ALAN WILSON
ATTORNEY GENERAL

April 23, 2018

The Honorable Joe Daning, Member
South Carolina House of Representatives
310-B Blatt Building
Columbia, SC 29201

Dear Representative Daning:

Attorney General Alan Wilson has referred your letter to the Opinions section. The letter asks the following:

> I write you to request an opinion on whether or not a person who is lawfully carrying a concealed weapon would be immune from criminal and civil liability if they attempt to defend themselves, and others, during a mass shooting. Does the doctrine of self-defense, "Stand Your Ground" law, or any other law protect these individuals if they harm the shooter or others?

Law/Analysis

I. Would a person be immune from criminal and civil liability if, in an attempt to defend themselves or others during a mass shooting, he harms a shooter or shooters?[1]

The General Assembly enacted the Protection of Persons and Property Act ("the Act"), 2006 Act No. 379, with the stated intent to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420. Section 16-11-450(A) provides both civil and criminal immunity where a person is justified in using deadly force according to the Act. Further, a court is required to award "reasonable attorneys' fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of a civil action" if the court finds that the defendant is immune from prosecution. S.C. Code Ann. § 16-11-450(C).

The South Carolina Supreme Court explained in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), how a person can seek immunity under the Act as follows:

[1] As stated in your letter, this opinion assumes that the person responding to the mass shooting with deadly force does so in compliance with this State's concealed weapons, handgun, and deadly weapons statutes.

> Section 16–11–440(A), the main thrust of the Act, provides a presumption of reasonable fear of imminent peril of death or great bodily injury to a person who uses deadly force if he is attacked by or attempting to remove another from a dwelling, residence, or occupied vehicle. However, the presumption of subsection (A) does not apply if the victim has an equal right to be in the dwelling or residence. S.C. Code § 16–11–440(B). ... [Subsection (C)] deals with the use of force by one who is attacked in another place where he has a right to be.

406 S.C. at 370, 752 S.E.2d at 265. Section 16-11-440(C) allows for the use of deadly force under the following conditions:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code § 16–11–440(C) (emphasis added). The Court in State v. Jones, 416 S.C. 283, 297, 786 S.E.2d 132, 139 (2016), interpreted subsection (C) to apply broadly "without a geographical restriction." Therefore, for purposes of this opinion, it will be assumed that Section 16-11-440(C) is the appropriate subsection under which most mass shooting self-defense or defense of others scenarios would be analyzed as its framework applies to more locations than the limited set of locations to which subsection (A) applies.

The Curry Court stated that for this statutory immunity to apply, the elements of self-defense must still be met, except for "the duty to retreat." Curry, 406 S.C. at 371, 752 S.E.2d at 266.

> While the Act may be considered "offensive" in the sense that the immunity operates as a bar to prosecution, such immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.

406 S.C. at 372, 752 S.E.2d at 267.

There are four elements required by law to establish a case of self-defense:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if

> his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.
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> State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). It is the fourth element—the duty to retreat—that is excused under the Act and the Castle Doctrine.

406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. Moreover, the Court in State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000), explained under what circumstances a person may use deadly force in the defense of others such that he or she would not be criminally or civilly liable for taking the life of an assailant. The Court stated:

> Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense. State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997). "[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); see also William S. McAninch & W. Gaston Fairey, *The Criminal Law of South Carolina* (3rd ed. 1996) ("There must, of course, be some evidence that the defendant was defending others at the time of his act in order for him to be entitled to the instruction.").

340 S.C. at 322–23, 531 S.E.2d at 913.

While this Office cannot categorically state that in all mass shooting scenarios a person who uses deadly force on an attacker or attackers in self-defense or the defense of others would be able to demonstrate each of the elements described above, it is more than probable that these elements would be satisfied. Assuming such a person demonstrates each of the elements required to establish a claim of self-defense and is also in compliance with S.C. Code § 16–11–440, he or she would qualify for civil and criminal immunity under Section 16-11-450(A). The determination of whether this immunity would be available in a given case is reserved to our state courts. See Op. S.C. Atty. Gen., 2015 WL 4497734 (July 2, 2015) ("[A]s we have cautioned in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts.").

II. Would a person be immune from criminal and civil liability if, in an attempt to defend themselves or others during a mass shooting, he harms someone other than the shooter or shooters?

Whether a person who uses deadly force to respond to an attacker or attackers in self-defense or the defense of others and as a result harms an individual or individuals who were not involved in the attack would be immune from criminal and civil liability is currently an open question pending before the South Carolina Supreme Court. Historically, South Carolina has not recognized the doctrine transferred intent in regards to the doctrines of self-defense or defense of others. In Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014), the South Carolina Supreme Court discussed the transferability of intent in a regards to a claim of self-defense. The Court explained why a witness's testimony in regards to the defendant's claim of self-defense was not probative of a material fact when the victim was an innocent bystander as follows:

> [T]he weight and quality of Bellamy's testimony as "evidence of material facts, not previously presented and heard" is severely undermined because it pertains not to a theory of self-defense but to one of transferred self-defense. S.C. Code Ann. § 17–27–20(A)(4) (emphasis added). Specifically, Bellamy's testimony would tend to show Respondent fired shots at Jig before Jig could shoot Respondent; however, the victim who died in this case was an innocent, fifteen-year-old bystander, not Jig. The transferability of intent in a self-defense claim has not been recognized in South Carolina, and Respondent does not ask this Court to recognize it now. See State v. Porter, 269 S.C. 618, 622, 239 S.E.2d 641, 643 (1977) (noting the theory of transferred self-defense has not been accepted in South Carolina); cf. State v. Wharton, 381 S.C. 209, 215, 672 S.E.2d 786, 789 (2009) (noting the applicability of the doctrine of transferred intent to voluntary manslaughter cases remains an unsettled question in South Carolina).

410 S.C. at 471, 765 S.E.2d at 130–31 (emphasis in original). Nevertheless, Justice Pleicones wrote a dissenting opinion, joined by Justice Beatty, which explained why he would find transferred intent to be inapplicable to a claim of self-defense as follows:

> I disagree with the majority's finding that Bellamy's testimony is not material on the basis that we have not recognized "the transferability of intent in a self-defense claim." In my opinion, if there is any such doctrine as "transferred self-defense," it has no applicability to this case. Whether a defendant harms an unintended victim while acting in self-defense is irrelevant since the question is whether the defendant's state of mind entitled him to react as he did. See, e.g., Dickey, 394 S.C. at 499, 716 S.E.2d at 101. On the other hand, transferred intent permits a jury to find a defendant criminally responsible even though the defendant did not have the "intent" to harm the victim. See State v. Fennell, 340 S.C. 266, 271–72, 531 S.E.2d 512, 515 (2000) (explaining transferred intent as a

> legal fiction by which a jury may convict a defendant even though he did not act with the requisite *mens rea* towards an unintended victim). Thus, a defendant need not have a specific "intent" in order to assert a viable claim of self-defense; instead, the only question is whether Bellamy's testimony would have entitled him to a charge on self-defense.

410 S.C. at 474, 765 S.E.2d at 132 (footnote omitted).

However, the Jamison Court's holding that transferability of intent in a self-defense claim has not been recognized in South Carolina has subsequently been called into question in State v. Scott, 420 S.C. 108, 800 S.E.2d 793 (Ct. App. 2017), *reh'g denied* (June 29, 2017), *cert. granted* (Feb. 1, 2018). The South Carolina Court of Appeal's description of the record reflects that Scott and his family were shot at by an occupant of a SUV, Scott fired his roommate's gun, and one of the bullets fired by Scott struck and killed victim in a second vehicle. 420 S.C. 108, 110–11, 800 S.E.2d 793, 794–95. Scott claimed he was entitled to immunity under the Protection of Persons and Property Act, specifically S.C. Code Ann. § 16-11-440(C). The Court of Appeals concluded that the circuit court did not abuse its discretion where it held that Scott was entitled to immunity under subsection (C) based on the following:

> Again, the evidence regarding the location of the SUV and Honda when Scott fired his weapon is conflicting and somewhat unclear. However, the circuit court found the Honda was directly in front of the house moving along the same path as the SUV. See USAA Prop. & Cas. Ins. Co., 377 S.C. at 652-53, 661 S.E.2d at 796 ("[N]oting the circuit court judge, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign comparative weight to their testimony."). This finding negates the State's contention the vehicles were so far apart Scott's fatal shot could have only been the result of an intentional act. We conclude the circuit court did not abuse its discretion in finding by a preponderance of the evidence Scott was entitled to immunity pursuant to subsection (C).

420 S.C. at 117, 800 S.E.2d at 798 (emphasis added). This holding suggests that the Court of Appeals viewed Scott's intent to respond to the shot from the SUV as transferable to the victim in the second vehicle under S.C. Code Ann. § 16-11-440(C). Such a reading appears to be at odds with the Supreme Court's holding in Jamison that transferability of intent in a self-defense or defense of others claim has not been recognized in South Carolina. 410 S.C. at 474, 765 S.E.2d at 132. On February 1, 2018, the South Carolina Supreme Court granted certiorari to hear the State's appeal in this case. Based on the authorities discussed above, this Office advises that historically South Carolina has not recognized the doctrine of transferred intent in regards to self-defense or defense of claims, and that the doctrine's current applicability is subject to a pending appeal before the South Carolina Supreme Court. Therefore, this Office cannot offer an opinion

on whether a person who uses deadly force to respond to an attacker or attackers in self-defense or the defense of others and as a result harms an individual or individuals who were not involved in the attack would be immune from criminal and civil liability as the issue is pending in litigation.

Conclusion

The Protection of Persons and Property Act ("the Act"), 2006 Act No. 379, was adopted by the General Assembly with the stated intent to "codify the common law Castle Doctrine." While this Office cannot categorically state that in all mass shooting scenarios a person who uses deadly force on an attacker or attackers in self-defense or the defense of others would be able to demonstrate each of the elements discussed above, it is likely that these elements would be satisfied. Assuming such a person demonstrates each of the elements required to establish a claim of self-defense and is also in compliance with S.C. Code § 16–11–440, he or she would qualify for civil and criminal immunity under Section 16-11-450(A). The determination of whether this immunity would be available in a given case is reserved to our state courts. See Op. S.C. Atty. Gen., 2015 WL 4497734 (July 2, 2015) ("[A]s we have cautioned in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts."). Please note, however, this Office cannot offer an opinion on whether a person who uses deadly force to respond to an attacker or attackers in self-defense or the defense of others and as a result harms an individual or individuals who were not involved in the attack would be immune from criminal and civil liability as the issue is pending in litigation. See State v. Scott, 420 S.C. 108, 800 S.E.2d 793 (Ct. App. 2017), *reh'g denied* (June 29, 2017), *cert. granted* (Feb. 1, 2018).

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General