

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

1 Dragon’s Ascent Video Gaming Machine;
SC Games of Skill, LLC,

C/A No. 2022-CP-08-02026

ORDER

Appellants,

vs.

South Carolina Law Enforcement
Division (SLED),

Respondent.

RECEIVED
May 11 2023
SC Court of Appeals

This matter is before me on appeal from an August 11, 2022 order of the magistrate court (the “magistrate court order”) holding that a “Dragon’s Ascent” video machine owned by Appellant SC Games of Skill, LLC, is illegal under S.C. Code Ann. § 12-21-2710 and must be destroyed pursuant to S.C. Code Ann. § 12-21-2712. Based on a detailed recitation of the testimony and evidence presented at a lengthy post-seizure hearing, the magistrate court correctly found that Dragon’s Ascent is a game of skill, *i.e.*, that skill predominates over chance in determining the outcome. (Order, at 4-8.) This holding was not appealed by Respondent State Law Enforcement Division (“SLED”), and accordingly it is the law of the case. In addition, I agree with the magistrate court order as to this finding.

Despite finding that Dragon’s Ascent is a game of skill, the magistrate court nevertheless held that the machine violates S.C. Code Ann. § 12-21-2710 according to *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), which involved a completely different statute, S.C. Code Ann. § 16-19-40. The magistrate court interpreted *Chimento* as abandoning the longstanding “skill vs. chance” test applicable under § 12-21-2710 and adopting a novel

“wagering” test, under which any consideration paid to participate in any game constitutes illegal gambling, regardless of the degree of skill involved. (Order, at 10-13.) Applying this “wagering” test, the magistrate court concluded that “although Dragon’s Ascent is a game in which skill predominates, a person ‘gambles’ when money is wagered in so playing,” and therefore the machine violates § 12-21-2710. (Order at 11.) Appellant appeals this ruling, arguing that the traditional multiple-decades-old definition of gambling is payment of something of value, to participate in a game based on chance, to win a prize. *Ward v. West*, 387 S.C. 268, 692 S.E.2d 516 (2010).¹

For the reasons set forth herein, this Court agrees with Appellants that the magistrate court misapplied *Chimento* and that the determination of legality under § 12-21-2710 begins and ends with the skill vs. chance inquiry. Conversely, in order to affirm, this Court would have to accept or ignore all of the following untenable propositions:

- That in deciding *Chimento*, the Supreme Court silently overruled decades of precedent recognizing the legality of skill games in this State without clearly stating it was doing so, contrary to its consistent practice of explicitly announcing that it is overruling prior decisions when it intended an opinion to do so;
- That the *Chimento* opinion repeatedly stated that it was solely concerned with interpreting and applying S.C. Code Ann. § 16-19-40—which is completely irrelevant to post-seizure hearings under § 12-21-2710—can simply be ignored;
- That this Court should also disregard multiple post-*Chimento* rulings and decisions from various South Carolina courts, including a per curiam opinion by the same five justices who decided *Chimento*, applying the long-established “skill vs. chance” test to determine legality of a video game under § 12-21-2710; and
- That the interpretation of *Chimento* by the magistrate court is correct even though it would make it illegal for any person in this state to pay, in one

¹ This unanimous decision of the Supreme Court in *Ward*, decided two years before *Chimento*, repeated this long-recognized definition of gambling as containing three elements—consideration, chance and reward.

way or another, to participate in a skill-based game for a prize—activities that encompass everything from local spelling bees, to nationally renowned events like the Heritage Golf Tournament at Hilton Head, and even state-sponsored events like the Governor’s Cup fishing tournament.

Accordingly, this Court reverses the magistrate court’s adoption of a novel “wagering” test from *Chimento* and its application of that test to find Dragon’s Ascent is illegal.

I. BACKGROUND

On November 19, 2021 a Dragon’s Ascent video machine was seized from a business called LG’s By The Creek, located at 1005 Tanner Ford Boulevard, Hanahan, South Carolina. After examining the machine, the magistrate court made a preliminary finding that it was an illegal gambling device under S.C. Code Ann. § 12-21-2710 and ordered its destruction pursuant to S.C. Code Ann. § 12-21-2712. After Appellant requested a post-seizure hearing, one was held on February 4, 2022.

The testimony and evidence at this post-seizure hearing established that Dragon’s Ascent is an aim-and-shoot video game in which the player attempts to capture dragons of varying sizes, colors, and point values as they move across a screen. To begin playing, the player inserts currency into a bill acceptor, establishing the credits the player uses to play the game. For example, if the player inserts a ten-dollar bill, the game will show that the player has \$10 worth of credits. Using a “Shot Cost” button, the player selects a value of between 10¢ and \$2 for each shot. Between each shot, the player can adjust the shot value up or down. The shot value has no bearing on the number of shots needed to capture a dragon. A session of play begins when the player, without any time limit, decides to take the first shot at a dragon.

Game play occurs by the use of a panel on which is located various controls. The player is represented on screen by a turret controlled by a joystick used for aiming and a shot button used for firing. “Shot Power” is a graphic representation of five small vials, each filled with fluid. The

player uses the level of fluid in each vial to determine the power of a shot when shooting in order to maximize the reward for capturing the targeted dragon. The dragons are of different sizes, shapes, and most importantly colors. A key aspect of success in the game is the player's ability to match the color of his or her turret, which rotates through a repeating cycle of colors, to the color of the targeted dragon. The closer the color match at the moment a shot is accurately fired, the fewer shots will be required to capture the dragon and the greater the reward to the player. The amount awarded for capturing each dragon is determined according to a formula that is set in advance, involves no algorithms or random number generators, and is fully disclosed on the Help Screen² available to the player at all times, including prior to depositing any currency into the bill acceptor. Finally, the game also features a "Ticket Button" that the player uses to print a redeemable receipt which the player can exchange for cash.

II. LEGAL STANDARD

"An action for forfeiture of property is a civil action at law." *Gowdy v. Gibson*, 391 S.C. 374, 379, 706 S.E.2d 495, 497 (2011) (quoting *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006)). On an appeal of a magistrate court's judgment:

[T]he appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

S.C. Code Ann. § 18-7-170; *see also* S.C. Code Ann. § 18-7-140 (on appeal from a magistrate court order, the circuit court "shall have the same power over its own determinations, and shall render judgment thereon in the same manner, as the circuit court in actions pending therein, without trial by jury"). "Sections 18-7-140 and 18-7-170 give the Circuit Judge sitting in an

² The Help Screen provides detailed instructions on how to successfully play this game.

appellate capacity the ability to make a determination in the same manner as Circuit Courts in trials without a jury and to reverse a judgment for errors of fact even though the Circuit Judge may not have had the opportunity to observe the demeanor of the witnesses.” *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 234, 312 S.E.2d 20, 21 (Ct. App. 1984); *see Parks v. Characters Night Club*, 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001) (“Section 18-7-170 provides that on appeal from Magistrate’s Court, the Circuit Court may make its own findings of fact.”).

“Determining the proper interpretation of a statute is a question of law” subject to *de novo* review. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). S.C. Code Ann. § 12-21-2710 is a penal statute and “when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.” *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). Moreover “[a]s a general rule, ... forfeitures are not favored in the law or equity.” *Ducworth v. Neely*, 319 S.C. 158, 162, 459 S.E.2d 896, 899 (Ct. App. 1995) (civil forfeiture action in drug related matter).

III. ANALYSIS

The legality of the Dragon’s Ascent machine is governed by S.C. Code Ann. § 12-21-2710, which prohibits:

any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind[.]

As the magistrate court order correctly observed, Dragon’s Ascent obviously is not a machine “for the play of poker, blackjack, keno, lotto, bingo, or craps.” Thus, the critical question is whether it

is a game of chance or skill. *See SLED v. I-Speedmaster S/N 00218*, 397 S.C. 94, 99, 723 S.E.2d 809, 812 (Ct. App. 2011) (holding that skill, as opposed to chance, is what distinguishes a legal activity from illegal “gaming” or “gambling”).

A. The Magistrate Court Correctly Found that Dragon’s Ascent Is a Game of Skill

This Court agrees with, and adopts in full, the magistrate court’s determination that Dragon’s Ascent is a game of skill:

The Court finds that just as with any game of skill, a player may successfully play Dragon’s Ascent using keen hand/eye coordination, memorization, and recognition of learned patterns, timing, accuracy in aiming, reflexes and reaction time, manual dexterity, mental aptitude, concentration, and deductive analysis, Based on the evidence presented at the hearing, the Court finds that Dragon’s Ascent is a game in which skill predominates over chance.

(Order, at 8.)

SLED devotes a substantial portion of its Respondent’s Brief to its argument that Dragon’s Ascent is not a game of skill. Because SLED did not file a notice of cross-appeal, however, it cannot challenge this finding. An unappealed ruling, “right or wrong, is the law of this case and requires affirmance.” *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970).

Even if SLED had filed a notice of cross-appeal, it would make no difference because the magistrate court’s finding that Dragon’s Ascent is a game of skill is manifestly correct and is fully supported by the testimony of experts and evidence presented at the post-seizure hearing. This included the testimony of Nick Farley, whom the magistrate court recognized without objection as an expert in the evaluation of video games. Mr. Farley testified, based upon his examination of the

Dragon's Ascent game,³ that as a player can improve upon his or her skills, and achieve better outcomes, by becoming more familiar with the game and the available strategies and features. Mr. Farley's expert opinion is that Dragon's Ascent is a game that is 100 percent skill and thus is certainly a game that is predominantly based in skill.

The magistrate court also heard testimony from the designer of Dragon's Ascent, Brock Smith. Without objection, the magistrate court qualified Mr. Smith as an expert in the design and operation of Dragon's Ascent. Mr. Smith testified that many individuals will study the instruction manual for Dragon's Ascent, practice often, and develop strategies, all of which enables them to consistently succeed in playing this game successfully. Regarding the design of Dragon's Ascent, Mr. Smith testified that he was tasked with developing a game that was "100 percent skill—no chance involved." (Hr'g Tr. 153:6-11.) Mr. Smith, aided by a staff of 20 individuals, spent five years developing Dragon's Ascent. He testified that the game never thwarts a player's efforts to win. It contains no random number generator, algorithm, or other device or coding that might override the player's skill. Finally, he testified that he successfully played Dragon's Ascent for 16 consecutive games just prior to the delivery of the machine to LG's By The Creek. During the hearing he successfully played Dragon's Ascent four consecutive times in the courtroom.

SLED presented testimony from Special Agent Ryan Wood, who played the Dragon's Ascent machine and observed others playing it. Special Agent Wood testified that he did not read any rules or study the Help Screen prior to his initial play session on the game. He testified that he inserted money into the machine, familiarized himself with the buttons on the console, and began playing by shooting at dragons on the screen. Special Agent Wood felt that his results were "totally

³ The machine examined by Mr. Farley was identical to the machine seized from LG's By The Creek.

random” in that it seemed like he obtained different results even when shooting at the same dragons the same number of times. (Hr’g Tr. at 108:19-25.) In light of the testimony of Mr. Farley and Mr. Smith, however, the Court concludes it is far more likely that what Special Agent Wood perceived as different results from multiple shots at the same dragon was, in reality, a result of the differing degree to which his shots matched the color of the target dragon. Maximizing the reward for capturing a dragon by paying close attention to the Shot Power vials and matching the color of the shot fired as closely as possible to the color of the target dragon clearly involves the exercise of skill such as timing, hand/eye coordination, and selectivity. It also accounts for the fact that shots fired at the same dragon will produce more credits or less credits, depending on the shot power and color match.

More broadly, Special Agent Wood’s testimony demonstrates that skill plays the predominant role in the outcome of Dragon’s Ascent even if the player never reads the Help Screen, takes the time to learn the dragons’ patterns, or actively monitors the Shot Power vials. Successful play (*i.e.*, capturing a dragon) inevitably requires hand/eye coordination, aim, timing, manual dexterity, and concentration. Therefore, whether the average player will read the help screen has no bearing on whether Dragon’s Ascent is in fact a game of skill. *See, e.g.*, S.C. Att’y Gen. Op., 2003 WL 21108489, at *2 (S.C.A.G. May 5, 2003) (“Courts considering whether elements of skill are involved in the playing of a particular game have examined factors such as whether the player must demonstrate attributes such as manual dexterity, hand-eye coordination, reflexes, muscular control or the ability to concentrate.”); S.C. Att’y Gen. Op., 2002 WL 31341812, at *2 (S.C.A.G. Aug. 28, 2002) (same); *see also, e.g., Wnek Vending & Amusements Co. v. City of Buffalo*, 434 N.Y.S.2d 608, 612 (N.Y. Sup. Ct. 1980) (video game was one of skill because success “depend[ed] upon eye-hand coordination, reflexes, muscular control and above

all, concentration” as well as “[p]roper timing in aiming and firing”); *Crazie Overstock Promotions, LLC v. State*, 830 S.E.2d 871, 873 (N.C. Ct. App. 2019), *aff’d*, 858 S.E.2d 581 (N.C. 2021) (game that tests player’s hand-eye coordination is a game of skill).⁴

As noted above, the magistrate court’s ruling that Dragon’s Ascent is a game of skill is the law of the case because SLED did not file a notice of cross-appeal. Nevertheless, and for the avoidance of doubt, this Court fully agrees with and therefore affirms the magistrate court’s finding that Dragon’s Ascent is a game of skill.⁵

⁴ The Court does not doubt that Special Agent Wood acted in good faith in seizing the Dragon’s Ascent machine; he simply lacks the training and knowledge to offer persuasive testimony on the issue of its legality. There is no evidence that Special Agent Wood or anyone else on behalf of SLED viewed or analyzed the operating software, the underlying source code, or the internal operations of Dragon’s Ascent. The expert testimony from Mr. Smith, who designed the game, and Mr. Farley, who independently conducted a painstaking examination of the machine, its code, and the manner of its operation, far outweighs Special Agent Woods’s genuine but unfounded view that “this game is pretty simple to me.” (Hr’g Tr. at 121:3-4.) To the contrary, Dragon’s Ascent is in fact a very sophisticated, multi-featured game that rewards players who invest the time and effort needed to develop their skills in playing it.

⁵ As already noted, SLED’s challenges to this finding are not before the Court because SLED did not file a notice of cross-appeal. Nevertheless, the Court notes that SLED’s response brief makes factual statements that are at best unsupported by the record and at worst are contradicted by it. For example, SLED contends that “the functionality of this device preys on the addictive nature of gaming machines” and that certain features of the game are “what keeps players playing.” (Resp. Br. at 19.) However, there is nothing whatsoever in the record regarding whether video games in general have an “addictive nature” or the effect on players of the specific features of Dragon’s Ascent. If SLED had wanted to present testimony regarding the psychology of video games, it could have attempted to find an appropriate expert. Having failed to do so, SLED cannot be allowed to simply invent facts in a “win at any cost regardless of the facts” approach.

Another unsupported factual contention is SLED’s claim that “the device’s algorithm ultimately dictates the outcome of each and every single play on this machine” and that “a player’s knowledge, skill, dexterity, or ability absolutely cannot improve the overall result because this is entirely controlled by the algorithm of the machine.” (Resp. Br. at 16.) SLED does not cite any part of the record to support this totally unfounded statement, and in fact the uncontradicted evidence is that Dragon’s Ascent does not contain any “compensating algorithms” or “random number generators” that might overcome the effect of a player’s skill. (Hr’g Tr. 34:12-19.)

B. The Magistrate Court Erred in Its Interpretation of *Chimento*

Under settled law, the magistrate court’s finding that Dragon’s Ascent is a game of skill established that it is not “gaming” or “gambling” and therefore is not prohibited by S.C. Code Ann. § 12-21-2710. See *Speedmaster*, 397 S.C. at 100, 723 S.E.2d at 812; *Allendale Cnty. Sheriff’s Office v. Two Chess Challenge II*, 361 S.C. 581, 583, 606 S.E.2d 471, 472 (2004). Nevertheless, the magistrate court separately considered whether the Dragon’s Ascent machine was “used for gambling” and adopted a novel “wagering” test to perform this analysis.⁶ (Order at 10.) The magistrate court derived this test from *Chimento*, citing that case for the proposition that “[w]hether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game’s outcome.” (Order at 10 (quoting *Chimento*, 401 S.C. at 533, 737 S.E.2d at 838).) After considering the written briefs and the parties’ oral arguments, this Court is persuaded that the magistrate court erroneously interpreted *Chimento* as applying to the issues in this case.

First, the question of a machine’s legality under S.C. Code Ann. § 12-21-2710 was not presented in *Chimento*—indeed, the majority never even cited § 12-21-2710. Rather, the appellants in *Chimento* were convicted of violating S.C. Code Ann. § 16-19-40 by playing “cards” in a “house used as a place of gaming.” In a divided opinion, the Supreme Court reversed the circuit court order setting aside their convictions. Tracing the history of § 16-19-40, the Supreme Court

⁶ The Court notes that although the parties’ briefs discuss whether Dragon’s Ascent has a “free play” feature, the magistrate court did not find the machine to be illegal on this basis. In *dicta*, the magistrate court simply listed “the free play feature” as one of several ways in which the machine seemed to have “characteristics of gambling devices.” (Order, at 12.) In any event, the testimony and evidence clearly demonstrates that what the magistrate court erroneously described as a “free play feature” is nothing of the kind. Rather than a “free play” feature that provides “an entire game free of charge,” Revenue Ruling 16-4, 2016 WL 8794171 (S.C. Dep’t of Rev. May 17, 2016), Dragon’s Ascent has a “free shot” feature that is merely an entertaining way of revealing (not awarding) the credits that the player has already won by previously capturing certain dragons.

concluded that this particular statute applied to the playing of certain specified, enumerated games (such as cards or dice) in certain specified, enumerated locations (such as a kitchen, a barn, or a house used as a place of gaming), regardless of whether they were games of chance or skill. *See id.* at 531, 737 S.E.2d at 836 (“[Section] 16-19-40 criminalizes the playing of certain games and gambling.”).

That *Chimento*’s analysis and holding are limited to § 16-19-40 becomes even clearer upon review of the concurrence written by Chief Justice Toal and the dissent written by Justice Hearn. Chief Justice Toal “agree[d] wholeheartedly” with Justice Hearn’s conclusion that § 16-19-40 is unconstitutionally vague. *Id.* at 536, 737 S.E.2d at 839 (Toal, C.J., concurring); *see id.* at 547-552, 737 S.E.2d at 845-847 (Hearn, J., dissenting). She joined the majority, however, because “we cannot sever the language, ‘a house used as a place of gaming,’ from section 16-19-40 without striking the provision in its entirety,” which she feared would “open the door wide to *all* heretofore illegal gaming practices in this state, including video poker.” *Id.* at 537, 737 S.E.2d at 839-40 (Toal, C.J., concurring) (emphasis in original).

Justice Hearn’s explanation of why Chief Justice Toal’s concern was entirely misplaced is because of the difference between § 16-19-40 and § 12-21-2710:

The prohibition of video poker is found in Section 12–21–2710 of the South Carolina Code (2000). This is a completely separate section (and title) of the code and makes no reference at all to section 16–19–40. In fact, it is entirely independent and separate from the general gambling prohibitions involved here. Striking section 16–19–40 in whole or in part would have no impact on section 12-21–2710.

Id. at 552, 737 S.E.2d at 848 (Hearn, J., dissenting, and concurred in by Justice Kittredge). Notably, the *Chimento* majority opinion did not challenge Justice Hearn on this important explanation.

Second, accepting the magistrate court’s reading of *Chimento* would require this Court to conclude that the Supreme Court overruled decades of precedent without saying it was doing so.

However, numerous decisions demonstrate that when the Supreme Court overrules existing law, it clearly and explicitly states that it is doing so—including in cases involving gambling. *See State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196-97, 525 S.E.2d 872, 883 (2000) (stating, in a case concerning the application of S.C. Code Ann. § 12-21-2710, “We overrule *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932), to the extent it permits the destruction of allegedly illegal property without any opportunity for the owner to contest the magistrate’s determination of illegality.”); *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 321, 778 S.E.2d 888, 890 (2015) (“[W]e now overrule our decisions that have implicitly authorized recovery beyond” specific statutes providing for the recovery of gambling losses); *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 477-78, 527 S.E.2d 763, 765 (2000) (per curiam) (stating that “we overrule our cases which apply the traditional approach” to substantive due process analysis); *Paradis v. Charleston Cnty Sch. Dist.*, 433 S.C. 562, 564, 861 S.E.2d 774, 775 (2021) (“We overrule precedent that requires the pleading of special damages and return to the traditional definition of civil conspiracy in this state.”).

Third, this Court cannot reconcile the magistrate court’s interpretation of *Chimento* with *Richland County Sheriff’s Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam), decided a mere two years after *Chimento* by the same five justices. In *Awde*, the Court unanimously affirmed a magistrate court’s “finding that two ‘Chess Challenge II’ devices before it were legal games of skill.” *Id.* The parties’ briefs raised arguments concerning, *inter alia*, the “used for gambling” prong of § 12-21-2710. If the Supreme Court had intended *Chimento* to apply when determining the legality of a machine under § 12-21-2710, it surely would not have issued an affirmance in *Awde*. The fact that the Court affirmed—in an unpublished, per curiam opinion—strongly demonstrates that the “wagering” test used in *Chimento* does not apply

to the analysis of whether a game is legal under § 12-21-2710 but, in fact, is limited solely to § 16-19-40.

In addition to the Supreme Court’s post-*Chimento* ruling in *Awde*, all of the following have applied the dominant factor test in the years after the *Chimento* decision: the Attorney General;⁷ the Administrative Law Court;⁸ the Circuit Court;⁹ and the Court of Appeals.¹⁰ Moreover, no court or other authority has ever cited *Chimento* for the proposition that any video game involving consideration and a potential prize is illegal regardless of whether the outcome is determined by chance or the player’s skill. Rather, South Carolina courts at every level have only cited *Chimento* for the entirely unrelated subject of standards for constitutional challenges to statutory provisions.¹¹ Notably, one of these cases involved the legality of a video game machine under § 12-21-2710. *See Smith v. SLED*, 2013 WL 8477943 (S.C. Ct. Com. Pl., Anderson County, Nov.

⁷ *See Op. S.C. Atty Gen.*, 2017 WL 4707542 (S.C.A.G. Oct. 11, 2017) (stating that “South Carolina gambling laws” prohibit “games of chance”).

⁸ *See SCDOR v. Chestnut*, 2021 WL 4822858, at *6 (Oct. 8, 2021) (stating that “games of chance [are] prohibited by [S.C. Code Ann.] § 12-21-2710”).

⁹ *See Smith v. SLED*, 2013 WL 8477943, at *2 (S.C. Ct. Common Pl., Anderson County, Nov. 6, 2013) (“[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance[.]”).

¹⁰ *See SCDOR v. Meenaxi, Inc.*, 417 S.C. 639, 658, 790 S.E.2d 792, 802 (Ct. App. 2016) (“[T]he Department showed the Products Direct and Gift Surplus machines contained games of chance in violation of section 12–21–2710[.]”).

¹¹ **Supreme Court:** *S.C. Hum. Affairs Comm’n v. Zeyi Chen*, 430 S.C. 509, 531, 846 S.E.2d 861, 872 (2020) (vagueness); *State v. Legg*, 416 S.C. 9, 14 n.4, 785 S.E.2d 369, 371 n.4 (2016) (facial challenge); *S.C. Dep’t of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506–07, 757 S.E.2d 388, 392–93 (2014) (facial challenge). **Court of Appeals:** *Rutter v. City of Columbia Design/Dev. Rev. Comm’n*, 2021 WL 2701549, at *3 (S.C. Ct. App. June 30, 2021) (vagueness). **Circuit Courts:** *Retail Servs. & Sys., Inc. v. S.C. Dep’t of Rev.*, 2014 WL 12692755, at *2 (S.C. Com. Pl., Aiken County, May 29, 2014) (as-applied challenge); *Smith v. SLED*, 2013 WL 8477943, at *11 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013) (citing vagueness). **Administrative Law Courts:** *Hyndman v. Charleston County Assessor*, 2013 WL 1786476, at *3 (S.C. Admin. Law Ct. Apr. 18, 2013) (as-applied challenge).

6, 2013). The circuit court decided the question under the dominant factor test rather than under *Chimento*'s "wagering test," even though its order contains a discussion of *Chimento* in the context of a constitutional challenge based on vagueness. *See id.* at *2-3.

Fourth and finally, the Court cannot ignore that the magistrate court's view of *Chimento*, if widely adopted would turn participating in ordinary skill-based games into an illegal activity if a participant merely pays an entry fee and may receive a prize for successful play. The magistrate court's novel "wagering" test utterly disregards the decades-old accepted legality of "paying to play" a predominantly skill game, whether by depositing currency into a video game machine like *Dragon's Ascent* or by paying an entry fee to participate in a local golf tournament. The affected participants would also include not just amateurs participating in local events but also pro athletes who come to South Carolina to participate in nationally known events like the Heritage Classic golf tournament, the Charleston Open women's tennis tournament, and the Darlington 500 NASCAR race. The effect would extend even to state-sponsored events like the Governor's Cup Billfishing Series. The potentially far-reaching consequences of reading *Chimento* as establishing a "wagering" test which applies across the board to all games of skill is a strong basis to question the wisdom of accepting the magistrate court's order *in toto*, especially in light of the other factors discussed above, all of which indicate that the magistrate court read into *Chimento* a holding that simply is not there.

For these reasons, this Court affirms the magistrate court's decision finding that *Dragon's Ascent* is a game predominantly based on skill and reverses the magistrate court's decision to the extent it holds that *Dragon's Ascent*, despite being a game of skill, nevertheless violates S.C. Code Ann. § 12-21-2710 under a novel "wagering" test derived from the Supreme Court's decision in *Chimento*.

IV. CONCLUSION

For the reasons set forth herein, the order of the magistrate court is affirmed in part and reversed in part.

IT IS SO ORDERED.

Hon. Bentley Price, S.C. Circuit Court Judge

Charleston, S. C.

December _____, 2022.



Berkeley Common Pleas

Case Caption: 1 Dragon'S Ascent Video Gaming Machine , plaintiff, et al VS South Carolina Law Enforcement Division (Sled)

Case Number: 2022CP0802026

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766