

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

APR 30 2010

The Honorable R. Markley Dennis, Jr., Circuit Court Judge SUPREME COURT

C A No 2009-CP-10-001551

Robert L. Chimento, Scott Richards, Michael Williamson,
Jeremy Brestel, and John T. Willis

Respondents,

v

Town of Mount Pleasant

Appellant

FINAL REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Despite Respondents' efforts to obscure, this case is straightforward and simple. The fundamental issue in this case is not, as Respondents would portray to this Court, the right of citizens to be free to play cards with friends in the privacy of their own homes. Instead, the issue here is whether S.C. Code Ann. Section 16-19-40 permits a residence to be transformed into a casino-like facility, where the public, or a large part thereof, is invited via the Internet, to play "Texas Hold'em" poker for money. And, as the Record demonstrates, large numbers came on a regular basis. As the Pennsylvania Court noted in *Commonwealth v. Hubbard*, 69 Pa. D&C2d 571, 574, 1974 WL 15856 (1974), "[i]t is obvious from the testimony that this is not a situation where a few of the boys [or girls] drop in for a Friday night social game of poker." Rather than the "friendly poker game" with a few friends, this is a situation where, as the investigating officer described it, there were so many people attending these games, held twice a week, that the CVS parking lot had to be employed to accommodate the overflow. *Record* at 77. Section 16-19-40 plainly forbids games with cards or dice for money played in a "house used as a place of gaming." The State submits that if § 16-19-40 is to have any meaning at all, its enforcement here was warranted. Thus, the Circuit Court should be reversed.

Respondents' attempts to avoid S.C. Code Ann. Section 16-19-40 are misplaced. Despite their numerous efforts to distract the Court's attention by impugning the State,¹ Respondents' argument that playing "Texas Hold'em" poker for money is not "gaming" under § 16-19-40, because it is predominantly a game of skill, not chance, completely misses

¹ We will address Respondents' multiple inaccuracies below. See n. 5, *infra*.

the mark. The statute plainly forbids the playing of “any game with cards or dice” in the places enumerated in § 16-19-40. It does not make exception for “games of skill” as Respondents would hope. The words in the statute could not have been clearer.

Erroneous also is Respondents’ contention that § 16-19-40 applies to “residential outbuildings, *but not the residence itself*.” Such an argument misses the point that the express language contained in the statute makes a “house used as a place of gaming” one of the prohibited places within the law’s reach. See, *Respondents’ Brief* at 17 (emphasis in original). Contrary to Respondents’ arguments otherwise, the house in question was made accessible to the public through an Internet web site, moreover, this was a “house used as a place of gaming,” regardless of whether Nathan Stallings made any profit or not. At the very least, he was compensated for food and drinks. Indeed, when asked on cross-examination whether “anyone could come over,” Stallings answered “Sure.” Record at 177. Many did. As the Georgia Supreme Court has stated, a “gaming house or gaming place” is simply a “place at which persons gather for the purpose of hazarding or betting money.” *Gullat v State*, 150 S.E. 825, 827 (Ga. 1929).

Respondents’ argument that § 16-19-40 is unconstitutionally vague, and should, therefore, be construed to apply only to games of chance, ignores the fact that this Court has consistently construed the statute otherwise during its more than 200 years on the books. Games of cards, such as poker, played for money, have always been “gaming,” consistent with the literal language of § 16-19-40(a) “any game with cards or dice.” The fact that the statute is old or contains words written in the language of the 19th century does not render it unconstitutionally vague. For all these reasons, Respondents’ convictions should be upheld.

Since § 16-19-40's enactment in 1802 and its amendment in 1816, the playing of "any game with cards or dice" for money has been prohibited, if done at any of those places banned in the statute, including a "house used as a place of gaming." Respondents freely acknowledge "Texas Hold'em" poker is played with cards and that they were playing for money at the time of their arrest. *Respondents Brief* at 3, 11. Such constitutes "gaming" or a "game" under § 16-19-40 as a matter of law. This is so certainly if the term "gaming" is construed in its popular sense, to include betting on any game, whether skill or chance. Such was also the contemporaneous understanding of "gaming" when § 16-19-40 was enacted. See *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993) ["gaming" under the Statute of Anne included betting losses over a certain amount on all games, including all card games]. And, it is the way this Court has construed the statute, beginning in the early days of its existence.

But even assuming *arguendo*, that "gaming" includes only games of chance, as Respondents contend, there is a wealth of authority, discussed below, demonstrating that all card games are, *as a matter of law*, games of chance, because the luck of the draw determines the outcome, no matter how skilled the player may be. Recognizing this fundamental truth, the framers of § 16-19-40 specified that "any game with cards or dice" is prohibited when played in the prohibited location, such as here, in a "house used as a place of gaming."

Moreover, Respondents' arguments that § 16-19-40 applies to residential outbuildings, but not to residences, is, frankly, both illogical and inconsistent with the legislative purpose to combat "the pernicious practice of gaming." As the municipal court correctly determined, and as the Record amply demonstrates, the "house" in question was

“used as a place of gaming” The was hardly a game of poker with a few friends, or a gathering of a few citizens in their friend’s home for a card game as Respondents attempt to portray Moreover, as we discussed in our principal Brief, see *Appellant s Brief* at 19-24, the early decisions rendered by this Court found the statute applicable to a “dwelling” house which was being used as a gaming house See, *State v Brice*, 4 S C L (2 Brevard) 66 (1806) Indeed, in *State v Faulkener*, 13 S C L (2 McCord) 438 (1823), this Court noted that § 16-19-40 had been amended in 1816 because of the “mischief that the penalty might be eluded and the object of the Legislature entirely defeated by going into an outhouse (outbuilding), whether attached to the principal house or elsewhere” (emphasis added) The *Faulkener* Court’s choice of words hardly supports Respondents’ argument that § 16-19-40 applies only to outbuildings, but not the residence Such a reading defies common sense, especially given that the *Faulkener* Court construed the “outhouse” provision as all encompassing in order to avoid the statute’s circumvention It is difficult to imagine how the statute could be more “eluded” than by Respondents’ construction If § 16-19-40 is applicable only to a residence’s outbuildings – but not the residence itself – gambling would run amok simply by resorting to the residence as a “safe haven” for gaming

Likewise, Respondents’ argument that portions of § 16-19-40 are void-for-vagueness and overbroad are equally without merit Because Respondents deem § 16-19-40 constitutionally defective, they argue that construction of the statute must be narrowed to define “gaming” as limited to games of chance, hoping that the Court will deem “Texas Hold’em” as predominantly a game of skill

Such an approach is, we believe, futile, and we strongly disagree with this non-sequitur argument. Neither the Act, nor particularly the phrase “house used as a place of gaming” is void-for-vagueness. Nor does it punish innocent conduct. In *State v Torres*, 831 S.W.2d 903 (Ark. 1992), the Arkansas Supreme Court addressed a similar question. The statute at issue, like § 16-19-40 also a 19th century enactment, forbade the keeping of a “gaming house” or place of gambling. Similarly, “gaming” was not defined in that statute. The defendant attacked the statute as void-for-vagueness, but the Arkansas Supreme Court rejected the argument, noting that previous judicial decisions had construed the term. Quoting one of those decisions, *Portis v State*, 27 Ark. 360 (1872), *Torres* concluded that gaming constituted

“the risking of money, between two or more persons on a contest or chance of any kind where one must be *loser* and the other *gainer*. Some games depend altogether on skill, others upon chance, and others are a mixed nature. Billiards are an example of the first, lotteries of the second and backgammon of the last.” This definition, previously set forth by the court, which comports with the common understanding of the term “gambling” prevents the statutes in question from being void-for-vagueness.

27 Ark. at 362 (emphasis in *Torres*). Giving the statute its popular meaning, *Torres* found no void-for-vagueness problem.

Likewise, the South Carolina cases construing § 16-19-40 have sufficiently defined “gaming” under the statute so that there is no constitutional vagueness issue present here. Moreover, these decisions have not, by any means, limited the statute’s reference to “gaming” to games of chance. *State v Scarlet Red*, 41 S.C.L. (7 Rich.) 8 (1853) provides a good example. In that case, the defendant, as his defense, argued that, as a juggler, he possessed greater skill in the shell game at issue than those who played against him, in

essence arguing that § 16-19-40 only applied to games of chance. This Court noted that the object of § 16-19-40 was to “check, by severe penalties, the practice of gaming, which in the language of the preamble, tends to vice, misery and crime.” Accordingly, the Court, recognizing the statute’s broad purpose, rejected defendant’s argument that § 16-19-40 was limited to games of chance only. This Court concluded

[n]or can the defendant evade the law under the pretence that he was a juggler and that the alleged game was an exhibition of his dexterity, *because he kept a bank and a wager depended upon his success or failure*

If the prohibited games be confined to those alone in which the stake is won or lost by chance, the result would follow, that the gambler who relied on the practiced legerdemain of a juggler, whilst he professed that he depended on fortune, will escape punishment by playing freely

(emphasis added) Thus, the *Scarlet Red* Court emphasized that “the words used [in § 16-19-40] are sufficiently explicit” and that “gaming” is not “confined” to games of chance “alone.” “Gaming” as used here simply means any wager dependent upon the player’s success or failure in playing the game, – whether the game is one of chance or skill is thus not controlling. As in *Torres*, “gaming” is construed in its common and ordinary sense to include betting on contests of skill. Accordingly, § 16-19-40, enforced by this Court for more than two hundred years, is not constitutionally defective.²

² The issue of overbreadth is fully addressed in our earlier Brief. *See, Appellant’s Brief* at 36-37.

ARGUMENT

I

Public Policy Underlying § 16-19-40

This Court has repeatedly emphasized that “[t]he primary rule of statutory construction is to ascertain and give effect to the intent of the legislature” *Mikell v County of Charleston*, 386 S C 153, 687 S E 2d 326, 330 (2009). The determination of legislative intent is a matter of law. *Id.* Words used in a statute should ordinarily be given their common and ordinary meaning rather than any “technical, legal meaning.” Thus, words should ordinarily be construed in their “popular sense.” *Johnson v Collins Entertainment Co Inc*, 333 S C 96, 508 S E 2d 575 (1998).

Moreover, a statute should be construed as a whole and in such a way that no word, clause, sentence, provision or part is rendered surplusage or superfluous. *In re Decker*, 322 S C 215, 219, 471 S E 2d 462, 463 (1995). And, courts will reject a statutory interpretation which would tend to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. *Unisun Ins Co v Schmidt*, 339 S C 362, 368, 529 S E 2d 280, 283 (2000). A contemporaneous construction will prevail over the more technical import of the words used. *Weeks v Ruff*, 164 S C 398, 162 S E 450, 452 (1932), quoting *Rogers v Goodwin*, 2 Mass 475 (1807).

The policy underlying the enactment and later amendment of § 16-19-40 is fully set forth in *State v Faulkener supra*. *Faulkener* noted that “[t]he object of the act is expressed in the title, ‘– the more effectually to prevent the pernicious practice of gaming.’” According to the Court, gaming “is often attended with quarrels and controversies, the

impoverishment of many people, [and] corruption of the morals and manners of youth ”
Thus, “by looking at the evil here complained of, and the remedy intended , we should
be lead to the true construction of this act ” *Id*

Faulkener noted that the anti-gaming law which ultimately became § 16-19-40 was
enacted in 1802 and “was the first act creating this offence ” Further,

[t]he title and preamble of that act are in substance, and nearly in words, the
same as that of 1816 The enacting clause makes it penal in any person to
“play at any tavern, inn, store for the retailing of spirituous liquors, or in any
other public house, or in any street, highway, or in any open wood, race field,
or open place at any game or games, etc In this clause – houses of particular
description are enumerated, which necessarily excludes all others from the
operation of the act The mischief therefore complained of as arising under
the act was that the penalty might be eluded, and the object of the Legislature
entirely defeated by going into an outhouse [outbuilding], whether attached
to the principal house or elsewhere To remedy that evil, the act of 1816,
after repeating that part of the former Act, superadds the following words –
“any house used as a place of gaming, or in any barn, kitchen, stable or other
out-house

Clearly, this Court in *Faulkener* emphasized that even though the statute is penal in nature,
it must be deemed comprehensive, and thus broadly construed so as not to be avoided or, in
the words of the Court, “eluded ”

II

A Private Residence May Constitute A “House Used as a Place of Gaming”

Pursuant to Section 16-19-40

Faulkener thus makes it clear that § 16-19-40 may apply to residences or dwelling
houses if the house is “used as a place of gaming ” Contrary to Respondents’ argument that
the statute applies only to outbuildings of a dwelling, but not the dwelling itself, this Court
deemed residences not to be excluded from § 16-19-40's reach If the Act would be “eluded”

– as *Faulkener* says it would be – by gaming in the outbuildings, then, most certainly, if § 16-19-40 were inapplicable to the “principal or mansion house,” even if it had been transformed into a “house used as a place of gaming,” the purpose of the Act would be turned on its head and virtually eviscerated. *Faulkener*’s recognition that § 16-19-40 applies to the “mansion house” is entirely consistent with cases decided in other jurisdictions which conclude that a residence may be transformed into a “gaming house” or “house of gaming” or a “public place” for purposes of the applicable gambling statute. See, *Appellant’s Brief* at 21-24.³

Also, contrary to Respondents’ view, see *Respondent’s Brief* at 17, *State v. Brice supra* holds that a dwelling may constitute one of the places where gaming may not occur

³ See, 38 Am Jur *Gambling*, § 136 [“one who knowingly permits property or premises under his control to be used as a place to bet and wager to gamble with cards or dice may be convicted (for operating a gaming house) even though the premises so employed constitute his private residence ”], *State v. Black*, 94 N C 809, 1886 WL 987 (1886) [dwelling house may be turned “into a gaming house by allowing persons to resort thither from time to time for gaming purposes ”], *Simons v. State*, 56 Tex Crim 339, 120 S W 208, 210 (1909) [allowing the playing of poker for money in a residence on several occasions constituted the keeping of a gaming house], *Nickols v. State*, 111 Ala 58, 20 So 564 (1896) [private residence may, depending on the facts, become a ‘public place’ for gaming], *Thrasher v. State*, 168 Ala 130, 53 So 256 (1910) [room of a dwelling may, depending on the facts, constitute a “public place” used for gaming] See also, 6A McQuillin *Mun Corp*, § 24 138 [“A common gaming house may consist of a single room rented in a house of many rooms, and it need not necessarily be open to the whole public in common ”]

Respondents argue that Appellant’s reference in its earlier *Brief* to the fact that Nathan Stallings pled guilty to the operation of a gaming house is irrelevant. *Respondents’ Brief* at 11, n 10. We strongly disagree. If Stallings pled guilty to this crime, regardless of the motive for doing so, it is an admission by the occupier of the residence that the dwelling had become a gaming house. That admission is highly relevant to and indeed telling in support of the application of § 16-19-40 to these Respondents with respect to whether or not the residence in question had become a “house used as a place of gaming.” Certainly, Stallings admitted that he was operating a house of gaming. This fact was noted in the Order of the Municipal Court who obviously found that the residence had become a “house used as a place of gaming.” *Record* at 19-20.

pursuant to § 16-19-40 The indictment charged Brice with permitting and encouraging in his dwelling house certain persons to play at cards, dice etc This Court sustained the charge Even though *Brice* was indeed decided prior to the statute's amendment in 1816, adding the words "house used as a place of gaming," *Faulkener* notes that the words "other public house" were present when *Brice* was decided Clearly, the *Brice* Court determined that gaming in the "dwelling house" violated the statute Thus, it is fair to assume that *Brice* – like the Alabama Court in *Thrasher* and *Nickols supra* – found the residence in question had been transformed into a "public place" or a "public house " Regardless, however, *Brice* clearly held that a dwelling was one of the locations where gaming was prohibited in certain circumstances Those circumstances, – where the "house" is a "public house" or is "used as a place of gaming" – are applicable here

Likewise, *State v Yoe*, 76 S C 46, 56 S E 542 (1907) also involved a residence used as a gaming house In *Yoe*, the syllabus accompanying the reported case, states that the defendant "did unlawfully keep and maintain a home used for purposes of gaming " The Court concluded that the indictment charged a valid offense under § 16-19-40 *See also, City Council of Greenville v Kemmis*, 58 S C 427, 36 S E 727 (1900) [private hotel room served as a "place of gaming with cards for money or other stake" under Greenville municipal ordinance], *State v O Neal*, 210 S C 305, 42 S E 2d 523, 527 (1947) [it "is the general rule that where the proprietor of a place not kept for the purpose of gaming, allows gaming to be carried on, in which he participates, or from which in some way receives benefit he may be convicted as the keeper of a gaming place "]

III

“Texas Hold’em” Poker Constitutes “Gaming” Pursuant to Section 16-19-40 As

A Matter of Law

When applying the well recognized rules of statutory construction, referenced above, as well as the public policy underlying § 16-19-40's passage, it is difficult to escape the conclusion that the Legislature, in enacting the statute, did not intend to limit “gaming” only to games of chance, as Respondents argue. Instead, the General Assembly, consistent with its broad purpose, sought to punish the wagering upon *any game*, whether a contest or chance which occurs in a residence which has been transformed into a “house used as a place of gaming.”

We note that nothing contained in § 16-19-40 itself indicates or suggests that “gaming” under the statute is limited only to games of chance. Indeed, § 16-19-40 makes only a few games inapplicable, these are primarily games of skill, such as billiards or chess – typically played in the home at that time. However, even the playing of these few games of skill is not protected when betting or wagering upon them is involved. The exclusion of these few specific games of skill from the statute’s reach – and then, only where no betting on those games is involved – *strongly indicates that all other games of skill are prohibited particularly where betting accompanies the playing of such games.* See, *Riverwoods LLC v County of Charleston*, 349 S C 378, 384, 563 S E 2d 651, 655 (2002) [“The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all things not specifically excluded”]

Such a reading is consistent with the popular or ordinary meaning of the term

“gaming ” The leading dictionary definition of “gaming” or “gambling” is simply “[t]o bet on an uncertain outcome, as of a contest ” *American Heritage College Dictionary* (3d ed) Moreover, the Arkansas Supreme Court stated the following in *Mace v State*, 58 Ark 79, 22 S W 1108, 1108-9 (1893)

[w]e deem it unnecessary to enumerate the reasons for the enactment of the various statutes upon the offense of gaming, and think we may safely say, as did the leading commentator upon the English law, that the legislature has been careful to prevent the destructive vice, and that our laws against gaming are not deficient In the case of *Tatman v Strader*, 23 Ill 439, under a statute which prohibits betting on games, the court says The word “game” in our language has a very broad and comprehensive signification That illustrations innumerable might be given to show that the ordinary and popular understanding of the word “gaming” includes feats of physical power and skill, as a game of quoits, ball, etc In the case of *State v Miller*, 53 Iowa 154, 4 N W Rep 900, under a statute which prohibits the playing of any game for any other money or other property of any value, the court holds that billiards is a game within the inhibition In the case of *People v Weithoff*, 51 Mich 203, 16 N W Rep 442, it was held that the betting on a game of baseball was prohibited under a statute prohibiting the betting upon any game of skill or chance The court said (Cooley, J) that baseball was a game in the strict sense

Similarly, in *Adams v Antonio*, 88 S W 2d 503, 505 (Tex 1935), the Texas Court of Appeals stated

[1]n passing on the question here involved, we have not found it necessary to determine whether the game played on the machines here under consideration is one of skill or one of chance for the reason that the statute makes no such distinction, but applies alike to all such tables exhibited for the purpose of gaming, regardless of the character of the game played thereon

Other decisions elsewhere are in accord *Callison v State*, 172 S W 2d 772 (Tex 1942)

[“Our code does not define game or gaming, nor does the statute make any distinction between games of chance and games of skill Texas courts have made no such distinction ”]

McBride v State, 39 Fla 442, 22 So 711, 713 (1897) [the “wagering, betting or laying of

money or other thing of value upon the transpiring of any event whatsoever, whether it be upon the result of a game chance, or upon a contest of skill, strength, speed or endurance, whereby one party gains and the other loses something for nothing, whether the parties betting be the actors in the event upon which the wager is laid or not, is gaming or gambling within the meaning of these acts ”], *State v Lawrence*, 9 Okla Crim 16, 130 P 508 (1913) (“Gaming has always been an offense at common law A wager laid upon the result of any contest of chance, skill, or strength between men or beasts or men and beasts constitutes gaming ”], *Commonwealth v Gourdier*, 14 Gray 390, 80 Mass 390 (1860) [“To play at any game of chance or skill on the issue of which money or property having any value depends is illegal gaming ”], *In re Opinion of the Justices*, 73 N H 625, 63 A 505, 507 (1906) [“Game is defined in the Century Dictionary as ‘a contest for success or superiority in a trial of chance, skill or endurance ’”]

It thus defies imagination that the framers of § 16-19-40, who sought to cast the broadest possible net in the prohibition of the “pernicious practice of gaming, would have intended to limit such “gaming” to games of chance only This Court’s decisions are faithful to that legislative intent, applying the broad, popular meaning to the word “gaming” to include all games, not just those which are predominantly chance-based

For example, in *State v Laney*, 38 S C L (4 Rich) 193 (1850), the Court addressed the question of the sufficiency of an indictment for “gaming” with a slave This Court held that the word “game” is construed in its broadest sense, and thus the type of game involved is irrelevant The Court explained that

[t]he indictment is framed by the words of the statute, and that according to

the general rule, would be sufficient. But the reply to this is, that game means sport or amusement – and taking the whole clause, it is manifest the Legislature meant by the word game some unlawful game, and this ought to be set out, that the Court may know whether the game is prohibited by law. Assuming by the word ‘game,’ the Legislature meant playing at some unlawful or prohibited game, it is immaterial what the game was. It would be equally within the prohibition whether played with cards or dice, or at any gaming table, such as are described in the Act of 1816, or by whatever name it may be called. According to the principles above stated, the kind or name of the game is no part of the offence. [t]here are some American cases very much, if not exactly, like the one under consideration. *The State vs Dole* (3 Blackf 294,) was an indictment against a grocer for suffering gaming in his shop. The indictment was quashed on the Circuit, because it did not set out the particular game played. But in the Supreme Court it was held to be sufficient, because all games were unlawful in *such* places. *The State vs Bougher* (3 Blackf 307,) was an indictment for gaming at a tavern. The words of the Indiana statute are, “Any person who shall play at any game,” &c. The indictment charged the offence in the words of the statute, without stating what game was played. It was held sufficient, because the words were general, and included all games.

Moreover, as we have already discussed, *Scarlet Red, supra* rejects the argument that “the prohibited games [of § 16-19-40] be confined to those alone in which the stake is won or lost by chance.” Instead, this Court made clear that the test was whether “a wager depended on [the] success or failure” of a contest or event.

Further, in *Atchison v Gee*, 15 S C L (4 McCord) 211 (1827) the Court considered the question of “gaming” in the context of the statute of 9 Anne c 14, which had been made of force by the reception statute of 1712. The issue in *Atchison* was whether a bet on a horse race (a game of skill)⁴ in excess of the minimum amount designated by the Statute of Anne (L 10) was “other gaming.” While horse racing was not explicitly mentioned in the statute

⁴ See, e.g. *Rohan v Detroit Racing Assn*, 314 Mich 326, 22 N W 2d 433, 440 (1946) [“Horse racing, like foot racing, boat racing, football and baseball, is a game of skill and judgment and not a game of chance.”]

(as it was wagering on card games), nevertheless, the bet constituted “gaming” under the statute. Clearly, bets upon games of skill have constituted gaming in South Carolina since 1712. *See also, Colley v Berry*, 1 Bail 593, 1830 WL 1283 (1830) [reaffirming *Atchison v Gee supra*, contract to wager \$200 on a horse race is void], *Berkebile v Outen supra* [“gaming” under the Statute of Anne includes legal, as well as illegal games.]

In short, this is not a situation where the three elements of gambling or a lottery – prize, chance, consideration – must be involved, as Respondents argue.⁵ *See Johnson v Collins Entertainment Co Inc supra, Darlington Theatres Inc v Coker*, 190 S C 282, 2 S E 2d 782 (1939). Here, we are confronted with a longstanding anti-gaming statute, one

⁵ In addition, Respondents’ efforts throughout their *Brief* to impugn the State are disappointing. For example, Respondents characterize as a “gross misstatement” of Stallings’ testimony that there was more than \$200 on the table at one time. *Respondents Brief* at 3, n. 4. Yet, Respondents inaccurately reference testimony to which Appellant was not referring when it made that statement. The actual testimony to which we were referring is located on p. 100 of the Transcript, not on p. 98, as Respondents contend. *Record* at 164. There, Stallings answered “yes” to the simple question of whether there was ever more than \$200 on the table. He then explained how he arrived at that figure. *Id.*

Moreover, Respondents repeatedly criticize as “inflammatory” the State’s repeated references to the residence being a “casino like facility.” *Respondents Brief* at 5. However, the simple dictionary definition of a “casino” is a public room or building for gambling and other entertainment. *See, American Heritage College Dictionary* (3d ed.). Thus, to use the phrase “casino like facility” is hardly “inflammatory.” This Court is not a jury. And, use of the dictionary definition of a “casino” is apt here, based upon the Record, and the conclusion of the Municipal Court that the residence served as a “house used as a place of gaming.”

Finally, the Respondents’ contention that “[i]n its Statement of Facts, the State repeatedly ignores the factual findings of the Municipal Court and mischaracterizes evidence at trial,” *Respondents Brief* at 3, is also entirely misplaced. SCACR Rule 208(b)(1)(D) provides that “a party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party’s contentions.” Appellant’s treatment of the Statement of Facts was a fair summary of the testimony before the Municipal Court and completely within the above-referenced Rule.

with clear legislative intent as well as with decisions of this Court construing the word “gaming” according to its popular meaning, rather than in a technical legal sense, where the three elements of gambling are involved. That popular meaning should be applied here as well.

Finally, a more recent case, *State v O’Neal supra*, is particularly instructive. In *O’Neal*, the defendants were convicted of keeping and maintaining a gaming house. The State contended that a portion of the Five O’Clock Club had been transformed into a gaming house in violation of what is now § 16-19-40. There, a small poker game, in which the stakes were increased from twenty-five cents to a dollar was being held in a room in the Five O’Clock Club. In each game, a certain percentage of the amount stated was deducted for the “house.” This Court affirmed the conviction, citing the general rule that where the proprietor of a place not kept for the purpose of gaming allows the game to be carried on and in some way receives a benefit, he may “be convicted as the keeper of a gaming place.” 42 S E 2d at 527.

O’Neal is significant for two reasons: first in a factual scenario, not unlike here (except that the establishment was not a residence), a “gaming place” was found by this Court. Indeed, the number of participants in *O’Neal* was smaller than in this case, and the stakes were similar. Moreover, the *O’Neal* Court deemed the playing of poker as “gaming” under the statute. The Court did not find it necessary to engage in any analysis as to whether poker is a game of chance or skill. The playing of poker for money was deemed “gaming” *per se*. Thus, based upon the holding in *O’Neal*, it is difficult to escape the conclusion that the residence in question here, where poker was being played by a larger number of

participants than even in *O Neal*, was a “place” of gaming for purposes of § 16-19-40. Further, the playing of poker for money is “gaming” *pers se*, thus, any further analysis of skill versus chance is unnecessary.

However, even assuming *arguendo* that the Court determines that “gaming,” for purposes of § 16-19-40, is limited to games of chance only, still, *all card games*, including “Texas Hold’em” poker, are, as a matter of law, games of chance. In *Annotation*, “Games of Chance or Skill,” 135 A L R 104 (1941), it is written that “games of cards are games of chance even though the element of skill is more or less involved, since the element of chance predominates.” Moreover, in *State v Taylor*, 111 N C 680, 16 S E 168 (1892), the North Carolina Supreme Court found as follows:

It is a matter of universal knowledge that no game played with ordinary playing cards is unattended with risk, whatever may be the skill, experience, or intelligence of the gamblers engaging in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed, or the effect of a given play or mode of playing, there must be unavoidable uncertainty as to the results.

And, in *In re Advisory Opinion to Governor*, 856 A 2d 320, 329 (R I 2004), the Supreme Court of Rhode Island stated that “games that depend on an unpredictable and uncontrollable variable, such as the case in games involving cards and dice, are as a matter of law, games of chance.” See also, *Joker Club LLC v Hardin*, 183 NC App 92, 643 S E 2d 626, 630 (2007) [poker is “subject to defeat at the turn of the card.”]

Thus, even though both the municipal court and the circuit court agreed that “Texas Hold’em” poker is, based upon the facts, a game predominantly of skill, and this Court may not reopen that question, see *Allendale Co Sheriff s Office v Two Chess Challenge II*, 361

S C 581, 606 S E 2d 471 (2004), such a conclusion is not relevant here. The State certainly did not “waive” (as Respondents’ contend) any argument that as a matter of law, “any game of cards or dice” played for money in a “house used as a place of gaming” violates § 16-19-40. This is a question of law, not one of fact surrounding the particular card game. Based upon the foregoing authorities, we believe that any game played with cards or dice, including “Texas Hold’em” is, as a matter of law a game of chance. See, *Johnson v Collins Entertainment Co Inc*, 333 S C, *supra* at 119, 508 S E 2d, *supra* at 586 (Burnett, J, dissenting) [“Since the player cannot improve the likelihood he will obtain a certain card, I conclude chance dominates over skill in the operation of the Type III video game machines”]. For that reason, the Legislature made “any game with cards or dice” illegal at the places prohibited in § 16-19-40.

IV

Section 16-19-40 Is Neither Void-For-Vagueness, Nor Is It Overbroad

In *Rose v Locke*, 423 U S 48, 50 (1975), the United States Supreme Court articulated the following test with respect to void-for-vagueness under the Due Process Clause

[1] It is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual “criminally responsible for conduct which he could not reasonably understand to be proscribed.” *United States v Harriss*, 347 U S 612, 617, 74 S Ct 808, 812, 98 L Ed 989 (1954), see *Wainwright v Stone*, 414 U S 21, 22, 94 S Ct 190, 38 L Ed 2d 179 (1973). But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for “(i)n most English words and phrases there lurk uncertainties.” *Robinson v United States*, 324 U S 282, 286, 65 S Ct 666, 668, 89 L Ed 944 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid. All the Due Process

Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden

Based upon this standard, the Court in *Rose* found that the phrase “crimes against nature” is “no more vague than many other terms used to describe criminal offenses at common law and now codified in state and federal penal codes ” Moreover, added the Court,

[t]he phrase [“crimes against nature”] has been used among English-speaking people for many centuries, see 4 W Blackstone, *Commentaries* 216, and a substantial number of jurisdictions in this country continue to utilize it Anyone who cared to do so could certainly determine what particular acts have been considered crimes against nature, and there can be no contention were ones never before considered as such

Id

Here, Respondents focus much of their attention regarding their void-for-vagueness claim upon Officer Hembree’s uncertainty in answering their questions on cross-examination about § 16-19-40 They also center upon the colloquy between Mr Grossman (the prosecutor) and the Circuit Court See, *Respondents Brief* at 38-40 Even if Officer Hembree was uncertain regarding the finer points of § 16-19-40's reach, such is by no means dispositive here As the United States Supreme Court emphasized in *Rose*, a statute may well create confusion, absent resort to legal dictionaries or judicial decisions or even the full text of the statute itself Yet, the Due Process Clause is still not violated Consulting the text of § 16-19-40 or a dictionary or this Court’s decisions concerning “gaming,” such as *Scarlet Red*, would easily clarify any question about what constitutes “gaming” for purposes of § 16-19-40

Moreover, *Torres* applies these constitutional principles in the specific context of a statute prohibiting “gaming” In *Torres*, the Arkansas Supreme Court noted that

“ whenever the definition of general words in a criminal statute, passed pursuant to police power, may be adequately determined through reference to judicial decisions construing the statute, it is not void-for-vagueness ” 831 S W 2d *supra* at 905 As stated, the common and ordinary definition of “gaming,” as articulated in the decisions of this Court as well as other jurisdictions readily defeats any argument of void-for-vagueness in § 16-19-40 In addition to *Scarlet Red, Faulkener, Laney, Yoe, Kemmis* and *Brice*, as well as the statute itself, *State v Robinson*, 40 S C 553, 18 S E 891 (1894), expressly states that “[t]he acts of our general assembly do certainly denounce betting on the throwing of dice as an offense ” In *Robinson* no mention of chance is referenced because § 16-19-40 denounces “any game with cards or dice” as “gaming” under the statute According, contrary to Respondents’ arguments, § 16-19-40 is not void-for-vagueness

In summary, despite Respondents’ efforts at misdirection, this is a simple case Respondents were playing cards, “Texas Hold’em” poker, for money, in what had become a “house used as a place of gaming ” As the Record demonstrates, and the Municipal Court determined, the residence had been transformed into a gaming house Players learned of the poker games, which were held on a regular basis, over the Internet Numerous players attended and participated in these games If this scenario does not violate § 16-19-40, few would

CONCLUSION

The decision of the Circuit Court should be reversed and the convictions reinstated

Respectfully submitted,

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April 30, 2010

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable R Markley Dennis, Jr , Circuit Court Judge

C A No 2009-CP-10-001551

Robert L Chimento, Scott Richards, Michael Williamson,
Jeremy Brestel, and John T Willis

Respondents,

v

Town of Mount Pleasant

Appellant

Certificate of Counsel

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR

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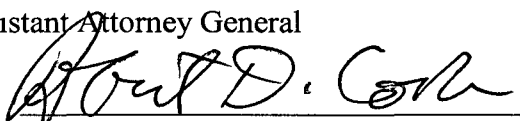
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