THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

C.A. No. 2009-CP-10-001551

Robert L. Chimento, Scott Richards, Michael Williamson,
Jeremy Brestel, and John T. Willis . . . . Respondents,

v.

Town of Mount Pleasant . . . . Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

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II.

Did the Circuit Court err in reversing Respondents' convictions for illegal gambling by concluding that § 16-19-40(a), in place for over 200 years, is unconstitutionally void-for-vagueness and overbroad?

STATEMENT OF THE CASE

Respondents were charged with illegal gaming pursuant to S. C. Code Ann. Section 16-19-40. A bench trial was held before the Honorable J. Lawrence Duffy, Municipal Judge of the Town of Mt. Pleasant, on February 13, 2009. In an Order, dated February 19, 2009, Judge Duffy found the Respondents guilty of violating § 16-19-40, concluding that the statute prohibits gambling in all forms and forbids the playing of "any game with cards or dice." Record at ___. The Court ordered Respondents "to pay the fines and assessments required by such a violation." *Id.*

Respondents appealed their convictions to the Circuit Court. In an Order, dated October 1, 2009, the Honorable R. Markley Dennis, Jr., Circuit Judge for the Ninth Judicial Circuit, reversed the convictions. Judge Dennis concluded that:

> ... the conduct in which [Respondents] ... were engaged – the playing of Texas Hold'em in a private residence – does not violate § 16-19-40 .... As an alternative and independent basis for the reversal of [Respondents'] convictions, this Court concludes that § 16-19-40(a) is unconstitutionally vague and overbroad.

Record at ___.

This appeal followed.

STATEMENT OF FACTS

Based upon information provided by a confidential informant, the Mount Pleasant Police Department learned "of an illegal gambling operation at 1405 Glencoe Street." The informant provided information "including details of large numbers of people from all over the Lowcountry that meet on specialized dates, prearranged dates, and gamble for money." Record at ___. Based upon this information, Officer Justin Hembree of the Mt. Pleasant Police Department decided to initiate both stationary and mobile surveillance of the Glencoe Street residence. Surveillance revealed that "large numbers of cars and people [were] coming to and from the residence" and that "there were so many cars that oftentimes they would park at the CVS store behind the residence and walk to and from the residence." *Id.*

Using this information and observation, and in consultation with his supervisor, Officer Hembree "decided to send a confidential informant in with an audio/video recording device and sufficient police funds to gamble." *Id.* Hembree testified that this video revealed the following information:

> ... there was two large tables. One in the kitchen area, one in the den, large numbers of people, a variety of different age groups, anywhere from what appeared to be early 20's to possibly late 70's, early 80's. I observed that there was gambling with cards for money. There appeared to be a buy-in, and there appeared to be money won and money lost from what I saw. Each person would expend a certain amount of money for a certain quantity of chips. And some of the folks knew each other. ....

Record at ___. The video indicated that the house was "sparsely furnished." Record at ___.

As a result of this information, the Mt. Pleasant Police Department then procured a search warrant. Seven officers were used to execute the warrant at the Glencoe Street House on April 12, 2006. All five of the Respondents, among approximately twenty people, were

inside. There were two green felt tables set up and a third table was also available. Record at ___. Cards were on the table and money was "in front of each player." Record at ___. Officer Hembree, upon entry, spoke with the owner of the dwelling, Nathan Stallings. Hembree testified that he then "learned [from Stallings] that the games were found on the Internet, that often there would be large numbers of people, that he sometimes did not know the folks that were coming to and from the residence, and there was a $20 buy-in, that he [Stallings] would make $2 from each hand, and that this was his sole job." Record at ___. Officer Hembree testified further that Stallings was in possession of over nineteen hundred dollars in the house. Record at ___. Hembree thus concluded that, based upon his training and experience, the results of the surveillance, the video tape and his observations inside the house on April 12, 2006, that, in his opinion, "this residence was used for the express purpose of gaming, or gambling." Record at ___. Officer Hembree also concluded that the five Respondents were playing a game of cards for money on the evening in question. Record at ___.

At trial, Nathan Stallings testified that the buy-in for the poker game varied from $5 to $20. Stallings further testified that at any one time, the amount on the table could be more than $200. Record at ___. He further stated that his "rake" was 50 cents, but that he did not take a rake for every hand. His testimony was that the rake was to cover only food and beverages. Record at ___. Stallings also testified that the poker games started out being held once every week, but that a second game was subsequently added, resulting in games being conducted every Wednesday and Sunday night. These poker games always started at 7:00

p.m. Stallings' testimony was that if 10 people were at a table and "everybody went all in, you could win 200 bucks." Record at ___.

Stallings further testified that he lived at the house at 1405 Glencoe Street with his girlfriend. His testimony was that a web site on the Internet provided people desiring to participate and play with information concerning the games. According to Stallings, there was no standard for who could and who could not play in the poker games and that anybody who answered the ad on the internet could come over and play. He stated that "[i]f you knew someone that was already established on meetup.com," and "you were a friend of a friend," participation in the games was permitted. Record at ___. Mr. Stallings also admitted that he had been charged with and had pled guilty to operating a "gaming house" on the night in question. Record at ___.

Respondent Jeremy Brestel admitted on cross examination that a person could lose a "substantial amount of money" at the games. Record at ___. He also verified that the internet website served as a "meet up site." Record at ___.

The defense called Mike Sexton, a commentator on the World Poker Tour, from Las Vegas. Sexton testified that, in his opinion, "skill predominates over chance when it comes to playing poker." Record at ___. However, Sexton admitted that chance is an element in poker and that "if the best hand won every time there would be no game of poker." Record at ___. While Mr. Sexton was of the opinion that skill was the predominant element in poker, he also admitted that a completely unskilled player could beat an accomplished poker player, depending upon the cards dealt. Record at ___. Mr. Sexton also testified that he "was brought here by the Poker Players Alliance," an organization "that fights for the rights

of poker players." Record at ___. He further stated that he was paid a fee of $5,000 to testify. Record at ___.

Also testifying for the defense was Professor Robert Hannum, a professor at the University of Denver. The Court accepted Professor Hannum as an expert in statistics and probabilities. Dr. Hannum's testimony was that skill predominates over chance in poker. However, on cross-examination, Professor Hannum admitted that if two poker players possessed exactly the same skills, chance would be the deciding factor. Record at ___.

SUMMARY OF ARGUMENT

S.C. Code Ann. Section 16-19-40 broadly bans gambling and makes violation of the statute a crime. In virtually identical form to the present statute, § 16-19-40 has existed for more than 200 years, and has been consistently enforced by this Court through affirmance of numerous convictions thereunder. The gambling statute plainly forbids "any house [to be] used as a place of gaming" for playing "any game with cards or dice."

The Municipal Court convicted the Respondents for playing "Texas Hold'em" poker for money in a residence in Mt. Pleasant. This residence was regularly transformed into a casino-like facility, hosting large poker games with many participants, of all ages, from young to old, who were freely allowed to play after hearing of the games via the Internet. The magnitude of the games is demonstrated by Officer Hembree's testimony that he observed that "there were so many cars that oftentimes they would have to park at the CVS Store behind the residence and walk to and from the residence." Record at ___. The frequency of the games was expanded from once a week to twice a week. Record at ___. The owner of the house, Mr. Stallings, pled guilty to operating a gaming house, and admitted that he received a "rake" of fifty cents per hand (to cover food and beverages) for the games. Officer Hembree testified that Stallings told him that his "rake" was as much as $2.00 per hand. Testimony was to the effect that as much as $200.00 per hand could be lost in the games, and the figure could go higher depending upon whether players re-bought in. Record at ___. Clearly, this was no "friendly poker game" for amusement.

The Circuit Court, however, despite this wealth of evidence, and even testimony that the owner of the residence had pled guilty to operating a gambling house, reversed these

convictions. As part of that reversal, the Circuit Court struck down as void-for-vagueness and as overbroad a portion of this 200 year old statute.

It is our view that the Circuit Court erred, both in its interpretation of S.C. Code Ann. Section 16-19-40, as well as in its finding of a constitutional defect in § 16-19-40(a), where none exists. The Court's Order took into account none of this Court's many decisions regarding gaming, or those locations in which gaming is prohibited in South Carolina. Nor did the Circuit Court consider the general law of gaming in this country. Moreover, the Court's constitutional analysis was incorrect.

In the view of the Circuit Court,

> Texas Hold'em is not "gaming" within the meaning of South Carolina law because skill predominates over chance. Necessarily, then, a place devoted exclusively to the playing of Texas Hold'em is not a "house used as a place of gaming" under § 16-19-40. Because Appellants were not in a prohibited location [a private residence], their convictions under § 16-19-40 must be reversed.

Record at ___. This was legal error. The Circuit Court's analysis erroneously attempts to dissect games which are prohibited by § 16-19-40, and those games which are not, depending upon whether chance or skill predominates in the play of a particular game. Moreover, the Court incorrectly determined that "Appellants were not in a prohibited location" within the terms of the gambling statute because "the playing of Texas Hold'em in a private residence does not violate § 16-19-40 ...." Record at ___.

More specifically, by injecting a "chance versus skill" analysis the use of § 16-19-40, the Circuit Court ignored the Legislature's clear mandate that the playing of "*any game* with cards or dice" in the specified locations enumerated in the statute is expressly prohibited.

(emphasis added). When enacting § 16-19-40, the General Assembly chose not to mention games of chance at all, as it did, by comparison, in enacting §12-21-2710, the gambling device forfeiture statute.

Indeed, the municipal court considered the game here as one of skill, but, nevertheless, concluded that playing Texas Hold'em for money was still gambling pursuant to § 16-19-40. Over the course of two centuries, the Legislature could have expressly placed the words "chance" in the statute, but has not. If the Circuit Court's ruling stands, the statute will thus have been effectively rewritten after all these many years, and the gambling laws in this State significantly altered.

One obvious reason that "chance" need not be determined with respect to a particular game for purpose of the gambling statute is that the Legislature sought to ban all "gaming" for stakes at designated locations. In other words, in the General Assembly's view, the ills resulting from games played for money does not depend upon the particular game or the nature in which it was played. The many problems associated with gaming resulted from the playing of games for money, not whether the particular game is one of chance or skill.

Further, it is apparent that the General Assembly considered "any game with cards or dice" necessarily to be a game of chance, and thus illegal when played in the places prohibited by the statute. Thus, when the Legislature made "any game with cards or dice" played for money illegal, it recognized such games – all such games – are games of chance. As the Supreme Court of Rhode Island has stated, "... games that depend on an unpredictable and uncontrollable variable, such as the case in games involving cards and dice, are, *as a matter of law*, games of chance. *In re Advisory Opinion to the Governor*, 856 A.2d 320, 329

(R.I. 2004). Thus, it "requires no special fact-finding process to determine whether an element of chance is the dominant factor" in such games. *Id.*

Yet, the Circuit Court disregarded these obvious points and added the words "chance" and "skill" to its analysis of the statute, even though the Legislature chose not to insert those words. Instead, for almost two centuries, the Legislature has made "any game with cards or dice," played for money at the designated locations, illegal. The statute has always been construed broadly by this Court, consistently rejecting any "chance versus skill" analysis, and, we respectfully submit, that is the way this Court ought to interpret it now. See, *The State v. Scarlet Red*, 41 S.C.L. (7 Rich.) 8 (1853) [Court rejects "chance versus skill" delineation because to do otherwise would allow those who violate the Act to "escape punishment."].

Moreover, the Circuit Court also erred in misconstruing the words "house used as a place of gaming" as contained in § 16-19-40. Applying the rule of lenity applicable to criminal statutes generally, the Circuit Court incorrectly determined that, because § 16-19-40 does not define the word "house" for purposes of the phrase "house used as a place of gaming," such statute does not apply in this case because the gambling occurred in a private residence. In the Court's opinion, it "is thus equally plausible, if not more so, that the term 'house' is not intended to refer to a residence at all, but rather to a place maintained for the express and sole purpose of gambling." Record at ___. Accordingly, the Court found that "[t]his ambiguity in the statute compels this Court to adopt the more narrow reading of the statute and conclude that a residence is not a 'house of gaming' simply because persons are invited there on a regular basis to play Texas Hold'em." Record at ___.

The Circuit Court's reasoning in this regard immunizes from our gambling statute's reach large-scale casino gambling merely based upon the fact of where that gaming occurs. Common sense dictates that a gambling house can just as easily be established in a residence as in a bar or poolhall. Certainly, that was the case here: the residence was transformed into a virtual casino, twice weekly. People of all ages freely came and went, as they pleased, learning of the games through an Internet site, in order to play Texas Hold'em poker for money. Officer Hembree testified that so many came the overflow crowds had to park at the CVS parking lot. Record at ___. In short, Section 16-19-40 does not provide the immunity from prosecution which the Circuit Court created.

The Circuit Court's error is demonstrated by the fact that the lower court ignored the wealth of authority, both in this State and elsewhere, which has found that a private residence may, depending upon the circumstances, be transformed into a "gaming house" or a "place of gaming." Indeed, in *City Council of Greenville v. Kemmis*, 58 S.C. 427, 36 S.E. 727 (1900), this Court affirmed a conviction pursuant to a municipal ordinance under these very circumstances. The ordinance prohibited a person from permitting "his, her or their enclosure or place or house to be used" as a "place for gaming with cards ... for money or other stake ...." Yet, even though the card game occurred in a private hotel room, which had been rented by the defendant, this Court, nevertheless, concluded that the ordinance at issue had been violated.[1] Rejecting the argument that a private hotel room did not constitute a "house" or "place" of "gaming," this Court stated:

[1] The Court in *Kemmis* reserved judgment with respect to any interpretation of § 16-19-40. However, as will be seen below, a number of other decisions of this Court addressed the applicability of § 16-19-40.

> ... if we were at liberty to inquire into the propriety of the means which they [the City] saw fit to adopt to suppress the pernicious vice of gaming, we would be inclined to agree with them that ... a very efficient means would be that which they adopted, for if persons who rent furnished rooms for lodging in a city like Greenville are permitted, with impunity, to use their rooms as places of gaming, the vice would flourish, even if every public gaming house in the city were entirely suppressed.

36 S.E. at 729. Thus, although this Court did not construe § 16-19-40 specifically, it held that gambling is gambling, wherever it occurs, and thus one's private hotel room may be transformed into a "place for gaming." Moreover, for purposes of the Greenville ordinance, the hotel room was considered the renter's "castle" and was his "house" just as surely "as the poor man's hut in the wilderness." *Id.* Finally, this Court did not attempt any analysis of whether the particular "game" being played was one of "chance" or "skill" for purposes of whether "gaming" occurred. The Ordinance – very similar in language to § 16-19-40 – was violated simply by allowing a card game for money to be played in one's private residence.

Further, long ago, in *State v. Brice*, 2 Brev. 66, 1806 WL 329 (1806), this Court rejected any argument that § 16-19-40 does not apply to a private dwelling or residence. In *Brice*, the Court refused to arrest judgment on a conviction under a virtually identical predecessor to § 16-19-40. The indictment had charged the defendant Brice with permitting and encouraging in his dwelling house certain persons to play at cards, dice, etc. Over the dissent of Justice Brevard, who reasoned that the statute did not intend "for a casual game being played in a man's house" to be a violation of the law, the Court denied the motion to arrest judgment. Other decisions of this Court, concluding that § 16-19-40 may indeed apply to a private residence, are in accord. *See*, *State v. Faulkener*, 13 S.C.L. (2 McCord) 438 (1823). [Court discusses the applicability of the statute to the "mansion house" and

outbuildings]. This Court's decisions are, in other words, entirely consistent with the legal principle that "[a] private residence occupied by a family can become a gaming house when it is commonly resorted to for the purpose of gaming ...." *Sharp v. State*, 93 Tex. Crim. 542, 247 S.W. 1096, 1097 (1923).

In addition, even assuming *arguendo* that the Circuit Court construed § 16-19-40 correctly, by defining a violation of the statute only if the particular game was one of chance, the Court, nevertheless, erred in finding that Texas Hold'em poker is predominately a game of skill. As noted, card games are necessarily chance games. As the North Carolina Court of Appeals recently recognized in *Joker Club LLC v. Hardin*, 183 N.C. App. 92, 643 S.E.2d 626, 630 (2007),

> [p]oker, however, presents players with different hands, making the players unequal in the same game and subject to defeat at the turn of a card. Although skills such as knowledge of human psychology, bluffing, and the ability to calculate and analyze odds make it more likely for skilled players to defeat novices, novices may yet prevail with a simple run of luck. No amount of skill can change a deuce into an ace.

And, as this Court determined in *State v. O'Neal*, 210 S.C. 305, 42 S.E.2d 523 (1947), in upholding a conviction for keeping and maintaining a gaming house, poker, as a game of cards, constitutes "gaming." This principle was confirmed on cross-examination by Dr. Hannum, expert witness for the Respondents, when he acknowledged that, where two persons having exactly the same skill in playing poker compete against each other, the element of chance will determine the winner. Record at ___. Thus, the Circuit Court erroneously ignored the universally understood principle that "games of cards are games of chance even though the element of skill is more or less involved, since the element of chance

predominates." 135 A.L.R. 104 ("what are games of chance, games of skill and mixed games of chance and skill?"). *In re Advisory Opinion to the Governor, supra* [card games are, as a matter of law, games of chance].

Finally, the Circuit Court erred in finding § 16-19-40(a) to be unconstitutionally vague and overbroad. That Court determined that since § 16-19-40 "provides no definition of the term 'house used as a place of gaming'" and that the term "'place of gaming' must mean something more than a location where one of the subsequently enumerated games is played," § 16-19-40(a) is void-for-vagueness in this regard. Record at ___. Furthermore, in the Circuit Court's view, "§ 16-19-40(a), as written, has the potential to make criminals of virtually every man, woman and child in the State of South Carolina" and thus § 16-19-40(a) is overbroad Record at ___.

Such a parade of horribles, envisioned by the Circuit Court, is unjustified, unwarranted, and provides no basis for a determination that a provision which has been on the books and consistently enforced by decisions of this Court for over two hundred years is now deemed unconstitutional. As the municipal court noted, this Court's consistent application of § 16-19-40 strongly indicates the statute is not vague. Record at ___. As the Supreme Court of Arkansas recognized in *State v. Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992) – a statute, similar to § 16-19-40(a), and which forbids a person from keeping a "gambling house or place where gambling is carried on" – is not unconstitutionally vague. And, as will be seen below, a number of other decisions construing similar statutes, are in accord.

The convictions in this case thus may not be set aside because our gambling statute in South Carolina is old, or because it does not define terms such as "house used as a place of gaming." Because a statute is old, does not mean it is unclear, or void-for-vagueness. Nor may the Circuit Court step into the shoes of the General Assembly by adding terms such as "chance" or "skill" when the Legislature has made clear that "any game with cards or dice," when played for money or other consideration is forbidden. *See*, *State v. Robinson*, 40 S.C. 553, 18 S.E. 891 (1894) [playing dice for money violates § 16-19-40]. So long as the game of cards is played for money or other prize and the "house" is "used as a place of gaming," as the municipal court properly decided was the case here, § 16-19-40 prohibits such activities.

If Respondents do not like the law as written, their remedy is with the General Assembly, not the courts. The law cannot be changed by judicial construction or a finding of unconstitutionality where there exists on the books a perfectly valid statute, which is capable of being read and applied clearly.

Thus, the Circuit Court erred and that decision should be reversed.

ARGUMENT

I.

<u>Section 16-19-40 is applicable to these respondents and their convictions should be upheld</u>.

A. South Carolina Possesses A Longstanding Public Policy Against Gaming

While the operation or maintenance of a gambling house was considered a nuisance at common law, 66 C.J.S., *Nuisances*, § 82, gambling itself was not a common law crime. 38 C.J.S. *Gaming* § 131. Nevertheless, very early in its history, and ever since, South Carolina maintained a strong public policy against gambling.

The statute, now codified by Section 16-19-40, has been the centerpiece of the State's anti-gaming policy. In virtually identical form, § 16-19-40 has been the law in South Carolina for two centuries. Such provision states:

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

(emphasis added).

South Carolina courts have, through the years, also underscored the Legislature's efforts to prohibit and deter gambling. In *Westside Quik Shop v. Stewart*, 341 S.C. 297, 303, 534 S.E.2d 270 (2000), the Court recognized that gaming devices in general have long been recognized "as legitimately within the police power of the State" and that the Court "defers to the legislature's determination of what gaming devices must be sacrificed for the public welfare." Moreover, a federal three judge court observed in *Holliday v. Governor of South Carolina*, 78 F.Supp. 918, 924 (D.S.C. 1948), affd., 335 U.S. 803 (1948), that "[i]t is the public policy of the State of South Carolina to suppress gambling. Gambling in all forms is illegal in South Carolina." South Carolina's prohibition against gaming is thus "aimed at promoting the welfare, safety and morals of South Carolinians" and, therefore, represent a well-recognized exercise of state police power." *Casino Ventures v. Stewart*, 183 F.3d 307, 310 (4th Cir. 1999). Thus, as this Court observed in *Army Navy Bingo Garrison No. 2196 v. Plowden*, 281 S.C. 226, 228, 314 S.E.2d 339, 340 (1984), the State's power to suppress gambling is practically unrestrained." There "is no fundamental right to gamble protected by the Federal Constitution." *Id.*

B. In Order to Effectuate South Carolina's Public Policy Against Gambling, This Court Has Always Interpreted § 16-19-40 Broadly.

Gambling was commonplace in early South Carolina. European travelers to Charleston after the Revolution observed that "[b]etting and gambling were, with drunkenness and a passion for duelling and running in debt, the chief sins of the Carolina

gentlemen." Chafetz, *Play the Devil: A History of Gambling In the United States from 1492 to 1955* p. 187 (1960).

As a leading historian of the ante-bellum South has written,

> Southerners, like their Scots-Irish and English forbears, loved sports, hunting, games of chance and skill – in fact, any event that promised the excitement of deciding the inequalities of prowess among men, or among men and beasts .... Although Mississippi, Louisiana, and Texas were best known for the habit [of gaming], residents of the Carolinas, Georgia, Tennessee, Kentucky and Arkansas were also devoted to cards, dice, horse racing and cock fights. Such diversions had to involve more than simply a chance to turn a profit. The practice had to have social meaning for those participating.

Wyatt-Brown, *Honor and Violence In The Old South*, pp. 131-132 (1986).

With the dawning of the nineteenth century, gaming quickly became an enormous social problem in the State. It has been written that "[m]ost complaints were not directed at gambling itself but to the thievery and murder which it allegedly caused." One antebellum editor observed that gambling not only ruins the character, but also makes a person covet his neighbor's goods. Another editorial declared that gaming was "calculated to debase the human mind." Williams, *Vogues In Villainy: Crime and Retribution In Ante-Bellum South Carolina*, p. 47 (1959).

Recognizing the social costs which were being imposed by gambling, very early in the nineteenth century, the General Assembly took action to curb gaming in the State. Inasmuch as gambling was deemed to be "often attended with quarrels and controversies; the impoverishment of many people ... [and] corruption of the morals and manners of youth ...," the Legislature thus chose to make "the pernicious practice of gaming" a crime in South Carolina. *State v. Faulkener*, 13 S.C.L. (2 McCord) 438 (1823) indicates that gambling was

first deemed criminal as early as 1802. In *Faulkener*, the Court described the 1802 Act ("An Additional Act For the More Effectual Prevention of Gaming") as "the first act creating this offence." As *Faulkener* recognized, the 1802 Act was amended in 1816, because the Legislature deemed it necessary to address "the mischief ... complained of as arising under the [1802] act." Such "mischief" consisted of the fact that the 1802 Act was being circumvented by resort to gaming in "any outhouse [outbuilding], whether attached to the principal house or elsewhere." Thus, according to the *Faulkener* Court, in order "[t]o remedy that evil,"

> ... the act of 1816, after repeating that part of the former act, superadds the following words – "any house used as a place of gaming, or in any barn, kitchen, stable, or other out-house."

Id. Accordingly, with passage of the 1816 amendments, the Legislature sought to close any loopholes which had previously existed in the gambling statute.

C. Section 16-19-40 Has Consistently Been Interpreted by this Court as Being Applicable to a Dwelling or Residence. Thus, the Circuit Court's Exclusion of a Residence from § 16-19-40's Reach Was Error.

The issue before the Court in *Faulkener* was whether gaming conducted at a distillery house, which was an outbuilding to the principal residence, was encompassed by and thus made illegal pursuant to what is today the virtually identical § 16-19-40. The Court concluded that, clearly, it was. Recognizing the broad sweep of § 16-19-40, and the underlying reasons for enactment of the gaming statute, the Court summarized as follows:

> [n]ow what is the meaning of the words "out house?" Taken literally, they must mean any house separate and apart from the principal or mansion house.

> There is nothing in the act to limit their meaning to the out houses appurtenant to the mansion house. The policy of the law should lead us to extend it to out houses of every description. For its [§ 16-19-40's] professed object is to "prevent the pernicious practice of gaming." With that view, it is made to embrace high ways, open fields and race paths, kitchens, barns, stables and every other *out house*. It would have been difficult to have made use of the words more comprehensive. Both, the letter and the spirit of the act, therefore, seems to lead to the same construction. If gaming has a tendency to lead to quarrels and controversies, and to the corruption of morals, etc. when carried on in an open field, that tendency cannot be much lessened by carrying it on at a still house. And although penal laws are not to be extended by construction, yet the policy of the law is to be regarded.

There can be no doubt, therefore, that in *Faulkener*, this Court recognized that § 16-19-40 may be applied to all gaming occurring in residences or dwelling houses. In its analysis, the *Faulkener* Court used the term "mansion" or "mansion house" on at least two occasions. In its archaic form, a "mansion" or "mansion house" means simply a residence or dwelling. See thefreedictionary.com. See also, *The American Heritage College Dictionary* (3d ed.) As noted in *Black's Dictionary* (Revised 4th ed.), a "mansion" is a "dwelling-house or place of residence, including its appurtenant outbuildings."

Moreover, in *State v. Brice*, 2 Brev. 66, 1806 WL 329 (1806), this Court squarely concluded that § 16-19-40 applies to a dwelling or residence. In *Brice*, the defendant was indicted for permitting and encouraging the playing of cards, dice, etc. in his dwelling house. Over a vigorous dissent by Justice Brevard, the Court denied a motion to arrest judgment which had been made on the basis that "the offense laid was not such a one as is described by the act of 1802." According to Justice Brevard, the argument was that the indictment did not state that "the defendant kept his dwelling for gaming purposes, or that it was his practice to allow persons to game therein; but only that he encouraged and permitted certain persons

to play therein without asserting that they did actually play therein." Without written opinion, the majority rejected the point made in Justice Brevard's dissent that "[t]he legislature would not intend, that for a casual game being played in a man's house, he should forfeit the penalty."

Thus, based upon *Brice*, as well as *Faulkener*, it is clear that the Court long ago rejected the Circuit Court's reasoning in this case that the rule of lenity requires § 16-19-40 to be construed as not encompassing a residence or dwelling house. Indeed, *Faulkener* makes clear that the public policy underlying § 16-19-40 – to ban the "pernicious practice of gaming " in all forms and at all locations – mandates a broad, comprehensive construction, consistent with that policy. While acknowledging the rule of lenity, *Faulkener* expressly found that such rule of construction *may not be used* to defeat the underlying legislative purpose of the statute.

Accordingly, as this Court stated in *State v. O'Neal*, it "is the general rule that where the proprietor of a place not kept for the purpose of gaming, allows gaming to be carried on, in which he participates, or from which he in some way receives a benefit, he may be convicted as the keeper of a gaming place." 42 S.E.2d, *supra*, at 527. In other words, this Court has expressly noted that a place may be transformed into a place of gaming regardless of its principal use. Therefore, a house "used as a place of gaming" may include a dwelling or residence if that is the building where, as here, the gambling occurs.

This Court's rulings in *Faulkener*, *Brice* and *O'Neal* are consistent with the general law in this area. It is well recognized that, pursuant to statutes allowing a "house" or "place" to be used for gaming,

> ... one who knowingly permits property or premises under his control to be used as a place to bet and wager to gamble with cards or dice may be convicted even though the premises so employed constitute his private residence ....

38 Am.Jur.2d *Gambling* § 136. See also 6A McQuillin, *Mun. Corp.* § 24:138 (3d ed.) ["A common gaming house may consist of a single room rented in a house of many rooms ...."]. As the North Carolina Supreme Court appropriately reasoned, "[t]he fact that the keeper [of the gaming house] has his bed, or takes his meals where the gaming is done, does not necessarily change the character of the house. One might turn his dwelling house, his sleeping chamber, his office building or business house into a gaming house by allowing persons to resort thither from time to time for gaming purposes." *State v. Black*, 94 N.C. 809, 1886 WL 987 (1886).

And, in *Morgan v. State*, 42 Tex. Crim. 422, 424, 60 S.W. 763 (1901), the Court stated that "a private residence can be made a gaming house." There, the Court noted that "[t]he evidence further shows that one particular room, to wit, the kitchen and dining room was continuously used for the purpose [of gaming]." See also, *Simons v. State*, 56 Tex. Crim. 339, 120 S.W. 208, 210 (1909) [allowing the playing of poker in a residence on several occasions for money constituted the keeping of a gaming house; "[t]o hold otherwise, in the fact of this record, would permit the statute against gambling to be nullified on the ground that it was sheltered beneath the roof of a private residence. The fact that it is a private residence, if devoted to gambling, can make no difference."]; *Nickols v. State*, 111 Ala. 58, 20 So. 564 (1896) ["Prima facie, a dwelling is a private place, but where the evidence tends to show that it is used for other than private purposes, and as a resort to those who would

indulge in gaming, the question of its being also a 'public place' within the meaning of the statute, is properly left to the jury." Thus, a back shed of a dwelling may be within gaming statute]; *Thrasher v. State*, 168 Ala. 130, 53 So. 256 (1910) [room of dwelling may, depending on facts, constitute a public place used for gaming]. City *Council of Greenville v. Kemmis, supra* [person's private hotel room is a "place of gaming" pursuant to municipal ordinance].

It is also important to note that other statutes enacted by the General Assembly regarding gaming make it clear that the Legislature has not deemed § 16-19-40 to be inapplicable to residences. For example, § 17-13-70 authorizes the issuance of a warrant by judicial officers of a municipality for "any of the criminal laws against gambling [being] ..." violated; such warrant is to obtain entry into "*any closed door or room* within such city, *wherever* such offense is alleged to prevail." (emphasis added). Similarly, § 22-5-10 provides that

> [a]ny magistrate residing in any incorporated city or town of this State, on information by oath of any credible witness that any of the criminal laws against gambling is being violated, may grant his warrant ... to break open and enter any closed door or room within such city, *whenever* such offense is alleged to prevail.

(emphasis added). It is evident from these statutory provisions that, contrary to the Circuit Court's ruling, the Legislature does not consider that § 16-19-40 to offers immunity if such gambling occurs inside a residence or dwelling; these provisions authorize warrants to be issued for violation of "any of the criminal laws against gambling" [including § 16-19-40] "wherever such offense is alleged to prevail," even if occurring in "any closed door or room." Without doubt, such broad authority includes residences. See also, *Op. S.C. Atty. Gen.*, No.

2188 (November 2, 1966) ["Where an officer goes to the house of another, the person dwelling therein invites the officer inside, the officer observes gambling and thereupon arrests the gamblers, it is not necessary that the officers have either a search warrant or an arrest warrant. [Opinion of now Judge Goolsby].

Clearly, the evidence presented to the municipal court was overwhelming that the residence in question was a "house used as a place of gaming" within § 16-19-40. It was used twice weekly for large scale poker games by those who learned of the Texas Hold'em games through the Internet. Participants paid money to play poker and won money if they succeeded. Officer Hembree's testimony, as well as the videos introduced, demonstrate that large numbers of people of all ages came to play poker for money, little different than had they gone to a casino to gamble. Record at ___. This was hardly a "friendly game of cards" to while away the evening.

D. The Circuit Court's Conclusion That Poker Is a Game of Skill, And Thus Not "Gaming" for Purposes of § 16-19-40, Was Also Error.

The Circuit Court erroneously applied the "dominant factor" test – a test which deems a game predominantly involving skill, rather than chance, as not constituting gambling – in finding that Texas Hold'em does not violate § 16-19-40.[2] In doing so, the lower court ignored the clear language contained in § 16-19-40(a) that "any game with cards or dice" is prohibited by the statute (with certain enumerated exceptions, not here applicable). Such unambiguous language thus does not permit the Circuit Court to segregate particular card

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[2] The "dominant factor" test was discussed at length by Justice Burnett in his dissenting opinion in *Johnson v. Collins Entertainment Co., Inc.*, 333 S.C. 96, 111, 508 S.E. 2d 575, 583 (1998) (dissenting opinion of Burnett, J.)

games – such as Texas Hold'em poker – from other games on the basis that the game is predominantly one of skill and thus not "gaming." In essence, therefore, the Circuit Court rewrote § 16-19-40. A court may not use the rules of interpretation to alter or amend a statute. *Timmons v. S.C. Tricentennial Comm.*, 254 S.C. 378, 175 S.E.2d 805 (1970) [where language of statute is clear and explicit, the Court cannot rewrite the statute and inject matters not in the legislative language]. The General Assembly, in enacting § 16-19-40, did not write that only those "games with cards or dice which are games of chance" are prohibited. "Any" means all. Yet, the Circuit Court failed to consider this clear, all encompassing language of the statue in its analysis. As the municipal court here determined, the Legislature has prohibited "any game with cards or dice" in the places specified. Record at ___.

It is thus clear that the Circuit Court did not need to define "gaming" for purposes of § 16-19-40, by employing the "dominant factor" test. As noted above, the plain language of § 16-19-40, itself defines "gaming" to include "(a) any game with cards or dice." Such a comprehensive legislative determination is consistent with the general legal principle that "[e]ngaging in playing any game of cards in which money, property, or other thing of value is won or lost is gaming within the meaning of statutes prohibiting and penalizing gaming." 38 Am.Jur.2d *Gambling* § 49.

Moreover, *City of Greenville v. Kemmis, supra* rejects any conclusion that playing poker for money is not "gaming." There, the Court upheld a conviction under a Greenville Ordinance which was similar to § 16-19-40. Such Ordinance prohibited allowing a person's "enclosure or place or house to be used as a place of gaming with cards ... for money or other

stake." The card game occurred in the defendant's rented hotel room. While the principal issue in *Kemmis* was whether a person's hotel room constituted a "place" or "house" for gaming, there is also no doubt that the Court considered the card game, played for money (including poker chips), to be "gaming." This Court concluded that "even though the legislature may have passed a statute in reference to the offense against the state of gaming, the municipal corporation of Greenville is not there by restricted from making further regulations upon the same subject, which, of course, have no operation except within the corporate limits of Greenville." 36 S.E. at 729. Furthermore, the *Kemmis* Court found that the City's power to further regulate "gaming," which, in that instance, involved the playing of cards for money, was justified:

> ... if we were at liberty to inquire into the propriety of the means which they [City of Greenville] saw fit to adopt to suppress the pernicious vice of gaming, we would be inclined to agree with them that in order to effect the laudable purpose of a very efficient means would be that which they adopted, for if persons who rent furnished rooms for lodging in a city like Greenville are permitted, with impunity to use their rooms as places for gaming, the vice would flourish, even if every public gaming house in the city were entirely suppressed.

Id.

It is important to stress that the *Kemmis* Court did not deem it necessary to determine whether the particular card game which was played in that case was a game of chance or skill. Pursuant to the Ordinance reviewed in *Kemmis* – as in the case with § 16-19-40 – *any game played with cards or dice for money* was considered "gaming." Such analysis, the Circuit Court did not, in this instance, undertake. Instead, the Circuit Court essentially

rewrote § 16-19-40, by limiting those games prohibited by § 16-19-40 to games of chance, even though the Legislature long ago used the language "any games with cards or dice."

State v. Laney, 38 S.C.L. (4 Rich.) 193 (1850) is also instructive. In *Laney*, an indictment charged that the defendant "wilfully and unlawfully" did "game" with a slave and bet on the said game, in violation of a statute to that effect. Motions for arrest of judgment and for a new trial were made by the defendant. This Court noted that, pursuant to the 1816 statute prohibiting gambling (§ 16-19-40), "[e]very playing at cards is not prohibited by that statute; it is only criminal when done at particular places; the place, therefore must be alleged, because that enters into the definition of the offense."

Most importantly, for purposes here, this Court tellingly rejected defendant's argument that the indictment failed to allege the specific game involved in the charge, and thus was defective. By way of analogy, the Court expressed its view as to how the term "game" or "gaming" as used in §16-19-40 should be construed. Rejecting the defendant's argument that "gaming" encompassed only "some unlawful game," and not all games, the *Laney* Court stated:

> [t]he indictment is framed in the words of the statute, and that according to the general rule would be sufficient. But [defendant's] ... reply to this is, that *game* means a sport or amusement – and taking the whole clause, it is manifest the Legislature meant by the word game some unlawful game, and this ought to be set out, that the Court may know whether the game is one prohibited by the law. Assuming that, by the word 'game,' the Legislature meant playing at some unlawful or prohibited game, *it is immaterial what the game was. It would be equally within the prohibition whether played with cards or dice, or at any gaming table, such as are described in the Act of 1816, or by whatever name it may be called.* (emphasis added). According to the principles above stated, the kind or name of the game is no part of the offence, any more than whether there was betting, which in *Nates's* case was held to be an unnecessary allegation. There is nothing in the English cases

> which sheds much light on this subject ... but there are some American cases very much if not exactly like the one under consideration. The *State vs. Dole* 3 Blackf. 294) was an indictment against a grocer for suffering gaming in his shop. The indictment was quashed on the Circuit, because it did not set out the particular game played. But in the Supreme Court it was held to be sufficient, because *all games* (emphasis added) were unlawful in *such* places. (emphasis in original). The *State v. Bougher* (3 Blackf. 307,) was an indictment for gaming at a tavern. The words of the Indiana statute are, "Any person who shall play at game," etc. The indictment charged the offence in the words of the statute, without stating what game was played. It was held sufficient, because the words were general, and *included all games.* (emphasis added).[3]

Thus, this Court in *Laney* has construed § 16-19-40 and similar statutes as prohibiting *all games played "with cards or dice" for money in the designated places* set forth in the statute. Accordingly, whether a particular game of cards is one of chance or skill is irrelevant for purposes of whether that activity is "gaming" pursuant to the gambling statute. All games *with cards or dice* constitute "gaming" for purposes of § 16-19-40.

If there were any remaining doubt concerning the breadth of § 16-19-40, or that the Legislature did not intend a delineation of games into those of "chance" and those of "skill" for purposes of whether the statute is violated, this Court's decision in *The State v. Scarlet Red, supra* leaves no doubt about the issue. In *Scarlet Red,* the defendant was convicted for gaming in Spartanburg under the 1816 statute, now codified at § 16-19-40. Defendant's game was Thimble, or Thimbles and Balls, which historians have labeled a "grandaddy of

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[3] *Laney* references *Nates's* case [*State v. William Nates*, 21 S.C.L. (3 Hill) 200, 1836 WL 1511 (1836)] as indicating that betting is an unnecessary element for purposes of § 16-19-40. However, the later cases of *Scarlet Red, supra* and *State v. Robinson, supra* indicate that betting is required. In *State v. Robinson*, this Court defined "what [is] and what [is] not gambling." The Court upheld the trial court's charge to the jury that mere throwing of dice for amusement, where there is no betting or wager, is not illegal, while dice games, accompanied by betting, violate § 16-19-40.

the shell game." Chafetz, *supra* at 42. On appeal, the defendant argued that § 16-19-40 provided him an exception to the effect that games of skill were not covered. Defendant claimed to be a "juggler" and sufficiently skilled, in terms of his dexterity, that he regularly beat those who gambled against him.

This Court, however, rejected the distinction between "chance" and "skill" for purposes of whether or not the statute has been violated. What was important to the Court was not whether the game was "skill" or "chance," but whether a wager depended upon the success or failure of the "juggler." Noting that the 1816 statute was "so well calculated" to deter "vice, misery and crime," this Court, more than a century and a half ago, set forth the proper interpretation of § 16-19-40:

> [n]or can the defendant evade the law under the pretence that he was a juggler, and that the alleged game was an exhibition of his dexterity; because he kept a bank, and a wager depended on his success or failure.
>
> If the prohibited games be confined to those alone in which the stake is won or lost by chance, the result would follow, that the gambler who relied on the practiced legerdemain of a juggler, whilst he professed that the stake depended on fortune, will escape punishment by playing falsely.

The Court's analysis in these cases is clear that, for purposes of § 16-19-40's reach, "gaming" does not depend upon whether the particular game must be deemed predominantly one of chance. Moreover, the Court's decisions are entirely consistent with the well settled rule that

> [g]ambling has been defined as the act of playing or gaming for money or other stakes ... as the payment of consideration for the chance to win a prize, ... as the practice of playing or following up *any game, particularly a game of hazards, such as cards, dice, etc.* ....

38 C.J.S., *Gaming* § 5. (emphasis added). *See also*, *State v. O'Neal, supra* [court upheld conviction for maintaining a "gaming house" by allowing poker to be played for money in the Five O'Clock club]. Thus, the Circuit Court disregarded the words used by the Legislature, and thus was wrong to conclude that playing Texas Hold'em for money is not "gaming" for purposes of § 16-19-40. For purposes of § 16-19-40, the particular card game being played is irrelevant; all card games are considered by the Legislature as "gaming" and prohibited in the places specified. *State v. Laney, supra*; *The State v. Scarlet Red, supra.* To evade § 16-19-40's reach by claiming skill as an exemption is not what the Legislature intended and it is not what this Court has consistently held.

In short, the Legislature has chosen to sweep broadly for purposes of violation of the gambling statute. As *The State v. Scarlet Red* indicates, the intent of the General Assembly, was to attack the crime, vice and other social problems associated with gambling. Thus evasion of the statute, based upon any "chance versus skill," distinction is prevented by use of the words "*any* game with cards or dice." (emphasis added). Unlike § 12-21-2710, which expressly specifies that devices "pertaining to games of chance" are illegal *per se*, see, *Allendale Co. Sheriff's Office v. Two Chess Challenge II*, 361 S.C. 581, 606 S.E.2d 471 (2004), § 16-19-40 deems the playing of any game with cards or dice for money in the designated locations, including a house "used as a place of gaming," to constitute a violation of § 16-19-40. As discussed above, the evidence in this case that the residence in question was a house "used as a place for gaming" and that the game played was one "with cards" for money was overwhelming.

E. Even Assuming *Arguendo* That the Circuit Court Correctly Construed § 16-19-40, That Court Erred in Concluding That Texas Hold'em Is Predominantly a Game of Skill

It is true, as the Circuit Court held, that one of the essential elements of gaming is that the game is one of chance. As this Court recognized in *Johnson v. Collins Entertainment Co.*, a lottery is "a species of gaming, which may be defined as a scheme for the distribution of prizes of things of value by lot or chance among persons who have paid, or agreed to pay, a valuable consideration for a chance to win a prize." 333 S.C., *supra* at 103, 508 S.E.2d *supra* at 579 (quoting *Darlington Theatres, Inc. v. Coker*, 190 S.C. 282, 2 S.E.2d 782 (1939)). *See also Alexander v. Martin*, 192 S.C. 176, 6 S.E.2d 20, 24 (1939) [quoting *Myers v. City of Cincinnati*, 128 Ohio St. 235, 190 N.E. 569, 570 (1934) for the point that the "three elements of gambling ... [are] chance, prize and a price."].

In addition, there can be no doubt that in *Johnson v. Collins Entertainment, Co.*, in a dissenting opinion authored by Justice Burnett and concurred in by Justice Toal, there were indications from those two Justices that South Carolina would adopt the "dominant factor" test relating to chance. Rejecting the British Rule or pure chance doctrine, Justice Burnett instead concluded that the "American Rule" or "dominant factor test governed. Under the dominant factor doctrine, "'a scheme constitutes a lottery where chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment.'" 508 S.E.2d at 583 (quoting *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973)). Justice Burnett thus stated that

... 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.

333 S.C., *supra* at 113, 508 S.E.2d, *supra* at 584.[4]

However, the Circuit Court's conclusion that *Texas Hold'em is predominantly a game of skill* was also error, even assuming *arguendo* that such analysis of "chance versus skill" is appropriate for purposes of § 16-19-40. While it is true that Respondents offered testimony that poker is a game in which skill predominates, Record at ___, the overwhelming majority of courts have, nevertheless, concluded that poker, *being a card game*, is predominantly a game of chance *as a matter of law*, notwithstanding that certain skills may be involved. The dissenting opinions of Justices Burnett and Toal in *Johnson v. Collins, supra* indeed made it clear that the legal test is not whether skill is an element in the particular game, but whether *the ultimate outcome* is determined predominantly by skill or chance. Applying this test, poker is indeed predominantly a game of chance. Thus, the decision of the Circuit Court must be reversed for that reason as well.

As Justice Burnett noted in *Johnson v. Collins, supra*, in determining whether chance or skill predominates with respect to a particular game, the question is not whether one player might possess skill superior to another player, such that the superior player usually wins. Instead, the test is as follows:

> ... 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 .... [A] video poker player is unable to control the random

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[4] The full Court has yet to address the applicability of the "dominant factor" test in South Carolina and we do not concede that this is the test a majority of the Court would apply.

> selection of cards, in spite of his skill, knowledge or experience. Since the player cannot improve the likelihood he will obtain a certain card, I conclude chance dominates over skill in the operation of the Type III video game machines.

333 S.C., *supra* at 119, 508 S.E.2d, *supra* at 587. Such analysis applies here as well.

There is no question that poker, including Texas Hold'em, possesses an element of skill, as almost any card game does; certain players will win more often when playing against novice or inferior players. However, whether there is an element of skill present in Texas Hold'em poker, or whether the better player may more often win, is not the controlling question in this case. The Supreme Court of North Carolina in *State v. Taylor*, 111 N.C. 680, 16 S.E. 168 (1892) well stated the correct analysis in that Court's recognition that

> [i]t is a matter of universal knowledge that no game played with ordinary playing cards is unattended with risk, whatever may be the skill, experience, or intelligence of the gamesters engaging in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed, or the effect of a given play or mode of playing, there must be unavoidable uncertainty as to the results.

See also, *Darlington Theaters* 2 S.E.2d *supra* at 785 ["various forms of gambling" include games "in which chips, tickets, or other devices are used in connection with card games."]

Accordingly, based upon this analysis, numerous decisions from other jurisdictions have concluded that poker – including Texas Hold'em poker – is predominantly a game of chance. See, *People v. Dubinsky*, 31 N.Y.S.2d 234 (1941) [stud poker is a game of chance]; *Joker Club, LLC v. Hardin, supra* [notwithstanding considerable testimony that poker is a game of skill, Court concludes that "[n]o amount of skill can change a deuce into an ace" and thus poker is predominantly a game of chance]; *Lavick v. Nitzberg*, 83 Cal. App. 2d 381, 188

P.2d 758 (1948) [draw poker is "assuredly a game of chance"]; *Garrett v. State*, 963 So.2d 700 (Ala. 2007) (unpublished). Texas Hold'em is a game of chance; concurring opinion refers to Texas Hold-em poker as "fundamentally a game of chance, in that the outcome of the game ultimately depends on a random draw of the cards."]; *People v. Turner*, 165 Misc.2d 222, 629 N.Y.S.2d 661 (1995) [poker and blackjack "are as much games of chance as (a lottery) ... since the outcome depends to a material degree upon the random distribution of the cards .... The skill of the player may increase the odds in the players favor, but cannot determine the outcome regardless of the degree of skill employed."]. See also, *Loggins v. Southern Ry.*, 64 S.C. 321, 42 S.E. 163 (1902) [cites § 2174 of Railroad Act, allowing removal from train of any passenger for playing "any game of cards or other game of chance for money ...."]. These cases thus found that the results of *any card game* – including poker – depend upon the luck of the draw. Therefore, all games "involving cards and dice, are, as a matter of law, games of chance." Accordingly, testimony regarding the game of poker – whether skill or chance – is irrelevant. *Id. In re Advisory Opinion to the Governor, supra.* In our view, the General Assembly recognized this long ago when it broadly declared "any game with cards or dice" to be gaming in § 16-19-40. Thus, as one commentator recently stated, "there has been no judicial victory for poker players who had hoped that a court might conclude poker is a game that is exempt from gambling laws." 11 *Gaming Law Review* 190, 201 (June 2007).

Moreover, even assuming *arguendo* that testimony regarding poker was proper, it is important to note that Dr. Hannum, one of Respondents' witnesses at trial, acknowledged that if two poker players possessed exactly the same skill, chance would determine the

outcome. Record at ___. Further, Michael Sexton, another of Respondents' witnesses, conceded that a completely unskilled player could beat an accomplished player, depending upon the cards dealt. Record at ___. Thus, even Respondents' own witnesses admitted that chance was a significant element in poker. Accordingly, even assuming *arguendo*, that it was appropriate for the Circuit Court to engage in any "chance/skill" analysis here, which we certainly do not concede, nevertheless, the Court wrongly determined that poker is a game of skill. Poker, including Texas Hold'em, is predominantly a game of chance as a matter of law.

II.

The Circuit Court erred in concluding that § 16-19-40(a) is unconstitutionally vague and overbroad.

Finally, the Circuit Court erred in concluding that § 16-19-40(a) is constitutionally defective. According to the Circuit Court, "in the absence of the dominant factor test," § 16-19-40(a) "cannot be applied to Appellants consistent with the principles of due process." Record at ___. The Court concluded that

> S.C. Code Ann. § 16-19-40 provides no definition of the term "house used as a place of gaming." Simple logic dictates that "place of gaming" must mean something more than a location where one of the subsequently enumerated games is played; otherwise, the two elements required for conviction become one. But, because the statute does not articulate what is meant by a "place of gaming," there is no way for people to know when they are in violation of the statute. Because it is not possible to discern what conduct is criminal, § 16-19-40(a) is unconstitutionally vague.

Record at ___. Moreover, the Circuit Court found that § 16-19-40(a) is unconstitutionally overbroad because "[i]t criminalizes a variety of games played with cards or dice regardless of whether the dominant factor in a particular game is skill or chance." Record at ___.

The Circuit Court was again in error. The constitutionality of § 16-19-40(a) does not hinge upon the applicability of the dominant factor test. In our view, the statute needs no definitions of terms, nor is it unclear to an ordinary citizen such that he would not understand that playing poker for money in a residence, essentially operating as a casino, is illegal under § 16-19-40. Thus, the Court erroneously declared invalid a statute, pursuant to which this Court has affirmed many convictions over the course of two centuries.

At the outset, we note that this Court recently held in *State v. Neuman*, 384 S.C. 395, 401, 683 S.E.2d 268, 271 (2009) that use of "overbreadth" doctrine is inappropriate except in certain limited circumstances where First Amendment rights are involved. The Court explained as follows:

> [f]irst, Neuman's counsel's use of the term "overbroad" is not necessarily dispositive. Clearly, a challenge to § 24-13-450 would not have been based upon the overbreadth doctrine. This statute could not conceivably suppress protected speech or conduct. Without a First Amendment concern, the overbreadth doctrine would not have been an appropriate ground to challenge the statute. See *In re Amir X.S.*, 371 S.C. 380, 384, 639 S.E.2d 144, 146 (2006) (noting a person raising a First Amendment overbreadth doctrine challenge to a statute must demonstrate that the statute could cause someone to refrain from constitutionally-protected expression); *State v. Bouye*, 325 S.C. 260, 265, 484 S.E.2d 461, 464 (1997) ("The overbreadth doctrine applies only to First Amendment cases where the challenged law would have a 'chilling effect' on constitutionally protected forms of speech.").

As the United States Supreme Court has recognized, gambling "implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that could be,

and frequently has been banned altogether." *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993). See also, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). Certainly, no First Amendment rights could have been, and indeed were not, asserted below. The Circuit Court's order does not mention the First Amendment in its very brief overbreadth analysis. Thus, the employment of such analysis was legally incorrect. See, *State v. Burkhart*, 58 S.W.3d 694, 700 (Tenn. 2001) [because gambling or possessing a gambling device "is not constitutionally protected conduct ...," the overbreadth challenge to the Tennessee gambling statute was without merit as "the statutes ... do not reach a substantial amount of constitutionally protected conduct."] See also, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) [statute must reach First Amendment's protection for overbreadth to apply].

With respect to the Circuit Court's conclusion concerning vagueness, this Court set forth the governing principles for a finding of void-for-vagueness in *State v. Neuman, supra*. Quoting from its earlier decision in *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001), the Court stated:

> "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." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "A 'legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.' " *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 134-35, 568 S.E.2d 338, 344 (2002) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)). "A possible constitutional construction must prevail over an unconstitutional interpretation." *Curtis*, 345 S.C. at 569-70, 549 S.E.2d at 597.
>
> "The void-for-vagueness doctrine rests on the constitutional principle that procedural due process requires fair notice and proper standards for

> adjudication." *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007). "The constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies." *In re Amir X.S.*, 371 S.C. at 391-92, 639 S.E.2d at 150. "A statute is not unconstitutionally vague if a person of ordinary intelligence seeking to obey the law will know, and is sufficiently warned of, the conduct the statute makes criminal." *State v. Curtis*, 356 S.C. 622, 629, 591 S.E.2d 600, 603 (2004). This concept has been explained as follows, "[a] law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. at 572, 549 S.E.2d at 598. "One to whose conduct the law clearly applies does not have standing to challenge it for vagueness." *Id.*

Similarly, as the United States Supreme Court has repeatedly recognized, ,"'the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007), quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

However, due process does not require that every word in a statute be defined. *Johnson v. Collins Entertainment Co.*, 349 S.C. 613, 627, 564 S.E.2d 653, 660 (2002). Moreover, this Court has also recognized that a statute will not be deemed void-for-vagueness when the terms of the statute have been further defined by judicial decisions. As the Court determined in *State v. Avery*, 255 S.C. 570, 571, 180 S.E.2d 190, 191 (1971), in rejecting the argument that the term "riot" was not defined by statute, and was thus unconstitutionally vague,

> [r]iot is a common law offense in this State and the definition of the crime, as adopted in *State v. Connolly*, 3 Rich. 337, has been consistently followed in our decisions.

See also, *Johnson v. Collins, supra.* [prior judicial decisions may fairly disclose statute's scope].

Here, as discussed above, in addition to § 16-19-40 being clear on its face, this Court has carefully determined the meaning of this statute over the many years it has been on the books since enactment in 1802 and clarification in 1816. As we have emphasized, *State v. Faulkener*, *supra* made clear that the words "any house used as a place of gaming" were added by the 1816 statutory amendments to leave no doubt that all outbuildings were included within the statute's reach in addition to "the principal or mansion house." Thus, since time immemorial, this Court has recognized that § 16-19-40 is applicable to a "mansion house" or residence. Moreover, *State v. Brice* applied the statute in its original form to a dwelling house, where that house was transformed into use for the purpose of gaming. Further, the general law is clear that a house used for gaming may include a dwelling or residence.

And, *State v. Laney*, *supra* further clarified that it does not matter, for purposes of § 16-19-40, what the particular game being played might be; instead "all games" are included within the designated places prohibited. Finally, *The State v. Scarlet Red* makes clear that any delineation of "chance versus skill" is irrelevant to § 16-19-40's application. What is important, according to *Scarlet Red*, is that there be a wager based upon a certain outcome of success.

Accordingly, this Court has left no doubt as to how § 16-19-40 is to be applied. Thus, both of the Circuit Court's grounds for constitutional infirmity – overbreadth and void-for-vagueness – are without merit. The ordinary citizen is sufficiently aware of what a

"house used as a place of gaming" is; and he or she is certainly deemed to know that the phrase "any game with cards or dice" means exactly what it says and includes Texas Hold'em poker.

Courts elsewhere have concluded that statutes similar to § 16-19-40 are not unconstitutionally vague or overly broad. For example, in *State v. Torres, supra*, the Arkansas Supreme Court addressed the question of whether a statute making it unlawful to operate "any gambling house or place where gambling is carried on ..." was void-for-vagueness. The Court rejected such argument, even though the statute provided no definition of "gambling" or "gaming house." The *Torres* Court concluded:

> [t]his court has said that whenever the definition of general words in a criminal statute, passed pursuant to police power, may be adequately determined through reference to judicial decisions construing the statute, it is not void-for-vagueness. *Carter v. State*, 255 Ark. 225, 500 S.W.2d 368 (1973). Uncertainty may also be cured by judicial construction discoverable by search of legal precedent other than decisions construing the statute in question. See 3 Sutherland, *Statutory Construction* § 58.02 (1986 and Supp. 1992); J. Jeffries, *Legality, Vagueness and The Construction of Penal Statutes*, 71 Va. L. Rev. 189, 207-208 (1985).

831 S.W.2d at 905. In the Court's view, the appellees "who operated bingo establishments where money and risk were plainly involved, had fair warning that their actions were prohibited." *Id.*

Further, in *Bellamy v. State*, 347 So.2d 419 (Fla. 1977), the Supreme Court of Florida upheld a conviction for operation of a gambling house, notwithstanding arguments by the defendant that the statute under which the conviction was obtained was unconstitutionally vague and overbroad. The statute prohibited the keeping of a gaming table or room or "other place for the purpose of gaming," etc. Bellamy was convicted of permitting a dice game

played for money in his pool hall. He argued that the statute "is vague and overbroad because it would appear to outlaw games ... considered by reasonable men to be innocent." *Id.* at 420. However, the Court found that the words "gaming" and "game" are "synonymous with gambling and the wording of the statute would not mislead a person of ordinary intelligence into thinking that professional games mentioned by Bellamy are prohibited." *Id.*

Likewise, in *State v. Taylor*, 805 S.W.2d 440 (Tex. Crim. App. 1991) (en banc), the Court held that a statute prohibiting the keeping of a gambling place was not void-for-vagueness. Notwithstanding defendant's argument that the statute allowed conviction "merely by showing that appellee received bets at a certain building," the Court held that the statute required that the building in question had become "the location for the purpose of receiving bets." *Id.* at 442. Thus, the statute was not unconstitutionally vague. *See also*, 38 C.J.S., *Gaming*, § 21 [generally, the statutes prohibiting gaming have been upheld against vagueness and overbreadth challenges]; *State v. DeAngelis*, 257 S.C. 44, 183 S.E.2d 906 (1971) [statute making unlawful the operation of gambling devices not void-for-vagueness.].

In addition, it is well understood that "gaming" is "the practice of staking property, beyond the purpose of mere sport on the hazards of cards or dice." *State v. Lark*, 4 Ohio Dec. 241, 1896 WL 1523 (1896). Moreover, in *State v. Schlein*, 253 Kan. 205, 218, 854 P.2d 296, 305 (1993), the Kansas Supreme Court stated that the phrase "gambling place" possesses a well-defined meaning, such that

> ... if one advertises and invites the public to a poker tournament in his or her home, in a school, in a church, in a monastery, or in a nursing home; charges each contestant an entry fee; provides the contestant with the rules of the

> tournament; and provides prizes – each of those places would be converted into a gambling place and an individual who enters the premises where gambling is occurring, with the intent to participate in a poker tournament, has entered into a gambling place.

And, in *State v. Chase*, 117 N.C. App. 686, 691, 453 S.E.2d 195, 199 (1995), the North Carolina Court of Appeals quoted with approval the language from *State v. Morgan*, 133 N.C. 743, 744-5, 45 S.E. 1033 (1903), which had concluded that "'[i]t was not necessary to charge in the indictment that the games played at the gaming-house were games of chance. That is sufficiently implied in charging that the defendant kept a common gaming-house, the word 'gaming' having a definite meaning in law, i.e. gambling, the act of playing games for stakes or wagers.'" As the Supreme Court of Georgia stated in *Woody v. State*, 113 Ga. 927, 39 S.E. 297 (1901) "[i]t was not essential that the accusation should minutely describe the games played, or the manner of playing them. The accused was sufficiently informed of the nature of the charge preferred against him ...." There, the charge against defendant simply recited the words of the gaming statute which did not distinguish games of chance from those of skill. In the words of the Missouri Court of Appeals, in *State v. Luther Maupin*, 71 Mo. App. 54, 1897 WL 2117 (1897), "... cards and dice are singled out in the statute, wherein it is declared that if one plays any game whatsoever with cards or dice for money, he shall be punished. The state need not allege or prove that cards and dice thus specifically mentioned are a device which may be adapted to or used in play a game of chance." Moreover, *The State v. Scarlet Red, supra* clearly rejects any delineation required by § 16-19-40 as to whether the game is a of game of skill or chance.

Further, this Court in *State v. Lane*, 82 S.C. 144, 63 S.E. 612 (1909) affirmed a conviction for keeping a gambling house. In *Lane*, the Court had no problem with the certainty of the statute. Rejecting defendant's argument that the charge was unwarranted, the Court stated:

> [t]he next question for consideration is whether there was error on the part of his honor, the presiding judge, in refusing the motion of the defendant's attorney to direct a verdict of not guilty, on the ground that, in order to convict a person of keeping and maintaining a gaming house, it is necessary to prove that the gambling was carried on more than one time. The fact that a person is caught gambling one time in a place mentioned in the statute is simply to be weighed by the jury, in connection with all surrounding circumstances, in determining the character of the house. If the proposition for which the appellant's attorney contends should be sustained, it would have the effect of practically eliminating from the consideration of the jury all the surrounding circumstances, except the fact that there was gambling on one occasion in such house.

And, as referenced above, this Court has perceived no difficulty construing an ordinance prohibiting a "house ... to be used as a place of gaming with cards for money or other stakes" to apply to a private hotel room. *Kemmis, supra.*

In short, a person of ordinary intelligence would undoubtedly know that "any game of cards for stakes is technically gambling" and in violation of § 16-19-40. *In re Fischer*, 231 A.D. 193, 247 N.Y.S. 168 (1930). As the Supreme Court of North Carolina said as long ago as in 1848, it is universally accepted that the most obvious examples of games of chance are "... the games with dice, which are determined by throwing only, and those in which the throw of the dice regulates the play or the hand at cards depends upon a dealing with the face down ...." *State v. Gupton*, 30 N.C. 271, 1848 WL 1289 (1848). And, as the New York Court noted in *People v. Todd*, 4 N.Y.S. 25, 28 (1889), "... the word 'game' is defined by

Webster 'to play for a stake or purse; to use cards, dice, billiards, or other instruments, according to certain rules, with a view to win money or other thing waged upon the issue of the contest ....'" The ordinary person is fully aware that "as long as cards have to be shuffled in any game before being dealt out, it is the element of chance that becomes master of the situation .... [E]very card game [thus] is game of chance and if played for money" constitutes gaming. *People v. Welti*, 37 N.Y.S.2d 552, 555 (1942).

Section 16-19-40, extant for two centuries, accordingly needs no further definition in order to satisfy due process. The Constitution certainly does not require that the statute delineate "games of chance" expressly in order to pass constitutional muster. The playing of poker for stakes in a house "used as a place of gaming," as was the case here – where there were regular poker games for money, luring many players through internet advertisements – certainly would put these Respondents on sufficient notice that the gambling laws were being violated. Indeed, Mr. Stallings pled guilty to the operation of a gambling house in this very case. Record at ___. Thus, there can be no doubt that § 16-19-40 does not misinform or mislead the ordinary person – a residence repeatedly used to conduct large scale poker games for money, games open to the public, is a "house used as a place of gaming" to play a "game with cards or dice."

The words of the Pennsylvania Court are particularly instructive in this case's resolution. In *Commonwealth v. Hubbard*, 69 Pa. D. & C. 2d 571, 574, 1974 WL 15856 (1974), the question before the Court was whether there had been established the keeping of gaming house where, as here, the "place" involved was a private residence which was being

used as the "house" or "premises" for gaming. While Pennsylvania law had some differences with South Carolina, the Court's language is particularly helpful:

> [t]he words of the statute, the evil sought to be controlled and common sense all point to defendant's guilt. The code makes it illegal for one to allow persons to assemble for the purpose of playing at "... any game ... at which money or other valuable things may or shall be played for, or staked, or bet upon; ..." It is obvious from the testimony that this is not a situation where a few of the boys drop in for a Friday night social game of poker. Considering the number of persons on the premises, the fact that the dining area had been converted into a bar and the material found in the home, we conclude that defendant was involved with a gaming house as the words are used in the statute. Defendant relies on the rule of strict construction of penal statutes but there is a complementary principle that strict construction does not require the words of a criminal statute be given their narrowest meaning or that the lawmakers' intent be disregarded .... We continually exhort juries to use their common sense in evaluating evidence; courts should do likewise in interpreting statutes.

For centuries, courts everywhere, including this Court, have applied statutes similar to § 16-19-40. Vagueness has not been a problem in these statutes' enforcement. The Circuit Court thus erroneously concluded that § 16-19-40(a) was void-for-vagueness and overbroad.

In short, Respondents' issue, in reality, is not with the wording of the law, or its application, or its vagueness or overbreadth. If they wish the law not to be applied to their gaming activities, they should seek relief in the State House, not the courthouse.

CONCLUSION

The decision of the Circuit Court should be reversed and the convictions reinstated.

Respectfully submitted,

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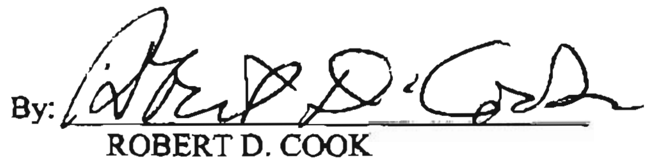
By: 
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December 22, 2009

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

C.A. No. 2009-CP-10-001551

Robert L. Chimento, Scott Richards, Michael Williamson,
Jeremy Brestel, and John T. Willis .... Respondents,

v.

Town of Mount Pleasant .... Appellant.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Appellant proposes the following to be included in the Record on Appeal:

1. Order of the Honorable R. Markley Dennis, Jr., dated October 1, 2009

2. Order of the Honorable J. Lawrence Duffy filed February 19, 2009

3. Transcript of Hearing held August 4, 2009, Circuit Court

4. Transcript of Hearing held February 13, 2009, Mount Pleasant Municipal Court

5. Notice of Intent to Appeal filed March 13, 2009

6. Return to Notice of Intent to Appeal dated March 23, 2009, prepared by the Honorable J. Lawrence Duffy

7. State's Exhibit 1 from Municipal Court hearing: 1 audio CD and 4 video CDs

8. State's Exhibit 3 from Municipal Court hearing: VCR tape

9. State's Exhibit 4 from Municipal Court hearing: Nathan Stallings sentencing sheet

10. Court's Exhibit 1: Warrant Affidavit dated May 1, 2006, for Nathan Stallings

I certify that this designation contains no matter which is irrelevant to this appeal.

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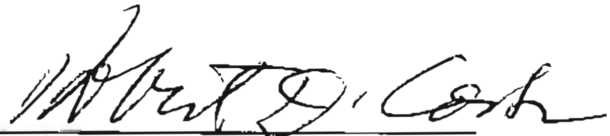
By: 
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PROOF OF SERVICE

I hereby certify that I have on this day, December 22, 2009, served all counsel with two copies of pleading(s) hereinbelow specified by mailing copies of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Initial Brief of Appellant
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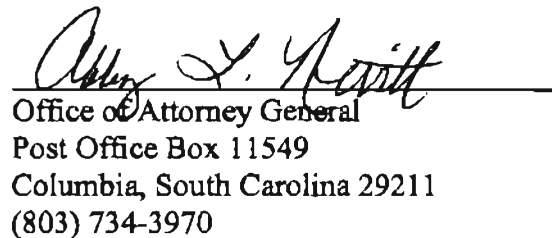

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