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Opinion No. 08-108

Reckless Driving Not a Crime Involving Moral Turpitude

QUESTION

Whether Tenn. Code Ann. § 57-5-301(a)(1) prohibits a person convicted of reckless driving under Tenn. Code Ann. § 55-10-205 within the last ten years from owning or being employed by a business with a beer permit.

OPINION

No. Tenn. Code Ann. § 57-5-301(a)(1) does not prohibit a person convicted of reckless driving in the last ten years from owning or being employed by a business with a beer permit because the offense of reckless driving is not a crime involving moral turpitude.

ANALYSIS

Tenn. Code Ann. § 57-5-301 prohibits certain persons from owning or being employed by a business regulated under Title 57, Chapter 5 of the Tennessee Code. Specifically, Tenn. Code Ann. § 57-5-301(a)(1) provides the following prohibition: "[n]either the person engaging in such business nor persons employed by that person shall be a person who has been convicted of any violation of the laws against possession, sale, manufacture and transportation of intoxicating liquor *or any crime involving moral turpitude* within the last ten (10) years." (emphasis added). The issue presented in this Opinion is whether a person convicted of reckless driving within the last ten years is prohibited from employment by a Title 57, Chapter 5 regulated business. This is a question of first impression as the issue has not been addressed by Tennessee courts. Accordingly, this opinion must examine and address the definition of a crime involving moral turpitude, how criminal offenses are classified as crimes involving moral turpitude, and whether or not the offense of reckless driving meets the criteria necessary to be considered a crime involving moral turpitude. The logical first step in such an analysis would be to examine the elements of "reckless driving" as it is defined under Tennessee law.

I. Tennessee Law on Reckless Driving

The criminal offense of "reckless driving" is defined in Tenn Code Ann § 55-10-205 as the following:

> (a) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property commits reckless driving.
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> (b) A person commits an offense of reckless driving who drives a motorcycle with the front tire raised off the ground in willful and wanton disregard for the safety of persons or property on any public street, highway, alley, parking lot, or driveway, or on the premises of any shopping center, trailer park, apartment house complex, or any other premises that are generally frequented by the public at large; provided, that the offense of reckless driving for driving a motorcycle with the front tire raised off the ground shall not be applicable to persons riding in a parade, at a speed not to exceed thirty miles per hour (30 mph), if the person is eighteen (18) years of age or older.[1]

While the act of reckless driving involving a motorcycle with the front tire raised off the ground, as defined in subsection (b) of the statute, is relatively new and has not yet been addressed by the courts, the more familiar act of general reckless driving as defined is subsection (a) has remained unaltered since it was enacted in 1955,[2] and has therefore been addressed and interpreted by several Tennessee appellate courts over the years. The Tennessee Supreme Court has noted that "willful or wanton disregard for the safety of persons or property is made the essential element of the offense of reckless driving." *Burgess v. State*, 369 S.W.2d 731, 732 (Tenn. 1963). Thus, the key to interpreting the offense has been to define "willful and wanton disregard." Accordingly, our highest court has declared that one manifests willful or wanton disregard who breaches a duty in a "heedless and reckless disregard for another's rights, with the consciousness that the act or omission to act may result in injury to another." *State v. Wilkins*, 654 S.W.2d 678, 679 (Tenn.1983) (citing *Burgess*, 369 S.W.2d at 733). More recently, the Tennessee Court of Appeals has affirmed that "[w]illful or wanton disregard is a 'heedless and reckless disregard for another's rights, with the consciousness that the act or omission to act may result in injury to another.'" *Wilkins*, 654 S.W.2d at 679. However, this is the extent to which Tennessee courts have defined the mens rea, or culpable mental state requirement, for the offense of reckless driving.

This Office has previously opined whether certain vehicle-related crimes involve moral turpitude and therefore bar persons convicted within ten years from owning or working in a business regulated by Title 57, Chapter 5. In 1995 this Office determined that a conviction for driving under the influence (DUI) would not trigger the Tenn. Code Ann. § 57-5-301(a)(1) bar because, consistent with the holding of Tennessee courts, driving under the influence is not a crime involving moral turpitude. *See* Op. Tenn. Att'y Gen. No. 95-37 (Apr. 18, 1995). *See also Flowers v. Benton County Beer Board*, 302 S.W.2d 335, 339 (Tenn. 1957) (holding that "driving an automobile while under

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[1]Subsection (c) of Tenn Code Ann. § 55-10-205 makes a violation of the reckless driving statute under either subsection (a) or (b) a Class B misdemeanor.

[2]Subpart (b) was added to the reckless driving statute pursuant to 2007 Public Acts, Chapter 308, § 1, and became effective on July 1, 2007. The language that is now contained in subsection (a) has remained unchanged since it replaced the previous version of Tennessee's reckless driving statute via 1955 Public Acts, Chapter 329, § 57.

the influence" is "not an act involving moral turpitude"). This Office, on the other hand, came to the opposite conclusion regarding the offense of vehicular homicide, declaring in 1998 that "Tenn. Code Ann. § 57-5-301(a)(1) prohibits a person convicted of vehicular homicide under Tenn. Code Ann. § 39-13-213(a)(2) within the last ten years from owning or being employed by a business regulated under Title 57, Chapter 5 because such a conviction constitutes a crime involving moral turpitude." Op. Tenn. Att'y Gen. No. 98-225 (Dec. 1, 1998).

A conviction for reckless driving differs from both of the previously addressed vehicle offenses in that the elements of the offense of reckless driving, specifically the culpable mental state of "willful or wanton disregard," is significantly dissimilar to the essential elements of both DUI and vehicular homicide. For example, Tennessee courts have determined that "[t]here is no culpable mental state required for guilt of DUI." *State v. Fiorito*, 1995 WL 695031, at *3 (Tenn. Crim. App. 1995). As such, DUI is a strict liability crime where proof of the act itself, without consideration of any particular culpable mental state, is sufficient for conviction.[3] But the Tennessee Supreme Court has determined that "'moral turpitude' means 'something immoral in itself, regardless of the fact that it is punished by law. It must not merely be malum prohibitum, but the act itself must be inherently immoral.'" *State Board of Medical Examiners v. Freidman*, 263 S.W. 75, 82 (Tenn. 1924) (citing favorably to *Ex Parte Marshall*, 93 So. 471 (Ala. 1922)). Thus, it logically follows that the strict liability crime of DUI would not be considered a crime involving moral turpitude by Tennessee courts. Significantly, reckless driving is not a strict liability crime in that it requires proof that the offender had the culpable mental state of "wilful and wanton disregard."

Likewise, vehicular homicide differs from the essential elements of reckless driving in that vehicular homicide requires a culpable mental state of "recklessness" as well as the additional aggravating factor that a death was the direct result of the offender's recklessness. *See* Tenn Code Ann. § 39-13-213(a). Based on these elements, this Office opined that because vehicular homicide "requires a conscious disregard of a substantial and unjustifiable risk that directly results in the death of another," vehicular homicide "is a crime involving moral turpitude." Op. Tenn. Att'y Gen. No. 98-225. Significantly, the offense of reckless driving does not explicitly list "recklessness" as the requisite culpable mental state and does not require any additional aggravating factor, such as the death of another. Accordingly, additional analysis on what constitutes a crime involving moral turpitude and whether the elements of reckless driving meet this criteria is necessary.

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[3]The Tennessee Court of Criminal Appeals has stated that "[c]riminal strict liability is defined as '[a] crime that does not require a mens rea element, such as traffic offenses and illegal sales of intoxicating liquor.'" *Swanson v. Knox County*, 2007 WL 4117259, at *5 (Tenn. Ct. App. 2007) (quoting Black's Law Dictionary 400 (8th ed. 2004)). Furthermore, the Tennessee Court of Appeals has explained the significance of strict liability as such: the "provisions [of a strict liability offense] obviate the necessity of establishing that the [act] or violation was intentional, reckless, or negligent, or that any type of culpable mind-set was involved," and therefore "'strict liability relieves the government of the obligation to show mens rea, not the actus reus.'" *State ex rel. Summers v. B & H Investments, Inc.*, 2004 WL 2113069, at *3 (Tenn. Ct. App. 2004) (citing *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164 (3rd Cir. 2004)).

II. Tennessee Moral Turpitude Law

The Tennessee Supreme Court, in determining what constitutes a crime involving moral turpitude within the context of the same beer permit regulation at issue in this opinion, lamented that "[i]t is unfortunate that the legislature used the language, 'crime involving moral turpitude,' for it has no satisfactory definition." *Gibson v. Ferguson*, 562 S.W.2d 188, 189 (Tenn. 1976).[4] The *Gibson* Court nonetheless recited what is now the accepted definition of a crime involving moral turpitude in Tennessee: "the term moral turpitude refers to an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or to society in general, contrary to the accepted rule of right and duty between man and man." *Gibson*, 562 S.W.2d at 189 (citing *Brooks v. State*, 213 S.W.2d 7, 11 (Tenn. 1948)). *See also State v. Morgan*, 541 S.W.2d at 388; Op. Tenn. Att'y Gen. No. 95-37; Op. Tenn. Att'y Gen. No. 98-225. Though also written in general terms, the Tennessee Court of Appeals has further stated that a crime involving moral turpitude "is a relative term dependent upon societal moral values. Anything done contrary to justice or honesty and good morals and with the purpose of defrauding another regardless of whether such act constitutes an act that the State has considered so serious as to make it a crime, comes within the term. The act must be malum in se rather than malum prohibitum." *Lee v. Personnel Merit Board*, 1986 WL 3368, at *5 (Tenn. Ct. App. 1986).

With the above recited definitions as guidance, Tennessee courts have determined that the following Tennessee crimes are crimes that do indeed involve moral turpitude: assault to commit murder,[5] theft,[6] alteration of a cable box to receive the HBO channel free,[7] larceny and burglary.[8] Additionally, as already noted above, this Office stated in a 1995 opinion that vehicular homicide is also a crime involving moral turpitude. The crimes that Tennessee courts have determined do not involve "moral turpitude" include the following: rolling high dice for a coke and failure to release seventeen bluegill fish,[9] dishonorable discharge,[10] overtime parking at a city parking meter and

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[4]The Supreme Court further stated: "The phrase is so inexact in meaning that this Court in *State v. Morgan*, 541 S.W.2d 385 (1976), abandoned its use as a criterion for determining which convictions may be inquired of a witness in order to affect his credibility." *Gibson*, 562 S.W.2d at 189. More recently, the Tennessee Court of Appeals has stated: "It is sometimes difficult to determine whether an offense involves 'moral turpitude' or not." *Kissell v. McMinn County Commission*, 2005 WL 1996621, at *4 (Tenn. Ct. App. 2005) (J. Susano, concurring).

[5]*McGee v. State*, 332 S.W.2d 507, 509 (Tenn. 1960).

[6]*Meadows v. Tennessee Board of Emergency Medical Service*, 2001 WL 1158873, at *3 (Tenn. Ct. App. 2001).

[7]*Lee v. Personnel Merit Board*, 1986 WL 3368, at *5 (Tenn. Ct. App. 1986).

[8]*Jenkins v. State*, 509 S.W.2d 240, 246 (Tenn. Crim. App., 1974).

[9]*Gibson*, 562 S.W.2d at 188.

[10]*Rhea v. State*, 357 S.W.2d 486 (Tenn. 1961) (but only if there is no evidence that the breach of military discipline resulting in the dishonorable discharge involved acts of moral turpitude).

failure to stop at a stop sign,[11] driving under the influence,[12] bootlegging,[13] simple possession of marijuana,[14] escape,[15] vagrancy and public drunkenness,[16] and inciting children under age eighteen to leave school.[17] This ad hoc Tennessee case law pertaining to crimes that either do or do not involve moral turpitude fails, for the most part,[18] to establish objective criteria useful for determining if the elements of crimes not already addressed by the courts are indicative of an "act of baseness, vileness, or depravity."[19] In other words, there is no bright line test for determining whether or not a particular Tennessee offense is or is not a crime involving moral turpitude. An examination of existing Tennessee case law reveals that intentional crimes historically held to be "intrinsically and morally wrong," such as theft and burglary, are often considered crimes involving moral turpitude, while strict liability crimes such as DUI and failure to stop at a stop sign are not. Yet the case law does not expressly address the criminal act of driving a vehicle in "willful and wanton disregard for the safety of persons or property" as set forth in the reckless driving statute. Accordingly, a complete analysis of this issue must look to guidance from analogous law in other jurisdictions.

III. Analogous Federal Moral Turpitude Law

The largest body of analogous case law addressing the classification of criminal offenses as crimes involving moral turpitude is that arising in the context of federal immigration law.[20] Over the years various federal immigration statutes have penalized aliens convicted of an offense termed a "crime of moral turpitude" and therefore a significant body of case law on the subject has

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[11]*Davis v. Wicker*, 333 S.W.2d 921, 923 (Tenn. 1960).

[12]*Flower*, 302 S.W.2d at 339.

[13]*Gray v. State*, 235 S.W.2d 20, 22 (Tenn. 1950).

[14]*Hatchett v. State*, 552 S.W.2d 414, 415 (Tenn. Ct. App. 1977).

[15]*Munsey v. State*, 496 S.W.2d 525 (Tenn Crim. App. 1973).

[16]*Bolin v. State*, 472 S.W.2d 232, 235 (Tenn. Crim. App. 1971).

[17]*McKenzie v. State*, 462 S.W.2d 243, 245 (Tenn. Crim. App. 1970).

[18]The Court of Appeals has clarified that a crime involving moral turpitude can be either a felony or a misdemeanor. *See Meadows*, 2001 WL 1158873, at *4.

[19]*See Brooks v. State*, 213 S.W.2d 7, 11 (Tenn. 1948).

[20]This Office has previously found it helpful to consult federal immigration law on whether criminal offenses should be classified as crimes involving moral turpitude. *See* Op. Tenn. Att'y Gen. No. 98- 225. Indeed, Tennessee appellate courts have themselves examined analogous federal immigration law to aid in their determination of whether a particular crime was one that involved moral turpitude. *See, e.g., Meadows v. Tennessee Board of Emergency Medical Services*, 2001 WL 1158873, at *4 (Tenn. Ct. App. 2001) (citing *Yousefi v. U.S. I.N.S.*, 260 F.3d 318 (4th Cir. 2001)).

developed.[21] Much like Tennessee courts, federal courts charged with classifying crimes with regard to moral turpitude have expressed their dismay that Congress did not define the term "crime involving moral turpitude" when it inserted the phrase into the Immigration Act. *Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004). While concluding the term moral turpitude "defies a precise definition," the federal courts nonetheless delve into "the amorphous morass of moral turpitude law," and usually concede that the Board of Immigration Appeals' (BIA) stated definition is as workable as any: "moral turpitude [is] conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general."[22] *Partyka v. Attorney General*, 417 F.3d 408, 409-13 (3rd Cir. 2005). The Seventh Circuit recognized that this BIA definition is not unique to federal immigration law but rather "merely parrot[s] the standard criminal law definition" of moral turpitude.[23] Upon examining crimes previously classified as either involving or not involving moral turpitude, the Seventh Circuit also concluded that crimes that involve moral turpitude are "serious crimes" in "terms either of the magnitude of the loss that they cause or the indignation that they arouse in the law-abiding public" and are "deliberate" because only one who deliberately commits a serious crime is "behaving immorally and not merely illegally."[24] *Mei*, 393 F.3d at 740. Taking into account these general definitions and guidelines, the next useful point of inquiry concerns the level of culpable mental state the federal courts determine is necessary for a crime to involve "moral turpitude."

The "longstanding test" to determine the existence of moral turpitude is "whether the act is accompanied by a vicious motive or a corrupt mind," and therefore it has been held in prior case law that "'evil intent' is a requisite element for a crime involving moral turpitude." *Partyka*, 417 F.3d at 413. However, as early as 1976, the BIA changed course and took the position that criminally reckless behavior can be a crime involving moral turpitude even absent "intent" to harm.[25] In 1995, the Eighth Circuit held that the crime of involuntary manslaughter, with the essential element of

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[21]For example, 8 U.S.C.A. 1182(a)(2)(A)(i) states that "any alien convicted of . . . a crime of moral turpitude . . . is inadmissible." As for those aliens already in the United States, 8 U.S.C.A. 1227(a)(2)(A)(i) states that "[a]ny alien who is convicted of a crime of moral turpitude . . . is deportable."

[22]This BIA definition of moral turpitude, which is remarkably similar to the definition adopted by Tennessee courts, *see Brooks v. State*, 213 S.W.2d 7, 11 (Tenn. 1948), is the generally accepted definition in federal case law. *See, e.g., Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165 (9th Cir. 2006) (relying on this same definition and citing to *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3rd Cir. 2004)).

[23]*Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004). This declaration, supported by a string of citations to state case law, only reinforces this Office's view that the federal immigration law dealing with moral turpitude is both analogous and helpful to the issue addressed in this Opinion.

[24]Conversely, crimes most often considered not to involve moral turpitude are those that are either "very minor" deliberate crimes or "graver crimes committed without bad intent," such as "strict-liability crimes." *Id.* Accordingly, the Seventh Circuit recognizes that a certain level of culpable mental state is required to trigger classification of a crime as one involving moral turpitude, and establishes this benchmark mens rea as "deliberate." Unfortunately it does not adequately define this term.

[25]*Franklin v. INS*, 72 F.3d 571, 572 (8th Cir. 1995) (citing *In re Medina*, 15 I & N. Dec. 611 (BIA 1976)).

"recklessly causing the death of a child," was a crime involving moral turpitude. *Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995). In so ruling, the court determined that the culpable mental state of recklessness, which it defined as "conscious disregard of a substantial and unjustifiable risk, gross deviation from the standard of care," was sufficient to constitute moral turpitude, at least when the death of a child was involved.[26] *Id*. at 572. Two years later a New York district court noted that while "intent" is normally "critical" it is not "the single dispositive factor" in determining if a crime involves moral turpitude, and therefore concluded that, in the context of assault, "[t]o find moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury." *Toutounjian v. INS*, 959 F. Supp. 598, 606 (W.D. New York, 1997). Thus, the court hinted that the standard may be recklessness plus an aggravating factor; if the mens rea element is not so high as to require intent, but merely a reckless state of mind will suffice, this recklessness must then be "coupled" with some other aggravating factor, such as injury, in order for the crime to involve "moral turpitude."

In a series of cases beginning in 2004, the federal circuit courts have clarified the standards required for a crime to be classified as one involving moral turpitude. The current dual routes to a finding of moral turpitude were outlined and explained by the Third Circuit in *Knapik v. Ashcroft*, (3rd. Cir. 2004). The *Knapik* Court noted that while one "strain" of modern case law "equates moral turpitude with evil intent," yet another strain developed after the 1976 *Medina* case recognizes and affirms that "the BIA consistently has interpreted moral turpitude to include recklessness crimes *if certain statutory aggravating factors are present*." *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3rd Cir. 2004) (emphasis added). Accordingly, the *Knapik* Court clarified that there are two distinct routes to determine if the culpable mental state of the offense supports a finding of moral turpitude: (1) evil intent, or (2) recklessness plus an aggravating factor.[27] The court further clarified that the aggravating factor combined with a mens rea of recklessness need "not require injury." *Knapik*, 384 F.3d at 89-90. This dual route to moral turpitude is affirmed in several recent federal Court of Appeals cases.[28]

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[26]While the *Franklin* Court did not expressly state that an aggravating factor was required in addition to recklessness, it is worthy to note that every case it cited to in support of its conclusion that a mens rea of recklessness could involve moral turpitude did in fact involve a crime that included some type of "aggravating factor," such as the use of a deadly weapon or causing a death, in addition to reckless conduct. *See Franklin*, 72 F.3d at 572.

[27]*See also Gill v. INS*, 420 F.3d 82, 94 (2nd Cir. 2005) (Jacobs, dissent, noting that "The [BIA], without particular emphasis or fanfare appears to have developed at least two separate and distinct lines of cases which relate to whether or not a conviction for a crime of reckless conduct is also one involving moral turpitude.").

[28]*See Gill v. Immigration and Naturalization Service*, 420 F.3d 82, 89 (2nd. Cir. 2005) (holding that "[c]rimes committed knowingly or intentionally generally have been found . . . to be C[rimes] I[nvolving] M[oral] T[urpitude]," but "likewise, crimes committed recklessly . . . have, in certain aggravated circumstances" also been found to constitute crimes involving moral turpitude) and *Partyka v. Attorney General*, 417 F.3d 408, 413-14 (3rd Cir. 2005) (holding that the "longstanding" test still followed by many courts is "intent," but noting that "in recent years" moral turpitude has been found to "inhere in serious crimes committed recklessly").

Accordingly, we learn from federal immigration law that crimes involving moral turpitude involve the commission of a reprehensible act committed with either (1) intent, or (2) recklessly along with circumstances that include an aggravating factor. As such, it becomes crucial to identify whether or not the Tennessee offence of reckless driving includes elements of either intent, or recklessness plus an additional aggravating factor.

IV. Law on "Willful or Wanton Disregard"

As already noted, the key element in the Tennessee reckless driving statute is the culpable mental state of "willful or wanton disregard for the safety of persons or property." Tenn. Code Ann. § 55-10-205(a).[29] However, the guidance gleaned from Tennessee and other jurisdictions concerning the classification of offenses as crimes involving moral turpitude use the more standardized American Law Institute's Model Penal Code language concerning culpable mental states.[30] As such, it is necessary to translate "willful and wanton disregard" into one of the more familiar intentional, knowing, reckless, or criminal negligence culpability standards.[31] *See* Tenn. Code Ann. § 39-11-302.

As stated above, our Supreme Court has interpreted the reckless driving culpable mental state of "willful and wanton disregard" as the "heedless and reckless disregard for another's rights, with the consciousness that the act or omission to act may result in injury to another." *Wilkins*, 654 S.W.2d at 679 (citing *Burgess*, 369 S.W.2d at 733). This language is very similar to Tennessee's statutory definition of the culpable mental state of "reckless," defined as the state of mind of one

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[29]It should be noted that subsection (b) of the reckless driving statute states the culpable mental state to be "willful *and* wanton disregard," Tenn. Code Ann. § 55-10-205(b) (emphasis added). While usually the conjunction "and" is used in the conjunctive while "or" is used in the disjunctive, it is not always so, and it does not appear in this statute that the legislature intended to require a culpable mental state of both willful and wanton in subpart (b) while settling for either one or the other in subpart (a). Indeed, the Tennessee Supreme Court has recognized that the two "words are interchangeable in the construction of statutes when necessary to carry out the legislative intent." *Stewart v. State*, 33 S.W.3d 785, 792 (Tenn. 2000). In all likelihood the legislature intended willful *and* wanton, as the two words have always been linked together in the reckless driving statute since 1955, and the word "and" was expressly used to link the two words in the most recent amendment to the statute pertaining to driving motorcycles.

[30]Tennessee enacted a new criminal code on November 1, 1989, that adopted much of the American Law Institute's Model Penal Code, including the four culpable mental states now codified at Tenn. Code Ann. § 39-11-302. *State v. Ducker*, 1999 WL 160981, at *16 n.10 (Tenn. Crim. App. 1999).

[31]It is crucial to translate the reckless driving mens rea into one of the four standard culpable mental states because this is the language of modern criminal law. As already stated above, established case law holds that crimes of moral turpitude require either "intent" or "recklessness" plus an additional aggravating factor. Regarding the other two culpability standards, a "knowing" mens rea tends to support classification as a crime involving moral turpitude, *see Gill v. Immigration and Naturalization Service*, 420 F.3d 82, 89 (2nd. Cir. 2005) (holding that "[c]rimes committed *knowingly* or intentionally" are generally crimes involving moral turpitude) (emphasis added), while a culpable mental state of mere negligence would not rise to the level of moral turpitude, *see Partyka*, 417 F.3d at 414 (holding that negligence, even with an aggravating factor of bodily injury, "lacks the inherent baseness or depravity that evinces moral turpitude.").

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> is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn Code Ann. § 39-11-302(c). Both the court's and the statutory definitions refer to a "consciousness" that the criminal act "may result in injury" or that a "substantial and unjustifiable risk" exists. Thus, the similarity in the Tennessee Supreme Court's definition of "willful or wanton" and the statutory definition of "reckless" lends support to the conclusion that "willful or wanton" is
synonymous with the culpable mental state of "recklessness."

Indeed, the vast majority of other jurisdictions to have directly addressed the issue of whether the phrase "willful and wanton" in the context of the offense of reckless driving is synonymous with the culpable mental state of "reckless" have ruled in the affirmative. *See People v. Pene*, 962 P.2d 285, 289 (Col. Ct. App. 1997)[32]; *Williams v. City of Minneola*, 619 So.2d 983, 986 (Fla. Ct. App. 1993); *People v. Sienkiewicz*, 771 N.E.2d 580, 585 (Ill. Ct. App. 2002); *State v. Ritchey*, 613 P.2d 501, 503 (Or. App. 1980)[33]; *Commonwealth v. Bullick*, 830 A.2d 998, 1001-02 (Penn. Super. Ct. 2003); and *White v. State*, 647 S.W.2d 751, 753 (Tex. Ct. App. 1983). Research conducted by this Office found only one state, Washington, to have determined that "willful and wanton" implies a higher culpable mental state than "reckless." *See State v. Thompson*, 950 P.2d 977, 981 (Wash. Ct. App. 1998) (holding that the "degree of reckless behavior in vehicular assault ('reckless manner') is less than the 'willful or wanton disregard' of reckless driving"), and *State v. Roggenkamp*, 106 P.3d 196, 211 (Wash. 2005) (holding that "[r]ecklessness . . . is easier to prove than the willful or wanton standard.").

Additionally, while Tennessee courts have never directly addressed the issue of whether the reckless driving "willful and wanton" culpable mental state is synonymous with "reckless," the Tennessee Court of Appeals has on several occasions inferred that the Tennessee offense of reckless driving bears the mens rea element of recklessness. In *State v. Gilboy*, the court twice describes the crime of reckless driving as an "act of recklessness." *State v. Gilboy*, 857 S.W.2d 884, 887-88 (Tenn Crim. App., 1993). Likewise, the court in *State v. Kelly* struck down a conviction of reckless driving on double jeopardy grounds because it was found to have the same elements as crimes requiring a

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[32]The court determined that both "willful and wanton" and "reckless" relate to the actor's awareness of risk and conscious decision to disregard that risk.

[33]Holding that "willful or wanton" is synonymous with "recklessness" and "[a]ny attempt to rationally distinguish these two definitions would be merely an exercise in semantics." *Id.*

mental state of "reckless." *State v. Kelly*, 1998 WL 712268, at * 10 (Tenn. Crim. App. 1998). [34]

Based on these authorities — the similarity between the Tennessee Supreme Court's definition of "willful or wanton disregard" as used in the reckless driving statute and the statutory definition of the culpable mental state of "reckless," the conclusions of the overwhelming majority of other jurisdictions, and the view expressed by the Tennessee Court of Criminal Appeals that the reckless driving statute carries a mens rea element of recklessness — this Office concludes that the culpable mental state of "willful or wanton" as used in the reckless driving statute is synonymous with Tennessee's statutory definition of the criminal culpable mental state of "reckless." We also conclude that, unlike the vehicle-related crimes of reckless endangerment, vehicular assault, and vehicular homicide, all of which require the mens rea of recklessness plus some aggravating factor, reckless driving requires no such additional aggravating factor; rather, proof of the mere act of reckless driving along with a culpable mental state of recklessness suffices to secure a conviction for reckless driving. Accordingly, because the offense of reckless driving does not require intent, but rather only the reckless disregard for the safety of persons or property without any aggravating factor, this Office concludes that reckless driving is not a crime involving moral turpitude.

In so concluding that reckless driving is not a crime involving moral turpitude, this Office is in agreement with the majority of other jurisdictions that have addressed this same issue and held that reckless driving is not a crime of moral turpitude. *See Lewis v. Alabama Dept. of Public Safety*, 831 F. Supp. 824, 826-27 (M.D. Ala. 1993); *Benitez v. Dunevant*, 7 P.3d 99, 104 (Ariz. 2000)[35]; *Hendrick v. Strazzulla*, 135 So.2d 1, 2-3 (Fla. 1961); *Bane v. State*, 533 A.2d 309, 314 (Md. App. 1987); and *Klein v. Larson*, 724 N.W.2d 565, 571 (N.D. 2006). Only California has reached a contrary conclusion.[36]

In sum, Tenn Code Ann. § 55-10-205 requires a person to drive a vehicle in "willful or wanton disregard for the safety of persons or property" to be convicted of reckless driving. "Willful or wanton disregard" would most likely be considered synonymous with "reckless" by a Tennessee court. To be a crime of moral turpitude in Tennessee, the elements of the crime must reflect "something immoral in itself," *Freidman*, 263 S.W. at 82, and the act must be one of "baseness, vileness, or depravity" and "contrary to the accepted rule or right and duty between man and man."

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[34]The state and federal constitutions protect against multiple convictions or punishments for a single offense (double jeopardy). U.S. Const. amend. V; Tenn. Const. art. 1, § 10. One test for determining if multiple convictions present a double jeopardy problem is to examine whether or not each offense requires proof of an element the other does not. *See Blockburger v. United States*, 284 U.S. 299 (1932). In *Kelly*, the court determined that reckless driving contained the same elements as vehicular assault and vehicular homicide, both of which require a mens rea of recklessness. *See* Tenn. Code Ann. §§ 39-13-106 and -213 respectively.

[35]The *Benitez* Court concluded: "[m]oral turpitude is implicated when behavior is morally repugnant to society. It is not implicated when the offense merely involves poor judgment, lack of self-control, or disrespect for the law involving less serious crimes." *Benitez*, 7 P.3d at 104.

[36]California courts, in interpreting the "willful or wanton disregard" mens rea of their reckless driving statute, have concluded that the offense of reckless driving "evinces a general readiness to do evil," and therefore is a crime involving moral turpitude. *See People v. Dewey*, 42 Cal. App. 4th 216 (Cal. Ct. App. 1996).

Brooks, 213 S.W.2d at 11. The offense of reckless driving, which requires only the act of driving a vehicle in a reckless manner — without proof of injury to others, the intent to inflict same, or any other aggravating factor — does not rise to the level of depravity necessary to be considered a crime involving moral turpitude under Tennessee law. Accordingly, a person convicted of reckless driving in the last ten years would not be prohibited by Tenn Code Ann. § 57-5-301(a)(1) from operating or being employed in a business holding a beer permit.

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