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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Trial Court Case No. 2022-CP-23-04923  
Appellate Case No. 2023-001265

The State,

Respondent,

v.

Michael Carl Zieminski,

Appellant.

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RECORD ON APPEAL

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS  
Civil Action No. 2022-CP-23-04923

The State, )  
 )  
Respondent, )

v. )

Michael Carl Zieminski, )  
 )  
Appellant. )  
\_\_\_\_\_ )

**ORDER AFFIRMING MAGISTRATE COURT  
JUDGMENT AND APPELLANTS' CONVICTIONS**

Appellant Michael Carl Zieminski has appealed his convictions in Magistrate Court for three counts of cruelty to animals in violation of Section 4-19 of the Greenville County Code of Ordinances. For the reasons provided below, this Court affirms the Magistrate Court's judgment and the Appellant's convictions.

**PROCEDURAL AND FACTUAL BACKGROUND**

On September 1, 2022, a unanimous jury convicted the Appellant of three counts of cruelty to animals in violation of Greenville County Ordinance Section 4-19. The Appellant filed a Notice of Appeal, claiming that his convictions should be overturned because (a) the County ordinance is invalid; (b) the Magistrate Court abused its discretion by admitting certain picture evidence and testimony concerning the dogs that were the subject of his charges and the conditions of his home where he kept the dogs; (c) the Magistrate Court abused its discretion by not requiring the County to present expert veterinarian testimony; and (d) the Magistrate Court abused its discretion by not declaring a mistrial when a dog walked into the courtroom during the trial.

After receiving the Notice of Appeal, the Magistrate Court filed a return pursuant to S.C. Code Ann. § 18-7-60. The Magistrate Return included, among other things, a statement from the Magistrate Judge and the evidence entered by the parties at trial.

The parties filed appellate briefs and presented oral arguments to this Court on June 28, 2023.

**FINDINGS AND ANALYSIS**

1. Failure to Preserve Challenge to the Validity of the Ordinance for Appellate Review.

Because the Appellant failed to preserve the issue of the County Ordinance’s validity for appellate review, this Court must decline to consider the issue. When acting in an appellate capacity, a South Carolina court must refrain from considering issues that were not raised to and ruled upon by the court below:

[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.

*Elam v. SCDOT*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). The requirement to preserve issues for appellate review applies equally to criminal cases appealed from a state magistrate court. *See, e.g., State v. Taylor*, 411 S.C. 294, 299, 768 S.E.2d 71, 74 (Ct. App. 2014) (“In criminal appeals from magistrate ... court, the circuit court does not conduct a de novo review, *but instead reviews for preserved error raised to it by appropriate exception.*”) (emphasis added). To preserve an issue, the Appellant

must both raise the issue to the lower court and obtain a ruling. *E.g., Smith v. NCCI, Inc.*, 369 S.C. 236, 247–48, 631 S.E.2d 268, 274 (Ct. App. 2006) (“When a trial court does not explicitly rule on an argument raised, and the appellant makes no Rule 59(e), SCRCP, motion to obtain a ruling, the appellate court may not address the issue.”).

The Appellant contends that this Court should reverse his convictions because the County Ordinance is unconstitutional and, thus, invalid. Specifically, the Appellant contends that (a) the County lacked the authority to enact its animal cruelty ordinance; (b) state law preempted the ordinance; and (c) the ordinance is impermissibly vague. However, the Record on Appeal in this matter is devoid of any evidence that the Appellant raised these issues to the magistrate court or obtained a ruling. To the contrary, the Magistrate Return, filed in compliance with S.C. Code Ann. § 18-7-60, expressly states, “The defendant did not raise the constitutional questions at the time of trial [that] he seeks to use to reverse this case.” *Magistrate Return*. Because the Appellant has failed to establish that he preserved these issues for appellate review, the Court cannot consider them and, therefore, affirms the Appellant’s convictions and the Magistrate Court’s judgment.

As a separate and additional ground for affirming, the Court finds that the Appellant’s failure to provide the South Carolina Attorney General with notice of the challenge to the ordinance’s validity in compliance with the South Carolina Rules of Civil Procedure is fatal to his appeal.

2. Magistrate Court did not abuse its discretion in admitting challenged evidence, declining to order a mistrial because of a dog's presence in the courtroom, or concluding that expert veterinarian testimony was not necessary for the County to meet its burden of proof.

A trial judge has "considerable latitude in ruling on the admissibility of evidence," and an appellate court will not disturb the ruling absent an abuse of discretion. *See State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). The Appellant contends that the Magistrate Court erred when it allowed the County to introduce a picture of one of Appellant's dogs depicting an obvious medical issue and testimony that the Appellant's house was condemned because their probative value was substantially outweighed by the potential they posed of having a prejudicial impact. This Court finds nothing in the record that indicates the Magistrate Court abused its discretion in allowing this evidence.

This Court also finds no abuse of discretion in the Magistrate Court's allowing an animal control officer to testify about the severity of the conditions to which the animals were subjected without the assistance of expert veterinarian testimony. The Appellant's arguments concerning the lack of expert testimony go to the weight of that evidence.

Finally, there is no evidence that the Appellant requested a mistrial when the dog entered the courtroom, and this Court finds no abuse of discretion by the Magistrate Court by not declaring a mistrial *sua sponte*.

#### CONCLUSION

Based on the appellate record, which this Court finds to be adequate, the Magistrate Court's judgment and the Appellants' convictions are affirmed.



Greenville Common Pleas

**Case Caption:** Michael Carl Zieminski VS South Carolina State Of  
**Case Number:** 2022CP2304923  
**Type:** Order/Other

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )  
The State of South Carolina, )  
Respondent, )  
v. )  
Michael Carter Zieminski, )  
Appellant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

Civil Action No. 2022-CP-23-04923

**ORDER**

This matter came before the court on appellant Michael Carter Zieminski's motion to reconsider a July 20<sup>th</sup>, 2023 order denying appellants magistrate appeal. After further review and deliberation, appellants motion for reconsideration is denied without the need of a formal hearing and no formal order is requested.

IT IS ORDERED this \_\_\_\_\_ day of July, 2023.

\_\_\_\_\_  
The Honorable R. Lawton McIntosh  
Tenth Judicial Circuit



Greenville Common Pleas

**Case Caption:** Michael Carl Zieminski VS South Carolina State Of  
**Case Number:** 2022CP2304923  
**Type:** Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	APPELLANT'S BRIEF ON APPEAL
The State,	)	
	)	Summary Court Case Nos. 2309636
Respondent,	)	2309637
	)	2309638
Michael Carl Zieminski,	)	
	)	
Appellant.	)	Circuit Court Case No. 2022CP2304923

Appellant respectfully submits his brief on appeal of his three sentences from the Summary Court on September 1, 2022, and complains, as follows:

I.

On September 1, 2022, the Appellant, Michael Zieminski (Michael) was convicted of three violations of a local ordinance regarding animals in Greenville County. He timely filed a Notice of Appeal, paid the required fee and made all proper service of any required notifications. To date the Summary Court Judge (hereafter Magistrate) has not filed a Record on Appeal as is required by Rule 18 of the Magistrate Court Rules. Without the record of the trial, it is impossible for the Defendant to make a meaningful and fair Appeal. Accordingly, the Due Process jurisprudence and fundamental fairness corpus of law require that the convictions should be dismissed.

II.

On or about the 25<sup>th</sup> day of February, Appellant was arrested at his home for an unrelated matter and taken into custody by Greenville County Sheriff deputies. They discovered three dogs and three cats in the home and had dispatch contact Greenville County Animal Control. The animal control officers found the three dogs, but not the three cats. Later, when Michael went to retrieve his dogs, he was served with three court summons charging him with cruelty to animals

in violation of a County Ordinance. During the trial no expert witnesses testified and a dog was allowed to enter the courtroom and visit each juror. After a jury trial in the Greenville County Summary Court, Michael was convicted on all three charges and sentenced alternatively to fines or consecutive terms of imprisonment.

### III.

The case should have been dismissed because the Greenville County Ordinance, specifically § 4-19, violates the South Carolina Constitution by, *inter alia*, making it illegal to keep animals in an unsanitary residence, contravenes South Carolina statutory law, specifically South Carolina Code of Laws § 47-1-40 (A). Appellant should prevail on his appeal because the county ordinance that he was found guilty of violating is unconstitutional under Article VIII, section 14 of the Constitution of The State of South Carolina.

Section 14 provides, in pertinent part: "In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: ... (5) criminal laws and the penalties and sanctions for the transgression thereof." S.C. Const., art. VIII, § 14.

We have observed that this subsection of the Constitution requires "statewide uniformity" regarding the criminal law of this State, and therefore, "local governments may not **criminalize** conduct that is legal under a statewide criminal law." *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272, 274 (1996) (emphasis added); accord *Connor v. Town of Hilton Head Island*, 314 S.C. 251, 442 S.E.2d 608 (1994) (where the Court held that a municipality cannot criminalize nude dancing when State law does not). *Foothills Brewing v. City of Greenville*, 660 S.E.2d 264, 377 S.C. 355 (S.C. 2008).

South Carolina Code of Laws Section 47-1-40 (A) reads: "A person who knowingly or intentionally overloads, overdrives, overworks, or ill-treats an animal, deprives an animal of necessary sustenance or shelter, inflicts unnecessary pain or suffering upon an animal, or by omission or commission knowingly or intentionally causes these acts to be done, is guilty of a misdemeanor and, upon conviction, must be punished by imprisonment not exceeding ninety days or by a

fine of not less than one hundred dollars nor more than one thousand dollars, or both, for a first offense; or by imprisonment not exceeding two years or by a fine not exceeding two thousand dollars, or both, for a second or subsequent offense.”

On the other hand, part of the Greenville County ordinance at issue reads:

**§ 4-19 CRUELTY TO ANIMALS.**

(a) Any person who abuses an animal, aids another person in abusing an animal, or causes or permits an animal to abuse another animal, by acting or failing to act, shall be in violation of this section. Cruelty to an animal includes, but is not limited to, the following:

(4) Failing to provide adequate shelter, sustenance, space, exercise, bedding, and **sanitary conditions** for the animal (emphasis added);

First, the County ordinance requires sanitary conditions, while the State law does not. In the case at bar, the Defendant’s violation was solely based on the assertion that sanitary conditions had not been provided.

As we held in *Foothills Brewing*, Article VIII, § 14, of our State Constitution<sup>1</sup> requires uniformity regarding the criminal law of this State and local governments may not criminalize conduct that is legal under a statewide criminal law. See also *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996).<sup>2</sup> Here, the State has not preempted the regulation of indoor smoking; a local government may therefore criminalize indoor smoking, but only to the extent consistent with State law. See *City of North Charleston v. Harper*, 306 S.C. 153, 410 S.E.2d 569 (1991) (local governments may not enact ordinances that impose greater or lesser penalties than those established by state law). Town’s ordinance is invalid in that it imposes a criminal penalty for smoking in places where smoking is not illegal under State law. *Beachfront Enter. v. Sullivan’s Island*, 666 S.E.2d 912, 379 S.C. 602 (2008).

Basically, a county can not make illegal that which is legal under State law. *Connor v. Hilton Head Island*, *Supra*.<sup>1</sup>

<sup>1</sup> Connor’s holding is supported by the comments of the drafters of the proposed section, which was added as part of major revisions made to the state constitution in the early 1970s. A special committee was created, headed by John C. West (the “West Committee”), to recommend these revisions. Regarding proposed Article VIII, Section 14 (which was adopted by the legislature verbatim), the West Committee commented, “There are certain fundamentals related to freedom which should be treated only by the State and should not be left to local variation or abuse.” Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, at 91 (1969). One of the Committee’s major concerns regarding this constitutional provision was the “local government’s making an act a

Second, the County omits the requirement found in the State statute that the acts made unlawful be “knowingly or intentionally” committed. Thus, the County has created a strict liability criminal law, but our State’s animal cruelty law requires criminal intent. Thus, the County is violating the Constitution by making more actions or omissions illegal than does the State’s Code.

This conflict in State and County laws sets up a scenario where, for example, a woman is trailering her horse from an adjoining county to Greenville County across Greenville County to another county. As she drives something happens to the trailer to create a harmful condition in the trailer that could be considered animal cruelty under the Greenville County code section. Maybe a hole is made that allows exhaust to flood the trailer or the rear door becomes unlatched and is open. The driver/owner is not aware of this change in the condition of the trailer.

As this woman drives across Pickens County, for example, she is not committing a crime because she is not knowingly harming the horse. However, when she crosses into Greenville County she is committing a crime. Such an unreasonable disparity in laws from county to county is fundamentally unfair and contrary to the Constitution of the State and the U.S.

This Honorable Court should grant Michael’s appeal because the County ordinance is unconstitutional.

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crime that was not a crime under state law.” 2 James L. Underwood, *The Constitution of South Carolina* 133, 134 (1989). Finally, our language regarding Article VIII, Section 14 in other cases shows that we have consistently interpreted that section broader than only prohibiting local governments from adopting ordinances that conflict with state general law. See *Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996) (Davis Adv.Sh. No. 1 at 11, 14) (Construing Article VIII, Section 14(4) as effectively withdrawing the subject “from the field of local concern”); *Robinson v. Richland County Council*, 293 S.C. 27, 30, 358 S.E.2d 392, 395 (1987) (stating Article VIII, Section 14 “precludes the legislature from delegating to counties the responsibility for enacting legislation relating to the subject encompassed by that section”).

*Diamonds v. Greenville County*, 325 S.C. 154, 161, 480 S.E.2d 718, 721 (1997)

## IV.

The case should have been dismissed because the Greenville County Ordinance, specifically § 4-19, violates the South Carolina Constitution in that it is preempted by the State law because there are extensive statutes in the State Code that cover all generally known forms of animal cruelty that occur in the State. There are no forms of animal cruelty that are uniquely common in one county. *Palmetto Princess v. Edisto Beach*, 631 S.E.2d 68 (Supreme Court, 2006).

## V.

The case should also have been dismissed because the Greenville County Ordinance, specifically § 4-19, violates the South Carolina Constitution and the United States Constitution under the void for vagueness doctrine. The county ordinance essentially makes it illegal to have garbage or bad smells in one's house if there are also animals in the house. At what point the items or fumes could be adversely affecting the pets is unspecified. The County code lacks any standards that would allow for an objective determination of whether a specific set of conditions found in a residence violate the ordinance. Specifically, the County ordinance is also unconstitutional because it does not provide any objective standards for what is considered illegal unsanitary conditions. It does supply the following definition:

*Insanitary condition.* Animal living space, including shelter and exercise area, contaminated by health hazards, irritants, items or conditions that endanger or pose a risk to an animal's health, including but not limited to:

- (a) Excessive animal waste;
- (b) Garbage, trash or effluent;
- (c) Standing water or mud;
- (d) Rancid/contaminated food or water;
- (e) Fumes, foul or noxious odor, air, hazardous chemicals or poisons;
- (f) Decaying material;
- (g) Uncontrolled parasite or rodent infestation; and

(h) Areas that contain nails, screws, broken glass, broken boards, pits, poisons, sharp implements or other items that could cause injury, illness or death to an animal.

How is one to know how much of the conditions in the subparagraphs, (a) through (h) are too much? Under subparagraph (e) how is an average person going to know what odors are harmless and which ones are not. In this case there was much testimony about how bad the air smelled in Mr. Zieminski's house, but no objective measurement or quantification was offered at all. The claim that the air smelled too bad was not supported by any objective evidence and no expert witness testimony. Just listing aromatic conditions with vague, subjective adjectives gives people insufficient guidance. Even "air" is listed in (e) as a dangerous condition in an animal's quarters. Further, how much animal waste is excessive? Where do you draw the line?

Without any objective standards, residents of Greenville County are not sufficiently warned that certain actions are illegal. Additionally, everyone involved in this case and other cases, especially the jurors, are given no guidance on determining what conditions qualify as animal cruelty. If jurors are left to their so called common sense, well my experience has been that dogs are attracted to smells that many people consider "bad."

The ordinance does specify that the conditions must endanger or pose a risk to an animal's health in order to meet the definitions of unsanitary, how does a layman know how much of any of these specific items is too much? Many causes of disease are invisible to the unaided eye. What role does exposure time and levels play? Is air contaminated with the COVID-19 virus covered by the mention of "fumes" in subsection (e)? At a minimum, expert testimony is required to guide the jurors. In fact, in this case no expert evidence was presented that supported the government's claim that paper and smells could harm dogs.

In the case at bar, there was lay testimony that there was too much paper and debris on the floor in the house. No attempt was made to scientifically determine if the trash threatened the health of the dogs. The animal control officer simply testified that there was a lot of trash and animal feces on the floors. Lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony involves "a process of reasoning which can be mastered only by specialists in the field." *State v. Brown*, 836 S.W.2d 530, 549 (1992). The animal control officer had no specialized training or education that would qualify him as an expert in animal health or medicine. See Fed.R.Evid. 701 advisory committee note; see also *United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997) (officers could not testify in detail as lay witnesses that defendant's actions were consistent with those of an experienced drug trafficker); *Ragland v. State*, 385 Md. 706, 870 A.2d 609 (2005) (officer could not testify as lay witness as to whether phone calls from service stations and cash sorted into different pockets related to drug transaction because such opinion testimony required specialized knowledge or experience). *People v. Veren*, 140 P.3d 131, 137 (Colo. App. 2006). Likewise, in the case at bar the officer simply testified that there was a lot of mess on the floors.

Jurors are essentially being left, unguided, to decide if bad housekeeping rises to the level of animal cruelty. Obviously, everyone has their own standards for housekeeping and those standards are based on how they personally want to live. The average juror has no idea what level of trash on the floor of a house is cruel to a dog. It would have been relatively easy for the investigator to have taken representative sample of the contents of the house and have them tested for pathogens and, if any, the quantity present. Instead, the jurors were left to subjectively speculate on whether there were pathogens present and to a degree that should be considered cruel. Dogs and cats are known to investigate garbage containers and cause the contents to spill

out into a house. In this case, there were no specifications of how the trash got on the floor of the house, how long it had been present and how it was cruel or harmful to the dogs.

These concerns about identifying what level of messy housekeeping amounted to cruelty to animals obviously underpinned the South Carolina Legislature's decision to not include insanitary conditions as a type of proscribed animal cruelty in its legislation.

#### VI.

Michael's conviction should be overturned because the State failed to introduce any testimony or other evidence from a veterinary expert. The State offered photographic evidence and the testimony of an animal control officer and a building codes inspector. Neither state witnesses have any medical training or veterinary medicine training. Thus, the State simply invited the jurors to act as their own veterinary experts. The ordinance that Michael was charged with violating requires that the conditions claimed by the State to be unsanitary must "endanger or pose a risk to an animal's health" in order to be illegal. Yet no evidence was presented that could properly allow the fact-finder to make that determination, thus, casting the jurors' boat onto an ocean of conjecture and surmise.

#### VII.

The State should not have been allowed to introduce testimony that the house in question had been condemned. Condemnation is a procedure related to human safety, not animal safety. Its prejudice outweighed its probative value. Likewise, the government's introduction of shocking photos of a medical condition of one dog characterized by an open wound that was neither caused by the owner, Michael, nor connected to the condition of the premises was highly prejudicial.

The Court further erred when it allowed a dog to enter the Courtroom and visit each juror, thus, creating a prejudicial environment for an animal cruelty case. While the judge could not have known that a dog used by the County Animal Control officers in public appearances at schools was going to walk in the open rear doorway of the courtroom, he could have prevented it from walking into the jury box and spending time with each juror. That such factors affect jurors can not be doubted and can be further explored by a reading of a 2013 article: *The Juror as Audience: The Impact of Non-Verbal Communication at Trial*, from *Oregon State Bar Litigation Journal*, published by Janet Lee Hoffman and Andrew Weiner, Fall 2013. For another good law review article on some aspects of this subject, do non-evidentiary factors affect jurors and their verdicts see, Levenson, Laurie L., "Courtroom Demeanor: The Theater of the Courtroom" (2008). *Minnesota Law Review*. 582. <https://scholarship.law.umn.edu/mlr/582> .

In conclusion, the Appellant did not receive a fair trial because he was charged and convicted of an unconstitutional County ordinance in a courtroom that was unconstitutionally prejudicial to the accused. Further, improper evidence was used in his prosecution that inflamed the jurors by making it appear that the Appellant caused his dog to suffer from an open wound that was, in fact, not related to the messy condition of his house. Further, the jury was forced to speculate on how much uncleanliness was too much. The Appellant was also denied a fair appeal because the Magistrate did not timely file a record.

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 Attorney for Appellant

June 7, 2023  
 Travelers Rest, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	APPELLANT'S AMENDED BRIEF ON APPEAL
The State,	)	
	)	Summary Court Case Nos. 2309636
Respondent,	)	2309637
	)	2309638
Michael Carl Zieminski,	)	
	)	
Appellant.	)	Circuit Court Case No. 2022CP2304923

Appellant respectfully submits this amended brief on appeal of his three sentences from the Summary Court on September 1, 2022, and complains, as follows:

I.

On September 1, 2022, the Appellant, Michael Zieminski (Michael) was convicted by a jury of three violations of a Greenville County ordinance regarding treatment of animals. He timely and duly filed a Notice of Appeal. The Summary Court Judge (hereafter Magistrate) did not file a Return until 9 months after the trial on June 8, 2023, after Defendant filed his first Brief on Appeal. This required document was not filed within the 30 day deadline set forth in the South Carolina Code of Laws:

SECTION 18-7-60. Return; when and how made.

The court below shall thereupon, after ten days and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings and judgment and file it in the appellate court.

The Return is skeletal at best. It recounts no testimony, nor much of the proceedings. A Record on Appeal is also required by Rule 18 of the Magistrate Court Rules. It reads, in part:

(b) Within thirty (30) days of the date of filing of the notice of appeal with the Circuit Court, the magistrate shall file the return to the notice of appeal with the Clerk of the Circuit Court for the

county wherein the judgment was rendered, together with the record, a statement of all proceedings in the case, and, if necessary, the testimony taken at trial. Upon motion for good cause shown, the Circuit Court may allow a definite extension of time in which to file the return.

Appellant is not aware of any Circuit Court action granting the Magistrate an extension to file the Return, a statement of all proceedings in the case, or testimony in accordance with the Rule.

Although the extremely sparse Return includes a claim by its author that Michael did not raise the Constitutional issues that are raised in his appeal (which Defense Counsel contends is inaccurate) doing so would not have put this appellate court in any better position to review this case because the lower court basically supplied no Record. The Magistrate's staff informed me several months ago that the recording of the trial failed and thus is not available to enlighten anyone on the exact words spoken. (See Exhibit 1.) Even if Defense Counsel had made the exact same arguments, word for word, during the trial that he is making in this brief, they would not have appeared in this Return or Record. "The law does not require a party to perform a useless act. *United States v. Conti*, 64 F.Supp. 187 (D.Mass.1946), *aff'd*, 158 F.2d 581 (1st Cir.1946); *DeFee v. Kaley*, 119 Ga.App. 538, 167 S.E.2d 758 (1969). 2..." *Orange Bowl Corp. v. Warren*, 300 S.C. 47, 386 S.E.2d 293 (S.C. App. 1989). Thus, it would be fair and reasonable for this Court to proceed with deciding this appeal on the Briefs.

## II.

On or about the 25<sup>th</sup> day of February, Appellant was arrested at his home for an unrelated matter and taken into custody by Greenville County Sheriff deputies. They discovered three dogs and three cats in the home and had dispatch contact Greenville County Animal Control. The animal control officers found the three dogs, but not the three cats. Later, when Michael went to

retrieve his dogs, he was served with three court summons charging him with cruelty to animals in violation of a County Ordinance. He requested a jury trial.

During the trial no expert witnesses testified and a dog was allowed to enter the courtroom and visit each juror in the jury box. After a jury trial in the Greenville County Summary Court, Michael was convicted on all three charges and sentenced alternatively to fines or consecutive terms of imprisonment.

### III.

The case should have been dismissed because the Greenville County Ordinance, specifically § 4-19, violates the South Carolina Constitution by, *inter alia*, making it illegal to keep animals in an unsanitary residence. This specific outlawed circumstance contradicts South Carolina statutory law, specifically South Carolina Code of Laws § 47-1-40 (A). Appellant should prevail on his appeal because the county ordinance that he was found guilty of violating is unconstitutional under Article VIII, section 14 of the Constitution of The State of South Carolina.

Section 14 of our Constitution provides, in pertinent part: "In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: ... (5) criminal laws and the penalties and sanctions for the transgression thereof." S.C. Const., art. VIII, § 14.

We have observed that this subsection of the Constitution requires "statewide uniformity" regarding the criminal law of this State, and therefore, "local governments may not **criminalize** conduct that is legal under a statewide criminal law." *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272, 274 (1996) (emphasis added); accord *Connor v. Town of Hilton Head Island*, 314 S.C. 251, 442 S.E.2d 608 (1994) (where the Court held that a municipality cannot criminalize nude dancing when State law does not). *Foothills Brewing v. City of Greenville*, 660 S.E.2d 264, 377 S.C. 355 (S.C. 2008).

South Carolina Code of Laws Section 47-1-40 (A) reads: “A person who knowingly or intentionally overloads, overdrives, overworks, or ill-treats an animal, deprives an animal of necessary sustenance or shelter, inflicts unnecessary pain or suffering upon an animal, or by omission or commission knowingly or intentionally causes these acts to be done, is guilty of a misdemeanor and, upon conviction, must be punished by imprisonment not exceeding ninety days or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, for a first offense; or by imprisonment not exceeding two years or by a fine not exceeding two thousand dollars, or both, for a second or subsequent offense.”

On the other hand, part of the Greenville County ordinance at issue reads:

**§ 4-19 CRUELTY TO ANIMALS.**

(a) Any person who abuses an animal, aids another person in abusing an animal, or causes or permits an animal to abuse another animal, by acting or failing to act, shall be in violation of this section. Cruelty to an animal includes, but is not limited to, the following:

\* \* \*

(4) Failing to provide adequate shelter, sustenance, space, exercise, bedding, and **sanitary conditions** for the animal (emphasis added);

First, the County ordinance requires sanitary conditions, while the State law does not. In the case at bar, the Defendant’s violation was solely based on the assertion that sanitary conditions had not been provided. South Carolina case law has clearly established that a local government can not make criminal that which is not criminal under State law. This precedence was followed in the following case.

As we held in *Foothills Brewing*, Article VIII, § 14, of our State Constitution<sup>1</sup> requires uniformity regarding the criminal law of this State and local governments may not criminalize conduct that is legal under a statewide criminal law. See also *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996).<sup>2</sup> Here, the State has not preempted the regulation of indoor smoking; a local government may therefore criminalize indoor smoking, but only to the extent consistent with State law. See *City of North Charleston v. Harper*, 306 S.C. 153, 410 S.E.2d 569 (1991) (local governments may not enact ordinances that impose greater or lesser penalties than those established by state law). Town’s ordinance is invalid in that it imposes a criminal penalty for smoking in places where smoking is not illegal under State law.

*Beachfront Enter. v. Sullivan’s Island*, 666 S.E.2d 912, 379 S.C. 602 (2008).

Thus, the County of Greenville could not make it illegal to keep animals in unsanitary conditions, which is legal under State law. *Connor v. Hilton Head Island*, Supra.<sup>1</sup>

Second, the County omits the requirement found in the State statute that the acts made unlawful be “knowingly or intentionally” committed. Thus, the County has created a strict liability criminal law, but our State’s animal cruelty law requires criminal intent. Thus, the County is violating the Constitution by making more actions or omissions illegal than does the State’s Code.

This conflict in State and County laws sets up a scenario where, for example, a woman is trailering her horse from an adjoining county to Greenville County across Greenville County to another county. As she drives something happens to the trailer to create a harmful condition in the trailer that could be considered animal cruelty under the Greenville County code section. Maybe a hole is made that allows exhaust to flood the trailer or the rear door becomes unlatched and is open. The driver/owner is not aware of this change in the condition of the trailer.

As this woman drives across Pickens County, for example, she is not committing a crime because she is not knowingly harming the horse. However, when she crosses into Greenville

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<sup>1</sup> Connor’s holding is supported by the comments of the drafters of the proposed section, which was added as part of major revisions made to the state constitution in the early 1970s. A special committee was created, headed by John C. West (the “West Committee”), to recommend these revisions. Regarding proposed Article VIII, Section 14 (which was adopted by the legislature verbatim), the West Committee commented, “There are certain fundamentals related to freedom which should be treated only by the State and should not be left to local variation or abuse.” Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, at 91 (1969). One of the Committee’s major concerns regarding this constitutional provision was the “local government’s making an act a crime that was not a crime under state law.” 2 James L. Underwood, *The Constitution of South Carolina* 133, 134 (1989). Finally, our language regarding Article VIII, Section 14 in other cases shows that we have consistently interpreted that section broader than only prohibiting local governments from adopting ordinances that conflict with state general law. See *Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996) (Davis Adv.Sh. No. 1 at 11, 14) (Construing Article VIII, Section 14(4) as effectively withdrawing the subject “from the field of local concern”); *Robinson v. Richland County Council*, 293 S.C. 27, 30, 358 S.E.2d 392, 395 (1987) (stating Article VIII, Section 14 “precludes the legislature from delegating to counties the responsibility for enacting legislation relating to the subject encompassed by that section”).

*Diamonds v. Greenville County*, 325 S.C. 154, 161, 480 S.E.2d 718, 721 (1997)

County she is committing a crime. Such an unreasonable disparity in laws from county to county is fundamentally unfair and contrary to the Constitution of the State and the Due Process protections in the U.S. Constitution.

This Honorable Court should grant Michael's appeal because the County ordinance is unconstitutional.

#### IV.

The case should have been dismissed because the Greenville County Ordinance, specifically § 4-19, violates the South Carolina Constitution in that it is preempted by the State law because there are extensive statutes in the State Code that cover all generally known forms of animal cruelty that occur in the State. There are no forms of animal cruelty that are uniquely common in one county. *Palmetto Princess v. Edisto Beach*, 631 S.E.2d 68 (Supreme Court, 2006).

#### V.

The case should also have been dismissed because the Greenville County Ordinance, specifically § 4-19, violates the South Carolina Constitution and the United States Constitution under the void for vagueness doctrine. The county ordinance essentially makes it illegal to have garbage or bad smells in one's house if there are also animals in the house. At what point the items or fumes could be adversely affecting the pets is unspecified. Although the County code § 4-11 attempts to define insanitary conditions, and lists things like garbage and excessive animal wastes, it fails to say how much is too much. The County Code lacks any standards that would allow for an objective determination of whether a specific set of conditions found in a residence violate the ordinance. Specifically, the County ordinance is also unconstitutional because it does

not provide any objective standards for what is considered illegal unsanitary conditions. It does supply the following definition:

*Insanitary condition.* Animal living space, including shelter and exercise area, contaminated by health hazards, irritants, items or conditions that endanger or pose a risk to an animal's health, including but not limited to:

- (a) Excessive animal waste;
- (b) Garbage, trash or effluent;
- (c) Standing water or mud;
- (d) Rancid/contaminated food or water;
- (e) Fumes, foul or noxious odor, air, hazardous chemicals or poisons;
- (f) Decaying material;
- (g) Uncontrolled parasite or rodent infestation; and
- (h) Areas that contain nails, screws, broken glass, broken boards, pits, poisons, sharp implements or other items that could cause injury, illness or death to an animal.

Greenville County Code, § 4-11.

How is one to know how much of the conditions in the subparagraphs, (a) through (h) are too much? Under subparagraph (e) how is an average person going to know what odors are harmless and which ones are not. In this case there was much testimony about how bad the air smelled in Mr. Zieminski's house, but no objective measurement or quantification was offered at all. The claim that the air smelled too bad was not supported by any objective evidence and no expert witness testimony. Just listing aromatic conditions with vague, subjective adjectives gives people insufficient guidance. Even "air" is listed in (e) as a dangerous condition in an animal's quarters. Further, how much animal waste is excessive? Where do you draw the line?

Without any objective standards, residents of Greenville County are not sufficiently warned that certain actions are illegal. Additionally, everyone involved in this case and other cases, especially the jurors, are given no guidance on determining what conditions qualify as animal cruelty. If jurors are left to their so called common sense, well my experience has been that dogs are attracted to smells that many people consider "bad."

The ordinance does specify that the conditions must endanger or pose a risk to an animal's health in order to meet the definitions of unsanitary, how does a layman know how much of any of these specific items is too much? Many causes of disease are invisible to the unaided eye. What role does exposure time and levels play? Is air contaminated with the COVID-19 virus covered by the mention of "fumes" in subsection (e)? At a minimum, expert testimony is required to guide the jurors. In fact, in this case no expert evidence was presented that supported the government's claim that discarded paper and smells could harm dogs.

In the case at bar, there was lay testimony that there was too much paper and debris on the floor in the house. No attempt was made to scientifically determine if the trash threatened the health of the dogs. The animal control officer simply testified that there was a lot of trash and animal feces on the floors. Lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony involves "a process of reasoning which can be mastered only by specialists in the field." *State v. Brown*, 836 S.W.2d 530, 549 (1992). The animal control officer had no specialized training or education that would qualify him as an expert in animal health or medicine. See Fed.R.Evid. 701 advisory committee note; see also *United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997) (officers could not testify in detail as lay witnesses that defendant's actions were consistent with those of an experienced drug trafficker); *Ragland v. State*, 385 Md. 706, 870 A.2d 609 (2005) (officer could not testify as lay witness as to whether phone calls from service stations and cash sorted into different pockets related to drug transaction because such opinion testimony required specialized knowledge or experience). *People v. Veren*, 140 P.3d 131, 137 (Colo. App. 2006). Likewise, in the case at bar the officer simply testified that there was a lot of mess on the floors.

Jurors are essentially being left, unguided, to decide if bad housekeeping rises to the level of animal cruelty. Obviously, everyone has their own standards for housekeeping and those standards are based on how they personally want to live. The average juror has no idea what level of trash on the floor of a house is cruel to a dog. It would have been relatively easy for the investigator to have taken representative sample of the contents of the house and have them tested for pathogens and, if any, the quantity present. Instead, the jurors were left to subjectively speculate on whether there were pathogens present and to a degree that should be considered cruel. Dogs and cats are known to investigate garbage containers and cause the contents to spill out into a house. In this case, there were no specifications of how the trash got on the floor of the house, how long it had been present and how it was cruel or harmful to the dogs. Are conditions that are unsanitary for humans necessarily unsanitary for pets?

These concerns about identifying what level of messy housekeeping amounted to cruelty to animals obviously underpinned the South Carolina Legislature's decision to not include insanitary conditions as a type of proscribed animal cruelty in its legislation.

## VI.

Michael's conviction should be overturned because the State failed to introduce any testimony or other evidence from a veterinary expert. The State offered photographic evidence and the testimony of an animal control officer and a building codes inspector. Neither state witnesses have any medical training or veterinary medicine training. Thus, the State simply invited the jurors to act as their own veterinary experts. The County code section that Michael was charged with violating does require that the conditions claimed by the State to be unsanitary must "endanger or pose a risk to an animal's health" in order to be illegal. Yet no scientific

evidence was presented that could properly allow the fact-finder to make that determination, thus, casting the jurors' boat onto an ocean of conjecture and surmise.

## VII.

The State should not have been allowed to introduce testimony that the house in question had been condemned. Condemnation is a procedure related to human safety, not animal safety. Its prejudice outweighed its probative value. Likewise, the government's introduction of shocking photos of a medical condition of one dog characterized by an open wound that was neither caused by the owner, Michael, nor connected to the condition of the premises was highly prejudicial. (See Exhibit 2.)

The Court further erred when it allowed a dog to enter the Courtroom and visit each juror, thus, creating a prejudicial environment for an animal cruelty case. While the judge could not have known that a dog used by the County Animal Control officers in public appearances at schools was going to walk in the open rear doorway of the courtroom, he could have prevented it from walking into the jury box and spending time with each juror. That such factors affect jurors can not be doubted and can be further explored by a reading of a 2013 article: *The Juror as Audience: The Impact of Non-Verbal Communication at Trial*, from *Oregon State Bar Litigation Journal*, published by Janet Lee Hoffman and Andrew Weiner, Fall 2013. For another good law review article on some aspects of this subject- do non-evidentiary factors affect jurors and their verdicts see, Levenson, Laurie L., "Courtroom Demeanor: The Theater of the Courtroom" (2008). *Minnesota Law Review*. 582. <https://scholarship.law.umn.edu/mlr/582> .

In conclusion, the Appellant did not receive a fair trial because he was charged and convicted of violating an unconstitutional County code in a courtroom that was unconstitutionally prejudicial to the accused. Further, improper evidence was used in his

prosecution that inflamed the jurors by making it appear that the Appellant caused his dog to suffer from an open wound that was, in fact, not related to the messy condition of his house. Further, the jury was forced to speculate on how much uncleanliness was too much. The Appellant was also denied a fair appeal because the Magistrate did not timely file a record.

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Attorney for Appellant

June 21, 2023  
Travelers Rest, SC

**EXHIBIT 1**

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Certified Mediator  
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April 4, 2023

The Honorable Michael D. Stokes  
North Greenville Summary Court  
301 Trailblazer Dr.  
Travelers Rest, SC 29690

Re: Our Client: Michael Carl Zieminski  
Uniform Ordinance Summons Nos.: 2309636, 2309637, 2309638  
Date of Trial: 9-1-22  
Appeal: 2022CP2304923

Dear Judge Stokes:

This letter is to confirm that the Court has advised us that there is no intelligible recording or transcript of the hearing which occurred before you on September 1, 2022 and there is no record on appeal.

With kind regards, I remain

Sincerely yours,



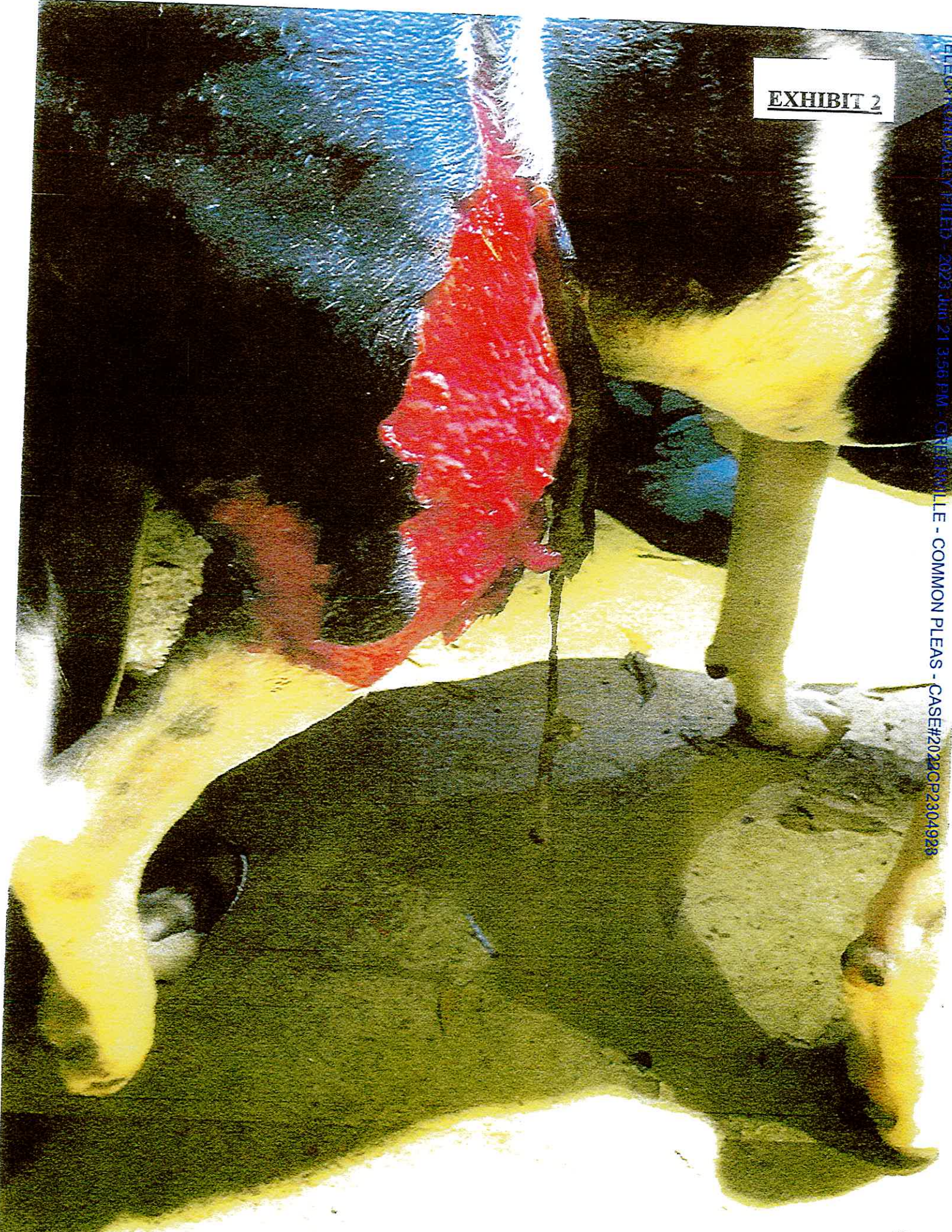
Joseph S. Lyles

JSL:ph

cc: Christopher R. Antley  
Client

Office Location: 20 S. Poinsett Hwy., Ste. A, Travelers Rest, SC 29690

**EXHIBIT 2**



STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE )

Civil Action No. 2022-CP-23-04923

The State, )

Respondent, )

v. )

Michael Carl Zieminski, )

Appellant. )

**RESPONDENT'S (COUNTY OF GREENVILLE) APPELLATE BRIEF**

**SUMMARY OF ARGUMENT**

On September 1, 2022, a unanimous jury convicted the Appellant of three counts of cruelty to animals in violation of § 4-19 of the Greenville County Code of Ordinances. On appeal, the Appellant asks this Court to reverse based on three arguments: (1) the County's ordinance should be declared unconstitutional; (2) the weight of the evidence presented was insufficient to support a conviction; and (3) the Court erred by admitting certain pieces of evidence and testimony and by being present when a dog wandered into the Court during the trial.

The Court should affirm the conviction because:

- A. the Appellant has failed to preserve the issues for appellate review;
- B. the ordinance at issue is a valid exercise of the County's police power and is constitutional;
- C. the Appellant has failed to satisfy his burden to ensure that the Court has an adequate record from which to evaluate the Appellant's arguments;
- D. the Appellant has abandoned several of the arguments on appeal by citing no case law or other law to support his arguments;

- E. the evidence the Court admitted was relevant and its probative value was not substantially outweighed by the potential for prejudicial impact; and
- F. The Magistrate's return was adequate, and if not, the Court should follow the procedure laid out by S.C. Code Ann. § 18-7-80.

#### ARGUMENT

- I. **The Appellant failed to preserve his challenges to the validity of the County's animal cruelty ordinance, and this Court lacks authority to consider the issues on appeal.**

The Court should elect not to consider the Appellant's arguments challenging the constitutionality of the County's animal cruelty ordinance because the Appellant's failure to preserve these issues for appellate review removes this Court's authority to entertain them on appeal. When acting in an appellate capacity, a South Carolina court must refrain from considering issues that were not raised to and ruled upon by the court below:

[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.

*Elam v. SCDOT*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). The requirement to preserve issues for appellate review applies equally to criminal cases appealed from a state magistrate court. *See, e.g., State v. Taylor*, 411 S.C. 294, 299, 768 S.E.2d 71, 74 (Ct. App. 2014) ("In criminal appeals from magistrate ... court, the circuit court does not conduct a de novo review, *but instead reviews for preserved error raised to it by appropriate exception.*") (emphasis added). To preserve an issue, the Appellant must both raise the issue to the lower court and obtain a ruling. *E.g., Smith v. NCCI*,

*Inc.*, 369 S.C. 236, 247–48, 631 S.E.2d 268, 274 (Ct. App. 2006) (“When a trial court does not explicitly rule on an argument raised, and the appellant makes no Rule 59(e), SCRCP, motion to obtain a ruling, the appellate court may not address the issue.”).

The Record on Appeal in this matter is devoid of any evidence that the Appellant raised these issues to the magistrate court or obtained a ruling. To the contrary, the Magistrate’s Return, filed in compliance with S.C. Code Ann. § 18-7-60, expressly states, “The defendant did not raise the constitutional questions at the time of trial [that] he seeks to use to reverse this case.” *Magistrate’s Return*. Because the Appellant has failed to establish that he preserved these issues for appellate review, the Court should not consider them and should affirm the Appellant’s convictions.

In addition, the ordinances at issue were included in the jury charge without objection.

## **II. The County’s Animal Cruelty Ordinance is Valid and Enforceable.**

Even if the Appellant had preserved his constitutional challenges to the County’s ordinance, the Court should affirm the convictions because the County’s animal cruelty ordinance is a valid and enforceable ordinance enacted as part of a legitimate exercise of the County’s police power. Any evaluation of the validity of a County ordinance begins with the general rule that “an ordinance is a legislative enactment and is presumed to be constitutional.” *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 425, 593 S.E.2d 462, 467 (2004). The first question, then, is whether Greenville County had the authority to enact Section 4-19 of its Ordinances.

Section 4-19 provides, among other things:

(a) Any person who *abuses* an animal, aids another person in abusing an animal, or causes or permits an animal to abuse another animal, *by acting or failing to act*, shall be in violation of this section. Cruelty to an animal includes, but is not limited to, the following:

(1) Failing to provide *adequate humane care*;

\* \* \* \* \*

(4) Failing to provide adequate shelter, sustenance, space, exercise, bedding, *and sanitary conditions* for the animal;

\* \* \* \* \*

(c) The owner or person having ownership, charge or custody of an animal cruelly abused, treated or used, etc., as enumerated in this section, who is convicted of any violation of this section of the article, forfeits ownership, charge, or custody of the animal, and at the discretion of the court, the person who is convicted of a violation of this section may be ordered to pay costs incurred to care for the animal and related expenses.

Greenville County Ord. § 4-19 (emphasis added). **(Exhibit 1)**. The County’s ordinance defines “abuse” to include “an act or negligent harming [of] any animal, including, but not limited to depriving adequate food, water, shelter, ventilation, *care*, space or veterinary care,” County Ord. § 4-11 (emphasis added). **(Exhibit 1)**, and the term “care” as:

*Care (adequate humane)*. Attention to the needs of an animal, including but not limited to, providing adequate water, food, shelter, bedding, *sanitary condition*, ventilation, space, exercise and veterinary medical attention necessary to maintain the health of the animal with regard to its specific age, size, species and breed.

County Ord. § 4-11 (emphasis added). **(Exhibit 1)**. Finally, the ordinance defines unsanitary conditions as:

Animal living space, including shelter and exercise area, contaminated by health hazards, irritants, items or conditions that endanger or pose a risk to an animal's health, including but not limited to:

- (a) Excessive animal waste;
- (b) Garbage, trash or effluent;
- (c) Standing water or mud;
- (d) Rancid/contaminated food or water;
- (e) Fumes, foul or noxious odor, air, hazardous chemicals or poisons;
- (f) Decaying material;
- (g) Uncontrolled parasite or rodent infestation; and
- (h) Areas that contain nails, screws, broken glass, broken boards, pits, poisons, sharp implements or other items that could cause injury, illness or death to an animal.

County Ord. § 4-11 (emphasis added). **(Exhibit 1)**.

The South Carolina Constitution and state statutes grant broad authority to counties to enact local ordinances:

All counties of the State, in addition to the powers conferred to their specific form of government, have *authority to enact regulations, resolutions, and ordinances*, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties *or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them*. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

S.C. Code Ann. § 4-29-50 (emphasis added); S.C. Const. art. VIII, § 17 ("The provisions of this Constitution and all laws concerning local government shall be liberally

construed in their favor.”).<sup>1</sup> In addition, the South Carolina legislature has expressly delegated its authority to counties to regulate this area of the law:

The governing body of each county or municipality in this State may enact ordinances and promulgate regulations for the care and control of dogs, cats, and other animals and to prescribe penalties for violations.

S.C. Code Ann. § 47-3-20. Greenville County clearly had the authority to enact its animal cruelty ordinance.

The Appellant also contends that the state law has preempted the County ordinance. A review of preemption law, however, quickly dispatches this argument. “To preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way.” *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 395, 629 S.E.2d 624, 627 (2006). South Carolina recognizes three types of preemption: (1) express preemption, (2) implied field preemption, and (3) implied conflict preemption. *Sandlands C & D, LLC v. Cnty. of Horry*, 394 S.C. 451, 462-469, 716 S.E.2d 280, 285-289 (2011).

“Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area.” *Sandlands C & D, LLC v. Cnty. of Horry*, 394 S.C. 451, 462, 716 S.E.2d 280, 286 (2011) (quoting *Ports Auth.*, 368 S.C. at 397, 629 S.E.2d at 628). Rather than announce an intent to preempt this field, the state announced the opposite by delegating authority to local governmental bodies to regulate the field. Express preemption is inapplicable to the County’s ordinance.

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<sup>1</sup> This delegation of authority to local government is commonly referred to as “Home Rule.”

It is equally clear that the state has not impliedly preempted the County from enacting an ordinance in the field of the care and control of dogs. Implied field preemption occurs “when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity.” *Sandlands*, 394 S.C. at 465, 716 S.E.2d at 287. Instead of enacting state laws evincing an intent to occupy the field of regulation in this area, the state expressly delegated authority to regulate the care and control of animals, including dogs, to the counties. *See* S.C. Code Ann. § 47-3-20 (“The governing body of each county or municipality in this State may enact ordinances and promulgate regulations for the care and control of dogs, cats, and other animals and to prescribe penalties for violations.”); *Sandlands*, 394 S.C. at 466, 716 S.E.2d at 288 (“Where the General Assembly specifically recognizes a local government's authority to enact local laws in the same field, the statutory scheme does not evidence legislative intent to occupy the entire field of regulation.”).

Finally, the state has not preempted the County under an implied conflict analysis. “Implied conflict preemption occurs when the ordinance hinders the accomplishment of the statute’s purpose or when the ordinance conflicts with the statute such that compliance with both is impossible. *Sandlands*, 394 S.C. at 467, 716 S.E.2d at 288. Here, the state’s animal cruelty statute sets a baseline for what constitutes prohibited conduct, and the County’s animal cruelty ordinance merely supplements the state prohibitions by enlarging the acts that constitute animal cruelty. *Compare* S.C. Code Ann. § 47-1-40 *and* County Ord. §§ 4-19 and 4-11. *See*

*Denene, Inc. v. City of Charleston*, 352 S.C. 208, 214, 574 S.E.2d 196, 199 (2002) (holding that additional regulation that supplements state law does not conflict with state law). Also, the County's animal cruelty ordinance's inclusion of unsanitary conditions as specie of animal cruelty does not conflict with the state's statute -- enforcement of the County ordinance does not interfere with state law or render compliance with state law impossible. *Sandlands*, 394 S.C. at 467, 716 S.E.2d at 288 ("Implied conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible.") In fact, South Carolina law is silent as to whether subjecting a dog to unsanitary conditions constitutes animal cruelty. *Id.* at 468, 716 S.E.2d at 288 ("Mere differences in detail do not render them conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand.").

By enacting its animal cruelty ordinance, Greenville County did what the legislature intended the County to do -- the delegation of this authority to the County upends any preemption argument or argument that the ordinance violates the South Carolina Constitution. Accordingly, this Court should affirm the convictions. These arguments also address the appellant's claim that the ordinance conflicts with state law in violation of Article VIII, § 14 of the South Carolina Constitution.

Next, citing no authority in support, the Appellant makes a naked allegation that the ordinance is unconstitutionally vague. He cites no authority that defines what standard the Court should use to assess the claim. Instead, he provides an

editorial on why he does not like the ordinance. This approach to the vagueness issue renders it abandoned, and this Court should not address the merits of the issue. See *Palmer v. State*, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (“An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.”); *Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 506, 812 S.E.2d 438, 441 (Ct. App. 2018) (“When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue.”).

However, the outcome of this appeal should remain the same even if the Court were to consider the argument. A county ordinance “is a legislative enactment and is presumed to be constitutional.” *E.g., McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504-05, 719 S.E.2d 660, 662-63 (2011).

Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution. The power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.

*Id.*

County Ordinance § 4-19 is not unconstitutionally vague. The ordinance, with the definitions in § 4-11, appraises potential defendants of the types of conduct that are prohibited, including a list of representative instances that render the conditions to which an animal is subjected unsanitary. While there is some subjectivity in the ordinance, that is the case with nearly all legislation. Taken as a whole, the County

ordinances give adequate notice of what acts constitute animal cruelty in violation of §4-19.

Given the high bar for declaring a county ordinance unconstitutional, this Court should decline to reach the conclusions suggested by the Appellant and affirm the convictions.

**III. Magistrate Court did not abuse its discretion in admitting challenged evidence.**

The Appellant attacks his convictions by arguing that the magistrate court erred by admitting certain evidence into the record. However, there is no record of the objections the Appellant claims to have made or of the Court's ruling. Because the Appellant has the burden of ensuring that this Court has an adequate record for appellate review, the Court should decline to consider these issues. See *State v. Knighton*, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999), *citing State v. Hutto*, 279 S.C. 131, 303 S.E.2d 90 (1983) (“[A]ppellant has burden of presenting an adequate record which is sufficiently complete to permit this Court to review lower court's actions”). And, as with the other arguments raised in the Appellant's brief, there is no record showing that the Appellant preserved these issues for appellate review.

However, the Court should still affirm if it were to consider the merits of these arguments. The Appellant maintains that it was error for the magistrate court to allow testimony that the house in which the dogs were found was condemned and pictures of a dog found in the house with an open wound. The Court should decline to vacate the conviction on these grounds because the Appellant has failed to show that the judge abused his discretion. A trial judge has “considerable latitude in ruling on

the admissibility of evidence,” and an appellate court will not disturb the ruling absent an abuse of discretion. *See State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). The Appellant claims that introduction of testimony that the house was condemned was prejudicial because condemnation addresses human, not dog, habitability. However, that a house is unfit for human habitation is relevant evidence on its suitability for housing dogs under the animal cruelty ordinance. In addition, the condemnation evidence was part of a host of evidence showing the deplorably unsanitary conditions to which the dogs had been subjected in the Appellant’s house. The evidence was clearly probative, and it would not have been an abuse of discretion for a judge to conclude that the potential it may have had, if any, to generate prejudice did not substantially outweigh that probative value. Likewise, the picture of the dog with leg wound was highly probative. While the Appellant suggests that it was problematic because of an alleged lack of proof that the conditions caused the dog to have that malady, the Appellant disregards its probative value in showing that the Appellant allowed a dog with skin sloughing off its muscle tissue to reside in supremely unsanitary conditions. As with the condemnation evidence, there is nothing in the record that indicates that the judge abused his discretion in admitting this evidence.

**IV. The entry of a dog into the trial was not an error supporting a reversal.**

As with all the grounds asserted in this appeal, the Appellant has failed to establish that he preserved them for appellate review. However, addressing the merits of his concerns about a dog walking into the courtroom during the trial, the

Court should decline to grant the Appellant the relief he seeks. The dog was apparently at the courthouse as part of the a Greenville County Sheriff's Office's program dealing with children. Contrary to the Appellant's assertion, the County and its animal control department had nothing to do with the dog's presence. In addition, the dog's emergence in the courtroom was totally unanticipated. By the time the dog calmly walked in front of the jurors and a constable gently grabbed its collar and led the dog back out, there was no time for the judge to do anything to prevent what happened. While unusual, the dog's appearance was not a big disruption, and the presence of the dog alone did not rise to the level of warranting a mistrial (which there is no evidence that one was asked for). This event does not warrant awarding the Appellant a new trial.

**V. The lack of expert testimony did not warrant a directed verdict or JNOV.**

Next, the Appellant contends that proof of animal cruelty under the County ordinance required expert testimony. The Court should dismiss this argument because nothing in the ordinance requires expert testimony. While the Appellant dresses this issue up as a fundamental requirement, the Appellant is really referring to the weight of the evidence. As the Magistrate's Return indicates, an experienced animal control officer provided evidence of the conditions and gave context as to its severity based on his experience with animals found in similar conditions. The jury had adequate evidence upon which to render a verdict. While the Appellant had the option of calling an expert witness to persuade the jury that allowing the dogs to live

in the extreme conditions in the Appellant's house were not a violation of the ordinance,<sup>2</sup> that would have gone to the weight of the evidence.

**V. The Magistrate's Return.**

The Appellant also contends that the Court should rely on the Appellant's summary of evidence and assurances that it made objections and obtained rulings because the Return is inadequate. The Court should decline to do so. As argued above, however, it is the Appellant's burden to ensure that the appellate court receives an adequate record on appeal.

In addition, if the Court deems a Magistrate Court's return inadequate, S.C. Code Ann. § 18-7-80 provides the procedure to be followed:

If the return be defective the appellate court may direct a further or amended return as often as may be necessary and may compel a compliance with its order. And the court shall always be deemed open for this purpose.

S.C. Code Ann. § 18-7-80.

In the end, though, the Appellant received a fair jury trial that ended in convictions for three counts of animal cruelty under the Greenville County ordinance. Nothing raised in the Appellant's brief warrants anything but an affirmance.

---

<sup>2</sup> An option he did not avail himself of, likely because no expert veterinarian would have given such an opinion.

*s/ Christopher R. Antley*

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Attorney for the Respondent

Date: June 23, 2023

Greenville, South Carolina

§ 4-19 CRUELTY TO ANIMALS.

(a) Any person who abuses an animal, aids another person in abusing an animal, or causes or permits an animal to abuse another animal, by acting or failing to act, shall be in violation of this section. Cruelty to an animal includes, but is not limited to, the following:

(1) Failing to provide adequate humane care;

(2) Mistreating animals. No person shall beat, cruelly ill treat, overload, overwork or otherwise abuse an animal, or cause, instigate or permit any dogfight or other combat between animals, or between animals and humans;

(3) Abandoning animals;

(4) Failing to provide adequate shelter, sustenance, space, exercise, bedding, and sanitary conditions for the animal;

(i) *Adequate shelter for an animal other than a dog* means shelter that reasonably may be expected to protect the animal from physical suffering or impairment of health due to exposure to the elements or adverse weather.

(ii) *Adequate shelter for a dog* means a moisture proof and windproof structure of suitable size to accommodate a dog and allow retention of body heat. The structure must be provided with a sufficient quantity of hay, straw, cedar shavings, blankets, or the equivalent, to provide insulation and protection against cold and dampness and promote retention of body heat.

(5) Hoarding or collecting animals;

(6) Owning, managing, obtaining, confining or caring for any number of animals in an animal mill;

(7) Giving away animals for commercial purpose. No person shall give away any live animal as a prize for, or as inducement to enter, any contest, game or other competition, or as an inducement to enter a place of amusement;

(8) Intentionally striking an animal with a motor vehicle. Any person operating a motor vehicle who strikes a domesticated animal, shall report such injury or death to County Animal Control or appropriate law enforcement authority. However, due to the possibility of injury from aiding an injured animal, this provision shall in no way be construed to require or encourage the physical touching of an injured animal by a non-qualified person who strikes a domesticated animal;

(9) Poisoning animals. No person shall expose any known poisonous substance, whether mixed with food or not, so that the same shall be liable to be eaten by any animal; provided that it shall not be unlawful for a person to expose on his own property common rat or vermin poison for the express purpose of rat or vermin control.

(10) Confinement in motor vehicle. No owner or person shall confine any animal in a motor vehicle in such a manner that places it in a life- or health-threatening situation by exposure to a prolonged period of extreme heat or cold, without proper ventilation or other protection from such heat or cold. In order to protect the health and safety of an animal, an animal control officer, law enforcement officer or agent of the county who has probable cause to believe that this section is being violated shall have authority to enter such motor vehicle by any reasonable means under the circumstances, after making a reasonable effort to locate the owner or other person responsible. If the vehicle is damaged during such removal, the animal control officer, law enforcement officer or agent of the county shall not be liable for any damage to the vehicle.

(b) An animal control officer may move before a magistrate to take custody of any animal being

ARTICLE II: DOGS, CATS, WILDLIFE AND EXOTIC ANIMALS

Section

- 4-11 Definitions
- 4-12 Animal control officer's duties
- 4-13 Animal shelter and dog or cat pounds
- 4-14 Required to have a rabies tag
- 4-15 Impoundment; notice to owners; release and disposition of impounded dogs or cats
- 4-16 Procedure in case of attack by dog or cat
- 4-17 Continuous barking, crying and the like
- 4-18 Unlawful acts
- 4-19 Cruelty to animals
- 4-20 Keeping wild, dangerous or vicious animals
- 4-21 Dead animals
- 4-22 Enforcement
- 4-23 Penalty
- 4-24 Municipalities excepted

public or private property, including but not limited to, the property of the owner/custodian;

(b) Puts out, leaves, abandons or in any other way discards any animal on public or private property, including but not limited to, property of the owner/custodian, and including but not limited to, leaving an animal in a box, bag, fence, house or other structure; or

(c) Places an animal in the custody of a state-licensed entity, such as, but not limited to, a veterinary clinic, grooming facility or pet sitter for treatment, boarding or other care, and fails to reclaim the animal by an agreed upon time.

*Abuse.* An act or neglect harming any animal, including but not limited to:

(a) Depriving adequate food, water, shelter, ventilation, care, space or veterinary care;

(b) Physically harming, torturing, mutilating, beating or illegally killing;

(c) Training/using for fighting other animals; and

(d) Using as bait to train/lure other animals to fight/kill.

*Animal.* Any non-human living vertebrate, whether wild or domesticated.

*Animal bite.* Any physical contact of the teeth, nails or claws of an animal with human flesh,

*Statutory reference:*

*Authority of county relative to dogs and domestic pets generally, see S.C. Code, §§ 47-3-10 through 47-3-75*

§ 4-11 DEFINITIONS.

For the purposes of this article, the following words and phrases shall have the meanings respectively ascribed to them by this section:

*Abandonment (of an animal).* The act of any person who:

(a) Abandons an animal by leaving it unattended for a period of in excess of 48 hours without adequate food, water, ventilation or shelter on

Greenville County - Animals and Fowl

including but not limited to, a scrape, puncture, pierce, scratch or tear, so long as bleeding results.

*Animal control office.* The office designated by Greenville County with such powers and duties as are hereinafter set forth in this article.

*Animal control officer.* A person appointed by county council with such powers and duties as are hereinafter set forth in this article.

*Animal hoarding.*

(a) Collecting animals and failing to provide them with humane/adequate care;

(b) Collecting dead animals that are not properly disposed; or

(c) Collecting, housing or harboring animals in filthy, insanitary conditions that constitute a health hazard to the animals being kept, and/or to the animals or residents of adjacent property.

*Animal mill.* An individual or entity that keeps and/or breeds animals in conditions where animals are frequently caged for extended periods of time, do not receive adequate care, and/or are not kept in an environment conducive to the health and well being of the animal. An *animal mill* may be used for the purpose of producing multiple offspring for sale.

*Animal shelter.* Any premises designated by county council for the purpose of impounding, care or destruction of dogs or cats held pursuant to this article.

*Care (adequate humane).* Attention to the needs of an animal, including but not limited to, providing adequate water, food, shelter, bedding, sanitary condition, ventilation, space, exercise and veterinary medical attention necessary to maintain the health of the animal with regard to its specific age, size, species and breed.

*Cat.* All members of the domesticated feline family.

*County.* The unincorporated area of the county and any municipally requesting dog or cat control services of the county, as long as county council approves and the city adopts appropriate legislation to this effect.

*Current cost of impound fee.* The amount of money paid to a contractor of the county to provide board and care for an impounded animal for a minimum period set in the contract.

*Dangerous or vicious animal.* An animal:

(a) With a known propensity, tendency or disposition to attack unprovoked, to cause injury to, or to otherwise endanger the safety of, humans or domestic animals;

(b) That attacks a human being or other domestic animal without provocation; or

(c) That is trained or used to fight or to attack humans or other animals.

This definition shall not apply to a dog owned or used by a governmental entity; or to an animal that bites or attacks a person or animal trespassing on the property of the attacking animal's owner; or to an animal that bites or attacks a person or animal that provokes, torments, tortures or treats that animal cruelly.

Feeding a domesticated animal to a snake shall not make the snake a *vicious animal*.

*Dog.* All members of the canine family.

*Domestic animal.* Any animal other than wildlife, a wild animal or an exotic animal, as defined by this article, that is domesticated by humans so as to live and breed in a tame condition. *Domesticated animal*

includes, but is not limited to, cats, dogs, fowls, horses, cattle, sheep and goats.

*Euthanize.* To put to death in a humane manner.

*Exterior area.* Any area outside a structure, including but is not limited to, an area enclosed by fence.

*Exotic animal.* Any animal that is not indigenous to this state.

*Fence.*

(a) A structure of wire, wood, stone or other materials, not including invisible fencing, which is of sufficient height and strength to act as barrier against the passage of the animal it is intended to enclose.

(b) A fence does not include an invisible fence that is:

1. Turned off or within which the animal is not wearing a properly operating signaling device;

2. Ineffective for any animal that has learned it can cross the fence line; or

3. Intended to be a means of keeping people or animals out of an enclosed area, buried in or adjacent to a county right-of-way.

(c) An invisible fence is not an acceptable means of control for an animal classified as dangerous, or in estrus/heat.

*Food (adequate).* Adequate quantity of non-contaminated and nutritionally *adequate food*, fed according to age, size, species and breed requirements, which is sufficient to prevent starvation, malnutrition or risk to the animal's health. Garbage or spoiled/rancid food is not considered *adequate food*.

*Garbage.* All refuse matter/effluent. *Garbage* includes, but is not limited to, animal or vegetable refuse, by-product of a restaurant, kitchen or meat-/poultry-processing establishment, spoiled/rancid food and refuse accumulation of animal, fruit or vegetable matter, liquid or otherwise, that is normally discarded.

*Humane society.* An organization chartered under the principles of the South Carolina Society for the Prevention of Cruelty to Animals.

*Impound.* The act of an officer or agent of the county, whereby this person takes charge of an animal for the purpose of confining in a humane manner, including but not limited to, providing sufficient and nourishing food, warm and well ventilated shelter and medical attention.

*Insanitary condition.* Animal living space, including shelter and exercise area, contaminated by health hazards, irritants, items or conditions that endanger or pose a risk to an animal's health, including but not limited to:

- (a) Excessive animal waste;
- (b) Garbage, trash or effluent;
- (c) Standing water or mud;
- (d) Rancid/contaminated food or water;
- (e) Fumes, foul or noxious odor, air, hazardous chemicals or poisons;
- (f) Decaying material;
- (g) Uncontrolled parasite or rodent infestation; and
- (h) Areas that contain nails, screws, broken glass, broken boards, pits, poisons, sharp implements or other items that could cause injury, illness or death to an animal.

ELECTRONICALLY FILED - 2023 Jun 23 4:20 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2304923

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	APPELLANT'S REPLY BRIEF ON APPEAL
The State,	)	
	)	Summary Court Case Nos. 2309636
Respondent,	)	2309637
	)	2309638
Michael Carl Zieminski,	)	
	)	
Appellant.	)	Circuit Court Case No. 2022CP2304923

Counsel for the County omitted the key second half of the rules laid down in the line of cases he cited.

Questions of statutory interpretation are questions of law, which are subject to de novo review and which we are free to decide without any deference to the court below. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010); *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

*State v. Whitner*, 399 S.C. 547, 552 (S.C. 2012).

The prosecution argues in its brief that ordinances are presumed Constitutional, citing *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 425, 593 S.E.2d 462, 467 (2004), which is not a criminal case, but fails to note that statutory construction of criminal statutes significantly differs in that:

"[P]enal statutes are to be strictly construed. This rule of lenity applies when a criminal statute is ambiguous, and requires any doubt about a statute's scope be resolved in the defendant's favor." *State v. Miles*, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017). "One of the foundations of the rule of lenity is the concept of fair notice—the idea that those trying to walk the straight and narrow are entitled to know where the line is drawn between innocent conduct and illegality." *Id.* "Criminal ordinances are, of course, to be strictly construed and a defendant has a right to know just wherein he is charged with the commission of a crime . . . ."

*Town of Conway v. Lee*, 209 S.C. 11, 18, 38 S.E.2d 914, 917 (1946).

The record clearly shows that Defense counsel made a motion to dismiss the charges at the close of the prosecution's case. This motion clearly preserved Defendant's argument that the State failed to prove a case of guilt under the County Code sections.

It is customary to make Motions To Dismiss in criminal trials orally because (1) a written motion could not have been prepared in advance as the defense counsel would have no way of predicting what the State's full case would consist of and (2) the trial courts rarely recesses a criminal trial, particularly at the Magistrate's level, to allow the defense counsel to prepare a written motion. With the trial court's failure to preserve any of the argument on the motion, the State can not argue that defense counsel's argument failed to preserve certain issues.

The Magistrate waited until after defense counsel's first Brief was filed to issue a skeletal record that went out of its way to address one of the issues raised on appeal, namely whether constitutional issues were raised during the trial. Because the trial judge failed to dispute that any of the other issues raised in Defendant's appeal and brief were raised in trial. Thus, all other issues raised in those documents must be considered preserved.

As argued in Defense counsel's brief, the County ordinance lists unsanitary conditions as a possible type of abuse, but fails to define what that means. The definition of unsanitary is unhealthy. Only a medically trained expert can testify to whether certain messy conditions amount to unsanitary conditions that could arise to the state of abuse. The only two witnesses presented by the State were laymen. Neither had any training in veterinary medicine. Therefore, even if the constitutionality of this law as it was applied in this case is not considered, this Court has the right and duty to consider if the State could prove unsanitary conditions without such expert testimony. A messy house does not automatically equate with an unhealthy house.

Another issue ignored by the State's brief was how the County Code differed substantially from the State Code by making a failure to properly care for an animal a strict liability crime, whereas, the State Code makes such a failure a crime that requires criminal intent. It is a matter of statutory construction and legal analysis whether S.C. Code Ann. § 47-3-20 authorizes a county to enact an animal abuse ordinance that radically shifts the burden of proof from a similar state statute.

The State cites argues in its Brief on preemption and includes the holding that where a local law "conflicts with the statute such that compliance with both is impossible," that local law is preempted. *Sandlands C & D, LLC v. Cnty. Of Horry*, 394 S.C. 451 at 467, 716 S.E.2d 280 at 288 (2011). The County Ordinance does not merely supplement the State statute, it deviates on a key issue: the required intent. Compliance with two similar laws that have different **intent requirements** is impossible. The intent requirement in a criminal statute is not a "mere detail." The case at Bar is a clear example of implied conflict equaling implied preemption.

Appellant has not abandoned its argument on the longstanding, well known body of law on the void for vagueness doctrine. "The void-for-vagueness doctrine rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) (quoting *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007)). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001)." *Town of Sullivan's Island v. Murray*, 435 S.C. 22, 864 SE 2d 909 ( Ct. App. 2021). Affirmed, *Town of Sullivan's Island v. Michael Murray*, No. 28153 (S.C. 2023).

In conclusion, Appellant properly raised the issues argued in his brief during his Motion To Dismiss at the close of the prosecution case. The Appeal should be granted because the County code section regarding care of animals is unenforceable because it fails to provide sufficient guidance on what exactly constitutes unsanitary conditions. This is especially true when no expert evidence is provided to guide the jury on how much trash is too much trash.

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Attorney for Appellant

June 27, 2023  
Travelers Rest, SC

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 The County of Greenville, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 Michael Carl Zieminski, )  
 )  
 Defendant. )

IN THE MAGISTRATE'S COURT

NOTICE OF MOTION AND  
 MOTION IN LIMINE

Warrant Nos.: 2309636  
 2309637  
 2309638

TO: CHRISTOPHER ANTLEY, Attorney for Plaintiff

NOW COMES THE DEFENDANT who respectfully moves this Honorable Court for an order prohibiting the introduction of photographic or testimonial evidence regarding the health or medical effects on the dogs of the cluttered condition of the house in which they were found in the above-captioned action.

This motion is made on the grounds that admission of the evidence should be barred because. S.C. Rule of Evidence 701 prohibits a lay witness from testifying to opinions or inferences that "require special knowledge, skill, experience or training."

This is a criminal case in which the Defendant is accused of causing animal cruelty in violation of Greenville County Ordinance 4-19. When the animal control officer went to Mr. Zieminski's home, he found three dogs who were, at that time, inside a house that had significant trash on the floors and some dried dog feces. It is my understanding that the officer will testify that he charged the Defendant because of this condition of the house. At the pretrial he told me that he was of the opinion that it was unhealthy for the dogs to be living in that house and that was the "cruelty."

This Court Court to limit the officer from testifying to a lay opinion regarding the potential health effects of dried animal feces under the circumstance he found. To establish a causal connection between an alleged cause and a disease in animals, it is necessary to have testimony from a qualified veterinarian. *Bernloehr v. Central Livestock Order Buying Co.*, 296 Minn. 222, 208 N.W.2d 753 (Minn. 1973). "Obviously, this was a case in which expert testimony was important because the medical effect of inhalation of ethylene glycol is not a matter within the common knowledge and experience of most individuals. *Cf. Gass v. Haines*, 298 S.C. 549, 381 S.E. (2d) 923 (Ct. App. 1989) (medical malpractice case)." *Armstrong v. Union Carbide*, 308 S.C. 235, 417 S.E.2d 597 (S.C. 1992).

Courts should also consider whether the opinion results from "a process of reasoning familiar in everyday life," or "a process of reasoning which can be mastered only by specialists in the field." See Fed.R.Evid. 701 advisory committee note; see also *United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997) (officers could not testify in detail as lay witnesses that defendant's actions were consistent with those of an experienced drug trafficker); *Ragland v. State*, 385 Md. 706, 870 A.2d 609 (2005) (officer could not testify as lay witness as to whether phone calls from service stations and cash sorted into different pockets related to drug transaction because such opinion testimony required specialized knowledge or experience).

*People v. Veren*, 140 P.3d 131, 137 (Colo. App. 2006).

The State has indicated that it intends to introduce photos of one dog that had a disease of its leg. The photo is shocking to the average person and may have been enhanced to make the red color of raw muscle "pop" and appear more dramatic than it appeared in real life. Most importantly, the photo will mislead the jury by inferring that the messy condition of the house caused or worsened the dog's medical condition. Again, such an opinion can only be given by a qualified expert in veterinary medicine.

In the case of Lawrence Durocher, Jr. v. Rochester Equine Clinic, 629 A.2d 827 (N.H. 1993), the Supreme Court of New Hampshire ruled:

Nonetheless, we adopt the reasoning of the Montana Supreme Court that "[m]atters concerning the standard of care owed by a veterinarian during and after surgery are outside the common experience and knowledge of lay jurors; expert testimony is necessary to assist [the jurors] in resolving such cases." *Zimmerman v. Robertson*, 854 P.2d 338, 340 (Mont. 1993). Moreover, expert testimony by a veterinarian is necessary on the issue of whether the surgery actually caused the purported injury. See Annotation, *Veterinarian's Liability for Malpractice*, 71 A.L.R. 4th 811, 824-25 (1989). Contrary to the plaintiff's suggestion, we believe that a horse trainer simply cannot be qualified as an expert to interpret x-rays and medical records to assess the causation of any purported injuries. A trainer may, however, testify as to the agility of a horse prior to and after a specific time.

In conclusion, the animal control officer is not a veterinary expert by any scope of the imagination and should not testify to opinions or inferences.

THE LYLES LAW FIRM, LLC

By: 

Joseph S. Lyles

Attorney for Defendant

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August 31, 2022

Travelers Rest, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Case No. 2022-CP-23-04923
	)	
The State,	)	
	)	
Respondent,	)	NOTICE OF MOTION AND
	)	MOTION TO ALTER OR
vs.	)	AMEND JUDGMENT
	)	
Michael Carl Zieminski,	)	(MOTION FOR RECONSIDERATION)
	)	
Appellant.	)	
_____	)	

TO: CHRISTOPHER R. ANTLEY, Attorney for Respondent

NOW COMES the Appellant, Michael Carl Zieminski, who respectfully moves this Court to reconsider its Order filed on July 20, 2023.

The Court is asked to reconsider or amend its ruling pursuant to Rule 59 SCRPC on the following grounds:

1. The Court failed to address and rule on numerous issues raised by the Appellant.
2. The Court failed to address the Appellant’s argument that the Magistrate had a duty to declare a mistrial when a dog, not only walked into the Courtroom but visited members of the jury in the jury box.
3. The Court failed to address the Appellant’s argument that the County ordinance required a showing that the conditions of the house in which the dogs and the Appellant lived endangered or posed a risk to the animals’ health before those conditions could be found to violate the County ordinance on the grounds they were unsanitary.
4. The Court failed to address or rule on the Appellant’s argument that the Magistrate violated both S.C. Code of Laws, Section 18-7-60 and Rule 18 of the Magistrate

Court Rules and therefore unfairly, unreasonably and in violation of Appellant's Due Process Rights deprived Appellant of the opportunity for a fair appeal.

5. The Court failed to address that the need for expert witness testimony was clear and the Magistrate's failure to require it was an abuse of his discretion. Both the Magistrate's Court and this Court has the right and duty to interpret the construction of the ordinance at issue and to do so while applying the rule that penal laws are strictly construed and to apply the rule of lenity.

6. The Court failed to address the issue that the differences in the State animal cruelty laws and the County ordinance were fundamental and, regardless of the Constitutional implications, indicated an even greater standard of construction should be applied, especially when the County has changed the basic element of intent so as to make the County ordinance much more broad in application and difficult to understand and comply with.

7. The Court failed to address the issue that the dramatic photo of a medical condition suffered by one of the dogs implied that the alleged unsanitary conditions caused the condition and invited the jury to speculate when expert testimony was necessary to understand what the actual cause of the condition was. It was a classic case of the probative value of a piece of evidence being outweighed by its prejudicial effect on the jury.

8. The Court failed to address the argument that the prosecution failed to give any evidence of what conditions were like that were unsanitary for a dog, as opposed to a human. How much is too much? The prosecution proceeded on the assumption that the standard for unsanitary conditions was the same for dogs and humans and only offered evidence on the human standard. There is no scientific basis for that assumption and, thus, the jury obviously assumed that the standards were equal.

9. The Court *sua sponte* raised the argument that the Appellant was required to put the Attorney General on notice of this appeal, but erred because the only requirement to do so is found in SCRCP no. 4(d)(4)(B) and that rule only requires notice to the Attorney General when the State is not a party to an action in which unconstitutionality is raised. Further, Title 18, Chapter 3 of the South Carolina Code of Laws governs appeals from magistrates in criminal cases and does not include such a requirement.

RESPECTFULLY SUBMITTED.

THE LYLES LAW FIRM, LLC

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Attorney for Appellant

July 25, 2023  
Travelers Rest, SC

State of South Carolina	)	Court of Common Pleas
	)	Thirteenth Judicial Circuit
County of Greenville	)	Case No. 2022-CP-23-04923
	)	
	)	
The State,	)	
	)	
Respondent,	)	
	)	
-vs-	)	Transcript of Record
	)	
Michael Carl Zieminski,	)	
	)	
Appellant.	)	
	)	

June 28, 2023  
 Greenville, South Carolina

B E F O R E:

The Honorable R. Lawton McIntosh, Judge

A P P E A R A N C E S:

Joseph S. Lyles, Esquire  
 Attorney for the Appellant

Christopher R. Antley  
 Attorney for the Respondent

Proceedings taken down electronically  
 Transcribed by:  
 Krystal J. Smith  
 Official Circuit Court Reporter III

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I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NUMBER</u>
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E X H I B I T S

NO.                      DESCRIPTION    ID.                      EV.

(No Exhibits Presented)

COURT REPORTER LEGEND

dashes    --                      intentional or purposeful interruption  
or change in thought

ellipses . . .                      trailing off

[ph]                                      phonetically written

[sic]                                      written as said

1 JUNE 28, 2023

2 (WHEREUPON, the proceedings began, taken down live in  
3 court via WebEx recording.)

4 THE COURT: Zieminski out of order. Is this Zieminski?

5 MR. LYLES: Yes, Your Honor.

6 MR. ANTLEY: It is, Your Honor.

7 THE COURT: Okay.

8 MR. ANTLEY: Chris Antley with Greenville County. I'm  
9 the last man standing. Everybody's on vacation, and I've got  
10 to take them into executive session this afternoon. So I  
11 appreciate you accommodating us.

12 THE COURT: Okay.

13 All right. Mr. Lyles?

14 MR. LYLES: Thank you, Your Honor. I have submitted an  
15 amended brief and a reply brief have been filed with the  
16 Court, and --

17 THE COURT: Okay.

18 MR. LYLES: -- I emailed them.

19 Basically, this case presents a couple of issues. One,  
20 how messy can your house be if you're a dog owner and still be  
21 legal in Greenville County?

22 The Greenville County ordinance differs very much from  
23 the state ordinance on animal cruelty. The state ordinance  
24 does not include, you know, having trash and stuff in your  
25 house as being a violation of the animal control rules, the

1 animal abuse rules.

2 The other issue is, was this defendant given a fair  
3 trial. Now, the first issue is the magistrate's return was  
4 not filed until over nine months after the case was tried,  
5 which violates both the state and the magistrate court rules,  
6 state statute and the magistrate's court rules, which I've  
7 cited in my brief. It's a skeletal return. If he hadn't used  
8 such wide spacing, it wouldn't have taken more than a page.

9 He goes out of his way in the return to say that the  
10 defendant did not raise the constitutional questions at the  
11 time of trial, and I'm assuming that's because he read my  
12 brief because I had already filed my brief with the Court by  
13 the time he gave his return. Now, that's significant for two  
14 reasons. One, the County's claim that I didn't raise any of  
15 the issues raised in my briefs during the trial.

16 THE COURT: Say that again, please?

17 MR. LYLES: The County is saying that I did not raise any  
18 of these issues that I'm raising on appeal during the trial.  
19 Now, my position is the County -- the magistrate went out of  
20 his way to say I didn't raise the constitutional issues. So  
21 other issues must have been raised or he would have said that  
22 too. He would have said they weren't raised.

23 Now, the return does note that I made a motion for a  
24 directed verdict after the prosecution case, and it was  
25 denied. So, obviously, I raised some issues in that motion,

1 but my friend here is going to argue that it's my duty to  
2 provide a record, a complete record, but the statute puts the  
3 obligation on the magistrate and the magistrate's rules put  
4 the obligation on the magistrate. Am I not entitled to rely  
5 on the statute and the rules that say the magistrate should do  
6 this? That seems completely unfair.

7 Now, to the matter, my client was charged with three  
8 counts of animal cruelty under the County Code because he had  
9 three dogs, and they discovered his house was very messy. And  
10 I think pictures are going to be shown to you, and I admit it  
11 was very messy. The question is, how messy is too messy?

12 And under the Code that -- that they prosecuted him  
13 under, you have to show that it was unhealthy to the dog.  
14 They produced no medical expert testimony, no veterinary  
15 expert testimony whatsoever. They just put in pictures and  
16 the -- the animal control officer testified that it was a  
17 messy house. They didn't take any tests to see if any of the  
18 mess had pathogens in it.

19 How is a person to know how messy his house can be?  
20 There was no evidence of how long those dogs would stay in  
21 that house from day to day. There was no evidence other than,  
22 hey, this guy has a messy house and he has three dogs.

23 One of the reasons I believe the jury found against him  
24 is because during the trial a dog walked into the back of the  
25 courtroom. The magistrate did nothing. The dog walked into

1 the jury box and was petted by each juror that -- in  
2 succession. The magistrate sat silent. It's his courtroom,  
3 not mine. That was fundamentally unfair.

4 And on top of that, the magistrate allowed a picture,  
5 which I've attached to my brief, that was flagrantly  
6 repulsive. The dog had a condition. One of the dogs had a  
7 condition with an open wound, and there was absolutely no  
8 evidence my client did anything to cause that wound or not  
9 take care of it. My friend here wants to put the burden on  
10 the defendant by saying we could have called an expert. It's  
11 not our job to prove our case. It's his job to prove his  
12 case.

13 The statute not only makes it a matter of cruelty to  
14 animals if you have unsanitary conditions but changes the  
15 burden of proof completely from the state statute. In the  
16 state statute, you have to knowingly do the things enumerated  
17 to be violating the law. In the Code, you could be totally  
18 negligent. It's a strict liability statute.

19 And I say in my brief, you know, if you had an example of  
20 someone trailering a horse from another county, they're -- as  
21 they're trailering it, the door comes open or something  
22 happens so exhaust is getting into the trailer. That person  
23 trailering that horse is legal in these surrounding counties,  
24 but when they get into Greenville County, it doesn't matter  
25 that they don't know the door is open on the back of the

1 trailer or that exhaust is suddenly going in there. They're  
2 committing a crime in Greenville County. Then when they get,  
3 say, to Laurens County or Spartanburg County, they're not  
4 committing a crime.

5 The Constitution 8 -- Article 8, Section 14, says that --  
6 has been interpreted by the courts to say criminal law should  
7 be the same across the state. So while there is a statute  
8 cited by the County that says the counties can pass ordinances  
9 about animal care, it doesn't say they can completely change  
10 the statutory scheme so that it's a strict liability. So, in  
11 short, the unsanitary requirement doesn't exist in the state  
12 law.

13 The burden of proof or, you know, intent issue is  
14 different, and the statute is vague. How much is too much?  
15 If you look at the picture, if we took a garbage bag full of  
16 stuff out of that house, is it going to be in compliance? How  
17 about if we took out two? How do we know? There's no  
18 guidance.

19 And perhaps they could have cleaned that up if they had  
20 brought in a veterinarian or an expert in veterinary care, but  
21 they didn't. The client -- the jury was left just to  
22 speculate how much is too -- how much garbage? You know, were  
23 those plastic -- empty plastic milk jugs, were they dangerous  
24 to a dog? They're not experts. They don't know.

25 So for all those reasons, we think that these cases

1 should be dismissed, Your Honor. Thank you.

2 THE COURT: Thank you.

3 Mr. Antley?

4 MR. ANTLEY: Thank you, Your Honor. May it please the  
5 Court.

6 You know, first, a lot of what he seems to be arguing is  
7 preemption. I mean, that was kind of -- you're doing this  
8 when state law says X, Y, and Z. Preemption goes back to the  
9 issue of constitutional -- I mean, yeah, constitutionality.

10 So we'll start with the return flatly says that the  
11 defendant did not raise the constitutional questions at the  
12 time of trial that he seeks to use to reverse this case. And  
13 as far as the state law preemption thing, I was at the trial,  
14 I can't profess to remember everything that was said there,  
15 but I can assure you one thing. That in my first six months  
16 of being a county attorney, if I -- if there was a direct  
17 assault on the constitutionality of an ordinance and we were  
18 in too deep in the weeds to preemption to where I've briefed  
19 it thoroughly for you all here, that would have been pretty  
20 obvious, and that just didn't happen in this trial.

21 So my first argument would be that largely, yeah, this is  
22 not preserved for appellate review. You have to argue and  
23 maintain an issue in front of the lower court and get a ruling  
24 on it, and it's not enough to just kind of say I make a  
25 directed verdict motion on everything. It's got to be

1 specific as to the specific issue. That wasn't done here.

2 Hitting the merits though, Your Honor, just briefly, this  
3 stemmed from a September -- well, this stemmed from an arrest  
4 of Mr. Zieminski or the appellant -- of the appellant for an  
5 unrelated matter. So I'm happy now the community sheriff's  
6 deputies arrested him at his home. They then entered the  
7 house and were blown away by -- I mean, it has been said in  
8 here about paper strewn about like it's this desk or something  
9 like this.

10 There's pictures, and I believe that the file actually  
11 has these pictures now that were physically handed to or  
12 brought over by the magistrate court as part of the return,  
13 but I don't think they were able to be scanned in  
14 electronically. So I believe they're in your file now.

15 I mean, I just -- the point being is they ran that and  
16 they saw dogs in this thing, and I'm talking there was human  
17 feces on places that weren't toilets. I mean, it was -- it  
18 was beyond the pale. And then animal control officers were  
19 called out because they did find dogs, including a dog, whose  
20 picture you're going to see in there, whose skin had sloughed  
21 off its leg and its muscle was just showing, and that dog was  
22 living in that house in that condition.

23 THE COURT: Were all these pictures made part of the  
24 record below?

25 MR ANTLEY: They were, Your Honor. That's why they'll be

1 part of the return.

2 THE COURT: Okay.

3 MR. ANTLEY: They were introduced. I don't think there's  
4 any contro -- I mean, Mr. -- as far as the picture of the dog,  
5 even Mr. Lyles put it as part of his brief.

6 Animal control was called out. They did testify and, you  
7 know, they testified as to their observation of what it was  
8 like, the smells that it was like, everything else out there.  
9 They did take the dogs into custody at that point and took  
10 them into care because, one, they were going to be left alone  
11 out there and, two, the conditions really were mind bogglingly  
12 bad.

13 So in that vein, first we have a question of can the  
14 County have this ordinance. Can the County have an animal  
15 cruelty ordinance that includes as a component that it's  
16 cruelty to subject a dog to inhumane or unsanitary conditions?

17 State law is pretty clear on how we handle preemption in  
18 this state. There's three types. There's express preemption,  
19 there's implied preemption, and there's something called  
20 implied conflict preemption. We'll talk about that last or  
21 I'll take it in the order you want, but I assume you're okay  
22 with that.

23 Certainly, no express preemption. As he did state, South  
24 Carolina does have an animal cruelty statute. In that animal  
25 cruelty statute, they don't mention anything about the

1 conditions in which you at your house keep your dogs in terms  
2 of, you know, how messy it is, how -- how many, you know,  
3 human feces can be on the floor and everything else. They  
4 don't -- they don't do that.

5 But they purposely didn't do that because of Section  
6 47-3-20. The governing body of each county or municipality in  
7 this state may enact ordinances and promulgate regulations for  
8 the care and control of dogs, animals, and other animals, and  
9 to prescribe penalties criminal for violations.

10 Clearly, they haven't expressly preempted it. They asked  
11 us to do it. They asked -- they delegated the authority to  
12 all the counties to do it, and so there's no express  
13 preemption. And they certainly didn't expressly -- they  
14 didn't do the opposite, then later on and say, by the way, we  
15 preempt the counties from doing the thing we just said.

16 Secondly, implied preemption. This is implied field  
17 preemption where it's so obvious and they've made it so  
18 obvious that they -- the state has intended to preempt the  
19 field, here it would be animal cruelty, that no reasonable  
20 mind could differ as to whether or not it's dang near express.

21 Again, it can't be implied field -- field preemption if  
22 the state has a statute which directly tells the county please  
23 regulate in this area. Please do criminal ordinances in this  
24 area. We're not the last word on all this, and it's  
25 recognized that way because they think there's local problems

1 and local issues with different -- you know, what it's like up  
2 in -- you know, out in the middle of Cherokee in the country  
3 might be different than the way it is in Irmo and Richland  
4 just as far as what animals may or may not do as far as  
5 running at large, that type of thing. So they've left it to  
6 the counties.

7 Third would be implied conflict preemption, and this  
8 would be where an ordinance was made that made it impossible  
9 to follow a state law. This can't happen here, and there's  
10 case law. Let's talk about this, because state law has not --  
11 all the state law dealing with animal cruelty don't touch on  
12 the condition we're here about today, which is the conditions  
13 in which animals live.

14 So you can comply with our -- with our county ordinance,  
15 and it won't make it impossible to comply with the state law  
16 within the areas that they hold. They have animal control or  
17 animal -- animal abuse or cruelty statutes. So it doesn't fit  
18 within the state, and it doesn't contradict any state  
19 statutory scheme. And frankly, the County did exactly what  
20 they asked the County to do, what the General Assembly has  
21 asked.

22 In that situation -- even if we get to the merits -- and  
23 again, I apologize. We can't because it's simply not been  
24 preserved. It still would not be preempted. It would not be  
25 unconstitutional. And -- and that -- and that argument should

1 not avail them to avoid the three counts of animal cruelty for  
2 which he was convicted.

3 And this did go to a jury trial, and I will mention the  
4 dog. The dog did walk in there, by the way. It was a strange  
5 thing that the Greenville County Sheriff's Office had a -- I  
6 think it was a brown poodle, but they had it out. They do an  
7 outreach. Now, this whole thing where he frolicked along with  
8 the -- it just walked very quietly in front of all these --

9 THE COURT: Did anybody make a motion for a mistrial?

10 MR. ANTLEY: I don't recall any motion for a mistrial.

11 THE COURT: The record will reflect it.

12 MR. ANTLEY: And -- but -- but it was a very brief  
13 moment. And, frankly, the judge is up in a place kind of like  
14 yours. I think he has a door where you come to the side.  
15 There wasn't a lot of time for him to jump down and hurdle the  
16 bench and sit there and grab the dog, and what did happen is a  
17 -- is a constable was back there and he just very -- the dog  
18 didn't bark or anything. It just walked through. He grabbed  
19 the dog, walked back. We're talking maybe a 40-second  
20 interval in a trial.

21 So even if you give -- if he'd have made a motion for a  
22 mistrial, Your Honor, there would be no abuse of discretion  
23 for not granting it. It was just not the type of thing that  
24 would do that.

25 With regard to vagueness, again, we have the

1 preservation. The constitutionality issue, preservation on  
2 the thing, but here we get into a situation in which, you  
3 know, the law is clear that when we talk about challenges of  
4 vagueness, it's got to be (a) in light of the complaining  
5 party's conduct and the facts of the case at hand.

6 This story about what happens if you're trailering a  
7 horse from Pickens to Greenville, it doesn't matter because  
8 this isn't about trailering a horse. This is about having  
9 trash, refuse, and feces all over the house and letting the  
10 dogs live there and some in some apparent bad medical  
11 condition. Also, yeah, the statute is not invalid simply  
12 because it may arguably be vague in a hypothetical instance  
13 and, also, courts must indulge every presumption in favor of  
14 validity and resolve any doubt in favor of the  
15 constitutionality of an ordinance.

16 And finally, facts that a statute -- the fact that a  
17 statute applies in a wide variety of situations in general  
18 language, they must necessarily use words of general meaning,  
19 and they don't render it invalid. And if -- if -- under his  
20 theory, the county ordinance says that any person who -- any  
21 person who abuses an animal, aids another in abuse by acting  
22 or failing to act shall be in violation of this section. This  
23 includes failing to provide adequate care. This includes  
24 failing to provide adequate shelter, sustenance, space,  
25 exercise, bedding, and sanitary conditions for the animal.

1 Not only that, they go to the ordinance and this is up --  
2 these are attached to my brief as to what the ordinance said.  
3 That was Section 419 -- 4-19 that he was charged under. Care  
4 is defined as attention to the needs of an animal, including  
5 but not limited to adequate water, food, shelter, bedding,  
6 sanitary condition, ventilation, space, whatnot.

7 And then finally in Section 4-11 of our ordinance as  
8 well, which is also an exhibit to the thing, it was one of the  
9 charges, which, by the way, the charges -- the jury -- this  
10 was all charged to the jury without objection.

11 Animal living space, including shelter, exercise area,  
12 contaminated by health hazards or irritants, items or  
13 conditions that endanger an animal, including but not limited  
14 to, excessive animal waste. We had some of that, but we also  
15 had some excessive human waste, which is a first.

16 MR. LYLES: Your Honor, that is completely not true, and  
17 I object to him testifying.

18 MR. ANTLEY: Your Honor, there are pictures of the  
19 bathroom in there.

20 MR. LYLES: I'm --

21 THE COURT: Stop. Guys, this is a record on appeal. I  
22 can look at it and tell whether or not. It's on appeal.

23 MR. ANTLEY: There was next (b) garbage, trash, or  
24 effluent. There was certainly garbage and trash all over.  
25 Fumes, foul or noxious odor. I don't need an expert to know

1 if there's a foul odor. Decaying material, and things of this  
2 nature, Your Honor.

3 And I bring this up because the idea about this vagueness  
4 thing is to some idea that a person of reasonable intelligence  
5 would be on notice of what is or is not a crime, but it  
6 doesn't have to be so written down to the T. That you've got  
7 to look at the whole ordinance as a whole, and you can go from  
8 there. If a reasonable -- reasonable people can then glean  
9 from there what constitutes the conditions that warrant a  
10 conviction under this thing.

11 And if you look at the whole thing, what we're talking  
12 about is -- and by the way, it is a community standard too,  
13 like me telling -- you know, having this kind of excessive  
14 problem in there didn't require any more proof. The ordinance  
15 didn't require any more proof. A lot of proof was put in  
16 there and the jury made their verdict, and that was that on  
17 that issue, Your Honor.

18 As far as -- I'm trying to think if there were any other  
19 -- there were other issues he brought up in his brief, which  
20 included he did say the dog picture. He said that it's --  
21 it's -- that it was unfairly prejudicial. Your Honor,  
22 discretion. The trial court has the ultimate discretion in  
23 being able to determine whether or not to admit evidence.

24 The probative value of that particular picture was that  
25 -- wasn't that we were trying to prove that Mr. Zieminski's

1 conditions that he subjected them to caused that condition to  
2 exist. It was more important to show that a dog in that  
3 condition, without flesh to even protect its tissue, its  
4 muscle and everything, was in this -- this house in this  
5 condition.

6 And I mean to that, that's very -- that -- that's got a  
7 highly probative value on whether or not that dog was  
8 subjected to animal cruelty under the ordinance, and certainly  
9 it's within this Court's discretion to determine that that  
10 probative value wasn't substantially outweighed by the  
11 potential for prejudicial impact because it's not just if it's  
12 outweighed, it's got to be substantially outweighed. And  
13 again, deference has got -- got -- deference to discretion of  
14 the magistrate judge does -- is supposed to be applied there.

15 Let's talk about the dog. There's nothing in the  
16 ordinance that requires any type of expert testimony. People  
17 of common knowledge, people of regular knowledge could apply  
18 these facts to the law and reach a verdict, and that's what  
19 happened in this situation.

20 And then finally, the magistrate's return. The  
21 magistrate's return actually includes this return, as well as  
22 the exhibits that he sent that were physical exhibits that are  
23 in that file. To the extent anybody thinks that the record is  
24 inadequate, two things.

25 One is that the law really does put the burden on the

1 appellant to ensure that you, as the appellate court judge,  
2 has an adequate record from which you can determine the issues  
3 and the solemn issues that they bring up. It's just what the  
4 law is, and we maintain that to the extent that this record is  
5 inadequate, that -- that's the appellant's job to have fixed  
6 that or to have accommodated it. That's their job.

7 Secondly, with regard to the return itself, if it's  
8 deemed that what the magistrate court sent up is inadequate,  
9 the remedy is in the statute, and it's that the Court can ask  
10 the magistrate judge for more, for more in the return, I need  
11 more. It's sitting there in the statute.

12 In fact, there's case law. I can cite one case, *Chapman*  
13 *Computer Parts and Repairs, Inc.* case. That's 513 S.E.2d 120.  
14 Remedy for an inadequate return from a magistrate is not a new  
15 trial, but a circuit court does have -- under the statute if  
16 it deems to ask for it, can ask for and require an amended  
17 return if there's more information that the Court would need.

18 There's no requirement under the statute that there be a  
19 transcript when it comes back from the magistrate court. In  
20 fact, we all know the practice in magistrate court. There  
21 aren't court reporters there, and there's a recording device.  
22 And we know there's certain magistrates where people bring in  
23 their own court reporter or somebody to record it, because the  
24 amount of money the magistrates have to have recording devices  
25 is not great anyway.

1           Again, people do make their own records out of -- or  
2 produce ability to make a record, but there's nothing in the  
3 statute that requires a transcript of any sort. I looked up  
4 -- I looked for case law. There's just none. The return is  
5 what you've got in front of you. That's the record.

6           But aside from that, Your Honor, those would be the  
7 reasons why we think that the jury received -- and they  
8 received the evidence and made a good verdict, and that should  
9 be upheld.

10           THE COURT: Thank you, sir.

11           Briefly.

12           MR. LYLES: The two things that you've got to remember,  
13 questions of statutory interpretations are questions of law,  
14 which are subject to *de novo* review, and the Court is free to  
15 decide without any deference to the court below.

16           Secondly, penal statutes are to be strictly construed.  
17 The rules of lenity applies when a criminal statute is  
18 ambiguous and requires any doubt about a statute's scope to be  
19 resolved in the defendant's favor. And the cases go on to say  
20 that one of the foundations of the rule of lenity is that the  
21 concept of fair notice, the idea that those trying to walk the  
22 straight and narrow are entitled to know where the line is  
23 drawn between innocent conduct and illegality.

24           In this case, the County is arguing that you don't need  
25 an expert to say how much trash is too much. There was no

1 human feces in -- all over the place. I deny that. And also  
2 he -- he said the sheriff's deputy was blown away. The  
3 sheriff's deputy didn't -- didn't testify. So that's outside  
4 the record.

5 But the statute says the conditions must endanger or pose  
6 a risk to an animal's health in order to meet the definitions  
7 of unsanitary. How can you say that those conditions are  
8 unhealthy without an expert on veterinary medicine? My client  
9 lived there. He's healthy.

10 If you just want to go on common sense and have no  
11 medical testimony whatsoever, there's all kind of arguments we  
12 can make, but the fact is, I'm not an expert. You're not an  
13 expert. He's not an expert. My client's not an expert. Only  
14 an expert could say how much is too much and what's unsanitary  
15 and what's not.

16 Thank you, Your Honor.

17 THE COURT: Thank you. Was the Attorney General served  
18 with this case when you --

19 MR. LYLES: No.

20 THE COURT: All right. Thank you, gentlemen. I'll read  
21 it and give you my decision.

22 MR. ANTLEY: Thank you, Your Honor.

23 MR. LYLES: Thank you.

24 (WHEREUPON, the proceedings ended.)

25 --- END REQUESTED TRANSCRIPT ---

**UNIFORM ORDINANCE SUMMONS NO. 2309837**  
**COUNTY OF GREENVILLE VERSUS**

Last Name: Zemise First Name: Michael Middle Name: Carl  
 Street Address: W. Carby Dr City: Greenville State: SC Zip Code: 29605  
 Birth Date: 11-10-59 Race: W Sex: M Ht.: 5-10 Wt.: 200 Hair: Brn Eyes: Brn  
 Drivers License Number: SSA 205-88-0416 Other I.D.:

**YOU ARE SUMMONED TO APPEAR BEFORE THE COURT**

Magistrate M. Stokes A.M.   
 Municipal Judge 2-25-20 9:00 P.M.   
 Trial Date: 2-25-20 Trial Time: 9:00  
 Street Address: 201 Trullinger Dr. Room: City: Greenville Zip Code: SC 29670  
 Mailing Address (if different): City: Zip Code:

**FOR A TRIAL CONCERNING VIOLATION OF  
 COUNTY OF GREENVILLE**

Ordinance Sec. No.: 4-19 Ordinance Description: Crash to Animals (Living Conditions)  
 Arrest Date: 8-5-20 Arrest Time: 1:00 A.M.  P.M.   
 Arrest Location: Summer Park Rd Greenville, S.C.  
 If different from citation date:  
 Violation Date: 8-25-20 Violation Time: 1:30 A.M.  P.M.   
 Violation Location: Carby Dr  
 Issuing Officer: D. Harper Title/Rank: Officer Bond Amount: \$100.00

Bond Received: M. Stokes Date: 9/1/20 Received by:  
 Presiding Judge: Disposition Date:

Defendant:  Did Not  Did Appear  
 Forfeited Bond  Dismissed  Nolo Prosequi  
 Pled Guilty  Nolo Contendere  
 Bench Trial  Jury Trial  Guilty  Not Guilty

Fine Imposed: \$25 Suspended: 20 days consecutive Assessments: Total Collected:  
 Jail Term: Suspended: Committed To:

Signature: [Signature] Date:

UNIFORM ORDINANCE SUMMONS NO. 2309638  
COUNTY OF GREENVILLE VERSUS

Last Name: Ziminski First Name: Michael Middle Name: Carl  
Street Address: 415 Conroy Cir City: Greenville State: SC Zip Code: 29605  
Birth Date: 12/10/77 Race: W Sex: M HT: 5-10 WT: 160 Hair: Blk Eyes: Brn  
Drivers License Number: 307 50288 0466 Other I.D.:

YOU ARE SUMMONED TO APPEAR BEFORE THE COURT

Magistrate M. Stokes A.M.   
 Municipal Judge Trial Date: 2-22-20 Trial Time: 9:00 P.M.

Street Address: 201 Matthews Dr Room: City: Greenville

Mailing Address (if different): City: Greenville SC Zip Code: 29606

FOR A TRIAL CONCERNING VIOLATION OF  
COUNTY OF GREENVILLE

Ordinance Sec. No.: 25-10 Ordinance Description: Cruelty to Animals  
Living Container  
Arrest Date: 1/10/20 Arrest Time: 1:45 A.M.   
P.M.  Arrest Location: Furman Hall Rd  
Greenville, SC

If different from citation date:  
Violation Date: 2-18-20 Violation Time: 12:30 A.M.   
P.M.  Violation Location: Conroy Cir

Issuing Officer: P. Hoffer Title/Rank: Officer Bond Amount: \$1000

Bond Received: M. Stokes Date: 2/1/20 Received by: [Signature]

Presiding Judge: Disposition Date:

Defendant:  Did Not Appear  Did Appear  
 Forfeited Bond  Dismissed  Nolo Prosequi  
 Pled Guilty  Nolo Contendere  
 Bench Trial  Jury Trial  Guilty  Not Guilty

Fine Imposed: \$25 Suspended: Total Collected: \$25

Jail Term: 28 hrs Suspended: Committed To:

Certified Correct by: [Signature] Date: 2/1/20

**UNIFORM ORDINANCE SUMMONS NO. 2309636**  
**COUNTY OF GREENVILLE VERSUS**

Zieminski Michael Carl  
 Last Name First Name Middle Name  
115 Crosby Cir Greenville SC 29605  
 Street Address City State Zip Code  
12-12-99 W M 5-10 160 Brown Blue  
 Birth Date Race Sex Ht. Wt. Hair Eyes  
54 545-82-0466  
 Drivers License Number Other I.D.

**YOU ARE SUMMONED TO APPEAR BEFORE THE COURT**

Magistrate M. Stokes A.M.   
 Municipal Judge Trial Date 8-25-22 Trial Time 9:00 P.M.   
901 Truittboro Dr Street Address Room City SC 29605 Zip Code  
 Mailing Address (if different) City Zip Code

**FOR A TRIAL CONCERNING VIOLATION OF  
 COUNTY OF GREENVILLE**

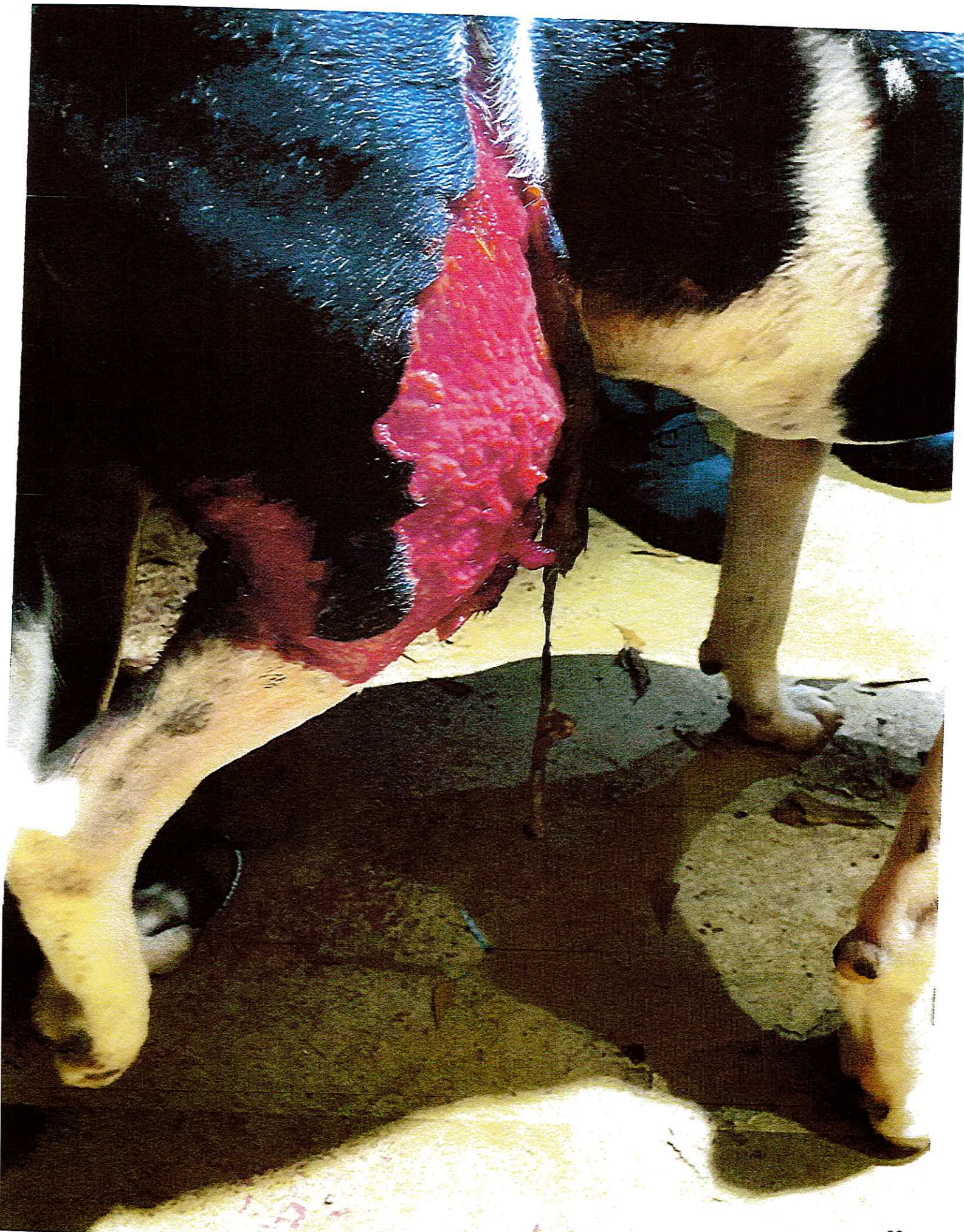
H-19 Crack to Aminals  
 Ordinance Sec. No. Ordinance/Description  
8-5-22 1145 A.M.  P.M.  Francis Hall Rd  
 Arrest Date Arrest Time Arrest Location Greenville, S.C.

If different from citation date:  
2-28-22 0130 A.M.  P.M.  Crosby Cir.  
 Violation Date Violation Time Violation Location  
D. Harper GLSC 99 \$1,100.00  
 Issuing Officer Title/Rank Bond Amount

\$ \_\_\_\_\_ Date \_\_\_\_\_ Received by \_\_\_\_\_  
 Bond Received Date Received by  
8/15/22 9/1/22  
 Presiding Judge Disposition Date

Defendant:  Did Not  Did Appear  
 Forfeited Bond  Dismissed  Nolle Prosequi  
 Pled Guilty  Nolo Contendere  
 Bench Trial  Jury Trial  Guilty  Not Guilty

\$ 925 \$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ 10/1/22  
 Fine Imposed Suspended Assessments Total Collected  
20 dp credits Suspended Committed To



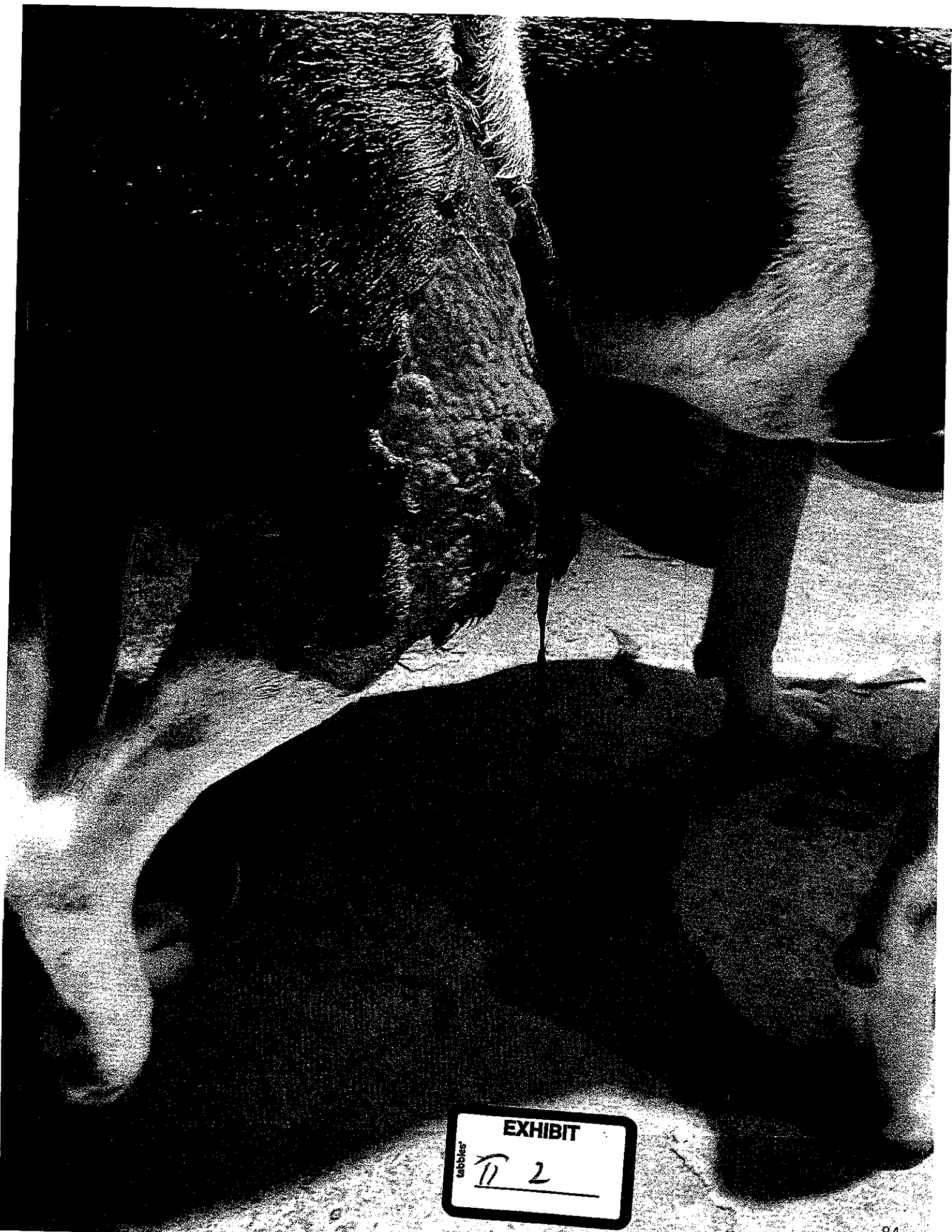


EXHIBIT  
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Π 2

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )  
State of South Carolina, )  
Respondent, )  
vs. )  
Michael Carl Zieminski, )  
Appellant )

IN THE COURT OF COMMON PLEAS

NOTICE OF INTENT TO APPEAL  
from Summary Court for Greenville County

Summary Court Case Nos.  
2309636  
2309637  
2309638

Circuit Court No.:

Pursuant to § 18-3-30, South Carolina Code of Laws, Appellant gives his notice that he intends to appeal the three sentences he received from the Summary Court on September 1, 2022.

I.

That on or about the 25<sup>th</sup> day of February, 2022, Plaintiff Appellant Michael Zieminski (Michael) was arrested at his home on charges unrelated to these cases. He was taken into custody by Greenville County Sheriff deputies. They discovered three dogs and three cats in his home so they had dispatch contact Animal Control. The animal control officers found the three dogs, but not the three cats. Later, when Michael went to retrieve his dogs he was served with three court summons charging him with cruelty to animals in violation of a County Ordinance. The cases were consolidated and tried before a jury in the Greenville County Summary Court, where no expert testimony was presented by the County, Michael was convicted on all three charges and sentenced alternatively to fines or consecutive terms of imprisonment.

## II.

This appeal should be granted as the Summary Court Judge should have granted Michael's motion for a directed verdict of acquittal on all charges because the Greenville County Code of Ordinances, § 4-19 (4) violates the South Carolina Constitution by, *inter alia*, making it illegal to keep animals in an unsanitary residence, if they could be adversely affected, which is legal behavior under South Carolina statutory law, specifically South Carolina Code of Laws § 47-1-40 (A). A county can not make illegal that which is legal under State law.

## III.

This appeal should be granted as the Summary Court Judge should have granted Michael's motion for a directed verdict of acquittal on all charges because the Greenville County Code of Ordinances, § 4-19 (4) violates the South Carolina Constitution as it is preempted by our State's law because there are extensive statutes in the South Carolina Code of Laws that address, *inter alia*, all generally known forms of animal cruelty that occur in the State. There are no forms of animal cruelty that are unique to one county.

## IV.

The charges should have been dismissed because the Greenville County Ordinance, specifically § 4-19 violates the South Carolina Constitution and the United States Constitution under the void for vagueness doctrine. The county ordinance essentially makes it illegal to have garbage or bad smells in one's house, if there are also animals in the house that could be adversely affected, without enumerating any standards that would allow for an objective determination of whether a specific set of conditions found in a residence violate the ordinance. It fails to provide any measurements such that one can determine how much trash is too much trash or how badly a smell has to be, to be illegal.

## V.

Michael's convictions should be overturned, as his motions for directed verdicts should have been granted because the State failed to introduce any testimony or other evidence from a veterinary expert. The State offered photographic evidence and the testimony of an animal control officer and a building codes inspector. Neither has any medical training or veterinary medicine training. Thus, the State simply invited the jurors to act as their own veterinary experts. The ordinance that Michael was charged with violating requires that the conditions claimed by the State to be unsanitary must "endanger or pose a risk to an animal's health" in order to be illegal. Yet no evidence was presented that could properly allow the fact-finder to make that determination, thus, casting the jurors' boat onto an ocean of conjecture and surmise.

## VI.

The State should not have been allowed to introduce testimony that the house in question has been condemned. Michael timely objected because condemnation is a procedure related to human safety, not animal safety. The prejudice of informing the jury that such an administrative determination, not a judicial determination, had been made far outweighed its probative value.

## VII.

The State should not have been allowed to introduce two inflammatory photographs, which depicted close-ups of one of the dog's leg. (Exhibit A & B) That leg had an unsightly medical condition that was not related to the act of animal cruelty at issue. Michael filed a Motion in Limine before trial and timely objected because there was no causal connection between the alleged acts of the accused and the medical condition depicted. With no expert medical testimony to guide them, the jury members likely blamed Michael for the condition.

WHEREFORE, Plaintiff/Respondent prays for judgment, as follows:

1. For an order granting the appeal and acquitting him of the charges and vacating the sentences that were handed-down against him;
2. For an award of costs and
3. For such other and further relief as the Court may deem just, equitable and proper.

THE LYLES LAW FIRM, LLC

By: s/ Joseph S. Lyles  
S.C. Bar No. 3462  
Attorney for Plaintiff  
P.O. Box 915  
Travelers Rest, SC 29690  
864-834-8111

September 7, 2022  
Travelers Rest, S.C.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 County of Greenville )  
 )  
 APPELLANT )  
 )  
 vs. )  
 )  
 Michael Carl Zieminski )  
 )  
 RESPONDENT )  
 )

IN THE CORT OF COMMON PLEAS

C.A. No.: 2022-CP-23-04923  
 2309636; 2309637; 2309638

23 JUN 9 AM 8:26  
 Paul Winkler/Assistant Clerk SC

MAGISTRATE'S RETURN

These cases were tried before a jury on September 1, 2022, on three counts of cruelty to animals due to living conditions pursuant to the Greenville County Ordinance prohibiting Cruelty to Animals.

The County presented the Officer making the tickets and the officer testified as to the conditions he found. The officer also presented photographs taken at the time of the seizure that are attached hereto

At the close of the County's case the defendants moved for a directed verdict. This Court denied this motion.

The defendant presented its case to the jury.

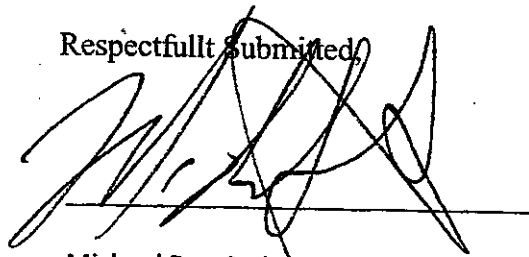
The case was turned over to the jury. Neither party objected to the jury charges issued by this court.

The jury returned a guilty verdict on all three charged. The court sentenced the

defendant to fines or jail time. The defendant was given a scheduled time payment for the payment of his fines.

The defendant did not raise the constitutional questions at the time of trial thus he seeks to use to reverse this case.

Respectfullt Submitted,

A handwritten signature in black ink, appearing to read "Michael Don Stokes", written over a horizontal line.

Michael Don Stokes

Greenville County Magistrate

Travelers Rest, South Carolina  
June 8, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	Case No. 2022-CP-23-04923
The State of South Carolina,	)	
	)	
Respondent,	)	NOTICE OF INTENT TO APPEAL
vs.	)	
Michael Carl Zieminski,	)	
	)	
Appellant.	)	

The above-named APPELLANT intends to appeal the decision of the Honorable R. Lawton McIntosh issued on July 20, 2023, denying the Appellant's appeal of three convictions from Summary Court, and the decision on Appellant's Motion for Reconsideration filed July 25, 2023, in the above-captioned matter. Appellant's counsel received notice of the Court's later order on August 1, 2023.

THE LYLES LAW FIRM, LLC

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 (864) 610-2033 (fax)  
 Attorney for Appellant

August 3, 2023  
 Travelers Rest, SC

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

RECEIVED

AUG 08 2023

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Trial Court Case No. 2022-CP-23-04923

The State of South Carolina, ..... Plaintiff/Respondent,

v.


Michael Carl Zieminski, ..... Defendant/Appellant.

NOTICE OF APPEAL

Michael Carl Zieminski appeals the following decisions of the Honorable R. Lawton McIntosh:

1. Order Affirming Magistrate Court Judgment and Appellants' Convictions dated July 20, 2023, denying appeal. Defendant/Appellant received written notice of entry of this judgment on July 20, 2023;
2. Order dated August 1, 2023, denying SCRCF 59 motion. Defendant/Appellant received notice of entry of this judgment on August 1, 2023.

August 4, 2023

  
 Joseph S. Lyles  
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 (864) 834-8111  
 Attorney for Appellant

Other Counsel of Record:

Christopher R. Antley  
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Greenville, SC 29601  
(864) 467-7110  
Attorney for Respondent

RECEIVED

Aug 22 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Trial Court Case No. 2022-CP-23-04923  
Appellate Case No. 2023-001265

The State,

Respondent,

v.

Michael Carl Zieminski,

Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material and complies with Rule 210(g), SCACR.

August 22, 2024

  
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Attorney for Respondent