STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON)
) Civil Action No.: 2013-CP-04-00147

Cas Smith dba Fun City Cyber Café et al.,

Defendants/Appellants,

v.

South Carolina Law Enforcement Division,

Plaintiff/Respondent.

ORDER

This matter came before me on September 9, 2013 on the appeal of the post-seizure hearing order of The Honorable J. Wesley White, an Anderson County Magistrate Judge finding, among other things, that all of the machines and devices at issue in this action violate § 12-21-2710. The Plaintiff/Respondent was represented by Assistant Attorney General Adam L. Whitsett of the South Carolina Attorney General's Office and the Defendants/Appellants were represented by W. Norman Epps, III of Epps, Nelson & Epps.

After considering the evidence in this matter and the arguments set forth by both parties, I hereby DENY this appeal and AFFIRM and UPHOLD the trial court's order in its entirety. This decision is based on the following:

PROCEDURAL HISTORY

On or about May 23, 2012, in accordance with South Carolina Code Section 12-21-2712, 19 Gaming Consoles and other operational equipment were seized by the Anderson County Sheriff's Department working with agents from the South Carolina Law Enforcement Division from the Fun City Cyber Café located at 1716 Pearman Dairy Road in Anderson, South Carolina 29626. On that same date, the machines were examined by The Honorable Ronald W. Whitman who issued an order finding that the machines violate S.C. Code § 12-21-2710 and

authorizing the seizure and destruction of the machines and the other equipment set forth in the order and its attachments.

On or about July 13, 2012, in accordance with South Carolina Code Section 12-21-2712, 22 Computer Type Gambling Devices and other operational equipment were seized by the Anderson County Sheriff's Department working with agents from the South Carolina Law Enforcement Division from the Fun City Cyber Café located at 4415 Highway 24 in Anderson, South Carolina 29626. On that same date, the machines were examined by The Honorable Ronald W. Whitman who issued an order finding that the machines violate S.C. Code § 12-21-2710 and authorizing the seizure and destruction of the machines and the other equipment set forth in the order and its attachments. Post-seizure hearings were requested on both cases by W. Norman Epps, III, Esquire on behalf of the owner of these businesses and consolidated by agreement of the parties.

After considering the evidence and the applicable law, Judge White issued an order finding that all of the gaming machines at issue in this action were in violation of § 12-21-2710. This appealed followed.

STANDARD OF REVIEW

"The appellant, within thirty days after written notice of judgment has been given him or his attorney by the magistrate, recorder, or judgment of the municipal court, except when the judgment is announced at the trial in the presence of the appellant or his attorney then no written notice is necessary, shall serve a notice of appeal, stating the grounds upon which the appeal is founded." S.C. Code § 18-7-20. "In the notice of appeal the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him" S.C. Code § 18-7-30.

"Upon hearing the appeal the 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.

"At a post-seizure hearing, the burden is on the owner of the *res* [the seized machines and other devices/items] 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) *citing* State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).

LAW/ANALYSIS

1. THE TRIAL COURT'S RULING THAT ALL OF THE MACHINES AND DEVICES AT ISSUE IN THIS ACTION VIOLATE § 12-21-2710 WAS CORRECT.

I find that the trial court's ruling that all of the machines and devices at issue in this action violate § 12-21-2710 was in accordance with South Carolina law and should be upheld in its entirety. The South Carolina Supreme Court has acknowledged that "[g]aming devices in general have long been recognized as legitimately within the police power of the State to control or take by forfeiture" and that "[g]aming machines have been illegal and subject to forfeiture as contraband in this state since the 1930s." Mims Amusement Co. v. S. Carolina Law Enforcement Div., 366 S.C. 141, 147, 621 S.E.2d 344, 347 (2005) *citing* Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 303, 534 S.E.2d 270, 273 (2000); Lawton v. Steele, 152 U.S. 133, 136 (1894). In addition, the South Carolina Supreme Court has noted 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. *Id.* at 304, 534 S.E.2d at 273 *citing* Bennis v. Michigan, 516 U.S. 442, 452 (1996); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-87 (1974).

The South Carolina Supreme Court has also indicated that when analyzing devices pursuant to § 12-21-2710, courts should "look behind the name and style of the device to ascertain its true character." Ward v. W. Oil Co., Inc., 387 S.C. 268, 278, 692 S.E.2d 516, 522 (2010) *citing* 38 C.J.S. Gaming § 10 (Supp. 2010). And 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." *Id.*

Furthermore, the South Carolina Supreme Court has indicated 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.

A. The machines and devices at issue in this action violate § 12-21-2710.

I find that Magistrate Judge White correctly determined that all of the machines devices at issue in this action violate § 12-21-2710 and are thus illegal to possess in South Carolina. Section 12-21-2710 prohibits several different categories of gaming machines and all devices pertaining to games of chance in South Carolina. The full text of 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 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.
>
> Any 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.

A machine need only meet one prohibited category in order to violate this statute, and a machine can simultaneously be classified as illegal in several different ways. Even if the machines and devices at issue may contain the component parts of computers, I find that this has no impact on the machines' ultimate illegality under § 12-21-2710. The South Carolina Supreme Court has previously ruled that even though a machine may be capable of being operated in a lawful manner or, in fact might be completely inoperable, that the legislature clearly intended to outlaw even the mere possession of certain types of machines themselves, "regardless of their intended use or operation." State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). As such, because these machines are devices pertaining to games of chance, slot machines, and gambling machines; the machines are illegal to possess or operate under South Carolina law.

1. Devices Pertaining to Games of Chance

I find that the machines and devices at issue in this action are prohibited under § 12-21-2710 because I find these machines and devices are devices pertaining to games of chance of whatever name or kind. There is no dispute that the games available for play on these machines are poker, keno, and spinning "reel" slot machine games, which are all unquestionably games of chance. In addition, there is no dispute that players can win money, including the advertised jackpots of over $12,000.00 through these games of chance. As such, I find that these machines

and devices are clearly devices pertaining to games of chance of whatever name or kind that are specifically prohibited by § 12-21-2710.

I find the Appellants' arguments that the language "other devices pertaining to games of chance of whatever name or kind" set forth in § 12-21-2710 is not a prohibition of devices and that this statute does not apply to "computers" are each without merit and I find that the trial court correctly rejected each argument. I find that the plain language of § 12-21-2710 and decades of South Carolina jurisprudence indicate to the contrary. As far back as 1939, the South Carolina Supreme Court held, "[i]t is clear that the law condemns any devices pertaining to games of chance, of whatever name or kind, except certain types of machines therein mentioned 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." Alexander v. Martin, 192 S.C. 176, 6 S.E.2d 20, 23 (1939) (emphasis added). In 1967, the South Carolina Supreme Court again acknowledged,"[i]t is clear that the Legislature, by the enactment of the statutes here involved [Sections 5—621 and 5—622 of the Code, the predecessor statutes to Sections 12-21-2710 and 12-21-2712], did condemn any devices pertaining to games of chance." Squires v. South Carolina Law Enforcement Division, 249 S.C. 609, 612-13, 155 S.E.2d 859, 861 (1967). This same language from Squires was quoted by the South Carolina Supreme Court in the year 2000 in the case of State v. 192 Coin-Operated Video Game Machines, which is a decision that ultimately upheld the Squires decision. 338 S.C. 176, 188, 525 S.E.2d 872, 878-79 (2000).

In addition, this specific phrase of § 12-21-2710 was also directly at issue in Martin v. Lloyd, a case decided by the United States Court of Appeals for the Fourth Circuit on November 21, 2012. 700 F.3d 132 (4th Cir. 2012). The case arose as a facial challenge to the constitutionality of § 12-21-2710. In that case, Appellant's counsel conceded "that the statute,

taken as a whole, is not impermissibly vague in all its applications. For instance, they do not dispute that poker, blackjack, keno, lotto, bingo and craps are clearly outlawed. However, they argue that one phrase in the statute – the blanket prohibition against possessing any 'other device pertaining to games of chance of whatever name or kind,' is impermissibley vague in all its applications." *Id.* at 136 (4th Cir. 2012). The Fourth Circuit Court of Appeals specifically called this phrase "the disputed catchall provision" on several occasions, which is a clear indication that this phrase stands independent of the other "multiple categories of games that § [12-21-] 2710 covers." *Id.* As such, I find that South Carolina state and federal jurisprudence clearly indicates that § 12-21-2710 prohibits multiple categories of machines and devices, including all "devices pertaining to games of chance of whatever name or kind." As it is undisputed that all of the games available for play on these devices at issue in this action are games of chance, I find these machines and devices are devices pertaining to games of chance of whatever name or kind, which are specifically prohibited by § 12-21-2710. Accordingly, I hereby uphold the trial court in this regard.

B. The Appellants' argument that machine must a physical slot to be illegal is without merit.

I also find that the Appellants' argument that a machine must have a physical slot on each individual machine to be prohibited by § 12-21-2710 is without merit. This argument disregards the plain language of the statute and seeks to add language into the statute that simply does not appear. I decline to do such as I find that this would be inapposite to South Carolina law. *See* Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E. 2d 805, 817 (1970) (holding that where the language of the statute is clear and explicit, a court cannot rewrite the statute and inject matters into it that are not in the legislature's language.) The South Carolina Supreme Court has also held that, "[i]f a statute's language is plain and unambiguous, and

conveys a clear and definite meaning, there is no occasion for employing rules of statutory construction 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).

South Carolina courts have consistently held that § 12-21-2710 is clear and unambiguous. "The plain language of the statute [§ 12-21-2710] makes clear the legislature's intent to outlaw mere possession of such machines." 192 Coin-Operated Video Game Machines, 338 S.C. at 188, 525 S.E.2d at 879; *see also* Ward v. West Oil, 387 S.C. 268, 273-75, 692 S.E.2d 516, 519-20 (2010) (quoting the above-quoted language in Miller concerning the rule of statutory interpretation and applying that rule to § 12-21-2710); State v. DeAngelis, 257 S.C. 44, 257 S.E.2d 44 (1971) (interpreting the language in the predecessor to § 12-21-2710 against a vagueness challenge and holding that "an analysis of [the statute's] wording convinces us that a man of reasonable intelligence is given fair notice of the machines proscribed."); Martin v. Lloyd, No. 2:06-cv-400-DCN, 2011 WL 1261543 (D.S.C. Mar. 31, 2011) (rejecting the argument that § 12-21-2710 is unconstitutionally vague in federal court and finding that the statute had a plainly legitimate sweep.); Martin v. Lloyd, 700 F.3d 132 (4th Cir. 2012) (affirming the District Court). As such, any attempt to rewrite § 12-21-2710 to inject requirements into the statute that simply do not appear must fail.

While it is indisputable that many categories of prohibited machines in § 12-21-2710 contain the word "slot," many, including the specific prohibition of all "devices pertaining to games of chance of whatever name or kind", do not. Had the Legislature wished, it could have written § 12-21-2710 to prohibit "all devices pertaining to games of chance operated by a slot in which is deposited a coin or thing of value." The Legislature did not so draft the law, and the absence of any mention of the word "slot" from several prohibited categories of machines is

controlling. *See, e.g.*, Rorrer v. P.J. Club, Inc., 347 S.C. 560, 569, 556 S.E.2d 726, 731 ("The legislature is presumed to have fully understood the meaning of the words it used in a statute."). Further, a machine can be "operated by a slot" without physically containing a slot. These machines are not legal simply because the designers of this system have attempted to use technology to artificially separate payment from the play. *See e.g.* Cleveland v. Thorne, 2013-Ohio-1029, 987 N.E.2d 731, 744 (Ohio Ct. App. 2013) (holding that the "the justice system is not some lumbering oaf who must ignore the patently obvious gambling scheme apparent here simply because of a contrived separation between consideration and the scheme of chance.")

In addition, the South Carolina Supreme Court has found devices without a slot to be illegal under § 12-21-2710. In Sun Light Prepaid Phone Co., Inc. v. State, 360 S.C. 49, 600 S.E.2d 61 (2004), the machines at issue dispensed phone cards. Attached to each phone card was a game piece with an array of nine symbols in an 8-liner or tic-tac-toe format. If the symbols lined up in a particular order, the customer won a prize. Sun Light, 360 S.C. at 51, 600 S.E.2d at 62. The Supreme Court found both the dispensers and the phone cards themselves to be illegal under § 12-21-2710. The phone cards had no slot anywhere to be found. While the machine which dispensed the phone cards did contain a slot, this was not of any importance in finding the phone cards themselves separately illegal. "Although the phone cards are an integral component of the dispensers, the phone cards would be illegal if they were issued over the counter as opposed to being placed in the dispensers." Sun Light, 360 S.C. at 54, 600 S.E.2d at 64. Thus, it was the game of chance on the phone cards that made them illegal, regardless if they came from a machine or over the counter. If § 12-21-2710 required a slot, the Supreme Court could not have found the phone cards illegal since they had no slot.

Moreover, United States Court of Appeals for the Fourth Circuit decision in Martin v. Lloyd is also instructive on this issue. In upholding the constitutionality of § 12-21-2710, the Fourth Circuit noted:

> [t]he Supreme Court of South Carolina has provided significant clarity to the disputed phrase by deciding several cases based, at least in part, on whether a device is a game of chance under § 2710 and its predecessor statute. *See* State v. DeAngelis, 183 S.E.2d 906, 908 (S.C. 1971) (affirming a jury's determination that a game requiring "no skill" was illegal under a predecessor statute); *see also* Ward v. West Oil Co., 692 S.E.2d 516, 522 (S.C. 2010) (holding that pull-tab game machines were illegal games of chance); Sun Light Prepaid Phonecard Co. v. State of South Carolina, 600 S.E.2d 61, 64 (S.C. 2004) (holding that machine dispensing phone cards with pull-tab attached was an illegal game of chance). While these cases may not draw definitive parameters around the catchall phrase that Appellants contest, they do demonstrate that use of the term "games of chance" has a "plainly legitimate sweep" and more than a conceivable application, which is all that is required to survive a facial challenge to a criminal statute where constitutional rights are not implicated. *See* Comstock, 627 F.3d at 518.

Martin v. Lloyd, 700 F.3d at 136-37. The Fourth Circuit's decision centers entirely on the analysis of the language "devices pertaining to games of chance" and noted that the analysis is actually whether or not a seized machine is a device pertaining to games of chance. Notably absent from this analysis is the question as to whether a device has a "slot" or not. *Id.* If the requisite analysis under § 12-21-2710 was simply a determination of whether or not a device has a slot, there could be no vagueness challenge as there would be no room for interpretation. However, as the Fourth Circuit correctly noted, the inquiry into whether a machine or device is prohibited by § 12-21-2710 begins and ends with a determination as to whether the machine fits into a prohibited category, including, whether a particular machine or device "pertains to games of chance." *Id.* Thus, any argument that a machine or device must contain a "slot" to be illegal under § 12-21-2710 must fail and I hereby uphold the trial court's order in this regard.

C. The Appellants' argument that these devices do not "look" like illegal machines is without merit.

I find that the Appellants' argument that these machines and devices at issue in this action do not look like one-arm slot machines of old is without merit. I find that this argument was correctly rejected by the trial court as South Carolina law does not care how the machine looks. More than ten years ago, the Supreme Court faced a similar question in the case of State v. 192 Coin-Operated Video Game Machines. The court noted,

> [t]he substance of appellant's argument is that in the 1960s, when the predecessor statute to § 12-21-2710 was enacted, slot machines were readily identifiable. Today, with the advent of the computer, a video game machine is simply a box containing a computer which can be configured to play a variety of games, from poker to pac-man; therefore, the machine itself should not be considered illegal.

338 S.C. at 188, 525 S.E.2d at 878. The Supreme Court rejected this argument, finding that "[a]lthough slot machines have changed since the 1960s, the substance of the statute has not. The relevant portions of the current version outlaw the same conduct as its predecessor. *See* [Squires v. South Carolina Law Enforcement Division, 249 S.C. 609, 611, 155 S.E.2d 859, 860 (1967)] ('Section 5–621 of the Code makes it unlawful for any person to keep on his premises any slot machine or other device pertaining to games of chance of whatever name and kind.'). *Id.* The Supreme Court also noted that the plain language of § 12-21-2710 made "clear the legislature's intent to outlaw mere possession of such machines." *Id.* As such, South Carolina law is clear, how a machine or device "looks", *i.e.* whether the hardware and software are contained in a large black cabinet with a lever or a small black computer case with a mouse, is irrelevant. It is the operation of the machines, the illegal games of chance they pertain to, and the fact that people are gambling on these machines that require their destruction.

Other states have reached this same conclusion. *See* Barber v. Jefferson County Racing Ass'n, Inc., 960 So.2d 599 (Ala. 2006); Moore v. Mississippi Gaming Commission, 64 So.3d

537 (Miss. 2011); U.S. v. Davis, 690 F.3d 330 (5th Cir. 2012). On December 14, 2012, the North Carolina Supreme Court noted,

> [N]o sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter of the definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited. It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

Hest Technologies, Inc. v. State ex rel. Perdue, 169A11-2, 2012 WL 6218202 (N.C. Dec. 14, 2012) *citing* State v. Lipkin, 169 N.C. 265, 271, 84 S.E. 340, 343 (1915). When stripping the Appellants' operation of all its thin and false apparel, it is clear that the magistrate's decision is supported by the facts and the law and should stand.

D. Whether a winner is "predetermined" does not matter under § 12-21-2710.

In addition, I find that the Appellants' "predetermination" argument is without merit. The timing of when the prizes are assigned value is irrelevant to the determination of whether the machines are illegal under § 12-21-2710. It is undisputed in this matter that whether or not a particular entry is a "winner" and the person wins cash on these games is entirely up to chance. *See e.g* U.S. v. Davis, 690 F.3d 330 (5th Cir. 2012) (The sweepstakes was predetermined and a player could learn whether he or she had won either by asking the clerk, using an instant reveal, or by playing a variety of casino-like games. Regardless, the defendants were each convicted of illegal gambling, conspiracy to commit illegal gambling, and money laundering."); Cleveland v. Thorne, 987 N.E.2d at 743 (Ohio Ct. App. 2013) ("At trial, it was essentially conceded that these

businesses operated chance-based sweepstakes that offered the chance for monetary gain. It was also conceded that patrons participated in the hopes of gain."); Barber v. Jefferson County Racing Ass'n, Inc., 960 So.2d 599 (Ala. 2006); Moore v. Mississippi Gaming Commission, 64 So.3d 537 (Miss. App. 2011).

As such, I find that the chronology of when the chance occurs simply does not matter. *See* Ward v. W. Oil Co., Inc., 387 S.C. 268, 692 S.E.2d 516 (2010) (the placement of pre-printed cards, some of which were designated as "winners" of various sums of money, into the dispenser creates the element of chance). Also, the phone cards found illegal by the South Carolina Supreme Court in Sun Light were "predetermined." Each was preprinted and inserted into the dispenser. Thus, each card was a predetermined winner or loser. However, the Supreme Court still found that these cards contained the element of chance and were illegal under § 12-21-2710. Sun Light Prepaid Phone Co., Inc. v. State, 360 S.C. 49, 600 S.E.2d 61 (2004). Similarly, in Ward v. West Oil, the South Carolina Supreme Court noted that the dispensers contained "pre-rated" game pieces wherein some were "designated as 'winners of various sums of money'" and that therefore the payout amount and profits were "predetermined." 387 S.C. at 278, 692 at 521. Yet, the Supreme Court ultimately determined that "function" of these predetermined game cards "was to provide a game of chance, in the form of a cash prize, to players who deposited a dollar in the card dispenser." *Id.* In addition, scratch-off lottery cards are predetermined winners or losers, and yet these cards of no less games of chance or gambling. As such, I find that any argument that the machines and devices at issue in this matter are legal because the outcome is pre-determined is without merit. The jurisprudence, both statewide and nationally, is abundantly clear that simply predetermining results does not remove the element of chance and does not render a device any less a device pertaining to games of chance.

E. The Devices at Issue are Contraband *Per Se*.

I also reject the Appellants' argument that the devices at issue in this action are derivative contraband. The South Carolina Supreme Court has also ruled, on several occasions, that video gaming machines are contraband *per se*. This issue was specifically addressed in State v. 192 Coin-Operated Video Game Machines, in which the Supreme Court acknowledged, "[t]he State asserts the machines are contraband *per se,* such that their possession, without more, constitutes a violation. Appellant asserts that coin-operated video games are not inherently illegal, so the machines are therefore only derivative contraband. We conclude the machines are contraband *per se.*" 338 S.C. 176, 189, 525 S.E.2d 872, 879 (2000). The Court went on further to articulate that "[t]hese illegal gambling machines cannot be considered derivative contraband because they are themselves the subject of the statute's prohibition. In light of the statute's clear proscription of mere possession of the machines, the machines are clearly contraband *per se*." *Id.* (internal citations omitted). Likewise, I find that the devices at issue in this action are themselves the subject of § 12-21-2710's prohibition, and thus, contraband *per se*.

The South Carolina Supreme Court addressed this issue again in 2005 in the Mims Amusement case. Mims Amusement Co. v. S. Carolina Law Enforcement Div., 366 S.C. 141, 621 S.E.2d 344 (2005). In Mims, the Court articulated that the "controlling question we must answer, then, is whether a video gaming machine—at the moment of seizure—is an item of contraband *per se* or derivative contraband. Is the unexamined machine more like a roulette wheel or an automobile? If it is the former, a claimant has no right to a jury trial; if it is the latter, a claimant has a right to a jury trial." *Id.* at 153. The Court held as follows: "[w]e conclude, based on our precedent addressing an owner's right to adequate due process in the forfeiture of a machine and the statutory regulation of the video gaming business, that a video gaming machine

constitutes contraband *per se* at the moment it is seized by authorities." *Id.* The Court went further to state that,

> [i]t is apparent, however, 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").

Id. at 154. Ultimately, the Court found, "[a]ccordingly, we conclude that a seized video gaming machine constitutes contraband *per se* in the nature of a roulette wheel, and is not in the nature of derivative contraband such as a vehicle or parcel of real property normally used for lawful purposes." *Id.* As such, I find that this issue has been conclusively decided by the South Carolina Supreme Court and the trial court's order should stand.

2. THE TRIAL COURT CORRECTLY RULED THAT PROBABLE CAUSE IS NOT AN ISSUE FOR ADJUDICATION AT A POST-SEIZURE HEARING.

I also find that the trial court correctly rejected the Appellants' attempts to inquire into the probable cause behind the search and seizure in this matter. The South Carolina Supreme Court has clearly ruled that a post-seizure hearing is a machine owner's opportunity to come forward to prove why the seized property is not illegal to possess and why the property should not be forfeit and destroyed accordingly. *See* Union County Sheriff's Office v. Henderson, 395 S.C. 516, 719 S.E.2d 665, 666 (2011); State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). As such, the trial court was correct that the circumstances surrounding the seizure are simply not relevant to this determination as the only issue for adjudication at a post-seizure hearing is the legality the seized items.

In State v. 192 Coin-Operated Video Game Machines, the South Carolina Supreme Court went further and noted that even if a search and/or seizure of gaming machines or devices was ultimately determined to be illegal, there is no remedy for such at a post-seizure hearing. The Court noted that the usual remedy for an unlawful search is suppression of evidence in a criminal trial; however, a post-seizure hearing is not a criminal trial and there is no jury from which to suppress the evidence. The Court went on to note that, "because the machines are contraband *per se*, the State certainly cannot return them to appellant, which is presumably the remedy sought." *Id.* at 882-83 *citing* Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948), *overruled on other grounds,* 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950) ("[S]ince this property was contraband, they have no right to have it returned to them."). The South Carolina Supreme Court also cited to an Oklahoma case, State v. Four Bell Fruit Gum Slot Machines, which held specifically that machines seized without a warrant were contraband and must be destroyed regardless of the legality of the seizure. *Id. citing* State v. Four Bell Fruit Gum Slot Machines, 196 Okla. 44, 162 P.2d 539 (1945). Accordingly, as the South Carolina Supreme Court has conclusively settled this issue and as the trial court's decision was in accordance with the South Carolina Supreme Court's established jurisprudence, this order should stand in its entirety.

Furthermore, to require the Respondent to prove probable cause in this matter would improperly shift the burden of proof in clear contravention of the procedure set forth in S.C. Code Ann. § 12-21-2712. In Union County Sheriff's Office v. Henderson, the South Carolina Supreme Court rejected a similar argument indicating that the burden of proof in civil post-seizure hearings "rests solely on the owner of the seized machines to show why the machines should not be forfeited and destroyed." 395 S.C. 516, 719 S.E.2d 665 (2011). Accordingly, as

the only relevant inquiry in this matter whether the machines are legal to possess, probable cause was not properly an issue at this post-seizure hearing and any evidence and testimony solely challenging the seizure was properly excluded by the trial court as irrelevant.

3. THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT PROTECT THE APPELLANTS' CONDUCT.

In find and conclude that the First Amendment to the United States Constitution does not provide the Appellants' any relief in this matter. The South Carolina Supreme Court has long acknowledged that "[g]aming devices in general have long been recognized as legitimately within the police power of the State to control or take by forfeiture." Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 303, 534 S.E.2d 270, 273 (2000) *citing* Lawton v. Steele, 152 U.S. 133, 136, 14 S.Ct. 499, 38 L.Ed. 385 (1894). The United States Court of Appeals for the Fourth Circuit has also noted the long history of the enforcement of § 12-21-2710 acknowledging the "measured approach to enforcement for the eighty-one years § [12-21] 2710 and its predecessor statutes have been in effect." Martin v. Lloyd, 700 F.3d 132, 137 (4th Cir. 2012). Section 12-21-2710 was codified as an exercise of South Carolina's police power as the clear language of this statute regulates conduct, *i.e.* the possession of illegal machines and/or devices, not speech. *See* Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005) ("[w]hen a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."); Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E. 2d 805, 817 (1970) (holding that where the language of the statute is clear and explicit, a court cannot rewrite the statute and inject matters into it that are not in the legislature's language.). South Carolina courts have long acknowledged that § 12-21-2710 prohibits the possession of certain gaming machines and devices, and prohibits such possession regardless of the intended use or capable operation of the machines or devices.

See State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). As such, there is simply no protected speech at issue in this action and the Appellants' arguments are without merit.

Courts across the country have found similar regulations regarding gaming devices to be outside the ambit of the First Amendment. Most recently, on December 14, 2012, the North Carolina Supreme Court held that North Carolina's law, N.C.G.S. § 14–306.4, "which bans the operation of electronic machines that conduct sweepstakes through the use of an 'entertaining display'" regulated conduct, not speech. Hest Technologies, Inc. v. State ex rel. Perdue, 169A11-2, 2012 WL 6218202 (N.C. Dec. 14, 2012). In so finding, the Court held,

> [w]e are convinced that N.C.G.S. § 14–306.4 primarily regulates noncommunicative conduct rather than protected speech. This conclusion turns directly on how we describe what N.C.G.S. § 14–306.4 does. The statute here makes it "unlawful for any person to operate, or place into operation, an electronic machine or device" to "[c]onduct a sweepstakes through the use of an entertaining display." N.C.G.S. § 14–306.4(b). Operating or placing into operation an electronic machine is clearly conduct, not speech. We conclude that the act of running a sweepstakes is conduct rather than speech, despite the fact that sweepstakes participants must be informed whether they have won or lost.

Id.

In addition, in rejecting the argument that two recent United States Supreme Court decisions, Brown v. Entm't Merchs. Ass'n, __U.S.__, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) and Sorrell v. IMS Health, Inc., __U.S.__, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011), dictate First Amendment protection for these types of operations, the North Carolina Supreme Court indicated that "[t]elling a sweepstakes participant that he or she has won or lost is no more protected speech than calling 'Bingo!' or '21.'" Hest Technologies, Inc. v. State ex rel. Perdue, 169A11-2, 2012 WL 6218202 (N.C. Dec. 14, 2012). The North Carolina Court also quoted the

Seventh Circuit Court of Appeals in There to Care, Inc. v. Comm'r of Ind. Dep't of Revenue, 19 F.3d 1165, 1167 (7th Cir.1994) analyzing,

> [i]s bingo speech? People buy cards in the hope of winning back more than they spend. A voice at the front of the hall drones "B–2" and "G–49"; after a while someone at the back of the hall shouts "BINGO!" and gets a prize. These words do not convey ideas; any other combination of letters and numbers would serve the purpose equally well. They employ vocal cords but are no more 'expression' than are such statements as '21' in a game of blackjack or 'three peaches!' by someone who has just pulled the handle of a one-armed bandit.

Ultimately, the North Carolina Supreme Court concluded, the

> Plaintiffs have attempted to "skillfully disguise[ ]" conduct with a façade of speech to gain First Amendment protection for their conduct. [*State v.*] *Lipkin,* 169 N.C. [323,] 329, 169 N.C. [265,] 271, 84 S.E. [340,] 343 [(1915)]. We have "strip [ped] the transaction of all its thin and false apparel and consider[ed] it in its very nakedness," *id.,* and have found plaintiffs' arguments unavailing. We conclude that N .C.G.S. § 14–306.4 regulates conduct, with only incidental burdens on associated speech, and is therefore constitutional.

Hest Technologies, Inc. v. State ex rel. Perdue, 169A11-2, 2012 WL 6218202 (N.C. Dec. 14, 2012).

In Telesweeps of Butler Valley, Inc. v Kelly, the United States District Court for the Middle District of Pennsylvania acknowledged that

> [d]espite Plaintiffs contention that simulated gambling programs are like video games which are entitled to First Amendment speech protection, the sweepstakes games themselves and the words used within the games do not constitute protected speech. Unlike in *Brown* [v. *Entm't Merchs. Ass'n,* __U.S.__, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011)], the simulated gambling programs at issue here do not contain plots, storylines, character development, or any elements that would communicate ideas. Rather the words associated with the display merely state whether a player has won a prize by displaying a depiction of, for instance, three cherries.

3:12-CV-1374, 2012 WL 4839010 (M.D. Pa. Oct. 10, 2012) *citing* There to Care, Inc. v. Comm'r of Ind. Dep't of Revenue, 19 F.3d 1165, 1167 (7th Cir.1994)(quoted above); Allied Veterans of World Inc., Affiliate 67 v. Seminole County, 783 F.Supp.2d 1197, 1202 (M.D.Fla.2011) (finding

that gambling is not protected speech "because ... the interaction and communication involved in these types of simplistic games is singularly in furtherance of the game; it is totally divorced from a purpose of expressing ideas, impressions, feelings, or information unrelated to the game itself."); Serpico v. Village of Elmwood Park, 344 Ill.App.3d 203, 279 Ill.Dec. 158, 799 N.E.2d 961, 968 (III.App.Ct.2003) (affirming district court's finding that an ordinance banning simulated video gaming devices did not implicate First Amendment protections, and the ordinance was rationally related to a legitimate governmental interest in regulating illegal gambling) (internal citations and quotation marks omitted). The Court in Telesweeps further note that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Telesweeps of Butler Valley, Inc. v Kelly, 3:12-CV-1374, 2012 WL 4839010 (M.D. Pa. Oct. 10, 2012) *quoting* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978) (internal citations omitted). As such, In find that the Appellant's arguments seeking protection under the First Amendment to the United States Constitution are without merit and were properly rejected by the trial court.

4. THE TRIAL COURT ALSO CORRECTLY REJECTED THE APPELLANTS' "AS APPLIED" VAGUENESS CHALLENGE.

I find that the trial court correctly rejected the Appellants' "as applied" due process challenge in this matter. I note that this issue was raised for the first time at the reconsideration hearing in this matter, and is not properly preserved for appellate review. *See* Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct.App.1995) ("If an issue could have been initially presented to the trial court, a party cannot raise that issue for the first time in a post-trial motion.") (citing generally C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct.App.1990)).

Nevertheless, I would have upheld the trial court's decision on this issue. South Carolina law is clear, "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." Last v. MSI Constr. Co., 305 S.C. 349, 352, 409 S.E.2d 334, 336 (1991) (citations omitted). Further, the South Carolina Supreme Court has acknowledges that "[t]his Court is directed by the constitution, and our precedent, to make every effort to find acts of the General Assembly constitutional." Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 653, 528 S.E.2d 647, 657 (1999).

An "as-applied challenge requires the moving party to show that the [contested] statute cannot be constitutionally applied to the defendant under the particular facts of the case." Town of Mount Pleasant v. Chimento, 401 S.C. 522, 543, 737 S.E.2d 830, 843 (2012), *reh'g denied* (Jan. 10, 2013)(Hearn dissenting) *citing* Chapman v. United States, 500 U.S. 453, 467–468, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). I find that the Appellant failed to show that either § 12-21-2710 or § 12-21-2712 was not constitutionally applied in this case.

Moreover, in State v. DeAngelis, the South Carolina Supreme Court specifically indicated that "[a]n analysis of [the] wording [of the predecessor statute to § 12-21-2710, which also prohibited all devices pertaining to games of chance] convinces us that a man of reasonable intelligence is given fair notice of the machines proscribed; that the statute cannot be used in a capricious or discriminatory manner; and that the personal liberties guaranteed by the Bill of Rights are satisfied thereunder." 257 S.C. 44, 48, 183 S.E.2d 906, 908 (1971). Furthermore, I note South Carolina Courts have held that § 12-21-2710 is clear and unambiguous for decades. "The plain language of the statute makes clear the legislature's intent to outlaw mere possession of such machines." 192 Coin-Operated Video Game Machines, 338 S.C. at 188, 525 S.E.2d at 879; Ward v. West Oil, 387 S.C. 268, 273-75, 692 S.E.2d 516, 519-20 (2010); 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); *see also* Martin v. Lloyd, 700 F.3d 132 (4th Cir. 2012) ("South Carolina has taken a measured approach to enforcement for the eighty-one years § 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.").

As such, based on the applicable South Carolina jurisprudence and the evidence presented in this matter, I find that both § 12-21-2710 and § 12-21-2712 are constitutional, and that each of these statutes were applied constitutionally in this matter. Therefore, I find that that there was no due process violation in how these constitutional statutes were applied to the Appellants in this matter and uphold and affirm the trial court's order in this regard.

CONCLUSION

THEREFORE, based on the foregoing and in accordance with the laws of the State of South Carolina, IT IS HEREBY ORDERED, DECREED and ADJUDGED that appeal in this matter is hereby DENIED, and the trial court's orders is hereby AFFIRMED and UPHELD in its entirety.

AND IT IS SO ORDERED.

J. Cordell Maddox, Jr.
Presiding Judge
Court of Common Pleas
10th Judicial Circuit

Anderson, South Carolina
11/5, 2013

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