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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

1 DRAGON'S ASCENT VIDEO GAMING MACHINE, SC GAMES OF SKILL, LLC — Respondents,

v.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION (SLED) — Appellant.

AMICUS CURIAE BRIEF OF ATTORNEY GENERAL OF SOUTH CAROLINA IN SUPPORT OF SLED

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INTEREST OF AMICUS CURIAE

In this appeal, SLED argues that the Dragon's Ascent video machine seized is violative of § 12-21-2710 and is subject to forfeiture. One of SLED's arguments, and the one we address herein, is that the machine seized is illegal pursuant to § 12-21-2710's language encompassing "any machine or device licensed pursuant to section 12-21-2720 and used for gambling. . . ." (emphasis added). The Magistrate agreed with SLED, but the Circuit Court reversed. This was error.

We submit this amicus brief as chief prosecutor of South Carolina to concur with SLED and the Magistrate's court in this regard. In our view, the Magistrate was right in concluding that the seized Dragon's Ascent machine was "used for gambling." As SLED correctly argues, the circuit court, by allowing cash payouts and gambling on video devices, may well have opened the door to yet another round of the spread of video gambling in South Carolina. We submit such would be a disaster. We thus ask that the Circuit Court decision be reversed.

As the State's chief prosecuting officer pursuant to Art. V, § 24 of the South Carolina Constitution, as well as its chief legal officer, the Attorney General is of the view that video machines "used for gambling" are illegal. Such was the case here. It has long been recognized that the "state has an important interest in ensuring that property is not used unlawfully." *Pooler v. Wilson*, 452 F.Supp. 428, 436 (D.S.C. 2020) (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974)). It is the Attorney General's duty and obligation to ensure that the law is enforced, and the public interest is protected. See *State ex rel. Condon v. Hodges*, 349 S.C. 232, 239-240, 562 S.E.2d 623, 627 (2002). Enforcement of § 12-21-2710 protects the public. Thus, we believe that any

machine "used for gambling" is contraband pursuant to § 12-21-2710, thereby requiring seizure of the Dragon's Ascent machine.

The definition of "gambling," as employed in the phrase "used for gambling," contained in § 12-21-2710, is enunciated in the landmark decision, *Town of Mt. Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012). There, the Court defined "gambling" in South Carolina as consisting of whether money or a thing of value is being wagered or bet on the outcome of an event. As Justice Pleicones wrote "[w]hether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game's outcome." 401 S.C. 533, 747 S.E.2d at 838. The Attorney General participated in and prevailed in the *Chimento* case, arguing that the proper definition of "gambling" is exactly what Justice Pleicones recognized it to be. This knowledge of *Chimento* may be particularly beneficial to the Court in resolving this matter. Moreover, the Attorney General has represented the State in many cases regarding the scope of § 12-21-2710 and has issued numerous advisory opinions thereupon. Thus, we believe participation as an amicus curiae to assert that *Chimento* is controlling will be of considerable benefit to the Court.

SUMMARY OF ARGUMENT

For decades, the State has struggled with the problem of amusement devices, or so-called "legal" machines – seemingly innocent – being used as an instrument for gambling. When such use for gambling occurs, it is a circumvention of state law. See *Pooler, supra.* Regardless of whether a machine is a game of chance or skill, legal or illegal, betting on the outcome of games on that machine is illegal. See *State v. Kizer*, 164 S.C. 383, 162 S.E. 444, 446 (1932), overruled on other grounds, *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000) [In 1931, the Legislature "passed a very far-reaching statute (37 St. at Large, p. 367) against all forms of gambling devices, vending machines which could be operated as gambling devices, and all games of chance."] (emphasis added). Thus, efforts were made, even back then, with the passage of this comprehensive anti-gambling statute, to address the issue of vending machines being used for gambling. To close this loophole, in 1931, the Legislature thus required a uniform and fair return for every coin inserted in such machines. However, as technology has developed far beyond simple vending machines into the world of complex electronic, computerized devices, the problem of machines being used for gambling has continued, and even grown.

To address this burgeoning problem, in Act No. 125 of 1999 (specifically § 12-21-2710), the Legislature in plain and unmistakable language made illegal and subject to forfeiture any machine or device ". . . licensed pursuant to section 12-21-2720 and used for gambling." We contend this phrase was included to ensure that even so-called "games of skill" or games, such as those played for amusement – which might otherwise be legal – would become illegal and thus subject to confiscation if used for gambling. See *People v. Schapiro*, 77 N.Y.S.2d 726, 730 (1948) [game of skill in which "a player wins or loses,

depending on the outcome of the contingent event," is a violation of the gambling statute]; *State v. Doe*, 263 N.W. 529, 529-30 (Iowa 1935) ["Many things or articles may be innocent in themselves, but may fall under the condemnation of the law by reason of the manner of their use. . . . [I]t is on this theory that the court undoubtedly acted in the condemnation of these machines, to wit, that as a matter of fact they were being used in such a way as that it was a violation of law."]. Thus, the State asserts that even legal machines which are used to violate the gambling laws, become illegal pursuant to the express language of § 12-21-2710.

The question then becomes what is the meaning of "gambling" as contained in § 12-21-2710? The Supreme Court's landmark decision in *Town of Mt. Pleasant v. Chimento* answers that question definitively. *Chimento* broadly defined "gambling" in South Carolina – not as dependent upon whether the machine or game in question is one of skill or chance – but whether betting or wagering on the outcome of that game has occurred. *Chimento's* definition of "gambling" is consistent with the common and ordinary meaning of the word, which the Court should apply. The *Chimento* case based its definition in part on the Court's much earlier decision in *State v. Scarlet Red*, 41 S.C.L. (Rich.) 8 (1853). There, the Court had concluded that the gambling statute could not be limited to games of chance only. Accordingly, "gambling" has long had a broad meaning in South Carolina, focused not on chance versus skill, but on betting or wagering on the outcome. Courts in other jurisdictions have likewise concluded that the definition of "gambling" in the phrase "used for gambling" must be defined in its broad or generic sense – that of staking money on an uncertain event. *State v. Berkman*, 74 N.E.2d 411, 413 (Ohio 1944). Once the Court in 2012 defined the term "gambling," based upon *Red*, that definition should have defined

"gambling" in the phrase "used for gambling" in § 12-21-2710 and should have governed this seizure in 2021.

It is obvious that if the Legislature had intended a more "technical" definition of "gambling," based upon chance, in the phrase "used for gambling," there would have been no need to insert that phrase in § 12-21-2710. The "technical" definition of "gambling" relates only to games predominantly of chance. "Chance" was thus already referenced in the statute, making machines which are games of chance illegal per se. See *Alexander v. Martin*, 192 S.C. 176, 6 S.E.2d 20, 23 (1939) ["It is clear that the law condemns any devices pertaining to games of chance, including whatever name or kind, except certain types of machines therein mentioned which are so constructed as to give a uniform and fair return in value for each coin deposited therein, and in which there is no element of chance."]. Therefore, the *Chimento* definition – which reflects the common and ordinary meaning – that of betting or wagering on any game, whether chance or skill – is controlling here. See Black's Law Dictionary, "Gambling," ("Betting" or "Wagering"). The Circuit Court failed to follow *Chimento*, decided a decade earlier, – as it should have done. It thus erred. If the *Chimento/Scarlet Red* definition had been applied, the Circuit Court would have agreed with the Magistrate and deemed the Dragon's Ascent machine illegal regardless of whether chance or skill governed this machine. Contrary to Respondents' suggestion otherwise, Respondents' Brief at 15, the Attorney General has not construed the word "gambling" in the phrase "used for gambling," in § 12-21-2710, in the context of the Court's decision in *Chimento*. We do not dispute that the "technical" meaning of "gambling" relates to "games of chance," but that is hardly the question here: what is at issue is the meaning of "gambling" in the phrase "used for gambling" in § 12-21-2710.

Section 12-21-2710, was enacted in 1999 in response to the onslaught of "video gambling in South Carolina, which mushroomed from a rather clandestine and inauspicious beginning in 1986 into a multi-billion dollar business by its demise in 2000." *Mims Amusement Co. v. South Carolina Law Enforcement Div.*, 366 S.C. 141, 146, 621 S.E.2d 344, 346 (2005). As seen below, the purpose of inserting the phrase "used for gambling" was to prevent circumvention of the gambling laws by turning an otherwise innocent machine or device into a gambling device. The General Assembly's inclusion of the phrase "used for gambling" would thus defeat any argument that games of skill or otherwise legal machines could never be seized or confiscated as gambling devices. See *Allendale Co. Sheriff's Office v. Two Chess Challenge II*, 361 S.C. 581, 606 S.E.2d 471 (2004) [requiring "machine-by-machine forfeiture process" of gambling devices]. See also *Albright v. Muncrief,* 176 S.W.2d 426 (1943) [innocent teletype machine converted to gambling device by betting on horse races]. In other words, in addition to making games of chance illegal per se and forfeitable, see *Alexander v. Martin, supra,* the Legislature also sought to close an obvious and longstanding loophole, dating back at least to 1931, in which so called "innocent" machines or devices were converted to gambling devices by wagering or betting thereupon. Relying upon this loophole, such devices had previously managed to escape being declared illegal. However, passage of § 12-21-2710 sought to bar such escape. The Circuit Court reopened the loophole and thus failed to give § 12-21-2710 its true meaning, as *Chimento* clearly dictated. In summary, the 1999 law was a clear reflection that cash payouts, as well as video machines which are used for gambling, are illegal in South Carolina. The circuit court decision, by reversing the Magistrate's ruling, opens the door to ignore these prohibitions and to revive video gambling in this State.

As historians have noted, "the forerunners of coin-operated gambling devices first appeared in the nineteenth century. For pennies or nickels, vending machines delivered candy, weighed people, told fortunes or played music" and "entrepreneurs realized that great profits could be made by converting vending machines into gambling devices." Rychlak, "Video Gambling Devices," 37 UCLA L. Rev. 555, 558-59 (1990). Similarly, there is considerable historical evidence that, in South Carolina, machines which were otherwise perfectly legal – such as chewing gum or mint machines – were being converted to illegal gaming devices by allowing gambling on such machines. Thus, in light of the well documented history and circumstances surrounding passage of § 12-21-2710, which will be detailed below, we request that the Court view this statute as remedial in nature, designed to protect the public pursuant to the State's police powers, and entitled to a broad interpretation, consistent with the law's purpose and design. See *Campbell v. Marion Co. Hosp. Dist.*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (2003) [a statute, such as FOIA, which is remedial in nature "should be liberally construed to carry out the purpose mandated by the legislature."].

In our view, the Court should not read the phrase "used for gambling" merely in isolation, but in light of the overarching design of Act 125 generally and § 12-21-2710 in particular – to clean up video gambling in South Carolina. We respectfully ask that this Court construe the phrase "used for gambling" in light of the circumstances surrounding passage of § 12-21-2710 and Act 125 of 1999. In short, the Legislature's purpose in inserting the phrase "used for gambling" would be altogether defeated if the word "gambling" did not encompass betting or wagering on various games of every variety. Accordingly, SLED and the Magistrate were correct in applying *Chimento's* broad and

commonly understood definition of "gambling" – based upon wagering or betting – to the phrase "used for gambling" as contained in § 12-21-2710. *Chimento* established the binding precedent to define "gambling" in statutes, Thus, the Circuit Court erred in rejecting this broad meaning and ignored the purpose leading to the passage of Act 125.

ARGUMENT

SLED's ARGUMENT REGARDING CHIMENTO IS CORRECT

At the outset, we emphasize that the Attorney General participated in and prevailed in the appeal of *Town of Mt. Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012). We believe this decision, and its definition of gambling – based upon wagering or betting – is crucial to the outcome here and that SLED and the magistrate correctly applied *Chimento* to the Dragon's Ascent seizure. The Circuit Court, in failing to follow *Chimento's* binding precedent, erred and unleashed the potential for gambling chaos.

In *Chimento*, the Attorney General successfully argued to the Supreme Court that whether activity constitutes "gambling" or "gaming" depends not upon whether such activity is a "game of skill" or one of "chance," but whether money or a thing of value is being wagered or bet on the game's outcome. *Chimento's* ruling is entirely consistent with the common and ordinary meaning of the word "gambling." The Supreme Court agreed with the Attorney General's position; Justice Pleicones, relying upon the *Scarlet Red* decision, wrote that "[g]ambling as defined in South Carolina includes betting money on the outcome of any 'game' whatsoever, regardless of the amount of skill involved in the game." *Chimento*, 401 S.C. at 532-33, 737 S.E.2d at 837 (emphasis added). It is particularly notable that the *Chimento* Court spoke of "gambling" in South Carolina generally, pursuant to the foregoing definition. The Court did not limit its definition to § 16-19-40. Fundamental principles of statutory construction dictate that no such limitation should be applied here. The *Chimento* Court employed historical examples to demonstrate clearly that this definition of "gambling" was not confined only to § 16-19-40, but was all

encompassing (citing *Red*). In short, gambling is gambling. If the *Chimento* Court had intended to limit its definition of "gambling" to § 16-19-40, it could easily have said so. Yet, it did not. Instead, it referred to gambling "in South Carolina."

Thus, *Chimento's* reliance upon the commonly understood meaning of "gambling" is governing here. The Magistrate in this case found that "[t]he Chimento Court held that although Texas Hold'em is a game in which skill predominates, a person 'games' or 'gambles' when money is wagered thereupon." Thus, as another authority has stated, "whether an activity is gaming or gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game's outcome." 38 Am. Jur.2d Gambling § 2 (citing *Chimento*); *Albright, supra*. As the Second Circuit held in *U.S. v. DiCristina*, 726 F.3d 92 (2nd Cir. 2013), "Texas Hold 'em" is "gambling" regardless of whether poker be considered a game of chance or one of skill. And, as was recognized by the Florida Court in *McBride v. State*, 22 So. 711, 713 (Fla. 1897), "[t]he consensus of the better opinions is that wagering, betting, or laying of money or other thing of value upon the transpiring of any event whatsoever, whether it be upon the result of a game of chance or upon a contest of skill, strength, speed or endurance, whereby one party gains and the other loses something for nothing, whether the parties betting be the actors in the event upon which their wager is laid or not, is gaming or gambling, within the meaning of these acts." Accordingly, the Magistrate here was correct. The Circuit Court was not and therefore erred. The definition of "gambling," which *Chimento* applied, governs with respect to § 12-21-2710.

Relying upon *Chimento*, the Magistrate properly found that § 12-21-2710 prohibits Dragon's Ascent's use as a gambling device. Notwithstanding the question whether

Dragon's Ascent is a game of chance or skill (and the Attorney General is in no position to comment upon that question), § 12-21-2710, nevertheless, prohibits the machine's use for "gambling," as defined by *Chimento*. In view of the fact that the Magistrate properly concluded that "a person 'gambles' when money is wagered in playing Dragon's Ascent, "such machine is illegal per se under the express language 'used for gambling as found in § 12-21-2710.'"

THE LEGISLATURE'S ENACTMENT OF SECTION 12-21-2710

Section 12-21-2710 of the South Carolina Code, enacted in 1999, in part of Act 125, provides as follows:

> [i]t is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game with a free play feature operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to section 12-21-2720 and used for gambling or any punch board, pull board or other device pertaining to games of chance of whatever name or kind, including those machines, board, or other devices that display different pictures, words or symbols, at different plays or different numbers, whether in words or figures or which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provision of this section do not extend to coin-operated non-payout pin tables, in line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance. . . .

(emphasis added). As was stated by the District Court in *Holliday v. Governor*, 78 F.Supp. 918, 924 (W.D.S.C. 1948), *aff'd*., 35 U.S. 803 (1948), "[i]t is the public policy of the State of South Carolina to suppress gambling. Gambling in all forms is illegal in South Carolina." (emphasis added). Further, in *Union Co. Sheriff's Office v. Henderson*, 395 S.C. 516, 519-20, 719 S.E.2d 665, 667 (2011), the Supreme Court explained that "Section 12-

21-2710 makes it unlawful to possess illegal gambling machines, even if they are not fully operational. The mere possession of gambling devices, or even their component parts, is unlawful." (citing *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000)). This statement by the Court in *Union County* reflects South Carolina's continuing policy prohibiting gambling in all forms.

As noted, earlier versions of a comprehensive anti-gambling law have been on the books since at least 1931. See *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 300, 534 S.E.2d 270, 271 (2000), overruled on other grounds, *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005). As the Court in *Westside* stated, "[i]n 1931, the General Assembly enacted a comprehensive statute outlawing the possession of all forms of gambling devices, including vending machines that could be operated as gambling devices." Of course, the 1931 law pre-dated video gambling. Even so, the 1931 statute was described in *State v. Kizer*, 164 S.C. 383, 162 S.E. 444, 446 (1932), overruled on other grounds in *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000) as "a very far-reaching statute." (quoting *Durant v. Bennett*, 54 F.3d 634, 635 (W.D.S.C. 1931)).

As noted, video gambling, among other forms of gambling, was addressed by Act No. 125 of 1999. The background for enactment of Act No. 125 was succinctly summarized in Op. S.C. Att'y Gen., 2000 WL 1205949 (May 8, 2000), as follows:

> [p]ursuant to Act 125, S.C. Code Ann. Section 12-21-2710, which makes certain gambling devices illegal, was amended by the General Assembly to include video gambling machines. Such provision was to take effect July 1, 2000 unless the voters in a statewide referendum voted to continue video gambling as legal in South Carolina. Prior to any election being held, the Supreme Court of South Carolina declared in *Joytime Distributors and Amusement Co. v. State*, 1999 WL 969280

> (October 14, 1999) [338 S.C. 634, 528 S.E.2d 647 (1999)] that the referendum of the statute [was] . . . unconstitutional as an unlawful delegation of legislative authority to the voters of South Carolina. The Court also ruled that the statute was severable and that Part 1 of Act No. 125 survived intact. Thus, § 12-21-2710, as amended by Act No. 125, [became] . . . effective at midnight of June 30, 2000.

This Court here is required to interpret the word "gambling" as used in § 12-21-2710. We believe the Magistrate applied the correct definition based upon *Chimento* and the Circuit Court the wrong one ignoring that decision. Of course, the cardinal rule as to the meaning of a statute "is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The language used in a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Jones v. State Farm Auto Ins. Co.,* 364 S.C. 222, 230-32, 612 S.E.2d 719, 723-24 (Ct. App. 2005). The Court looks to the language as a whole in light of its manifest purpose. Id.

In determining the construction of words or phrases in a statute, such are not confined to the abstract, technical meaning of the words employed, but the Court must look to the ordinary and popular meaning also. *City of Chas. v. Oliver*, 16 S.C. 47, 52 (1881). A word and its meaning must be interpreted not in isolation, but in conjunction with the purpose of the whole statute and the policy of the law. *Hernandez-Zuniga v. Tickle,* 374 S.C. 235, 247-48, 647 S.E.2d 691, 697 (Ct. App. 2007). Provisions of the same Act must be read in harmony. Generally speaking, a gambling forfeiture statute is "remedial, not punitive....", and thus must be broadly construed. *U.S. v. Land, Winston Co.*, 221 F.3d 1194, 1198 (11th Cir. 2000). As the South Carolina Supreme Court observed in *Mims Amusement Co. v. SLED*, 366 S.C. 141, 147, 621 S.E.2d 344, 347 (2005), "[g]aming

devices in general have long been recognized as legitimately within the police power of the State to control or take by forfeiture. . . . This Court consistently has deferred to the Legislature's determination of which gaming devices must be sacrificed for the public welfare." Thus, § 12-21-2710 should be deemed as particularly broad in scope, and construed in accordance with this State's policy against gambling in all forms. Wagering on so-called games of skill is just as much gambling as betting on games of chance. Deference must be afforded to the Legislature's determination that machines "used for gambling" must be forfeited.

It is also important to note that § 12-21-2710 was just one part of Act 125 of 1999. This provision was enacted as Section 1 of the Act. Section 5 reenacts § 16-19-40. Importantly, therefore § 16-19-40 is part of the same Act as § 12-21-2710. Both § 12-21-2710 and § 16-19-40 employ the same language: "any machine or device licensed pursuant to Section 12-21-2720 and used for gambling." These sections thus must be construed in harmony with one another and they easily may be. Clearly, identical words which are in different parts of the same Act are intended to have the same meaning. *Oakley v. Bft. County Assessor*, 435 S.C. 462, 467, 868 S.E.2d 384, 386 (Ct. App. 2021). Accordingly, even if the definition of "gambling" contained in *Chimento* could somehow be limited to § 16-19-40, it would make no sense to have the word "gambling" mean different things in the same statute. See e.g. *Busby v. State Farm Mut. Auto Ins. Co.*, 280 S.C. 330, 333, 312 S.E.2d 716, 718 (Ct. App. 1984) ["Where the same word is used more than once in a statute it is presumed to have the same meaning throughout to avoid an absurd result."]. In this instance, *Chimento* has provided a clear definition of "gambling" and it is the one which should be applied here.

Thus, this comprehensive legislation, designed to bar video gambling in Act No. 125, contained for the first time the language "any machine or device licensed pursuant to § 12-21-2720 and used for gambling. . . ." It is noteworthy that such language did not specify that a machine "used for gambling" must be a "game of chance." This is in contrast to other pre-existing parts of § 12-21-2710 which do employ such "chance" language. It is well recognized that the expression in a statute of one thing "'implies the exclusion of another, or of the alternative.'" *Hodges v. Rainey*, *supra*. Moreover, if the General Assembly had intended the word "gambling" to be used in its technical sense – relating to "games of chance" – it would have said so, and there would have been no real purpose in inserting the phrase "used for gambling." Compare *SLED v. 1-Speedmaster*, 397 S.C. 94, 99, 723 S.E.2d 809, 812 (Ct. App. 2011) [gambling "necessarily encompasses the element of chance"]. In light of the broad and sweeping purpose of the General Assembly in enacting Act No. 125 of 1999, we do not think the Legislature meant to leave the loophole with respect to purported games of skill which are "used for gambling" through betting or wagering. To have done so would have been inconsistent with the General Assembly's remedial purpose in enacting § 12-21-2710 and Act 125 of 1999.

Further, the Court should apply the plain meaning of a word or phrase used in a statute. *Heritage Fed. Sav. And Loan v. Eagle Lake Condominiums*, 318 S.C. 535, 541, 458 S.E.2d 561, 565 (Ct. App. 1995). While the term "gambling" certainly has a technical meaning, the word in its simplest form means "the practice or activity of betting; the practice of risking money or other stakes in a game or bet." Merriam-Webster Dictionary. *Chimento*, decided after *Speedmaster* (which recognized that *Chimento* was pending), applied this common and ordinary dictionary meaning, emphasizing that this definition

constitutes "gambling" in South Carolina. Therefore, reliance upon *Speedmaster* is not dispositive in light of the later decision in *Chimento.* Thus, the common and ordinary meaning of the word "gambling" is applicable to the phrase "used for gambling" in § 12-21-2710. *State v. Berkman, supra*. Otherwise, wagering or betting on so-called "games of skill" could escape the State's gambling laws. Such is inconsistent with the Legislature's purpose.

Furthermore, "[i]t is proper to consider the title or caption of an action aid of construction to show the intent of the legislature[.]" *Joytime*, 338 S.C. at 649, 528 S.E.2d at 655 (citing *Lindsay v. Southern Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 188 S.E.2d 374 (1972)). See also *Father v. S.C. Dept. of Soc. Servs*, 345 S.C. 57, 66-67, 545 S.E.2d 523, 528 (Ct. App. 2001), *aff'd*., 358 S.C. 254, 578 S.E.2d 11 (2003). In this instance, the title of Act No. 125 is particularly illuminating. Such title states that the purpose of Act No. 125 was, in part, "To Amend Sections 16-19-40 And 16-19-50, Relating To The Offense of Gambling, So As To Extend These Offenses Specifically To Playing or Maintaining Any Licensed Coin-Operated Machine or Device Used For Gambling Purposes. . . ." Therefore, it is clear that the General Assembly sought to "extend" the prohibition of gambling beyond § 16-19-40 (and 16-19-50) to encompass video gaming machines used for gambling. Accordingly, the fundamental definition of "gambling" set forth in *Chimento* and *Scarlet Red* is made applicable to video gaming machines and other machines by Act No. 125 of 1999.

POWELL v. RED CARPET LOUNGE

Before our discussion of the *Chimento* case, we first look to historical background. The South Carolina Supreme Court's decision in *Powell v. Red Carpet Lounge*, 280 S.C.

142, 311 S.E.2d 719 (1984), decided prior to the enactment of Act No. 125 of 1999, is considerably enlightening in this regard. As will be seen, *Powell* may be deemed to have served as a basis for the insertion of the language "used for gambling" in Act No. 125 of 1999. In *Powell*, the Court addressed the issue of whether a legal machine had been made illegal by being used for gambling. However, the Court did not decide this question because the issue was not properly raised. Nevertheless, the Court's discussion is certainly enlightening.

The *Powell* Court first noted that the video machines in that case were seized on the basis that the machines themselves were per se illegal. However, the Court held that, pursuant to then-existing § 16-19-60, coin-operated nonpayout machines with a free play feature had been made legal by the General Assembly. Thus, according to the Court, the machines themselves were not illegal per se under the predecessor statute to § 12-21-2710.

Nonetheless, the Court sua sponte raised the additional question of whether the legal machines had been used for gambling, thereby possibly transforming a legal machine into an illegal one. In the view of the *Powell* Court, this issue however, had not been properly raised by the parties and thus could not be addressed. The Court stated that

> [w]hile these machines like dice and decks of cards might be used for the purpose of gambling, there is no contention in this proceeding that the machines were used for that purpose or other illegal purpose.

280 S.C. at 146, 311 S.E.2d at 721.

Thus, the Court recognized that a "legal" machine which was used for gambling might thereby become illegal. In this regard, as was recognized in Op. S.C. Att'y Gen., 2000 WL 33120661 (December 7, 2000), *Powell* certainly acknowledged the possibility

that a legal machine could be made illegal if used for gambling. In that opinion, it was stated:

> In *Powell v. Red Carpet Lounge*, 280 S.C. 142, 311 S.E.2d 719 (1984), the Supreme Court held that certain "in-line pin games" were exempted from summary destruction pursuant to § 52-15-10 and 52-15-20 [predecessors of § 12-21-2710, § 12-21-2712], but acknowledged that the machines could be used for the purpose of gambling and inferred that had there been evidence of such, the outcome of the case may have been different.

The 2000 Attorney General's opinion referenced an earlier Attorney General opinion which had concluded that ". . . poker chips, which are in and of themselves legal to possess, when used in violation of the gambling laws, are subject to confiscation and destruction pursuant to § 16-514 of the 1962 Code [§ 16-514 is the verbatim predecessor of current § 16-19-120]". This analysis is closely akin to the characterization of property as "derivative contraband" – property which is "normally legal to possess (such as cash or vehicles) but which becomes contraband when used for illegal purposes." *Richardson on behalf of 15th Cir., Drug Enf't. Unit v. Twenty Thousand Seven Hundred Seventy-One Dollars*, 437 S.C. 290, 298-99, 578 S.E.2d 868, 872 (2022). See also *State v. Doe, supra* [machines which are innocent in themselves may be made illegal by illegal use]. Thus, *Powell* may well have served as the impetus for insertion of the "used for gambling" language in § 12-21-2710.

PRE-POWELL HISTORY OF MACHINES "USED FOR GAMBLING"

Moreover, the decision in *Powell* was hardly the first time the issue had arisen as to whether machines "used for gambling" were illegal. As the Court noted in *Westside, supra,* in 1931, the Legislature attempted to address the question of "vending machines that could be operated as gambling devices. . . ." The concern was that such machines – innocent in form and perfectly legal – could be converted to gambling devices when "used for gambling." As noted, this was a common problem throughout the country. Thus, the 1931 statute was designed to remove any confusion regarding the legality of all such "gambling devices." The Legislature inserted language in the 1931 law requiring that vending machines must "be constructed to give a certain uniform and fair return for each coin deposited therein and in which there is no element of chance."

The circumstances surrounding passage of the 1931 law are well set forth in the decision of *Durant v. Bennett*, 54 F.2d 634 (D.S.C.W.D. 1931). There, Judge Glenn, speaking for a three-judge court, explained the circumstances surrounding enactment of the 1931 law as follows:

> [f]or the last several years the State of South Carolina has been particularly vigilant in its activities to enforce its criminal statutes directed against gambling devices. Particularly have these activities been directed against the operation of so-called slot machines which have been placed in the state and which are undoubtedly operated primarily as gambling devices. It appears that these machines are so constructed as to yield an enormous return to the owners and the local custodians with whom the owners place the machines. In that the machines, so far as outward appearance is concerned, closely resemble innocent vending machines the determination of the illegality of each particular machines has not always been an easy task. The owners of the machines have sought court protection in state and federal courts alike. Proceeding have been had in the original jurisdiction of the State Supreme Court. See *Harvie v. Heise*, 150 S.Ct. 277, 148 S.E. p. 66. But the opponents of the slot machine felt that section 196 of the Code of

> Laws of 1922, Vol. 2 was not drastic enough. Accordingly, the Legislature of 1931 passed a very far-reaching statute (37 St. at Large, p. 367) against all forms of gambling devices, vending machines which could be operated as gambling devices, and all games of chance.

(emphasis added). Thus, in *Durant*, the Court distinguished "games of chance" from "vending machines which could be operated as gambling devices. . . ." In short, "games of chance" is but one form of a "gambling device."

Further, in *Holliday v. Governor,* 78 F.Supp. 918, 924 (W.D.S.C. 1948), *affd. sub nom.* 335 U.S. 803 (1948), the Court made it clear that even under the 1931 law, whether the game was primarily one of chance is not controlling. There, the District Court, per Judge Wyche, noted that "the South Carolina statute is much broader" than prohibiting "games of chance." Judge Wyche continued:

> [i]t is the public policy of the State of South Carolina to suppress gambling. Gambling in all forms is illegal in South Carolina. . . . [T]he Legislature of South Carolina, in its discretion, in carrying out this public policy, determined in 1931 that any coin operated machine which does not give a uniform and fair return in value for each coin deposited, and in which there is any element of chance, was illegal as a gambling device, and as tending to promote and encourage the gambling instinct.

Judge Wyche concluded that "[w]hile there may be some skill in operating the machines," nevertheless the machines "do not give a certain uniform return value for each coin deposited" and the element of chance was involved. Moreover, the "varying scores are conducive to side wagers." *Id.* at 924-925.

Following enactment of the 1931 statute, and as technology further evolved, there were concerns that other loopholes designed to circumvent the 1931 law might be found. The thought was – as recognized in *Powell* – that gambling may occur even on so-called "legal" video machines. For example, in *Alexander Amusement Co. v. State*, 246 S.C. 530,

534, 144 S.E.2d 718, 720 (1965), the Court noted that "coin-operated nonpayout pin tables with free play feature" were specifically exempted from the 1931 statute unless in violation of "any other law of this State." The Court could find no such law, but the "use of any such machine for an actual gambling transaction might support a charge against the individual for gambling. . . ." See also *State v. DeAngelis*, 257 S.C. 44, 51, 183 S.E.2d 906, 909-10 (1971) ["Like any other amusement device, it, of course, could be used for the purposes of gambling," but there was no evidence thereof]. As the Attorney General emphasized in Op. S.C. Att'y Gen., 2000 WL 33120661 (Dec. 7, 2000), ". . . a distinction has been made between those machines which are per se illegal and those which require actual use for gambling purposes." The opinion continued: "[w]here a device is not inherently offensive, its legality and liability to confiscation will depend on the nature of its actual use, proof of its use for gambling purposes must precede seizure and forfeiture, a [device] may be condemned as a gambling device only on proof of its actual use for gambling purposes. . . ." (citing 38 C.J.S. Gaming § 78.) This distinction set forth in the Attorney General's opinion is made by insertion of the phrase "used for gambling" in Act No. 125 of 1999.

Thus, the problems posed over the years by machines "used for gambling" certainly explains insertion of the specific language in § 12-21-2710. This insertion was to remedy a separate problem from those video gaming machines found primarily to be "games of chance." As the Court declared in *Mims*, "'The seizure of property employed as a gambling device in violation of a statute is a proceeding in rem and [is] contraband.'" 366 S.C. at 154-55, 621 S.E.2d at 351 (quoting *People v. One Pinball Machine*, 44 N.E.2d 950, 957 (Ill. 1942)) (emphasis added). With the advent of video machines, the Legislature sought

to deal broadly with the problem raised earlier in the *Powell* decision. Regardless of whether such machines are illegal per se, the General Assembly, in enacting Act No. 125 of 1999, inserted specific language to make clear that machines proven to be "used for gambling" are made illegal thereby. To confine "gambling" to games of chance only would invite ignoring the overarching purpose of Act 125.

CHIMENTO's DETERMINATION OF THE MEANING OF "GAMBLING" IN SOUTH CAROLINA

We turn now to the *Chimento* decision. As noted, the Attorney General's Office successfully handled the appeal in *Chimento*. There, in the context of a "Texas Hold'em" poker event, we cited to the Court a number of authorities supporting the principle that gambling did not necessarily depend upon whether the game played was one of chance. Among these authorities was the decision of *State v. Scarlet Red, supra*, a case which the Supreme Court relied upon. As the Attorney General argued to the Court, "[w]hat was important . . . [in *Red*] was not whether the game was 'skill' or 'chance' but whether a wager depended upon the success or failure of the 'juggler.'" Final Brief of Appellant, at 29. With that in mind, the State argued that the "Texas Hold'em" game was illegal under state gambling laws, even if poker is considered a game of skill.

The Supreme Court agreed. The *Chimento* majority indeed assumed poker to be a game of skill, but held that ". . . one 'games' within the meaning of § 16-19-40 when money is wagered on Texas Hold'em, even though it is a game in which skill predominates." 401 S.C. at 533, 737 S.E.2d at 837. According to Justice Pleicones, "[t]he statutory meaning of the word 'gambling' in South Carolina includes games in which skill outweighs chance." He further stated that "gambling as defined in South Carolina includes betting money on

the outcome of any 'game' whatsoever, regardless of the amount of skill involved in the game." *Id.* at 531-32, 737 S.E.2d at 837 (emphasis added). In other words, the common dictionary definition of "gambling" – that of betting or wagering on the outcome of a game or contest – was applied by the Court. Moreover, the Court expressed the view that this was the definition of "gambling as defined in South Carolina." After reviewing the history of "gambling" or "gaming" in South Carolina, the *Chimento* Court held that "[w]hether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game's outcome." 401 S.C. at 532-533, 737 S.E.2d at 837-838. We believe that definition is the one intended by the Legislature and is governing here. That is why we believe SLED is correct. See also 401 S.C. at 537-38, 737 S.E.2d at 840 (Toal, C.J. concurring) [striking words "house used as a place of gaming" would "also open the door to all heretofore illegal gaming practices in this state, including video poker."].

There is no indication whatever that the *Chimento* Court limited its analysis to card or dice games specified in § 16-19-40. In fact, the opposite is true. Indeed, as *Powell v. Red Carpet* makes clear, gambling is gambling, whether using cards, dice or video machines. If the "used for gambling" phrase were limited to only games of chance, such an interpretation would leave a huge loophole, clearly not the Legislature's intent. The machines seized in *Powell* were legal, pursuant to then-existing § 16-19-60. Yet, as the magistrate in this case held, "[i]n using the *Chimento* reasoning, . . . although Dragon's Ascent is a game in which skill predominates, a person 'gambles' when money is wagered in so playing." That rule sums up this case nicely.

CONCLUSION

Gambling is gambling. It matters not whether the machine is one of skill or chance because either type can be gambled on just as well. As the Court recognized in *Grant v. State*, 44 S.E.2d 513, 515 (Ga. 1947), "'[b]aseball is usually classed as a game of skill as distinguished from a game of chance . . . however, wagering or betting on a game of baseball may constitute a game of chance as between those who wager or bet.'" We thus believe SLED's position in this case is correct.

That position is in accordance with South Carolina law, including the history of machines or devices "used for gambling." *Chimento* – and *Powell* before it – both emphasize that gambling in all forms is illegal in this State. The definition and history of "gambling" set forth in *Chimento* – which is in accord with the common and ordinary meaning of "gambling" – determines this case. As *Chimento* stressed, gambling is betting or wagering on the outcome of any game – chance or skill.

And in *Powell*, even before § 12-21-2710 was amended in 1999, the Court strongly suggested that legal machines which are used for gambling are, nevertheless, illegal. Dating back to the *Holliday* case, in 1948, the machine in question which required skill to operate was, nevertheless, rendered illegal because it did not provide a uniform return for every coin deposited and was subject to "side wagers." In the words of SLED in its Reply Brief here, ". . . it is simply inarguable that the South Carolina Legislature intended for a device on which individuals wager, gamble, and receive cash payouts to be legal in South Carolina." Appellant's Reply Brief at 7. The circuit court misperceived this analysis.

In 1999, with the enactment of § 12-21-2710 and Act 125, the General Assembly formalized and updated South Carolina's longstanding anti-gambling policy to meet the

onslaught of video gambling in this State – particularly, video poker. Not only did the Legislature outlaw video gaming machines which are games of chance, but also, seeking to address a separate, longstanding issue, banned machines – whether games of chance or not – which are "used for gambling." See Scoppe, "Don't Let Poker Bosses Fool You: 'No' Vote Outlaws Machines," The State, October 13, 1999 [even arcade games "used for gambling" become illegal under Act No. 125], 1999 WLNR 1620414. This purpose is best summarized by the words of our Supreme Court, noting that "[i]n no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling." *Harvie v. Heise*, 150 S.C. 277, 148 S.E. 66, 69 (1929).

As pointed out herein, the problem of machines "used for gambling" often transforms the most innocent machines – including arcade games – into gambling devices. As has been recognized, where a person places a wager even on a game of skill, that person "lacks any ability to control the outcome. . . . It is this type of chance inherent in a game which a person cannot influence, that contributes to the undeniable evils at which antigambling statutes are aimed." *Dew-Becker v. Wu*, 178 N.E.3d 1034, 1044 (Ill. 2021) (Karmeier, J., dissenting).

To rectify this concern, the Legislature sought to ensure, with the enactment of Act No. 125 of 1999, that any characterization of a video machine as a "game of skill" – whether correct or not – is not determinative as to illegality. Should such machine be "used for gambling," as is the case here, it is illegal. See *S.C. Dept. of Rev. v. Carter*, 2007 WL 470528 (Adm. Law. Ct. 2007) at * 8 [in *Powell*, the Court "affirmed the circuit court in

holding that coin-operated in-line games and video games are not illegal and are not subject to seizure in the absence of a showing that they were used for gambling or other illegal use." (emphasis in original and emphasis added)]. In this instance, the Circuit Court did not apply the meaning of "gambling" in its ordinary sense, and the meaning used in *Chimento*, thereby disregarding the history which led to the insertion of the phrase "used for gambling" in § 12-21-2710. The circuit court ignored the common meaning of "gambling." That Court ignored the precedent set by *Chimento*, which had been on the books for a decade when this machine was seized, that "gambling" is not confined to games of chance, but is betting or wagering on the outcome of games of skill and chance and such is the definition "in South Carolina." As is seen in many cases referenced herein, wagering on the outcome of a game of skill is as much "gambling" as betting on a game of chance. The magistrate correctly concluded that the Dragon's Ascent machine was indeed used for "gambling" as defined by *Chimento*. We respectfully support SLED in this regard.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Hon. Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

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1 DRAGON'S ASCENT VIDEO GAMING MACHINE, Respondents,

v.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION (SLED) Appellant.

PROOF OF SERVICE

Pursuant to Rule 262(c)(3) and In re Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, App. No. 2020-000447 (S.C. Sup. Ct. filed Apr. 24, 2024), I certify that I have served the Amicus Curiae Brief in Support of SLED by email and by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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