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S.C. SUPREME COURT

HENRY MCMASTER
GOVERNOR

October 10, 2020

VIA EMAIL & ELECTRONIC FILING
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: *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*
Appellate Case No.: 2020-000775

Dear Mr. Shearouse:

On behalf of Respondent Henry McMaster, in his capacity as Governor for the State of South Carolina ("Governor McMaster"), I write to file a suggestion of mootness in connection with the above-referenced matter and to submit supplemental authorities in accordance with Rule 208(b)(7), SCACR.

First, Governor McMaster respectfully asserts that the Court should not entertain this moot appeal. As Appellant's counsel has recently, and candidly, acknowledged, this appeal, and any resulting decision by this Court, "will not, obviously, reinstate [Appellant] in any way" and "will not have any direct or positive effect for [Appellant]."[1] Therefore, the Court should decline Appellant's invitation to render advisory opinions on what are purely abstract and academic questions and should dismiss the present appeal as moot.

It is axiomatic that this Court does not concern itself with moot cases and will not answer stale, speculative, or abstract questions. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25–26, 630 S.E.2d 474, 477 (2006); *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001).

1. Chris Trainor, *Former Columbia councilman's lawsuit against McMaster heading to state Supreme Court*, POST & COURIER (Oct. 7, 2020), *available at* www.postandcourier.com/columbia/former-columbia-councilmans-lawsuit-against-mcmaster-heading-to-state-supreme-court/article_cb65ad2e-08ad-11eb-88fb-e7f359f22cf0.html.

Otherwise, in the absence of an actual, ongoing controversy, judicial action would run afoul of the long-standing and "elementary" principle that "the courts of this State have no jurisdiction to issue advisory opinions." *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975). This Court has repeatedly recognized that "[a] moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Sloan*, 369 S.C. at 26, 630 S.E.2d at 477 (citing *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). "If there is no actual controversy, this Court will not decide moot or academic questions." *Id.* (citing *Mathis*, 260 S.C. at 346, 195 S.E.2d at 715).

All told, it has been over three years since a Grand Jury indicted Appellant for Domestic Violence, Second Degree, and Governor McMaster issued Executive Order No. 2017-05, temporarily suspending Appellant from Columbia City Council "until such time as the above-referenced charge is resolved." (R. p. 25.) In the meantime, Appellant sought relief in this Court's original jurisdiction, fully litigated the matter before the circuit court, and appealed the resulting order to the court of appeals. While his appeal was pending before the court of appeals, Appellant entered into pretrial intervention, the State disposed of Appellant's charge by entry of a *nolle prosequi*, and Governor McMaster promptly issued Executive Order No. 2018-51, rescinding his prior Order and reinstating Appellant.[2] (Ex. A.) Although Appellant subsequently filed to run for reelection to Columbia City Council, he did not prevail, and his successor was elected following a run-off between two other candidates.[3] As Appellant's counsel seemingly recognized, the aforementioned "intervening events" have rendered this appeal moot.[4] *Curtis*, 345 S.C. at 567, 549 S.E.2d at 596 ("[M]oot appeals result when intervening events render a case nonjusticiable.").

Appellant's underlying complaint sought (1) a "temporary stay" of Executive Order No. 2017-05; (2) a declaration that Appellant was a member of the Legislative Branch not subject to suspension by the Governor; (3) a declaration that Domestic Violence, Second Degree, is not a

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2. The Court can take judicial notice of the Governor's Executive Orders. *See* Rule 201(b), SCRE; Rule 201(f), SCRE; *Heyward v. Long*, 178 S.C. 351, ___, 183 S.E. 145, 152 (1935); *see also Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 440 F. Supp. 3d 520, 524 n.2 (D.S.C. 2020) ("The court takes judicial notice of the executive orders as matters of public record.").

3. *See Official Election Results*, Summary Results Report General Election November 5, 2019, at 3, CITY OF COLUMBIA, *available at* www.columbiasc.net/depts/elections/docs/2019_Election/Election%20Summary%20Results%20-%20OFFICIAL%20-%20CITY%20OF%20COLUMBIA.pdf. The Court can take judicial notice of the election results and the current membership of Columbia City Council. *See* Rule 201(b), SCRE; Rule 201(f), SCRE.

4. The case law is replete with examples of both federal and state courts dismissing challenges to suspensions as moot where the suspensions are no longer in effect. *See, e.g.*, *Alejandrino v. Quezon*, 271 U.S. 528, 532 (1926) ("We do not think that we can consider this question, for the reason that the period of suspension fixed in the resolution has expired, and, so far as we are advised. Alejandrino is now exercising his functions as a member of the Senate. It is therefore in this court a moot question whether or not he could be suspended in the way in which he was."); *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001) (concluding that federal district judge's "claims are moot insofar as they distinctively relate to the one-year suspension, which expired"); *Allied Home Mortg. Corp. v. U.S. Dep't of Hous. & Urban Dev.*, 618 F. App'x 781, 783–84 (5th Cir. 2015) ("During the pendency of the case, HUD withdrew the suspensions. We now hold that the case is moot and we therefore dismiss it."); *Bruce v. Maxwell*, 270 Ga. 883, 883, 515 S.E.2d 149, 150 (1999) ("Inasmuch as Bruce has resigned from office, this appeal, which simply challenges the propriety of Bruce's suspension, is moot and must be dismissed.").

"crime involving moral turpitude" for purposes of article VI, section 8 of the South Carolina Constitution, or at least not as charged in the Indictment; (4) a declaration that Executive Order No. 2017-05 is invalid and cannot be enforced; and (5) an award of attorney's fees and costs. (*See* R. pp. 22–23.) Obviously, the Court need not stay a suspension or an Executive Order that is no longer in effect, and no declaratory relief will alter the fact that Appellant's term has expired and his now-former constituents have elected his successor. *See Pee Dee Elec. Co-op., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983) ("Even if the court had declared the questioned statute unconstitutional, appellant's position would not change."). It is well-settled that "[t]he existence of an actual controversy is essential to jurisdiction to render a declaratory judgment." *S.C. Elec. & Gas Co. v. S.C. Pub. Serv. Auth.*, 215 S.C. 193, 215, 54 S.E.2d 777, 787 (1949); *see also Power v. McNair*, 255 S.C. 150, 154–55, 177 S.E.2d 551, 553 (1970) ("Under these circumstances, an adjudication of the present question would settle no legal rights of the parties. It would be only advisory and, therefore, beyond the intended purpose and scope of a declaratory judgment. We simply refuse to enter the field of advisory opinions."). Accordingly, this Court should dismiss the present appeal as moot and decline to issue advisory opinions.

To be sure, none of the exceptions to the mootness doctrine that this Court has recognized would apply to this case or to the arguments raised therein. Appellant's challenge has not evaded review and does not raise a "recurring dilemma" that requires this Court to clarify the law. *See Evans v. S.C. Dep't Soc. Servs.*, 303 S.C. 108, 110 n.1, 399 S.E.2d 156, 157 n.1 (1990). Likewise, this case can hardly be said to involve questions of "imperative and manifest urgency." *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596. And the circuit court's order will not have collateral consequences for the parties such that appellate review is required.[5] Rather, here, as in *Sloan*, where the appellant similarly "conceded that his interest in this matter is purely academic," "any judgment by this Court would constitute an advisory opinion." *Sloan*, 369 S.C. at 26, 630 S.E.2d at 478. Therefore, the Court should dismiss this appeal as moot.

Second, notwithstanding the foregoing, should the Court deem it necessary or appropriate to reach the merits of this case, Governor McMaster hereby provides a supplemental citation to a November 7, 2018 Attorney General's Opinion, which is enclosed for the Court's review. 2018 WL 6015927, at *1 (S.C.A.G. Nov. 7, 2018) (Ex. B.) Governor McMaster offers this Opinion, as well as the authorities cited therein, in further support of his arguments—and previous discretionary determination—that Appellant was charged with a "crime involving moral turpitude" for purposes of article VI, section 8 of the South Carolina Constitution. *E.g.*, Brief at 12–13. The Court can also take judicial notice of this otherwise admissible government record. *See* Rule 201(b), (f), SCRE; Rule 803(8), SCRE.

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5. Appellant cannot, for instance, claim that he was entitled to compensation during the period in which he was suspended as a member of Columbia City Council. *See In re Ferguson*, 304 S.C. 216, 219, 403 S.E.2d 628, 631(1991) ("[A] public officer who is suspended from office is not entitled to compensation."); *see also* 2004 WL 2016233, at *1 (S.C.A.G. Aug. 24, 2004) ("Consistent with [*In re Ferguson*], Commissioner Sharpe would not be entitled to receive his salary or benefits during the period of his suspension from office."). In exercising similar discretionary suspension authority, this Court has repeatedly reaffirmed the principle plainly stated in *In re Ferguson* and confirmed that officers are not entitled to compensation or benefits during a temporary suspension. *E.g.*, *In re Gillens*, 429 S.C. 456, 839 S.E.2d 100 (2020) (Beatty, C.J.); *In re Johnson*, 425 S.C. 557, 823 S.E.2d 473 (2019) (Beatty, C.J.); *In re Sherlin*, 398 S.C. 112, 727 S.E.2d 739 (2012); *In re Hughes*, 388 S.C. 434, 698 S.E.2d 203 (2010) (Toal, C.J.).

For the reasons set forth above, Governor McMaster respectfully submits that the Court should dismiss this appeal as moot. In the alternative, should the Court deem it necessary and appropriate to reach the merits of this case, Governor McMaster provides the cited and enclosed Attorney General's Opinion, as well as the authorities referenced therein, in support of his previous determination that Appellant was charged with, and the Grand Jury returned an Indictment charging Appellant with a "crime involving moral turpitude" for purposes of article VI, section 8 of the South Carolina Constitution.

Should the Court have any questions or concerns or need anything further in this regard, please do not hesitate to contact me. By copy of this letter, I am providing the enclosed materials to all counsel of record via email and notifying them of this communication with the Court.

Very truly yours,

Thomas A. Limehouse, Jr.
Chief Legal Counsel

Enclosures
cc w/ enc: Tobias Gavin Ward, Jr., Esquire
James Derrick Jackson, Esquire
Joseph M. McCulloch, Jr., Esquire
Kathy R. Schillaci, Esquire

EXHIBIT A

Executive Order No. 2018-51

State of South Carolina

Executive Department

FILED
OCT 17 2018
Mark Hammond
SECRETARY OF STATE

Office of the Governor

EXECUTIVE ORDER NO. 2018-51

WHEREAS, on March 13, 2017, the undersigned issued Executive Order 2017-05, suspending Mohsen A. Baddourah as a member of the City Council of the City of Columbia following his indictment for "a crime involving moral turpitude" pursuant to article VI, section 8 of the South Carolina Constitution; and

WHEREAS, in accordance with article VI, section 8 of the South Carolina Constitution, the suspension of Mohsen A. Baddourah was effective until such time as the aforementioned indictment was resolved; and

WHEREAS, the undersigned is informed that the aforementioned indictment has been disposed of by entry of a *nolle prosequi*; and

WHEREAS, under South Carolina law, "a *nolle prosequi* upon charges extinguishes the State's prosecution upon those charges" and "treats charges *nol prossed* as if they never existed," *Mackey v. State*, 357 S.C. 666, 669, 595 S.E.2d 241, 243 (2004).

NOW, THEREFORE, by virtue of the authority vested in me as Governor of the State of South Carolina and pursuant to the Constitution and Laws of this State and the powers conferred upon me therein, I hereby rescind Executive Order 2017-05 and reinstate Mohsen A. Baddourah as a member of the City Council of the City of Columbia. This Order is effective immediately.

GIVEN UNDER MY HAND AND THE GREAT SEAL OF THE STATE OF SOUTH CAROLINA, THIS 17th DAY OF OCTOBER, 2018.

HENRY MCMASTER
Governor

ATTEST:

MARK HAMMOND
Secretary of State

EXHIBIT B

November 7, 2018 Attorney General's Opinion

ALAN WILSON
ATTORNEY GENERAL

November 7, 2018

Thomas A. Limehouse, Jr., Esquire
Legal Counsel to Governor Henry McMaster
State House
1100 Gervais Street
Columbia, SC 29201

Dear Mr. Limehouse:

We received your letter dated July 24, 2018 for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue:
Whether a Mayor who pleaded guilty to one count of Domestic Violence, Third Degree, as a lesser included offense to an indictment for Domestic Violence, Second Degree, pursuant to negotiated sentence prompts the Governor's authority to in Article VI, section 8 of the South Carolina Constitution to remove the Mayor from his office.

Law/Analysis:
As you are aware, this Office regularly advises, assists and represents the Governor, as authorized and required by law. S.C. Const. art IV, § 15; S.C. Code Ann. § 1-7-90. As you mention in your letter, this Office answered a similar question for you, as legal counsel to the Governor, in 2017 when you asked whether the crime of domestic violence second (2nd) degree was a "crime of moral turpitude." See Op. S.C. Att'y Gen., 2017 WL 1095385 (S.C.A.G. March 9, 2017). In that opinion this Office 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." Id. However, that opinion limited its conclusion to domestic violence second (2nd) degree. Id.

The South Carolina Constitution authorizes the Governor with discretion to suspend a State officer indicted for "a crime of moral turpitude" but mandates a vacancy in the office of a State official convicted of "a crime involving moral turpitude" when it states that:

> 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. In case of conviction the office shall be declared vacant and the vacancy filled as may be provided by law. (1972 (57) 3181; 1973 (58) 83.)

S.C. Const. art. VI, § 8. Certainly the Mayor you describe has been indicted by a grand jury for a crime involving moral turpitude according to the information you provided, as our March 9, 2017 opinion

concluded that the crime of domestic violence second (2nd) degree is a crime of moral turpitude. Our understanding is your question is whether the Mayor's guilty plea with a conviction of a lesser included offense would be considered a conviction for Section 8 purposes. S.C. Const. art. VI, § 8. To further complicate matters, it is this Office's understanding the Mayor was also indicted for domestic violence third (3rd) degree on the same day as the indictment for domestic violence second (2nd) degree. Since it is our understanding the indictment for domestic violence third (3rd) degree was *nolle prossed* on 6/7/18 (the same day as the conviction for domestic violence third (3rd) degree on the sentencing sheet), it would not satisfy Article VI, § 8's requirement of a "conviction." This Office believes a court would conclude that if the crime that the Defendant was convicted of was one "involving moral turpitude" and if the crime the Defendant was indicted on was also a "crime involving moral turpitude" based on the same incident or set of facts, then the Governor has authority pursuant to S.C. Const. art. VI, § 8 to declare the office vacant "and the vacancy filled as may be provided by law." S.C. Const. art. VI, § 8. Thus, since the indictment for domestic violence second (2nd) degree and the conviction for domestic violence third (3rd) degree were based on the same incident, it is likely a court would determine that they would satisfy the conviction requirement of Article VI, § 8. The facts from the transcript dated June 7, 2018 for the guilty plea of the Defendant to the crime of domestic violence third (3rd) degree pursuant to S.C. Code § 16-25-20 *et seq.* include that the Defendant and Victim were married at the time of September 19, 2016 when an incident occurred where the Victim was in reasonable fear for her safety due to the actions of the Defendant and had visible injuries from the incident. Guilty Plea Tr. (17-GS-24-1439, -1440 dated June 7, 2018). The facts from the transcript state, among other things, that the Defendant grabbed the Victim, slammed her against a wall and then onto a bed, and took the Victim's cell phone from her. Id. The statement written by the Victim read at the plea include that she "was led to believe that no one would help [her] because of [the Defendant's] status as a public official" and that belief that the police within the Defendant's public office's jurisdiction would not help her. Id. at 8-10. It should also be noted that within the Code of Ordinances for the Town of Ware Shoals, South Carolina, the chain of the command for the police department reads as follows:

- **Sec. 26-58. - Chain of command.**

  The chain of command and lines of authority for the department shall be as follows:
  (1)
  The council;
  (2)
  Police committee;
  (3)
  The chief of police;
  (4)
  The assistant chief of police;
  (5)
  Officers; and
  (6)
  Patrol officers.

Code of Ord. for the Town of Ware Shoals Sec. 26-58 (Code 1988, § 2-1-32); https://library.municode.com/sc/ware_shoals/codes/code_of_ordinances?nodeId=COOR_CH26LAEN. The Town of Ware Shoals ordinances and list of council members, which includes

the mayor, is found at www.wareshoals.org/forms. Code of Ord. for the Town of Ware Shoals Sec.2-1 (Code 1988, § 1-1-1; Ord. of 6-21-1976). Furthermore, the ordinances for the Town of Ware Shoals authorize the members of Town Council, which includes the mayor (according to Ord. No.) to assist the police as follows:

- **Sec. 26-57. - Authority of council and chief.**

  (a)
  The council shall have full power to prescribe any and all such policies, rules and regulations for the police department as shall be recommended by the standing committee in charge thereof.
  (b)
  In cases of emergency, the members of council may assist the police and lend their presence to the authority of the town, but the chief of police shall have the sole authority to direct the operation of the department.

Code of Ord. for the Town of Ware Shoals Sec. 26-57 (Code 1973, § 17-40; Code 1988, § 2-1-31). Additionally, town council has authority to discharge "at-will" law enforcement officers. Code of Ord. for the Town of Ware Shoals Sec. 26-60 (Code 1988, § 2-1-34; Ord. No. 01-09, 2001).

Nevertheless, we must address now whether the crime of domestic violence (3rd) degree is a "crime involving moral turpitude." S.C. Const. art. VI, § 8. The law reads regarding domestic violence third (3rd) degree that:

> (A) It is 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.
> ...
> (D) A person commits the offense of domestic violence in the third degree if the person violates subsection (A).
> (1) A person who violates this subsection is guilty of a misdemeanor and, upon conviction, must be fined not less than one thousand dollars nor more than two thousand five hundred dollars or imprisoned not more than ninety days, or both. Notwithstanding the provisions of Sections 22-3-540, 22-3-545, and 22-3-550, an offense pursuant to the provisions of this subsection may be tried in summary court.
> (2) Domestic violence in the third degree is a lesser-included offense of domestic violence in the second degree, as defined in subsection (C), 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.
> (3) Assault and battery in the third degree pursuant to Section 16-3-600(E) is a lesser-included offense of domestic violence in the third degree as defined in this subsection.
> (4) A person who violates this subsection is eligible for pretrial intervention pursuant to Chapter 22, Title 17.

S.C. Code Ann. § 16-25-20. Please note that assault and battery in the third degree is a lesser-included offense of domestic violence third (3rd) degree. S.C. Code Ann. § 16-25-20(D)(3). The South Carolina Administrative Law Court has opined that traditionally "the law is silent on whether obstruction of justice and criminal domestic violence are crimes of moral turpitude." Robert D. Rice d/b/a Poverty Flats, Applicant, 94-ALJ-17-0280-CC, 1994 WL 925106, at *3 (Dec. 16, 1994). Accordingly, in the March 9, 2017 opinion, this Office examined how South Carolina and other jurisdictions have dealt with whether domestic violence second (2nd) degree constitutes a crime of moral turpitude and concluded that "there are strong indications the [South Carolina Supreme] Court would conclude that domestic violence 2nd degree constitutes a crime of moral turpitude." Op. S.C. Att'y Gen., 2017 WL 1095385 (S.C.A.G. March 9, 2017) (citing In Re Laguiere; In Re Berry, 345 S.C. 463, 549 S.E.2d 254 (2001); In Re Courtney, 342 S.C. 617, 538 S.E.2d 652 (2000)). Some of the cases that opinion referenced were Morelli v. Ashcroft, 100 Fed. Appx. 620, 621-22 (9th Cir. 2014), Grageda v. U.S. INS, 12 F.3d 919, 922 (9th Cir. 1993), People v. Rodriguez, 5 Cal. App. 4th 1398, 7 Cal. Reptr. 495 (1992), and People v. Burton, 243 Cal. App. 4th 129, 135, 136, 196 Cal. Reptr. 392, 398, 399 (2015).

The Supreme Court of South Carolina has defined moral turpitude as "an act of baseness, vileness or depravity in the private and social duties that a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man." Smith v. Smith, 194 S.C. 247, 259, 9 S.E.2d 584 (1940); see also State v. Horton, 271 S.C. 413, 238 S.E.2d 263 (1978); Ops. S.C. Att'y Gen., 2017 WL 3841519 (S.C.A.G. August 16, 2017); 2017 WL 1095385 (S.C.A.G. March 9, 2017). This Office previously opined regarding moral turpitude that one must look to whether the offender violates his or her "duty to society and fellow man" and that the issue of moral turpitude "depends not only on the nature of the offense, but also on the attendant circumstances." Op. S.C. Att'y Gen., 1991 WL 474741 (February 12, 1991) (quoting State v. Ball, 292 S.C. 71, 73, 354 S.E.2d 908 (1987) (overruled by State v. Major, 301 S.C. 181, 391 S.E. 2d 235 (1990), which held that possession of cocaine is a crime of moral turpitude) and 21 Am.Jur.2d Criminal Law, § 23, p. 138)) (emphasis added). Our Supreme Court broadened moral turpitude to the point where it "implies something immoral in itself, regardless of whether it is punishable by law as a crime." State v. Horton, 271 S.C. at 414, 248 S.E.2d at 263 (1978) (quoting 58 C.J.S. Moral p. 1203).

Regarding a "crime of moral turpitude" in the context of 8 U.S.C. § 1182(a)(2) of the Immigration and Nationality Act, and as mentioned above, certainly other courts have found domestic violence to be a crime of moral turpitude. See, e.g., Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1163–64 (9th Cir. 2006). The Ninth (9th) Circuit Court of Appeals explains its review process in that:

> To determine whether a specific crime falls within the category of "crimes involving moral turpitude," we apply the categorical and modified categorical approaches set forth in *Taylor v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). *See Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013, 1017 (9th Cir.2005). Under the categorical approach, we must compare "the elements of the statute of conviction to the generic definition, and decide whether the conduct proscribed [by the Arizona statute] is broader than, and so does not categorically fall within, this generic definition." *Huerta-Guevara v. Ashcroft,* 321 F.3d 883, 887 (9th Cir.2003). Under this approach, "[t]he issue is not whether the actual conduct constitutes a crime involving moral turpitude, but rather, whether the full

> range of conduct encompassed by the statute constitutes a crime of moral turpitude." *Cuevas-Gaspar,* 430 F.3d at 1017.
>
> If the statute of conviction is not a categorical match because it criminalizes both conduct that does and does not involve moral turpitude, we apply a "modified" categorical approach "under which we may look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings." *Tokatly v. Ashcroft,* 371 F.3d 613, 620 (9th Cir.2004) (internal quotation marks omitted). We may not, however, "look beyond the record of conviction itself to the particular facts underlying the conviction." *Id.*

Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1163–64 (9th Cir. 2006). Thus the Ninth (9th) Circuit looks to the State statute itself to determine whether it criminalizes only conduct involving moral turpitude or includes conduct that would not be involve moral turpitude. Id. The Court in Fernandez-Ruiz v. Gonzales states that the crime of simple assault is not considered moral turpitude under the Immigration and Nationality Act. The Court goes on to clarify that:

> [A]s we recently explained in *Galeana-Mendoza v. Gonzales,* 465 F.3d 1054, 2006 WL 2846379, *5 (9th Cir.2006), *Grageda* stands only for the proposition that "when a person beats his or her spouse *severely enough to cause 'a traumatic condition,'* he or she has committed an act of baseness or depravity contrary to accepted moral standards." *Id.* (quoting *Grageda,* 12 F.3d at 922 (discussing Cal. Penal Code § 273.5(a))) (emphasis added). It does *not* suggest that a spousal contact that causes minor injury or a spousal threat that results in no physical injury constitutes a crime of moral turpitude. Rather, the California spouse abuse and child abuse statutes that we held to involve moral turpitude in *Grageda* and *Guerrero de Nodahl* both required the willful infliction of bodily "injury *resulting in a traumatic condition.*" *Grageda,* 12 F.3d at 921 (quoting Cal. Penal Code § 273.5(a)) (emphasis added); *Guerrero de Nodahl,* 407 F.2d at 1406 n. 1 (quoting Cal. Penal Code § 273d) (emphasis added).
>
> ...
>
> Here, Arizona's class 2 misdemeanor assault merely requires "recklessly causing *any* physical injury to another person," *or* "placing another person in reasonable apprehension of imminent physical injury." Ariz. Rev. Stat. §§ 13-1203(A)(1), (2) (emphasis added).[8] Subsection (A)(2) contains absolutely no element of injury whatsoever, as it prohibits conduct that merely places another person "in reasonable apprehension of" physical injury. *Id.* § 13-1203(A)(2). Accordingly, not only does a conviction under Arizona's Class 2 misdemeanor assault statute not require "beat[ing] [one's] spouse *severely enough to cause a traumatic condition,*" *Grageda,* 12 F.3d at 922 (emphasis added), it does not require inflicting bodily injury of *any* kind. The BIA thus overreads *Grageda;* our decision there does not suggest that physical contacts that result in the most minor of injuries or threats that cause no injury at all involve moral turpitude. A statute encompassing such conduct includes within it acts that are not necessarily base, vile or depraved.

Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1167 (9th Cir. 2006) (emphasis added). Certainly while the Ninth Circuit's interpretation of Federal law is not binding on our advice to you today, it is helpful to consider. Conversely, this Office concurs with Judge Shedd's dissent in Prudencio v. Holder where he reasons that:

> In employing these approaches for purposes of the INA [Immigration and Nationality Act], we accord the Attorney General deference regarding the determination of what type of conduct involves moral turpitude. *Yousefi,* 260 F.3d at 326. The Attorney General has directed that, generally, a crime involves moral turpitude if it is "inherently base, vile, or depraved and contrary to accepted rules of morality and the duties owed between persons or to society in general." *Matter of Olquin–Rufino,* 23 I. & N. Dec. 896, 896 (B.I.A.2006). ...
>
> Like the provision at issue in *Nijhawan,* the moral turpitude provisions have no analogue in federal or state criminal statutes and "moral turpitude" is not an element of any offense. In addition, the presence of the word "involving," like the phrase "in which" at issue in *Nijhawan,* suggests a more individualized approach.[7] In sum, "[t]he need to decide whether a crime is one of 'moral turpitude' does not have a parallel in criminal cases," because " 'moral turpitude' just isn't relevant to the criminal prosecution; it is not as if 'turpitude' were an element of an offense." *Ali,* 521 F.3d at 741–42.[8] ...
>
> In light of these factors, and with due regard for the level of deference owed to the Attorney General in immigration matters, I believe that immigration judges have "the discretion to consider evidence beyond the charging papers and judgment of conviction" in determining if an alien was convicted of a crime involving moral turpitude, *Ali,* 521 F.3d at 743. ...
>
> It is difficult to believe that Congress intended for courts to straitjacket immigration courts with a doctrine based on concerns peculiar to the federal judiciary to enable individuals who infect underage girls with sexually transmitted diseases to avoid removal by pleading guilty to an overbroad statute that includes both crimes involving moral turpitude and crimes that do not.

Prudencio v. Holder, 669 F.3d 472, 484-85, 491–92 (4th Cir. 2012) (citations omitted). The majority in that opinion concluded that the statutory inquiry regarding the Immigration and Nationality Act are not the "acts of moral turpitude themselves, but the admissions establishing the essential elements of a particular type of crime... [and the] focus of the inquiry directed by the statute is the alien's actual conviction, not the conduct underlying that conviction." Prudencio v. Holder, 669 F.3d 472, 482 (4th Cir. 2012). Additionally, the dissent noted that the Fifth Circuit had previously used a "categorical approach to the moral turpitude provisions but nonetheless applying circumstance-specific approach to determine whether an alien had been 'convicted of ... domestic violence.'" Id. at 491 (quoting Bianco v. Holder, 624 F.3d 265, 272-73 (5th Cir. 2010)).

Conclusion:

This Office believes that a court would determine that since the indictment for domestic violence second (2nd) degree and the conviction for domestic violence third (3rd) degree were based on the same

incident, that they would satisfy the conviction requirement of Article VI, § 8 of the South Carolina Constitution. As to whether or not the domestic violence third (3rd) degree conviction is a crime "involving moral turpitude," this Office disagrees with the Ninth Circuit Court of Appeal's position that domestic violence is only a crime involving moral turpitude when one beats his or her spouse "severely enough to create a traumatic condition" but instead believes a court will conclude that all degrees of the crime of domestic violence **can** be crimes "involving moral turpitude," both as incidents charged and as convictions. S.C. Const. art IV, § 15; art. V, § 24; S.C. Code Ann. §§ 1-7-50, 1-7-60, 1-7-90, 1-7-100; Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1167 (9th Cir. 2006). In this instance, the fact that the Mayor pled to the crime of domestic violence third (3rd) degree on facts indicted for second (2nd) degree thus alleges conduct that is a "crime of moral turpitude" based on our March 9, 2017 opinion. See Op. S.C. Att'y Gen., 2017 WL 1095385 (S.C.A.G. March 9, 2017). We hope this assists you in answering your question. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,

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REVIEWED AND APPROVED BY:

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