

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Richland County Sheriff's Department,

Appellant,

vs.

Nizar Awde,

Respondent.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 5

ARGUMENT

I. The circuit court erred in affirming the magistrate’s determination that the video machines were not illegal vending machines. 6

II. The circuit court erred as a matter of law in finding that section 12-21-2710 requires a showing that a machine with a free play feature must be used for gambling to be prohibited 9

III. The circuit court erred in affirming the magistrate court’s findings that the machines were games of skill... 13

A. The circuit court erred by failing to apply the right standard of review on appeal from magistrate’s court and in misapplying Allendale County Sheriff’s Office v. Two Chess Challenge II; therefore, this Court should conduct a de novo review and find that the machines play illegal games of chance. 13

B. The dominant factor test. 16

C. Where the expert’s “skill” was attained through video tape analysis unavailable to the consumer, the Circuit Court erred in affirming the magistrate’s finding that the machines played a game of skill.. . . . 18

D. The circuit court erred in finding that the

	machines were games of skill where the outcome in the fifth field of play was, as admitted by Respondent’s expert, determined by chance, as was play in the vault..	21
E.	The circuit court erred in affirming the magistrate’s finding that the machines did not play a game of chance where the machines have a stop-all button which stops play in all fields and allows a player to win without any exercise of any skill, as admitted by Respondent’s expert.	22
IV.	The Chess Challenge II machines are machines licensed and used for gambling and therefore violate section 12-21-2710	25
V.	The circuit court erred in affirming the magistrate’s findings concerning whether the Sheriff had probable cause to seize the machines where assuming seizure of machines without probable cause, return of the machines, as contraband per se, is unavailable as a remedy	27
CONCLUSION		28

TABLE OF AUTHORITIES

Cases:

<u>Alexander v. Hunnicutt</u> , 196 S.C. 364, 13 S.E.2d 630 (1941)	21
<u>Alexander v. Martin</u> , 192 S.C. 176, 6 S.E.2d 20 (1939)	24, 25-26
<u>Allendale County Sheriff's Office v. Two Chess Challenge II</u> , 361 S.C. 581, 606 S.E.2d 471 (2004)	13, 14, 21
<u>Bowers v. Thomas</u> , 373 S.C. 240, 644 S.E.2d 751 (Ct. App. 2007)	5, 13
<u>Collins Coin Music Co. v. North Carolina Alcoholic Beverage Control Comm'n</u> , 451 S.E.2d 306 (N.C. Ct. App. 1994)	17
<u>Harvie v. Heise</u> , 150 S.C. 277, 148 S.E. 66 (1929)	6, 7
<u>Johnson v. Collins</u> , 333 S.C. 96, 508 S.E.2d 575 (1998)	16, 17, 19, 24, 25
<u>Mims Amusement Company v. South Carolina Law Enforcement Division</u> , 366 S.C. 141, 621 S.E.2d 344 (2005)	9, 10, 16
<u>Moore v. Greenville Restaurants, Inc.</u> , 287 S.C. 295, 337 S.E.2d 892 (1985)	7
<u>Morrow v. State</u> , 511 P.2d 127 (Alaska 1973)	20, 22, 23
<u>Parks v. Characters Night Club</u> , 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2004)	15
<u>South Carolina Law Enforcement Division v. One Speedmaster</u> , 397 S.C. 94, 723 S.E.2d 809 (Ct. App. 2011)	10, 19
<u>Squires v. SLED</u> , 249 S.C. 609, 155 S.E.2d 859 (1967)	24, 25
<u>State v. 192 Coin-Operated Video Game Machines</u> , 338 S.C. 176, 525 S.E.2d 872 (2000).	24, 25, 27
<u>State v. Appley</u> , 207 S.C. 284, 35 S.E.2d 835 (1945)	10
<u>State v. Gaines</u> , 380 S.C. 23, 667 S.E.2d 728 (2008)	9
<u>State v. Hudson</u> , 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999)	9

<u>State ex Inf. McKittrick v. Globe-Democrat Publishing Co.,</u> 110 S.W.2d 705 (Mo. 1937)	19-20
<u>State v. Ted’s Game Enterprises, 893 So.2d 355 (Ala. Civ. App. 2002)</u>	17, 19, 23
<u>Union County Sheriff’s Office v. Henderson, 395 S.C. 516, 719 S.E.2d 665 (2011)</u>	5
<u>United States v. Dobkin, 423 S.E.2d 612 (W.V. 1992)</u>	12
<u>Ward v. West Oil Co., 387 S.C. 268, 692 S.E.2d 516 (2010)</u>	25
 <u>Other Authorities:</u>	
S.C. Code Ann. § 12-21-2710	6, 10, 12, 16, 25, 27
S.C. Code Ann. § 18-7-170	15
38 C.J.S. <i>Gaming</i> § 10 (Supp. 2010)	25
Attorney General Opinion letter dated April 29, 2005 to Major Mark A. Keel. 2005 WL 1024601 (S.C. A.G.)	11

STATEMENT OF ISSUES ON APPEAL

I.

The circuit court erred in affirming the magistrate's determination that the video machines were not illegal vending machines.

II.

The circuit court erred as a matter of law in finding that section 12-21-2710 requires a showing that a machine with a free play feature must be used for gambling to be prohibited.

III.

The circuit court erred in affirming the magistrate court's findings that the machines were games of skill.

IV.

The Chess Challenge II machines are machines licensed and used for gambling and therefore violate section 12-21-2710.

V.

The circuit court erred in affirming the magistrate's findings concerning whether the Sheriff had probable cause to seize the machines where assuming seizure of machines without probable cause, return of the machines, as contraband per se, is unavailable as a remedy.

STATEMENT OF THE CASE

Two video gaming machines referred to Chess Challenge II machines were seized from Respondent's business in December 2008 and the Honorable Magistrate Michael Davis issued an order of destruction. A post-seizure hearing was held on February 6, 2009. On March 3, 2009, Magistrate Michael Davis issued an order declaring as follows:

(a) The two Chess Challenge II games are games of skill that are lawful to possess, own and operate under South Carolina law as redemption machines distributing prizes, including gift certificates, and merchandise;

(b) The seizure of these Chess Challenge II machines was unlawful and without probable cause.

Order dated March 3, 2009.

Appellant moved to alter or amend the judgment pursuant to Rule 59(e), SCRCF. A hearing on Appellant's motion was held before Magistrate Davis on May 22, 2009. On June 19, 2009, Magistrate Davis issued an order denying the motion to alter or amend.

Appellant filed an appeal to the Richland County Court of Common Pleas. Oral argument for the appeal was heard on September 1, 2011 before the Honorable Judge DeAndrea G. Benjamin. Judge Benjamin issued an order affirming the magistrate's rulings by order dated October 13, 2011. Appellant filed a motion to alter amend pursuant to Rule 56(e), SCRCF. The motion was denied without a hearing by Form 4 motion issued on November 22, 2011.

STATEMENT OF FACTS

Two video gaming machines referred to as Chess Challenge II machines were seized in Richland County from Respondent's business by Investigator Robbie Crane after consulting via phone with SLED Agent Pat Jackson, and brought before Magistrate Davis, who examined them and found them illegal under S.C. Code § 12-21-2710 and issued an order of destruction. Subsequently, Respondent requested a post-seizure hearing, which was heard before Magistrate Davis. At the hearing, several witnesses testified, including Robert Snyder as an expert for Respondents and SLED Agent Brad Godfrey as an expert presented by Appellant.

Snyder testified as follows concerning the play of the machines:

. . . the thrust of the game, there's four windows on top, little circles that are – you could call them windows or reels. And the object is to stop those particular icons as they move and try to get three or more of the same type of icons. If you achieve three or four, you are returned a number of points.

As you accumulate points, you can ultimately hit the ticket button, and it'll dispense a ticket, which is – I'm not sure what the tickets are good for in this state, but it does give you a Chuck E. Cheese game type of ticket.

Mag. Tr. p. 19, line 19 -p. 20, line 4. The icons are chess-themed characters, such as kings, queens, castles, and the like. Tr. p. 20. The icons rotate in a fixed 255 character pattern, but play may begin anywhere in the 255 icon sequence. Mag. Tr. p. 21, p. 54. The icons rotate at a rate of 3.8 icons a second. Mag. Tr. p. 23. Play ends automatically at 30 seconds, which means a player will see no more than 114 icons in a single play. Mag. Tr. p. 53.

While a player can stop play in each of these four windows individually, the player can also stop play by hitting what Snyder referred to as a "stop-all" button. Snyder admitted

that a player may win using this button, and playing in this manner does not utilize any skill. Mag. Tr. pp. 68-69.

At the bottom of the screen is a grid of twenty-eight characters in an array of seven columns and four rows. The object of play in this grid, or fifth field of play, is to stop on an icon in the 4x7 grid that matches with icons in the first four fields. While a player may be able to control which column he selects, the selection of a row is based purely on chance as admitted by Snyder. So a player has, at best, a one in four chance of attaining the desired outcome in this field. Mag. Tr. pp. 36-37, pp. 58-61. Snyder testified that a player would get a bonus of a 100 points for attaining a fifth king. Mag. Tr. p. 61.

There is an additional field of play in what is referred to as the vault. A player needs to match three warriors to play in the vault, and a player would randomly win credits in the vault. Respondent's expert was largely unfamiliar with this portion of the game. Mag. Tr. pp. 61-62; pp. 80-81.

During the hearing, multiple games were played by both experts. The machine played celebration music. Mag. Tr. p. 153 (machine chimes).

STANDARD OF REVIEW

At a post-seizure hearing, the burden is on the owner of the *res* to show why the seized property should not be forfeited and destroyed. Union County Sheriff's Office 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.” Id. However, a *de novo* review is proper to determine if a ruling is controlled or affected by an error of law. Bowers v. Thomas, 373 S.C. 240, 644 S.E.2d 751 (Ct. App. 2007).

ARGUMENT

I.

The Circuit Court erred in affirming the magistrate's determination that the video machines were not illegal vending machines.

Testimony at the magistrate's hearing established that the seized machines dispensed red tickets in varying amounts based on the degree of successful play. Tr. pp. 161-162. Further, the testimony established an element of chance in playing the machines.

Under S.C. Code Ann. § 12-21-2710, in relevant part, a person may not keep or operate "any vending or slot machine", "but the provisions of this section do not extend to . . . 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 machines in the instant case vended red tickets in varying amounts based on degree of successful play on the machines. Additionally, the machines in several aspects had an element of chance. Accordingly, as a matter of law, the machines did not meet either of the two requirements necessary to fall within the exception to the prohibition on vending machines.

The circuit court affirmed the magistrate's erroneous determination that the machines were not vending machines because "they do not vend products to consumers." Cir. Ct. Order dated October 13, 2011 (Cir. Ct. Ord.) p. 4. This ruling was an error of law.

The vending machine provision in section 12-21-2710 remains intact from the 1922 code provision analyzed in Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1929). In that case the machine at issue vended a single mint and between two to twenty tokens, which Harvie

alleged had no trade value and the Sheriff contended were traded for merchandise. The South Carolina Supreme Court noted as follows:

From a reading of this section it is seen that, in order to escape the condemnation of the statute (1), the vending machine must give a certain uniform and fair return in value for each coin deposited therein, and (2) there must be no element of chance in the operation of the machine.

Id. at 67. The Harvie Court found chance in the operation of the machine and that the machine did not give a certain uniform return for each coin deposited. *Id.* at 69 (“we are satisfied that the checks or tokens have some monetary or trade value, and, in view of the fact that they are released by the machine at irregular intervals and in uncertain numbers, the element of chance is always present and there is no certain and uniform return in value for the coin deposited in the machine. In these respects, the operation or possession of the machine clearly violates the statute in question.”).

In the instant case, the machine dispenses red tickets instead of tokens, which at a minimum, are redeemable for merchandise, and like the machine in Heise, the number of tickets dispensed is variable based on success in playing the games on the machine.

Like the tokens dispensed in Harvie, the red tickets dispensed by the machines in this case render them vending machines, and since the return is not uniform, the machines are illegal. See Moore v. Greenville Restaurants, Inc., 287 S.C. 295, 337 S.E.2d 892 (1985) (finding in interpreting a gross sales sharing clause of a lease that a video game machine was a “vending type machine” expressly exempted from the sharing provision in the lease).

Further, under the plain language of the statute, a vending machine is required to have “no element of chance”, and chance undisputedly plays a part in several aspects of play as

admitted by Respondent's own expert. See Mag. Tr. pp. 58-60 (testifying that in fifth field of play, the "grid", the player has a one in four chance of attaining a particular row, even though the player might be able to use skill in selecting the optimal column); pp. 61-62 (play in the vault is random); pp. 80-81 (testifying vault play is probably luck); pp. 68-69 (agreeing there is no exercise of skill utilizing the "stop-all" button to play).

Accordingly, since the magistrate's determination was controlled by an error of law, as was the Circuit Court's affirmance of the magistrate's findings, and the machines undisputedly offer a variable return and have an element of chance, this Court should reverse the Circuit Court and find the machines are illegal vending machines pursuant to section 12-21-2710.

II.

The circuit court erred as a matter of law in finding that section 12-21-2710 requires a showing that a machine with a free play feature must be used for gambling to be prohibited.

The magistrate court and circuit court erred as a matter of law in finding the machines were not prohibited as video games with a free play feature, due to mistakenly finding that Appellant was required to show the machines were used for gambling to be prohibited under this provision.

Section 12-21-2710 prohibits “any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value”.¹ Note that this clause is an independent clause, and not modified by any other language in the statute. When a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and such language must be interpreted in light of the statute’s intended purpose. State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). “This Court consistently has deferred to the Legislature’s determination of which gaming devices must be sacrificed for the public welfare.” Mims Amusement Company v. South Carolina Law Enforcement Division, 366 S.C. 141, 147, 621 S.E.2d 344, 347 (2005).

The meaning and application of the free-play feature clause found in section 12-21-

¹ This clause was inserted in 2000 Act. No. 125.

2710 is a novel issue of law that has not yet been interpreted by the appellate courts. Accordingly, a de novo review of this issue is appropriate. Mims, 366 S.C. at 146, 621 S.E.2d at 346 (“In a case raising a novel question of law, the Court is free to decide the question with no particular deference to the lower court”).

Further, as noted in South Carolina Law Enforcement Division v. One Speedmaster, 397 S.C. 94, 100, 723 S.E.2d 809, 812 (Ct. App. 2011), section 12-21-2710 does not require a showing that the illegal device is actually used for gambling.² See also State v. Appley, 207 S.C. 284, 288, 35 S.E.2d 835, 836 (1945) (possession of a prohibited machine is a violation in itself, separate from the crime of operation).

Snyder was asked on cross-examination to define a free play feature, which he described as where a player can achieve extra plays. Snyder was also asked to define a knock-off feature. Snyder defined a knock-off feature as follows:

A knock-off feature is used on gray-area gambling machines, and that’s like video pokers, perhaps, other than in a strict casino environment where they’re regulated. That’s where you achieve points but then, when you want to cash out or get the prize, the overseer of the game can erase those points from the screen

* * *

And typically, what happens in a situation like that, an eight-liner or poker game in a bar, somebody wins 20 points, the bartender sees it, pays you 20 points and has the means to

² The circuit court relied on language in the original Speedmaster opinion, issued on May 29, 2011. The Court of Appeals withdrew this opinion and substituted another opinion on September 27, 2011. The Circuit Court based its ruling on the gambling requirement on language subsequently withdrawn by the Court of Appeals. Cir. Ct. Ord. p. 5. Appellant addressed this matter in its Rule 59, SCRCP motion. Rule 59 motion, pp. 1-3. However, the circuit court did not correct this language.

erase or knock off those credits from the screen.

* * *

Internally, they're kept in the bookkeeping, and then the route person come around and divvy up with you, knowing that you already paid out x amount of dollars.

Mag. Tr. p. 65, lines 6-23.

Snyder denied the machines had a knock-off feature, but then admitted the machine will redeem credits for red tickets. Typically, the tickets may be exchanged for something of value. Mag. Tr. p. 66. Agent Godfrey testified that the machines had a free-play feature and a knock-off feature. Mag. Tr. p. 143, pp. 148-150. The machines also had two hard meters to measure the money paid into the machine and the number of tickets dispensed from the machine. Mag. Tr. p. 158.

In the instant case, the machines are illegal for the free play feature alone based on the plain language of the statute.³ Agent Brad Godfrey's testimony proved the machines have a free-play feature. Mag. Tr. pp. 148-150. Snyder, disturbingly, did not know whether the machines had a free play feature although he described accumulating points won in the "score" column. Mag. Tr. pp. 63-65; pp. 68-70. Further, Snyder described a knock-off feature and claimed the Chess Challenge II machines did not have a knock-off feature, but then admitted that the machine allowed the exchange of points won for red tickets, meeting even his own definition of a knock-off feature. Mag. Tr. pp. 64-66.

³ The free-play feature clause is discussed in length in the Attorney General Opinion letter dated April 29, 2005 to then Major Mark A. Keel. 2005 WL 1024601 (S.C. A.G.). The opinion, consistent with arguments presented on behalf of the Sheriff in this case, opines as follows: "Certain devices, such as slot machines, video games with a free play feature operated by a slot, punch boards and pull boards are expressly outlawed by statute."

The circuit court and magistrate erred as a matter of law, finding that section 12-21-2710 only prohibits video games with a free-play feature if the video games are used for gambling. Cir. Ct. Ord. p. 4. The machines in the instant case are clearly machines falling the scope of the free-play feature clause found in section 12-21-2710 since the machines have a free-play feature and additionally, a knock-off feature found in gambling-related machines which are clearly intended to be prohibited by section 12-21-2710. See United States v. Dobkin, 423 S.E.2d 612, 615 (W.V. 1992) (. . . “when video poker machines are used in such a way that accumulated free games are paid for in cash, the video poker machine is being used as a gaming device”).

Accordingly, the circuit court erred as a matter of law in affirming the magistrate’s finding that the machines were not video machines with a prohibited free play feature and the finding should be reversed.

III.

The circuit court erred in affirming the magistrate court's findings that the machines were games of skill.

The circuit court erred in affirming the magistrate court's findings that the Chess Challenge II machines were games of skill. As discussed below, the circuit court applied the wrong standard of review for an appeal from magistrate's court, mistakenly believing that the standard of review was for errors of law only. Additionally, the circuit court misapplied the holding of Allendale County Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 606 S.C. 581, 606 S.E.2d 471 (2004), which resulted in the magistrate's court and circuit court erroneously shifting the burden to the Sheriff to show that the machines were different from machines from years ago that were not present in the courtroom at the time of the hearing. Accordingly, this Court should take a *de novo* review of the record and find the machines play games of chance. Further, even as a matter of law, chance predominates over skill.

A. The circuit court erred by failing to apply the right standard of review on appeal from magistrate's court and in misapplying Allendale County Sheriff's Office v. Two Chess Challenge II; therefore, this Court should conduct a *de novo* review and find that the machines play illegal games of chance.

A *de novo* review is proper to determine if a circuit court's affirmance of a magistrate's ruling is controlled or affected by an error of law. Bowers v. Thomas, 373 S.C. 240, 644 S.E.2d 751 (Ct. App. 2007). In the instant case, the circuit court misapplied the holding of Allendale County Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 606 S.C. 581, 606 S.E.2d 471 (2004) resulting in the ruling being controlled by an error of law.

Further, the circuit court failed to apply the proper standard of review from magistrate's court which allows for the trial court to make its own findings of fact.

In Allendale, a magistrate issued an order finding two Chess Challenge II machines and all others operating in an identical manner were legal. The solicitor then conceded on appeal that the machines were legal. Subsequently, SLED became a party to the case and the Attorney General's Office assumed representation for SLED and the sheriff. Id.

The Supreme Court found that the "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." Id., 361 S.C. at 587, 606 S.E.2d at 474. Further, the Supreme Court concluded as follows: "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. . . . 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." Id. (emphasis in original).

In the instant case, the circuit court affirmed the magistrate's findings that "Snyder testified that games before [the magistrate] operated in an identical manner to those seized in the Allendale case. Magistrate Davis received no testimony that the games before him had been manipulated or changed in any manner to distinguish them from the Chess Challenge II games deemed lawful by the Supreme Court, Judge Buckner, and Magistrate Love." Circuit Court Order p. 4.

The Circuit Court's order turned the holding of Allendale on its head, eviscerating the Supreme Court's mandate for magistrates to conduct a machine by machine review and

ignoring the Supreme Court's broad language finding "nothing" prevented a law enforcement agency from seizing the very two machines seized in that case, much less two other machines seized in a separate county years later. This also effectively shifted the burden from the owner to the Sheriff to show the seized machines were different from other machines seized years ago.

Since the magistrate's findings and the circuit court's affirmance is premised on an error of law, this Court should conduct a de novo review and find that Respondent did not meet his burden of proving the machines were legal.

Further, the circuit court erred in failing to apply the correct standard of review on appeal from magistrate's court. South Carolina Code Section 18-7-170 provides that on appeal from Magistrate's Court, the Circuit Court may make its own findings of fact. See Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2004). "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." § 18-7-170.

In contrast to applying the proper standard, the circuit court stated: "but the issue is an issue – I'm determining the issue of law from the lower court as to the judge's ruling." Cir. Ct. Tr. p. 14, lines 22 - 25. In its Order affirming the magistrate's determination, the circuit court indicated it relied on the magistrate's orders, the submitted memorandums and arguments of counsel, but failed to indicate it was relying on the transcript of the magistrate's proceedings or the evidence offered in magistrate's court. Cir. Ct. Order. p. 5. Further, the circuit court refused to view the machines brought to court, which are properly part of the

record since they are the *res* of the action in an *in rem* proceeding.⁴ Cir. Ct. Tr. pp. 14-15.

Since the circuit court erred in applying the proper standard of review of the magistrate's determination, this Court should conduct a *de novo* review of the facts and evidence.

B. The dominant factor test.

The Supreme Court has not expressly determined the standard to determine whether a game is a game of skill or chance. However, Justice Burnett's dissent in Johnson v. Collins Co., 333 S.C. 96, 508 S.E.2d 575 (1998)⁵ is informative in constructing an appropriate standard this Court might adopt.

Justice Burnett opined the following in his proposed application of the dominant factor test:

Instead, I would hold, where the dominant factor in a participant's success or failure in a particular scheme is beyond his control, the scheme is a lottery, even though the participant exercises some degree of skill or judgment. If a participant's skill does not govern the result of the game, the scheme contains the requisite chance necessary to constitute a lottery. On the other hand, if through the exercise of skill or judgment a participant can determine the outcome, the scheme is not a lottery. My opinion is supported by the majority of jurisdictions which have considered this question. Only three jurisdictions adopt the pure chance doctrine.

Collins, at 333 S.C. 113, 508 S.E.2d at 584.

⁴ See Mims Amusement Company v. South Carolina Law Enforcement Division, 366 S.C. 141, 150, 621 S.E.2d 344, 348 n.4 (2005).

⁵ At issue was whether various machines playing a variety of games, violated the Constitutional prohibition of lotteries rather than determining violations of S.C. Code § 12-21-2710.

Further, Justice Burnett later concluded: “In my opinion, skill should be defined in terms of the ability to obtain the desired outcome – a certain card – rather than the ability of one player to play more judiciously than another. As noted by the certification order, a video poker player is unable to control the random selection of cards, in spite of his skill, knowledge, or experience.” *Id.* at 333 S.C. 119, 508 S.E.2d at 587.

A North Carolina Court of Appeals case summarizes the issue pointedly: “A game of chance **is such a game as is determined entirely or in part by lot or mere luck**, and in which judgment, practice, skill or adroitness have honestly no office at all, **or are thwarted by chance.**” Collins Coin Music Co. v. North Carolina Alcoholic Beverage Control Comm’n, 451 S.E.2d 306 (N.C. Ct. App. 1994) (emphasis added, internal quotations omitted).

The Alabama Court of Civil Appeals noted the following in determining whether or not chance predominates over skill:

As long as chance matters – as long as chance makes a meaningful difference in the outcome – the activity differs in kind, not just in degree, from a game of skill. The issue is whether the nature of the game is such that the role of chance in determining the outcome is thwarted by the skill involved, or whether chance meaningfully alters the outcome and thereby predominates over the skill.

State v. Ted’s Game Enterprises, 893 So.2d 355, 374 (Ala. Civ. App. 2002).

As discussed in detail below, chance plays a part in several aspects of play and a player can win without the exercise of any skill, be denied a matching icon despite the exercise of skill, and become subject to random play, all admitted by Respondent’s expert. Further, evidence fails to indicate that a member of the general public is in a position to

exercise any skill.

C. Where the expert's "skill" was attained through video tape analysis unavailable to the consumer, the Circuit Court erred in affirming the magistrate's finding that the machines played a game of skill.

The machines play a game involving five principle fields of play. Four of those fields involves a series of icons revolving at 3.8 icons a second in each of the four fields. The sequence of icons is a portion of a fixed 255 icon sequence. The player is able to push a button to stop play in each of four fields of play. However, if a player does not stop play, the machine will automatically do so in thirty seconds, so a player will be able to view, at most, approximately 114 icons (30 x 3.8). Further, the machine randomly starts play in any portion of the "fixed" sequence. Mag. Tr. pp. 52-55.

Mr. Snyder testified that he learned "trigger points" to be able to successfully attain the king icons. On direct examination, Mr. Snyder testified as follows:

Q: How do you play the game [inaudible] how do you put strategy [inaudible]?

A: Well, when you start it, I look for kings. Kings, when I see a king, that's my starting point, and I say, "That's one of the ten kings. I know what follows it," or "It isn't one of the ten kings that I know" –

Court: How do you know there's ten kings?

A: Through videotape analysis.

Court: Oh. But a regular person stepping up to the machine doesn't know that.

A: He would not know that.

Mag. Tr. p. 26, lines 8-19; see also Mag. Tr. p. 79 (Snyder testifying as to the need for

videotape analysis to determine that there was a fixed 255 icon sequence).

Respondent attempted to rebuild this testimony by referring to testing with trial subjects, specifically four individuals who played the machine, but in their instructions, they were advised about the workings of the machine and also strategy not made available to the consumer. So the four subjects likewise had inside knowledge of the machine unavailable to a consumer. Mag. Tr. pp. 55-58.

In this case, the skill Snyder was able to display was derived by particularized knowledge of the inner workings of the machine unavailable to the consumer. Even his test subjects had to be advised of how the machine worked and the strategy necessary for them to “improve play”.⁶ Video tape analysis is not available to the consumer, so for the consumer, it is a game of chance.

Respondent relied on South Carolina Law Enforcement Division v. One Speedmaster, 397 S.C. 94, 723 S.E.2d 809 (2011) arguing that Mr. Snyder displayed a similar degree of success as the expert in the Speedmaster case. However, in the instant case, it is clear Snyder utilized video analysis to help create his success, and the Speedmaster opinion is silent as to how the expert was able to learn successful play on the machine in that case.

“[W]hether chance or skill was the determining factor in the contest must depend upon the capacity of the general public – not experts – to solve the problems presented.”

State v. Ted’s Game Enterprises, 893 So.2d 355, 372 n.12 (Ala. 2002) (quoting State ex Inf.

⁶ In Johnson v. Collins, 333 S.C. 96, 508 S.E.2d 575 (1998), Justice Burnett, in his dissent, disagreed that merely improving play indicates a game of skill: “In my opinion, skill should be defined in terms of the ability to obtain the desired outcome – a certain card – rather than the ability of one player to play more judiciously than another.” Id., 333 S.C. at 118-119, 508 S.E.2d at 587.

McKittrick v. Globe-Democrat Publishing Co., 110 S.W.2d 705, 717 (Mo. 1937)).

Morrow v. State, 511 P.2d 127 (Alaska 1973) also cites McKittrick favorably in discussing at length what is necessary for skill to predominate over chance:

(1) Participants must have a distinct possibility of exercising skill and must have sufficient data upon which to calculate an informed judgment. The test is that without skill it would be absolutely impossible to win the game. (2) Participants must have the opportunity to exercise the skill, and the general class of participants must possess the skill. Where the contest is aimed at the capacity of the general public, the average person must have the skill. It is irrelevant that participants may exercise varying degrees of skill. Johnson v. Phinney, 218 F.2d 303, 306 (5th Cir. 1955). The scheme cannot be limited or aimed at a specific skill which only a few possess. Whether chance or skill was the determining factor in the contest must depend upon the capacity of the general public – not experts – to solve the problems presented. State ex inf. McKittrick v. Globe-Democratic Publishing Co., 341 Mo. 862, 110 S.W.2d 705, 717 (1937). (3) Skill or the competitor's efforts must sufficiently govern the result. Skill must control the final result, not just one part of the larger scheme. Commonwealth v. Plissner, 295 Mass. 457, 4 N.E.2d 241 (1936). Where chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result, the scheme is a lottery. State ex inf. McKittrick, v. Globe-Democrat Publishing Co., *supra*. Where skill does not destroy the dominant effect of chance, the scheme is a lottery. Horner v. United States, 147 U.S. 449, 459, 13 S.Ct. 409, 37 L.Ed.237, 241 (1893), (4) the standard of skill must be known to the participants and this standard must govern the result. The language used in promoting the scheme must sufficiently inform the participants of the criteria to be used in determining the results of the winners. The winners must be determined objectively. Note, 'Contest and the Lottery Law,' 45 Harv.L.Rev. 1196, 1216 (1932).

Morrow, at 129-30 (internal quotations omitted).

In the instant case, the general public was not provided any information or the

possibility of exercising skill. The machines played a game intended to avoid the capacity of the general public, and the standard of skill was unknown to the public. For the general public, the Chess Challenge II machines play games of chance.

Accordingly, in the absence of evidence that skill is attained from normal play without the aid of videotape analysis or other information not made available to the consumer, the magistrate's findings were unsupported by even slight evidence and the circuit court erred in affirming the findings. Allendale County Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 585, 606 S.E.2d 471, 473 (2004).

D. The circuit court erred in finding that the machines were games of skill where the outcome in the fifth field of play was, as admitted by Respondent's expert, determined by chance, and where play in the vault was also random.

In the instant case, assuming a player could obtain the desired result in four fields of play (the four fields where the icons spin), chance determines the outcome in the fifth field – where lights flash across a seven icon by four icon grid – as admitted by the Defendant's expert witness, Snyder. He also admitted random play to be eligible to play "the Vault" which he admitted being unfamiliar with. Mag. Tr. pp. 58-62. The optimum desired result, of obtaining five identical icons (such as five kings), is ultimately determined by chance, despite a player's exercise of skill.⁷ Further, scoring in the bonus play resulting from a match of five icons is based on chance, not skill. Play in the vault, as admitted by Snyder, is random. Therefore, the video game is a game of chance, not skill. Alexander v. Hunnicutt, 196 S.C. 364, 13 S.E.2d 630 (1941) (finding under the predecessor statute that a pin table

⁷ Mr. Snyder testified that a player would get bonus points for five kings, his recollection was a hundred points. Mag. Tr. p. 61, lines 6-13.

game that did not have a payout mechanism or award free plays was still illegal noting: “if we may assume that no free games are awarded and that the only element of chance as to the score which may be made and indicated as the affidavits state, the machine comes directly within the terms of the criminal statute . . .”).

“Skill must control the final result, not just one part of the larger scheme.” Morrow, supra. In the instant case, Respondent cherry-picked a portion of the game to declare that the game is a game of skill, even though chance clearly controlled several aspects of play, as admitted by their expert. However, taken as a whole, chance plays a large part of play for the subject Chess Challenge II machines. Therefore, even as a matter of law, the circuit court erred in affirming the magistrate’s findings that the machines played a game of chance.

E. The circuit court erred in affirming the magistrate’s finding that the machines did not play a game of chance where the machines have a stop-all button which stops play in all fields and allows a player to win without any exercise of any skill, as admitted by Respondent’s expert.

Testimony and argument was presented to the Magistrate concerning the “stop all button” which allows play to stop in all fields with the push of one button. Despite being Respondent’s machine, Respondent was unable to explain this button’s existence in what Respondent alleges to be a game of skill.⁸ Snyder testified that no skill is used in playing the machine using the stop all-button and that a player could win playing the games in this fashion. Tr. pp. 68-69.

⁸ At oral argument, the circuit court asked Respondents to address the stop-all button, Respondent’s counsel did not have an answer, so co-counsel proceeded to address the court at length, but without ever explaining the reason or purpose for the stop-all button. Cir. Ct. Trans. pp. 58-64. Their continued evasion of this issue confirms that the real purpose of these machines is to allow for gambling.

Besides being demonstrative of the true intent that the machine be utilized for gambling, the stop-all button allows players to win without exercising any skill. So chance destroys any skill. Ted's Game Enterprises noted the following: "Does chance . . . proximately influence the final result, or does skill . . . destroy the existence of effect of the chance? If the former and not the latter, it can hardly be said that the skill predominates over chance in the qualitative or causative sense contemplated." Ted's Game Enterprises, 893 So.2d at 374 (internal citations and quotations omitted). In the instant case, as long as the player stands to win without the exertion of even the slightest skill due to the stop-all button, skill fails to destroy chance, and chance predominates because it proximately influences the final result.

Morrow, supra, notes simply: "The test is that without skill it would be absolutely impossible to win the game." Morrow, at 129.

The existence of the stop-all button is to allow a player to wager purchased credits five times faster than if the player has to press five buttons to stop play for each of the five fields of play, and thus the stop-all button allows machine owners to obtain profit at a markedly faster rate.

In magistrate's court, Respondent asserted a blind-fold analogy in an attempt to defend the function, but the inescapable conclusion is that the machines are designed for this play, unlike where a player decides to use an extraneous impediment such as a blindfold.

Given the manufacturing costs of additional electronic components and software, this function is hardly unintentional and cannot be dismissed as irrelevant to the chance/skill analysis, despite Respondent's efforts to convince the courts to turn a blind eye to the

function and purpose of the stop-all button. This Court should not turn a blind eye to the stop-all function and its relevance to the entire scheme presented in the Chess Challenge machines.

The machine is illegal as a matter of law because its design makes it a game of chance due to the inclusion of the “stop-all” button. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 188-189, 525 S.E.2d 872, 879 (2000) (Supreme Court reaffirms Squires v. SLED, 249 S.C. 609, 155 S.E.2d 859 (1967), which held that subparts of illegal machines were contraband per se, noting “the plain language of the statute makes clear the legislature’s intent to outlaw mere possession of such machines The Circuit Court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.”). “Even if the slot machine involved in this case is manufactured and intended for lawful operation, its potentiality and design is such that it may be easily put to unlawful use. The regulation or prohibition of such a mechanism need not be postponed until such event occurs.” Alexander v. Martin, 192 S.C. 176, 6 S.E.2d 20, 25 (1939).

In the instant case, Respondent’s machine is designed for the games to be played as a game of chance, based even on their expert’s testimony. Accordingly, the magistrate court and circuit court erred as a matter of law in finding the machines legal even though they are designed to play a game of chance. Further, chance predominates over the utter lack of skill where no effort needs to be exercised to win. See Johnson, supra.

IV.

The machines are machines licensed and used for gambling and therefore violate section 12-21-2710.

At the hearing, Appellant established that the Department of Revenue issued licenses for both machines. Mag. Tr. pp. 163-164. Further, it was established that consideration, money, was inserted into the machine and that successful play resulting in the reward of red tickets likely redeemable for merchandise or other prizes. Assuming “skill” elsewhere, the stop-all button, as admitted by Snyder, allowed successful play based solely on chance. Mag. Tr. p. 69. Thus the three elements of gambling are present – consideration, chance, and prize. See Johnson, supra.

Section 12-21-2710 specifically prohibits machines licensed by the department of revenue and used for gambling. “An apparatus is a gambling device where there is anything of value to be won or lost as a result of chance, no matter how small the intrinsic value”. Ward v. West Oil Co., 387 S.C. 268, 278, 692 S.E.2d 516, 522 (2010) (quoting with approval 38 C.J.S. *Gaming* § 10 (Supp. 2010)); State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 188-189, 525 S.E.2d 872, 879 (2000) (Supreme Court reaffirms Squires v. SLED, 249 S.C. 609, 155 S.E.2d 859 (1967), which held that subparts of illegal machines were contraband per se, noting “the plain language of the statute makes clear the legislature’s intent to outlaw mere possession of such machines The Circuit Court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.”). “Even if the slot machine involved in this case is manufactured and intended for lawful operation, its potentiality and design is such that it may be easily put to unlawful

use. The regulation or prohibition of such a mechanism need not be postponed until such event occurs.” Alexander v. Martin, 192 S.C. 176, 6 S.E.2d 20, 25 (1939). In the instant case, a player utilizing the stop-all button is gambling, even if the court was to accept Respondent’s claim that the machines are not intended for such use.

In Sun Light Prepaid Phonecard Co. v. State, 360 S.C. 49, 600 S.E.2d 61 (2004), the Supreme Court, in finding phone card dispensers were illegal under section 12-21-2710, noted the dispensers had a gambling-themed video screen, played celebration music when a player won, contained a meter recording the value of prizes paid out, and did not give change, all characteristics resembling slot machines.⁹ Sunlight, 360 S.C. at 55, 600 S.E.2d at 64. In the instant case, the Chess Challenge II machines have these same characteristics. Mag. Tr. pp. 143-149; p. 153, p. 156, pp. 158-160. A review of the record reveals that the machines are machines designed for gambling.

Since the machine is licensed and readily capable in its design to be used for gambling, it is illegal. Accordingly, the magistrate’s court and circuit court erred as a matter of law in not finding the machines illegal.

⁹ The record does not indicate whether the machines froze at a pre-determined level of prize money. See Sunlight.

V.

The circuit court erred in affirming the magistrate's findings concerning whether the Sheriff had probable cause to seize the machines where assuming seizure of machines without probable cause, return of the machines, as contraband per se, is unavailable as a remedy.

The Magistrate found the Sheriff did not have probable cause to seize the machines. The circuit court affirmed this finding. To the extent the Magistrate's order required the Sheriff to return the machines on this ground, this ruling is in error as a matter of law. For reasons previously articulated in this brief, the machines are illegal under section 12-21-2710 and therefore are contraband *per se*. Under State v. 192 Coin Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), the exclusionary rule explicitly does not apply to illegal machines due to their status as contraband per se. Therefore, since these machines violate S.C. Code § 12-21-2710, then the failure of the deputy to have probable cause before seizing the machines does not implicate the remedy of returning the machines.

In 192 Coin Operated Machines, the Supreme Court addressed an allegation that machines were found subject to an illegal search. The Court found the search legal, but went further, noting: "Finally, even if the searches were illegal – and we conclude they were not – appellant has no remedy." *Id.*, 338 S.C. at 195, 525 S.E.2d at 882. Noting that machines in violation of S.C. Code § 12-21-2710 are contraband *per se* as opposed to derivative contraband, the Supreme Court concluded: "Furthermore, because the machines are contraband per se, the State certainly cannot return them to appellant, which is presumably the remedy sought." *Id.*, 338 S.C. at 196, 525 S.E.2d at 882 (internal quotations omitted).

Because the machines are contraband per se pursuant to section 12-21-2710, they

constitute contraband *per se* and should not be returned regardless of whether the Sheriff's Department had probable cause at the time of seizure.

CONCLUSION

For all of the foregoing reasons, the circuit court and magistrate court's rulings should be reversed and the gaming machines should be destroyed.

Respectfully submitted,

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