ALAN WILSON
ATTORNEY GENERAL

March 3, 2014

The Honorable Richard M. Gergel
Judge, United States District Court
P. O. Box 835
Charleston, SC 29402

Dear Judge Gergel:

You have asked South Carolina's position regarding the proper interpretation of Sections 6 and 7 of Act No. 69 of 2011, now codified at S.C. Code Ann. § 17-13-170 and 23-3-1100 respectively. It is our opinion that, consistent with the language of Section 6 itself, as well as the requirement that the Section should, if possible, be interpreted in conformity with the Constitution, such Section must be construed to require that, once the purpose of a valid traffic stop has been fulfilled, the officer making the stop may not continue to detain the automobile and occupants thereof based upon the person's or persons' lawful presence in the United States (or suspected lack thereof). In other words, it is our opinion that Section 6, as properly interpreted pursuant to well-recognized principles of statutory interpretation, does not permit officers to prolong the original stop based upon the officer's inquiry into or based on a determination, suspicion, or admission concerning a person's immigration status. We reach a similar conclusion that Section 7 does not authorize prolonging the detention of a person in jail or prison simply to determine the person's immigration status. Likewise, state law does not authorize state and local officials to arrest or maintain custody of an individual believed or determined to be unlawfully present for any purpose, even to transfer the individual to federal custody.

Law/Analysis

Sections 6 and 7 of Act No. 69 of 2011

Section 6 of Act No. 69 of 2011, is codified at S.C. Code Ann. Section 17-13-170 provides as follows:

> **§ 17-13-170. Law enforcement authorization to determine immigration status; reasonable suspicion; procedures; data collection on motor vehicle stops.**

(A) If a law enforcement officer of this State or a political subdivision of this State lawfully stops, detains, investigates, or arrests a person for a criminal offense, and during the commission of the stop, detention, investigation, or arrest the officer has reasonable suspicion to believe that the person is unlawfully present in the United States, the officer shall make a reasonable effort, when practicable, to determine whether the person is lawfully present in the United States, unless the determination would hinder or obstruct an investigation.

(B)(1) If the person provides the officer with a valid form of any of the following picture identifications, the person is presumed to be lawfully present in the United States:

(a) a driver's license or picture identification issued by the South Carolina Department of Motor Vehicles;

(b) a driver's license or picture identification issued by another state;

(c) a picture identification issued by the United States, including a passport or military identification; or

(d) a tribal picture identification.

(2) It is unlawful for a person to display, cause or permit to be displayed, or have in the person's possession a false, fictitious, fraudulent, or counterfeit picture identification for the purpose of offering proof of the person's lawful presence in the United States. A person who violates the provisions of this item:

(a) for a first offense, is guilty of a misdemeanor, and, upon conviction, must be fined not more than one hundred dollars or imprisoned not more than thirty days; and

(b) for a second offense or subsequent offenses, is guilty of a felony, and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than five years.

(3) If the person cannot provide the law enforcement officer with any of the forms of picture identification listed in this subsection, the person may still be presumed to be lawfully present in the United States, if the officer is able to otherwise verify that the person has been issued any of those forms of picture identification.

(4) If the person is operating a motor vehicle on a public highway of this State without a driver's license in violation of Section 56-1-20, the person may be arrested pursuant to Section 56-1-440.

(5) If the person meets the presumption established pursuant to this subsection, the officer may not further stop, detain, investigate, or arrest the person based solely on the person's lawful presence in the United States.

(6) This section does not apply to a law enforcement officer who is acting as a school resource officer for any elementary or secondary school.

(C)(1) If the person does not meet the presumption established pursuant to subsection (B), the officer shall make a reasonable effort, when practicable, to verify the person's lawful presence in the United States by at least one of the following methods:

(a) contacting the Illegal Immigration Enforcement Unit within the South Carolina Department of Public Safety;

(b) submitting an Immigration Alien Query through the International Justice and Public Safety Network;

(c) contacting the United States Immigration and Customs Enforcement's Law Enforcement Support Center; or

(d) contacting the United States Immigration and Customs Enforcement's local field office.

(2) The officer shall stop, detain, or investigate the person only for a reasonable amount of time as allowed by law. If, after making a reasonable effort, the officer is unable to verify the person's lawful presence in the United States by one of the methods described in item (1), the officer may not further stop, detain, investigate, or arrest the person based solely on the person's lawful presence in the United States.

(3) If the officer verifies that the person is lawfully present in the United States, the officer may not further stop, detain, investigate, or arrest the person based solely on the person's lawful presence in the United States.

(4) If the officer determines that the person is unlawfully present in the United States, the officer shall determine in cooperation with the Illegal Immigration Enforcement Unit within the South Carolina Department of Public Safety or the United States Immigration and Customs Enforcement, as applicable, whether the officer shall retain custody of the person for the underlying criminal offense for which the person was stopped, detained, investigated, or arrested, or whether the Illegal Immigration Enforcement Unit within the South Carolina Department of

Public Safety or the United States Immigration and Customs Enforcement, as applicable, shall assume custody of the person. The officer is not required by this section to retain custody of the person based solely on the person's lawful presence in the United States. The officer may securely transport the person to a federal facility in this State or to any other point of transfer into federal custody that is outside of the officer's jurisdiction. The officer shall obtain judicial authorization before securely transporting a person to a point of transfer that is outside of this State.

(D) Nothing in this section must be construed to require a law enforcement officer to stop, detain, investigate, arrest, or confine a person based solely on the person's lawful presence in the United States. A law enforcement officer may not attempt to make an independent judgment of a person's lawful presence in the United States. A law enforcement officer may not consider race, color, or national origin in implementing this section, except to the extent permitted by the United States or South Carolina Constitution. This section must be implemented in a manner that is consistent with federal laws regulating immigration, protecting the civil rights of all persons, and respecting the privileges and immunities of United States citizens.

(E) Except as provided by federal law, officers and agencies of this State and political subdivisions of this State may not be prohibited or restricted from sending, receiving, or maintaining information related to the immigration status of any person or exchanging that information with other federal, state, or local government entities for the following purposes:

(1) determining eligibility for any public benefit, service, or license provided by the federal government, this State, or a political subdivision of this State;

(2) verifying any claim of residence or domicile, if determination of residence or domicile is required under the laws of this State or a judicial order issued pursuant to a civil or criminal proceeding in this State;

(3) determining whether an alien is in compliance with the federal registration laws prescribed by Chapter 7, Title II of the federal Immigration and Nationality Act; or

(4) pursuant to 8 U.S.C. Section 1373 and 8 U.S.C. Section 1644.

(F) Nothing in this section must be construed to deny a person bond or from being released from confinement when such person is otherwise eligible for release. However, pursuant to the provisions of Section 17-15-30, a court setting bond

shall consider whether the person charged is an alien unlawfully present in the United States.

(G) No official, agency, or political subdivision of this State may limit or restrict the enforcement of this section or federal immigration laws.

(H) This section does not implement, authorize, or establish, and shall not be construed to implement, authorize, or establish the federal Real ID Act of 2005.

(I) Any time a motor vehicle is stopped by a state or local law enforcement officer without a citation being issued or an arrest being made, and the officer contacts the Illegal Immigration Enforcement Unit within the Department of Public Safety pursuant to this section, the officer who initiated the stop must complete a data collection form designed by the Department of Public Safety, which must include information regarding the age, gender, and race or ethnicity of the driver of the vehicle. This information may be gathered and transmitted electronically under the supervision of the Department of Public Safety, which shall develop and maintain a database storing the information collected. The Department of Public Safety must promulgate regulations with regard to the collection and submission of the information gathered. In addition, the Department of Public Safety shall prepare a report to be posted on the Department of Public Safety's website regarding motor vehicle stops using the collected information. The General Assembly shall have the authority to withhold any state funds or federal pass-through funds from any state or local law enforcement agency that fails to comply with the requirements of this subsection.

Section 7 of Act No. 69, codified as § 23-3-1100, further provides in relevant part:

§ 23-3-1100. Determination of lawfulness of prisoner's presence in United States; notification of Department of Homeland Security of presence of unlawful alien; housing and maintenance expenses; transportation.

(A) If a person is charged with a criminal offense and is confined for any period in a jail of the State, county, or municipality, or a jail operated by a regional jail authority, a reasonable effort shall be made to determine whether the confined person is an alien unlawfully present in the United States.

(B) If the prisoner is an alien, the keeper of the jail or other officer must make a reasonable effort to verify whether the prisoner has been lawfully admitted to the United States or if the prisoner is unlawfully present in the United States. Verification must be made within seventy-two hours through a query to the Law Enforcement Support Center (LESC) of the United States Department of Homeland Security or other office or agency designated for that purpose by the

United States Department of Homeland Security. If the prisoner is determined to be an alien unlawfully present in the United States, the keeper of the jail or other officer shall notify the United States Department of Homeland Security.

(C) Upon notification to the United States Department of Homeland Security pursuant to subsection (B), the keeper of the jail must account for daily expenses incurred for the housing, maintenance, transportation, and care of the prisoner who is an alien unlawfully present in the United States and must forward an invoice to the Department of Homeland Security for these expenses.

(D) The keeper of the jail or other officer may securely transport the prisoner who is an alien unlawfully present in the United States to a federal facility in this State or to any other point of transfer into federal custody that is outside of the keeper of the jail or other officer's jurisdiction. The keeper of the jail or other officer shall obtain judicial authorization before securely transporting a prisoner who is unlawfully present in the United States to a point of transfer that is outside of this State.

(E) If a prisoner who is an alien unlawfully present in the United States completes the prisoner's sentence of incarceration, the keeper of the jail or other officer shall notify the United States Department of Homeland Security and shall securely transport the prisoner to a federal facility in this State or to any other point of transfer into federal custody that is outside of the keeper of the jail or other officer's jurisdiction. The keeper of the jail or other officer shall obtain judicial authorization before securely transporting a prisoner who is unlawfully present in the United States to a point of transfer that is outside of this State.

(F) Nothing in this section shall be construed to deny a person bond or from being released from confinement when such person is otherwise eligible for release. However, pursuant to the provisions of Section 17-15-30, a court setting bond shall consider whether the person charged is an alien unlawfully present in the United States.

(G) The State Law Enforcement Division shall promulgate regulations to comply with the provisions of this section in accordance with the provisions of Chapter 23, Title 1.

(H) In enforcing the terms of this section, no state officer shall attempt to make an independent judgment of an alien's immigration status. State officials must verify an alien's status with the federal government in accordance with 8 U.S.C. Section 1373(c).

In construing Sections 6 and 7, as codified, a number of principles of statutory construction are applicable. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). "[Courts] will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). Statutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable. *State v. Thomas*, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007). Moreover, a statute must, if possible, be construed consistently with the Constitution. *State v. Peake*, 353 S.C. 499, 579 S.E.2d 297 (2003). As our Supreme Court has consistently recognized, "[a] possible constitutional construction of a statute must prevail over an unconstitutional interpretation . . . ." *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196, 525 S.E.2d 872, 873 (2000).

Fourth Amendment Background

Before addressing Sections 6 and 7 specifically, it is also helpful to provide some general background regarding the requirements of the Fourth Amendment of the United States Constitution in the context of investigative stops and seizures. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." U.S. Const., Amend. IV. We have previously advised that these constitutional guarantees apply both to citizens of the United States, as well as to undocumented immigrants. *Op. S.C. Atty. Gen.*, May 26, 2010 (2010 WL 2320807) [citing *Plyler v. Doe*, 457 U.S. 202 (1982)]. The Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention. *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840, 847 [citing *United States v. Mendenhall*, 446 U.S. 544, 551 (1980)]. The temporary detention during an automobile stop, even if only for a brief and limited purpose, constitutes a seizure under the Fourth Amendment. *Pichardo*, 623 S.E.2d at 847 [citing *Whren v. United States*, 517 U.S. 806, 809-10 (1996)]. Generally, the decision to conduct a traffic stop is reasonable when the police have probable cause to believe a traffic violation has occurred. *Id.*, 517 U.S. at 810. See also, *State v. Provet,* 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) ["Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop."] The principles articulated by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 20 (1968), holding that a law enforcement officer may conduct an investigation "reasonably related in scope to the circumstances which justified the interference in the first place," generally govern such stops.

Further, upon making a valid traffic stop, an officer's actions must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. The detention "must be temporary and last no longer than necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983); see also, *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468 (Ct. App. 2011). Moreover, the officer should employ the least intrusive means reasonably available to investigate his or her suspicions in a short period of time.

Royer, 460 U.S. at 500. With regard to duration of the stop, although the reasonable duration of a traffic stop "cannot be stated with mathematical precision," *Branch*, 537 F.3d at 336, a stop may become unlawful if it is prolonged beyond the time reasonably necessary to effectuate the stop. The proper inquiry is whether, during the detention, the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the individual(s). *United States v. Sharpe*, 470 U.S. 675 (1985); *State v. Woodruff*, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001). If the time, manner or scope of the investigation exceeds the proper parameters, a constitutionally permissible stop may be transformed into one which violates the Fourth Amendment. *Id.*

The Fourth Circuit Court of Appeals has also recently summarized the permissibility of a traffic stop as follows:

> [a]lthough the scope and duration components of *Terry's* second prong require highly fact-specific inquiries, the cases make possible some generalizations. When a police officer lawfully detains a vehicle, "police diligence involves requesting a driver's license and vehicle registration, running a computer check, and issuing a ticket." *United States v. Digiovanni*, 650 F.3d 498, 507 (4th Cir. 2011). The officer may also, "in the interest of personal safety," request that the passengers in the vehicle provide identification, at least so long as the request does not prolong the seizure. *United States v. Soriano–Jarquin*, 492 F.3d 495, 500-01 (4th Cir. 2007). Similarly, the officer may "inquir[e] into matters unrelated to the justification for the traffic stop," *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009), and may take other actions that do not constitute "searches" within the meaning of the Fourth Amendment, such as conducting a dog-sniff of the vehicle, [*Illinois v.] Caballes*, 543 U.S. [405,] 409 [2005], but again only "so long as those inquiries [or other actions] do not measurably extend the duration of the stop." *Johnson*, 129 S.Ct. at 788.

United States v. Guijon-Ortiz, 660 F.3d 757, 764-65 (4th Cir. 2011).

Once the officer has completed the original purpose of the stop, the traffic stop should come to an end. Moreover, when the unrelated questions demonstrate that the officer has "definitely abandoned the prosecution of the traffic stop and embarked on another sustained course of investigation or where the unrelated questions constitute the bulk of the interaction between the police officer and the defendant, they unreasonably extend the scope and duration of the stop." *Digiovanni*, 650 F.3d at 508-09. In other words, if an individual is detained incident to a traffic stop, "when the purpose justifying the stop is exceeded, the detention becomes illegal unless a reasonable suspicion of some other crime exists." *United States v. Jackson*, 280 F.3d 403, 405 (4th Circuit 1998).

Again, courts emphasize that the intrusiveness and duration of the stop must bear a reasonable relation to either the underlying traffic offense or other circumstances suggesting criminal activity that come lawfully to the officer's attention during the stop. *State v. Pichardo*, 367 S.C., *supra* at 98, 623 S.E.2d, *supra* at 848 [once the purpose of the traffic stop has been completed, an officer can lengthen the stop, or expand the scope of the stop, only with a reasonable, articulable suspicion of criminal activity needed to justify further detention]. See also *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ["... a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes upon interests protected by the Constitution."]. Normally, an extension is permitted only if (1) the encounter becomes consensual or (2) the officer has at least a reasonable, articulable suspicion of other criminal activity. *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468, 471 (Ct. App. 2011); *Pichardo*, 623 S.E.2d at 848. The officer's suspicion, of course, must be based upon "particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed." In determining whether reasonable suspicion exists, the Court must consider the totality of the circumstances. In doing so, the court may consider any added meaning that certain conduct might suggest to experienced law enforcement officers in the field, trained in the observation of criminal activity. *United States v. Cortez*, 449 U.S. 411, 417 (1981).

Arizona v. United States

With this general summary of Fourth Amendment case law in the context of investigative stops in mind, we turn now to the application of these principles to immigration enforcement by state and local officers in light of the Supreme Court's seminal decision in *Arizona v. United States,* ___ U.S. ___, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012), (hereinafter "Arizona"). There, the Court addressed a provision similar to § 17-13-170 (Section 6 of Act No. 69 of 2011). The Court declined to enjoin that Arizona provision, recognizing that the law was subject to two possible interpretations, one of which could be read as not subjecting the statute to federal preemption. According to the Supreme Court, "[a]t this stage, without the benefit of the definitive interpretation from the state courts, it would be inappropriate to assume [the provision] will be construed in a way that creates a conflict with federal law." 132 S.Ct. at 2510. However, while *Arizona* did not directly decide the issue, the Supreme Court noted that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." *Arizona*, 132 S.Ct. at 2509. Referencing *Arizona v. Johnson, supra* and *Illinois v. Caballes, supra*, the Supreme Court in *Arizona* quoted *Caballes* with approval that "[a] seizure that is justified solely by the interest of issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Id.*, quoting *Cabelles*, 543 U.S. at 407. Moreover, in the Supreme Court's view, "it would disrupt the federal framework [regarding immigration policies] to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision." *Id.* However, according to the Court, if the Arizona provision "only requires state officers to conduct a status check during the course of an organized, lawful detention ...(,)" then "the provision likely would survive preemption – at least absent some showing that it has other consequences

that are adverse to federal law and its objectives." *Id.* Thus, *Arizona,* cognizant of the constitutional concerns regarding prolonged detention, noted that "the state courts may conclude that, unless *the person continues to be suspected of some crime for which he may be detained by state officers,* it would not be reasonable to prolong the stop for the immigration inquiry." *Id.* (emphasis added).

Santos Case (4th Circuit)

Following the *Arizona* decision by the Supreme Court, the Fourth Circuit recently addressed the nature of an immigration status inquiry in *Santos v. Frederick County Bd. of Com'rs.*, 725 F.3d 451 (4th Cir. 2013). There, the Court dealt with the issue of whether, once there was a "seizure" pursuant to the Fourth Amendment, deputies could then further detain and ultimately arrest an individual based upon the existence of a civil ICE removal warrant. The Fourth Circuit noted that state officers could assist "federal immigration efforts under 8 U.S.C. § 1357 (g)(1), which authorizes the Attorney General to enter into agreements with local law enforcement agencies that allow specific local officers to perform the functions of federal immigration officers." 725 F.3d at 463-464, citing *Arizona v. United States,* 132 S.Ct. at 2506. Further, the Court proceeded to explain that other provisions of federal law allow state or local officers to assist in federal immigration enforcement:

> Even in the absence of a written agreement, local law enforcement agencies may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." § 1357 (g)(10)(B). When enforcing federal immigration law pursuant to Section 1357(g) local law officers are "subject to the direction and supervision of the Attorney General." § 1357 (g)(3).
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> Other statutory provisions authorize local law enforcement officers to engage in immigration enforcement in more circumscribed situations. See, e.g. § 1103 (a)(10) (allowing the Attorney General to authorize local law enforcement officers to assist in immigration enforcement in the event of an 'actual or imminent mass influx of aliens arriving off the coast of the United States"); § 1252 c(a) (authorizing local law enforcement officers to arrest illegally present aliens who have "previously been convicted of a felony in the United States and deported or left the United States after such conviction); § 1324 (c) (allowing local law enforcement officers to arrest individuals for bringing in and harboring certain aliens).

Id. at 464.

The Fourth Circuit, in *Santos*, quoting Arizona,, noted that " '[a]s a general rule, it is not a crime for a removable alien to remain present in the United States ....' " 725 F.3d at 464, quoting *Arizona*, 132 S.Ct. at 2505. Thus, as *Santos* recognized, the Supreme Court in *Arizona*

concluded that " '[i]f the police stop someone based on nothing more than possible removability, the usual predicate for arrest is absent.' " *Santos, Id.* Thus, as the Fourth Circuit correctly pointed out, *Arizona* held unconstitutional a provision that authorized a state officer to " 'without a warrant ... arrest a person if the officer has probable cause to believe ... [the person] has committed any public offense that makes [him] removable from the United States.' " *Santos, Id.* quoting *Arizona, Id.* (which quoted Ariz.Rev.Stat. Ann. § 13–3883(A)(5)). In the view of the Supreme Court in *Arizona* such a provision "attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers." *Arizona,* 132 S.Ct. at 2506. Thus, according to *Santos, Arizona* was dispositive of this question:

> Lower federal courts have universally-and we think correctly-interpreted *Arizona v. United States* as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations. *See Melendres v. Arpaio,* 695 F.3d 990, 1001 (9th Cir.2012); *Melendres v. Arpaio,* No. PHX–CV–07–02513–GMS, 2013 WL 2297173, at *60–63 (D.Ariz. May 24, 2013); *Buquer v. City of Indianapolis,* No. 1:11–cv–00708–SEB, 2013 WL 1332158, at *10–11 (S.D.Ind. Mar. 28, 2013).

725 F.3d at 464-465. As the *Santos* Court reasoned:

> A law enforcement officer may arrest a suspect only if the officer has " 'probable cause' to believe that the suspect is involved in criminal activity." *Brown v. Texas,* 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). Because civil immigration violations do not constitute crimes, suspicion or knowledge that an individual has committed a civil immigration violation, by itself, does not give a law enforcement officer probable cause to believe that the individual is engaged in criminal activity. *Melendres,* 695 F.3d at 1000–01. Additionally, allowing local law enforcement officers to arrest individuals for civil immigration violations would infringe on the substantial discretion Congress entrusted to the Attorney General in making removability decisions, which often require the weighing of complex diplomatic, political, and economic considerations. *See Arizona v. United States,* 132 S.Ct. at 2506–07 .... Nonetheless, the Court's logic regarding arrests readily extends to brief investigatory detentions. In particular, to justify an investigatory detention, a law enforcement officer must have reasonable, articulable suspicion that "criminal activity may be afoot." *Terry,* 392 U.S. at 30, 88 S.Ct. 1868. And because civil immigration violations are not criminal offenses, suspicion or knowledge that an individual has committed a civil immigration violation "alone does not give rise to an inference that criminal activity is 'afoot.' " *Melendres,* 695 F.3d at 1001.
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> Therefore, we hold that, absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may

> not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.
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> Like the district court, we conclude that the deputies seized Santos for purposes of the Fourth Amendment when Deputy Openshaw gestured for her to stay seated after dispatch informed him of the outstanding civil ICE deportation warrant. *See supra* Part III.C. At that time, the deputies' only basis for detaining Santos was the civil ICE warrant. Yet as the defendants concede, the deputies were not authorized to engage in immigration law enforcement under the Sheriff's Office's Section 1357(g)(1) agreement with the Attorney General. *They thus lacked authority to enforce civil immigration law and violated Santos's rights under the Fourth Amendment when they seized her solely on the basis of the outstanding civil ICE warrant.*

Id., at 464-465 (emphasis added). Thus, in *Santos* the Fourth Circuit concluded that "... the deputies violated Santos' rights under the Fourth Amendment when they seized her after learning that she was the subject of a civil immigration warrant and absent ICE's express authorization or direction." *Id.* at 469.

Conclusion

In *Arizona v. United States, supra*, the United States Supreme Court addressed the validity of a provision similar to Section 6 of Act No. 69 of 2011, now codified at § 17-13-170. The Court declined to enjoin that provision, recognizing that the law was subject to two possible interpretations, one of which could be read as not subjecting the Arizona statutory provision at issue to federal preemption. While the Supreme Court cautioned that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns," the Court further observed that such "constitutional concerns" could be avoided if statutes similar to §17-13-170 are construed so that "unless the person [stopped and detained for a valid reason other than immigration status] continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry." *Arizona*, 132 S.Ct. at 2509. According to the *Arizona* Court, if the provision "only requires state officers to conduct a status check *during the course of an organized lawful detention* or after a detainee has been released, the provision likely would survive preemption – at least absent some showing that it has other consequences that are adverse to federal law and its objectives." *Id.* (emphasis added). Moreover, in *Santos*, the Fourth Circuit also recently held that "local officers lack authority to arrest individuals suspected of civil immigration violations." 725 F.3d *supra* at 464.

It is our opinion that a court is likely to interpret § 17-13-170 (Section 6 of Act No. 69 of 2011) in the manner which *Arizona* recognized necessary to ensure avoidance of preemption concerns. The express language of § 17-13-170 (A) specifies that "during the commission of a valid stop" [such as for a traffic offense], an officer, upon "reasonable suspicion," must "make a

reasonable effort, when practicable, to determine whether the person [suspected of a criminal offense] is lawfully present in the United States ...."[1] Based upon the legislature's use of the language "during the commission of a valid stop" – indicating that the immigration inquiry must occur *while the investigation of the original stop is ongoing,* but not afterwards – in other words, we believe the General Assembly intended that individuals may not be stopped, detained, arrested or have their detention prolonged based upon their immigration status, and any immigration inquiry may not be initiated after the stop has ended.

In our opinion, this means that even if a state or local officer is able to verify that an individual is present in violation of federal immigration laws, § 17-13-170 does not authorize the officer to make an arrest or continue to detain the individual on that basis. Section 17-13-170 (C)(4) emphasizes that even "[i]f the officer determines that the person is unlawfully present in the United States ...," the officer "is not required by this section to retain custody of the person based solely on the person's lawful presence in the United States." Such a limitation is the overriding premise throughout the statute – i.e. a person may not be held or detained *based upon his or her immigration status.*

Thus, if an officer stops, detains or arrests a person for a valid non-immigration reason [e.g. reasonable suspicion or probable cause to believe that the individual has violated a state criminal law], *during that time*, the officer may ask the person questions related to his or her immigration status and may even communicate with the authorities (including federal authorities), specified in § 17-13-170, to inquire further regarding such immigration status. However, such questioning and inquiry regarding the person's or persons' immigration status *may not prolong the original detention*, even if the inquiry as to immigration status is still pending. Thus, once the original justification for the stop has been addressed, the individual must be released unless there is additional reasonable suspicion of a separate crime that would justify further detention. As stated, the express language used in § 17-13-170 (A) "during the commission of the stop" means that any prolonged detention in order to make or further an immigration inquiry is not authorized. Accordingly, the General Assembly clearly anticipated that § 17-13-170 must conform to federal immigration law. See, § 17-13-170 (D).

Likewise, § 23-3-1100 does not authorize prolonging the detention of a person in jail or prison simply to determine the person's immigration status. As § 23-3-1100 (F) expressly states, nothing in the Section "shall be construed to deny a person bond or from being released from confinement when such person is otherwise eligible for release." While § 23-3-1100 (E) might suggest otherwise, the literal language of § 23-3-1100 (F) is clear that additional confinement or

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[1] It is important to note that the literal text of Section 6 requires that an investigation conducted pursuant thereto applies only to the person suspected of a criminal offense, and not to other individuals who may be present but are not suspected of any criminal activity. For example, officers may question a vehicle passenger about his or her immigration status pursuant to Section 6 only when that individual is also suspected of a criminal offense, even if the officer has reasonable suspicion that the individual may also be present without authorization.

detention of an individual, based upon one's immigration status, is not authorized.[2] In short, § 23-3-1100 does not authorize a state or local law enforcement officer to transfer an individual suspected of being unlawfully present, and who has completed his or her sentence, to a federal facility, as this would constitute a prolonging of the person's detention based upon immigration status.

Moreover, we do not believe the Legislature, in enacting Sections 6 and 7 of Act No. 69 of 2011, sanctioned such prolonged detention of those suspected of illegal presence even in the narrow circumstances of a suspected federal criminal violation or at of the request of ICE. Again, the words "during the commission of the stop," as we read them, particularly in conjunction with the requirement of § 17-13-170 (D) – that any stop must be consistent with federal immigration law and the United States Constitution – mandates that any detention not be prolonged based solely upon one's immigration status. Thus, as § 17-13-170 expressly directs, any inquiry concerning a person's or persons' immigration status must be conducted "during the commission of the [original] stop" and not beyond that time and circumstance. Nothing herein should be construed to undermine general Fourth Amendment law, as specified in *Arizona,* that an officer may continue to detain a person suspected of "some other crime for which he may be detained by state [or local] officers …."

We trust that this opinion is responsive to your questions concerning interpretation of Sections 6 and 7 of Act No. 69 of 2011.

Sincerely,

Robert D. Cook
Solicitor General

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[2] Our opinion herein is confined to the terms of Act No. 69 of 2011. We do not address the applicability of any federal statute or any detainer from federal authorities.