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.

FINAL BRIEF OF APPELLANT

Appellant respectfully submits his brief on appeal of his three convictions from the Summary/Magistrate's Court on September 1, 2022 and the orders of the Honorable R. Lawton McIntosh denying his appeal.

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STATEMENT OF THE CASE

On September 1, 2022, the Appellant, Michael Zieminski (Michael) was convicted by a Magistrate's Court jury of three violations of a local ordinance regarding treatment of animals in Greenville County, S.C. Michael owned three dogs at the time of the charges. Michael was sentenced to $500.00 fines or 20 days in jail concurrent on each offense. Fees were added to the fines in the amount of $325.00 each. He timely filed a Notice of Intent to Appeal on September 7, 2022.

The Summary Court Judge (hereafter Magistrate) did not timely file a Return on Appeal as is required by Rule 18 of the Magistrate Court Rules and Section 18-7-60 of the S.C. Code of Laws, Annotated (1985). The Notice of Appeal to the Circuit Court was filed on September 7, 2022 and the Magistrate's Return was filed on June 9, 2023, Nine months later. Several documents from the Magistrate Court file were filed just before the hearing of the appeal in the Circuit Court. Further, the Magistrate Court failed to successfully record the proceedings so it was impossible for a transcript of testimony to be prepared.

The appeal to the Circuit Court was heard by the Honorable Lawton McIntosh on June 28, 2023, who denied the appeal by orders filed July 11, 2023 (Form 4), and July 20, 2023. Michael filed a Motion for Reconsideration on July 25, 2023, that was denied by an order filed on August 1, 2023, (Form 4).

STANDARD OF REVIEW

"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, 732 S.E.2d 861 (S.C. 2012).

"[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).

"In reviewing criminal cases, this court may review errors of law only." *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct.App.2001) (internal citations omitted), cert. denied, Mar. 22, 2002. *City of Landrum v. Sarratt*, 352 S.C. 139, 572 S.E.2d 476 (S.C. App. 2002)

FACTS

There are few facts to be stated here because the Record of Appeal prepared by the Magistrate contains very few facts. Some facts are provided below. During the trial the prosecution called two witnesses: an animal control officer and an employee from the County codes section. Michael Zieminski testified on his own behalf. During the trial a dog entered the courtroom and visited the jurors in the jury box. No veterinary experts testified.

ARGUMENT

1. APPELLANT DID NOT HAVE TO NOTIFY THE ATTORNEY GENERAL IN THIS CASE PURSUANT TO SCRCP NO. 4(d)(4)(B).

The Circuit Court Judge, while hearing arguments on the appeal, *sua sponte* raised the issue of whether the S.C. Attorney General had been notified of the appeal from the Magistrate's Court convictions. (R. pp. 2-6) Apparently the Judge based his ruling against Michael on this issue on a misinterpretation of SCRCP No. 4(d)(4)(B): "When Unconstitutionality of Statute Is Asserted. In any action attacking the Constitutionality of a State statute when the State, officer or agency is not made a party, a copy of the summons and complaint shall be sent by registered or certified mail to the Attorney General." The rule requires that a plaintiff mail a copy of the summons and complaint to the Attorney General only when the State is not a party to the action, which it was in the case at bar. Additionally, the appeal to the Circuit Court was not an action attacking the Constitutionality of a state statute. It was an appeal that raised the issue of the constitutionality of a county ordinance.

2. APPELLANT'S RIGHT TO AN APPEAL WAS DENIED BY THE LACK OF A SUFFICIENT RECORD, WHICH IS NOT HIS FAULT AND HE IS PREJUDICED BY THAT FAILURE.

Facts needed for further analysis of the case:

That on or about the 25th day of February, 2022, 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 so they requested the dispatch of the County Animal Control officers. 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.

Argument

The thrust of the State's case was that Michael's house, where the dogs lived with him, was insanitary. After a jury trial in the Greenville County Magistrate's Court, where no veterinary medical expert testimony was presented by the County, Michael was convicted on all three charges and sentenced alternatively to fines or consecutive terms of imprisonment.

After the Notice of Appeal was filed, the Summary Court Judge (hereafter Magistrate) did not file a Return until June 9, 2023, nine months after the trial. In fact, the Magistrate waited until after Michael filed his first Brief on Appeal. The Magistrate failed to file his Return 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 in this case is skeletal at best - 12 sentences plus photographs and miscellaneous documents that are not relevant to the issues raised by the appeal. It recounts no testimony, nor much of the proceedings. (R. pp. 89-90)

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.

The unexplained nine month delay in preparing the Record also appears to violate Canon 3(B)8 of the S.C. Codes of Judicial Conduct. Rule 501, SCACR. IN RE MCCULLOUGH, 354 S.C. 207, 580 S.E.2d 143 (S.C. 2003). Additionally, the Magistrate filed several documents from his court file on June 28, 2023, which was the same day as oral arguments on the appeal in the Circuit Court. It would have been helpful to Michael's counsel to review them before the argument.

Appellant raised the issue of an inadequate return in his Amended Brief and his Motion to Reconsider, but the Circuit Court failed to rule on it. (R. pp. 18-19, 26) (R. pp. 56-58) Respondent included the following argument in its Brief, but the Court apparently chose not to follow the procedure set-forth in the cited statute. When a Circuit Court deems a Magistrate Court's return inadequate, S.C. Code Ann. § 18-7-80 (1985) provides a procedure that the Circuit Judge may choose to follow:

> 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 (1985).

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. Even if Appellant's counsel had made

the exact same arguments, word for word, during the trial that he made in this brief to the Circuit Court, they would not have appeared in the Magistrate's Return. "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).

If the Record had been filed in a timely manner, the parties would have had an opportunity to move that the record be reconstructed. As it was, so much time had passed that an accurate reconstruction of the record was doubtful and with the additional passage of time is even more doubtful. Without an adequate record of the trial, especially testimony, objections, arguments and rulings, it is very difficult for Michael to effectively argue his appeal or for this Appellate Court to have a sufficient record to review.

The failure of the Magistrate to provide an accurate and complete record of the trial prejudices Michael by preventing him from showing how the judge was hostile to his defense attorney by denial of most, if not all, of the objections he made and preventing Michael from testifying on some subjects. The lopsided granting of objections made by the State's attorney and the denial of the introduction of Michael's testimonial evidence and his attorney's objections alone show prejudice. However, it is the way the lower court made those rulings that was prejudicial. For example, the record fails to show how the Magistrate granted the County Attorney's objection to testimony by the Defendant at a Bench-Bar Conference loudly enough for the jury members to hear when he exclaimed that he "had grown up on a farm" and therefore personally knew about the subject matter, which was animal manure, and clearly implied that Defense Counsel was stupid or attempting to mislead the jury.

Further, the cumulative impact of the Magistrate's rulings against the Defense and the outburst during the Bench/Bar conference was to invalidate the defense case in the eyes of the jury, just as the inappropriate comments about an advocate's gender by the trial judge in an important case did:

> Here, the judge commented to the jury upon the attorney's age and gender. As the dissent stated in *State v. Mitchell*, *supra*, "[t]he remarks of the court tended to impugn the credibility of counsel and to diminish him and his defense of appellant in the eyes of the jury." 261 S.C. 461, 200 S.E.2d 453. Prejudice to Pace is evident on this record since his attorney's credibility was crucial to his defense of alibi. We hold that these remarks undermined counsel's ability to effectively represent her client and constituted reversible error.

State v. Pace, 316 S.C. 71, 74 (S.C. 1994)

The Magistrate's timing of his filing of the Return demonstrates his partiality. He waited long past the time limit imposed by S.C. law, until the Appellant filed his Brief on Appeal, and then filed his paltry record, but included a statement specifically challenging the right of the Defendant to argue unconstitutionality in that Brief, i.e. "The defendant did not raise the constitutional questions at the time of trial thust [sic] he seeks to use to reverse this case." (R. pp. 89-90)

Why did the Magistrate go out of his way to help the State in this unusual manner? In his Return he also submitted only black and white copies of the photos that were introduced during the trial in his Return making it difficult for Michael to show the Circuit Judge how egregiously the colored photos of the medical condition found on one of the dogs were enhanced, making the wound appearance more shocking. (R. p. 84)

What are the constitutional questions the Magistrate is referring too? He has absolutely no evidence other than his possible memory upon which to base that claim. If there was a proper

record, then the Appellate Courts would decide if the issues were raised, not the trial judge. The primary constitutional arguments can be found in the briefs submitted to the Circuit Court, which are incorporated by reference herein. (R. pp. 9-30, 49-52)

Michael does not have to prove that the trial judge was partial. Judges have a duty to avoid the appearance of partiality. Canon 2, Code of Judicial Conduct, SCACR Rule 51.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that `Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' * * * Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way `justice must satisfy the appearance of justice.' * * *".
> *Sheppard v. Maxwell*, 231 F.Supp. 37 (S.D. Ohio 1964)(emphasis added).

When a dog entered the Courtroom and visited the jurors in the jury box, a matter that will be discussed in more detail elsewhere, the magistrate made light of the situation. That callous attitude toward the seriousness of the proceedings is difficult to show without a transcript. The Record does not clearly show that these issues of a fair trial were not raised.

> Our supreme court has cautioned that issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atl. Coast Builders & Contractors, LLC v. Lewis*,398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved." *Id.* at 330, 730 S.E.2d at 285 (emphasis added)... .

Johnson v. Roberts, 812 S.E.2d 207, 422 S.C. 406 (S.C. App. 2018).

The Record is barren and fails to provide the detail needed by Michael to show all the errors that accumulated to deny him a fair trial. Like the farmer in the Parable of the Sower, Michael's appeal efforts are hindered by such barren ground. Matthew 13:19-30 *NABRE.*

3. DISMISSAL IS THE APPROPRIATE REMEDY FOR THE LACK OF AN ADEQUATE RECORD OF THE TRIAL IN THE MAGISTRATE'S COURT.

It is well established law in South Carolina that an Appellate Court can remand a case to the trial judge with instructions to attempt to reconstruct the record. When a sufficient record can not be reconstructed the case should be remanded for a new trial. *State v. Ladson*, 373 S.C. 320, 324-25, 644 S.E.2d 271, 273 (Ct. App. 2007). However, if the record is sufficient to allow the Court to perform its review, then it should do so.

It is doubtful that the record can be reconstructed in this case because there is no recording of the testimony, objections, arguments or rulings on objections or motions. There must not be good notes taken by the Magistrate or he would have provided a better Return. So much time has passed that he could not possibly accurately remember important elements of the trial. At a minimum Michael is entitled to a new trial, but he submits that with all the unusual aspects and errors in this case that the charges against him should simply be dismissed.

4. MICHAEL WAS DENIED A FAIR TRIAL BEFORE AN IMPARTIAL JURY BY THE CREATION OF AN ATMOSPHERE HOSTILE TO THE DEFENSE AND FAVORABLE TO THE PROSECUTION THROUGH THE MAGISTRATE'S

COMMENTS, RULINGS AND FAILURE TO MAINTAIN THE INTERGRITY OF HIS COURTROOM.

The Magistrate failed to maintain a disciplined courtroom and allowed a dog to enter the back door and go into the jury box where several jurors petted it. Nothing was immediately done to stop this unusual interruption of the trial. The Magistrate had a duty to react quickly to stop this highly prejudicial action and investigate why it happened, but he did neither. Were it to happen in a traffic offense trial or a trial of contract dispute case, it would not have been prejudicial, but this was a case specifically concerning cruelty to dogs.

It was clear that the wandering dog was in the custody of a County employee who had it in the back corridor. 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. Another good law review article on some aspects of the subject, how 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.

Why that dog was present in the building at that time was never explained. Its release to wander into the courtroom was never explained either. Why did the County officer who was the custodian of the dog feel so comfortable that he or she could bring a dog into the building without reproach was never answered. This was no coincidence and a mistrial should have been declared by the court.

> "The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U. S. Constitution and by Article I, § 14, of the S. C. Constitution. While this right does not require a "perfect" trial, the very heart of a "fair trial" embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment.

State v. Stewart, 278 S.C. 296, 295 S.E.2d 627 at 630 (S.C. 1982)"

The County argues that no request was made for a mistrial and thus the issue was not preserved. As explained elsewhere, the hostility of the Magistrate to Michael's case, the comical remark by the Magistrate and the unexpected nature of this singularly extraordinary event explains any failure by Counsel to object by requesting a mistrial. In this case, the same approach should be followed as was done in *State v. Pace* where the Court held that failures to object are understandable in certain circumstances:

> As to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile. Accordingly, we find no waiver of this issue. *Cf.Dunn v.Charleston Coca-Cola Bottling*, ___ S.C. ___, 426 S.E.2d 736 (1993).

State v. Pace, 316 S.C. 71, 74 (S.C. 1994)

However, the Courts have long held that some situations that clearly violate a criminal defendant's rights are so egregious that objection is not necessary. In criminal cases, the trial court has a duty to protect a defendant's constitutional right to a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). "We decline to take such a view of these cases as to, with one hand, charge the trial court with the duty of protecting both the defendant's and the public's constitutional rights, and with the other hand, hamstring the court by requiring it to refrain from considering these issues until asked to do so." *Ex Parte Hearst-Argyle Television, Inc.*, 631 S.E.2d 86, 369 S.C. 69 (S.C. 2006).

The courtroom is under the control of the trial judge, not the parties or their attorneys. *Sheppard v. Maxwell*, 384 U.S. 333 (1966)(the court controls the courtroom and courthouse premises). Essentially, the Magistrate allowed someone to obstruct the proceedings in a manner that could only favor the County. Legal precedence is clear that "[i]t is the duty of the trial judge to see that the integrity of his court is not obstructed by any person or persons whatsoever. *Shearer v. DeShon*, 240 S.C. 472, 126 S.E.2d[278 S.C. 304] 514 (1962); 75 Am.Jur.2d Trial § 40 (1974)." *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627 (S.C. 1982). One can not avoid his or her duty as the trial judge by simply opining that the attorneys failed to object. If a criminal defendant is wronged in a trial all actors have a responsibility to try to stop it and correct it.

Regardless of the relative lower gravity of the offense charged or the perceived inferior status of the trial court, defendants, including Michael, deserve a fair jury trial. Accordingly, the requirements of due process and fundamental fairness require that the convictions should be dismissed.[1]

5. BOTH THE MAGISTRATE'S COURT AND THIS COURT HAVE THE RIGHT AND DUTY TO INTERPRET THE CONSTRUCTION OF THE ORDINANCE AT ISSUE

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[1] "The English barrister, short story writer, playwright, screenwriter, novelist, and biographer, John Mortimer, speaking through his main character, Horace Rumpole, recently lamented the loss of historic rights. "What distresses me most about our times," he said, "is the cheerful manner in which we seem prepared to chuck away those blessed freedoms we have fought for, bled for and got banged up in chokey for down the centuries. We went to all that trouble with King John to get trial by our peers, and now a lot of lawyers with the minds of business consultants want to abolish juries. We struggled to get the presumption of innocence, that golden thread that runs through British justice, and no one seems to give a toss for it any more. What must we do, I wonder. Go back to Runnymede every so often to get another Magna Carta and cut off King Charles's head at regular intervals to ensure our constitutional rights? Speaking entirely for myself, and at my time of life, I really don't feel like going through all that again.' J. Mortimer, Rumpole a la Carte, 80 (1990).'

Nor do we." *State v. Dennison*, 305 S.C. 161, 406 S.E.2d 383 (S.C. App. 1991).

AND TO DO SO WHILE APPLYING THE RULE THAT PENAL LAWS ARE STRICTLY CONSTRUED AND TO APPLY THE RULE OF LENITY.

The 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);

Obviously, Michael is presented with a dilemma not in his making, but occasioned by the unusual Return filed by the Magistrate. He has strong constitutional arguments that he argued in all his briefs to the Circuit Court; however, that Court simply refused to hold whether the constitutional error arguments were preserved: although, Michael made a motion for reconsideration. (R. pp. 2-8) (R. pp. 56-58) It is in the interest of justice that this Appellate Court address and resolve the constitutional arguments as the State statutes and the County Ordinances clearly conflict with each other. The State statute requires specific intent and the County does not. The State statute does not criminalize insanitary conditions, but the County Ordinance does. As Michael argued in the Circuit Court hearing, a person trailering a horse could be in violation while passing through Greenville County, but not in the adjoining counties. Yet, the State argues the record doesn't provide Michael with a solid foundation on which to stand while making these valid arguments.

As the Court is well aware, few citizens convicted of violating the Greenville County Ordinance or indeed any county level ordinance will appeal their convictions for practical reasons. Thus, this constitutional violation will continue to ensnare citizens, but is capable of never being reviewed. While this is not a case of mootness, it is analogous. *Sloan v. Dep't of Transp.*, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005) (stating an appellate court can accept jurisdiction, despite mootness, if the issue is capable of repetition but evading review). "However, because the issue is one capable of repetition yet evading review, we decline to strictly apply the mootness doctrine and reverse the court of appeals on that basis." *State v. Stacardo Grissett*, Opinion No. 28192 (S.C. Sup. Ct. February 7, 2024). Assuming that somebody, someday will raise the constitutional issues with the Greenville Ordinance is not sufficient. "Delay of Justice is Injustice." Walter Savage Landor.[2]

Michael does not abandon the constitutional arguments he made in his briefs. If this Court elects to consider them regardless of the comment in the Return supplied by the Magistrate, Michael furthers judicial economy by incorporating them by reference.

As argued in the next section, the County Ordinance makes it a crime to be responsible for keeping a pet in an insanitary environment that is a threat to the health and safety of the pet, but fails to provide enough guidance on what constitutes such an environment. Further, the Ordinance relies on the subjective judgement of a county employee to enforce the law even though those employees have had no scientific or medical education that would enable them to

[2] Walter Savage Landor was an English writer, poet, and activist. His best known works were the prose Imaginary Conversations, and the poem "Rose Aylmer," but the critical acclaim he received from contemporary poets and reviewers was not matched by public popularity. Wikipedia

make those decisions based on valid scientific knowledge and logic in the veterinary medicine field.

How does the employee know how much trash is too much? Is one cubic foot of trash enough? What if it is not compacted? What if it is compacted? What if it is simply paper like junk mail? What if the trash constitutes mostly garden dirt and twigs? These questions show that the wording of the ordinance is too broad.

For example, would a criminal law that makes illegal to "consume or possess a non-prescribed substance that makes one feel good in the short run, but has adverse health consequences in the long run," be enforceable? Obviously, such a law would criminalize eating of desserts and drinking sugary sodas illegal, in addition to the traditionally regulated drugs like cocaine. The hypothetical law would be overly-broad. Likewise, the ordinance language in this case is too broad.

The County Ordinance is additionally problematic because it does not require intent. If for example, a pet owner had lost their sense of smell due to a virus and therefore was not aware that their pet's housing smelled highly unpleasant (to those who possessed normal senses of smell) would be violating the County Ordinance unintentionally. Add the additional situation that the pet owner is blind and neither sees or smells that the dog has been defecating in the corner of a room. Lack of intent is not a defense to charged violations of the ordinance. How can a criminal law that is constructed so obviously to be a trap for the unwary, be valid and enforceable?

Because the ordinance is not clear, the rule of lenity should be applied.

> Moreover, in construing a criminal statute, we are guided by the rule of lenity — the principle that any ambiguity must be resolved in favor of the accused. *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991)

("[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.").

Berry v. State, 675 S.E.2d 425 (S.C. 2009)

6. EXPERT VETERINARY TESTIMONY WAS NECESSARY FOR THE PROSECUTION TO PROVE ITS CASE UNDER THE CODE SECTION AT ISSUE.

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.

Michael raised this issue in a Motion *in Limine* prior to trial. The motion read, in part: "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." (R. pp. 53-55)

The ordinance that Michael was charged with violating requires that the conditions claimed by the County 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 adrift onto an ocean of conjecture and surmise.

The drafters of the ordinance apparently attempted to define what an "insanitary" condition is, knowing that it is a vague term, it reads, in part:

> 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 ok and which ones are not. In this case there was testimony about how bad the air smelled in the Defendant's house, but no objective measurement was offered at all. The claim that the air smelled too bad was not supported by any objective evidence and no expert witness testimony.[3] The question is left to the subjective interpretation of the government official charged with enforcing the law.

Curiously "air" is listed in (e)? Which begs the question, did anyone proofread this ordinance?

The attorney for the County argued to the Circuit Court that excessive human waste was present in the house, (R. p. 68, lines 16-17) (R. p. 74, lines 14-15) but such waste is not even listed in the ordinance. Michael contends this claim is a gross exaggeration, but more importantly it is an argument that appeals to emotions, while failing to offer any specificity as to quantity or

[3] For example, my wife hates the slightest whiff of the smell of a skunk, but I don't mind it unless it is overpowering.

quality. It plays to current inaccurate beliefs that all exposure to all human waste is unhealthy to animals, including humans. However, human waste has been used to fertilize farmland for ages. *Farmers of Forty Centuries* by Franklin Hiram King, Chapter 12, Rice Culture in the Orient, p.297. Without expert evidence a juror may assume that all waste, human or animal, is dangerous to a dog's health, regardless of the age, condition and content of the waste and the degree of contact a dog has with it.[4]

It should go without saying, that animals are not like people, biologically and mentally.[5]

Without testimony of a veterinary expert, jurors are allowed to, and most assuredly will, apply their anthropomorphism to the facts, instead of good science. "Anthropomorphizing is a common way humans perceive and interact with the world around them. The way we project human-like qualities onto objects has changed over the years, but the concept remains the same." *Why Do We Anthropomorphize?* Psych Central, Medically reviewed by Lori Lawrenz, PsyD — By Sarah Barkley — Updated on September 14, 2022.

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 slim guidance on determining what conditions qualify as animal cruelty. With animal cruelty being a hot button, emotional issue, the jurors needed good,

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[4] There was no evidence presented that the animal control officers examined the yard surrounding Michael's home. Therefore, they could not and did not testify to what percentage of the dogs' lives were spent indoors and how much was spent outside in the fresh air and sunlight. Nor could they testify that the dogs did not have suitable housing, water or food outside the residence.

[5] For some species, like rabbits, eating poop is a totally normal way of obtaining key nutrients. In fact, if you prevent rabbits from doing this, they will develop health problems, and young rabbits will fail to thrive. Fortunately, dogs don't need to get nutrition this way. Eating poop, however, is a normal, natural dog behavior at some life stages. *Why Dogs Eat Poop and How to Stop It*, By the staff of the American Kennel Club. Updated: Sep 22, 2023

medical guidance on how to evaluate the evidence.

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).

The ordinance does, however, specify that the conditions must endanger or pose a risk to an animal's health in order to meet the definitions of insanitary, 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 roles do exposure time and pathogen levels play? How much risk is too much?

Risk assessment is vitally important to understand the impact of an animal's living conditions on its health.

> Animal husbandry has been used by humans for eons and has developed to the point today that it is a major industry worldwide. Along side of it, the science and practice of veterinary medicine has arisen, as well as, the science of evaluating risks to animal health. There is even a World Organization for Animal Health. Further, the World Trade Organization has developed standards on animal husbandry and import/export practices with a view toward minimizing risk to population of domesticated animals in a country. An integral part of the science and application of science in this area is the development of methods for measuring risk or risk assessment. Front. Vet. Sci., 07 February 2023 Sec. Veterinary Epidemiology and Economics,Volume 10 - 2023 | https://doi.org/10.3389/fvets.2023.1102131, A review of qualitative risk assessment in animal health: Suggestions for best practice.

All threats to an animal's health can not be eliminated, nor is it reasonable to try to do so. Clearly, the witnesses called by the attorney for the County were not specialists in veterinary medicine or animal husbandry or risk assessment- nor were the jurors. The State's witnesses were not offered as having mastery of a process of reasoning such that they could be considered specialists in the field of animal health or veterinary medicine, yet they needed that expertise.

> As noted by the division in *People v. Rincon,* 140 P.3d 976 (Colo. App. 2006), 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 jurors in this case were essentially 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 a relatively easy for the investigator to have taken representative sample of the contents of the house and have them tested for the presence of 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 unhealthy and, thus, insanitary.[6]

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[6] This concern 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 statute on the subject.

The State's witness testified that the house in question has been condemned. Condemnation is a procedure related to human safety, not animal safety. There was no testimony relating how the condemnation related to the dogs' health. The Greenville County Code of Ordinances reads, in part:

> Section 5-54 STANDARDS FOR DETERMINING FITNESS OF DWELLINGS FOR HUMAN HABITATION
>
> The codes administrator may determine that a dwelling is unfit for human habitation if he finds that conditions exist in such dwellings which are dangerous or injurious to the health, safety or morals of the occupants of such dwelling, the occupants of neighboring dwellings or other residents in the county. Such conditions may include the following (without limiting the generality of the foregoing): Defects increasing the hazards of fire, accidents or other calamities; lack of adequate ventilation, light or sanitary facilities; dilapidation; disrepair; structural defects; uncleanliness; and breeding areas for insects or vermin. Greenville County Code of Ordinances, (1976 Code, § 5-54) (Ord. 733, § 4)

Its prejudicial influence outweighed its probative value.

7. THE OVERRULING OF MICHAEL'S OBJECTION TO THE INTRODUCTION OF A GRAPHIC PHOTO OF A DOG'S UNRELATED MEDICAL CONDITION WAS MORE PREJUDICIAL THAN PROBATIVE AND THUS AN ABUSE OF DISCRETION.

Michael made a written Motion *in Limine* (R. p. 53-55) prior to the trial objecting to the introduction of shocking photos (R. p. 83) of a medical condition characterized by an open wound that was neither caused by the owner, Michael, nor connected to the case or condition of the premises, was highly prejudicial. The photo shows a wound that is brighter red than and glowing more than a normal, natural animal wound would. The photo compels a layperson to

leap to the conclusion that Michael caused the wound either directly or through the insanitary condition of his house, but there was no evidence whatsoever that the condition was the result of Michael's commissions or omissions. Even the attorney for the County argued to the Circuit Court that the photo of the condition depicted a specific type of wound that consisted of certain elements as if he was a veterinary doctor. (R. p. 68, lines 20-21) Michael testified that the medical condition exaggeratingly depicted in the photograph was not caused by his subjective failures, but his testimony was not recorded and is lost forever from the record. Nonetheless, it is undeniable that no veterinary testimony linked the graphic condition to any malfeasance committed by Michael.

Only a veterinarian can testify to the causation of an animal's injury. *Durocher v. Rochester Equine Clinic,* 629 A.2d 827 (N.H. 1993). Attributing a cause to a graphic medical condition of an animal because the animal's owner is a messy housekeeper is an example of a logical fallacy. The photographs introduced do not show other likely causes, such as genetics, common pathogens and contamination of prepared dog foods by the manufacturers because they can not be observed in a regular photograph. In fact, dog food recalls are quite common and a website exists to warn of such recalls: DogFoodAdvisor.com.

8. TAKEN AS A WHOLE, THE CUMULATIVE ERRORS, SUCH AS THE FAILURE TO PROVIDE A TIMELY, MINIMALLY SUFFICIENT REVIEWABLE RECORD, TO MAINTAIN THE INTEGRITY OF THE COURTROOM, TO REQUIRE EXPERT VETERINARY TESTIMONY AND TO PREVENT INTRODUCTION OF A PHOTO THAT HAD ONLY THE PURPOSE TO EXCITE THE JURORS' EMOTIONS, ADD

UP TO A VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY AND REQUIRE A DISMISSAL OF THE CASE.

The Court created an atmosphere hostile to the Defense. Everything from the trial judge's partiality to failing to control his courtroom when it allowed a dog to enter and visit jurors, created a prejudicial environment for an animal cruelty case. The admission of a highly prejudicial photo and the trial court's failure to require expert evidence to tie the alleged insanitary conditions to adverse effects on the health of the dogs combined to deny Michael a fair trial before an impartial jury. While Michael asserts that each of the above-argued errors were prejudicial, their synergistic, cumulative effect resulted in a clear failure to provide a fair trial. Each error built upon the other and erected a wall of unfairness that the Defense could not scale. Michael's defense counsel is also walled-off from presenting other errors because of the utter failure of the Magistrate to provide a timely Return that was actually a "record" of the details that constituted the trial.

In 1995, this Court gave its support to the cumulative effect doctrine.

> Although each point of error raised alone is insufficient to warrant a new trial, the cumulative effect is enough to require that relief. See *Myers v. Moffett*, 312 S.W.2d 59, 65 (1958) (conduct of counsel of defendant in interrogation of witnesses and in argument to jury affected trial in such a way as to have substantial, prejudicial influence on verdict, so as to justify granting a new trial); see also *Ryan v. United Parcel Service*, 205 F.2d 362, 365 (1953) (although perhaps no one of the errors standing alone would call for reversal, in their totality they do). We are aware that every instance of trial error does not entitle an appellant to prevail on appeal. However, the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal. In their totality, the cumulative effect of the lack of latitude allowed the defense in cross-examining the State's investigating officers along

with the court's comments, unfairly prejudiced the defense and necessitates the convictions be set aside.

State v. Freeman, 319 S.C. 110, at123,124, 459 S.E.2d 867 (S.C. App. 1995)

CONCLUSION

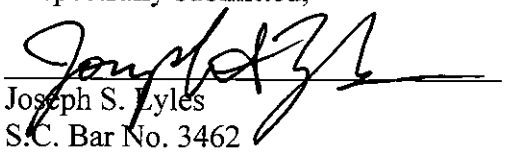
In conclusion, the Appellant did not receive a fair trial because he was charged and convicted of a vague county ordinance in a courtroom that was unfairly prejudicial to the accused because of the Magistrate's conduct and his failure to stop a violation of the court's integrity or to attempt to cure the damage done. Further, improper evidence 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 and not shown to be related to the messy condition of his house, as well as allowing the jury to speculate on how much uncleanliness was unhealthy to a dog. Many people are passionately affectionate to their pets and naturally want to assign a cause to any injury or illness suffered by a pet. However, their assumption that the owner caused the unfortunate condition is erroneous in this case.

Expert veterinary testimony was necessary to guide the jurors away from false assumptions and towards scientific facts about the issues at hand.

The Appellant was also denied a fair appeal because the Magistrate did not timely file a record and the one he did file was grossly insufficient and prejudicial to the Appellant. That and the many other errors, some recorded and some not, accumulated to also deny Michael a fair trial.

For the reasons stated, this Court should reverse the judgment of the Circuit Court and dismiss the charges laid against Michael.

Respectfully submitted,



September 9, 2024

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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.

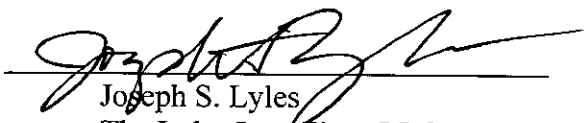
Michael Carl Zieminski,

Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

September 9, 2024



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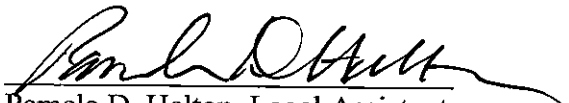
PROOF OF SERVICE

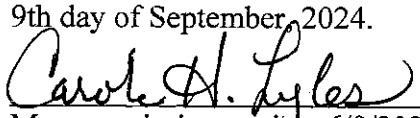
I certify that I have served the Final Brief of Appellant on the Respondent by emailing a copy of it to its attorney of record, Christopher R. Antley, via **cantley@greenvillecounty.org**.

September 9, 2024



Pamela D. Helton, Legal Assistant

SWORN to before me this
9th day of September, 2024.



My commission expires 6/9/2025

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