ALAN WILSON
ATTORNEY GENERAL

December 6, 2018

Solicitor Jimmy A. Richardson, II
Fifteenth Circuit Solicitor's Office
PO Box 1276
Conway, SC 29528

Dear Solicitor Richardson:

We received your request seeking an opinion on questions related to the intersection of the Fifth Amendment privilege against self-incrimination and the South Carolina Protection of Persons and Property Act, Section 16-11-410 et. seq. This opinion sets out our Office's understanding of your questions and our response.

Issue:

Your request letter describes a situation where a criminal defendant is charged with a crime and the defendant asserts that they are entitled to immunity under South Carolina's Protection of Persons and Property Act. *See* S.C. Code Ann. § 16-11-410 et. seq. (2015). This is our State's "Stand Your Ground" law, and will be referred to in this opinion as the "Act." In the factual scenario presented, the defendant takes the stand and testifies in support of their motion for immunity. In this context, your specific questions are:

1. Does the Fifth Amendment apply after one has waived the right against self-incrimination by testifying in direct examination?
2. Does the Fifth Amendment apply in motion hearing and trials alike, or does the law make a distinction between the two for purposes of Fifth Amendment analysis?
3. Can one invoke the Fifth Amendment in part while testifying in their own defense?
4. Can statements by a party opponent that are made while testifying and a "Stand Your Ground" hearing be used against them at a subsequent trial or only for impeachment purposes?

Law/Analysis:

Initially we must recognize the proper role and scope of an opinion of this Office with respect to a criminal case. South Carolina law does not permit this Office to issue an opinion which attempts to supersede or reverse any order of a court or other judicial body. *Orr v. Clyburn*, 277 S.C. 536, 290 S.E.2d 804 (1928); S.C. Const, art I, § 8; S.C. Const. art V. Accordingly, we are issuing this opinion in order to answer a legal question in the abstract, and

nothing in this opinion should be construed as a comment on any particular criminal proceeding or decision except the precedential authorities cited herein.

Additionally, we must restrict our discussion and conclusion here specifically to the intersection Fifth Amendment testimonial privilege and South Carolina's Protection of Persons and Property Act. Given the breadth of potential scenarios presented by general questions regarding the Fifth Amendment, we could not address them thoroughly without undertaking an extraordinarily lengthy and hypothetical discussion of the law which would exceed the proper scope of an opinion of this Office. Therefore, in order to be as responsive as possible to your request, we will focus our discussion on the question of whether the Protection of Persons and Property Act is intended to lead to a different result than generally-applicable law which governs testimonial privileges, such as Fifth Amendment jurisprudence and the South Carolina Rules of Evidence.

It is the opinion of this Office that if the question were presented to the South Carolina Supreme Court, our State's highest Court would conclude that the General Assembly did not intend for the Protection of Persons and Property Act to establish any unique rules relating to testimonial privilege in a criminal proceeding where immunity under the Act is at issue. *See State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011); *see also State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013). Therefore, we believe that the Court would conclude that where questions arise in connection with the testimonial privilege of a defendant seeking to establish immunity under the Act, such as questions of waiver or the use of a defendant's testimony in a trial, those questions should be resolved according to established and generally-applicable principles of law as appropriate in the context. *See Isaac*, 405 S.C. 177, 747 S.E.2d 677; *cf.* Rule 104 SCRE (Rule of Evidence specifically governing testimony of the accused in hearings held to determine the admissibility of certain evidence). We offer this conclusion with the caveat that we are not aware of any published decision of an appellate court of this State which has answered this question directly. However, we believe that this conclusion is consistent with the prior jurisprudence of the South Carolina Supreme Court which has resolved procedural questions arising under the Act according to established, generally-applicable South Carolina law where possible. *See Isaac*, 405 S.C. 177, 747 S.E.2d 677.

As you reference in your request letter, the Fifth Amendment of the United States Constitution provides in relevant part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Similarly, the South Carolina Constitution provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself. S.C. Const. art. I, § 12; *see also* S.C. Code Ann. § 19-11-80 (2014)

(codifying the same). This privilege can be waived by the defendant, as discussed by the South Carolina Supreme Court in the case of *Brown v. State*:

> The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions. Rule 609, SCRE. If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations. *State v. Gunter*, 286 S.C. 556, 335 S.E.2d 542 (1985). A defendant's decision to testify or not must be made with knowledge of the consequences of either choice. *See State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991) (waiver of Fifth Amendment right must be knowing and voluntary), *overruled in part on other grounds, State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (emphasis added). We highlight again the language of our state's highest Court noting that "if a defendant chooses to testify, he subjects himself to cross-examination." *Id.* This is consistent with the language of the United States Supreme Court in *Mitchell v. United States*, where the opinion of that Court summarized its prior jurisprudence in a description of the general rule:

> It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. *See Rogers v. United States*, 340 U.S. 367, 373, 71 S.Ct. 438, 95 L.Ed. 344 (1951). The privilege is waived for the matters to which the witness testifies, and the scope of the "waiver is determined by the scope of relevant cross-examination," *Brown v. United States*, 356 U.S. 148, 154-155, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958). "The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry," *id.*, at 155, 78 S.Ct. 622. Nice questions will arise, of course, about the extent of the initial testimony and whether the ensuing questions are comprehended within its scope, but for now it suffices to note the general rule.
>
> The justifications for the rule of waiver in the testimonial context are evident: A witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry. As noted in *Rogers*, a contrary rule "would open the way to distortion of facts by permitting a witness to select

> any stopping place in the testimony," 340 U.S., at 371, 71 S.Ct. 438. It would, as we said in *Brown*, "make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell," 356 U.S., at 156, 78 S.Ct. 622. The illogic of allowing a witness to offer only self-selected testimony should be obvious even to the witness, so there is no unfairness in allowing cross-examination when testimony is given without invoking the privilege.

Mitchell v. United States, 526 U.S. 314, 321-22 (1999). This rule that a defendant who testifies in their own defense is subject to cross-examination has been present in the jurisprudence of the United States Supreme Court at least since the decision in *Fitzpatrick v. United States* over one hundred years ago:

> Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement . . . he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.

Fitzpatrick v. United States, 178 U.S. 304, 315 (1900) (emphasis added).

While we have quoted several cases here discussing situations where a defendant waives their Fifth Amendment privileges by testifying, we observe also that there are situations where a defendant may testify without such a waiver. For example, in the case of *Simmons v. United States* the US Supreme Court considered the question of whether a defendant waived their Fifth Amendment privilege by taking the stand in a pretrial suppression hearing to testify that evidence had been seized in violation of their Fourth Amendment rights. *Simmons v. U.S.*, 390 US 377 (1968). The Court in *Simmons* opined:

> In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

Id. at 394.

Courts sometimes wrestle also with questions about the application and operation of the Fifth Amendment at the earliest stages of a criminal proceeding, in particular following the split plurality opinions of the United States Supreme Court in *Chavez v. Martinez*, 538 U.S. 760 (2003). *Cf. Burrell v. Virginia*, 195 F.3d 508 (4 Cir. 2005) (post-*Chavez* analysis by the Fourth

Circuit Court of Appeals). For a further discussion of this particular topic, consider reading: Aaron L. Weisman, Annotation, *Applicability of Fifth Amendment to Pretrial Proceedings*, 25 A.L.R. Fed. 3d Art. 3 (2017).

In addition to constitutional considerations, the South Carolina Rules of Evidence also govern questions regarding admissibility and use of testimony. *See, e.g.,* Rules 104, 501, SCRE. With respect to testimonial privilege specifically, Rule 501 specifies that:

> Except as required by the Constitution of South Carolina, by the Constitution of the United States or by South Carolina statute, the privilege of a witness, person or government shall be governed by the principles of the common law as they may be interpreted by the courts in the light of reason and experience.

Rule 501, SCRE. We must reiterate that we cannot undertake an exhaustive discussion of Fifth Amendment and other evidentiary case law here. We trust that you are fully aware of these points of law and other precedential cases in this area.

Having have set out a few general principles of testimonial privilege law for context, we turn to South Carolina's Protection of Persons and Property Act to examine whether there is any indication that the General Assembly intended for a defendant asserting immunity under that Act to have different testimonial privileges than they would under generally-applicable law. This author's research has not identified any reported South Carolina case or prior opinion of this Office which addresses your question directly[1]. It appears that a court faced with this question would rely upon the rules of statutory construction to give effect to the intention of the Legislature in codifying the Act. As this Office has previously opined:

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). Additionally, "[t]he rules of statutory construction developed by our Supreme Court establish that a criminal statute must be strictly

[1] Although our research has not identified any reported South Carolina case wherein the particular issues presented in your question were raised and ruled on, the Supreme Court opinion in the case of *State v. Curry* did reject the apparent argument that "the Act should be construed to require a trial court to accept the accused's version of the underlying facts." 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

construed against the state and any ambiguity or doubt or uncertainty must be resolved in favor of the defendant." *Op. S.C. Att'y Gen.*, 1983 WL 182044 (November 2, 1983) (citing *State v. Germany*, 216 S.C. 182, 57 S.E.2d 165 (1950); *State v. Lewis*, 141 S.C. 483, 86 S.E. 1057 (1927).).

The General Assembly included express findings and statements of intent in the Protection of Persons and Property Act and codified them in Section 16-11-420, which reads in full:

> (A) It is the intent of the General Assembly 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.
>
> (B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.
>
> (C) The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed.
>
> (D) The General Assembly finds that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.
>
> (E) The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.

S.C. Code Ann. § 16-11-420 (2015). The Act goes on to set out definitions in Section 16-11-430, codify a presumption of reasonable fear in Section 16-11-440, and provide for immunity from criminal prosecution and civil actions in Section 16-11-450. S.C. Code Ann. § 16-11-430 et. seq. Recently our Office summarized the operation of the Act as follows:

> Assuming such a person demonstrates each of the elements required to establish a claim of self-defense[2] 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).

[2] The April 23, 2018 opinion also noted the Act and the Castle Doctrine excused the duty to retreat. *Op. S.C. Att'y Gen.*, 2018 WL 2084205 (April 23, 2018).

> 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.").

Op. S.C. Att'y Gen., 2018 WL 2084205 (April 23, 2018). That prior opinion focused on the substance of the Act, and our discussion here should be understood in the context of that and other relevant prior opinions of this Office. *See id.*

Crucial to your question here, however, the text of the Act is silent on procedural and evidentiary questions, as observed by the South Carolina Supreme Court in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). In *Duncan*, a defendant who had been indicted for murder moved to dismiss the indictment prior to trial pursuant to the Protection of Persons and Property Act. 392 S.C. at 406, 709 S.E.2d at 663. At the pretrial motion hearing, the defendant's girlfriend testified in support of his motion for dismissal pursuant to his immunity under the Act. 392 S.C. at 406-07, 709 S.E.2d at 663. The motion was granted, and our state's highest Court then was faced with the question of whether a pre-trial determination of immunity was proper under the Act and what evidentiary standard applied. 392 S.C. at 407, 709 S.E.2d at 663. The Supreme Court in *Duncan* noted that "[w]hether immunity under the Act should be determined prior to trial is an issue of first impression in this state. Further, the Act does not explicitly provide a procedure for determining immunity." 392 S.C. at 409, 709 S.E.2d at 664 (emphasis added). The Court went on to discuss how other states have approached the question before concluding that:

> [B]y using the words "immune from criminal prosecution," the legislature intended to create a true immunity, and not simply an affirmative defense. We also look to the language of the statute that provides, "the General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers *without fear of prosecution* or civil action for acting in defense of themselves and others." We agree with the circuit court that the legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial. Accordingly, we find the trial court properly made a pre-trial determination of respondent's immunity.

392 S.C. at 410, 709 S.E.2d at 665 (emphasis in original). The Court in *Duncan* also held that the appropriate evidentiary standard was a preponderance of the evidence. *Id.*, 392 S.C. at 411, 709 S.E.2d at 665. In the absence of express procedural provisions in the South Carolina Act to

resolve these novel questions of law in *Duncan*, our State's highest Court did find persuasive the reasoning of cases from other states construing the appropriate procedure under their own "Stand Your Ground" laws. *Id.* 392 S.C. at 409, 709 S.E.2d at 664 (discussing, *inter alia*, *Dennis v. State*, 51 So.3d 456 (Fla.2010)).

Shortly after the decision in *State v. Duncan*, the South Carolina Supreme Court decided the case of *State v. Isaac* which clarified questions related to the right of immediate appeal and the possible retroactive application of the Act. *State v. Isaac*, 405 S.C. 177, 747 S.E2d 677 (2013). Of course your question concerns testimonial privilege, not the issues under appeal in *Isaac*. But for the purpose of this opinion, we simply will highlight that the analysis of the South Carolina Supreme Court focused on how the Personal Protection and Property Act operates within the established parameters of South Carolina criminal law. *See discussion infra.*

In *Isaac*, a defendant who had been indicted for murder made a motion at the beginning of his trial for immunity under the Protection of Persons and Property Act. 405 S.C. at 180, 747 S.E.2d at 678. The trial court conducted a hearing, found that the Act did not provide immunity based on the evidence presented, and denied the motion. *Id.* The defendant appealed the denial, and the appeal included an argument that the Act was intended to apply retroactively to his actions. 405 S.C. at 181-87, 747 S.E.2d at 679-82. The majority opinion of the Court in *Isaac* began with the issue of immediate appeal, writing:

> The right to appeal a criminal conviction is conferred by section 14–3–330 of the South Carolina Code. In order to exercise the right to appeal, a defendant must come within the terms of the statute. *State v. Miller*, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986). An order denying a request for immunity under the Act does not fall within any category of orders which are immediately appealable under section 14–3–330.
>
> [The Court then quoted Section 14-3-330 in full].
>
> An order involving the merits "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Mid–State Distrib., Inc. v. Century Imp., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). An order denying an immunity request is not an order involving the merits in that it does not finally determine a substantial cause of action or defense. Accordingly, it is not immediately appealable under section 14–3–330(1).

405 S.C. at 181-83, 747 S.E.2d at 679-80 (emphasis added). The opinion went on to include this rationale to support its conclusion:

> The denial of a request for immunity under the Act is analogous to the denial of a motion to dismiss a criminal case on the ground of double jeopardy, which is not immediately appealable. *Miller*, 289 S.C. at 427, 346 S.E.2d at 706. Absent an unambiguous expression of legislative intent, we see no reason to alter settled law concerning appealability, which additionally would have the illogical effect of elevating a statutory immunity claim over one constitutionally based.

405 S.C. at 184, 747 S.E.2d at 680 (emphasis added). Accordingly, the Supreme Court in *Isaac* relied upon South Carolina's generally-applicable statutes and established case law regarding appealability to construe the Act to not create a right to immediate appeal of a denial of a motion for immunity. *Id.* But the majority opinion in *Isaac* went further still by directly addressed an alternative interpretation that the Act effectively created a new right to immediate appeal by implication, as advocated by a concurring justice:

> [T]he concurrence suggests that the prefatory language of the Act allows this Court to interpret section 14–3–330 to create a nonexistent right to immediate appeal based on a denial of immunity under the Act. We have no quarrel with the concurring opinion's reading of the purpose of the Act. However, we do part company with the concurrence in its extrapolation of a legislatively mandated immediate appeal from the denial of an immunity motion under the Act. . . . Indeed, there are many matters on which the Act is silent, which this Court sought to answer in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). As noted in *Duncan*, "the Act does not explicitly provide a procedure for determining immunity." If the concurring opinion's clairvoyance is correct, we invite the General Assembly to amend the Act to reflect its intent to allow an immediate appeal in clear terms.

405 S.C. at 184-85, 747 S.E.2d at 680-81.

Similarly, the Court in *Isaac* went on to consider whether the Act offer immunity retroactively to actions committed before its effective date. 405 S.C. at 186-87, 747 S.E.2d at 681-82. The Court in *Isaac* again relied upon established, generally-applicable South Carolina law and the language of a commonly-used savings clause to conclude that the Act was intended to operate prospectively only. *Id.*

We observe once again that your question which prompted this opinion concerns testimonial privilege, not the issues under appeal in *State v. Duncan* or *State v. Isaac*. But for the purpose of this opinion, we believe it is instructive that the decisions of the South Carolina Supreme Court have concluded that the Act focuses on establishing a substantive right to

immunity while remaining silent on procedural and evidentiary issues in cases where that immunity is at issue. *See State v. Duncan*, 392 S.C. 404, 709 S.E2d 662 (2011). Moreover, our state's highest Court has sought to give effect to the intent of the Legislature in passing the Act by resolving procedural questions arising under the Act within the established parameters of generally-applicable South Carolina law where possible. *See State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013) (clarifying the procedural holding in *Duncan*). In summary, we understand from these opinions that the Act was intended simply to create a substantive right to immunity from prosecution under specific circumstances, and the Act was not intended otherwise to alter established, generally-applicable law without some clear expression of that intent. *See id.*

Applying that understanding to the question presented in your letter, we observe first that that text of the Protection of Persons and Property Act does not reference testimonial privileges. *See* S.C. Code Ann. § 16-11-410 to -450 (2015). Indeed, the text does not reference direct or cross-examination or the use of testimony in any way, consistent with the observation of the South Carolina Supreme Court "that the Act does not explicitly provide a procedure for determining immunity." *State v. Duncan*, 392 S.C. at 410, 709 S.E.2d at 665 (2011). Absent any such reference, the reasoning of the Supreme Court in *State v. Isaac* countenances that the General Assembly did not intend to effect any change in the general law of testimonial privilege in the Protection of Persons and Property Act, and therefore questions of privilege should be resolved according to generally-applicable law as appropriate in the context. *State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013); *see also State v. Duncan*, 392 S.C. 404, 409, 709 S.E.2d 662, 664 (2011) ("[T]he Act does not explicitly provide a procedure for determining immunity."); *cf.* S.C. Code Ann. § 16-11-410–450 (2015); *see also* Rule 501 SCRE (setting out the general evidentiary rule for testimonial privilege), *Op. S.C. Att'y Gen.*, 1975 WL 28886 (June 5, 1975) ("[A]ll statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law . . . ."). In the words of that Court in *State v. Isaac*, "[a]bsent an unambiguous expression of legislative intent, we see no reason to alter settled law . . . which additionally would have the illogical effect of elevating a statutory immunity claim over one constitutionally based." 405 S.C. at 184-85, 747 S.E.2d at 680-81.

Conclusion:

For the reasons set forth above, it is the opinion of this Office that if the question were presented to the South Carolina Supreme Court, that Court would conclude that the General Assembly did not intend for the Protection of Persons and Property Act to establish any unique rules relating to testimonial privilege in a criminal proceeding where immunity under the Act is at issue. *See State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011); *see also State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013). Therefore, we believe that where questions arise in connection with the testimonial privilege of a defendant seeking to establish immunity under the Act, such

as question regarding waiver or the use of a defendant's testimony in a trial, those questions should be resolved according to generally-applicable law, such as Fifth Amendment jurisprudence and the South Carolina Rules of Evidence, as appropriate in the context. *See Isaac*, 405 S.C. 177, 747 S.E.2d 677.

This opinion should be read in the context of the substantial body of law addressing the privilege against self-incrimination, which we cannot undertake to summarize fully here. We reiterate that South Carolina law does not permit this Office to issue an opinion which attempts to supersede or reverse any order of a court or other judicial body. *Orr v. Clyburn*, 277 S.C. 536, 290 S.E.2d 804 (1928); S.C. Const, art I, § 8; S.C. Const. art V. Accordingly, this opinion is issued to you as a solicitor in order to answer a legal question in the abstract, and nothing in this opinion should be construed as a comment on any particular criminal proceeding or decision except the authorities cited herein.

Finally, this Office has reiterated in numerous opinions that it strongly supports the Second Amendment and the right of citizens to keep and bear arms, and we do so again here. *See, e.g., Op S.C. Att'y Gen.*, 2015 WL 4596713 (July 20, 2015).

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General