

1983 WL 181804 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 18, 1983

***1 RE: Clarendon County Indictment for Lottery Offenses**

The Honorable Richard W. Riley
Governor
State House
Post Office Box 11450
Columbia, South Carolina 29211

Dear Governor Riley:

You have inquired as to whether or not a public official may be suspended from office by the Governor under [Article VI, § 8 of the Constitution of South Carolina](#), when that official has been indicted by a grand jury for:

1. Setting up a lottery,
2. Selling lottery tickets, and
3. Engaging in a criminal conspiracy to set up and operate a lottery.

The constitutional provision cited above requires that at least one (1) of the crimes named in the indictment be a crime of moral turpitude for the Governor's power of suspension to be invoked.

It is the opinion of this office that none of the above crimes constitute crimes of moral turpitude, as have been defined by law.

The Supreme Court of South Carolina defines a crime of 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 . . .

[State v. Smith](#), 194 S.C. 247, 9 S.E.2d 584 (1940); [State v. Horton](#), 271 S.C. 413, 238 S.E.2d 263 (1978); [State v. Lilly](#), Smith's Advanced Sheets, Op. No. 21840, January 4, 1983.

That definition was drawn from, [inter alia](#), 58 C.J.S. 'Moral' p. 1201. It has been used by the United States Supreme Court in [Jordan v. DeGeorge](#), 341 U.S. 223, 95 L.Ed. 886 (1951); the same definition has also been found in cites from Wisconsin, Virginia, Indiana, California, and the Federal District Courts in Pennsylvania and Missouri.

Using that definition, a determination as to whether or not a crime is one of moral turpitude is whether it is 'immoral in itself without respect to any legal prohibition'. 21 Am.Jur.2d 'Criminal Law' § 24. Such a crime would therefore be [mala in se](#), as opposed to crimes that are [mala prohibita](#), or crimes that are prohibited by statute. That distinction was followed by the South Carolina Supreme Court in [State v. Horton, supra](#), where it was held that moral turpitude 'implies something immoral in itself, regardless of whether or not it is punishable by law as a crime'.

Applying the above definition, and addressing lotteries, the U.S. Supreme Court has noted that lotteries are not, in the legal acceptance of the term, mala in se, although they may be properly made mala prohibita. [Stone v. Mississippi](#), 101 U.S. 814, 25 L.Ed. 1079 (1880).

The lower federal courts have on at least one occasion, that has not been overruled, held that writing a letter regarding the selling or promotion of a lottery in violation of the federal mail statutes was not a crime of moral turpitude. In [U.S. v. Carrollo](#), 30 Fed.Sup. 3 (D.Mo. 1939) it was held that the moral turpitude that may be involved in a crime exists because the act denounced 'grievously offends the moral code of mankind, and would do so even in the absence of a prohibiting statute.' The court went on to say that '[e]ven conducting a lottery' would not be such a crime, noting that churches and states conduct lotteries where laws do not prohibit them.

*2 The Supreme Court of Virginia has addressed the question of whether or not a lottery, or a 'numbers game', is a crime of moral turpitude. In [Parr v. Commonwealth](#), 96 S.E.2d 160 (Va. 1957), it was noted that lotteries were not mala in se, but 'may properly be made mala prohibita', citing [Stone v. Mississippi](#), *supra*. The court went on to observe:

We have been pointed to no case, nor have we been able to find any, holding to the contrary, or holding that the operation of a lottery or gambling establishment is an offense involving moral turpitude . . . Our conclusion is that while the conduct of a 'numbers game' is contrary to the public policy of this State and our standard of morals, it is not per se immoral or inherently evil and does not involve moral turpitude. To adopt the opposite view would lead to the conclusion that other States legalize and permit operations which are per se immoral and inherently evil. It is inconceivable that they would do so.

[96 S.E.2d at 164.](#)

The mala in se—mala prohibita distinction has been followed by our sister state Georgia. Under Georgia law, for an offense to be a crime of moral turpitude, it must be mala in se, under the same definition used in [State v. Horton](#), *supra*. [Ramsey v. State](#), 243 S.E.2d 555 (Ga.App. 1978). In accordance with that rationale, Georgia Appellate courts have on at least one occasion held a prior conviction for gambling not to be a crime of moral turpitude. [Curtis v. State](#), 165 S.E.2d 150 (Ga.App. 1968).

It must be noted that the South Carolina Supreme Court has not directly addressed the issue regarding lotteries as crimes of moral turpitude. However, as early as 1818 the court noted that certain wagers were not illegal merely as wagers. They were only illegal when forbidden by a statutory provision, calculated to injure third persons, or militate against the morality or sound police of the state. [Hasket ads. Wooten](#), 1 N. & McC. (10 S.C.L.) 177. But cf. [Lavel v. Myers](#), 1 Bailey (17 S.C.L.) 486 (1830).

Whether or not a crime is one of moral turpitude has been developed in South Carolina over the years on a case-by-case basis at common law, using the definitions and standards set forth above. [State v. Yates](#), Smith's Advanced Sheets, Op. No. 21835, December 22, 1982. A decision as to whether or not a specific offense involves moral turpitude is not made by deciding if the offense is a felony or misdemeanor, or even a crime, as an act may involve moral turpitude even if not a crime. [State v. Horton](#), *supra*.

Our Supreme Court has also held that while all crimes involve some degree of social irresponsibility, at the same time all crimes do not involve moral turpitude. Accordingly, in [State v. LaBarge](#), 268 S.E.2d 278 (S.C. 1980), the following crimes were held not to involve moral turpitude: Public drunkenness, breach of peace, disorderly conduct, driving without a license, possession of unlawful weapon, and trespass. And in [State v. Harvey](#), 275 S.C. 225, 268 S.E.2d 587 (1980), it was held that simple possession of marijuana was not a crime of moral turpitude. However, it has also been expressed in opinions of this office that a conspiracy to dispense controlled substances, in violation of federal or state law, would be a crime of moral turpitude.

*3 In addition, it has been held in this State that the crimes of larceny, assault and battery with intent to kill, and attempted robbery were crimes of moral turpitude, while the offense of carrying a pistol was not. [State v. Spinks](#), 260 S.C. 404, 196 S.E.2d 313 (1973).

Further opinions of this office have held a number of offenses to be crimes of moral turpitude, including jury tampering, vote buying, criminal sexual conduct, embezzlement of public funds, and breach of trust with fraudulent intent.

At the same time, opinions issued by this office have in the past held that conspiracy and contempt of court do not automatically constitute crimes of moral turpitude. Further examination would have to be conducted as to the grounds for the contempt of court, or the exact nature of the crime for which conspiracy was indicted.¹

In light of the above analysis regarding crimes of social irresponsibility, and crimes that are mala in se versus crimes that are mala Prohibita, the indictment in Clarendon County must be examined. While the crimes contained therein certainly constitute a degree of social irresponsibility, and, if public policy arguments against gambling are included, also constitute crimes against one's fellow man, they do not at the same time fall within the definition of baseness, depravity, or direct harm toward mankind. They are not crimes that are mala in se *Stone v. Mississippi, supra*. It is noted that in many states certain lotteries are sanctioned. In at least two states, outright gambling is allowed. In this state, bingo operations under certain restrictions are permitted.

In conclusion, therefore, it is the opinion of this office that the offenses alleged in the Clarendon County indictment do not constitute crimes of moral turpitude, as defined by the courts, and stated in numerous opinions issued by this office.

Sincerely yours,

T. Travis Medlock
Attorney General

Footnotes

- ¹ If the crime in the conspiracy contains fraud, deceit, misrepresentation, or any other offense involving moral turpitude consistent with the foregoing analysis, it may be held to be a crime of moral turpitude. *State v. Horton, supra*. However, on its face, the Clarendon County indictment does not contain such allegations.

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