." Morelli cited in support of this conclusion Grageda v. U.S. INS, 12 F.3d 919, 922 (9th Cir. 1993), which had held that inflicting injury upon one's spouse severely to cause a "traumatic condition" is "an act of baseness or depravity contrary to accepted moral standards."

And, in People v. Rodriguez, 5 Cal. App. 4th 1398, 7 Cal. Repr. 495 (1992), the Court held that the crime of inflicting corporal injury upon a spouse or cohabitant is a crime of moral turpitude. There, the Court's reasoning was as follows:

[t]o violate section 273.5 the assailant must, at the very least, have set out, successfully to injure a person of the opposite sex in a special relationship for which society rationally demands, and the victim may reasonably expect stability and safety, and in which the victim for these reasons among others, may be especially vulnerable. To have joined in, and thus necessarily to be aware of, that special relationship, and then to violate it willfully, and with intent to injure, necessarily connotes the general readiness to do evil that has been held to define moral turpitude.

5 Cal. App. 4th at 1402, 7 Cal. Repr. at 497. Thus, in the California Court of Appeals' view, it is the breach of the "special relationship" of the couple through the infliction of injury by one upon the other which marks the crime as one of "moral turpitude." See also People v. Burton, 243 Cal. App. 4th 129, 135, 136, 196 Cal. Repr. 392, 398, 399 (2015) [purpose of statute is to "afford greater protection to intimate partners" and that "we agree with the California courts that have previously addressed this issue that a violation of Section 273.5 is a crime of moral turpitude as a matter of law."]

While, as you indicate, the South Carolina Supreme Court has not squarely addressed this question, there are strong indications the Court would conclude that domestic violence 2nd degree constitutes a crime of moral turpitude. In Re Laguiere is a good example. There, in an attorney disciplinary proceeding, in which the attorney was publicly reprimanded, the Supreme Court noted that the attorney in question had admitted that he violated several rules of professional conduct following his plea of guilty for criminal domestic violence. One of the Rules which Respondent admitted to have violated was Rule 8.4(c) (professional misconduct for a lawyer to engage in conduct involving moral turpitude).

Moreover, In Re Berry, 345 S.C. 463, 549 S.E.2d 254 (2001), also involved a disciplinary action. Respondent was accused of numerous violations of the Rules of Professional Responsibility, including having pled guilty to the offense of criminal domestic violence, as well as several narcotics offenses. The Court noted that these criminal offenses (including domestic violence) had been found by the Panel to constitute "convictions of serious crimes as defined by Rule 2 of Rule 413, as well as crimes of moral turpitude." (emphasis added). The Court disbarred the Respondent as "the appropriate sanction in similar cases involving multiple acts of

Thomas Limehouse, Legal Counsel

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misconduct, including criminal violations.” One of the cases cited by the Court was In Re Courtney, 342 S.C. 617, 538 S.E.2d 652 (2000) which had concluded that Respondent Courtney had violated, among other Rules. Rule 8.4(c), relating to conduct involving moral turpitude. Thus, it can reasonably be assumed that the Court in In Re Berry implicitly affirmed the recommendation of the Panel regarding the conviction of criminal domestic violence as one involving moral turpitude.

In the present situation the Indictment states:

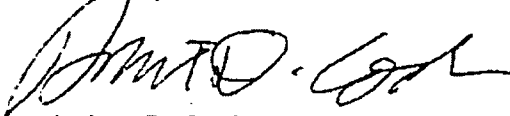
That Mohsen A. Baddourah did in Richland County on or about June 29, 2016 cause physical harm or injury to a household member, CARRIE RHETT, or did offer or attempt to cause physical harm or injury to a household member, CARRIE RHETT, with apparent present ability under circumstances reasonably creating fear of imminent peril by striking CARRIE RHETT with a car door an act likely to result in moderate bodily injury, in violation of Section 16-25-20 (A-D), S.C. Code of Laws, 1976, as amended.

Thus, the Indictment alleges conduct which falls within §§’s 16-25-20(A) and (C)(1)’s ambit. Based upon the foregoing authorities, in our opinion, the Indictment alleges sufficiently a “crime of moral turpitude” for purposes of Article VI, § 8.

Conclusion

It is our opinion that the crime of domestic violence 2nd degree is a “crime of moral turpitude” for purposes of the Governor’s suspension power provided in Article VI, § 8 of the South Carolina Constitution. We address herein only domestic violence 2nd degree and no other domestic violence offenses or any other offense.

Sincerely,

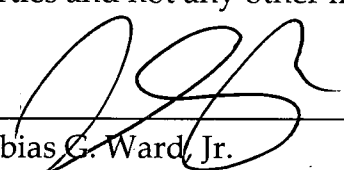
A handwritten signature in black ink, appearing to read "R.D. Cook", written over a horizontal line.

Robert D. Cook
Solicitor General

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all the material proposed to be included by any of the parties and not any other material.

Dated: 6/15/18



Tobias C. Ward, Jr.

J. Derrick Jackson

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803-708-4200

Attorney for Appellant

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