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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5856 (S.C. Ct. App. filed September 1, 2021)
Appellate Case No. 2018-000511

Town of Sullivan's Island ..... Petitioner,

v.

Michael Murray ..... Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that Petitioner filed a Petition for Rehearing on September 15, 2021, and that the Court of Appeals denied the Petition for Rehearing by order dated October 1, 2021. **(Pet. For Reh'g); (Order Denying Pet. For Reh'g).**

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals' decision conflicts with prior decisions of this Court when the Court of Appeals ignored the factual findings of the trial court and made its own factual findings on appeal, without any deference to the trial court's findings, that were contrary to the factual findings of the trial court?

2. Whether the Court of Appeals' decision conflicts with prior decisions of this Court, when the Town's Ordinances are not vague and it was undisputed at trial that Respondent was on notice of the Town's Ordinances, he understood them, and he violated them?

3. Whether the Court of Appeals' decision conflicts with prior decisions of this Court when it is based solely on arguments that were not raised to and ruled upon by the circuit court?

SPECIAL CONSIDERATIONS FOR GRANTING A WRIT OF CERTIORARI

This Court should grant review of the decision of the Court of Appeals because it conflicts with numerous, binding decisions of this Court. See SCACR 242(b)(3). It is well-settled that in criminal cases "an appellate court sits to review only errors of law, and it is **bound** by the trial court's factual findings **unless they are clearly erroneous**." State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012) (emphasis added) (citations omitted). As explained herein, the Court of Appeals impermissibly made new factual findings on appeal that directly conflict with the trial courts findings of fact, without any deference to the lower court's findings.

Additionally, this Court should grant review of the Court of Appeal's decision because a substantial constitutional issue is directly involved and the Court of Appeal's decision conflicts with numerous decisions of this Court on the constitutional issue of whether municipal ordinances that explicitly provide notice of what the prohibit (and it is undisputed that the defendant

understood what was prohibited by the ordinances in question) could be impermissibly vague. See SCACR 242(b)(3) and (4). The Court of Appeals found that the Town's Ordinances did not provide Respondent with notice of potential criminal liability. Whether an ordinance is impermissibly vague or provides proper notice of potential criminal liability directly implicates the Constitution. In re Amir X.S., 371 S.C. 380, 391, 639 S.E.2d 144, 150 (2006) ("The constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies."). The Court of Appeals gutted every municipality's ability to enforce its laws and this Court should grant review of the decision to correct that error of Constitutional significance.

The Court of Appeals' decision also conflicts with prior decisions of this Court because it ruled only on issues that were not raised and ruled upon by the lower court. See generally, Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (" . . . preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.") (citing cases). Here, the Court of Appeals based its **entire** decision on unpreserved issues – specifically, the issues of whether the Town's Ordinances provided Respondent with notice of potential criminal liability and whether those Ordinances were impermissibly vague. See **(Opinion at p. 7)**. For that additional reason, this Court must grant certiorari and reverse the Court of Appeals. See Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) ("[w]hen an appellate court rules on an issue not preserved for appellate review, the portion of the appellate court's opinion pertaining to the unpreserved issue should be vacated.").

For these important reasons, as well as the other reasons to be discussed in this Petition, this Court should issue a Writ of Certiorari.

STATEMENT OF THE CASE

This is an appeal from a conviction and a fine of $1,040 for an admitted violation of the Town's Ordinances. Respondent is the president and owner of American Dock and Marine construction. **(R. at p. 231, ll. 5-18).** Jason Thompkins[1] hired Respondent to construct a dock at 1102 Osceola Avenue (the "Property"), on the western side of Sullivan's Island after acquiring the Property on February 21, 2014. **(R. at pp. 253-54, ll. 25-12).** The Property owners submitted permit applications to the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("OCRM"), as a prerequisite to receiving Town permits, and received approval. **(R. at pp. 89-92). (R. at p. 192, ll. 21-24) (R. at pp. 86-97).** OCRM's approval included a condition that it be provided an as-built survey after construction. **(R. at pp. 86-97).**

Respondent then applied for building permits from the Town. **(R. at pp. 86-97).** The Town issued a dock construction permit, which stated, "approved as noted" with the written condition that the dock "**must not exceed adjacent docks.**" **(R. at pp. 86-97)** (emphasis added); see also **(R. at p. 217, ll. 3-25)** (Building Official Robinson testifying that the building permit issued stated "must not exceed adjacent docks and ten feet from extended property line" and that since he was employed by the Town, "if there were docks adjacent to a proposed dock, we made those docks line up."); **(R. at p. 175, ll. 11-15)** (Town Zoning Administrator Henderson testifying that as to Respondent's permit, "we denoted the line that the dock pier head had to be dropped back, too, to the build-to line. And then the building official made a note that you can't go beyond

[1] C&B Beach House, LLC owns the Property; Mr. Thompkins is a member of C&B Beach House, LLC. Mr. Thompkins was acquitted at the lower court and is not a party to this appeal. **(R. at p. 102).**

the adjacent docks."). A Certificate of Zoning Compliance was also issued by the Town and included a notation to ". . . not exceed adjacent docks." **(R. at pp. 21-22).** Additionally, as part of the approval, like OCRM, the Town required an as-built survey be submitted at the completion of construction to verify permit compliance. See **(R. at pp. 86-97)** (notation requiring an as-built survey be submitted to the Town upon completion); see also, **(R. at pp. 180-81, ll. 25-12)**; **(R. at p. 220, ll. 8-23)**; **(R. at p. 250, ll. 8-21).**

The Town Zoning Administrator met and discussed with Respondent that the Town's approval of the dock's construction was conditional as noted above. **(R. at p. 171, ll. 15-24)**; **(R. at p. 174, ll. 3-24)** ;**(R. at p. 174, l.18-p. 175 l.8); (R. at p. 212 ll. 14-21)** ("Q:. . . . did [Respondent] . . . ever indicate to you that they did not understand the notations that were made on the documents that had been received as part of the building permit application. . . A. No, sir."). Further, the permit documents specifically put Respondent and all applicants on notice that a failure to comply with the permit was violation of the Town's ordinances:

> **I further understand that any deviation from the approved plans and conditions thereof shall constitute a violation of the Town of Sullivan's Island Zoning Ordinance.**

(R. at p. 88) (bold added). The Town's Ordinances provide that a violation of the zoning ordinance is a criminal violation. **(TOSI Ordinance § 1-7, R. at p. 71)**; (stating that violating a zoning ordinance constitutes a misdemeanor); see also **(R. at p. 77-78)** (Ordinances governing and requiring building permits).

As explained herein, it is undisputed that: (1) Respondent agreed that the condition of the permit that the dock not be built seaward of the adjacent docks was part and parcel of the building permit; (2) that a building permit is required to build a dock on Sullivan's Island; (3) that he understood the Town's permitting requirements; and (4) that the dock that he constructed violated

the permit. Appellant explained at trial that he accepted the permit and the condition that he not build any dock exceeding adjacent docks:

> Q: And you acknowledged that the building permit application, which has been initialed by both Mr. Henderson, the zoning administrator and Mr. Robinson, the building official, specifically say 'Approved as noted;' correct?
>
> A: Yes, sir.
>
> Q: And those notations being the two notes, 'must not exceed adjacent docks,' and then the other issue with regard to ten feet from the adjoining property line; correct?
>
> A: That is correct.
>
> Q: And would you agree that those specific notations became a part and parcel of the building permit that was issued to your company relative to the construction of the dock [at the Property]?
>
> A: As far as I know, yes, sir.

(R. at pp. 244, l. 18-p. 245, l. 8).; see also: **(R. at p. 265, ll. 9-14)** (Respondent acknowledging that he was required to comply with the terms and conditions of the building permit). Appellant built the dock past adjacent docks by approximately ten feet and admitted to doing so. **(R. at pp. 23-25); (R. at p. 49); (R. at p. 242, ll. 1-5); (R. at p. 245, ll. 13-18)** (Appellant admitting that the dock he built exceeded the adjoining docks by at least nine feet).

Despite the conditions and warnings of potential criminal liability, Respondent accepted and did not appeal[2] the permit documents; Respondent could have appealed the permit if he

[2] Courts have held that when an individual accepts the benefit of a building permit, those individuals agree to and must accept the conditions attached to thereto. See Lynch v. California Coastal Com., 3 Cal. 5th 470, 478, 396 P.3d 1085, 1090 (2017) ("Similarly, because plaintiffs here took advantage of their permit's benefits by building a seawall, they must now accept the permit's conditions."); Pfeiffer v. City of La Mesa, 69 Cal. App. 3d 74, 78, 137 Cal. Rptr. 804, 806 (Ct. App. 1977) ("It is fundamental that a landowner who accepts a building permit and complies with its conditions waives the right to assert the invalidity of the conditions."); L.A. Dev. v. City of Sherwood, 159 Or. App. 125, 133, 977 P.2d 392, 396 (Ore. 1999) (citing Pfeiffer); Town of Flower Mound v. Stafford Ests. Ltd. P'ship, 135 S.W.3d 620, 629 (Tex. 2004).

disagreed with its contents. See S.C. Code § 6-29-800 (A)(1); **(R. at p 184, l.10–p. 185, l.6); (R. at p. 185, ll. 3-6)**; **(R. at p. 213, ll. 2-5)** (". . . after its was issued, we didn't hear from them. For all we knew, they were going to comply with the terms and conditions of the permit."); **(R. at p. 220, ll. 3-7)** (no appeal of building permit that was issued). **(R. at p. 244, l.18-p. 245, l.8); (R. at p. 244, ll. 12-17)** ("Q: And this is your signature in a couple of places on the accessory structures permit? A: Yes, sir. Q: And again on the building permit application? A: Yes, sir.").

As stated above, rather than comply with the known and accepted provisions of the permit, Respondent built the dock past the adjacent docks by approximately ten feet; Respondent does not dispute this fact. **(R. at p. 244, ll. 4-8)** ("Q: And you -- you agree with me that the as-built dock that your company constructed exceeds the adjoining dock, as depicted on the third page of Exhibit F, by some 9.2 feet - - A: That is correct."). The violation was discovered on June 27, 2016,[3] when the Property's owner applied for a certificate of occupancy and the Town's Zoning Administrator discovered that the dock exceeded adjacent docks. **(R. at p. 179, ll. 15-25)** (". . . so I walked out on the dock, and I noticed 'my goodness, this has to be ten feet past the adjacent docks, violating the permit.'"). The Zoning Administrator contacted Respondent via telephone and e-mail about the violation and about Respondent's failure to submit an as-built survey. **(R. at p. 180, ll. 3-22)**; **(R. at p. 207 ll. 17-25).** On June 29, 2016, the Town issued ticket number 5713 for violations of

[3] The dock was completed in 2014 but Appellant did not submit an as-built survey until 2016. **(R. at p. 258, ll. 1-4); (R. at p. 181, ll. 13-15); (R. at p. 248, l.18-p. 249, l.11); (R. at p. 250, ll. 8-21)**; **(R. at p. 49).**

the Town Ordinance Sections 5-10[4] and 21-75,[5] which provide the building permit requirement, because Respondent violated the conditions of the permit he obtained by building the dock past adjacent docks when the permit, which he agreed to comply with, included a condition that the dock not be built to extend past adjacent docks. **(R. at p. 5).**

Trial occurred in the Sullivan's Island municipal court on October 4, 2016. Respondent was found guilty of failing to comply with the permit and fined $1,040. **(R. at pp. 130-279); (R. at p. 28).** The evidence at trial was entirely undisputed that the permit documents included a condition that the dock not extend seaward of the adjacent docks and that the permit condition had been violated. **(R. pp. 53-55 at ¶¶ 7-11).** Respondent appealed his conviction to the circuit court on October 20, 2016. **(R. at pp. 29-37).** On December 29, 2016, the municipal court judge, Francis J. Cornely, filed a Return[6] to Respondent's Notice of Intent to Appeal. **(R. at pp. 52-55).** Judge Cornely set forth the following factual findings relating to Respondent's Permit:

> 7) THAT it is undisputed that:. . .
>
> B) The application permit and building permit were approved with notations by the Town on June 30, 2014.
>
> C) The Certificate of Zoning Compliance was approved with notations by the Town on June 30, 2014.

---

[4] Section 5-10 provides that an "[a]plication for a building permit shall be made in writing to the Building Inspector or his designated representative at the Town Hall on a form or forms approved and furnished by said Inspector" and supported with "[p]lans and specifications adequately describing the proposed erection, construction, improvement, alteration or repair. . ." **(R. at pp. 77-78).**

[5] Section 21-75 provides that that no dock will be constructed without "approval of the Town of Sullivan's Island, U.S. Corps of Engineers, the Department of Health and Environmental Control/Office of Ocean and Coastal Resource Management (DHEC/OCRM) and any other governmental or regulatory agency with jurisdiction" and that "No dock shall be permitted to be constructed which extends into the channel or extends so far as to interfere with navigation." **(R. at pp. 66-67).**

[6] Submitting a Return is required by S.C. Code § 14-25-105.

D) The dock was completed in late 2014 but an as built survey was not submitted to the Town by the Defendant, Michael Murray, until June 28, 2016.

* * *

8) THAT testifying on behalf of the Town was Joseph Henderson who is the Zoning Administrator for the Town of Sullivan's Island.

B) Mr. Henderson testified that he participated in an email exchange with the engineer about the fact that the dock was conditionally approved but only if the dock did not extend beyond adjacent docks.

* * *

9) THAT testifying on behalf of the Town was Thomas Robinson who is the Chief Building Inspector for the Town of Sullivan's Island:

A) Mr. Robinson testified that the building permit issued to the Defendant, Michael Murray, had a notation that the dock could not extend beyond adjacent docks.

* * *

11) THAT the dock builder, Michael Murray, testified:

A) Mr. Murray testified that he acknowledged that he was told not to build the dock any further out than the adjacent docks.

(R. at pp. 53-54).

On January 1, 2017, the circuit court affirmed the municipal court by Form 4 Order, filed on January 11, 2017. **(R. at pp. 3-4).** The circuit court found: "the appeal filed by Murray is denied. Based on the record, Murray acknowledged notice of the zoning laws and permit requirements and was found in violation. Murray has failed to demonstrate an error of law." **(R. at pp. 3-4).** Respondent filed a motion to alter or amend on January 25, 2017. **(R. at pp. 56-57).**

By written Order, on February 22, 2017, the circuit court denied Respondent's motion to alter or amend. **(R. at pp. 1-2).** Respondent appealed to the Court of Appeals. **(Notice of Appeal).** The Court of Appeals issued an Opinion (the "Opinion") on September 1, 2021 overturning the decisions of the municipal court and circuit court. **(Opinion).** Petitioner filed a Petition for Rehearing on September 15, 2021 and the Court of Appeals denied the Petition on October 1,

2021. **(Pet. For Reh'g); (Order Denying Pet. For Reh'g).** The Town now seeks this Court's review of the Opinion for the reasons described herein.

ARGUMENT

I. The Court of Appeals' decision conflicts with prior decisions of this Court because the Court of Appeals ignored the factual findings of the trial court and made its own factual findings on appeal, without any deference to the trial court's findings.

The Court of Appeals impermissibly usurped the role of the trial court and made its own factual findings in conflict with those of the trial court, without any deference to the trial court's findings. In criminal cases, "[o]rdinarily, the appellate court is not free to make its own factual findings." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); see also State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) ("In criminal cases, the appellate court sits to review errors of law only.") An appellate court may only disregard factual findings of the trial court when a factual finding made by the lower court is clearly erroneous. Id. City of Aiken v. David Michael Koontz, 368 S.C. 542, 546, 629 S.E.2d 686, 688 (Ct. App. 2006) ("In criminal appeals from municipal court, the circuit court does not conduct a de novo review.") (emphasis added).

The Court of Appeals made no decision that the trial court's findings were clearly erroneous.[7] Instead, the Court of Appeals considered the case as if it were the trial court, making its own findings, (contrary to the lower court's findings), that the Town's Ordinances did not provide Murray with proper notice that he may be subject to criminal liability. Compare **(Opinion at p. 6)** (" . . . [the Town's] ordinances . . . did not provide Murray with sufficient fair notice that

[7] The Opinion's summary of the facts even recites that Murray agreed at trial that the dock extended 9.2 feet seaward of the adjacent docks and that the notation that the dock "must not exceed adjacent docks" was part of the building permit. **(Opinion, 3).**

violation [of the Ordinances] could result in criminal liability.") and **(Opinion 6-7)** with **(R. at pp. 53-55)** (Return of the trial court judge stating that Murray acknowledged at trial he knew he was prohibited by the Town from building the dock out any further than the adjacent docks, he was aware of that condition at the time of construction and that he violated that condition of the permit). The Opinion's finding is also completely unsupported by the evidence at trial. As explained in detail above, it was undisputed at trial that Murray agreed that the condition of the permit that the dock not be built seaward of the adjacent docks was part and parcel of the building permit; that a building permit is required to build a dock on Sullivan's Island; that Murray understood the permit requirement; and that the dock he constructed violated the permit. **(R. at pp. 244, l. 18-p. 245, l. 8); (R. at p. 265, ll. 9-14); (R. at p. 242, ll. 1-5); (R. at p. 245, ll. 13-18); (R. at pp. 54-55); (R. at p. 217, ll. 3-8)**; **(R. at p. 217, ll. 9-25)**; **(R. at p. 175, ll. 11-15); (R. at p. 243, l.10-p. 244, l.8); (R. at pp. 88); (R. at pp. 23-25)** (surveys showing violation) **(R. at p. 49)** (same).

Despite the undisputed evidence of Respondent's guilt for violation of the permit he accepted, undisputed evidence that Respondent understood the rules and violated them anyway, the Court of Appeals found that the Ordnances at issue were unclear and vague such that it was possible that Respondent was not on notice of potential criminal liability. **(Opinion, 7).** Murray, the Town, the trial court (municipal court), the first appellate court (circuit court) uniformly agreed that Murray knew the rules and violated them. The Court of Appeals contorted these undisputed facts until they fit the desired outcome—even though Murray understood the law, knew the law, had previously followed the law, and admitted he broke the law, the Court of Appeals decided that the law was unclear and vague.

The Court of Appeals' rogue factual determination is at the heart of the case. See generally, South Carolina Dept. of Social Services v. Michelle G., 757 S.E.2d 388, 393, 407 S.C. 499, 507

(2014) ("when raising a claim of unconstitutional vagueness, the litigant must demonstrate that the challenged statute is vague *as applied to his own conduct*, regardless of its potentially vague application to others") (italics in original) (citations omitted); **(Opinion, 6)** (holding that the law "as applied" to Murray did not provide fair notice that a violation could result in criminal liability). The Court of Appeals inexplicably found the law was vague and unclear despite the admissions by Murray, and the lower court's findings, to the contrary. Therefore, for this reason, this Court should grant review and reverse the Court of Appeals.

II. The Court of Appeals' decision conflicts with prior decisions of this Court, because the Town's Ordinances are not vague and it was undisputed at trial that Respondent was on notice of the Town's Ordinances, he understood them, and he violated them.

The Court of Appeals held that the Town's Ordinances fail to provide notice of potential criminal liability and are impermissibly vague. **(Opinion at p. 6)** [8] The Opinion concluded that ". . . [the Town's] ordinances failed to provide Murray with fair notice that building a dock beyond adjacent docks was a criminal violation. Because this issue is dispositive, we need not address Murray's remaining issues." **(Opinion at p. 7).**[9]

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[8] The Court of Appeals' analysis switches from analyzing the Town's two dock construction Ordinances to analyzing just one ordinance: criminal violation. **(Opinion at p. 6).** The Opinion only discusses Section 21-75's prohibition of construction in a manner that interferes with navigation. The Court of Appeals does not mention the Town's other Ordinances in its holding, and further does not mention the provisions of Section 21-75 which require approval of dock construction before such construction can take place, even though Respondent's conviction was for failing to comply with Respondent's permitting requirements. **(Opinion at pp. 6-7).** Respondent will nonetheless discuss how the Town's Ordinances provide proper notice and are not vague in this Section.

[9] As discussed in Section III of this Petition, this issue was not preserved, and the Court of Appeals' Opinion should be overturned on that basis alone.

A. The void for vagueness doctrine and the presumption of constitutionality.

The notion that a defendant must have fair notice of potential criminal liability is rooted in the Constitution's guarantees of due process; the issues of notice and vagueness are interdependent; a vague statute is a statute that fails to give notice of what it prohibits or allows. See, e.g., Johnson v. United States, 576 U.S. 591, 595, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015) ("The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'") (citing cases). An ordinance is impermissibly vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. See State v. Houey, 375 S.C. 106, 119, 651 S.E.2d 314, 321 (2007). Common sense governs in evaluating void-for-vagueness questions. United States v. Biocic, 928 F.2d 112, 114 (4th Cir. 1991) ("Indeed, the legal test of statutory vagueness is one that is expressed essentially in terms of common sense.").

A reviewing court must start with a presumption of constitutionality. S.C. Dep't of Soc. Servs. v. Michelle G., 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014) ("This Court begins with a presumption of constitutionality."); see also Curtis v. State, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) ("This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid."). The Court of Appeals disregarded the presumption of constitutionality and erred in finding that the Town's Ordinances were impermissibly vague. In fact, the Opinion conflated language from cases on the rule of lenity (stating that criminal statutes should be "strictly construed") with cases discussing the void for vagueness doctrine, resulting in an incorrect presumption of unconstitutionality. See **(Opinion, 5).** While one of the foundations of the rule of

lenity is the concept of fair notice—the idea that those trying to walk the straight and narrow[10] are entitled to know where the line is drawn between innocent conduct and illegality—the rule of lenity requires any doubt about an ambiguous statute's scope be resolved in the defendant's favor. See State v. Miles, 805 S.E.2d 204, 210, 421 S.C. 154, 164 (Ct. App. 2017) (citing Berry v. State, 381 S.C. 630, 633, 675 S.E.2d 425, 426 (2009)). The rule of lenity is an entirely different legal doctrine than the doctrine that an impermissibly vague statute is unconstitutional and void for vagueness. The Court of Appeals should be reversed because by conflating the two doctrines, the Court of Appeals incorrectly started its analysis with a presumption that the Town's Ordinances were unconstitutional.

B. The Town's Ordinances are not impermissibly vague.

The Town's Ordinances give explicit notice that contractors are required to obtain and comply with the conditions set forth in permits before constructing a dock (or any structure). Section 21-75 of the Town Ordinances, providing that no dock will be constructed without "approval of the Town of Sullivan's Island . . . ." **(TOSI Ordinance § 21-75, R. p. 66)**. Section 21-75 includes a provision that "[n]o dock shall be permitted to be constructed which extends into the channel or extends so far as to interfere with navigation." **(TOSI Ordinance § 21-75, R. p. 66)**.

The Town's general building ordinances also require proper permits and compliance therein. Town Ordinance Section 5-10 states that "[a]pplication for a building permit shall be made in writing to the . . . [town]. . ." and supported with "[p]lans and specifications adequately describing the proposed erection, construction, improvement, alteration or repair. . ." See also **(TOSI Ordinance § 5-9, R. p. 77)** (providing that "[i]t shall be unlawful to erect, construct,

[10] It is worth noting again that Murray understood the law and admitted he violated it.

improve, . . . any . . . structure . . . without first having obtained . . . a written permit. . . "); **(TOSI Ordinance § 1-7, R. p. 71).**

Respondent was convicted of violating the permit conditions. The Court of Appeals found that even though Respondent conceded he fully understood the permit condition and that he violated the permit, that the Town "failed to present evidence the docks actually interfered with navigation or in any way extended into the channel." **(Opinion, 6).** The conviction was for violating the permit. On appeal, the Court of Appeals decided to go back in time and consider whether the permit condition was appropriate, even though Respondent agreed to it and was convicted for violating the permit. For this reason, this Court should grant review and reverse the Court of Appeals.

C. Respondent had ample notice that he was required to obtain a building permit from the Town and comply with the conditions therein.

Respondent admitted that he needed a permit, his permit included a condition, and he was on actual notice of the explicit condition contained within the permit. **(R. at p. 244, l.12-p. 245, l.9)** (Respondent agreeing that the specific notations and conditions of the permit, including the condition to not build the dock beyond adjacent docks, **were part and parcel of the building permit**.).

Respondent also received written confirmation that violating the Town's Zoning Ordinances could result in criminal liability by way of a Certificate of Zoning Compliance issued by the Town on June 30, 2014, for the work to be done. **(R. at p. 88).** In a bold, capitalized, and underlined section of the Certificate entitled "**NOTICE**," the Certificate reads, in part:

> I hereby certify that I have read and understand the requirements of this permit, the conditions of approval of this permit, the conditions noted on the approved plans and that there are no restrictive covenants on the tract or parcel of land for which this permit is being requested. **I further understand that any**

deviation from the approved plans *and conditions thereof* shall constitute a violation of the Town of Sullivan's Island Zoning Ordinance.

(R. at p. 88) (emphasis, double emphasis, and triple emphasis added).

The Town's Ordinances, as discussed: 1) require that builders obtain and comply with the conditions set forth in permits; and 2) make it clear that failing to comply with a permit condition would invalidate the permit. **(TOSI Ordinance § 5-10, R. at pp. 77-78); (TOSI Ordinance § 5-9, R. at pp. 77); (TOSI Ordinance § 21-75, R. at pp. 66-67).** Town Ordinance Section 1-7 also provides notice that violating the Town's Ordinances constitutes a misdemeanor, and violators will accordingly be punished. **(TOSI Ordinance § 1-7, R. at p. 71).** Respondent had ample notice of these prohibitions. Respondent even admitted at trial that he had notice of the Ordinances and what they required, noting that he had complied with or attempted to comply with the Ordinances many times prior. **(R. at p. 240, ll. 8-10); (R. at p. 242, l.24-p. 243 l.9).**

Further, Respondent had experience building other docks, and being required to comply with Town Ordinances, on Sullivan's Island. **(R. at p. 231, l.16-p. 232 l.1)** ("Q: Okay. And have you constructed docks on Sullivan's Island? A: I have. Q: All right. Other than Mr. Thompkins' dock? A: I have. Q: And Isle of Palms? A: I have. Q: Any idea, approximately, how many docks you have constructed in your career? A: Hundreds."); see also, State v. Neuman, 384 S.C. 395, 405, 683 S.E.2d 268, 273 (2009) (". . . we find a person of ordinary intelligence and judgment would be sufficiently apprised of conduct that would come within the purview of the statute. Clearly, one who is incarcerated in a correctional facility is aware of his status as an inmate and conduct the statute makes criminal.").

The record is clear that Respondent had actual, clear, written notice that he would be in violation of the Town's Ordinances if he deviated from the approved plans for the to be constructed

dock. Section 1-7 makes it clear that such violation of the Town Zoning Ordinance is criminal. **(TOSI Ordinance § 1-7, R. at p. 71).**

Even if Respondent claimed he was not aware of Section 1-7 (or any of the Town's Ordinances), which he has never asserted, citizens are charged with notice of laws and ignorance or mistake of law is no excuse. State v. Latimore, 390 S.C. 88, 98, 700 S.E.2d 456, 462 (Ct. App. 2010), aff'd as modified, 397 S.C. 9, 723 S.E.2d 589 (2012) ("Even if we presume [a defendant] was not notified of the changes to the statutory scheme, ignorance of the law is no excuse."); Cheek v. United States, 498 U.S. 192, 199, 111 S. Ct. 604, 609 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system . . . Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law.")

A person of reasonable intelligence using common sense would thus know what the Town's Ordinances proscribe or allow. The Town's Ordinances clearly require individuals and contractors to obtain and comply with permits before construction. Respondent admitted at trial that he knew of the requirements. For this additional reason, this Court should grant review and reverse the Court of Appeals.

D. Respondent had notice that no dock on Sullivan's Island can be constructed so as to interfere with navigation.

Despite the fact that Respondent was convicted of violating the Town's prohibitions on constructing without permit compliance, the Court of Appeals held another portion of 21-75, which prohibits construction of docks that interfere with navigation, was unconstitutionally vague. As discussed above, such a holding was an error. Assuming *arguendo*, that Murray was convicted of building a dock that extended past other docks, he had notice that such an act would result in criminal liability. Section 21-75, in addition to requiring permits for dock construction, provides

that "[n]o dock shall be permitted to be constructed which extends into the channel *or extends so far as to interfere with navigation.*" **(TOSI Ordinance § 21-75, R. pp. 63-67)** (emphasis added).

The language contained in Section 21-75 is simple and precise. The Town's Building Official explained that common sense dictates that on a winding creek docks that protrude further seaward than the adjacent docks would interfere with navigation and create a safety hazard: ". . .you're in a boat and you're riding down a creek . . . and you're using those docks as a guide to go down the dock . . . [a]nd if one's sticking out there, you run (*sic*) in that dock." **(R. at p. 218, ll. 6-13).** Furthermore, Respondent was clearly on notice of the prohibitions provided in 21-75 because the condition was contained in his building permit.

While not part of its holding, the Opinion stated that the Town did not present evidence at trial that the dock actually interfered with navigation. That statement ignores the common sense that the void for vagueness doctrine requires courts to employ. There was no dispute that this dock was built extending more than 9 feet further than the adjacent docks on a narrow creek behind Sullivan's Island. See **(R. pp. 24-25).** As explained by the building official at trial, the alignment of docks is used for navigation. When one dock is built significantly out of line with the adjacent docks, common sense dictates that such a condition interferes with navigation.

The Court of Appeals' decision conflicts with a long line of cases on the issue of the void for vagueness doctrine. See State v. Neuman, 683 S.E.2d 268, 274, 384 S.C. 395, 408 (2009) (holding that section 24–13–450, proscribing conduct for the offense of taking of hostages by an inmate, is not unconstitutionally vague); State v. Smith, 275 S.C. 164, 166, 268 S.E.2d 276, 277 (1980) (finding the kidnapping statute was not unconstitutionally vague because the terms of the kidnapping statute are clear and unambiguous.); State v. Greene, 255 S.C. 548, 560, 180 S.E.2d 179, 185 (1971) (holding "prison riot statute," the pre-cursor to section 24–13–430, was not

unconstitutionally vague in that it did not define the crime of "riot" given the statute in question was directed at prisoners and the common law offense of riot was well established and understood by the ordinary man); Town of Mount Pleasant v. Chimento, 737 S.E.2d 830, 839, 401 S.C. 522, 535 (2012) (noting that a person of reasonable intelligence would understand the gaming statute to prohibit gambling on a card game at a house where players were invited on a regular basis to engage in this activity, especially where, while not a profit-making commercial activity, the players were required to contribute money to cover the host's expenses.).

Further, it is worth noting again that in this specific case, Murray knew exactly what the rule required in terms of the specific dock at issue—he could not build it extending further into the creek than the adjacent docks. The Court should grant the Town's Petition for a Writ of Certiorari and issue an opinion reversing the Court of Appeals.

III. The Court of Appeals' decision conflicts with prior decisions of this Court because it is based solely on arguments that were not raised to and ruled upon by the circuit court.

In rendering its Opinion, the Court of Appeals ignored one of the most well-established tenets of appellate procedure—it based its Opinion on arguments that were not raised to and ruled upon below. It is axiomatic that for an issue to be preserved for appellate court review, it must have been raised to and ruled upon by the lower court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); see also, Wierszewski v. Tokarick, 308 S.C. 441, 444, 418 S.E.2d 557, 559 (Ct. App. 1992) ("We do not address this point, because it was not raised in the petition or addressed in the order. An issue is not preserved for appeal merely because the trial court mentions it."); State v. Passmore, 363 S.C. 568, 583, 611 S.E.2d 273, 281

(Ct. App. 2005) (citing State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691(2003); State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (Ct. App. 2002)).

In addition to the above, because an appellate court does not have jurisdiction over issues not raised before it, considering unpreserved issues is an improper jurisdictional overreach. Ulmer, 369 at 490, 632 S.E.2d at 861 (2006) ("[the Court] has appellate jurisdiction over only those matters which are properly appealed."). The Court of Appeals only had jurisdiction to review issues raised and ruled upon by the *circuit court*. See City of Rock Hill v. Suchenski, 374 S.C. 12, 16, 646 S.E.2d 879, 880 (2007) (". . . we may only review the circuit court's order for errors of law. We cannot determine error regarding an issue not addressed by the circuit court."); See also Williams v. Williams, 329 S.C. 569, 579, 496 S.E.2d 23, 29 (Ct. App.1998), *rev'd on other grounds,* 335 S.C. 386, 517 S.E.2d 689 (1999) ("The circuit court has the authority to hear motions to alter or amend the judgment when it sits in an appellate capacity, and these motions are required in order to preserve issues for further review by the Court of Appeals or the Supreme Court in cases where the circuit court fails to address an issue raised by a party.").

After the municipal court found Respondent guilty of failing to comply with the conditions set forth in his dock construction permit, Respondent appealed the municipal court's decision. **(R. at pp. 29-37)**. In the municipal court's Return to Notice of Intent to Appeal, the municipal court stated:

> Based on the testimony presented, it is clear that the Defendant, Michael Murray, make a mistake building the dock further out than adjacent docks. Mr. Murray was aware of that condition from the building permit. Mr. Murray further did not turn in the asbuilt survey to the Town of Sullivan's Island as is required. Mr. Murray took responsibility for the violation and further that Mr. Murray indicated that it was not the fault of the homeowner, Jason Thompkins.

(R. at p. 55).

In the appeal to the circuit court, Respondent raised the following issues: 1) no evidence existed to show that the dock interfered with navigation; 2) Ordinance Section 21-75 does not require ensuring that docks do not exceed the length of existing docks;[11] and 3) Respondent complied with Ordinance Section 5-10, which requires compliance with valid construction permits, by seeking a permit. **(R. at pp. 32-34).**

In the circuit court's Form 4 Order denying the appeal, the circuit court issued its ruling and stated: "[b]ased on the record, [Respondent] acknowledged notice of the zoning laws and permit requirements and was found in violation. [Respondent] has failed to demonstrate an error of law." **(R. at p. 3).** In Respondent's Motion to Alter or Amend the ruling of the circuit court, Respondent stated the following as his basis for that motion:

> The grounds for this Motion are as follows . . . Th[e] ruling does not address the primary issue raised by Defendant which is whether the Town of Sullivan's Island can enforce a requirement that has not been promulgated and is merely an interpretation by the Town of its authority and whether such enforcement can be in the form of criminal prosecution . . . the Town cannot enforce a requirement that a newly constructed dock not exceed the channelward extension of the docks on either side as such requirement is admittedly Town policy and not embodied in the Town's very specific ordinance governing dock construction.

(R. at pp. 56-57). Critically, Respondent did not even mention the words or phrases "void for vagueness" or "vagueness" or "notice" in his Motion to Alter or Amend the circuit court's decision. **(R. at pp. 56-57).**

In denying Respondent's Motion, the circuit court stated as follows:

> 1. There is no express requirement in the Town of Sullivan's Island's Ordinances, including Chapter 21-75 which would prohibit docks from extending any further than adjacent docks.

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[11] Issues must be raised to the lower court with sufficient specificity to be preserved. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (to be preserved, issues must be "raised to the trial court with sufficient specificity."). Furthermore, the circuit court did not rule on this issue, and it was not raised in a motion to reconsider. **(R. at p. 3); (R. at pp. 56-57); (R. at pp. 1-2).**

2. Chapter 5-10 of the Town of Sullivan's Island's ordinances require an applicant seeking to construct to secure a building permit application.

3. Defendant/Respondent (sic) submitted an application and accepted a building permit from the Town that included provisions that the dock not extending any further into Cove Creek than adjacent docks.

4. It is undisputed that the dock extends further into Cove Creek then the adjacent docks.

(R. at pp. 1-2).

Despite the issue of vagueness not having been raised to and ruled upon by the circuit court, Respondent raised that unpreserved issue on appeal. **(Appellant Br. 9-25).** The Town argued that those issues were not preserved. **(Resp't Br. at pp. 13-16).** The Court of Appeals did not even address the Town's preservation arguments, despite the abundant precedent stating that litigants cannot raise unpreserved issues to the appellate court.

Simply put, the Court of Appeals erred and failed to follow precedent when it based its entire decision on issues not raised to and ruled upon by the lower courts. The Court should grant Petitioner's Petition and issue an opinion vacating the Court of Appeals.

CONCLUSION

Therefore, for these reasons, the Town respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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November 1, 2021
Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5856 (S.C. Ct. App. filed September 1, 2021)
Appellate Case No. 2018-000511

Town of Sullivan's Island ..... Petitioner,

v.

Michael Murray ..... Respondent.

PROOF OF SERVICE

I certify that on **November 1, 2021**, I have served **PETITIONER'S PETITION FOR CERTIORARI**, by electronic mail, in accordance with the August 25, 2021, order of the Supreme Court, Appellate Case No. 2020-000447) on counsel of record as follows:

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Paralegal

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From:	Nancy Jane Dennis
To:	Mary Shahid (mshahid@nexsenpruet.com); Steve Groves
Cc:	John P. Linton, Jr.; Trenholm Walker; John Dodds (john@cisadodds.com)
Subject:	Appellant Case No. 2018-000511 TOSI v Michael Murray
Date:	Monday, November 1, 2021 4:49:45 PM
Attachments:	image128490.png 11-01-21 Petition for Writ Certiorari.pdf

Counsel,

Attached for service by electronic mail only please find Petition for Writ of Certiorari and correspondence to the Supreme Court with copy to the Court of Appeals.

Nancy Jane Dennis
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November 1, 2021

EMAIL

Hon. Patricia A. Howard
supctfilings@sccourts.org
Clerk of Court for S.C. Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: Town of Sullivan's Island v. Michael Murray
Appellate Case No. 2018-000511
WGFL File 6670.018

Dear Ms. Howard:

We are filing and serving Respondent's Petition for Writ of Certiorari and Proof of Service by electronic mail only, with a copy to the Court of Appeals. Pursuant to the Court's Order of August 25, 2021 regarding methods of electronic filing and service under Rule 262, we will not be filing an Appendix unless requested by the Court.

Enclosed with this correspondence is the filing fee of $250.

Thank you very much for your courtesies in this matter

Sincerely,

WALKER GRESSETTE FREEMAN & LINTON, LLC

John P. Linton, Jr.

Attachment (Petition and POS)
Enclosure (Check)
c: Hon. Jenny Abbott Kitchings (ctappfilings@sccourts.org)
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