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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2025-_____

Opinion No. 6098 (S.C. Ct. App. filed February 5, 2025)

1 Dragon's Ascent Video Gaming Machine;
SC Games of Skill, LLC, ... Petitioners,

v.

South Carolina Law
Enforcement Division, ... Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME I

William W. Wilkins, SC Bar No. 6112
BILLY WILKINS LAW LLC
212 E. Park Ave.
Greenville, SC 29601
Telephone: 864.616.9866
Billy@billywilkinslaw.com

Kirsten E. Small, SC Bar No. 75681
MAYNARD NEXSEN, PC
104 S. Main Street, 9th Floor
Greenville, SC 29601
Telephone: 864.370.2211
KSmall@maynardnexsen.com

Additional counsel listed inside front cover

Christopher J. Murphy, SC Bar No. 8903
MURPHY CRANTFORD MEEHAN, ATTORNEYS AT
LAW, LLC
136 West Richardson Ave.
Summerville, SC 29483
Telephone: 843.832.1120
chris@mcmlawsc.com

-and-

Peter M. McCoy, Jr., SC Bar No. 73866
MCCOY LAW GROUP, LLC
15 Prioleau Street
Charleston, SC 29401
Telephone: 843.459.8835
peter@mccoylawgrp.com

Attorneys for Petitioners

Adam L. Whitsett, SC Bar No. 74888
General Counsel
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, South Carolina 29221-1398
Telephone: 803.896.0647
awhitsett@sled.sc.gov

Attorney for Respondent

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

South Carolina Law Enforcement Division, Appellant.

Appellate Case No. 2023-000783

Appeal From Berkeley County
Bentley Price, Circuit Court Judge

Opinion No. 6098
Heard November 7, 2024 – Filed February 5, 2025

REVERSED

Adam L. Whitsett, of Columbia, for Appellant.

Peter Michael McCoy, Jr., of McCoy Law Group, LLC,
of Charleston; Kirsten Elena Small, of Maynard Nexsen,
PC, of Greenville; Christopher John Murphy, of Murphy
Crantford Meehan, Attorneys at Law, LLC, of
Summerville; and William W. Wilkins, of Billy Wilkins
Law LLC, of Greenville, all for Respondents.

Attorney General Alan McCrory Wilson, Solicitor
General Robert D. Cook, and Assistant Deputy Solicitor
General Thomas Tyler Hydrick, all of Columbia, for
Amicus Curiae Office of Attorney General.

Elizabeth Van Doren Gray, Robert E. Tyson, Jr.,
Vordman Carlisle Traywick, III, and Sarah C. Frierson,
all of Robinson Gray Stepp & Laffitte, LLC, of
Columbia, for Amicus Curiae South Carolina Lottery
Commission.

HEWITT, J.: This case concerns a "Dragon's Ascent" video game machine. The South Carolina Law Enforcement Division (SLED) confiscated the machine from a business in Hanahan after deciding it was an illegal gambling device. A magistrate found the device to be a game where skill predominated over chance but still concluded the device was illegal under South Carolina law because it was "used for gambling." The game and its owner (Respondents) appealed to the circuit court. The circuit court agreed the game was one of skill but found this meant the machine was legal based on the view that legality under the relevant statute "begins and ends" with the skill versus chance inquiry. SLED appealed to this court.

The sole issue before us is whether the statute in question—section 12-21-2710 of the South Carolina Code—only prohibits games of chance or also prohibits machines and devices that can be used for gambling. The statute's text, its history, and precedent all strongly support the latter view. For those reasons, we reverse.

BACKGROUND

After SLED received a complaint about an illegal gambling device being used at a Hanahan restaurant/bar, "LG's By the Creek," a special agent conducted three separate undercover visits to the business. He played the Dragon's Ascent machine at issue each time before ultimately seizing it.

The basic features of the Dragon's Ascent game do not appear to be in dispute. The game was created to be a game that exclusively relies on skill and has no element of chance. The game's stated goal is to "[s]hoot dragons to win credits!" The game features various dragons, all of different colors and sizes, that continuously move across the video screen. Credits earned by shooting dragons are redeemable for cash.

The machine at issue here has two player stations and one video monitor. There are versions of Dragon's Ascent where the game is played on a large table with multiple player stations surrounding the table, but that sort of machine is not before us, and, as our standard of review section explains, our review in this case is limited to the individual machine that SLED seized.

Dragon's Ascent always allows a player to access a "Help Screen," even prior to beginning play. This screen provides extensive instructions on how to play and how to win the game. Play begins after a player inserts currency into the bill acceptor on the front of the machine and confirms he or she is eighteen years of age. Initial play "credits" are based on how much money a player deposits into the machine.

A player is represented on the video screen by a turret. The turret is controlled by a joystick that players use to aim at dragons. A shot button is then used to fire. Each shot has a "value" that the player can adjust using a "Shot Cost" feature. Shot values range from ten cents to two dollars and can be adjusted between shots.

The amount awarded for capturing a dragon is based on the player's shot value and the player's ability to match the color of his or her turret to the color of the targeted dragon. The color of the player's turret changes on a pattern throughout play. For some dragons, rewards range from two times the shot cost to ten times the shot cost, depending on color matching, while other dragons have rewards ranging from fifty times to two hundred fifty times the shot cost. These award amounts or multipliers are disclosed to players in a "Reward Chart" on the Help Screen.

The largest single reward available in the game comes from a particular dragon called the "Rainbow Dragon," but the amount of this reward is not disclosed on the Reward Chart. The reward for the Rainbow Dragon depends on variables such as shot value and the number of shots fired (including shots fired by other players) directly at the dragon. Players may also receive "interim rewards" as the Rainbow Dragon's "health" begins to drain and it becomes more susceptible to capture.

A game session ends when a player's credits run down to zero, or, put differently, when the player loses all of the money deposited into the machine. If a player wishes to end the session before all the credits have run, the player may print a ticket receipt. This receipt is exchangeable for cash.

After the SLED agent seized the machine at issue here, it was taken to the magistrate court, where a magistrate found it to be an illegal gambling device prohibited by the statute. A post-seizure hearing was held several months later.

The magistrate heard extensive arguments, received testimony, and watched as Dragon's Ascent's lead designer demonstrated how to successfully play the game. The magistrate issued a written order finding that the game was one "in which skill predominates over chance," but found that the game was nevertheless illegal because

it was used for gambling. The magistrate relied on our supreme court's opinion in *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012) (upholding convictions for playing "Texas Hold'em" in a residence), in concluding that "the determination as to whether th[e] Dragon's Ascent machine is an illegal gambling device is not limited to the skill/chance ratio, but rather on the existence of a wager."

Respondents appealed to the circuit court. As described at the beginning of this opinion, the circuit court agreed with Respondents that an analysis of illegality under the statute "begins and ends" with whether the game is one of skill or one of chance. The circuit court distinguished *Chimento* by reasoning that the case involved a different statute and did not concern the question whether a particular machine was an illegal gambling device. This appeal followed.

STANDARD OF REVIEW

"Section 18-7-170 of the South Carolina Code ([2014]) articulates the standard of review to be applied by the circuit court in an appeal of a magistrate's judgment" *Bowers v. Thomas*, 373 S.C. 240, 244, 644 S.E.2d 751, 753 (Ct. App. 2007). The circuit court, as the initial appellate court, must "give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits." § 18-7-170. "In giving judgment[,] the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact." *Id.*

Our review in this posture can be limited if factual findings are involved. *See Union Cnty. Sheriff's Off. v. Henderson*, 395 S.C. 516, 519, 719 S.E.2d 665, 666 (2011) ("The magistrate's factual findings, confirmed by the circuit court, must be upheld by the appellate court if supported by any evidence."). But when it comes to questions of law, and particularly questions of statutory interpretation, our review is de novo. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo.").

Last, we specify that the case before us deals only with the specific Dragon's Ascent machine found at LG's By the Creek. *See Mims Amusement Co. v. S.C. L. Enft Div.*, 366 S.C. 141, 155, 621 S.E.2d 344, 351 (2005) ("[A] magistrate's ruling on legality applies only to the machine before the court."); *id.* ("[T]he legality of a particular machine must be determined on an individual basis at the time of seizure and examination.").

ANALYSIS

As mentioned before, this appeal turns on a legal question—whether certain language of the relevant statute prohibits only games of chance, or whether it also prohibits machines or devices allowing games of skill to be used for gambling. The case has this narrow focus because SLED does not challenge the finding that Dragon's Ascent is predominately a game of skill and Respondents have insisted throughout this case that the machine must be deemed legal because the inquiry stops once skill is found to predominate chance. With that in mind, we turn first to our analysis of the statute's text and history.

Statutory Construction

The relevant statute is section 12-21-2710. The statute is titled "Types of machines and devices prohibited by law; penalties." S.C. Code Ann. § 12-21-2710 (Supp. 2024). The statute separately prohibits several different categories of machines and devices, one of which is "device[s] pertaining to games of chance of whatever name or kind," but another of which is "device[s] licensed pursuant to [a different statute] and used for gambling." *Id.* In pertinent part, the statute provides:

It 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 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

Id. (emphasis added). We see our conclusion that these are separate prohibitions as a straightforward application of the rule that we begin (and can often stop) statutory interpretation with the statute's text. *See Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *see also Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (considering the plain text of a statute "the best evidence of the legislat[ure's] intent or will" and requiring courts to give effect to that language) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992))). The statute prohibits coin-operated machines with a free play feature; coin-operated machines used for playing certain games like poker and blackjack; machines and devices used for gambling; and punch boards, pull boards, or other devices pertaining to games of chance. § 12-21-2710.

If Respondents were correct that the legal definition of "gambling" under this statute is limited to games of chance, there would be no conceivable reason for the clause prohibiting licensed machines used for gambling.

We readily acknowledge that most previous cases evaluating potential gambling devices focused on whether particular games were games of chance. *See, e.g., S.C. L. Enft Div. v. I-Speedmaster S/N 00218*, 397 S.C. 94, 97–100, 723 S.E.2d 809, 811–12 (Ct. App. 2011) (relying on the lack of chance in determining a game did not constitute illegal gambling); *Ward v. W. Oil Co.*, 387 S.C. 268, 272–78, 692 S.E.2d 516, 519–22 (2010) (including an element of chance in its gambling analysis under section 12-21-2170; however, the specific provision applied there was "any punch board, pull board, or other device *pertaining to games of chance*" (emphasis added)); *Sun Light Prepaid Phonecard Co. v. State*, 360 S.C. 49, 53–56, 600 S.E.2d 61, 63–65 (2004) (same as *Ward*). Even so, our reading of the relevant statute is bolstered by the history of our legislature's "longstanding prohibition against gambling," *Chimento*, 401 S.C. at 538, 737 S.E.2d at 840 (Toal, C.J., concurring), and the fact that the legislature added the "used for gambling" language after the statute already prohibited games of chance. *See Senate by & through Leatherman v. McMaster*, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) ("[Courts] should not concentrate on isolated phrases within [a] statute[, and instead] . . . must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [each provision] to have some efficacy, or the legislature would not have enacted [the statute] into law.'" (quoting *CFRE, L.L.C. v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011))).

Since as early as 1816, the General Assembly has expressed its clear disapproval of gambling. *Chimento*, 401 S.C. at 537, 737 S.E.2d at 840 (Toal, C.J., concurring). South Carolina has outlawed gambling devices for decades. *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 300, 534 S.E.2d 270, 271 (2000), *overruled on other grounds by Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005).

As time has passed, the General Assembly has progressively broadened what the statute prohibits. In the early 1930s, in what appears to be the first statute outlawing the possession of gambling devices, the General Assembly provided:

It shall be 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 slot machine of whatever name or kind, except automatic weighing, measuring, musical and

vending machines which are so constructed as to give a certain uniform and fair return in value for each coin deposited therein, and in which there is no element of chance.

1932 Code of Laws § 1301-A. In 1942, the legislature extended the list of prohibited devices to include "any vending or slot machine, punch boards[,] pull boards, or other devices pertaining to games of chance of whatever name or kind" while maintaining the exemption for certain games with no element of chance. 1942 Code of Laws § 1301-1(1). Then, in 1999, the statute was amended to specifically prohibit devices allowing individuals to play poker, other specific games, and "any machine or device . . . used for gambling." Act. No. 125, 1999 S.C. Acts 1322. Thus, for over fifty years prior to the 1999 amendment, the law already prohibited games of chance. *See* § 1301-1(1). The addition of blackjack and poker illustrates a need to prohibit certain specific games, but the language prohibiting machines "used for gambling" can only be understood as broadening the legislature's prohibitions on gambling. It is difficult to understand the addition of this language if those prohibited devices must also "pertain[]" to games of chance." That argument is severely undermined by the disjunctive "or" separating *games used for gambling* and *games of chance*. § 12-21-2710.

For these reasons, we conclude the statute does not narrowly prohibit only the listed games and games of chance, but instead includes in its prohibitions any licensed device used for gambling.¹

Chimento and the Definition of Gambling

¹ The machine at issue here was not licensed, but Respondents conceded to the magistrate that it should have been licensed and claimed it was an inadvertent mistake. As the magistrate found, it would be absurd for a gambling machine to be legal based on the failure to obtain a license for the machine, whether inadvertent or not. *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, [courts] will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature."); *see also* § 12-21-2710 (prohibiting "any machine or device *licensed pursuant to Section 12-21-2720* and used for gambling" (emphasis added)).

While our reading of the relevant statute leads us to the firm conclusion that the statute draws a distinction between games used for gambling and games of chance, the section itself does not include a definition of "gambling." Respondents maintain that in order for a game to constitute gambling, chance must predominate over skill. SLED points us to our supreme court's decision in *Chimento* for a definition of gambling that includes games of skill when something of value is wagered on the outcome. Respondents counter that *Chimento* does not apply here because that case dealt with a different statute, section 16-19-40 of the South Carolina Code (2015), which criminalizes gaming and betting in certain locations.

Though Respondents are correct that the issue in *Chimento* centered around a different statute than the one at issue here, we are not able to reconcile Respondents' argument that *Chimento* does not apply with the analysis and approach our supreme court employed in that case. *Chimento* did not focus solely on section 16-19-40. The court wrote, "The statutory meaning of the word 'gambling' in *South Carolina* includes games in which skill outweighs chance." 401 S.C. at 533, 737 S.E.2d at 837 (emphasis added). The court looked to other statutes and precedent:

For example, [section] 32-1-10 [of the South Carolina Code] (2007), found in an article captioned "Gambling Contracts," permits persons who have lost money or other thing(s) of value in an amount equal to at least \$50 at cards, at a dice table, or "at any other game whatsoever," or by betting on those games, to recover their losses under certain circumstances. The plaintiffs in such a suit are almost uniformly referred to as "gamblers" regardless whether the enterprise was unlawful. *See Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993).

Id. at 532, 737 S.E.2d at 837.

While the court based some of its analysis on the text of section 16-19-40 (the statute at issue there), it nevertheless concluded: "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 532–33, 737 S.E.2d at 837 (emphasis added) (quoting § 32-1-10). In other words, the court held, "Whether 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." *Id.* at 533, 737 S.E.2d at 838 (emphases added); *see also, e.g., State v. Red*, 41 S.C.L. (7 Rich.) 8 (1853) ("If the prohibited games be confined to those alone in which the

stake is won or lost by chance, the result would follow, that the gambler who relied on the practiced legerdemain of a juggler, whilst he professed that the stake depended on fortune, will escape punishment by playing falsely.").

And while it is true that *Chimento* was not analyzing gambling under section 12-21-2710, it is worth mentioning that section 16-19-40 similarly criminalizes playing "any machine or device licensed . . . and used for gambling purposes" *Compare* S.C. Code Ann. § 16-19-40(g) (2015) with § 12-21-2710 (deeming "any machine or device licensed pursuant to [another section] and used for gambling" unlawful). We construe statutes regarding the same subject with a "harmonious result" in mind. *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). We cannot meaningfully distinguish *Chimento* as relating to a completely separate statute when the language in that statute has significant overlap with the language in section 12-21-2710.

Respondents point us to this court's decision in *Speedmaster* as support for their argument that gambling must include an element of chance. There, this court relied on the usual evaluation of skill versus chance in determining whether a particular game constituted illegal gambling. *Speedmaster*, 397 S.C. at 97–99, 723 S.E.2d at 811. This court went on to address the parties' dispute over whether the "used for gambling" portion of section 12-21-2710 meant that the statute did not prohibit mere possession of an illegal device but instead required the machine to actually be *in use*. *Id.* at 99, 723 S.E.2d at 811–12. This court concluded that the statute does not specifically require an illegal gaming device be *actually* in use. *Id.* at 100, 723 S.E.2d at 812; *see also State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000) ("The plain language of [section 12-21-2710] makes clear the legislature's intent to outlaw *mere possession* of such [unlawful] machines." (emphasis added)). Still, this court wrote that because "gambling necessarily encompasses the element of chance[.]" and the game there was not one of chance, "the circuit court properly affirmed the magistrate's ruling the [game] was not 'used for gambling.'" *Speedmaster*, 397 S.C. at 100, 723 S.E.2d at 812.

To put the point simply, *Chimento* was released over a year after *Speedmaster*, and we believe *Chimento*'s analysis controls. The circuit court here limited *Chimento* because it did not explicitly overrule *Speedmaster* or any other cases, but as described above, we simply cannot read *Chimento* as limiting its conclusions to a single statute. We hasten to add that we do not read *Chimento* as abolishing the skill versus chance analysis; instead, we read *Chimento* as recognizing the common-sense fact that a game of chance *and* a game of skill can both be "used for gambling." This neatly tracks with what we see as the obvious purpose of the language in question,

which is to prohibit gaming machines that attract players to deposit money for the purpose of trying to "win" more, whether by skill or chance.

CONCLUSION

The circuit court erred in ending its analysis with the skill versus chance inquiry. We therefore reinstate the magistrate's order finding that this Dragon's Ascent machine was used for illegal gambling. We need not address any remaining issues based on the foregoing conclusions. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling it unnecessary for an appellate court to address remaining issues when its resolution of a prior issue is dispositive).

The circuit court's decision is

REVERSED.

THOMAS and VINSON, JJ., concur.

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BERKELEY COUNTY
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Appellate Case No. 2023-000783

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

v.

South Carolina Law
Enforcement Division, ... Appellant.

PETITION FOR REHEARING

Respondents 1 Dragon's Ascent Video Gaming Machine and SC Games of Skill, LLC, respectfully request rehearing of this Court's Opinion filed February 5, 2025. *See* Rule 221(a), SCACR. Rehearing is warranted because the Opinion overlooks and/or misapprehends multiple points of fact and law, proper consideration of which would have led to affirmance of the circuit court's order. In particular, the Court expanded the narrow holding of *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), far beyond its context, thereby abandoning the long-established rule that where skill predominates over chance in determining the outcome of a game, it is not gambling.

BACKGROUND

This matter concerns a Dragon's Ascent Video Machine seized by Appellant South Carolina Law Enforcement Division ("SLED") on November 19, 2021. (R. 1.) The evidence

presented at the post-seizure hearing showed that Dragon's Ascent is an aim-and-shoot video game in which the player attempts to capture dragons of varying sizes, colors, and point values as they move across a screen. (R. 155-157, 379, 438-440.) Game play in Dragon's Ascent occurs according to rules that are established in advance, fully disclosed to the player, and do not change over the course of the game. (R. 397.) To begin playing, the player¹ inserts currency into a bill acceptor, establishing the credits the player uses to play the game. (R. 163.) The player selects a per-shot value of between 10¢ and \$2, which can be adjusted between shots. (R. 218, 254.) The shot value has no bearing on the number of shots needed to capture a dragon. (R. 397.)

The player uses a turret controlled by a joystick to aim and a shot button for firing. (R. 379-380.) "Shot Power" is a graphic representation of five small vials, each filled with a different color of fluid. The player uses the level of fluid in each vial to determine the power of a shot when shooting in order to maximize the reward for capturing the targeted dragon. (*Id.*) The dragons are of different sizes, shapes, and most importantly colors. A key aspect of success in the game is the player's ability to match the color of his or her turret, which rotates through a repeating cycle of colors, to the color of the targeted dragon. (R. 292, 381.) The closer the color match at the moment a shot is accurately fired, the fewer shots will be required to capture the dragon and the greater the reward to the player. (R. 183, 293.) The amount awarded for capturing each dragon is determined according to a formula that is set in advance, involves no algorithms or random number generators, and is fully disclosed. (R. 160, 397-400.) Finally, the game also features a "Ticket Button" that the player uses to print a redeemable receipt which the player can exchange for cash. (R. 380.)

Contrary to SLED's primary argument that Dragon's Ascent was a game of chance, based

¹ Players must manually confirm that they are age 18 or older in order to play Dragon's Ascent. (R. 218, 379.)

on the overwhelming evidence, the magistrate found that Dragon’s Ascent is a game in which skill predominates over chance. (R. 10.)² Nevertheless, the magistrate court ruled that the machine is an illegal gambling device under S.C. Code Ann. § 12-21-2710 because it is a machine required to be licensed under S.C. Code Ann. § 12-21-2720 “and used for gambling.” (R. 11-14.) Respondents timely appealed to the circuit court. After briefing and a hearing, the circuit court reversed, holding that because Dragon’s Ascent is a game of skill, it is legal under § 12-21-2710. SLED timely appealed the circuit court’s ruling to this Court.

This Court issued its Opinion reversing the circuit court on February 5, 2025. The Court began its analysis by noting that it is undisputed that Dragon’s Ascent is a game of skill. (Opinion at 4.) The Court then considered whether it was illegal under § 12-21-2710 because it was “used for gambling.” (Opinion at 5.) Noting that § 12-21-2710 does not define “gambling,” the Court “readily acknowledge[d] that most previous cases evaluating potential gambling devices focused on whether particular games were games of chance.” (*Id.*) Nevertheless, based on “our legislature’s longstanding prohibition against gambling,” the Court concluded that § 12-21-2710 “includes in its prohibition any licensed device used for gambling.” (Opinion at 6-7.) To find the definition of “gambling,” the Court looked to the Supreme Court’s decision in *Chimento*, concluding that *Chimento* redefined “gambling” or “gaming” as any game “when something of value is wagered on the outcome.” (Opinion at 7.) On this basis, the Court held that Dragon’s Ascent, despite being a game of skill, is illegal under § 12-21-2710. (Opinion at 9.)

ARGUMENT

Rehearing is warranted because this Court’s decision erroneously relies on a novel wagering pay-to-play test derived from *Chimento*, which involved a criminal conviction under

² SLED did not contest this determination in the circuit court.

S.C. Code Ann. § 16-19-40 and which did not cite § 12-21-2710. Although *Chimento* is clearly limited to the context of § 16-19-40, this Court interpreted that decision to accomplish a result that effectively rewrites § 12-21-2710 and nullifies decades of court rulings, administrative decisions, statutes, and Attorney General opinions, *all* of which recognize the core principle that “gambling” or “gaming” requires three distinct elements: consideration, *chance*, and reward.

I. *Chimento* Is Limited to S.C. Code Ann. § 16-19-40

No question of a machine’s legality under § 12-21-2710 was presented in *Chimento*. Rather, the appellants in *Chimento* challenged their convictions for violating S.C. Code Ann. § 16-19-40 by playing “cards” in a “house used as a place of gaming.” In a divided opinion, the Supreme Court reversed the circuit court order setting aside their convictions. Tracing the history of § 16-19-40, the Supreme Court concluded that this particular statute applied to the playing of certain *specified, enumerated games* (such as cards, dice, any roley-poley table, rouge et noir, or faro bank) in certain *specified, enumerated locations* (such as a kitchen, a barn, stable, open space, or a house used as a place of gaming), regardless of whether they were games of chance or skill. See *id.* at 531, 737 S.E.2d at 836 (“[Section] 16-19-40 criminalizes *the playing of* certain games and gambling.” (emphasis added)).

The majority in *Chimento* repeatedly made clear that it was construing “gambling” or “gaming” in the specific context of § 16-19-40. See *Chimento*, 401 S.C. at 531, 737 S.E.2d at 836 (“The circuit court ... [held] that ‘gaming’ *as used in § 16-19-40* applies only to betting on games of chance[.]” (emphasis added)); *id.* at 532, 737 S.E.2d at 837 (describing issue as “whether ... betting on a card game ... is unlawful gaming” and citing, *inter alia*, § 16-19-40); *id.* (“Under the plain language *of § 16-19-40*, gambling on a game of skill is a violation if that gambling is being done *in a prohibited location*.” (emphasis added)); *id.* (“A violation *of the gaming prohibition of § 16-19-40* does not depend on whether the particular game involves more skill than chance.”

(emphasis added)); *id.* at 533, 737 S.E.2d at 837 (“[T]here is precedent that indicates § 16-19-40 is *concerned with wagering* regardless of the skill involved in the game wagered upon.” (emphasis added)); *id.* (“We hold that one ‘games’ *within the meaning of § 16-19-40* when money is wagered on Texas Hold’em, even though it is a game in which skill predominates.” (emphasis added)).

In deciding to rely on *Chimento*, this Court stated that “it is worth mentioning that section 16-19-40 similarly [to § 12-21-2710] criminalizes playing ‘any machine or device licensed ... and used for gambling purposes.’” (Opinion at 8.) This is merely coincidental, however, because the “any machine or device” language was not at issue in *Chimento*. The primary question presented in *Chimento* was whether a person’s residence was a “house used as a place of gaming” under S.C. Code Ann. § 16-19-40 and thus a specifically identified prohibited location when used for the playing of a game of skill. *See Chimento*, 401 S.C. at 527, 737 S.E.2d at 832. In affirming the defendants’ convictions, the *Chimento* Court held that it is the “prohibited location,” not the character of the game being played, that determines illegality under § 16-19-40. *Chimento*, 401 S.C. at 532, 737 S.E.2d at 837. The *Chimento* majority made no reference whatsoever to the fact that both § 16-19-40 and § 12-21-2710 contain the phrase “any machine or device licensed ... and used for gambling.” In fact, the *Chimento* majority referenced the “any machine or device” language in § 16-19-40 only in quoting the statute as a whole, and it *did not even cite § 12-21-2710*. In short, there is nothing at all in *Chimento* to support any kind of connection between the meaning of “gaming” in “a house used as a place of gaming” and the meaning of “machine or device used for gambling.”

It is also noteworthy that the *Chimento* majority did not address Justice Hearn’s dissent, which responded to Chief Justice Toal’s concurrence by explicitly distinguishing between § 16-19-40 and § 12-21-2710. In her concurrence, Chief Justice Toal “agree[d] wholeheartedly” with the dissent’s conclusion that § 16-19-40 is unconstitutionally void for vagueness because it delegates

too much discretion to law enforcement to decide whether the statute has been violated. *Id.* at 536, 737 S.E.2d at 839 (Toal, C.J., concurring); *see* 547-552, 737 S.E.2d at 845-847 (Hearn, J., dissenting). Chief Justice Toal nevertheless joined the majority because “we cannot sever the language, ‘a house used as a place of gaming,’ from section 16-19-40 without striking the provision in its entirety,” which she feared would “open the door wide to *all* heretofore illegal gaming practices in this state, *including video poker*.” *Id.* at 537, 737 S.E.2d at 839-40 (Toal, C.J., concurring) (second emphasis added).

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

The prohibition of video poker is found in Section 12-21-2710 of the South Carolina Code (2000). This is a *completely separate section (and title) of the code* and makes no reference at all to section 16-19-40. In fact, *it is entirely independent and separate from the general gambling prohibitions involved here*. Striking section 16-19-40 in whole or in part would have no impact on section 12-21-2710.

Id. at 552, 737 S.E.2d at 848 (Hearn, J., dissenting) (emphasis added). Notably, the majority opinion did not challenge Justice Hearn on this point. Indeed, § 12-21-2710 is not even cited in the majority opinion.

The Court cites *State v. Red*, 41 S.C.L. (7 Rich.) 8 (1853), as support for its conclusion that, post-*Chimento*, an activity is gambling even when skill determines the outcome. (Opinion at 8.) In *Red*, the defendant had been convicted of operating a bank for the play of a shell game called “Thimbles and Balls.”³ The defendant argued that the game was actually “an exhibition of his dexterity,” and therefore was not illegal. *Id.* at 10. The court rejected this argument:

If the prohibited games be confined to those alone in which the stake is won or lost by chance, the result would follow, that the gambler who relied

³ *See* “Shell Game,” at https://en.wikipedia.org/wiki/Shell_game (“The shell game (also known as thimblig, three shells and a pea, the old army game) is a public gambling game that challenges players to follow the movement of a marker hidden under one of several covers (shells). In practice, the game is almost always run as a confidence trick that uses sleight of hand to transfer the marker between covers.”) (last visited Feb. 16, 2025).

on the practiced legerdemain of a juggler, *whilst he professed that the stake depended on fortune*, will escape punishment by *playing falsely*.

Id. (emphasis added). In other words, the court's concern was that the game was a fraud: the defendant falsely *claimed* that the outcome was determined by chance, when in reality he used sleight of hand to ensure that the unsuspecting player victim would guess wrong most of the time. The holding in *Red* thus stands for the common sense proposition that skillful cheating based on false pretenses is still cheating and thus unlawful.

The *Chimento* majority also did not consider that numerous South Carolina statutes explicitly define "gambling" or "gaming" as requiring the predominance of *chance*. As this Court noted (Opinion at 8), the *Chimento* majority cited S.C. Code Ann. § 32-1-10 and *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993), as suggesting that the "statutory meaning of the word 'gambling' in South Carolina includes games in which skill outweighs chance." *Chimento*, 401 S.C. at 533, 737 S.E.2d at 837. Such a suggestion is totally misplaced. In *Berkebile*, the Supreme Court construed § 32-1-10, a remedial statute that allowed for recovery of gambling losses, as applying to video poker losses even though video poker by statute was then legal. *Berkebile*, 311 S.C. at 55, 426 S.E.2d at 763. The issue of legality in *Berkebile* did not involve a skill vs. chance analysis because at the time of this decision *all* video gambling devices, including games of chance, were legal.

Importantly, the General Assembly has enacted multiple South Carolina statutes explicitly defining "gambling" using the only word *chance*. See S.C. Code Ann. § 3-11-100(2) (defining "Gambling" and "gambling device" to mean "any game of chance"); S.C. Code Ann. § 12-21-3920(1) (defining "bingo" or "game" as "a specific game of chance"); S.C. Code Ann. § 12-21-4130 (authorizing seizure of bingo cards that have been altered so that they are *not* games of chance); S.C. Code Ann. § 37-21-20(5)(a) (defining "prize promotion" as "a sweepstakes or other

game of chance”); S.C. Code Ann. § 52-1-20 (“No carnival to which games of chance or gambling devices are attached shall exhibit in this State.”); S.C. Code Ann. § 59-150-20(7) (“‘lottery’, ‘lotteries’, ‘lottery game’, or ‘lottery games’ means a game of chance....”). The General Assembly has thus repeatedly defined “gambling” as a game involving chance. This necessarily means that when chance does not determine the outcome — *i.e.*, when skill predominates — an activity is not “gambling” or “gaming.”

Moreover, the Court’s interpretation of *Chimento* as defining gambling for all purposes as including “games of skill when something of value is wagered on the outcome” has potentially far-reaching and unintended consequences. Based on the Court’s reasoning, all skill-based contests that require a pay-to-play entry fee and offer something of value to the winner — such as amateur and professional golf tournaments, NASCAR races, and local competitive events — are illegal, including events such as the following:

- Golf Tournaments:
 - Country club golf tournaments, such as that conducted by the Berkeley County Country Club: <https://www.berkeleycc.com/25-uncategorized/40-invitational-3>;
 - The Heritage Classic Golf Tournament: <https://www.heritageclassicfoundation.com/>;
 - “Closest to the pin”-type contests: *Op. S.C. Atty. Gen.*, 2011 WL 3918174, at *1 (S.C.A.G. Aug. 17, 2011) (stating that a golf promotion with \$5.00 entry fee, where the player who landed a golf ball closest to the pin would win up to \$10,000 “is not violative of South Carolina’s gambling laws” because the outcome was determined by skill); and
- Auto Racing:
 - The Southern 500: <https://www.darlingtonraceway.com/events/2022-fall-nascar-race/>.

II. The Dominant Factor Test Is Widely Recognized and Applied in South Carolina

That *Chimento* does not impact the application of § 12-21-2710 is indisputably confirmed by the Supreme Court’s ruling in *Richland County Sheriff’s Department v. Awde*, No. 2014-MO-024,

2014 WL 3016205 (S.C. July 2, 2014) (per curiam), decided by the *same* five justices who decided *Chimento* two years earlier. In *Awde*, the Court unanimously affirmed a magistrate court’s “finding that two ‘Chess Challenge II’ devices before it were legal games of skill.” *Id.* The parties’ briefs raised arguments concerning, *inter alia*, the “used for gambling” prong of § 12-21-2710.⁴ Additionally, the Attorney General submitted a letter of supplemental authorities specifically reminding the Supreme Court of its decision in *Chimento*. If the Supreme Court had intended *Chimento* to apply when determining the legality of a machine under § 12-21-2710, it surely would not have issued an affirmance in *Awde*. The fact that the Court affirmed – in an unpublished, per curiam opinion – demonstrates that the “wagering” test used in *Chimento* does *not* apply to the analysis of whether a game is legal under § 12-21-2710. Although *Awde* clearly undermines this Court’s reasoning, it was not mentioned or addressed in the Opinion.

The Court’s Opinion also does not address the fact that the Attorney General,⁵ as well as courts at every level of South Carolina’s court system,⁶ have *all* applied *the dominant factor skill vs. chance test* to determine the legality of a video game, even *after Chimento* was decided in 2012. Simply put, *Chimento* has *never* been cited for the proposition that *all* video games that involve

⁴ The briefs and other case materials are available through C-Track Public Access link on the main page of the website for the South Carolina Judicial Branch, <https://www.sccourts.org/>.

⁵ See Op. S.C. Atty Gen., 2017 WL 4707542 (S.C.A.G. Oct. 11, 2017) (stating that “South Carolina gambling laws” prohibit “games of chance”).

⁶ See **Administrative Law Court:** *S.C. Dep’t of Revenue v. Chestnut*, 2021 WL 4822858, at *6 (S.C. Admin. Law Ct. Oct. 8, 2021) (stating that “games of chance [are] prohibited by [S.C. Code Ann.] § 12-21-2710”); **Court of Common Pleas:** *Smith v. S.C. Law Enf’t Div.*, 2013 WL 8477943, at *2 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013) (“[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance[.]” (internal quotation marks omitted)); **Court of Appeals:** *S.C. Dep’t of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 658, 790 S.E.2d 792, 802 (Ct. App. 2016) (“[T]he Department showed the Products Direct and Gift Surplus machines contained games of chance in violation of section 12-21-2710[.]”); **Supreme Court:** *Richland Cty. Sheriff’s Dep’t v. Awde*, No. 2014-MO-024, 2014 WL 3016205, at *1 (S.C. July 2, 2014) (affirming magistrate court’s finding “that two ‘Chess Challenge II’ devices before it were games of skill”).

consideration and a potential prize or reward are illegal, even if the outcome is determined by the player's skill. Rather, South Carolina courts at every level have *only* cited *Chimento* for the entirely unrelated subject of standards for constitutional challenges to statutes.⁷ Notably, one of these cases involved a determination of whether a video machine was legal under § 12-21-2710, which the circuit court decided under *the dominant factor test* and *did not* hold that the machine was illegal under *Chimento* simply because it involved payment of consideration. See *Smith v. S.C. Law Enf't Div.*, 2013 WL 8477943, at *2-3 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013) (finding game illegal under § 12-21-2710 as a device "pertaining to games of chance").

III. The *Chimento* Majority Did Not Overrule Decisions Applying the Dominant Factor Test to Determine Legality Under § 12-21-2710

The Court recognized (Opinion at 9) that its prior decision in *South Carolina Law Enforcement Division v. 1-Speedmaster S/N 00218*, 397 S.C. 94, 99-100, 723 S.E.2d 809, 812 (Ct. App. 2011), held that if skill predominates over chance, no further inquiry is necessary to determine the legality of the machine under § 12-21-2710. *Id.* at 100, 723 S.E.2d at 812. *Speedmaster* clearly held that "the term gambling" as used in § 12-21-2710 "*necessarily encompasses the element of chance.*" *Id.* (emphasis added). Because the *Speedmaster* game was predominantly one of skill, "we conclude the circuit court properly affirmed the magistrate's ruling *the Speedmaster was not 'used for gambling.'*" *Id.* at 100, 723 S.E.2d at 812 (quoting § 12-21-2710; emphasis added).

Nevertheless, the Court declined to follow *Speedmaster* on the basis that *Chimento* was

⁷ **Supreme Court:** *S.C. Human Affairs Comm'n v. Zeyi Chen*, 430 S.C. 509, 531, 846 S.E.2d 861, 872 (2020) (vagueness); *State v. Legg*, 416 S.C. 9, 14 n.4, 785 S.E.2d 369, 371 n.4 (2016) (facial challenge); *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506-07, 757 S.E.2d 388, 392-93 (2014) (facial challenge). **Court of Appeals:** *Rutter v. City of Columbia Design/Dev. Rev. Comm'n*, 2021 WL 2701549, at *3 (S.C. Ct. App. June 30, 2021) (vagueness). **Circuit Courts:** *Retail Servs. & Sys., Inc. v. S.C. Dep't of Rev.*, 2014 WL 12692755, at *2 (S.C. Com. Pl., Aiken County, May 29, 2014) (as-applied challenge); *Smith*, 2013 WL 8477943, at *11 (citing vagueness). **Administrative Law Courts:** *Hyndman v. Charleston Cty. Assessor*, 2013 WL 1786476, at *3 (S.C. Admin. Law Ct. Apr. 18, 2013) (as-applied challenge).

decided later, even though it did not explicitly overrule *Speedmaster*. (Opinion at 9.) However, when the Supreme Court overrules precedent, it clearly states that it is doing so. See, e.g., *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 564, 861 S.E.2d 774, 775 (2021) (“We overrule precedent that requires the pleading of special damages and return to the traditional definition of civil conspiracy in this state.”); *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 320, 778 S.E.2d 888, 890 (2015) (“We find our Legislature has enacted specific gambling loss statutes as the exclusive remedy for a gambler seeking recovery of losses sustained by illegal gambling. Accordingly, we now overrule our decisions that have implicitly authorized recovery beyond these statutes.”); *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 477, 527 S.E.2d 763, 765 (2000) (stating “we overrule our cases which apply the traditional approach” and listing specific cases in a footnote); *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196–97, 525 S.E.2d 872, 883 (2000) (“We overrule *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932), to the extent it permits the destruction of allegedly illegal property without any opportunity for the owner to contest the magistrate's determination of illegality.”) *Chimento* did not state or even imply that it was overruling *Speedmaster* or any other case applying the skill vs. chance test. Moreover, the same five Justices *applied* the skill vs. chance test a mere two years later in deciding *Awde*.

CONCLUSION

The dominant factor skill vs. chance test has historically been recognized and applied in South Carolina and is reflected in numerous statutes and court decisions. By erroneously extending the narrow holding in *Chimento* to the context of § 12-21-2710, the Court has effectively eliminated the second element—skill or chance—from the established law. Instead of consideration, chance, and reward, it is now just consideration and reward. But there is nothing whatsoever in *Chimento*—which was expressly limited to application to specific games being played in specific places enumerated in § 16-19-40—to suggest such a sweeping change in the

law. Accordingly, the Court should grant rehearing.

Respectfully submitted,

s/ William W. Wilkins

William W. Wilkins, SC Bar No. 6112
BILLY WILKINS LAW LLC
212 E. Park Ave.
Greenville, SC 29601
Telephone: 864.616.9866
Billy@billywilkinslaw.com

Kirsten E. Small, SC Bar No. 75681
MAYNARD NEXSEN PC
104 S. Main Street, 9th Floor
Greenville, SC 29601
Telephone: 864.370.2211
KSmall@maynardnexsen.com

Christopher J. Murphy, SC Bar No. 8903
MURPHY LAW FIRM, LLC
136 West Richardson Ave.
Summerville, SC 29483
Telephone: 843.832.1120
chris@murphylawfirmllc.com

Peter M. McCoy, Jr., SC Bar No. 73866
MCCOY LAW GROUP, LLC
15 Prioleau Street
Charleston, SC 29401
Telephone: 843.459.8835
peter@mccoylawgrp.com

February 19, 2025
Greenville, South Carolina

Attorneys for Respondents

RECEIVED

Feb 19 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

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

v.

South Carolina Law Enforcement Division, ... Appellant.

PROOF OF SERVICE

I certify that on February 19, 2025, the foregoing **Petition for Rehearing** was served on Appellant South Carolina Law Enforcement Division by emailing a copy to the counsel of record using the primary email address listed in the Attorney Information System, as set forth below:

Adam L. Whitsett, General Counsel
South Carolina Law Enforcement Division
awhitsett@sled.sc.gov

s/Kirsten E. Small

Kirsten E. Small, SC Bar No. 75681



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 21, 2025

Mr. Adam L Whitsett, Esquire
PO Box 21398
Columbia SC 29221-1398

Re: 1 Dragon's Ascent Video Gaming Machine v. SLED
Appellate Case No. 2023-000783

Dear Counsel:

We received the respondent's petition for rehearing. The Court requests a return within ten (10) days of the date of this letter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jenny A. Kitchings", is written over the typed name.

CLERK

cc: William W. Wilkins, Esquire
Christopher John Murphy, Esquire
Peter Michael McCoy, Jr., Esquire
Kirsten Elena Small, Esquire
Elizabeth Van Doren Gray, Esquire
Robert E. Tyson, Jr., Esquire
Vordman Carlisle Traywick, III, Esquire

Sarah Cameron Frierson, Esquire
Alan McCrory Wilson, Esquire
Robert D. Cook, Esquire
Thomas Tyler Hydrick, Esquire

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Mar 03 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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Gaming Machine; SC Games
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Respondents,

v.

South Carolina Law
Enforcement Division (SLED)

Appellant.

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING

The Opinion issued in this case follows and applies established South Carolina law and jurisprudence and effectuates the clear and unambiguous intent of the South Carolina Legislature. Simply put, gambling in South Carolina has been prohibited for centuries and electronic devices that are “used for gambling” were specifically prohibited in 1999. *See* 1802 S.C. Acts No. 1786; 1999 S.C. Act 125 (Legislation to “extend the [statutory] prohibition on slot machines and other machines or devices pertaining to games of chance to video games with a free play feature or any other coin-operated machine or device used for gambling.”). Further, the Opinion did not overlook or misapprehend any relevant point of law. Accordingly, no rehearing or reconsideration is warranted in this matter.

As an initial matter, the Petitioners misconstrue the Opinion’s application of *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012). Notably, the Opinion acknowledges that it does not establish a “novel wagering pay-to-play test” as suggested by the Petitioners nor does it abolish the historical skill versus chance analysis applicable to S.C. Code Ann. § 12-21-2710’s prohibition on “devices pertaining to games of chance of whatever name or kind”. Rather, the Opinion correctly acknowledges that S.C. Code Ann. § 12-21-2710 prohibited devices pertaining to games of chance prior to 1999 when the Legislature included a separate prohibition for devices that were “used for gambling”. To that end, the Opinion correctly acknowledges that these separate prohibitions address separate issues and must be read together such that neither are rendered surplusage or meaningless, an inevitable result if Petitioners’ interpretation were followed. (Opinion p. 6). Moreover, the Opinion correctly applies the *Chimento* precedent and recognized “the common-sense fact that a game of chance and a game of skill can both be ‘use for gambling’” and thus illegal in South Carolina. (Opinion p. 9). This was made abundantly clear by the *Chimento* Court, which stated “the statutory meaning of the word ‘gambling’ in South Carolina includes games in which skill outweighs chance.” *Chimento* at 527.

In addition, the Opinion faithfully harmonizes the gambling laws in South Carolina to avoid the manifestly absurd result advocated by Petitioners, which is to hold that the definition of the word “gambling” in S.C. Code Ann. § 16-19-40 is somehow different from the definition of word “gambling” in S.C. Code Ann. § 12-21-2710. Of course, the “goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd”, which is the effect of this Opinion. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000).

In addition, it is axiomatic that “statutes dealing with the same subject matter are *in para materia* and must be construed together, if possible, to produce a single, harmonious result.” *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). And, “statutes [that] are part of the same Act must be read together.” *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). Simply put, as acknowledged by the Supreme Court in *Chimento* and properly applied in this case, the word “gambling” throughout South Carolina law should have the same definition, to wit: “[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* at 532–33, 737 S.E.2d at 837 (quoting § 32-1-10) (Opinion p. 8). This is the law in South Carolina and was properly applied in this Opinion.

Petitioners are also incorrect that this Court erred in not properly analyzing or applying prior unpublished opinions, circuit court opinions, and administrative decisions. This sentiment completely disregards Rule 268(D)(2) of the South Carolina Appellate Court Rules, which states unequivocally that “[m]emorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.” Similarly, reliance on the dissenting opinion in *Chimento* is no more appropriate. *See State v. Batson*, 107 S.C. 460, 93 S.E. 135, 135 (1917) (“The majority opinion shows what is the law, and the dissenting opinion shows what is not the law.”). The Petitioners reliance on unpublished opinions, inferior court decisions, and dissenting opinions only highlights the deficiencies of the Petitioners arguments in this matter, particularly when compared to the thoughtful, well-reasoned Opinion penned by this Court.

Lastly, Petitioner’s argument that the Opinion will render professional golf tournaments or auto racing is unavailing as well. As noted in the Opinion, this case involves the interpretation of S.C. Code Ann. § 12-21-2710, a statute that deals solely with gaming machines and gaming devices. (Opinion p. 2) (“The sole issue before us is whether the statute in question—section 12-21-2710 of the South Carolina Code—only prohibits games of chance or also prohibits machines and devices that can be used for gambling.”). And, while the Opinion properly harmonizes the interpretation of the word gambling in this statute with the word gambling in other statutes, it is simply not possible to apply this Opinion, or any interpretation of S.C. Code Ann. § 12-21-2710 contained therein, to professional golf tournaments, NASCAR races, spelling bees, or any other event of any kind that does not involve gaming machines or devices. Further, the Opinion expressly acknowledges the machine-by-machine forfeiture process in South Carolina. (Opinion p. 4) *see also Allendale County Sheriff’s Office v. Two Chess Challenge II*, 361 S.C. 581, S.E.2d 471 (2004). As such, the far-reaching examples offered by Petitioners in support of the request for rehearing are illogical red herrings based on false equivalencies. Simply put, this perceived “parade of horrors” has no conceivable relevance to the case at bar – a case involving the interpretation and application of South Carolina’s gaming machine statute to a machine on which individuals pay money to gamble for the chance to win substantial cash payouts.

In conclusion, this Honorable Court issued a thoughtful, well-reasoned opinion that faithfully applies South Carolina law and jurisprudence to the case at bar. The Opinion did not overlook or misapprehend any relevant point of law. Quite the contrary. The Opinion employed the settled rules of statutory construction and effectuated the clear and unequivocal intent of the South Carolina Legislature. To that end, if the longstanding prohibitions on gambling and cash payouts for the play of gaming machines are to be changed, this change must be made by the South Carolina Legislature – not the courts. Accordingly, no rehearing or reconsideration is warranted in this matter, and the petition should be denied.

Respectfully Submitted,

s/ Adam L. Whitsett

ADAM L. WHITSETT

SLED General Counsel

Post Office Box 21398

Columbia, South Carolina 29221-1398

Phone: (803) 896-0647

Email: awhitsett@sled.sc.gov

S.C. Bar Number: 74888

ATTORNEY FOR APPELLANT

March 3, 2025

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Mar 03 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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1 Dragon's Ascent Video
Gaming Machine; SC Games
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Respondents,

v.

South Carolina Law
Enforcement Division (SLED)

Appellant.

PROOF OF SERVICE

I hereby certify that I served the **Response in Opposition to Petition for Rehearing** on the Petitioners/Respondents by sending a copy of the same to all counsel of record using each counsel's primary email address listed in the Attorney Information System (AIS) as noted below:

William W. Wilkins, Esquire
Kirsten E. Small, Esquire
Maynard Nexsen, PC
104 S. Main Street, Suite 900
Greenville, SC 29601
Email: BWilkins@maynardnexsen.com
KSmall@maynardnexsen.com

Christopher J. Murphy, Esquire
Murphy Crantford Meehan, Attorneys at Law, L.L.C.
136 West Richardson Avenue
Summerville, SC 29483
Email: chris@mcmlawsc.com

Peter M. McCoy, Jr., Esquire
McCoy Law Group, LLC.
15 Prioleau Street
Charleston, South Carolina 29401
Email: peter@mccoylawgrp.com

On March 3, 2025 from Columbia, South Carolina.

By: s/ Adam L. Whitsett
Adam L. Whitsett, Esquire
Post Office Box 21398
Columbia, SC 29211-1398
(803) 896-0647 (phone)
S.C. Bar Number: 74888

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

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Mar 10 2025

SC Court of Appeals

1 Dragon's Ascent Video Gaming
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REPLY IN SUPPORT OF
PETITION FOR REHEARING

The possibility of besting one's competitors and earning a prize incentivizes the development of skill, whether in playing a video game, golfing, or "chucking" a hockey puck. Under this Court's decision, *all* such incentives are now illegal. However well-intentioned, the decision does not further the basic aim of South Carolina's longstanding policy against "gaming" and "gambling," which is to ensure that the gullible and desperate are not parted from their money by an unrealistic *chance* at obtaining a disproportionate reward. Accordingly, the Court should grant rehearing.

SLED incorrectly suggests that the Court's expansion of the *Chimento* majority's holding is necessary to avoid rendering "used for gambling" in § 12-21-2710 superfluous. (Return at 2.) Not so. For example, many machines licensed under § 12-21-2720 may be games of chance, but

they are allowed because they are played only for amusement. But if, for example, the owner of one of these machines began making cash payouts based on players' scores, the machine would be "used for gambling" and thus illegal.¹ Alternatively, a skill-based game would be "used for gambling" if *non-players* bet on the outcome. See Op. Atty. Gen., 2002 WL 31341812, at *3 (S.C.A.G. Aug. 28, 2002) ("Of course, placing a wager on the outcome of any skill-based activity is illegal (i.e. betting on the outcome of a sporting event).").² Both of these scenarios give content to the phrase "used for gambling" without requiring the Court to adopt an overly broad and incorrect reading of *Chimento*.

As Respondents pointed out in the Petition, the Court's unwarranted extension of *Chimento* to the context of § 12-21-2710 necessarily means that any skill-based contest where there is an entry fee and a prize is illegal gambling, including amateur and professional sporting events like golf tournaments and promotional events like "turkey shoots," "chuck a puck" and "closest to the pin" contests. See Op. Atty. Gen., 2006 WL 3522434, at *5 (S.C.A.G. Nov. 1, 2006) (determining that a "chuck a puck" promotion "is primarily a game of skill and thus not violative of the South Carolina gambling laws"); see also Op. Atty. Gen., 2011 WL 3918174, at *3 (S.C.A.G. Aug. 17, 2011) (holding that the outcome in a "closest to the pin" golf contest is determined by

¹ The South Carolina Department of Revenue has relied on exactly this reasoning. See S.C. Revenue Ruling No. 16-3, 2016 WL 8794170, at *2 n.1 (S.C. Dept. Rev. May 5, 2016) (recognizing that an electronic tablet used for ordering and paying at a restaurant, which also offered "applications, puzzles, cartoons, videos, and/or games" for patrons' amusement, could be "used for gambling" in violation of § 12-21-2710).

² Cf. *Midwestern Enters., Inc. v. Stenehjem*, 625 N.W.2d 234, 240 (N.D. 2001) (phone-card vending machine was "used for gambling" because it dispensed a chance to win \$500 along with each phone card purchased); *State v. 26 Gaming Machines*, 145 S.W.3d 368, 374-75 (Ark. 2004) ("In short, these countertop machines are more akin to video arcade machines intended for amusement, because a player inserts money and can play gambling-like games but never receives anything in return except amusement. We agree with the circuit court that these machines are not actually used for gaming due to the absence of any payoff mechanism or reward.").

skill and therefore is not “gambling” under South Carolina law).

Attempting to counter this, SLED contends that because this case only involves the legality of a machine under § 12-21-2710, the Court’s reasoning would not apply outside of that context. SLED conveniently ignores that the **only** question in *Chimento* was whether a location was a “house used as a place of gaming” under S.C. Code Ann. § 16-19-40, not whether a machine or device was “used for gambling” under § 12-21-2710, a different statute the *Chimento* majority never cited or even made reference to in any manner whatsoever. Nevertheless, this Court held that *Chimento* redefined “gambling in South Carolina” to mean “betting money on the outcome of any ‘game’ whatsoever,” even if the player’s skill is the predominant factor in determining the outcome. (Opinion at 8 (emphasis omitted).) There is no rational way to limit the Court’s reasoning solely to the context of § 12-21-2710.

The Petition points out that numerous statutes define “gaming” or “gambling” in terms of chance and that courts at every level of our judicial system, as well as the Attorney General, have continued to rely on the dominant factor skill-vs-chance test even *after Chimento*. Rather than attempting to refute the substance of these arguments, SLED chastises Respondents for relying on unpublished appellate decisions, circuit court orders, and administrative decisions because they are “non-binding.” (Return at 3.) But Respondents have never contended otherwise, and that is not why these rulings were cited. Most importantly, Respondents do not claim that this Court is literally bound by the Supreme Court’s order in *Richland County Sheriff’s Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam). Not only was *Awde* unpublished, it involved a completely different (albeit also skill-based) machine. Nevertheless, *Awde* is highly relevant because it speaks directly to the Supreme Court’s understanding of its *Chimento* decision, issued only two years earlier by the same five Justices who decided *Awde*. If the Supreme Court had intended for the “wagering” analysis used in *Chimento* to be universally

applicable because it changed the longstanding definition of gambling as recognized by our Legislature, courts at every level *could not* have ruled that the machine at issue in *Awde* was legal under § 12-21-2710. The ruling in *Awde* is thus powerful evidence that this Court erred in expanding *Chimento* to the context of § 12-21-2710.

Likewise, Respondents did not claim that the circuit court orders and administrative decisions cited in the Petition constitute binding authority. These orders and decisions are relevant because they demonstrate that courts throughout the State, and even the Attorney General, have not interpreted *Chimento* as creating a novel “wagering” test to replace the dominant factor test. Rather, they uniformly recognized and applied the traditional and longstanding dominant factor, skill-vs-chance test—further supporting Respondent’s argument that the Court’s decision is incorrect and that rehearing should be granted..

Finally, SLED makes no attempt to explain why, if *Chimento* really did redefine “gaming” and “gambling” as requiring only consideration and prize (rather than consideration, chance—as opposed to *skill*—and prize), the majority did not simply and clearly state that it was overruling prior decisions to the contrary—as our Supreme Court has *routinely* done in other cases.³ The only logical explanation is not that the *Chimento* majority wanted to see if lower courts would figure it out for themselves, but rather that it did *not* intend to make such a basic, fundamental change to longstanding law.

For the reasons explained in the Petition and further articulated in this Reply, the Court should grant rehearing.

³ See, e.g., *Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 564, 861 S.E.2d 774, 775 (2021); *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 320, 778 S.E.2d 888, 890 (2015); *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 477, 527 S.E.2d 763, 765 (2000); *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196-97, 525 S.E.2d 872, 883 (2000).

Respectfully submitted,

s/ William W. Wilkins

William W. Wilkins, SC Bar No. 6112
BILLY WILKINS LAW LLC
212 E. Park Ave.
Greenville, SC 29601
Telephone: 864.616.9866
Billy@billywilkinslaw.com

Kirsten E. Small, SC Bar No. 75681
MAYNARD NEXSEN PC
104 S. Main Street, 9th Floor
Greenville, SC 29601
Telephone: 864.370.2211
KSmall@maynardnexsen.com

Christopher J. Murphy, SC Bar No. 8903
MCM LAW GROUP
136 West Richardson Ave.
Summerville, SC 29483
Telephone: 843.832.1120
chris@mcmlawsc.com

Peter M. McCoy, Jr., SC Bar No. 73866
MCCOY LAW GROUP, LLC
15 Prioleau Street
Charleston, SC 29401
Telephone: 843.459.8835
peter@mccoylawgrp.com

March 10, 2025
Greenville, South Carolina

Attorneys for Respondents

The South Carolina Court of Appeals

1 Dragon's Ascent Video Gaming Machine; SC Games of
Skill, LLC; Appellants,

v.

South Carolina Law Enforcement Division, Respondent.

Appellate Case No. 2023-000783

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Adam L Whitsett, Esquire

William W. Wilkins, Esquire

Christopher John Murphy, Esquire

Peter Michael McCoy, Jr., Esquire

FILED
Mar 12 2025

Kirsten Elena Small, Esquire
Elizabeth Van Doren Gray, Esquire
Robert E. Tyson, Jr., Esquire
Vordman Carlisle Traywick, III, Esquire
Sarah Cameron Frierson, Esquire
Alan McCrory Wilson, Esquire
Robert D. Cook, Esquire
Thomas Tyler Hydrick, Esquire
The Honorable Bentley Price

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price., Circuit Court Judge

Appellate Case No. 2023-000783

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

Respondents,

v.

South Carolina Law
Enforcement Division (SLED)

Appellant.

FINAL BRIEF OF APPELLANT

Adam L. Whitsett, Esquire
General Counsel
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, South Carolina 29221-1398
(803) 896-0647
S.C. Bar Number: 74888

Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

- I. Does the circuit court’s interpretation of S.C. Code Ann. § 12-21-2710, which allows cash payouts on a gaming device accomplish the clear and unambiguous intent of the South Carolina Legislature to prohibit cash payouts and gambling on gaming devices?**
- II. Did the circuit court’s order disregard the existing precedent set forth by the South Carolina Supreme Court in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012), which provides that a conduct can still be illegal gambling even if skill is the predominant factor in determining the outcome?**
- III. Is the circuit court’s order an improper advisory opinion that does not follow the binding Supreme Court precedent set forth in Allendale Cnty. Sheriff’s Off. v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004), which mandates a machine-by-machine forfeiture process in South Carolina and prohibits rulings on future devices?**
- IV. Did the circuit court’s order apply the gambling capability analysis required by South Carolina law?**
- V. Does the circuit court’s order improperly render the phrase “device licensed pursuant to Section 12-21-2720 and used for gambling” in § 12-21-2710 meaningless and redundant to the phrase “other device pertaining to games of chance of whatever name or kind” in § 12-21-2710?**
- VI. Is the circuit court’s appellate finding that the trial court’s interpretation of § 12-21-2710 – a statute that applies to the possession and ownership of gaming machines – could result in the prohibition of local spelling bees, the Heritage Golf Tournament, and the Governor’s Cup fishing tournament clear error?**

STATEMENT OF THE CASE

This action began with Appellant's seizure of one (1) Dragon's Ascent device on November 19, 2021. The seized device was taken to the Honorable Rad S. Deaton, a Berkeley County Magistrate, for examination in accordance with S.C. Code Ann. § 12-21-2712. After reviewing the device, Judge Deaton signed an Order of Destruction. However, Respondents timely challenged this order, and a post-seizure hearing on this one device was held on February 4, 2022. On August 11, 2022, Judge Deaton applied existing Supreme Court precedent and held that, although he believed that skill was the predominant factor in determining the outcome of the game, the seized device was nonetheless an illegal device on which individuals gambled, wagered, and received cash payouts in violation of South Carolina law. (Deaton Order)(R. pp. 3-15).

Respondents timely appealed Judge Deaton's decision to the circuit court. (Circuit Court Notice of Appeal)(R. pp. 35-36). Because Judge Deaton found that the machine was an illegal gambling device, Appellant did not appeal Judge Deaton's findings related to skill being the predominant factor in determining the outcome of the game.¹ The Honorable Bentley D. Price heard appellate arguments on the case on December 12, 2022. On February 27, 2023, despite acknowledging cash payouts on the device, Judge Price reversed the trial court's finding that the device was an illegal gambling device. (Price Order)(R. pp. 16-31). Appellant filed a timely Rule 59 motion to alter, amend, and reconsider, which Judge Price denied. (Motion to Reconsider)(Price Order Denying Reconsideration)(R. pp. 32-34). This appeal follows.

¹ This decision would of course be subject to future challenge in accordance with South Carolina's machine-by-machine forfeiture process that will be discussed more fully below.

STATEMENT OF THE FACTS

SLED received a complaint that there was a possible illegal gambling device in LG's By the Creek, which is a restaurant located in Suite 105 of 1005 Tanner Ford Blvd. in Hanahan, SC 29410 (Trial Tr. p. 89)(R. p. 215). SLED Special Agent Ryan Wood subsequently conducted three (3) separate undercover surveillance operations at this location. (Trial Tr. p. 113)(R. p. 239). During these operations, Wood wagered and gambled on the Dragon's Ascent device, received a cash payout from the play of the device, and witnessed at least one other individual receive a cash payout from the play of this device. (Trial Tr. pp. 105, 120)(R. pp. 231, 246).

Dragon's Ascent is a gaming device initiated by the insertion of U.S. Currency into a bill acceptor on the device. (Price Order p. 3)(R. p. 18). The amount inserted by the player establishes the credits that can be used by the player. *Id.* The object of the game is to use a joystick to "point and shoot" in an effort to capture dragons of varying sizes, colors, and point values that move across the play screen for the chance to win money. *Id.* The stated "Goal" of the game is to, "Shoot dragons to win credits! Credits are redeemable for cash." (Player's Guide)(R. p. 411).

The device has a "Raise Shot Cost" button that allows the player to select the value of each shot – between \$.10, .20, .50, 1.00, or 2.00 per shot. (Trial Tr. p. 92)(R. p. 218). The more the player commits to a shot, the more the player stands to win with that shot. *Id.* The device has a "Ticket Button" that the player uses to print a redeemable ticket which can be exchanged for cash." (Price Order p. 3)(R. p. 18). The prize for shooting one individual dragon - the Rainbow Dragon – was \$614, \$1,555.41, and \$1,783 at different times prior to and during the post-seizure hearing. (Trial Tr. pp. 52, 96, and 115)(R. pp.

178, 222, 241). The “Rainbow Dragon” feature is a “progressive jackpot that exhibits a monetary figure on the dragon, enticing a player to shoot that dragon to win that amount.” (Deaton Order p. 8)(R. p. 10).

The trial court also noted that “a player may successfully play Dragon’s Ascent using keen hand/eye coordination, memorization, and recognition of learned patterns, timing, accuracy in aiming, reflexes and reaction time, manual dexterity, mental aptitude, concentration, and deductive analysis.” (Deaton Order p. 8)(R. p. 10). However, the trial court found that Dragon’s Ascent is a game played predominantly in establishments that serve alcohol. While it is possible for anyone over the age of eighteen (18) to play Dragon’s Ascent, it is not probable that most Dragon’s Ascent players will exercise the dedication, patience, and deductive analysis in order to play the game successfully” *Id.* Ultimately, the trial court noted that “while Dragon’s Ascent is a game that requires a high degree of skill to master its complexities, the Court believes that it is a game designed to make money for the ‘house’ not the player, in the context of regular game play and brings with it the dire concerns referenced by Chief Justice Toal in her concurring opinion in Chimento”. *Id.*

The evidence in this matter conclusively established that a player could insert \$1.00 into the Dragon’s Ascent device, could shoot the Rainbow Dragon, and could win a \$1,783 cash payout. (Trial Tr. pp. 52, 92)(R. pp. 178, 218).

STANDARD OF REVIEW

“Determining the proper interpretation of a statute is a question of law” subject to *de novo* review. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

“Upon hearing the appeal the [circuit court sitting as an] appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all of the parties and for errors of law or fact.” S.C. Code § 18-7-170.

“[T]he Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate’s judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are no facts that show the affirmance was influenced by an error of law.” Burns v. Wannamaker, 281 S.C. 352, 357, 315 S.E.2d 179, 182 (Ct.App.1984). However, the “Court of Appeals still retains *de novo* review of whether the facts show the circuit court’s affirmance was controlled or affected by errors of law.” Bowers v. Thomas, 373 S.C. 240, 245, 644 S.E.2d 751, 753 (Ct. App. 2007).

“At a post-seizure hearing, the burden is on the owner of the *res* [the seized device] to show why the seized property should not be forfeited and destroyed.” Union County Sheriff’s Office v. Henderson, 395 S.C. 516, 719 S.E.2d 665, 666 (2011).

The cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003).

ARGUMENTS

1. The circuit court's interpretation of S.C. Code Ann. § 12-21-2710, which allows cash payouts on a gaming device, does not accomplish the clear and unambiguous intent of the South Carolina Legislature to prohibit cash payouts and gambling on gaming devices.

The circuit court erroneously disregarded the clear and unambiguous intent of the South Carolina Legislature by specifically allowing cash payouts for the play of the device in question. The intent of the South Carolina Legislature in passing S.C. Code Ann. § 12-21-2710 (§ 12-21-2710), particularly the amendments enacted in 1999, was to specifically **prohibit** cash payouts on devices in South Carolina. These amendments also famously brought an end to video poker and the havoc it had wreaked on the State of South Carolina for years. The circuit court's order disregards the Legislative intent and seemingly ignores the dark history of cash payouts on devices and the damage that resulted therefrom in South Carolina. Accordingly, the circuit court's decision to allow cash payouts on devices, which may well usher in a new era of gambling on gaming devices in South Carolina, must be reversed. *See Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) ("The cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent."); *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."); *Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 59, 644 S.E.2d 675 (2007) ("[I]t is beyond this Court's power to effect a change in the statutes enacted by the Legislature.").

In 1999, the South Carolina Legislature passed 1999 S.C. Act 125 to specifically put an end to cash payouts on gaming devices in South Carolina. The introductory language of this Act provides a clear recitation of the explicit intent of the South Carolina Legislature in this regard. This bill was,

AN ACT TO AMEND SECTIONS 12-21-2710, AS AMENDED, 12-21-2712, 12-21-2720, AS AMENDED, AND 12-21-2726, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO COIN-OPERATED MACHINES OR DEVICES, SO AS **TO EXTEND THE PROHIBITION ON SLOT MACHINES AND OTHER MACHINES OR DEVICES PERTAINING TO GAMES OF CHANCE TO VIDEO GAMES WITH A FREE PLAY FEATURE OR ANY OTHER COIN-OPERATED MACHINE OR DEVICE USED FOR GAMBLING**, TO EXTEND THE SEIZURE AND DESTRUCTION PROVISIONS APPLICABLE TO GAMES OF CHANCE TO THESE EXPANDED PROHIBITIONS,...

AND TO REPEAL SECTIONS 12-21-2703, 16-19-60, AND ARTICLE 20, CHAPTER 21 OF TITLE 12 RELATING RESPECTIVELY TO THE RETAIL LICENSE REQUIREMENT FOR A LOCATION WITH VIDEO GAMES WITH A FREE PLAY FEATURE, THE EXEMPTION OF VIDEO GAMES WITH A FREE PLAY FEATURE FROM THE GAMBLING OFFENSES, AND THE VIDEO GAMES MACHINES ACT, **ALL OF THE ABOVE ENACTED FOR THE PURPOSE OF PROHIBITING CASH PAYOUTS FOR CREDITS EARNED ON VIDEO GAME MACHINES ON AND AFTER JULY 1, 2000**;....(emphasis added).

Should this clear language not be enough evidence the intent of the Legislature, “PART I” of this bill is also specifically entitled “**Prohibition on Payouts**”. 1999 S.C. Act 125 (emphasis added).

In Westside Quik Shop v. Stewart, the South Carolina Supreme Court acknowledged the purpose of the 1999 amendments to § 12-21-2710 indicating:

[f]inally in an extra session called by the Governor in June 1999 S.C. Act No. 125 providing for a November referendum to be held statewide to decide the fate of video gaming. Voters would be asked whether cash payouts for video gaming machines should continue to be allowed after June 30, 2000. If voters answered “no,” Part 1 of the Act would become effective

July 1, 2000. **This part of the Act repeals § 16-19-60, which allows nonmachine cash payouts, and amends S.C. Code Ann. § 12-21-2710 (2000) to remove the exception for video gaming machines, thereby rendering the possession of these machines illegal....** Further, under S.C. Code Ann. § 12-21-2712 (2000), these machines are then subject to forfeiture and destruction by the State.... Before the referendum was held, an action was brought challenging its constitutionality. After taking the case in our original jurisdiction in October 1999, this Court struck down the referendum, but severed it from the remaining parts of the Act. Specifically, we found Part I, which bans the possession or operation of these machines, to be a free standing legislative enactment and therefore valid. Joytime Distrib. and Amusement Co. v. State, 338 S.C. 364, 528 S.E.2d 647 (1999). **Accordingly, on July 1, [2000] under § 12-21-2710 and -2712, these machines will become contraband subject to forfeiture and destruction regardless of their use or operability.**

341 S.C. 297, 301-2, 534 S.E.2d 270, 272 (2000) *overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005).(emphasis added). The Supreme Court also specified that

The plain language of the statute [§ 12-21-2710] makes clear the legislature’s intent to outlaw mere possession of such machines. The statute makes it unlawful “for any person to keep on his premises *or* operate” certain gambling machines. S.C. Code Ann. § 12-21-2710 (Supp.1998) (emphasis added); *see also* State v. Appley, 207 S.C. 284, 288, 35 S.E.2d 835, 836 (1945) (possession of a machine is a violation in itself, separate from the crime of operation). **The circuit court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.**

State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 187-89, 525 S.E.2d 872, 878-79 (2000)(emphasis added). Accordingly, it is without question that the Legislature amended § 12-21-2710 in 1999 for the express purpose of prohibiting cash payouts.

However, despite this clear and unambiguous Legislative intent directly to the contrary, the circuit court’s order specifically allows for cash payouts for the play of this gaming device. To that end, the circuit court’s order openly acknowledges that “the game also features a “Ticket Button” that the player uses to print a redeemable receipt which the

player can exchange for cash.” (Price Order p. 4)(R. p. 19). In fact, the evidence in this matter indicated a player could win more than \$1,783 for the play of this machine. (Trial Tr. p. 52)(R. p. 178). Cash payouts did not matter to the circuit court. Rather, the circuit court interpreted the statute enacted “for the purpose of prohibiting cash payouts for credits earned on video game machines...” to allow cash payouts for credits earned on a video game machine. This is not only clear and reversible error, but it also absurdly results in the tacit allowance of gambling on a gaming device in direct contravention of South Carolina’s longstanding prohibitions on such. *See* 1999 S.C. Act 125 *see also* Lancaster Cnty. Bar Ass’n v. S.C. Comm’n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (courts “will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.”); Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (courts do “not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly”).

The South Carolina Supreme Court has long acknowledged that it “consistently has deferred to the Legislature’s determination of which gaming devices must be sacrificed for the public welfare. Furthermore, forfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable.” Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 303-4, 534 S.E.2d 270, 272 (2000) *overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005) *see also* S.C. Const. Art. I, § 8 (mandating separation of powers). This rationale acknowledges the exclusive policymaking role of the South Carolina Legislature. *See* Wilson ex rel. State v. City of Columbia, 434 S.C. 206,

213, 863 S.E.2d 456, 460 (2021) (“Where, as here, the General Assembly establishes policy via legislation, it is our solemn duty to uphold that law absent a clear constitutional infirmity.”)

In South Carolina, S.C. Code Ann. § 12-21-2710 is the South Carolina Legislature’s determination of the types of machines and devices that are prohibited. It states in pertinent part:

It 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 machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device 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, boards, 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 provisions of this section do not extend to coin-operated nonpayout 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....

The plain language of this statute prohibits all “device[s] licensed pursuant to Section 12-21-2720 and used for gambling....” Accordingly, the Legislature has established and long maintained a clear and unambiguous policy determination that gambling on gaming machines is illegal in South Carolina. *See* S.C. Code Ann. § 12-21-2710. The circuit court decision erroneously disregards this longstanding and clear Legislative policy and inexplicably opens to the door to conduct that South Carolina law was specifically designed to prohibit. Accordingly, this order should be reversed in its entirety. *See Wilson ex rel. State v. City of Columbia*, 434 S.C. 206, 213, 863 S.E.2d 456, 460 (2021).

It is also noteworthy that, while § 12-21-2710 has been amended since 1999, the Legislative policy decision to prohibit cash payouts on gaming devices has not changed. In May of 2022, the Legislature amended § 12-21-2710 to allow federally licensed South Carolina gaming device manufacturers to produce and sell items to out-of-state jurisdictions. *See* 2022 Act No. 190. However, this amendment did not change the clear prohibition on machines or devices used for gambling nor did it authorize cash payouts on machines in South Carolina. Moreover, there have been specific attempts to legislatively legalize gambling of “games of skill” in South Carolina. In fact, House Minority Leader Todd Rutherford filed former House Bill 4521 on November 11, 2021, which would have done exactly that. However, this effort was rejected by the Legislature, which only further signifies the tacit Legislative intent to prohibit cash payouts – even on games of skill.

The South Carolina Legislature has established and long maintained a clear and unambiguous policy determination that cash payouts and gambling on gaming machines are prohibited in South Carolina. *See* S.C. Code Ann. § 12-21-2710; 1999 S.C. Act 125. The circuit court’s interpretation of § 12-21-2710 that inexplicably allows cash payouts for the play of this Dragon’s Ascent gaming device is clear reversible error. In addition, the circuit court’s decision not only leads to the absurd result that a statute, enacted for the purpose of prohibiting cash payouts, authorizes them; but the circuit court’s ruling leads to a dangerous and very real concern that there will be a reemergence of the havoc wreaked on South Carolina by video gambling prior to 1999. Therefore, the circuit court’s decision must be reversed and the trial court’s finding that this device is an illegal gambling device that must be destroyed should be restored.

2. The circuit court's order disregards the existing precedent set forth by the South Carolina Supreme Court in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012), which provides that conduct can still be illegal gambling even if skill is the predominant factor in determining the outcome.

The circuit court also committed reversible error in disregarding the precedent set by the South Carolina Supreme Court precedent in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012). In *Chimento*, the South Carolina Supreme Court conclusively determined that South Carolina's gambling prohibitions can still apply to all games where skill predominates over chance in South Carolina.² Specifically, the Supreme Court held that "[t]he statutory meaning of the word 'gambling' in South Carolina includes games in which skill outweighs chance." *Id.* at 532. While the conduct at issue in *Chimento* was Texas Hold'em poker and the statute being challenged in that case was S.C. Code Ann. § 16-19-40 (South Carolina's "Unlawful games and betting statute), the Supreme Court did *not* limit the *Chimento* decision to § 16-19-40. Rather, the Supreme Court was clear and unequivocal in its use of the phrase "the statutory meaning of the word gambling *in South Carolina*...". *Id.* (emphasis added). Had the Supreme Court intended to limit the *Chimento* decision to S.C. Code Ann. § 16-19-40, as the circuit court ruled, the Court most assuredly would have explicitly said so. The Court did not. Rather, the Court ruled that the word "gambling" that exists in all South Carolina statutes, including § 12-21-2710, "includes games in which skill outweighs chance." *Id.* The circuit court erred in failing to follow this binding Supreme Court precedent. *See Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993)(decisions of the Supreme Court bind as precedent).

² Appellant acknowledges again that it did not appeal the trial court's finding that Dragon's Ascent is predominantly a game of skill choosing to leave that fight for a subsequent seizure pursuant to South Carolina's machine-by-machine forfeiture process. *See Allendale Cnty. Sheriff's Off. v. Two Chess Challenge II*, 361 S.C. 581, 606 S.E.2d 471 (2004).

In accordance with *Chimento* and since 2012 in South Carolina, “[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.” *Id.* at 533. This is the test that was properly employed and analyzed by the trial court. (Trial Court Order pp. 10-12)(R. pp. 12-14). To that end, the trial court correctly held that the “evidence in the record clearly established that players select the amount of money to play on individual shots and that the money the player stands to win correlates to the amount wagered – *i.e.* the more you pay to play, the more you stand to win on the device.” (Deaton Order p. 11)(R. p. 13). It is undisputed that this device has a “Raise your cost” button that directly facilitates a player’s ability to increase the amount committed per play, which correspondingly increases the size of the prize available per play. *Id.* The ability to increase the amount of the prize by increasing the amount played constitutes an illegal wager that renders an activity illegal gambling in South Carolina.

At the post-seizure hearing in this matter, SLED Special Agent Wood specifically testified that he “cycled through the raise your shot cost button”, which allowed the player to select his wager between \$.10, .20, .50, 1.00, or 2.00 per shot. (Trial Tr. p. 92)(R. p. 218). Wood also testified that “it was obvious that was some type of wager button.” *Id.* Wood further testified that he was able to continuously wager on the Dragon’s Ascent device and that “the more you wagered the more you stood to win if you were successful destroying that particular dragon.” (Trial Tr. p. 94)(R. p. 220). Specifically, Wood noted “I noticed that if I was wagering ten cent and selected the small pink dragons going across the screen and was successful destroying it then I would get 60 cents. If I moved my bet to 20 cents I would -- for that same dragon I would get a \$1.20.” *Id.*

Ultimately, Special Agent Wood confirmed unequivocally that he “put money in” this Dragon’s Ascent machine, that he “wagered different amounts”, that “the more you wagered the more you stood to win if you were successful destroying that particular dragon”, and that he “sometimes walked away with more money”. *Id.* Moreover, Wood testified that he also witnessed other players winning money on the play of this device. (Trial Tr. p. 120)(R. p. 246). As such, Special Agent Wood’s testimony established that an individual can wager and, thus, can illegal gamble on this device rendering it an illegal gambling device prohibited by § 12-21-2710. *See Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012). Accordingly, the circuit court’s decision must be reversed.

The circuit court also improperly relied on the *Speedmaster* case rather than applying the subsequent precedent that was established in the *Chimento* case. This was reversible error. Even the South Carolina Court of Appeals in *Speedmaster* acknowledged the existence of the *Chimento* case and the possibility that the Supreme Court may clarify South Carolina law on “games of skill” noting “[w]e are aware of a case currently under consideration by the South Carolina Supreme Court, *Town of Mt. Pleasant v. Chimento* (heard October 19, 2010), which may address this issue.” *See S.C. L. Enf’t Div. v. 1-Speedmaster S/N 00218*, 397 S.C. 94, 98, *fn 1*, 723 S.E.2d 809, 811 (Ct. App. 2011). As predicted by the Court of Appeals, the Supreme Court did in fact clarify gambling law in South Carolina. Again, in the context of whether “skillful” conduct can still be gambling, the Supreme Court held that courts must evaluate “whether there is money or something of value wagered on the game’s outcome.” *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830, 838 (2012).

The trial court's decision was not a departure from a "multiple-decades-old definition" of gambling as articulated by the circuit court. Rather, this was the Supreme Court expanding the clear anti-gambling policy set by the South Carolina Legislature and ruling accordingly. Simply put, the gambling analysis on gaming devices in South Carolina still begins with the analysis of the historical elements of gambling - chance, prize and consideration. *See Ward v. West Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (2010) *see also Harvie v. Heise*, 150 S.C. 277, 148 S.E. 66, 68 (1929) (a "machine is a gambling device where its operation is such that, although the player in any event will receive something, he stands a chance to win something in addition."). In that regard, should a device be determined to be predominantly a game of chance on which a player pays consideration to win a prize, the device is illegal. *Id.* However, after *Chimento*, even if a device is determined to be predominantly a game of skill, there is an additional analysis to determine whether the conduct is still illegal gambling. Specifically, courts must also determine "whether there is money or something of value wagered on the game's outcome." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830, 838 (2012). Former Chief Justice Toal articulated the reasoning behind the need for adding this additional consideration because allowing wagering and cash payouts for "games of skill"

would also open the door wide to *all* heretofore illegal gaming practices in this state, including video poker. *See* S.C.Code Ann. § 16-19-40(g) (proscribing the playing of "any machine or device ... used for gambling purposes"). Because of this very real consequence, I am concerned that striking this critical language from the statute would beget, as elucidated by the General Assembly in 1816 when amending section 16-191-40, the "impoverishment of many people, corruption of the morals and manners of youth, ... the tendency which is vice, misery and crime, as examples in this state have abundantly proven." These dire concerns resonate as much today as they did nearly 200 years ago. I do not need to remind any person of the havoc wreaked upon this State as a result of the "pernicious" practice of video poker. Although there are other sound provisions outlawing video

poker, *see* S.C.Code Ann. §§ 1221–2710, 2712 (2000), I am loathe to strike the critical language from the general ban on gaming in the event that it guts these provisions, and consequently, South Carolina’s longstanding prohibition against gambling.

Town of Mount Pleasant v. Chimento, 401 S.C. 522, 537–38, 737 S.E.2d 830, 840 (2012).

The South Carolina Supreme Court has also long acknowledged 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. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified and cunning mechanical inventions.

Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 69 (1929).

The circuit court’s interpretation of § 12-21-2710 to allow a “cunning mechanical invention” to facilitate cash payouts is contrary to the specific intent of the South Carolina Legislature and, without reversal, opens the door to the dire concerns of the havoc wreaked upon this State as a result of the “pernicious” practice of video poker. The Supreme Court in *Chimento* sought to avoid this outcome. The trial court’s decision avoids this outcome. Unfortunately, the circuit court disregarded former Chief Justice Toal’s warnings from *Chimento* and issued a decision that facilitates this dire outcome. This decision, which does not follow the binding Supreme Court precedent must be reversed. *See Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (recognizing decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. The trial court properly applied the *Chimento* precedent and the trial court’s finding that this Dragon’s Ascent device is an illegal gambling device on which individual’s wager, gamble, and receive cash payouts should be reinstated.

3. The circuit court's order is an improper advisory opinion that does not follow binding Supreme Court precedent that is set forth in Allendale Cnty. Sheriff's Off. v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004) mandating a machine-by-machine forfeiture process in South Carolina.

The circuit court's decision also disregards binding South Carolina jurisprudence and attempts to adjudicate the legality of all Dragon's Ascent machines – even ones not properly before the circuit court in this post-seizure hearing appeal. Put simply, this action involved one (1) Dragon's Ascent device that was seized by SLED from LG's By the Creek for which the procedures of S.C. Code Ann. § 12-21-2712 were followed. The circuit court's broad finding that "Dragon's Ascent is a game predominantly based on skill" is clearly intended to improperly adjudicate future Dragon's Ascent devices, including ones that were not capable of being lawfully ruled upon in this action. This finding is directly contrary to binding South Carolina jurisprudence and South Carolina's longstanding machine-by-machine forfeiture process. Specifically, in Allendale Cty. Sheriff's Off. v. Two Chess Challenge II case, the South Carolina Supreme Court found

In the present case, the magistrate ruled on the legality of the two machines before the court and "all those [machines] operating in an identical manner." This broad ruling exceeded the scope of the magistrate's authority and is contrary to the machine-by-machine forfeiture process outlined in the statute and carried out in other cases. Therefore, we find that the magistrate court lacked jurisdiction to determine the legality of machines not before court.

361 S.C. 581, 586–87, 606 S.E.2d 471, 474 (2004). The Court also noted that

As to the two machines seized, examined, and deemed legal, there is nothing preventing the Sheriff's Office or other law enforcement officials from seizing the machines once again for the magistrate's examination. Because video machines may be manipulated so as to change their nature from lawful to unlawful, law enforcement may, based on probable cause, seize the machines in question once again. In other words, the effect of the magistrate's order is that it deems the machines lawful *at the time* they were seized and examined.

Allendale Cnty. Sheriff's Off. v. Two Chess Challenge II, 361 S.C. 581, 587, 606 S.E.2d 471, 474 (2004).

The circuit court's decision is not properly limited to the one (1) Dragon's Ascent machine at issue in this action, nor did it acknowledge that the machine can only be adjudicated as it existed at the specific point in time that it was seized. Rather, the circuit court attempts to improperly foreclose future seizures and to improperly adjudicate the legality of future devices. This is directly contrary to binding precedent in South Carolina and must be reversed. *Id.* Courts in South Carolina have long rejected attempts to foreclose law enforcement seizures of gaming machines and the circuit court committed reversible error in failing to do so. *See generally Harvie v. Heise*, 150 S.C. 277, 148 S.E. 66 (1929) (denial of a request to enjoin actions regarding prosecutions for possession of slot machines).

Similarly, to the extent the circuit court's decision attempts to adjudicate future devices without a pending case or controversy, it is an improper advisory opinion that must be reversed. The South Carolina Supreme Court has long held that courts have no jurisdiction to "enter the field of advisory opinions." *Power v. McNair*, 255 S.C. 150, 155, 177 S.E.2d 551, 553 (1970). Further, it "is elementary that the courts of this State have no jurisdiction to issue advisory opinions." *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975). Therefore, the circuit court's attempt to improperly exercise non-existent jurisdiction to rule on all Dragon's Ascent machines and issue an improper advisory opinion must be reversed in compliance with South Carolina's longstanding machine-by-machine forfeiture precedent. Allendale Cnty. Sheriff's Off. v. Two Chess Challenge II, 361 S.C. 581, 587, 606 S.E.2d 471, 474 (2004).

4. The circuit court order does not properly apply the gambling capability analysis required by South Carolina law.

In furtherance of the South Carolina Legislature’s longstanding prohibition on gambling devices in South Carolina, the South Carolina Supreme Court has long interpreted § 12-21-2710 to prohibit even the mere possession of devices on which individuals **can** gamble. Specifically, as far back as 2000, the Supreme Court noted that

The plain language of the statute [S.C. Code Ann. § 12-21-2710] makes clear the legislature’s intent to outlaw mere possession of such machines. The statute makes it unlawful “for any person to keep on his premises *or* operate” certain gambling machines. S.C. Code Ann. § 12–21–2710 (Supp.1998) (emphasis added); *see also* State v. Appley, 207 S.C. 284, 288, 35 S.E.2d 835, 836 (1945) (possession of a machine is a violation in itself, separate from the crime of operation). The circuit court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.

State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 187-89, 525 S.E.2d 872, 878-79 (2000) (emphasis added). The Supreme Court has also long held that

an allegedly illegal video gaming machine is deemed an unlawful gambling device at the moment of seizure, *i.e.*, the machine is contraband *per se* because it is illegal to possess and not susceptible of ownership. Moreover, this conclusion is appropriate in light of South Carolina’s long-established statutory prohibitions on the ownership or use of specified gambling devices, including video gambling devices developed in recent years. *See Johnson [v. Collins Entertainment Co.]*, 88 F.Supp.2d [499]...502 n. 1 [D.S.C. 1999] (“[l]egislation designed to control ‘the mischiefs of gambling’ was enacted by the South Carolina colonial legislature in 1712”).

Mims Amusement Co. v. S. Carolina Law Enforcement Div., 366 S.C. 141, 154, 621 S.E.2d 344 (2005). The evidence at the post-seizure hearing demonstrated not only the capability of gambling; but actual wagering, gambling, and cash payouts on the seized Dragon’s Ascent device. Specifically, SLED Agent Wood testified that he personally wagered and gambled on this device during each of his three undercover operations at the location in question. He testified that he “put money in” this Dragon’s Ascent machine,

that he “wagered different amounts” during his play, that “the more you wagered the more you stood to win if you were successful destroying that particular dragon”, and that he “sometimes walked away with more money”. (Trial Tr. p. 94)(R. p. 220). Further, S/A Wood specifically acknowledged:

This -- this game is pretty simple to me. I could put in whatever amount of money I want to put in and I have the chance to win more money than that. That’s gambling to me. If I can put in a dollar and I’m able to win \$20 that’s gambling. I’m also able to lose that. So you’re able to lose or you might win. You’re gambling your money and that is -- to me that’s the point of this game. If there was no chance of winning money at this game I don’t see any entertainment value for bar patrons. I see there’s games all over bars that don’t offer payouts and they’re not getting paid. When I go in a bar and a game is getting played like this and they’re winning money but they’re playing it because they’re – it’s a gambling.

(Trial Tr. p. 121)(R. p. 247).

The evidence in this matter also established that a player could win up to \$1,783.00 for the play of this machine. Special Agent Wood testified that the amount of the “Rainbow Dragon”³ during his first undercover operation at LG’s By the Creek was “\$614.” (Trial Tr. p. 96)(R. p. 222). During his second undercover operation, Wood acknowledged that the “Rainbow Dragon” was worth in the “\$700 range”. (Trial Tr. p. 110)(R. p. 236). During his final undercover operation, the amount available to win for the “Rainbow Dragon” was “\$1,555.41”. (Trial Tr. p. 115)(R. p. 241). In court, the value of the “Rainbow Dragon” was “1,783”. (Trial Tr. p. 52)(R. p. 178). As such, the evidence in this case proved that the device facilitated illegal cash payouts. Therefore, the device is illegal in South Carolina – regardless of other intended, capable, or other possible uses, and the circuit court’s contrary decision must be reversed.

³ This is the only dragon on the entire game that displays its value and operates like a progressive jackpot to entice players. (Deaton Order p. 8)(R. p. 10).

5. The circuit court's order improperly renders the phrase "device licensed pursuant to Section 12-21-2720 and used for gambling" in § 12-21-2710 meaningless and redundant to the phrase "other device pertaining to games of chance of whatever name or kind" in § 12-21-2710.

In interpreting statutes in South Carolina, "we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" Senate by & through Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018). South Carolina Code § 12-21-2710 separately prohibits many different types of machines and devices. When broken apart to highlight the different categories of illegal machines for clarity, this statute provides,

It 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 machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or

other device 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, boards, 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 provisions of this section do not extend to coin-operated nonpayout 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).

The plain language of this statute evidences a clear Legislative policy decision to separately prohibit devices that are “used for gambling” and devices “pertaining to games of chance of whatever name or kind”. The trial court improperly joined these two provisions finding that the determination of whether skill or chance predominates is the end of the inquiry into the legality of an alleged gambling device in South Carolina. This decision not only disregards the binding precedent of *Chimento*, as discussed more fully above, but it also renders these separate phrases in § 12-21-2710 redundant and superfluous. This is clear and reversible error that should be reversed.

As discussed above, in a post-*Chimento* § 12-21-2710 analysis, court should inquire into whether a “device pertains to games of chance” or whether a device “is 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.” South Carolina Code § 12-21-2710. If a machine fails this test, it is subject to forfeiture and destruction. *Id.* If, however, skill predominates over chance on the device, the device does not “pertain to games of chance” and the analysis shifts to whether or not the device is “used for gambling”. In *Chimento*, the South Carolina Supreme Court specifically clarified the “statutory definition of the word gambling in South Carolina includes games in which skill outweighs chance” and the analysis becomes “whether there is money or something of value wagered on the game’s outcome.” Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830, 838 (2012). The evidence in this case clearly establishes that there were wagers on this device and that the more you pay the more you stand to win. (Trial Transcript. pp. 92, 94)(R. pp. 218, 220).

The circuit court’s decision to combine the analysis of the phrase “device licensed pursuant to Section 12-21-2720 and used for gambling” in § 12-21-2710 with the phrase “other device pertaining to games of chance of whatever name or kind” in § 12-21-2710 renders both surplusage and superfluous and negates the Legislature’s intent to prohibit both devices pertaining to games of chance and devices that are used for gambling. Therefore, this decision must be reversed. *See Senate by & through Leatherman v. McMaster*, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) *see also Wilson ex rel. State v. City of Columbia*, 434 S.C. 206, 213, 863 S.E.2d 456, 460 (2021) (“Where, as here, the General Assembly establishes policy via legislation, it is our solemn duty to uphold that law absent a clear constitutional infirmity.”). Further, the trial court’s ruling that this Dragon’s Ascent is an illegal device subject to forfeiture and destruction should be restored.

6. The circuit court's finding that the trial court's interpretation of § 12-21-2710 – a statute that applies to the possession and ownership of gaming machines – could somehow result in the prohibition of local spelling bees, the Heritage Golf Tournament, and the Governor's Cup fishing tournament is clear error.

The trial court found that “the evidence in the record clearly establishes that players select the amount of money to play on individual shots and the amount of money the player stands to win directly correlates to the amount wagered – *i.e.*, the more you pay to play, the more you stand to win on this device.” (Deaton Order p. 11)(R. p. 13). Accordingly, the trial court found that “the credible evidence before the Court supports the conclusion that money or something of value is wagered on the outcome of each Dragon's Ascent ‘play’ and players do so with the expectation of a larger regard for further play.” (Deaton Order pp. 11-12)(R. pp. 13-14). And, in “using the Chimento Court's reasoning, this Court finds that although Dragon's Ascent is a game in which skill predominates, a person ‘gambles’ when money is wagered in so playing. To hold otherwise would effectively legalize wagering and payouts for all games of skill, including golf, basketball, and the like.” (Deaton Order p. 12)(R. p. 14). Contrary to the circuit court's finding, the trial court did not hold, find, or even suggest that the payment of an entry fee to compete in spelling bees, professional golf tournaments, NASCAR races, fishing tournaments, and country club memberships was illegal in South Carolina. (Price Order p. 14)(R. p. 29). Rather, the trial court, like the Supreme Court in *Chimento*, acknowledged that “wagering” on a device or on the outcome of a contest – *i.e.*, the act of paying more to increase the size of the available prize illegal gambling. Simply put, the trial court did not rule that an entry fee into a local golf or basketball tournament was illegal. It is not. However, if there is a contest, whether it is golf or basketball, where players can choose to pay differing amounts of money to increase the size of the available prize, or if individual golfers make wagers

amongst themselves on the outcome of the contest – this is conduct that would likely be considered illegal gambling in South Carolina. However, the discussion of other activities is in fact dicta, and is certainly not determinative in this action. Rather, as the 4th Circuit Court of Appeals has noted,

South Carolina has taken a measured approach to enforcement for the eighty-one years § [12-21-]2710 and its predecessor statutes have been in effect. There is no indication that SLED officers might burst into a family's living room and yank a Monopoly board from the hands of a shocked child. Appellants could not refer the Court to a single instance demonstrating that South Carolina has enforced these statutes in this kind of draconian fashion.

Martin v. Lloyd, 700 F.3d 132, 137 (4th Cir. 2012) *see also* Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d 782, 787 (1939) (courts should “not to inquire into the theoretical possibilities of the scheme, but to examine it in actual practical operation.”).

Simply put, the legality of other conduct is simply not relevant to the analysis, and the only relevant question in this case was the legality of the Dragon's Ascent device on which players can pay money to increase the size of the cash prizes and can receive cash prizes. To that end, the payment of an entry fee to participate in a professional sports competition stands in stark contrast to a player inserting money into a gaming machine on which a player can use the “Raise Your Shot” button to select between \$.10, .20, .50, 1.00, or 2.00 per shot per play and have that selection directly correlate to the amount the player can win in cash prizes. A distinction made clear by the trial court. However, any discussion that does not in any way involve a machine or any device would not even fall under the purview of § 12-21-2710 in any conceivable way and should not bear on the outcome of this case. To the extent the circuit court misconstrued the trial court's analysis on this issue, the circuit court should be reversed.

CONCLUSION

In conclusion, based on the foregoing, the applicable laws of the State of South Carolina, the specific intent of the South Carolina Legislature to prohibit cash payouts on gaming machines, the binding Supreme Court precedent established in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012), and the entire record in this matter; this Court should reverse the circuit court decision in its entirety and should restore the trial court's finding that the Dragon's Ascent device at issue in this action on which individuals wager, gamble and receive cash payouts is an illegal gambling device in violation of S.C. Code Ann. § 12-21-2710 that should be forfeited and destroyed.

Respectfully Submitted,

s/ Adam L. Whitsett

ADAM L. WHITSETT

SLED General Counsel

Post Office Box 21398

Columbia, South Carolina 29221-1398

Phone: (803) 896-0647

Email: awhitsett@sled.sc.gov

S.C. Bar Number: 74888

ATTORNEY FOR APPELLANT

December 8, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

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

v.

South Carolina Law
Enforcement Division, ... Appellant.

FINAL BRIEF OF RESPONDENTS

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

Additional counsel listed inside front cover

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

-and-

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

Attorneys for Respondents

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COUNTER-STATEMENT OF THE CASE

Background

On November 19, 2021, Appellant South Carolina Law Enforcement Division (“SLED”) seized a Dragon’s Ascent Video Machine from a restaurant and sports bar named LG’s By The Creek, located at 1005 Tanner Ford Boulevard, Hanahan, South Carolina. (R. 1 (Order of Destruction at 1).) After examining the machine, the magistrate court made a preliminary finding that it was an illegal gambling device under S.C. Code Ann. § 12-21-2710 and ordered its destruction pursuant to S.C. Code Ann. § 12-21-2712. (*Id.*) A post-seizure hearing was conducted on February 4, 2022. (R. 127-337 (Hrg. Tr.).)

The testimony and evidence at the post-seizure hearing established that Dragon’s Ascent is an aim-and-shoot video game in which the player attempts to capture dragons of varying sizes, colors, and point values as they move across a screen. (R. 155-157 (Hr’g Tr. 29:22-31:20); R. 438-440 (Pl. Exs. 7-9); R. 379 (Expert Report of Nick Farley (“Farley Report”) at 3).) Game play in Dragon’s Ascent occurs according to rules that are established in advance, fully disclosed to the player, and do not change over the course of the game. (R. 397 (Farley Report at 21).) To begin playing, the player¹ inserts currency into a bill acceptor, establishing the credits the player uses to play the game. (R. 163 (Hr’g Tr. 37:15-22).) For example, if the player inserts a ten-dollar bill, the game will show that the player has \$10 worth of credits. (R. 379 (Farley Report at 3).) Using a

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

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

Game play occurs by the use of a panel on which is located various controls. The player uses a turret controlled by a joystick to aim and a shot button for firing. (R. 379-380 (Farley Report at 3-4).) “Shot Power” is a graphic representation of five small vials, each filled with a different color of fluid. The player uses the level of fluid in each vial to determine the power of a shot when shooting in order to maximize the reward for capturing the targeted dragon. (*Id.*) The dragons are of different sizes, shapes, and most importantly colors. Brock Smith, who designed Dragon’s Ascent and who was recognized as an expert at the post-seizure hearing, testified that a key aspect of success in the game is the player’s ability to match the color of his or her turret, which rotates through a repeating cycle of colors, to the color of the targeted dragon. (R. 292 (Hr’g Tr. 166:20-24); *see* R. 381 (Farley Report at 5).) The closer the color match at the moment a shot is accurately fired, the fewer shots will be required to capture the dragon and the greater the reward to the player. (R. 183, 293 (Hr’g Tr. 57:9-11, 167:9-12).) The amount awarded for capturing each dragon is determined according to a formula that is set in advance, involves no algorithms or random number generators, and is fully disclosed

on the Help Screen² available to the player at all times, including prior to depositing any currency into the bill acceptor. (R. 160 (Hr'g Tr. 34:12-24); R 397-400 (Farley Report at 21-24).) Finally, the game also features a "Ticket Button" that the player uses to print a redeemable receipt which the player can exchange for cash. (R. 380 (Farley Report at 4).)

Magistrate Court's Order

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

[(1)] "a machine (vending, slot, or video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value) for the play of poker, blackjack, keno, lotto, bingo, or craps";

[(2)] "[a] machine or device licensed by the State of South Carolina under S.C. Code § 12-21-2720 and used for gambling"; or

[(3)] "[a] device pertaining to games of chance of whatsoever name or kind."

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

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

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

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

[J]ust as with any game of skill, a player may successfully play Dragon’s Ascent using keen hand/eye coordination, memorization, and recognition of learned patterns, timing, accuracy in aiming, reflexes and reaction time, manual dexterity, mental aptitude, concentration, and deductive analysis. Based on the evidence presented at the hearing, the Court finds that Dragon’s Ascent is a game in which skill predominates over chance.

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

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

⁴ This test is also sometimes referred to as the “skill vs. chance test” or “the predominant factor test.”

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

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

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

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

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

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

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

Reversal by Circuit Court

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

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

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

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

The circuit court further stated that “[e]ven if SLED had filed a notice of cross-appeal, it would make no difference because the magistrate court’s finding that Dragon’s Ascent is a game of skill is manifestly correct and is fully supported by the testimony of experts and evidence presented at the post-seizure hearing.” (*Id.*) After carefully and thoroughly reviewing the testimony and evidence presented during the post-seizure hearing, the circuit court concluded that “this Court fully agrees with and therefore affirms the magistrate court’s finding that Dragon’s Ascent is a game of skill.” (R. 24 (Cir. Ct. Order at 9).) The circuit court thus affirmed this portion of the magistrate court’s order.

The circuit court next turned to the magistrate court’s holding that despite being a game of skill, Dragon’s Ascent was nevertheless illegal under the novel “wagering” test advocated by SLED. (R. 25-29 (Cir. Ct. Order at 10-14).) The circuit court held that the magistrate court erroneously “interpreted *Chimento* as abandoning the longstanding ‘skill vs. chance’ test applicable under § 12-21-2710 and adopting a novel ‘wagering’ test, under which any consideration paid to participate in any game constitutes illegal gambling, regardless of the degree of skill involved.” (R. 16-17 (Cir. Ct. Order at 1-2).)

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

Ct. Order at 14).)

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

SUMMARY OF ARGUMENT

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

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

ARGUMENT

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

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

A. This Argument Is Not Properly Before the Court

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

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

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

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

B. The Argument is Meritless

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

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

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

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

statutory language is the best guide to legislative intent).

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

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

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

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

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

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

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

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

¹⁰ See Op. S.C. Atty Gen., 2017 WL 4707542 (S.C.A.G. Oct. 11, 2017) (stating that “South Carolina gambling laws” prohibit “games of chance”).

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

¹² **Supreme Court:** *S.C. Human Affairs Comm’n v. Zeyi Chen*, 430 S.C. 509, 531, 846 S.E.2d 861, 872 (2020) (vagueness); *State v. Legg*, 416 S.C. 9, 14 n.4, 785 S.E.2d 369, 371 n.4 (2016) (facial challenge); *S.C. Dep’t of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506–07, 757 S.E.2d 388, 392–93 (2014) (facial challenge). **Court of Appeals:** *Rutter v. City of Columbia Design/Dev. Rev. Comm’n*, 2021 WL 2701549, at *3 (S.C. Ct. App. June 30, 2021)

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

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

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

(vagueness). **Circuit Courts:** *Retail Servs. & Sys., Inc. v. S.C. Dep't of Rev.*, 2014 WL 12692755, at *2 (S.C. Com. Pl., Aiken County, May 29, 2014) (as-applied challenge); *Smith*, 2013 WL 8477943, at *11 (citing vagueness). **Administrative Law Courts:** *Hyndman v. Charleston Cty. Assessor*, 2013 WL 1786476, at *3 (S.C. Admin. Law Ct. Apr. 18, 2013) (as-applied challenge).

the language, ‘a house used as a place of gaming,’ from section 16-19-40 without striking the provision in its entirety,” which she feared would “open the door wide to all heretofore illegal gaming practices in this state, *including video poker.*” *Id.* at 537, 737 S.E.2d at 839-40 (Toal, C.J., concurring) (second emphasis added).

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

I cannot comprehend [Chief Justice Toal’s] concern that if any part of the statute is held unconstitutional, a parade of horrors will ensue, including the resurrection of video poker. The prohibition of video poker is found in Section 12-21-2710 of the South Carolina Code (2000). This is a *completely separate section (and title) of the code* and makes no reference at all to section 16-19-40. In fact, *it is entirely independent and separate from the general gambling prohibitions involved here.* Striking section 16-19-40 in whole or in part would have no impact on section 12-21-2710.

Id. at 552, 737 S.E.2d at 848 (Hearn, J., dissenting) (emphasis added). Notably, the majority opinion did not challenge Justice Hearn on this point. Indeed, § 12-21-2710 is never even cited in the majority opinion.

That *Chimento* does not impact the application of § 12-21-2710 is confirmed by *Richland County Sheriff’s Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam), decided by the same five justices who decided *Chimento* only two years earlier. In *Awde*, the Court unanimously affirmed a magistrate court’s “finding that two ‘Chess Challenge II’ devices before it were legal games of skill.” *Id.* The parties’ briefs raised arguments concerning, *inter alia*, the “used for gambling”

prong of § 12-21-2710.¹³ If the Supreme Court had intended *Chimento* to apply when determining the legality of a machine under § 12-21-2710, it surely would not have issued an affirmance in *Awde*. The fact that the Court affirmed—in an unpublished, per curiam opinion—strongly indicates that the “wagering” test used in *Chimento* does *not* apply to the analysis of whether a game is legal under § 12-21-2710.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[T]he Court cannot ignore that the magistrate court’s view of *Chimento*, if widely adopted would turn participating in ordinary skill-based games into an illegal activity if a participant merely pays an entry fee and may receive a prize for successful play. The magistrate court’s novel “wagering” test utterly disregards the decades-old accepted legality of “paying to play” a predominantly skill game, whether by depositing currency into a video game machine like *Dragon’s Ascent* or by paying an entry fee to participate in a local golf tournament. The affected participants would also include not just amateurs participating in local events but also pro athletes who come to South Carolina to participate in nationally known events like the Heritage Classic golf tournament, the Charleston Open women’s tennis tournament, and the Darlington 500 NASCAR race. The effect would extend even to state-sponsored events like the Governor’s Cup Billfishing Series. The potentially far-reaching consequences of reading *Chimento* as establishing a “wagering” test which applies across the board to all games of skill is a strong basis to question the wisdom of accepting the magistrate court’s order *in toto*, especially in light of the other

factors discussed above, all of which indicate that the magistrate court read into *Chimento* a holding that simply is not there.

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Signature on following page

Respectfully submitted,

s/ William W. Wilkins

William W. Wilkins, SC Bar No. 6112

Kirsten E. Small, SC Bar No. 75681

MAYNARD NEXSEN, PC

104 S. Main Street, Suite 900

Greenville, SC 29601

Telephone: 864.370.2211

Facsimile: 864.282.1177

BWilkins@maynardnexsen.com

KSmall@maynardnexsen.com

-and-

Christopher J. Murphy, SC Bar No. 8903

Murphy Law Firm, LLC

136 West Richardson Ave.

Summerville, SC 29483

Telephone: 843.832.1120

Facsimile: 843.832.5969

chris@murphylawfirmllc.com

-and-

Peter M. McCoy, Jr., SC Bar No. 73866

McCoy Law Group, LLC

15 Prioleau Street

Charleston, SC 29401

Telephone: 843.459.8835

Facsimile: 843.459.8834

peter@mccoylelawgrp.com

Attorneys for Respondents

December 4, 2023

Greenville, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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Enforcement Division, ... Appellant.

CERTIFICATE OF COUNSEL

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

December 4, 2023

s/Kirsten E. Small

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

Attorney for Respondents

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FINAL REPLY BRIEF OF APPELLANT

Adam L. Whitsett, Esquire
General Counsel
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, South Carolina 29221-1398
(803) 896-0647
S.C. Bar Number: 74888

Attorney for Appellant

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STATEMENT OF FACTS

SLED Special Agent Ryan Wood conducted three (3) separate undercover surveillance operations regarding the one Dragon's Ascent device that was seized from LG's By the Creek and is the only device at issue on this appeal. (Trial Tr. p. 113)(R. p. 239). During each of these operations, S/A Wood wagered and gambled on the Dragon's Ascent device. (Trial Tr. pp. 105, 120)(R. pp. 231, 246). To that end, SLED Special Agent Wood specifically testified that he "cycled through the raise your shot cost button", which allowed the player to select his wager between \$.10, .20, .50, 1.00, or 2.00 per shot. (Trial Tr. p. 92)(R. p. 218). Wood also testified that "it was obvious that was some type of wager button" and "the more you wagered the more you stood to win if you were successful destroying that particular dragon." (Trial Tr. p. 92, 94)(R. pp. 218, 220). On at least one occasion, Wood received a cash payout from gambling on the device and witnessed at least one other individual receive a cash payout from the play of this device. (Trial Tr. pp. 105, 120)(R. pp. 231, 246). Further, the evidence in this matter conclusively established that a player can walk up to this Dragon's Ascent device, can insert \$1.00 into the device, can shoot the "Rainbow Dragon", and can win up to a \$1,783 cash payout. (Trial Tr. pp. 52, 92)(R. pp. 178, 218).

ARGUMENTS

1. The Dragon's Ascent device at issue on which individuals wager, gamble, and receive cash payouts violates the spirit, the intent, and the black letter application of S.C. Code Ann. § 12-21-2710.

The South Carolina Supreme Court has also long acknowledged 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. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified and cunning mechanical inventions.

Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 69 (1929). This appeal ultimately comes down to whether the spirit, intent, and black letter application of S.C. Code Ann. § 12-21-2710 (§ 12-21-2710) prohibits a device on which a bar patron can insert \$1.00, can make a wager (with the more committed to the play generally resulting in a higher available prize), can shoot one single dragon, and can walk away with a \$1,783 cash payout. The answer to that question is a resounding and unequivocal YES. Simply put, § 12-21-2710, which is a statute designed to suppress the vice of gambling and prohibits all machines and devices that are or are capable of being “used for gambling” in South Carolina, clearly prohibits this Dragon's Ascent device. The evidence and testimony in this matter established that individuals wager, gamble, and receive cash payouts on this device. SLED Special Agent Wood testified unequivocally that he did exactly that during his undercover operations at LG's By the Creek. (Trial Tr. pp. 105, 120)(R. pp. 231, 246). Accordingly, this device is an unlawful device that was illegally used for gambling in South Carolina and the circuit court's contrary finding should be rejected.

In pertinent part, § 12-21-2710 provides that it “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 machine or device licensed pursuant to Section 12-21-2720 and used for gambling....”¹ As far back as 1929 the South Carolina South Carolina Supreme Court has acknowledged that a “machine is a gambling device where its operation is such that, although the player in any event will receive something, he stands a chance to win something in addition.” Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 68 (1929) (quoting 27 C. J. 989). Further, in analyzing whether the device at issue was “used for gambling” in violation of § 12-21-2710, this Court also cannot simply disregard the history and legislative intent behind this statute as sought by Respondents. As noted by the South Carolina Supreme Court, a “statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. And the history of the period in which the Act was passed may be considered.” Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 815–16 (1942). Tellingly, the South Carolina Supreme Court directly quoted the original preamble of South Carolina’s gambling prohibition law from 1802 and recounted a significant portion history of this statute when analyzing this statute in the Town of Mount Pleasant v. Chimento decision. *See* 401 S.C. 522, 529-30 737 S.E.2d 830 (2012)(analyzing 1802 S.C. Acts No. 1796; 1816 S.C. Acts No. 2096; and a number of historical cases and jurisprudence). Accordingly, contrary to Respondents’ suggestion, it is proper and in fact logical for this Court to review and consider the history of § 12-21-2710 when analyzing its application to this case.

¹ Notably, this prohibition stands separate and apart from the specific prohibition on devices pertaining to games of chance in § 12-21-2710, the history of which distinction will be discussed more fully below.

It is also axiomatic that the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). As further noted by the South Carolina Supreme Court

It often happens that the true intention of the Legislature, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which is the prime and sole object of all rules of construction, can be accomplished only by departure from the literal interpretation of the language used. Hence, Courts are not always confined to the literal meaning of a statute; the real purpose and intent of the lawmakers will prevail over the literal import of the words...

[i]t is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words.

Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 815-16 (1942).

Accordingly, gambling has been illegal in South Carolina for centuries. *See* 1802 S.C. Acts No. 1786. Slot machines have been illegal in South Carolina since around 1922. *See* Section 196, Vol. 2, Code of 1922. In 1932, the Legislature extended this prohibition to include “any vending or slot machine, punch boards, pull boards, or other devices pertaining to games of chance of whatever name or kind....” *See Alexander v. Martin*, 192 S.C. 176, 6 S.E.2d 20, 22-3 (1939) (analyzing Section 1301-A of the Code of 1932). In 1976, the Legislature added a prohibition for “video games with a free play feature.” *See* S.C. Code § 52-15-10 (1976). Around that same time, the Legislature also enacted S.C. Code § 16-19-60, to prohibit “any machine which disburses money or property to the player.” However, in 1986, the South Carolina Legislature amended S.C. Code § 16-19-60 to specifically remove the prohibition on machines dispensing property to the player. 1986

S.C. Act 540. This amendment to the South Carolina Appropriations Act ushered in the video poker era in South Carolina. In State v. Blackmon, the South Carolina Supreme Court noted that

Section 16–19–60 plainly states that coin-operated nonpayout machines with free play features are exempt from the reach of Section 16–19–40 as long as the machines themselves do not disburse money to the player. Since the poker machines involved in this case fall within this specific statutory exemption, Blackmon cannot be indicted under Section 16–19–40. Although this result appears anomalous, as it allows activity which seems to be unlawful gambling to go unpunished, it is nonetheless clear that this outcome reflects the intent of the legislature.

304 S.C. 270, 274, 403 S.E.2d 660, 662 (1991). From 1986 through 1999 the pernicious practice of video poker wreaked havoc throughout South Carolina. However, in 1999, South Carolina law changed specifically to bring an end to video poker.

With the passage of 1999 S.C. Act 125, the South Carolina Legislature sought specifically to “extend the prohibition on slot machines and other machines or devices pertaining to games of chance [which had been illegal for over 50 years at that time] to video games with a free play feature or any other coin-operated machine or device used for gambling.” Notably, this was the first time in South Carolina’s history that the phrase “used for gambling” was included in § 12-21-2710. Further, the South Carolina Legislature specifically acknowledged that these amendments were also enacted “for the purpose of prohibiting cash payouts for credits earned on video game machines on and after July 1, 2000...”.) As recently acknowledged by the South Carolina Attorney General, “. . . the title or caption of an act may be properly considered to aid in the construction of a statute and to show the intent of the Legislature.” *See* S.C. Atty. Gen. Op. dated August 11, 2023 (written to the Honorable G. Murrell Smith, Jr., Speaker of the House of Representatives.)

If the specific words of the Act and title were not clear enough on the intent of the Legislature, the South Carolina Supreme Court surely resolved any lingering doubt by acknowledging that 1999 S.C. Act 125 specifically prohibited “nonmachine cash payouts” and resulted in all machines on which individuals pay out cash for game play becoming “contraband subject to forfeiture and destruction regardless of their use or operability.” Westside Quik Shop v. Stewart, 341 S.C. 297, 301-2, 534 S.E.2d 270, 272 (2000) *overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005).

Despite the clear intent of the South Carolina Legislature and the clear Supreme Court pronouncements regarding the impact of § 12-21-2710, the circuit court disregarded the Legislative history and intent and ruled that a machine on which SLED Special Agent Wood gambled and received a cash payout did not violate § 12-21-2710’s prohibition on machines and devices that are used for gambling. (Trial Tr. pp. 105, 120)(R. pp. 231, 246). This is a manifestly absurd result that should not be repeated by this Court. *See* Lancaster Cnty. Bar Ass’n v. S.C. Comm’n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (courts “will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.”; McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964) (“A sensible construction, rather than one which leads to irrational results is always warranted.”) Further, a “literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose.” U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). South Carolina law is clear, machines on which individuals can gamble and receive cash payouts, like the Dragon’s Ascent at issue in this action, are prohibited in South Carolina. *See* S.C. Code Ann. § 12-21-2710.

In addition, contrary to Respondents’ assertion, SLED clearly preserved its arguments regarding the intent of the South Carolina Legislature’s 1999 amendments to § 12-21-2710. Specifically, SLED directly quoted from the South Carolina Supreme Court opinion in Westside Quik Shop v. Stewart and the Supreme Court’s analysis of the intent of 1999 amendments to § 12-21-2710 throughout this litigation. (Appellant’s Initial Brief in Support of the Destruction of an Illegal Gambling Device p. 6)(R. p. 65). Furthermore, the issue in question is the intent of the South Carolina Legislature behind the application of § 12-21-2710, which is of course properly aided by consulting “the title or caption of an act ...to aid in the construction of a statute and to show the intent of the Legislature....” *See* S.C. Atty. Gen. Op. dated August 11, 2023 (written to the Honorable G. Murrell Smith, Jr., Speaker of the House of Representatives.) In addition, a “statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. And the history of the period in which the Act was passed may be considered.” Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 815–16 (1942).

Ultimately, understanding the history of South Carolina’s anti-gaming and anti-gambling prohibitions and the myriad of South Carolina jurisprudence regarding the same, it is simply inarguable that the South Carolina Legislature intended for a device on which individuals wager, gamble, and received cash payouts to be legal in South Carolina. Because the circuit court ruling disregards the intent of the Legislature, it should be reversed in its entirety.

2. Wagering and receiving cash payouts on a device is illegal gambling in South Carolina even if skill is determined to be the predominant factor in determining the outcome.

Contrary to the Respondents' assertions, the South Carolina Supreme Court decision in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012) applies to this case. As an initial matter, of course the Supreme Court devoted the bulk of the Chimento opinion to analyzing S.C. Code Ann. § 16-19-40 – that was the statute Mr. Chimento and his codefendants were arrested and charged with violating. However, this is simply not determinative in this matter. Rather, the parallel between Chimento and this present case is unmistakable. In Chimento, “[t]he circuit court held that respondents were entitled to directed verdicts because it is not unlawful to gamble on a game of skill in a residence”, which is essentially the same finding by the circuit court in this matter. Town of Mount Pleasant v. Chimento, 401 S.C. 522, 527, 737 S.E.2d 830, 832 (2012). However, the Supreme Court flatly rejected the argument that skillful conduct cannot constitute unlawful gambling specifically finding that “the statutory meaning of the work ‘gambling’ in South Carolina includes games in which skill outweighs chance.” *Id.* It was error for the circuit court to disregard this pronouncement, and the circuit court in this case should be overturned just like the circuit court was in Chimento. *Id.*

It is also noteworthy that in the Chimento decision itself, the Supreme Court acknowledged that its finding that “the statutory meaning of the word ‘gambling’ in South Carolina includes games in which skill outweighs chance” extends beyond S.C. Code Ann. § 16-19-40. The very next line in the opinion reads:

For example, S.C. Code Ann. § 32-1-10 (2007), found in an article captioned “Gambling Contracts,” permits persons who have lost money or other thing(s) of value in an amount equal to at least \$50 at cards, at a dice table, or “at any other game whatsoever,” or by betting on those games, to

recover their losses under certain circumstances. The plaintiffs in such a suit are almost uniformly referred to as “gamblers” regardless whether the enterprise was unlawful. *See Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993). 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. § 32–1–10.

Town of Mount Pleasant v. Chimento, 401 S.C. 522, 532–33, 737 S.E.2d 830, 837 (2012).

This is a clear indication that the Supreme Court intended for the Chimento decision to apply beyond the specific confines of S.C. Code Ann. § 16-19-40. It is also notable that the Berkebile v. Outen decision cited therein involved a video poker lawsuit.

In addition and again contrary to Respondents assertions, the Supreme Court did in fact reference South Carolina’s gaming machine laws in the Chimento decision itself – albeit the reference was to S.C. Code Ann. § 12-21-2712 rather than § 12-21-2710. However, this is ultimately of no consequence because S.C. Code Ann. § 12-21-2712 states

Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

Specifically, the Court held that

We hold that one “games” within the meaning of § 16–19–40 when money is wagered on Texas Hold’em, even though it is a game in which skill predominates. *See Atchison v. Gee*, 15 S.C.L. (4 McCord) 211 (1827) (betting on horse racing is gaming); *State v. O’Neal*, 210 S.C. 305, 42 S.E.2d 523 (1947) (poker is gaming); *State v. White*, 218 S.C. 130, 61 S.E.2d 754 (1950) (room where poker played for money is gambling room); *cf. Allendale County Sheriff’s Office v. Two Chess Challenge II*, 361 S.C. 581, 606 S.E.2d 471 (2004) (video game in which player’s skill could alter outcome not a “game of chance” within the meaning of that term in § 12–21–2712).

Whether 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. The circuit court erred in holding that respondents were entitled to directed verdicts because they were not gaming within the meaning of § 16-19-40.

Town of Mount Pleasant v. Chimento, 401 S.C. 522, 533, 737 S.E.2d 830, 837-38 (2012).

The Court's use of the intro signal "cf." when referencing the Allendale decision is also instructive. "Cf." does not connote a negative inference or contradiction like "Contra", "but see", or "but cf." Rather, "cf." is used when the analogous proposition indirectly supports the textual statement. In this instance, in finding conduct to be illegal gambling despite skill predominating, the Supreme Court noted that the Allendale decision indirectly supports the Court's ultimate finding, which was that "[t]he statutory meaning of the word 'gambling' in South Carolina includes games in which skill outweighs chance" and that conduct involving wagering is illegal in South Carolina regardless of the skill/chance ratio. Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (2012). Respondents' attempts to have this Court disregard the analysis and holding in Chimento should not stand. In South Carolina, the statutory meaning of the word "gambling" in South Carolina includes games in which skill outweighs chance and the circuit court's finding to the contrary should be reversed.

Even if the Court were to hold that Chimento is not binding precedent, which is not conceded, this Court should acknowledge as a matter of first impression that the phrase "any machine or device licensed pursuant to Section 12-21-2720 and used for gambling" in § 12-21-2710 does in fact prohibit games of devices in which skill outweighs chance.²

² Contrary to Respondents' assertion SLED does not now and has never conceded that Dragon's Ascent is a game of skill. Rather, SLED merely acknowledged the trial court's findings and SLED's decision to leave that fight for a subsequent seizure of a Dragon's

To that end, SLED would advocate that this Court apply the analysis from Chimento 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” to § 12-21-2710 in this action. *See Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 533, 737 S.E.2d 830 (2012).

In that regard, the trial court correctly held that the “evidence in the record clearly established that players select the amount of money to play on individual shots and that the money the player stands to win correlates to the amount wagered – *i.e.* the more you pay to play, the more you stand to win on the device.” (Deaton Order p. 11)(R. p. 13). The ability to increase the amount of the prize by increasing the amount played constitutes an illegal wager that renders an activity illegal gambling in South Carolina.

At the post-seizure hearing in this matter, SLED Special Agent Wood specifically testified that he “cycled through the raise your shot cost button”, which allowed the player to select his wager between \$.10, .20, .50, 1.00, or 2.00 per shot. (Trial Tr. p. 92)(R. p. 218). Wood also testified that “it was obvious that was some type of wager button.” *Id.* Wood further testified “the more you wagered the more you stood to win if you were successful destroying that particular dragon.” (Trial Tr. p. 94)(R. p. 220). Specifically, Wood noted “I noticed that if I was wagering ten cent and selected the small pink dragons going across the screen and was successful destroying it then I would get 60 cents. If I moved my bet to 20 cents I would -- for that same dragon I would get a \$1.20.” *Id.*

Ascent device in line with South Carolina’s machine-by-machine forfeiture process. *See Allendale Cnty. Sheriff’s Off. v. Two Chess Challenge II*, 361 S.C. 581, 606 S.E.2d 471 (2004).

Ultimately, Special Agent Wood confirmed unequivocally that he “put money in” this Dragon’s Ascent machine, that he “wagered different amounts”, that “the more you wagered the more you stood to win if you were successful destroying that particular dragon”, and that he “sometimes walked away with more money”. *Id.* Moreover, Wood testified that he also witnessed other players winning money on the play of this device. (Trial Tr. p. 120)(R. p. 246). As such, Special Agent Wood’s testimony established that an individual can wager and, thus, can illegally gamble on this device rendering it a device that is “used for gambling” that is prohibited by the spirit, intent, and plain language of § 12-21-2710. Accordingly, the circuit court opinion to the contrary should be reversed.

CONCLUSION

Respondents incorrectly assert that SLED’s position in this appeal “fundamentally re-writes long-standing South Carolina law by eliminating any notion of chance as a required element of illegal gambling”. (Initial Brief of Respondents p. 25). This is simply not true. SLED is merely advocating that this Court acknowledge the evolution of South Carolina gambling law over the years, which has resulted in the inexorable reality that there are scenarios where predominantly skillful conduct can still be illegal gambling in South Carolina. *See Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 533, 737 S.E.2d 830 (2012). Given the procedural posture of this case, this action presents one of these times. In that regard, SLED seeks only that this Court to acknowledge that this device, which provides a player in South Carolina with the ability to insert money into a machine for the chance to win a cash prize, is a device that is “used for gambling” in violation of § 12-21-2710. Accordingly, this Court should reverse the circuit court’s decision and hold that the Dragon’s Ascent device at issue in this action on which individuals wager, gamble, and receive cash payouts is an illegal gambling device in violation of S.C. Code Ann. § 12-21-2710 that should be forfeited and destroyed.

Respectfully Submitted,

s/ Adam L. Whitsett

ADAM L. WHITSETT

SLED General Counsel

Post Office Box 21398

Columbia, South Carolina 29221-1398

Phone: (803) 896-0647

Email: awhitsett@sled.sc.gov

S.C. Bar Number: 74888

December 8, 2023

ATTORNEY FOR APPELLANT

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

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

v.

South Carolina Law Enforcement Division Appellant.

**SOUTH CAROLINA LOTTERY COMMISSION'S
AMICUS BRIEF SUPPORTING APPELLANT SLED**

Elizabeth Van Doren Gray (2434)
Robert E. Tyson, Jr. (10820)
Vordman Carlisle Traywick, III (102123)
Sarah C. Frierson (104643)
ROBINSON GRAY STEPP & LAFFITTE, LLC
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
egray@robinsongray.com
rtyson@robinsongray.com
ltraywick@robinsongray.com
sfrierson@robinsongray.com

*Counsel for Amicus Curiae South Carolina Lottery
Commission*

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INTRODUCTION

As scholars have recognized, “video machine gambling is the most destructive gambling activity ever devised. It insinuates portable technology into every corner of a state, and the technology will be used for illegal gambling, no matter what the law or regulations say.” R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 Miss. L.J. 565, 729 (2002); see also *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 336, 778 S.E.2d 888, 897 (2015) (Toal, C.J., concurring in part and dissenting in part) (stating this article offers “a definitive history of video gambling in South Carolina”).

In South Carolina, video machine gambling “mushroomed from a rather clandestine and inauspicious beginning in 1986 into a multi-billion dollar business by its demise in July 2000.” *Mims Amusement Co. v. S.C. Law Enf’t Div.*, 366 S.C. 141, 146, 621 S.E.2d 344, 346 (2005). Though all three branches of state government agree video gambling is dead in South Carolina, Respondents seek to summon its ghost—this time with a flashy, but equally addictive, dragon-shooting game.

But Dragon’s Ascent is no game of Pac-Man. Cf. Note, *Video Poker and the Lottery Clause: Where Common Law and Common Sense Collide*, 49 S.C. L. REV. 549, 562 (1998) (“The lack of prize is one of the key distinctions between video gambling devices such as video poker and entertainment video games such as ‘Pac-Man.’ In essence, the winning of free games on ‘Pac-Man’ is of de minimis value to the player and therefore cannot properly be characterized as a prize.”). The goal of the game is to “[s]hoot dragons to win credits,” which “are redeemable for cash.” (R. p. 411). And the more value a player wagers on each shot, the more money the player stands to win. (R. p. 218). If a player, for example, inserts \$1 into the machine and shoots the “Rainbow Dragon,” he or she could win \$1,783. (R. pp. 178, 218).

That is the textbook definition of an unlawful video gambling machine.¹ Under section 12-21-2712, the Dragon’s Ascent machine was thus subject to forfeiture and destruction after a magistrate found it was “prohibited by [s]ection 12-21-2710.” S.C. Code Ann. § 12-21-2712. Of course, “forfeiture” is an important tool, for it “serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable.” *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 304, 534 S.E.2d 270, 273 (2000).

Yet the owner of Dragon’s Ascent remains undeterred. Its playbook is hardly novel though. As our supreme court recognized nearly a century ago, “[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, 286, 148 S.E. 66, 69 (1929) (quoting *Moberly v. Deskin*, 155 S.W. 842, 844 (Mo. Ct. App. 1913)).

Because the South Carolina Law Enforcement Division (SLED) properly seized the Dragon’s Ascent machine, and the magistrate correctly ordered its forfeiture and destruction, the South Carolina Lottery Commission (the Lottery) submits this amicus brief in support of SLED.

¹ See S.C. Code Ann. § 12-21-2710 (“It 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 machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device 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, boards, 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 provisions of this section do not extend to coin-operated nonpayout 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.”).

INTEREST OF *AMICUS CURIAE*

In 2001, the General Assembly passed the South Carolina Education Lottery Act (the Act) that created the Lottery. *See* 2001 S.C. Act No. 59, §§ 1–13 (codified as amended at S.C. Code Ann. §§ 59-150-10 through -410).

Along with requiring that “net proceeds of lottery games . . . be used to support improvements and enhancements for educational purposes and programs,” the General Assembly found that “lottery games must be operated and managed in a manner which ensures that the lottery is operated with integrity and dignity and free of political influence, maximizes the use of revenues, and provides continuing entertainment to the public.” *Id.* at § 1; *see also* S.C. CONST. art. XVII, § 7 (“Only the State may conduct lotteries, and these lotteries must be conducted in the manner that the General Assembly provides by law. The revenue derived from the lotteries must be used first to pay all operating expenses and prizes for the lotteries. The remaining lottery revenues must be credited to a separate fund in the state treasury styled the ‘Education Lottery Account,’ and the earnings on this account must be credited to it. Education Lottery Account proceeds may be used only for educational purposes as the General Assembly provides by law.”).

To fulfill its mission, the Lottery works closely with SLED to obtain thorough background checks, ensure the security and integrity of its games, and investigate violations of the Act. *E.g.*, S.C. Code Ann. §§ 59-150-40(B), -60(14), -130(A), -165, -240(C)(5), & -280.

The Lottery is governed by a board of commissioners that, among other things, has a duty to “promulgate regulations relating to the categories of lottery games and the conduct of lottery games.” S.C. Code Ann. § 59-150-50(4). It also has the power to “select and contract with lottery vendors and lottery retailers.” S.C. Code Ann. § 59-150-60(13); *see also* S.C. Code Ann. Regs. 44-30 (“The Executive Director shall enter into a contract for each approved lottery retail sales

location. The contract shall set out the duties, responsibilities, and obligations pertaining to the parties to the contract.”). In doing so, the Lottery has developed an Individual Retailer Contract that a retailer must sign when applying for a new or renewed retail license. *See Individual Retailer Application*, S.C. EDUC. LOTTERY (last visited Aug. 22, 2024), https://www.sceducationlottery.com/documents/retailers/applications/Application_IndividualRetailer_NewCOO.pdf.

Providing guidance to retailers wishing to sign the agreement, the Lottery flags three important issues: (1) the effect of a change in ownership, (2) the prohibition on illegal gaming devices, and (3) the contours of validating prizes. *Id.* As relevant here, the Lottery offers the following caution about gaming devices:

In 2014, more than thirty retail outlets were suspended after SCEL became aware of illegal gaming device(s) in the licensed location(s). It is the SCEL Retailer’s responsibility to ensure the legality of any amusement devices in their retail outlet. By signing the Retailer Contract, the Retailer agrees to an automatic, non-appealable six-month suspension if a magistrate determines an illegal device was present in your retail outlet.

Id. The agreement explains that “an illegal device at a location licensed by SCEL is inconsistent with the reputation, integrity, and public confidence SCEL must maintain.” *Id.* Notably, the paragraph on gaming devices specifically references the forfeiture procedures under sections 12-21-2710 and -2712. *See id.*

While the Lottery is not directly involved in the forfeiture process that the General Assembly created to combat illegal gaming machines, *see* S.C. Code Ann. § 12-21-2712, the resulting determinations in those judicial proceedings directly affect the Lottery’s individual retailer agreements with the offending establishments. What is more, the Lottery’s regulations expressly disallow “any lottery or lottery games prohibited by [s]ections 59-150-20(7), 12-21-2710, 16-19-40[,] and 16-19-50.” S.C. Code Ann. Regs. 44-140.

Heeding this proscription, the Lottery's board of commissioners weighed in on the legality of the Dragon's Ascent gaming machine:

While the General Assembly determines which types of lottery games may be lawfully offered for purchase in South Carolina, the Board of Commissioners of the South Carolina Lottery Commission has a responsibility to state its position pertaining to Dragon's Ascent. The Board is steadfastly committed to promoting fair and responsible play and does not support or endorse offering *any* game that requires an exemption to, or the suspension of, the express prohibitions codified in the South Carolina Code of Laws Sections 12-21-2710, 16-19-40, 16-19-50 (making video poker and other games of chance and skill illegal). This non-traditional game is inconsistent with responsible play by motivating repetitive play that often leads to excessive or compulsive spending, jeopardizing the integrity of lottery operations, games, and potentially lottery proceeds for education (which have grown from \$400.3 million in FY2017 to \$492.8 million in FY20). In adopting the Lottery Act in 2001, the General Assembly made the wise policy decision to not allow the Lottery to offer this form of addictive gaming and this prohibition should remain.

Meeting Minutes, S.C. EDUC. LOTTERY BD. OF COMM'RS (Dec. 9, 2020), https://www.sceducationlottery.com/documents/lottery/MeetingMinutes/Full_Board_Minutes_2020-12-09.pdf. Thus, the Lottery has an interest in the outcome of this appeal.

DESIRABILITY OF AN AMICUS BRIEF

The Lottery submits this brief to explain that the General Assembly—together with the Supreme Court of South Carolina—have set forth the proper lens through which the Court must determine whether Dragon's Ascent is an unlawful gaming machine subject to forfeiture and destruction under section 12-21-2712. In the Lottery's view, it is. As the Lottery recognized over three years ago, “[s]oon after the end of video poker, the General Assembly chose not to allow SCEL to offer addictive immediate gratification games. Dragon's Ascent is inconsistent with SCEL's culture and statutory mandate for encouraging socially responsible play as a traditional lottery.” *Id.* This brief directly addresses and counters Respondents' arguments to show why

playing the unscrupulous Dragon’s Ascent gaming machine by wagering money to win more money is a textbook example of video gambling that contravenes South Carolina law.

As the body charged with regulating retailers whom the owners of Dragon’s Ascent are pursuing, the Lottery has a unique perspective to offer in this case. In sum, the Lottery believes it can provide a useful voice as the Court considers whether the circuit court erred in reversing the magistrate’s determination that Dragon’s Ascent is an illegal gambling machine subject to forfeiture under section 12-21-2710.

ARGUMENT

The Lottery agrees with and adopts SLED’s arguments.² It writes only to offer additional perspective on how the circuit court erred in interpreting section 12-21-2710 and misapplied precedent in concluding Dragon’s Ascent was a lawful machine.

To start, “the interpretation of a statute is a question of law for the Court to review de novo,” *S.C. Pub. Interest Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021), “with no particular deference to the lower court,” *N.Y. Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7*, 374 S.C. 307, 310, 649 S.E.2d 28, 29 (2007). “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly].” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “If a statute’s language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.” *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

² The Lottery further adopts SLED’s Statement of the Issues on Appeal, Statement of the Case, Statement of the Facts, and Standard of Review sections in its opening brief. See Rules 208(b)(6) & 213, SCACR.

Still, a court must “not construe the statute in a way which leads to an absurd result or renders it meaningless.” *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (per curiam). “Courts will reject a statutory interpretation [that] would lead to a result so plainly absurd that it could not have been intended by the [General Assembly] or would defeat the plain legislative intention.” *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010). “If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.” *Hodges*, 341 S.C. at 91, 533 S.E.2d at 584 (quoting *Ray Bell Constr. Co., Inc. v. Sch. Dist. of Greenville Cnty.*, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998)).

“[A] familiar canon of construction [is] that a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter.” *Greenville Baseball v. Bearden*, 200 S.C. 363, 368–69, 20 S.E.2d 813, 816 (1942). “It is also an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words.” *Id.*

At issue here is section 12-21-2710—titled “[t]ypes of machines and devices prohibited by law; penalties”—which provides the following:

It 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 machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device 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, boards, 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 provisions of this section do not extend to coin-operated nonpayout 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.

S.C. Code Ann. § 12-21-2710 (emphasis added).³ Under the statute, “[a]ny person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both.” *Id.*

Section 16-19-40, for its part, provides as follows:

If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place at (a) any game with cards or dice, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank (f) any other table or bank of the same or the like kind under any denomination whatsoever or (g) *any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes*, except the games of billiards, bowls, backgammon, chess, draughts, or whist when there is no betting on any such game of billiards, bowls, backgammon, chess, draughts, or whist or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or fined not over one hundred dollars, and every person so keeping such tavern, inn, retail store, public place, or house used as a place for gaming or such other house shall, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense.

S.C. Code Ann. § 16-19-40 (emphasis added). The statute is aptly titled “[u]nlawful games and betting.” *Id.*

Although both statutes use the same language, reference section 12-21-2720, relate to unlawful gambling machines, and were amended by Act 125 of 1999, Respondents urge the Court to analyze section 12-21-2710 in a silo, without any regard to what section 16-19-40—or precedent

³ Licensure under section 12-21-2720 was no longer effective July 1, 2000. See 1999 S.C. Act No. 125, Part VI, § 23(C)–(D).

interpreting the statute—may have to say on the subject. Respondents also invite the Court to ignore the title of Act 125. The canons of statutory construction, however, do not countenance either cabined approach.

“In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose.” *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). The Court “must read the statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.’” *Senate ex rel. Leatherman v. McMaster*, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) (quoting *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). Further, “statutes [that] are part of the same Act must be read together.” *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). Indeed, “statutes dealing with the same subject matter are *in para materia* and must be construed together, if possible, to produce a single, harmonious result.” *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

“It is [also] ‘proper to consider the title or caption of an act in aid of construction to show the intent of the [General Assembly].’” *Hock Rh, LLC v. S.C. Dep’t of Revenue*, 423 S.C. 208, 214, 813 S.E.2d 540, 543 (Ct. App. 2018) (first alteration in original) (quoting *Rhame v. Charleston Cnty. Sch. Dist.*, 412 S.C. 273, 276-77, 772 S.E.2d 159, 161 (2015)); *see also Lindsay v. S. Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 277, 188 S.E.2d 374, 376 (1972) (same) (quoting *Univ. of S.C. v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966)).⁴

⁴ Our appellate courts did not find the statutes ambiguous in any of these cases. Nor is that a prerequisite to looking to the title of the Act. *See Creswick v. Univ. of S.C.*, 434 S.C. 77, 82, 862 S.E.2d 706, 708 (2021) (“Only where *the language of an act* gives rise to doubt or uncertainty as to legislative intent may this Court search for that intent *beyond the borders of the act* itself.” (emphasis added)). After all, the Court is merely looking at *all words* the General Assembly used to accomplish its goal. And the title is certainly within “the borders of the act.” *Id.*

Brushing aside the canons of construction, Respondents choose to spotlight the back-and-forth between a fractured supreme court on a subject that is only marginally related to the issue here. In *Town of Mount Pleasant v. Chimento*, our supreme court rejected a constitutional challenge to section 16-19-40. 401 S.C. 522, 737 S.E.2d 830 (2012). Chief Justice Toal concurred in result only, explaining that “[a]lthough there are other sound provisions outlawing video poker,” she was “loathe to strike the critical language from the general ban on gaming in the event that it guts these provisions, and consequently, South Carolina’s longstanding prohibition against gambling.” *Id.* at 537–38, 737 S.E.2d at 840 (Toal, C.J., concurring) (citing S.C. Code Ann. §§ 12-21-2710 & -2712 (2000)). Justice Hearn was unconvinced, arguing that 12-21-2710 was “entirely independent and separate from” section 16-19-40, and striking down one “in whole or in part would have no impact on” the other. *Id.* at 552, 737 S.E.2d at 848 (Hearn, J., dissenting).

Respondents devote significant airtime to Justice Hearn’s dissent, avoiding the relevant holdings in the majority. This approach is misguided. For one, with respect, Justice Hearn’s opinion about the nexus between sections 12-21-2710 and 16-19-40 is not the law, as she did not gain a majority for that proposition. For another, Respondents take her statement out of context. Justice Hearn simply said striking down one statute would not impact the constitutionality of the other. After all, they are different criminal statutes: one penalizes the player, S.C. Code Ann. § 16-19-40, while the other penalizes the establishment, S.C. Code Ann. § 12-21-2710. Further, the divided court considered the constitutionality of only one phrase within section 16-19-40—“house used as a place of gaming”—which does not appear in section 12-21-2710. But their independent constitutionality has nothing to do with whether the statutes—both of which use the same language to define the contours of unlawful gambling considered here—must be read together to decide legislative intent. *See Rivas*, 342 S.C. at 109, 536 S.E.2d at 375.

In all events, the parties did not make this argument in *Chimento*, and a majority of the Court did not rule on whether the statutes can be harmonized—especially where they use the same language—to inform the Court’s analysis of whether a machine is lawful. And our “appellate courts . . . do not speak unless spoken to and do not answer questions they are not asked.” *Watson v. Underwood*, 407 S.C. 443, 452 n.9, 756 S.E.2d 155, 160 n.9 (Ct. App. 2014) (quoting *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991)). Whatever value Justice Hearn’s dissent in *Chimento* on the constitutionality of section 16-19-40 adds to the conversation about the interpretation of section 12-21-2710, the question is now before the Court. Under longstanding rules of statutory interpretation, the Court must read sections 12-21-2710 and 16-19-40 together.

Sections 12-21-2710 and 16-19-40 both use the language “any machine or device licensed pursuant to Section 12-21-2720 and used for gambling” in prohibiting certain conduct: playing or owning/operating. While one penalizes the player, S.C. Code Ann. § 16-19-40, and the other penalizes the establishment, S.C. Code Ann. § 12-21-2170, *Chimento*’s interpretation of the former necessarily informs the Court’s interpretation of the latter.

Indeed, Justice Pleicones considered the meaning of the word “gambling” as used in section 32-1-10 of the South Carolina Code to inform his interpretation of “gambling” as used in section 16-19-40. *Chimento*, 401 S.C. at 532, 737 S.E.2d at 837. After considering what it meant in section 32-1-10, he stated 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.” *Id.* at 532–33, 737 S.E.2d at 837. “In other words, gambling/gaming depends not on the skill/chance ratio, but on the wager.”⁵ *Id.* at 533, 737 S.E.2d at 837. This became the majority

⁵ In so holding, the court found “[r]eliance on the ‘American Rule’ [or dominant factor doctrine] and lottery cases [in interpreting the statute] is misplaced, . . . as § 16-19-40 criminalizes the playing of certain games and gambling, not a lottery.” 401 S.C. at 531, 737 S.E.2d at 836. So too

because then-Chief Justice Toal agreed that the appellants had engaged in conduct that “fell so clearly within the statutory proscription.” *Id.* at 536, 737 S.E.2d at 839 (Toal, C.J., concurring).

The magistrate properly recognized as much here following a lengthy hearing and thoughtful analysis. (R. pp. 127–333 & 3–15). After finding Dragon’s Ascent did not constitute a “device pertaining to games of chance of whatever name or kind,” S.C. Code Ann. § 12-21-2710, the magistrate then determined whether it was “any machine or device licensed pursuant to Section 12-21-2720 and used for gambling,” *id.*; *see also* (R. pp. 10–12). Recognizing *Chimento* provided guidance on the issue of gambling, the magistrate properly found Dragon’s Ascent is an unlawful gambling machine because it is undisputed that wagering is required to play the game and “a person ‘gambles’ when money is wagered in so playing.” (R. p. 14). The magistrate noted the Dragon’s Ascent “machine also has several characteristics of gambling devices, including but not limited to the free play feature, the meter which records the amount of points that are redeemed, and the fact that the machine does not give change.” (R. p. 14).

But the circuit court, which did not ask a single question during the “brief” appellate hearing, reversed and found the magistrate erred by purportedly adopting a new test. (R. pp. 340–64 & 16–30). In doing so, the circuit court did not cite or apparently consider the canons of statutory construction. (R. pp. 25–29). Rather, the circuit court—as Respondents do now—leaned on commentary from Justice Hearn’s dissenting opinion on a different issue, various unpublished opinions and lower court orders, and other general policy arguments. *Id.*; *but see* Rule 268(d)(2), SCACR (“Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.”). Those nonbinding

here. *See* S.C. Code Ann. § 12-21-2710 (prohibiting the possession or operation of “any machine or device licensed pursuant to Section 12-21-2720 and used for gambling”).

authorities, however, cannot overcome *Chimento*'s holding that "gambling/gaming depends not on the skill/chance ratio, but on the wager." 401 S.C. at 533, 737 S.E.2d at 837.

Notably, the magistrate found the Dragon's Ascent machine was subject to destruction for an "additional" reason: "the playing of Dragon's Ascent by patrons of LG's By the Creek violates § 16-19-50 and must be destroyed pursuant to § 12-21-2712." (R. p. 14). Section 16-19-50 prohibits keeping or using "any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes." And under section 12-21-2712, any unlawful machine "in violation of Section 12-21-2710 *or any other law of this State*" is subject to destruction. S.C. Code Ann. § 12-21-2712 (emphasis added). Yet the circuit court did not address this holding, which appears to be an independent ground for destroying the unlawful Dragon's Ascent gambling machine.

At any rate, because the identical language in sections 12-21-2710 and 16-19-40 must be read together, *see Rivas*, 342 S.C. at 109, 536 S.E.2d at 375, to effectuate the General Assembly's intent, *see Roberts*, 393 S.C. at 342, 713 S.E.2d at 283, the circuit court erred as a matter of law by disregarding section 16-19-40—as analyzed in *Chimento*—to find the Dragon's Ascent machine was lawful. *See Bowers v. Thomas*, 373 S.C. 240, 245, 644 S.E.2d 751, 753 (Ct. App. 2007) (stating this Court "retains de novo review of whether the facts show the circuit court's [decision] was controlled or affected by errors of law" (citing *Hadfield v. Gilchrist*, 343 S.C. 88, 92–93, 538 S.E.2d 268, 271 (Ct. App. 2000))); *see also S.C. Pub. Interest Found.*, 432 S.C. at 495, 854 S.E.2d at 837; *N.Y. Times Co.*, 374 S.C. at 310, 649 S.E.2d at 29.

CONCLUSION

The Court should reverse the circuit court's decision and remand with instructions to reinstate the magistrate's order of forfeiture and destruction.

Respectfully submitted,

/s/Vordman Carlisle Traywick, III

Elizabeth Van Doren Gray (2434)

Robert E. Tyson, Jr. (10820)

Vordman Carlisle Traywick, III (102123)

Sarah C. Frierson (104643)

ROBINSON GRAY STEPP & LAFFITTE, LLC

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400

egray@robinsongray.com

rtyson@robinsongray.com

ltraywick@robinsongray.com

sfrierson@robinsongray.com

*Counsel for Amicus Curiae South Carolina
Lottery Commission*

Columbia, South Carolina
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

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

v.

South Carolina Law Enforcement Division Appellant.

**SOUTH CAROLINA LOTTERY COMMISSION'S
AMICUS BRIEF SUPPORTING APPELLANT SLED**

Elizabeth Van Doren Gray (2434)
Robert E. Tyson, Jr. (10820)
Vordman Carlisle Traywick, III (102123)
Sarah C. Frierson (104643)
ROBINSON GRAY STEPP & LAFFITTE, LLC
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
egray@robinsongray.com
rtyson@robinsongray.com
ltraywick@robinsongray.com
sfrierson@robinsongray.com

*Counsel for Amicus Curiae South Carolina Lottery
Commission*

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INTRODUCTION

As scholars have recognized, “video machine gambling is the most destructive gambling activity ever devised. It insinuates portable technology into every corner of a state, and the technology will be used for illegal gambling, no matter what the law or regulations say.” R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 Miss. L.J. 565, 729 (2002); see also *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 336, 778 S.E.2d 888, 897 (2015) (Toal, C.J., concurring in part and dissenting in part) (stating this article offers “a definitive history of video gambling in South Carolina”).

In South Carolina, video machine gambling “mushroomed from a rather clandestine and inauspicious beginning in 1986 into a multi-billion dollar business by its demise in July 2000.” *Mims Amusement Co. v. S.C. Law Enf’t Div.*, 366 S.C. 141, 146, 621 S.E.2d 344, 346 (2005). Though all three branches of state government agree video gambling is dead in South Carolina, Respondents seek to summon its ghost—this time with a flashy, but equally addictive, dragon-shooting game.

But Dragon’s Ascent is no game of Pac-Man. Cf. Note, *Video Poker and the Lottery Clause: Where Common Law and Common Sense Collide*, 49 S.C. L. REV. 549, 562 (1998) (“The lack of prize is one of the key distinctions between video gambling devices such as video poker and entertainment video games such as ‘Pac-Man.’ In essence, the winning of free games on ‘Pac-Man’ is of de minimis value to the player and therefore cannot properly be characterized as a prize.”). The goal of the game is to “[s]hoot dragons to win credits,” which “are redeemable for cash.” (R. p. 411). And the more value a player wagers on each shot, the more money the player stands to win. (R. p. 218). If a player, for example, inserts \$1 into the machine and shoots the “Rainbow Dragon,” he or she could win \$1,783. (R. pp. 178, 218).

That is the textbook definition of an unlawful video gambling machine.¹ Under section 12-21-2712, the Dragon's Ascent machine was thus subject to forfeiture and destruction after a magistrate found it was "prohibited by [s]ection 12-21-2710." S.C. Code Ann. § 12-21-2712. Of course, "forfeiture" is an important tool, for it "serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable." *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 304, 534 S.E.2d 270, 273 (2000).

Yet the owner of Dragon's Ascent remains undeterred. Its playbook is hardly novel though. As our supreme court recognized nearly a century ago, "[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, 286, 148 S.E. 66, 69 (1929) (quoting *Moberly v. Deskin*, 155 S.W. 842, 844 (Mo. Ct. App. 1913)).

Because the South Carolina Law Enforcement Division (SLED) properly seized the Dragon's Ascent machine, and the magistrate correctly ordered its forfeiture and destruction, the South Carolina Lottery Commission (the Lottery) submits this amicus brief in support of SLED.

¹ See S.C. Code Ann. § 12-21-2710 ("It 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 machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device 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, boards, 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 provisions of this section do not extend to coin-operated nonpayout 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.").

INTEREST OF *AMICUS CURIAE*

In 2001, the General Assembly passed the South Carolina Education Lottery Act (the Act) that created the Lottery. *See* 2001 S.C. Act No. 59, §§ 1–13 (codified as amended at S.C. Code Ann. §§ 59-150-10 through -410).

Along with requiring that “net proceeds of lottery games . . . be used to support improvements and enhancements for educational purposes and programs,” the General Assembly found that “lottery games must be operated and managed in a manner which ensures that the lottery is operated with integrity and dignity and free of political influence, maximizes the use of revenues, and provides continuing entertainment to the public.” *Id.* at § 1; *see also* S.C. CONST. art. XVII, § 7 (“Only the State may conduct lotteries, and these lotteries must be conducted in the manner that the General Assembly provides by law. The revenue derived from the lotteries must be used first to pay all operating expenses and prizes for the lotteries. The remaining lottery revenues must be credited to a separate fund in the state treasury styled the ‘Education Lottery Account,’ and the earnings on this account must be credited to it. Education Lottery Account proceeds may be used only for educational purposes as the General Assembly provides by law.”).

To fulfill its mission, the Lottery works closely with SLED to obtain thorough background checks, ensure the security and integrity of its games, and investigate violations of the Act. *E.g.*, S.C. Code Ann. §§ 59-150-40(B), -60(14), -130(A), -165, -240(C)(5), & -280.

The Lottery is governed by a board of commissioners that, among other things, has a duty to “promulgate regulations relating to the categories of lottery games and the conduct of lottery games.” S.C. Code Ann. § 59-150-50(4). It also has the power to “select and contract with lottery vendors and lottery retailers.” S.C. Code Ann. § 59-150-60(13); *see also* S.C. Code Ann. Regs. 44-30 (“The Executive Director shall enter into a contract for each approved lottery retail sales

location. The contract shall set out the duties, responsibilities, and obligations pertaining to the parties to the contract.”). In doing so, the Lottery has developed an Individual Retailer Contract that a retailer must sign when applying for a new or renewed retail license. *See Individual Retailer Application*, S.C. EDUC. LOTTERY (last visited Aug. 22, 2024), https://www.sceducationlottery.com/documents/retailers/applications/Application_IndividualRetailer_NewCOO.pdf.

Providing guidance to retailers wishing to sign the agreement, the Lottery flags three important issues: (1) the effect of a change in ownership, (2) the prohibition on illegal gaming devices, and (3) the contours of validating prizes. *Id.* As relevant here, the Lottery offers the following caution about gaming devices:

In 2014, more than thirty retail outlets were suspended after SCEL became aware of illegal gaming device(s) in the licensed location(s). It is the SCEL Retailer’s responsibility to ensure the legality of any amusement devices in their retail outlet. By signing the Retailer Contract, the Retailer agrees to an automatic, non-appealable six-month suspension if a magistrate determines an illegal device was present in your retail outlet.

Id. The agreement explains that “an illegal device at a location licensed by SCEL is inconsistent with the reputation, integrity, and public confidence SCEL must maintain.” *Id.* Notably, the paragraph on gaming devices specifically references the forfeiture procedures under sections 12-21-2710 and -2712. *See id.*

While the Lottery is not directly involved in the forfeiture process that the General Assembly created to combat illegal gaming machines, *see* S.C. Code Ann. § 12-21-2712, the resulting determinations in those judicial proceedings directly affect the Lottery’s individual retailer agreements with the offending establishments. What is more, the Lottery’s regulations expressly disallow “any lottery or lottery games prohibited by [s]ections 59-150-20(7), 12-21-2710, 16-19-40[,] and 16-19-50.” S.C. Code Ann. Regs. 44-140.

Heeding this proscription, the Lottery's board of commissioners weighed in on the legality of the Dragon's Ascent gaming machine:

While the General Assembly determines which types of lottery games may be lawfully offered for purchase in South Carolina, the Board of Commissioners of the South Carolina Lottery Commission has a responsibility to state its position pertaining to Dragon's Ascent. The Board is steadfastly committed to promoting fair and responsible play and does not support or endorse offering *any* game that requires an exemption to, or the suspension of, the express prohibitions codified in the South Carolina Code of Laws Sections 12-21-2710, 16-19-40, 16-19-50 (making video poker and other games of chance and skill illegal). This non-traditional game is inconsistent with responsible play by motivating repetitive play that often leads to excessive or compulsive spending, jeopardizing the integrity of lottery operations, games, and potentially lottery proceeds for education (which have grown from \$400.3 million in FY2017 to \$492.8 million in FY20). In adopting the Lottery Act in 2001, the General Assembly made the wise policy decision to not allow the Lottery to offer this form of addictive gaming and this prohibition should remain.

Meeting Minutes, S.C. EDUC. LOTTERY BD. OF COMM'RS (Dec. 9, 2020), https://www.sceducationlottery.com/documents/lottery/MeetingMinutes/Full_Board_Minutes_2020-12-09.pdf. Thus, the Lottery has an interest in the outcome of this appeal.

DESIRABILITY OF AN AMICUS BRIEF

The Lottery submits this brief to explain that the General Assembly—together with the Supreme Court of South Carolina—have set forth the proper lens through which the Court must determine whether Dragon's Ascent is an unlawful gaming machine subject to forfeiture and destruction under section 12-21-2712. In the Lottery's view, it is. As the Lottery recognized over three years ago, “[s]oon after the end of video poker, the General Assembly chose not to allow SCEL to offer addictive immediate gratification games. Dragon's Ascent is inconsistent with SCEL's culture and statutory mandate for encouraging socially responsible play as a traditional lottery.” *Id.* This brief directly addresses and counters Respondents' arguments to show why

playing the unscrupulous Dragon's Ascent gaming machine by wagering money to win more money is a textbook example of video gambling that contravenes South Carolina law.

As the body charged with regulating retailers whom the owners of Dragon's Ascent are pursuing, the Lottery has a unique perspective to offer in this case. In sum, the Lottery believes it can provide a useful voice as the Court considers whether the circuit court erred in reversing the magistrate's determination that Dragon's Ascent is an illegal gambling machine subject to forfeiture under section 12-21-2710.

ARGUMENT

The Lottery agrees with and adopts SLED's arguments.² It writes only to offer additional perspective on how the circuit court erred in interpreting section 12-21-2710 and misapplied precedent in concluding Dragon's Ascent was a lawful machine.

To start, "the interpretation of a statute is a question of law for the Court to review de novo," *S.C. Pub. Interest Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021), "with no particular deference to the lower court," *N.Y. Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7*, 374 S.C. 307, 310, 649 S.E.2d 28, 29 (2007). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

² The Lottery further adopts SLED's Statement of the Issues on Appeal, Statement of the Case, Statement of the Facts, and Standard of Review sections in its opening brief. See Rules 208(b)(6) & 213, SCACR.

Still, a court must “not construe the statute in a way which leads to an absurd result or renders it meaningless.” *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (per curiam). “Courts will reject a statutory interpretation [that] would lead to a result so plainly absurd that it could not have been intended by the [General Assembly] or would defeat the plain legislative intention.” *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010). “If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.” *Hodges*, 341 S.C. at 91, 533 S.E.2d at 584 (quoting *Ray Bell Constr. Co., Inc. v. Sch. Dist. of Greenville Cnty.*, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998)).

“[A] familiar canon of construction [is] that a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter.” *Greenville Baseball v. Bearden*, 200 S.C. 363, 368–69, 20 S.E.2d 813, 816 (1942). “It is also an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words.” *Id.*

At issue here is section 12-21-2710—titled “[t]ypes of machines and devices prohibited by law; penalties”—which provides the following:

It 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 machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device 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, boards, 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 provisions of this section do not extend to coin-operated nonpayout 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.

S.C. Code Ann. § 12-21-2710 (emphasis added).³ Under the statute, “[a]ny person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both.” *Id.*

Section 16-19-40, for its part, provides as follows:

If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place at (a) any game with cards or dice, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank (f) any other table or bank of the same or the like kind under any denomination whatsoever or (g) *any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes*, except the games of billiards, bowls, backgammon, chess, draughts, or whist when there is no betting on any such game of billiards, bowls, backgammon, chess, draughts, or whist or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or fined not over one hundred dollars, and every person so keeping such tavern, inn, retail store, public place, or house used as a place for gaming or such other house shall, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense.

S.C. Code Ann. § 16-19-40 (emphasis added). The statute is aptly titled “[u]nlawful games and betting.” *Id.*

Although both statutes use the same language, reference section 12-21-2720, relate to unlawful gambling machines, and were amended by Act 125 of 1999, Respondents urge the Court to analyze section 12-21-2710 in a silo, without any regard to what section 16-19-40—or precedent

³ Licensure under section 12-21-2720 was no longer effective July 1, 2000. See 1999 S.C. Act No. 125, Part VI, § 23(C)–(D).

interpreting the statute—may have to say on the subject. Respondents also invite the Court to ignore the title of Act 125. The canons of statutory construction, however, do not countenance either cabined approach.

“In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose.” *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). The Court “must read the statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.’” *Senate ex rel. Leatherman v. McMaster*, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) (quoting *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). Further, “statutes [that] are part of the same Act must be read together.” *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). Indeed, “statutes dealing with the same subject matter are *in para materia* and must be construed together, if possible, to produce a single, harmonious result.” *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

“It is [also] ‘proper to consider the title or caption of an act in aid of construction to show the intent of the [General Assembly].’” *Hock Rh, LLC v. S.C. Dep’t of Revenue*, 423 S.C. 208, 214, 813 S.E.2d 540, 543 (Ct. App. 2018) (first alteration in original) (quoting *Rhame v. Charleston Cnty. Sch. Dist.*, 412 S.C. 273, 276-77, 772 S.E.2d 159, 161 (2015)); *see also Lindsay v. S. Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 277, 188 S.E.2d 374, 376 (1972) (same) (quoting *Univ. of S.C. v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966)).⁴

⁴ Our appellate courts did not find the statutes ambiguous in any of these cases. Nor is that a prerequisite to looking to the title of the Act. *See Creswick v. Univ. of S.C.*, 434 S.C. 77, 82, 862 S.E.2d 706, 708 (2021) (“Only where *the language of an act* gives rise to doubt or uncertainty as to legislative intent may this Court search for that intent *beyond the borders of the act* itself.” (emphasis added)). After all, the Court is merely looking at *all words* the General Assembly used to accomplish its goal. And the title is certainly within “the borders of the act.” *Id.*

Brushing aside the canons of construction, Respondents choose to spotlight the back-and-forth between a fractured supreme court on a subject that is only marginally related to the issue here. In *Town of Mount Pleasant v. Chimento*, our supreme court rejected a constitutional challenge to section 16-19-40. 401 S.C. 522, 737 S.E.2d 830 (2012). Chief Justice Toal concurred in result only, explaining that “[a]lthough there are other sound provisions outlawing video poker,” she was “loathe to strike the critical language from the general ban on gaming in the event that it guts these provisions, and consequently, South Carolina’s longstanding prohibition against gambling.” *Id.* at 537–38, 737 S.E.2d at 840 (Toal, C.J., concurring) (citing S.C. Code Ann. §§ 12-21-2710 & -2712 (2000)). Justice Hearn was unconvinced, arguing that 12-21-2710 was “entirely independent and separate from” section 16-19-40, and striking down one “in whole or in part would have no impact on” the other. *Id.* at 552, 737 S.E.2d at 848 (Hearn, J., dissenting).

Respondents devote significant airtime to Justice Hearn’s dissent, avoiding the relevant holdings in the majority. This approach is misguided. For one, with respect, Justice Hearn’s opinion about the nexus between sections 12-21-2710 and 16-19-40 is not the law, as she did not gain a majority for that proposition. For another, Respondents take her statement out of context. Justice Hearn simply said striking down one statute would not impact the constitutionality of the other. After all, they are different criminal statutes: one penalizes the player, S.C. Code Ann. § 16-19-40, while the other penalizes the establishment, S.C. Code Ann. § 12-21-2710. Further, the divided court considered the constitutionality of only one phrase within section 16-19-40—“house used as a place of gaming”—which does not appear in section 12-21-2710. But their independent constitutionality has nothing to do with whether the statutes—both of which use the same language to define the contours of unlawful gambling considered here—must be read together to decide legislative intent. *See Rivas*, 342 S.C. at 109, 536 S.E.2d at 375.

In all events, the parties did not make this argument in *Chimento*, and a majority of the Court did not rule on whether the statutes can be harmonized—especially where they use the same language—to inform the Court’s analysis of whether a machine is lawful. And our “appellate courts . . . do not speak unless spoken to and do not answer questions they are not asked.” *Watson v. Underwood*, 407 S.C. 443, 452 n.9, 756 S.E.2d 155, 160 n.9 (Ct. App. 2014) (quoting *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991)). Whatever value Justice Hearn’s dissent in *Chimento* on the constitutionality of section 16-19-40 adds to the conversation about the interpretation of section 12-21-2710, the question is now before the Court. Under longstanding rules of statutory interpretation, the Court must read sections 12-21-2710 and 16-19-40 together.

Sections 12-21-2710 and 16-19-40 both use the language “any machine or device licensed pursuant to Section 12-21-2720 and used for gambling” in prohibiting certain conduct: playing or owning/operating. While one penalizes the player, S.C. Code Ann. § 16-19-40, and the other penalizes the establishment, S.C. Code Ann. § 12-21-2170, *Chimento*’s interpretation of the former necessarily informs the Court’s interpretation of the latter.

Indeed, Justice Pleicones considered the meaning of the word “gambling” as used in section 32-1-10 of the South Carolina Code to inform his interpretation of “gambling” as used in section 16-19-40. *Chimento*, 401 S.C. at 532, 737 S.E.2d at 837. After considering what it meant in section 32-1-10, he stated 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.” *Id.* at 532–33, 737 S.E.2d at 837. “In other words, gambling/gaming depends not on the skill/chance ratio, but on the wager.”⁵ *Id.* at 533, 737 S.E.2d at 837. This became the majority

⁵ In so holding, the court found “[r]eliance on the ‘American Rule’ [or dominant factor doctrine] and lottery cases [in interpreting the statute] is misplaced, . . . as § 16-19-40 criminalizes the playing of certain games and gambling, not a lottery.” 401 S.C. at 531, 737 S.E.2d at 836. So too

because then-Chief Justice Toal agreed that the appellants had engaged in conduct that “fell so clearly within the statutory proscription.” *Id.* at 536, 737 S.E.2d at 839 (Toal, C.J., concurring).

The magistrate properly recognized as much here following a lengthy hearing and thoughtful analysis. (R. pp. 127–333 & 3–15). After finding Dragon’s Ascent did not constitute a “device pertaining to games of chance of whatever name or kind,” S.C. Code Ann. § 12-21-2710, the magistrate then determined whether it was “any machine or device licensed pursuant to Section 12-21-2720 and used for gambling,” *id.*; *see also* (R. pp. 10–12). Recognizing *Chimento* provided guidance on the issue of gambling, the magistrate properly found Dragon’s Ascent is an unlawful gambling machine because it is undisputed that wagering is required to play the game and “a person ‘gambles’ when money is wagered in so playing.” (R. p. 14). The magistrate noted the Dragon’s Ascent “machine also has several characteristics of gambling devices, including but not limited to the free play feature, the meter which records the amount of points that are redeemed, and the fact that the machine does not give change.” (R. p. 14).

But the circuit court, which did not ask a single question during the “brief” appellate hearing, reversed and found the magistrate erred by purportedly adopting a new test. (R. pp. 340–64 & 16–30). In doing so, the circuit court did not cite or apparently consider the canons of statutory construction. (R. pp. 25–29). Rather, the circuit court—as Respondents do now—leaned on commentary from Justice Hearn’s dissenting opinion on a different issue, various unpublished opinions and lower court orders, and other general policy arguments. *Id.*; *but see* Rule 268(d)(2), SCACR (“Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.”). Those nonbinding

here. *See* S.C. Code Ann. § 12-21-2710 (prohibiting the possession or operation of “any machine or device licensed pursuant to Section 12-21-2720 and used for gambling”).

authorities, however, cannot overcome *Chimento*'s holding that "gambling/gaming depends not on the skill/chance ratio, but on the wager." 401 S.C. at 533, 737 S.E.2d at 837.

Notably, the magistrate found the Dragon's Ascent machine was subject to destruction for an "additional" reason: "the playing of Dragon's Ascent by patrons of LG's By the Creek violates § 16-19-50 and must be destroyed pursuant to § 12-21-2712." (R. p. 14). Section 16-19-50 prohibits keeping or using "any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes." And under section 12-21-2712, any unlawful machine "in violation of Section 12-21-2710 *or any other law of this State*" is subject to destruction. S.C. Code Ann. § 12-21-2712 (emphasis added). Yet the circuit court did not address this holding, which appears to be an independent ground for destroying the unlawful Dragon's Ascent gambling machine.

At any rate, because the identical language in sections 12-21-2710 and 16-19-40 must be read together, *see Rivas*, 342 S.C. at 109, 536 S.E.2d at 375, to effectuate the General Assembly's intent, *see Roberts*, 393 S.C. at 342, 713 S.E.2d at 283, the circuit court erred as a matter of law by disregarding section 16-19-40—as analyzed in *Chimento*—to find the Dragon's Ascent machine was lawful. *See Bowers v. Thomas*, 373 S.C. 240, 245, 644 S.E.2d 751, 753 (Ct. App. 2007) (stating this Court "retains de novo review of whether the facts show the circuit court's [decision] was controlled or affected by errors of law" (citing *Hadfield v. Gilchrist*, 343 S.C. 88, 92–93, 538 S.E.2d 268, 271 (Ct. App. 2000))); *see also S.C. Pub. Interest Found.*, 432 S.C. at 495, 854 S.E.2d at 837; *N.Y. Times Co.*, 374 S.C. at 310, 649 S.E.2d at 29.

CONCLUSION

The Court should reverse the circuit court's decision and remand with instructions to reinstate the magistrate's order of forfeiture and destruction.

Respectfully submitted,

/s/Vordman Carlisle Traywick, III

Elizabeth Van Doren Gray (2434)

Robert E. Tyson, Jr. (10820)

Vordman Carlisle Traywick, III (102123)

Sarah C. Frierson (104643)

ROBINSON GRAY STEPP & LAFFITTE, LLC

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400

egray@robinsongray.com

rtyson@robinsongray.com

ltraywick@robinsongray.com

sfrierson@robinsongray.com

*Counsel for Amicus Curiae South Carolina
Lottery Commission*

Columbia, South Carolina
August 23, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

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

v.

South Carolina Law
Enforcement Division, ... Appellant.

**RESPONDENTS' BRIEF IN RESPONSE TO
AMICUS CURIAE BRIEFS**

William W. Wilkins, SC Bar No. 6112
BILLY WILKINS LAW LLC
212 E. Park Ave.
Greenville, SC 29601
Telephone: 864.616.9866
Billy@billywilkinslaw.com

Kirsten E. Small, SC Bar No. 75681
MAYNARD NEXSEN, PC
104 S. Main Street, Suite 900
Greenville, SC 29601
Telephone: 864.370.2211
KSmall@maynardnexsen.com

Additional counsel listed inside front cover

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

-and-

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

Attorneys for Respondents

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INTRODUCTION

Pursuant to the Court's order of September 11, 2024, Respondents respectfully submit this brief in response to the amicus curiae briefs filed by the Attorney General ("AG Brief") and the South Carolina Education Lottery Commission ("SCELC Brief").

ARGUMENT

I. The Argument Based on the Title of Act 125 Is Unpreserved and Meritless

The SCELK attempts to bolster SLED's argument, *see* SLED Br. at 7-11, that the phrase "for the purpose of prohibiting cash payouts" in the title of 1999 S.C. Act 125 demonstrates legislative intent to ban all cash payouts, even on games of skill, despite the absence of any such language in the text of S.C. Code Ann. § 12-21-2710. SCELK Br. at 7-9. The SCELK's arguments are without merit.

First, the SCELK ignores that SLED waived this argument by failing to timely present it to the circuit court. Rather, SLED made this argument for the first time in its motion for reconsideration under Rule 59(e), SCRCP. A motion under Rule 59(e) "allow[s] a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004). A Rule 59(e) motion is *not* an opportunity for the losing party to raise *new* arguments in hopes of getting a better result. "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prod. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009); *see Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) ("[I]t appears the first time Commercial Credit made this argument was in its Rule 59(e) motion for reconsideration. Accordingly, this issue is not properly preserved for our review.").

Second, the argument fails on its merits. The SCELK contends that the title of an

act may be used to discern legislative intent even when a statute is not ambiguous. SCEL Br. at 9 & n.4. This argument is contrary to settled South Carolina law, which provides that if the language of a statute is clear and unambiguous there is no basis for a court to consider anything other than the statutory text. *See Connelly v. Main St. Am. Grp.*, 439 S.C. 81, 89, 886 S.E.2d 196, 200 (2023) (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). “Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning.” *Smith v. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 483 (2017). Just as with other interpretive aids, resort to the caption of a statute or the title of an act is appropriate only when necessary to resolve ambiguity in the statutory text. *Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (“[T]he title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt.”).

The cases cited by the SCEL are not to the contrary. Rather, each of the cited cases looked to title of an act solely as confirmation of the plain statutory text. *See Hock RH, LLC v. S.C. Dep’t of Rev.*, 423 S.C. 208, 214-15, 813 S.E.2d 540, 543-44 (Ct. App. 2018) (looking to the title of act to confirm legislative intent that statutory amendment would operate retrospectively, contrary to the usual rule that legislative changes operate prospectively only); *Rhame v. Charleston Cnty. Sch. Dist.*, 412 S.C. 273, 276-77, 772 S.E.2d 159, 161 (2015) (finding that title of statute confirmed plain statutory text); *Lindsay v. Southern Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 276-78, 188 S.E.2d 374, 376 (1972) (same).

Unlike in the cases it cites, here the SCEL seeks to use the title of Act 125 to *change or limit* the plain meaning of § 12-21-2710. This is prohibited by bedrock rules of statutory

construction:

For interpretative purposes, the title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, ***but they cannot undo or limit what the text makes plain.***

Garner, 312 S.C. at 486, 435 S.E.2d at 849] (emphasis added). Our Supreme Court and this Court have repeatedly cited *Garner* for precisely this proposition. See *Perry v. Bullock*, 409 S.C. 137, 142, 761 S.E.2d 251, 253–54 (2014) (citing *Garner* as “holding the title of a statute and heading of a section can be used to clarify ambiguity or doubt in a statute provided the interpretation does not undo or limit the plain meaning of the text”); *Savannah Riverkeeper v. S.C. Dep’t of Health & Envtl. Control*, 400 S.C. 196, 202–03, 733 S.E.2d 903, 906 (2012) (rejecting argument based on title of statute because the statute was not ambiguous; citing *Garner*); *Gaster v. Evatt*, 326 S.C. 33, 35 n.1, 483 S.E.2d 197, 198 n.1 (1997) (“To the extent appellant’s argument relies on the fact that § 16–3–655 is captioned ‘Criminal Sexual Conduct with Minors’, it also fails. The title of a statute is ‘of use only when [it] shed[s] light on some ambiguous word or phrase ... but [it] cannot undo or limit what the text makes plain.’ *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993).”); *Ashfort Corp. v. Palmetto Const. Grp., Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 535 (1995) (citing *Garner* in support of holding that “the title of the Rule 43[, SCRCPP,] may not limit the plain meaning of Rule 43(k)”; *McInnis v. McInnis*, 348 S.C. 585, 592, 560 S.E.2d 632, 636 (Ct. App. 2002) (citing *Garner*’s holding that “[a]lthough the title and headings of a statute may not be construed to limit the plain language of a statute, they may be used to shed light on an ambiguous word or phrase”).

The text of § 12-21-2710 says nothing whatsoever about prohibiting cash payouts based on playing a game of skill. Because the statutory text is plain, there is no basis for this Court to look beyond it to the title of Act 125. The title of Act 125 cannot be used to insert language—prohibiting cash payouts even on games of skill—that does not appear in § 12-21-2710.

That § 12-21-2710 does not prohibit payouts based on games of skill is confirmed by decisions of this Court and our Supreme Court recognizing that § 12-21-2710 permits cash payouts on machines that offer games of skill but not on machines containing games of chance. For example, in *Allendale County Sheriff's Office v. Two Chess Challenge II*, our Supreme Court affirmed the legality of “a coin-operated game that has a payout feature,” specifically recognizing that “games of skill ... are lawful to possess.” 361 S.C. 581, 583, 588, 606 S.E.2d 471, 472, 475 (2004); *see also Ward v. West Oil Co.*, 387 S.C. 268, 278, 692 S.E.2d 516, 521-22 (2010) (holding that “pull-tab” games violate S.C. Code Ann. § 12-21-2710 because they “created an element of chance”); *Sun Light Prepaid Phonecard Co. v. State*, 360 S.C. 49, 54, 600 S.E.2d 61, 64 (2004) (holding that phone card dispensers violated § 12-21-2710 because they “present[ed] the element of chance”). Similarly, this Court has ruled that games of skill are legal under § 12-21-2710. *See S.C. Law Enf't Div. v. 1-Speedmaster S/N 00218*, 397 S.C. 94, 99-100, 723 S.E.2d 809, 812 (Ct. App. 2011); *see also S.C. Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 658, 790 S.E.2d 792, 802 (Ct. App. 2016) (holding that machines violated § 12-21-2710 because they “contained games of chance”).

The text of a statute is the first and best guide to legislative intent. Here, the plain text of § 12-21-2710 unambiguously prohibits only machines or devices offering games

where the outcome is predominantly determined by chance. *See Speedmaster*, 397 S.C. at 99-100, 723 S.E.2d at 812 (holding that a machine is “used for gambling” if it presents a game of chance). Consistent with the plain statutory text, courts have recognized that the dividing line of legality under § 12-21-2710 is skill vs. chance—not whether there is a payout for successful play of the game.

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

Both Amici also attempt to bolster SLED’s argument, *see* SLED Br. at 12-16, that the Supreme Court’s decision in *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), must be broadly applied such that a machine is illegal under § 12-21-2710 even if it involves a game where the outcome is determined predominantly by the player’s skill.¹ This argument is without merit.

The Attorney General contends that “[i]f the *Chimento* Court had intended to limit its definition of ‘gambling’ to [S.C. Code Ann.] § 16-19-40, it could easily have said so.” AG Br. at 10. In fact, the *Chimento* Court did exactly that, repeatedly tying its discussion of “gaming” and “gambling” to the specific context of § 16-19-40. *See Chimento*, 401 S.C. at 531, 737 S.E.2d at 836 (“The circuit court ... [held] that ‘gaming’ *as used in § 16-19-40*

¹ As a preface to its discussion of *Chimento*, the Attorney General indulges in lengthy speculation regarding the possible impetus for the General Assembly to include the “used for gambling” language in Act 125. AG Br. at 16-22. Among other things, this portion of the Attorney General’s brief relies on cases having to do with the wholly irrelevant issue of whether a device is “contraband *per se*.” *Id.* at 20-21. Moreover, *none* of the cases discussed on pages 16-22 of the Attorney General’s brief holds, or even suggests, that “used for gambling” was intended by the General Assembly to make games of skill illegal.

applies only to betting on games of chance[.]” (emphasis added)); *id.* at 532, 737 S.E.2d at 837 (describing issue as “whether ... betting on a card game ... is unlawful gaming” and citing, *inter alia*, § 16-19-40); *id.* (“Under the plain language of § 16-19-40, gambling on a game of skill is a violation if that gambling is being done in a prohibited location.” (emphasis added)); *id.* (“A violation of the gaming prohibition of § 16-19-40 does not depend on whether the particular game involves more skill than chance.” (emphasis added)); *id.* at 533, 737 S.E.2d at 837 (“[T]here is precedent that indicates § 16-19-40 is concerned with wagering regardless of the skill involved in the game wagered upon.” (emphasis added)); *id.* (“We hold that one ‘games’ within the meaning of § 16-19-40 when money is wagered on Texas Hold’em, even though it is a game in which skill predominates.” (emphasis added)).

Amicus’ insistence that the 2012 *Chimento* decision adopted a new definition of “gaming” and “gambling” for all purposes, including application of § 12-21-2710, is contrary to every decision by all courts at *every* level of South Carolina’s judicial system. Just like every court before *Chimento*, every court after that decision has consistently continued to apply *the dominant factor test* to determine the legality of a video game.²

² See **Administrative Law Court**: *S.C. Dep’t of Rev. v. Chestnut*, 2021 WL 4822858, at *6 (S.C. Admin. Law Ct. Oct. 8, 2021) (stating that “games of chance [are] prohibited by [S.C. Code Ann.] § 12-21-2710”); **Court of Common Pleas**: *Smith v. S.C. Law Enf’t Div.*, 2013 WL 8477943, at *2-3 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013) (“[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance[.]” (internal quotation marks omitted)); **Court of Appeals**: *Meenaxi*, 417 S.C. at 658, 790 S.E.2d at 802 (“[T]he Department showed the Products Direct and Gift Surplus machines contained games of chance in violation of section 12-21-2710[.]”); **Supreme Court**: *Richland Cty. Sheriff’s Dep’t v. Awde*, No. 2014-MO-024, 2014 WL 3016205, at *1 (S.C.

Even the Attorney General, post-*Chimento*, has continued to recognize that skill games are not illegal under § 12-21-2710. See Op. S.C. Atty Gen., 2017 WL 4707542 (S.C.A.G. Oct. 11, 2017) (stating that “South Carolina gambling laws” prohibit “games of chance”). Additionally, if the *Chimento* Court had actually intended to redefine “gambling” for all purposes including § 12-21-2710, it would necessarily have had to overrule prior decisions, cited *supra*, in which legality under § 12-21-2710 turned solely on the question of skill vs. chance, and not on the question of whether there was a payout.

This Court’s decision in *Speedmaster* is particularly relevant in this regard. In *Speedmaster*, this Court squarely held that if skill predominates over chance, no further inquiry is necessary to determine the legality of the machine under § 12-21-2710. See *Speedmaster*, 397 S.C. at 100, 723 S.E.2d at 812. In that case, SLED argued that “the magistrate [court] erred in finding [that § 12-21-2710] contained a requirement that a machine must be used for gambling to be illegal.” *Id.* at 99, 723 S.E.2d at 811-12. Relying on the Supreme Court’s decision in *Ward*, this Court stated, “SLED is correct that section 12-21-2710 does not specifically require that an illegal gaming device be used for gambling.” *Id.* at 99-100, 723 S.E.2d at 812 (citing *Ward*, 387 S.C. at 278, 692 S.E.2d at 522, for the proposition that “[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of *chance*, no matter how small the intrinsic value” (emphasis in original; internal quotation marks omitted)). Rather, the Court of Appeals

July 2, 2014) (affirming magistrate court’s finding “that two ‘Chess Challenge II’ devices before it were games of skill”).

made clear, “the term gambling” as used in § 12-21-2710 “*necessarily encompasses the element of chance.*” *Id.* (emphasis added). Because the Speedmaster game was predominantly one of skill, “we conclude the circuit court properly affirmed the magistrate’s ruling *the Speedmaster was not ‘used for gambling.’*” *Id.* at 100, 723 S.E.2d at 812 (quoting § 12-21-2710; emphasis added).

The Attorney General’s interpretation of *Chimento* also flies in the face of *Richland County Sheriff’s Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam). In *Awde*, the same five justices who decided *Chimento* only two years earlier unanimously affirmed a magistrate court’s “finding that two ‘Chess Challenge II’ devices before it were legal games of skill.” *Id.* The parties’ briefs raised arguments concerning, *inter alia*, the “used for gambling” prong of § 12-21-2710, and the Attorney General submitted a letter to the Court identifying *Chimento* as supplemental authority.³ If the Supreme Court had intended *Chimento* to apply when determining the legality of a machine under § 12-21-2710, it surely would not have issued an affirmance in *Awde*. The fact that the Court affirmed—in an unpublished, per curiam opinion—strongly indicates that *Chimento* does not apply to the analysis of whether a game is legal under § 12-21-2710.

Chimento has *never* been cited for the proposition that *all* video games that involve consideration and a potential prize or reward are illegal, even if the outcome is

³ The filings in *Awde* are available at <https://ctrack.sccourts.org/public/caseView.do?csIID=50448> (last visited Sept. 30, 2024).

determined by the player's skill. To the contrary, at least one court has cited *Chimento* in the context of determining whether a video machine was legal under § 12-21-2710, and in that case the circuit court decided under *the dominant factor test* that the machine *was not* illegal under *Chimento* simply because it involved payment of consideration. See *Smith v. S.C. Law Enf't Div.*, 2013 WL 8477943, at *2-3 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013).

In its argument regarding *Chimento*, the SCELCL notes that "[s]ections 12-21-2710 and 16-19-40 both use the language 'any machine or device licensed pursuant to Section 12-21-2720 and used for gambling' in prohibiting certain conduct." SCELCL Br. at 11. The SCELCL ignores, however, that the "any machine or device" language was not at issue in *Chimento*. The primary question presented in *Chimento* was whether a person's residence could qualify under S.C. Code Ann. § 16-19-40 as a prohibited "house used as a place of gaming" when used for the playing of a game of skill, *i.e.*, Texas Hold'em. See *Chimento*, 401 S.C. at 527, 737 S.E.2d at 832. In affirming the defendants' convictions, the *Chimento* Court held that it is the "prohibited location," not the character of the game being played, that determines illegality under § 16-19-40. *Chimento*, 401 S.C. at 532, 737 S.E.2d at 837. The *Chimento* majority made no reference whatsoever to the fact that both § 16-19-40 and § 12-21-2710 contain the phrase "any machine or device licensed pursuant to Section 12-21-2720 and used for gambling." In fact, the *Chimento* majority referenced the "any machine or device" language in § 16-19-40 only in quoting the statute as a whole, and it *did not even cite* § 12-21-2710. In short, there is nothing at all in *Chimento* to support any kind of connection between the meaning of "gaming" in "a house used as a place of

gaming” and the meaning of “machine or device used for gambling.”

The SCELK is equally misguided in criticizing Respondents for discussing the exchange of views between Chief Justice Toal’s concurrence and Justice Hearn’s dissent, which the SCELK contends “is only marginally related to the issue here.” SCELK Br. at 10. However, the referenced exchange is directly relevant because it confirms that the majority opinion is limited to interpretation of § 16-19-40 and does not apply to § 12-21-2710. Specifically, Chief Justice Toal declined to join Justice Hearn, who would have held that § 16-19-40 was unconstitutionally vague, because she feared that the unconstitutional phrase “house used as a place of gaming” could not be severed from the statute—meaning that § 16-19-40 would have to be struck “in its entirety,” potentially “open[ing] the door wide to *all* heretofore illegal gaming practices in this state, *including video poker.*” *Chimento*, 401 S.C. at 537, 737 S.E.2d at 839-40 (Toal, C.J., concurring) (second emphasis added). Justice Hearn responded that this fear was unwarranted because “[t]he prohibition of video poker is found in Section 12-21-2710 of the South Carolina Code (2000),” and thus would not be impacted by any change to § 16-19-40. *See Chimento*, 401 S.C. at 552, 737 S.E.2d at 848 (Hearn, J., dissenting). What is important about this exchange is that the *Chimento* majority did not challenge Justice Hearn on this point, although it responded to other aspects of her dissent. *See Chimento*, 401 S.C. at 535 n.6, 737 S.E.2d at 838 n.6. Together with its repeated references to § 16-19-40, the majority’s silence on this point further shows that the *Chimento* Court did not intend to change the meaning of “gambling” as used in § 12-21-2710.

III. Amici's Other Arguments Are Without Merit

The Attorney General and the SCELCLC's briefs make various additional arguments that this Court should reject as meritless.

A. The Attorney General's Additional Arguments

In its Conclusion, the Attorney General's amicus brief refers to individuals betting on the outcome of a game of baseball or making "side wagers" as referenced in *Holliday v. Governor of South Carolina*, 78 F. Supp. 918, 925 (W.D.S.C. 1948), in which the machine at issue was determined to be a game of chance, not one of skill. However, this case does not involve a "side wager" scenario or other circumstance where money is won or lost based on the performance of a third party; rather, the outcome of a game of Dragon's Ascent is determined by the player's exercise of his or her own skill.

Likewise inapposite is the Attorney General's quotation of the *dissenting* opinion in *Dew-Becker v. Wu*, 178 N.E.3d 1034 (Ill. 2021), which concerned whether betting on a fantasy sports roster was gambling under the dominant factor test. AG Br. at 25. The dissent would have held that fantasy-sports betting is a game of chance (and therefore, is gambling under Illinois law) because the person betting selects a roster of players but has no control over how those persons play. *Id.* at 1044. The dissent distinguished this scenario from "contests in which the participant's *own skill* has the opportunity to overcome chance." *Id.* (emphasis added). Here, it has already been established and is the law of the case that Dragon's Ascent is a game of skill, *i.e.*, one in which the player's skill predominates over chance in determining the outcome.

B. The SCEL C's Additional Arguments

The SCEL C improperly urges the Court to reverse on the basis of the magistrate court's holding that Dragon's Ascent violates S.C. Code Ann. § 16-19-50. SCEL C Br. at 13. Although S.C. Code Ann. § 12-21-2712 provides for destruction of a machine if it is illegal under § 12-21-2710 "or any other law of this State," the language "or any other law of this State" is irrelevant here. The only question presented in this case is whether Dragon's Ascent is legal under § 12-21-2710, not any other statute. This is clear from the Order of Destruction/Notice of Post-Seizure Hearing, which states that the Dragon's Ascent machine was before the court for a determination of whether it was "prohibited pursuant to S.C. Code Ann. § 12-21-2710." (R. p. 1.)

Since the Dragon's Ascent machine was seized exclusively on the grounds that it was prohibited under § 12-21-2710, it was manifestly improper for the magistrate court to consider forfeiture on the basis of different statutes, S.C. Code Ann. §§ 16-19-40 and 16-19-50, that were never mentioned in the Notice. Moreover, SLED abandoned any argument on this point by failing to raise it on appeal. Accordingly, the Court should refuse to consider it.

CONCLUSION

"The term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). The amicus briefs filed by the Attorney General and the SCEL C are like "[t]he vast majority of amicus curiae briefs ... filed by allies of litigants," in that they merely "duplicate the arguments made in the litigants' briefs." *Id.* However, repeating the arguments made by SLED does

not make them better. Repetition does not transform a meritless argument into one that does have merit. It remains the case, as explained in Respondents' brief, that the position of SLED and its amici, if accepted by this Court, would fundamentally rewrite long-standing South Carolina law by eliminating any notion of chance as a required element of illegal gambling. Accordingly, this Court should affirm.

Signatures on following page.

Respectfully submitted,

s/ William W. Wilkins

William W. Wilkins, SC Bar No. 6112
BILLY WILKINS LAW LLC
212 E. Park Ave.
Greenville, SC 29601
Telephone: 864.616.9866
Billy@billywilkinslaw.com

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

-and-

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

-and-

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

Attorneys for Respondents

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Greenville, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

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

v.

South Carolina Law Enforcement Division, ... Appellant.

PROOF OF SERVICE

I certify that on October 11, 2024, the foregoing **Respondents' Brief in Response to Amicus Curiae Briefs** was served on Appellant South Carolina Law Enforcement Division, Amicus Attorney General of South Carolina, and Amicus South Carolina Lottery Commission by emailing a copy to counsel of record using the primary email address listed in the Attorney Information System, as set forth below:

Adam L. Whitsett
awhitsett@sled.sc.gov

Thomas T. Hydrick
thomashydrick@scag.gov

Robert E. Tyson, Jr.
rtyson@robinsongray.com

Sarah C. Frierson
sfrierson@robinsongray.com

Robert D. Cook
bcook@scag.gov

Elizabeth Van Doren Gray
egray@robinsongray.com

Vordman Carlisle Traywick, III
ltraywick@robinsongray.com

s/Kirsten E. Small

Kirsten E. Small, SC Bar No. 75681