THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

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1 Dragon's Ascent Video Gaming Machine; SC Games of Skill, Inc., ...Respondents,

v.

South Carolina Law Enforcement Division, ... Appellant.

FINAL BRIEF OF RESPONDENTS

William W. Wilkins, SC Bar No. 6112
Kirsten E. Small, SC Bar No. 75681
MAYNARD NEXSEN, PC
104 S. Main Street, Suite 900
Greenville, SC 29601
Telephone: 864.370.2211
Facsimile: 864.282.1177
BWilkins@maynardnexsen.com
KSmall@maynardnexsen.com

Additional counsel listed inside front cover

Christopher J. Murphy, SC Bar No. 8903
Murphy Law Firm, LLC
136 West Richardson Ave.
Summerville, SC 29483
Telephone: 843.832.1120
Facsimile: 843.832.5969
chris@murphylawfirmllc.com

-and-

Peter M. McCoy, Jr., SC Bar No. 73866
McCoy Law Group, LLC
15 Prioleau Street
Charleston, SC 29401
Telephone: 843.459.8835
Facsimile: 843.459.8834
peter@mccoylawgrp.com

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

COUNTER-STATEMENT OF THE CASE

Background

On November 19, 2021, Appellant South Carolina Law Enforcement Division ("SLED") seized a Dragon's Ascent Video Machine from a restaurant and sports bar named LG's By The Creek, located at 1005 Tanner Ford Boulevard, Hanahan, South Carolina. (R. 1 (Order of Destruction at 1).) 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. (*Id.*) A post-seizure hearing was conducted on February 4, 2022. (R. 127-337 (Hrg. Tr.).)

The testimony and evidence at the 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. (R. 155-157 (Hr'g Tr. 29:22-31:20); R. 438-440 (Pl. Exs. 7-9); R. 379 (Expert Report of Nick Farley ("Farley Report") at 3).) Game play in Dragon's Ascent occurs according to rules that are established in advance, fully disclosed to the player, and do not change over the course of the game. (R. 397 (Farley Report at 21).) To begin playing, the player[1] inserts currency into a bill acceptor, establishing the credits the player uses to play the game. (R. 163 (Hr'g Tr. 37:15-22).) For example, if the player inserts a ten-dollar bill, the game will show that the player has $10 worth of credits. (R. 379 (Farley Report at 3).) Using a

[1] Players must manually confirm that they are age 18 or older in order to play Dragon's Ascent. (R. 218 (Hr'g Tr. 92:5-7); R. 379 (Farley Report at 3).)

"Shot Cost" button, the player selects a value of between 10¢ and $2 for each shot. (R. 218, 254 (Hr'g Tr. 92:20-23, 128:15-17).) Between each shot, the player can adjust the shot value higher or lower. (R. 218, 254 (Hr'g Tr. 92:24-93:3, 128:10-24).) The shot value has no bearing on the number of shots needed to capture a dragon. (R. 397 (Farley Report at 21).) A session of play begins when the player, without any time limit, decides to take the first shot at a dragon. (R. 290 (Hrg. Tr. 164:5-10).)

Game play occurs by the use of a panel on which is located various controls. The player uses a turret controlled by a joystick to aim and a shot button for firing. (R. 379-380 (Farley Report at 3-4).) "Shot Power" is a graphic representation of five small vials, each filled with a different color of 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. (*Id.*) The dragons are of different sizes, shapes, and most importantly colors. Brock Smith, who designed Dragon's Ascent and who was recognized as an expert at the post-seizure hearing, testified that 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. (R. 292 (Hr'g Tr. 166:20-24); *see* R. 381 (Farley Report at 5).) 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. (R. 183, 293 (Hr'g Tr. 57:9-11, 167:9-12).) 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 Screen[2] available to the player at all times, including prior to depositing any currency into the bill acceptor. (R. 160 (Hr'g Tr. 34:12-24); R 397-400 (Farley Report at 21-24).) Finally, the game also features a "Ticket Button" that the player uses to print a redeemable receipt which the player can exchange for cash. (R. 380 (Farley Report at 4).)

Magistrate Court's Order

The magistrate court issued its order on August 11, 2022. (R. 3-15 ("Mag. Ct. Order").) The magistrate court reasoned that Dragon's Ascent would be prohibited by § 12-21-2710 if it fell into any of the categories of prohibited devices:

> [(1)] "a machine (vending, slot, or video game machine with a free play feature 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";
>
> [(2)] "[a] machine or device licensed by the State of South Carolina under S.C. Code § 12-21-2720 and used for gambling"; or
>
> [(3)] "[a] device pertaining to games of chance of whatsoever name or kind."

(R. 5-6 (Mag. Ct. Order at 3-4).)[3] The magistrate court easily rejected (1), holding that "[t]he evidence presented in the instant case with respect to the Dragon's Ascent machine does not support a finding that the machine was operated for the play of poker, slot machines, blackjack, keno, lotto, bingo, or craps." (R. 6 (Mag. Ct. Order at 4).)

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[2] The Help Screen provides detailed instructions on how to successfully play Dragon's Ascent. (R. 379 (Farley Report at 3).)

[3] The magistrate court also noted that S.C. Code Ann. § 12-22-1040 prohibits a machine that "simulates a bingo or slot machine" but easily concluded that "Dragon's Ascent does not simulate a bingo or slot machine." (R. 6 (Mag. Ct. Order at 4).)

To analyze legality under (2) and (3), the magistrate court first turned to the critical question of "whether the Dragon's Ascent game … is a game of chance or skill in the context of § 12-21-2710" under the "dominant factor" test identified in Justice Burnett's dissent in *Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 112, 508 S.E.2d 575, 583 (1998).[4] (R. 6 (Mag. Ct. Order at 4).) Based on the evidence and expert testimony presented at the post-seizure hearing, the magistrate court concluded that Dragon's Ascent is a game of skill:

> [J]ust 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.

(R. 10 (Mag. Ct. Order at 8).)[5] This finding established that the machine is not illegal under (3).

The magistrate court then considered the legality of Dragon's Ascent under (2), as a machine required to be licensed under S.C. Code Ann. § 12-21-2720 "and used for gambling." (R. 11-14 (Mag. Ct. Order at 9-12).) According to the magistrate court, § 12-

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[4] This test is also sometimes referred to as the "skill vs. chance test" or "the predominant factor test."

[5] The court appended to this analysis a lengthy footnote noting "that Dragon's Ascent is a game played predominantly in establishments that serve alcohol" and comparing "the successful play of Dragon's Ascent to the successful completion of standardized field sobriety tests in the DUI context." (R. 10 (Mag. Ct. Order at 8 n.3).) While it does not appear that this discussion impacted the magistrate court's application of the dominant factor test, it was nevertheless entirely improper as is based not on evidence presented during the post-seizure hearing but rather on mere speculation.

21-2710 "logically prevents the owners of machines … for the play of a game based entirely in skill, from being used for gambling." (R. 11 (Mag. Ct. Order at 9).) Therefore, the magistrate court reasoned, "the key issue" is "whether any machine required to be licensed pursuant to § 12-21-2720 ***is used for gambling***." (R. 11-12 (Mag. Ct. Order at 9-10 (emphasis in original)).)

In answering this question, the magistrate court disregarded established precedent and looked to *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012). The magistrate court acknowledged that *Chimento* "interpreted South Carolina's 'statutory' definition of gambling ***in the context of*** S.C. Code Ann. § 16-19-40," but nevertheless relied upon *Chimento* for the proposition that in ***all*** circumstances, not just under § 16-19-40, "gambling/gaming depends not on the skill/chance ratio, but rather on the wager." (R. 12 (Mag. Ct. Order at 10 (emphasis added)).) Based upon this novel "wagering" test, the magistrate court held that despite being a game of skill, Dragon's Ascent violates § 12-21-2710 because players place wagers and win money, "and … the amount of money the player stands to win directly correlates to the amount wagered." (R. 13 (Mag. Ct. Order at 11).)[6] Based on this reasoning, the magistrate court concluded:

> [A]lthough Dragon's Ascent ***is a game in which skill predominates***, a person "gambles" when money is ***wagered*** in so playing. To hold otherwise would effectively legalize wagering and payouts for all games of skill, including ***golf, basketball, and the like***. The

[6] There is nothing nefarious or hidden about this fact. As Mr. Farley explained in his expert report, the amount awarded for capturing a dragon is determined by a set formula: "(Color Match Value * Shot Cost) = Actual Reward." (R. 397 (Farley Report at 21).) The "Color Match Value" is also determined by a set formula. (R. 383 (Farley Report at 7).)

> Dragon's Ascent machine also has several characteristics of gambling devices, including but not limited to the free play feature, the meter which records the amount of points that are redeemed, and the fact that the machine does not give change.

(R. 14 (Mag. Ct. Order at 12) (emphasis added).)[7] The magistrate court therefore held Dragon's Ascent illegal under § 12-21-2710.

Reversal by Circuit Court

Respondents timely appealed the magistrate court's order. (R. 35-36 (Notice of Appeal).) After the parties filed their respective briefs, the circuit court heard oral argument on December 12, 2022. (R. 338-365 (Tr. of Oral Arg.).) The circuit court subsequently entered a written order reversing the decision of the magistrate court. (R. 16-31 (Cir. Ct. Order).)

The circuit court began its analysis by "agree[ing] with, and adopt[ing] in full, the magistrate court's determination that Dragon's Ascent is a game of skill." (R. 21 (Cir. Ct. Order at 6).) The circuit court noted that although SLED devoted "a substantial portion of its Respondent's Brief to its argument that Dragon's Ascent is not a game of skill," that issue was not before the court "[b]ecause SLED did not file a notice of cross-appeal" and thus could not challenge the finding. (R. 21 (Cir. Ct. Order at 6).) The circuit court cited *Buckner v. Preferred Mutual Insurance Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970), for the proposition that an unappealed ruling, "right or wrong, is the

[7] In a brief paragraph, the magistrate court also found the Dragon's Ascent machine illegal under S.C. Code Ann. § 16-19-50, which prohibits ***a person*** from setting up, keeping, or using "[a] machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes." (R. 14 (Mag. Ct. Order at 12).) Section 16-19-50 is not relevant to this *in rem* proceeding.

law of this case and requires affirmance." (R. 21 (Cir. Ct. Order at 6).)

The circuit court further stated that "[e]ven 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." (*Id.*) After carefully and thoroughly reviewing the testimony and evidence presented during the post-seizure hearing, the circuit court concluded that "this Court fully agrees with and therefore affirms the magistrate court's finding that Dragon's Ascent is a game of skill." (R. 24 (Cir. Ct. Order at 9).) The circuit court thus affirmed this portion of the magistrate court's order.

The circuit court next turned to the magistrate court's holding that despite being a game of skill, Dragon's Ascent was nevertheless illegal under the novel "wagering" test advocated by SLED. (R. 25-29 (Cir. Ct. Order at 10-14).) The circuit court held that the magistrate court erroneously "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." (R. 16-17 (Cir. Ct. Order at 1-2).)

The circuit court carefully considered, and rejected, each of SLED's arguments in support of affirmance. (R. 25-29 (Cir. Ct. Order at 10-14).) The circuit court concluded that the magistrate court erred in reading *Chimento* as creating a novel "wagering" test under which even games of skill are illegal and, accordingly, reversed the magistrate court's holding that Dragon's Ascent is illegal despite being a game of skill. (R. 29 (Cir.

Ct. Order at 14).)

SLED filed a motion to alter or amend the circuit court's ruling on March 9, 2023, which was denied on April 3, 2023. (R. 110-124 (Motion); R. 32-34 (Order).) SLED received notice of the denial the same day. (R. 125-126 (Notice of Appeal).) SLED timely served its Notice of Appeal on May 2, 2023, and filed the notice on May 11, 2023. (R. 125-126 (Notice of Appeal).)

SUMMARY OF ARGUMENT

The order of the circuit court should be affirmed. There is no dispute here that Dragon's Ascent is a game of skill. (*See* Brief of Appellant ("SLED Br.") at 2.) The circuit court correctly ruled that as a game of skill, Dragon's Ascent is legal under S.C. Code Ann. § 12-21-2710. Attempting to change this result, SLED rehashes arguments that were considered and rejected by the circuit court. SLED also presents an argument raised ***for the first time*** in its motion to alter or amend, contending that the title of 1999 S.C. Act 125 ("Act 125") shows that the General Assembly's purpose in amending § 12-21-2710 was to prohibit any "cash payout," regardless of whether the game is one of skill or chance. (R. 110-124 (Notice of Motion and Motion to Alter, Amend, and Reconsider).) This argument, raised for the first time on reconsideration, is not properly before the Court. Additionally, it is meritless. SLED's new "legislative purpose" theory disregards settled rules of statutory construction and flies in the face of decisions by the Court of Appeals and the Supreme Court holding that games of skill are legal under § 12-21-2710.

SLED's other arguments for reversal are equally without merit. Accordingly, this Court should affirm.

ARGUMENT

I. SLED's Argument Based on the Title of Act 125 Is Unpreserved and Meritless

SLED argues at length that in enacting Act 125, the General Assembly intended "to specifically put an end to cash payouts on gaming devices" like Dragon's Ascent, regardless of whether skill or chance predominates in the outcome.[8] (SLED Br. at 7.) In making this argument, SLED relies not on the ***text*** of § 12-21-2710, but on the ***title*** of Act 125—the act that amended the statute. This argument fails, however. First, it is not properly before the Court because it was raised by SLED for the first time on reconsideration. Second, SLED's reliance on the legislative title contravenes established rules of statutory construction and decisions of the Court of Appeals and the Supreme Court.

A. This Argument Is Not Properly Before the Court

"The purpose of [a motion under] Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (internal quotation marks omitted). A Rule 59(e) motion "allow[s] a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004). However, a Rule 59(e) motion is not an

[8] SLED does not dispute that Dragon's Ascent is a game of skill, as found by the magistrate court and by the circuit court.

opportunity for the losing party to raise ***new*** arguments in hopes of getting a better result. "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prod. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009); *see Com. Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) ("[I]t appears the first time Commercial Credit made this argument was in its Rule 59(e) motion for reconsideration. Accordingly, this issue is not properly preserved for our review.").

SLED's argument based on the title of Act 125 was asserted for the first time in its motion to alter or amend. Accordingly, it is not properly before the Court and should not be considered.

B. The Argument is Meritless

Apart from being procedurally improper, SLED's argument based on the title of Act 125 is wholly without merit. First, SLED's argument is contrary to established rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *see Kirakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Moreover, it is a well-established rule that the ***primary*** source of legislative intent is the statutory text. As our Supreme Court has explained, "[T]his Court will look ***first*** to the language of the statute to discern legislative intent, because ***the language itself is the best guide to legislative intent***." *Whitner v. State*, 328 S.C. 1, 9, 492 S.E.2d 777, 781 (1997) (emphasis added); *see also, e.g.*, *Connelly v. Main St. Am. Grp.*, 439 S.C. 81, 89, 886 S.E.2d 196, 200 (2023) ("[T]he language used in the statute is generally considered to be the best evidence of the legislature's intent."); *State v. Scott*, 351 S.C.

584, 588, 571 S.E.2d 700, 702 (2002) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." (internal quotation marks omitted)).

Contrary to SLED's argument, the title of a statute is not a primary source of legislative intent, but only a secondary one. "[T]he title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt." *Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993). Under no circumstance can the title of a statute be used to limit or contradict the legislative intent as expressed in the statutory text. "Although the title and headings are part of the statute, they may not be construed to limit the plain meaning of the text … ***they cannot undo or limit what the text makes plain***." *Id.* (emphasis added).

Here, SLED would have this Court disregard the text of § 12-21-2710, and even the statutory title ("Types of machines and devices prohibited by law; penalties"), and instead glean legislative intent from the title of Act 125, the bill used to amend § 12-21-2710. Plucking a single phrase out of the 975-word title of Act 125 ("all of the above enacted for the purpose of prohibiting cash payouts for credits earned on video game machines on or after July 1, 2000"), SLED contends that the General Assembly's purpose in Act 125 was to prohibit *all* cash payouts, regardless of whether a game is one of skill or chance. However, SLED fails to identify any ambiguity in § 12-21-2710 that justifies looking to the title of Act 125, rather than the statutory text, to discern the legislative purpose. *See Whitner*, 328 S.C. at 9, 492 S.E.2d at 781 (holding that the

statutory language is the best guide to legislative intent).

SLED's argument also cannot be squared with post-amendment decisions of the Court of Appeals and the Supreme Court holding that a machine's legality under § 12-21-2710 turns on whether the game is one of skill or chance, not on whether there is a cash payout. *See Ward v. West Oil Co.*, 387 S.C. 268, 278, 692 S.E.2d 516, 521-22 (2010) (holding that "pull-tab" games violate S.C. Code Ann. § 12-21-2710 because they "created an element of chance"); *Allendale Cty. Sheriff's Office v. Two Chess Challenge II*, 361 S.C. 581, 583, 606 S.E.2d 471, 472 (2004) (recognizing that "games of skill … are lawful to possess"); *Sun Light Prepaid Phonecard Co. v. State*, 360 S.C. 49, 54, 600 S.E.2d 61, 64 (2004) (holding that phone card dispensers violated § 12-21-2710 because they "present[ed] the element of chance"); *S.C. Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 658, 790 S.E.2d 792, 802 (Ct. App. 2016) (holding that machines violated § 12-21-2710 because they "contained games of chance"); *S.C. Law Enf't Div. v. 1-Speedmaster S/N 00218*, 397 S.C. 94, 99-100, 723 S.E.2d 809, 812 (Ct. App. 2011) (holding that games of chance are illegal under § 12-21-2710, but games of skill are legal).[9]

For more than 20 years, our Supreme Court and Court of Appeals have interpreted and applied § 12-21-2710 as creating a dividing line between ***illegal*** games

[9] SLED's argument that the General Assembly intended to prohibit any machine that provides a cash payout is inconsistent with its position in *Speedmaster* and other cases that legality under § 12-21-2710 turns on whether a game is one of skill or chance under the "dominant factor" test. *See, e.g.*, Final Brief of Appellant S.C. Law Enf't Div., *S.C. Law Enf't Div. v. 1-Speedmaster S/N 00218* (filed May 20, 2009 (arguing that "[t]he proper test to use in determining whether a game is a game of skill or chance is the dominant factor test" and contending that the Speedmaster game was illegal because the outcome was not within the player's control).

of chance and ***legal*** games of skill. Indeed, SLED itself has maintained, time and time again, that whether a machine is illegal under § 12-21-2710 depends upon whether it involves a game of skill, not whether it involves a "payout." In order to accept SLED's argument based on the title of Act 125, this Court would have to hold that all of the decisions relying on skill vs. chance to determine legality under § 12-21-2710 were wrongly decided.

II. *Chimento* Did Not Change the Meaning of "Gambling" in South Carolina

SLED next contends that the Supreme Court's decision in *Chimento*, *supra*, established a ***universally*** applicable "statutory meaning of the word gambling ***in South Carolina***" and that the decision in *Chimento* was ***not*** limited to the context of § 16-19-40. (SLED Br. at 12 (internal quotation marks omitted; emphasis in original)).) To the contrary, the majority in *Chimento* repeatedly made clear that its holding is limited to criminal convictions under S.C. Code Ann. § 16-19-40. *See Chimento*, 401 S.C. at 531, 737 S.E.2d at 836 ("The circuit court … [held] that 'gaming' ***as used in § 16-19-40*** applies only to betting on games of chance[.]" (emphasis added)); *id.* at 532, 737 S.E.2d at 837 (describing issue as "whether … betting on a card game … is unlawful gaming" and citing, *inter alia*, § 16-19-40); *id.* ("Under the plain language ***of § 16–19–40***, gambling on a game of skill is a violation if that gambling is being done in a prohibited location." (emphasis added)); *id.* ("A violation ***of the gaming prohibition of § 16–19–40*** does not depend on whether the particular game involves more skill than chance." (emphasis added)); *id.* at 533, 737 S.E.2d at 837 ("[T]here is precedent that indicates ***§ 16–19–40 is***

concerned with wagering regardless of the skill involved in the game wagered upon." (emphasis added)); *id.* ("We hold that one 'games' ***within the meaning of § 16-19-40*** when money is wagered on Texas Hold'em, even though it is a game in which skill predominates." (emphasis added)).

Moreover, SLED completely ignores that the Attorney General,[10] as well as courts at every level of South Carolina's court system,[11] have ***all*** applied ***the dominant factor test*** to determine the legality of a video game, even ***after*** *Chimento* was decided in 2012. Simply put, *Chimento* has ***never*** been cited for the proposition that ***all*** video games that involve consideration and a potential prize or reward are illegal, even if the outcome is determined by 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.[12] Notably, one of these cases involved

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[10] *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").

[11] *See* **Administrative Law Court**: *S.C. Dep't of Revenue v. Chestnut*, 2021 WL 4822858, at *6 (S.C. Admin. Law Ct. Oct. 8, 2021) (stating that "games of chance [are] prohibited by [S.C. Code Ann.] § 12-21-2710"); **Court of Common Pleas**: *Smith*, 2013 WL 8477943, at *2 ("[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance[.]" (internal quotation marks omitted)); **Court of Appeals**: *Meenaxi*, 417 S.C. at 658, 790 S.E.2d at 802 ("[T]he Department showed the Products Direct and Gift Surplus machines contained games of chance in violation of section 12–21–2710[.]"); **Supreme Court**: *Richland Cty. Sheriff's Dep't v. Awde*, No. 2014-MO-024, 2014 WL 3016205, at *1 (S.C. July 2, 2014) (affirming magistrate court's finding "that two 'Chess Challenge II' devices before it were games of skill").

[12] **Supreme Court:** *S.C. Human 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)

a determination of whether a video machine was legal under § 12-21-2710, which the circuit court decided under ***the dominant factor test*** and ***did not*** hold that the machine was illegal under *Chimento* simply because it involved payment of consideration. *See Smith v. S.C. Law Enf't Div.*, 2013 WL 8477943, at *2-3 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013) (finding game illegal under § 12-21-2710 as a device "pertaining to games of chance").

That *Chimento's* holding is limited to § 16-19-40— and specifically does not apply to § 12-21-2710—becomes clearer upon review of the concurrence written by Chief Justice Toal and the dissent written by Justice Hearn, joined by Justice Kittredge. In her concurrence, Chief Justice Toal criticized § 16-19-40 as "hopelessly outdated, as it applies to *any* gaming activity (including *all* card games) played in a residential house whether wagering occurs or not." *Id.* at 538, 737 S.E.2d at 840 (Toal, C.J., concurring) (emphasis in original).

Chief Justice Toal also "agree[d] wholeheartedly" with the dissent's conclusion that § 16-19-40 is unconstitutionally void for vagueness because it delegates too much discretion to law enforcement to decide whether the statute has been violated. *Id.* at 536, 737 S.E.2d at 839 (Toal, C.J., concurring); *see* 547-552, 737 S.E.2d at 845-847 (Hearn, J., dissenting). She wrote, however, that she joined the majority because "we cannot sever

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(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*, 2013 WL 8477943, at *11 (citing vagueness). **Administrative Law Courts:** *Hyndman v. Charleston Cty. Assessor*, 2013 WL 1786476, at *3 (S.C. Admin. Law Ct. Apr. 18, 2013) (as-applied challenge).

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) (second emphasis added).

In her dissent, Justice Hearn explained why Chief Justice Toal's concern was misplaced:

> I cannot comprehend [Chief Justice Toal's] concern that if any part of the statute is held unconstitutional, a parade of horribles will ensue, including the resurrection of video poker. 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) (emphasis added). Notably, the majority opinion did not challenge Justice Hearn on this point. Indeed, § 12-21-2710 is never even cited in the majority opinion.

That *Chimento* does not impact the application of § 12-21-2710 is confirmed by *Richland County Sheriff's Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam), decided by the same five justices who decided *Chimento* only two years earlier. 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.[13] 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 indicates that the "wagering" test used in *Chimento* does ***not*** apply to the analysis of whether a game is legal under § 12-21-2710.

SLED also incorrectly contends that in *Speedmaster*, decided while *Chimento* was pending before the Supreme Court, the Court of Appeals "acknowledged the existence of the *Chimento* case and the possibility that the Supreme Court may clarify South Carolina law on 'games of skill.'" (SLED Br. at 14.) In *Speedmaster*, the Court of Appeals merely speculated that in deciding *Chimento*, the Supreme Court might decide whether the dominant factor test (advocated by SLED) or the "pure chance" doctrine would apply to the determination of whether a machine involved a legal game of skill or a prohibited game of chance. *See Speedmaster*, 397 S.C. at 98 & n.1, 723 S.E.2d at 811 & n.1. The Court of Appeals never suggested that the decision in *Chimento* might fundamentally alter the law in South Carolina by adopting a novel "wagering" test that would replace the skill vs. chance test.

III. The Circuit Court's Order Is Not Contrary to the Machine-by-Machine Analysis Required Under *Two Chess Challenge*

In *Two Chess Challenge*, 361 S.C. at 583, 606 S.E.2d at 472, our Supreme Court held that the machine-by-machine forfeiture process under S.C. Code Ann. § 12-21-2712 did

[13] The briefs and other case materials are available through C-Track Public Access link on the main page of the website for the South Carolina Judicial Branch, https://www.sccourts.org/.

not permit a magistrate court to rule on "the legality of the two machines before the court and all those machines operating in an identical manner." *Id.* at 586-87, 606 S.E.2d at 474 (internal quotation marks & alterations omitted). SLED contends that "[t]he circuit court's broad finding that 'Dragon's Ascent is a game predominantly based on skill' is clearly intended to improperly adjudicate future Dragon's Ascent devices, including ones that were not capable of being lawfully ruled upon in this action," in violation of *Two Chess Challenge*. (SLED Br. at 17.)

SLED's argument should be recognized for what it is: an exercise in semantics that makes no difference to the outcome of this appeal. There has never been any dispute that the only machine at issue is the Dragon's Ascent machine seized from LG's By The Creek in Hanahan, South Carolina on November 19, 2021. Unlike the magistrate court in *Two Chess Challenge*, which attempted to rule on the legality of the machines before it as well as "all those machines operating in an identical manner," there is no language in the circuit court's Order stating or even suggesting that the court was ruling on any machine other than the specific one before it. Even if such language appeared in the circuit court's Order (it does not), it would not undermine the validity of the circuit court's conclusion that the Dragon's Ascent machine at issue here is a legal game of skill. *See id.* at 588, 606 S.E.2d at 475 (affirming the magistrate court's order as to the legality of the two seized machines and vacating only the portion of the magistrate court's order regarding machines that had not been seized).

IV. There Is No "Gambling Capability" Test Under S.C. Code Ann. § 12-21-2710

In its circuit court appellate brief, SLED made the spurious argument that all video games are "contraband *per se*," relying on cases that stand for the unremarkable—and wholly irrelevant—propositions that if seized items are contraband *per se*, it is illegal to possess them, *see State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 189, 525 S.E.2d 872, 879 (2000), and that there is no right to a jury at the post-seizure hearing, *see Mims Amusement Co. v. S.C. Law Enf't Div.*, 366 S.C. 141, 154, 621 S.E.2d 344, 351 (2005). In its motion to alter or amend, SLED cited these same cases in an attempt to support its argument about a "gambling capability analysis" that is supposedly "required by South Carolina law." (R. 117-118 (Mot. to Alter or Amend at 8-9).)

This argument, like SLED's argument based on the title of Act 125, *supra*, is not properly before this Court because it was raised ***for the first time*** on SLED's motion for reconsideration. Additionally, it is obviously meritless. Neither of the cases cited by SLED, nor any other South Carolina statute or case law, requires a "gambling capability analysis," and SLED makes no attempt to explain what such an analysis might entail. Rather, SLED simply quotes some of the hearing testimony of SLED Special Agent Ryan Wood, including his statement that "I could put in whatever amount of money I want to put in and I have the chance to win more money than that. That's gambling to me." (SLED Br. at 20 (quoting Hr'g Tr. 121).) While that may be the opinion of Agent Wood and SLED, it is not the law of South Carolina. Moreover, Agent Wood was ***not*** qualified nor recognized as an expert on ***any*** issue, much less the legal question of what

constitutes "gambling" under South Carolina law. *Accord Commonwealth v. Club Caravan, Inc.*, 571 N.E.2d 405, 406 (Mass Ct. App. 1991) ("The State trooper's statement that the machines employed 'absolutely no skill' was properly disregarded as an expert opinion in discord with the subsidiary facts on which it was based.").

V. The Circuit Court's Order Does Not Make Any Part of § 12-21-2710 Redundant or Superfluous

Next, SLED contends that "[t]he language of [§ 12-21-2710] evidences a clear Legislative policy decision to separately prohibit devices that are 'used for gambling' and devices 'pertaining to games of chance.'" (SLED Br. at 22 (quoting § 12-21-2710).) According to SLED, the circuit court "improperly joined these two provisions finding that the determination of whether skill or chance predominates is the end of the inquiry into the legality of an alleged gambling device in South Carolina." (SLED Br. at 22.)

As an initial matter, SLED fails to identify what part of the circuit court's analysis is at issue. This, by itself, is sufficient reason to reject this argument. Additionally, SLED's argument is contrary to South Carolina law. In *Speedmaster*, the Court of Appeals squarely held that if skill predominates over chance, no further inquiry is necessary to determine the legality of the machine. *See Speedmaster*, 397 S.C. at 100, 723 S.E.2d at 812. In that case, SLED argued (directly contrary to the position it takes in this case) that "the magistrate [court] erred in finding [that § 12-21-2710] contained a requirement that a machine must be used for gambling to be illegal." *Id.* at 99, 723 S.E.2d at 811-12. Relying on the Supreme Court's decision in *Ward*, the Court of Appeals stated, "SLED is correct that section 12-21-2710 does not specifically require that an

illegal gaming device be used for gambling." *Id.* at 99-100, 723 S.E.2d at 812 (citing *Ward*, 387 S.C. at 278, 692 S.E.2d at 522, for the proposition that "[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of *chance*, no matter how small the intrinsic value" (emphasis in original; internal quotation marks omitted)). Rather, the Court of Appeals made clear, "the term gambling" as used in § 12-21-2710 "***necessarily encompasses the element of chance***." *Id.* (emphasis added). Consequently, if a game is not a game of chance, the machine or device containing it ***by definition*** is not "used for gambling." *Id.*

VI. This Court Should Reject SLED's Attempt to Rewrite the Magistrate Court's Opinion

In its Order, the circuit court addressed the absurdity of the magistrate court's adoption of a "wagering test" based on *Chimento*, explaining:

> [T]he 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.

(R. 29 (Cir. Ct. Order at 14).)

Attempting to recast history, SLED misrepresents the order issued by the magistrate court by contending that it "did not hold, find, or even suggest that the payment of an entry fee to compete in spelling bees, professional golf tournaments, NASCAR races, fishing tournaments, and country club memberships was illegal in South Carolina." (SLED Br. at 24.) To the contrary, the magistrate court held, found, and wrote exactly that:

> The credible evidence before the Court supports the conclusion that money or something of value is wagered on the outcome of each Dragon's Ascent "play" and players do so with the expectation of a larger reward upon further play. In using the *Chimento* Court's reasoning, this Court finds that although Dragon's Ascent is a game in which skill predominates, a person "gambles" when money is wagered in so playing. ***To hold otherwise would effectively legalize wagering and payouts for all games of skill, including golf, basketball, and the like.***

(R. 14 (Mag. Ct. Order at 12) (emphasis added).) SLED attempts to reinterpret the magistrate court's holding, claiming that what the magistrate court ***really*** meant was that "'wagering' on a device or the outcome of a contest—*i.e.*, the act of paying more to increase the size of the available prize[—is] illegal gambling." (SLED Br. at 24.)

There are two problems with SLED's attempt to rewrite the magistrate court's opinion. First, the text of the magistrate court's order is clear and speaks for itself. The magistrate court's analysis is plainly addressed toward ***payment*** and ***payout***—not, as SLED would have it, ***increased payment*** and ***increased payout***. SLED cannot salvage the

magistrate court's analysis by rewriting it to say something it did not.

Second, SLED's attempt to rewrite the magistrate court's order contradicts SLED's own position in this case. The central claim SLED advances in this appeal is that "wagering" encompasses ***any*** cash payout, not merely an ***increased*** cash payout in exchange for an increased payment by the player. (*See, e.g.*, SLED Br. at 6 (the effect of Act 125 "was to specifically **prohibit** cash payouts" (emphasis in original); *id.* ("the circuit court's decision to allow cash payouts … may well usher in a new era of gambling on gaming devices in South Carolina");[14] *id.* at 8 ("[I]t is without question that the Legislature amended § 12-21-2710 in 1999 for the express purpose of prohibiting cash payouts."); *id.* at 9 ("the circuit court interpreted the statute enacted 'for the purpose of prohibiting cash payouts for credits earned on video game machines…' to allow cash payouts for credits earned on a video game machine."); *id.* at 11 (legislative intent was "to prohibit cash payouts—even on games of skill").)

SLED's position is that even if Dragon's Ascent is a game of skill, it is prohibited by § 12-21-2710 because a player can receive a cash payout for skillful play. The magistrate court correctly recognized the logical consequence of SLED's position that *Chimento* established a universal prohibition on cash payouts, namely, that if *Chimento* applies outside its specific context of S.C. Code Ann. § 16-19-40, it necessarily applies to

[14] This rather hyperbolic statement ignores that since the adoption of Act 125 in 1999, cash payouts on games of skill have been legal in South Carolina. It is undisputed that Dragon's Ascent is a game of skill, and there is nothing whatsoever in the circuit court's opinion that would open the door to cash payouts for the play of games of chance.

any cash payout for ***any*** game of skill, just as the magistrate court held.

CONCLUSION

SLED's position in this appeal, if accepted by this Court, would fundamentally rewrite long-standing South Carolina law by eliminating any notion of chance as a required element of illegal gambling. SLED's recently adopted view that it should be illegal to win a prize for prevailing in a game of skill (as opposed to chance) is not the law in South Carolina. Accordingly, this Court should affirm.

Signature on following page

Respectfully submitted,

s/ William W. Wilkins

William W. Wilkins, SC Bar No. 6112
Kirsten E. Small, SC Bar No. 75681
MAYNARD NEXSEN, PC
104 S. Main Street, Suite 900
Greenville, SC 29601
Telephone: 864.370.2211
Facsimile: 864.282.1177
BWilkins@maynardnexsen.com
KSmall@maynardnexsen.com

-and-

Christopher J. Murphy, SC Bar No. 8903
Murphy Law Firm, LLC
136 West Richardson Ave.
Summerville, SC 29483
Telephone: 843.832.1120
Facsimile: 843.832.5969
chris@murphylawfirmllc.com

-and-

Peter M. McCoy, Jr., SC Bar No. 73866
McCoy Law Group, LLC
15 Prioleau Street
Charleston, SC 29401
Telephone: 843.459.8835
Facsimile: 843.459.8834
peter@mccoylawgrp.com

Attorneys for Respondents

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

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1 Dragon's Ascent Video Gaming Machine; SC Games of Skill, Inc., ...Respondents,

v.

South Carolina Law Enforcement Division, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the foregoing Final Brief of Respondents complies with Rule 211(b), SCACR.

December 4, 2023

s/*Kirsten E. Small*

Kirsten E. Small, SC Bar No. 75681
Maynard Nexsen, PC
104 S. Main Street, 9th Floor
Greenville, SC 29601
(864) 370-2211
KSmall@maynardnexsen.com

Attorney for Respondents