IN THE COURT OF APPEALS OF MISSISSIPPI
CASE NO. 2009-CA-00235-COA

RT

**RONNIE MOORE and JEFF MOORE** — **APPELLANTS**

**VS.**

**STATE OF MISSISSIPPI** — **APPELLEE**

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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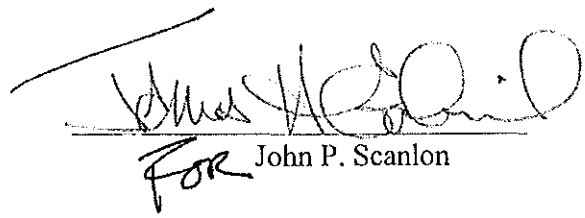
Respectfully submitted this the 18th day of November, 2009.



FOR John P. Scanlon

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## FACTUAL CLARIFICATIONS

The State makes multiple misstatements in its Brief of Appellee and the Moores now clarify those for the benefit of this Court. Throughout its brief, the State does little more than introduce an array of factually- and legally-unsupported assertions and attempt to mislead this Court in sleight-of-hand trickery, often without substantively responding to the Moores' initial Brief. All the while, the State's brief is almost entirely lacking is a citation to any persuasive record evidence supporting its contentions. The State's recitation of the facts is a mere re-hashing of the procedural posture of this case, and contains nothing regarding the legality of the machines or references to "game play." The majority of the "facts" in the State's Brief do not reference any testimony or a single document which provides proof supporting the State's case.

It should be first noted that the Circuit Court, sitting as a court of review in this matter, should have likely never been presented with the question of the legality of the computers, primarily because it was never decided below in the Justice Court and thus likely not appealable from that court. (R. 299.) The State raised the issue for the first time on appeal to the Circuit Court. This Court has made it clear that "an issue not raised before the lower court [the Justice Court here] and only raised for the first time on appeal is deemed waived and procedurally barred." *Harbin v. Chase Manhattan Bank*, 871 So. 2d 764, 766 (Miss. Ct. App. 2004) (citing *Mississippi Dept. of Transp. v. Trosclair*, 851 So. 2d 408(¶ 19) (Miss. Ct. App. 2003)). See also *Gale v. Thomas*, 759 So. 2d 1150, 1159 (Miss. 1999); *Davis v. State*, 684 So. 2d 643, 658 (Miss. 1996); *Cole v. State*, 525 So. 2d 365, 369 (Miss. 1987).

The State injects facts outside of the record with respect to the assertion that the CyberCrime Unit informed counsel for the state that it would take several weeks and possibly even months to have the machines analyzed by the CyberCrime Unit. (Brief of Appellee, 3.)

However, what is in the record shows that the State, by its own admission, was not prepared or able to try a case based on the crimes that had been previously charged against the Moores in the Justice Court. (R. 77-79.)

At the time of the Moores' June 25, 2008, Motion to Docket and Dismiss – now almost seventeen (17) months before the filing of the present brief – the State had been in possession of the seized property for two-hundred and eighty-six (286) days. (R. 332.) At the time of the submission of this Reply Brief, that amount of time has now more than doubled and is now at more than six hundred (600) days. It is likely that before this appeal reaches resolution, that time period will surpass three (3) full years. During this entire time, the State has been in possession of the property while no criminal charges whatsoever have been pending against the Moores. This all begs the question of how the seized computers can be subject to a criminal investigation without any criminal charges ongoing? How long must the State possess the computers before bringing criminal charges? If the State cannot complete an investigation in what is now more than two full years, how can the State argue that the charges were ready to be brought at that time? The State says the sweepstakes promotion is illegal, yet still needs to analyze why.

The State notes that the charges were dropped, but again fails to point to a single piece of record evidence as to ***why*** the charges were dropped. In fact, the reason was that the State had no case and was unprepared, and admitted as much to the Justice Court. (R. 77-79.) The State asserts that "make no mistake, there was sufficient evidence to render these machines illegal and proceed with the misdemeanors as charged." Even in that sentence the State fails to include a citation to any record evidence. This position also begs the question of – if there was in fact such "sufficient evidence" – why the State would not have simply proceeded with the charges at that

time. This position is in fact totally unsupported and even contradicted by the State's own comments in the Justice Court: "Without the examination, we can't make charges." (R. 81.)

The State notes that that "there is simply no legal requirement that criminal charges be pursued against an individual in order to seize illegal gambling machines." (Brief of Appellee, 4.) This sentence shows that the State misses the issue at hand completely. The Moores have never once argued anything contrary to the proposition of law that charges be pending *for seizure*. However, there is a legal requirement that charges be pending for a criminal defendant *to be tried for crimes of which he was accused*, as well as that charges be pending, a finding had, and a judgment issued, for a defendant to have an appeal on the illegality. Further, this all presumes that the seized computers were "illegal gambling machines;" however, this was not proven once by the State. In truth, the computers were identical to those commonly sold at retail stores such as Best Buy or Wal-Mart. Thus, if these computers are illegal gambling devices, then so are those found in schools and libraries across Mississippi.

The State also notes that counsel for the Moores "inexplicably objected to dismissal of criminal charges against his clients." In truth, the reason is not inexplicable. Even the Justice Court noted that the reason was to obtain a speedy trial for the Moores. (R. 298.) The fact that this appeal is still ongoing, after years with no criminal charges pending against the Moores, is enough to show this Court that the Moores' counsel's reasoning was well-founded. This unnecessarily long, drawn-out appeal process is precisely what the Moores were trying to avoid.

The State notes that on October 16, 2007, the Justice Court "apparently" informed the parties the charges would be dismissed, and "nonetheless" requested all to be present two days later. (Brief of Appellee, 4.) This was precisely what the State had requested of course, and the request for all to attend the hearing two days later was no mystery, contrary to the State's pleas

of ignorance. (R. 76, 83.) Though the State now argues it did not know "why their presence had been requested, on October 18, 2007," counsel for the state made comments in open court contradicting this. The Justice Court made clear during the Oct. 16 meeting in chambers that counsel's presence was required on Oct. 18; even counsel for the State stated "it's our understanding that we were just here to determine whether [the Moores' computers] should be returned or not." (R. 79.) Thus, the State did in fact know and have an understanding as to the need for the presence of all counsel at the hearing on Oct. 18, 2007, the original trial date. (R. 79.)

The State argues that "for reasons unknown, the State received an Order on November 13, 2007, without notice or otherwise, dated November 1, 2007, wherein the Justice Court ordered return of the items to both defendants by November 8, 2007." (Brief of Appellee, 5-6.) The reasons for this are not unknown at all – in fact, this Order was actually made at the request of counsel for the State. (R. 83.) The following exchange was between counsel for the Moores Jeffrey Hosford, counsel for the State Jim Giddy, and the Justice Court.

> MR. GIDDY: Could we ask the court to grant us several weeks to have the hard drives examined?
> THE COURT: How many weeks, sir?
> MR. GIDDY: Three weeks.
> MR. HOSFORD: Your Honor, they've had since September.
> THE COURT: I know that. And I'm going to let them have another three weeks to let them get their ducks in a row and then you'll get your ducks in a row.
> . . .
> I'll give you three weeks to check them out and either file more charges or return his computers.
> Is that fair enough?
> MR. GIDDY: Yes, sir.

(R. 83-85.) Thus, the request for time was actually made on the State's behalf. Accordingly, the Justice Court granted the State's request for three (3) more weeks from the date of the hearing, October 18, 2007, to complete its investigation and analysis of the seized machines, at which

point the State either would have to file more criminal charges, or return the machines. (R. 84, 299.) Further, no notice is required for the Justice Court to have entered an order which it made orally at the hearing. The state took no action in the following three weeks, however, and thus, the Justice Court's ruling for the State to return the Moores' computers took effect. That Nov. 1, 2007, Order contained no findings that the seized computers were contraband or illegal gambling devices. The Moores now request reversal of the Circuit Court.

## REPLY TO THE STATE'S SUMMARY OF THE ARGUMENT

The State repeatedly attempts to re-position its case as a civil action. This is once more nothing more than an attempt to mislead this Court. Although the Moores agree with the fact that there was no criminal trial, this appeal is by no means a civil appeal. Despite the State's cries to the contrary, the Moores have not once tried to argue that this matter was "an appeal of a criminal conviction." (Brief of Appellee, 8.) This is actually impossible, because there was in fact no trial whatsoever, whether criminal or civil, and thus *no criminal conviction of any crime against either Defendant*. However, the complete lack of a conviction or trial does not change the criminal nature of the matter, but in fact begs the question of how this matter arose to the appellate level in the first place.

This matter is in fact of a criminal nature. The issues surround personal property that was seized pursuant to a criminal warrant issued by the Justice Court at the State's request. The State still insists that possession of the computers constitutes a crime as the computers were contraband per se as illegal gambling devices. In fact, the seizure was ordered by the Justice Court via the two criminal warrants it issued stemming from those criminal charges brought by the State. (R. 52, 53, 60-69, 349-50.) The State even makes it clear in its own Brief that the

seizure of the Moores' computers was made in connection with the September 12, 2007, criminal charges initially filed – but later dropped – against the Moores. (Brief of Appellee, 3.)

The "confusing factual scenario and procedural nightmare" was a creature of the State's own choosing. The State seized the computers as criminal devices; chose the venue; requested multiple criminal warrants; filed the criminal charges; later requested that the charges be dismissed, admitting not being prepared to try the case; requested additional time to analyze the computers, after which time the Justice Court ordered the computers to be returned; and disobeyed the Justice Court Order, wishing finally for a change of venue. This appeal has resulted, and now the State claims the very court of its own choosing had no jurisdiction.

Other confusions are present as well. In its "Summary of the Argument," the State recites the 3-point test of illegal gambling devices, but points to no evidence whatsoever to support its assertions that the test is "clearly met," or that there is "no question" the computers are "squarely" within the three elements. (Brief of Appellee, 9.) In fact, in that very same sentence containing some of these unsupported assertions, the State confesses that these computers are "not yet specifically addressed by this Court in prior slot machine decisions." (Brief of Appellee, 9.) The State thus loses all its credibility.

The State also attacks the Moores as having spent "countless pages degrading law enforcement officers and discussing such search warrant issues that are not even the subject of the present appeal." This is laughable exaggeration. First, the pages are clearly not "countless," as they are in fact numbered and finite. Though this is a minor point, it simply goes to show the State's penchant for the dramatic. Second, the Moores did not once degrade any law enforcement officers or even use any language that could be construed as degradation; the Moores simply recited record evidence and summarized the transcript of the Circuit Court's

proceedings. The testimony of the State's witnesses simply falls short of constituting a prima facie case. Third, the warrant issues are unquestionably related. Although it is in the best interest of the State for counsel opposite to ignore its own criminal warrants and attempt to mischaracterize this matter as a civil action, possibly of replevin, the truth is that the warrants were criminal warrants, issued in connection with the criminal charges filed by the State, and both of which are boldly titled: "GENERAL AFFIDAVIT, CRIMINAL" (R. 48-49.)

It is in fact the State that stoops to making these below-the-belt jabs at the Moores, mischaracterizing two men, who have been convicted of no crime and are charged with no crime, as "unscrupulous" individuals seeking to "bilk" profits while "sidestepping" law enforcement. (Brief of Appellee, 9.) While counsel for the State may not believe in the innocent-until-proven-guilty mantra and attempt to debase the Defendants through this degrading language in its brief, it cannot point to a single piece of evidence to support these claims. See *Durdin v. State*, 924 So. 2d 562, 567 (Miss. Ct. App. 2005); *Carr v. State*, 4 So. 2d 887, 888 (Miss. 1941). This Court must therefore reverse the Circuit Court.

## STANDARD OF REVIEW CLARIFICATION

In its continued denial of this matter as a criminal appeal, the State attempts to offer a different standard of review under various, inapplicable cases.[1] Not one of these cases[1] is a criminal matter in which the State would be prosecuting criminal charges, as here; thus, none of these authorities is controlling. Another case the State offers is *St. Dominic-Jackson Memorial*

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[1] See *Harbin v. Chase Manhattan Bank*, 871 So. 2d 764, 766 (Miss. Ct. App. 2004) (a justice court matter in which the trustee for Chase Manhattan Bank initiated foreclosure proceedings against a Defendant who had become delinquent in her payments resulted in the sale of the property in question and Chase Manhattan, with a bid of $19,500, was the highest bidder); *Ezell v. Williams*, 724 So. 2d 396, 397 (Miss. 1998) (creditor failed to bring suit to collect on a promissory note within the three year statute of limitations period; the Supreme Court there found that because the debtor had induced the creditor not to bring suit, the circuit court's ruling there was correct that the debtor was estopped from raising the statute of limitations as a defense).

*Hosp. v. Mississippi State Dept. of Health*, 910 So. 2d 1077, 1079 (Miss. 2005) (a chancery court matter in which St. Dominic-Jackson Memorial Hospital appealed final orders of the Mississippi Department of Health granting two separate applications for a certificate of need by competing hospital for the addition of acute care beds and for renovation and expansion of its facility). Ironically, the State, without any substantial evidence of its own to support its claims, offers this case for the proposition that substantial evidence must be in the record for this Court to overturn the lower court. The reason for this is clear – under its proffered standard of review, the State must rely on "reasonable inferences . . . which favor the lower court's findings of fact." (Brief of Appellee, 10.) See *Ezell*, 724 So. 2d at 396; *Par-Industries, Inc. v. Target Container Co.*, 708 So. 2d 44, 47 (Miss. 1998)).

The proper standard of review is the "clearly erroneous" standard referenced in the initial Brief of the Appellants. *Brown v. State*, 731 So. 2d 595, 598 (Miss. 1999); *Simon v. State*, 679 So. 2d 617, 622 (Miss. 1996). However, under either standard of review, the Circuit Court's ruling must be overturned. The lower court was clearly erroneous in making its ruling, because the court was wholly without the "substantial evidence" required to rule as it did in the State's favor.

## REPLY ARGUMENT

### I. COMPUTERS ARE NOT ILLEGAL SLOT MACHINES

The State continues on appeal to fail to show how its prima facie case was ever proven at any level in any court. While the State does recognize Fourteenth Amendment principles of due process as a concern in gaming law, it cannot show how the due process rights of the Defendants was not encroached upon. (Brief of Appellee, 12.) The Moores do not now argue the statement of law that illegal gaming devices may be seized without encroaching on a party's Fourteenth

Amendment rights because there is no property rights in such contraband. However, simply because this statement summarizes good law does not mean that the Moores' computers seized by the state are in fact illegal gambling devices. This depends entirely on *whether the Moores' computers were ever proven to be illegal gambling devices.*

Despite the State's claims to the contrary, it was determined and proven before the Circuit Court that internet access was in fact available and apparent on all computers seized from the Moores, just as it is on any everyday personal computer, with icons readily available for clicking on the "desktop" screens. (T. 71, lines 16-19.) The fact that the State repeatedly admits it has not analyzed the computers belies their arguments in this regard. The confusion most likely arises from the fact that, after having testified otherwise on direct examination, Special Agent Robert Sharp admitted he did not even know if each of the computers in the internet café did in fact have internet access, primarily because he did not test or examine the machines. (T. 41.)

The State mischaracterizes the way the sweepstakes system works, though the State does concede that free "sweepstakes points" or entries are given to all patrons, with absolutely no purchase necessary, in addition to the free points which accompany any purchase of phone time. (Brief of Appellee, 15.) The State also miscalculates how many sweepstakes points are awarded, though this is not of consequence; this simply further illustrates the State's tendency to over-exaggerate the facts and show its misunderstanding of the case. (Brief of Appellee, 15.) There are in actuality no "terminal games" to be played as the State argues. (Brief of Appellee, 15, n.10.) In fact, a patron could ask an attendant in the internet café to complete an entire sale or assist the customer in the purchase so that use of the terminals – for participation in the sweepstakes – was completely optional. The terminals themselves do not contain any true games

with any real object or outcome over which the computer user has any control. The displays of the spinning wheels are simply an entertaining way to notify the computer user if he or she had purchased a pre-determined winner in the sweepstakes. This is not, as the State argues, the "identical theory of operation to (sic) a casino slot machine," because those machines – as the State admits – contain random number generators not present in the seized computers. (Brief of Appellee, 16.) This is however exactly analogous to a scratch-and-win game piece; the holder of a such a game piece simply scratches off the covering to reveal whether he or she is holding a pre-determined winner, but he or she cannot control whatsoever, through chance, skill, or otherwise, whether the piece is in fact a pre-determined winner. (See R. Supp. 12, Defendants' Exhibit 2.) This is in fact not even disputed, as the State actually admits as much in their brief. (Brief of Appellee, 17-18.)

In a true casino slot machine, as the State concedes, a "random number generator" determines whether a win occurs. One pull of a handle on such a machine could have almost innumerable possible results from the random number generator. However, regarding the sweepstakes system at bar, once certain sweepstakes points are purchased, there is *only one possible result* of winning or losing because they are pre-determined. Thus, despite the State's claims to the contrary, the computers are not "identical" in operation at all, as they completely lack the central physical hardware to be a slot machine. A patron participating in this sweepstakes system is no different from a patron with a scratch-and-win game piece who would not know if he or she is a winner until he or she scratches off the game piece to reveal the result from a finite pool of winners.

In *Mississippi Gaming Com'n v. Six Electronic Video Gambling Devices*, 792 So. 2d 321, 329 (Miss. Ct. App. 2001), this Court determined the machines at issue there to be slot machines,

because, unlike here, all three required elements were found to exist. This Court did recognize, though, that there exist legitimate vending machines with promotions. *Id.* The machines in that case dispensed a product and offered merchandise in varying quantities and simultaneously provided the results of a win or a loss. *Id.* at 323-24. The State wishes for this Court to believe that a patron moves a certain number of points, 100 for example, from sweepstakes winnings/win points to the sweepstakes entries side, purchasing credits toward gaming. (Brief of Appellee, 17.) The actual scenario is that, because 100 win points are valued at $1, one dollar is removed from the customer's "account" displayed onscreen, for lack of a better word, as a result of the purchase of phone time. (No actual accounts are ever actually opened, however, by a patron at any time – this is merely a display to indicate how much money the patron has spent.) With each dollar spent purchasing phone time, a patron is given 100 free entries in the sweepstakes. There is no such thing as "sweepstakes minutes" as the State would have this Court believe. (Brief of Appellee, 17.)

Despite the State's references to evidence of mail-in sweepstakes entry forms seized during the raid of the Moores' internet café, the Moores did not require any patron to mail any entry forms in, and instead allowed in-person participation in the sweepstakes for free; all of this information was made clear on the document entitled, Phone-Sweeps Prepaid Sweepstakes – How it Works." (R. Supp. 17-18, Defendant's Exhibit 4.) Testimony showed this Sweepstakes document was in fact in the internet café and among the items seized by the State in the investigation. (T. 66; R. Supp. 17, Defendant's Exhibit 4.) Thus, this information was readily available to all patrons.

**A. Consideration**

The State would have this Court believe that in this case there is only a "mere appearance or possibility that there exists a legal way to play." (Brief of Appellee, 20.) This is not true, however. In fact, there is no illegal way to participate in the sweepstakes at all because it is impossible to pay consideration for entry into the sweepstakes. The computers which can be used for the sweepstakes promotion are not activated by the insertion of currency, and anyone who enters the internet café may participate in the sweepstakes for free.

The State relies on the extra-jurisdictional case of *Barber v. Jefferson County Racing Association, Inc.*, 960 So. 2d 599, 601, 604 (Ala. 2006) (equipment seized at wager-driven, dog-racing track determined to be illegal gambling devices), which is not binding authority on this Court, to make the point that the expectation exists that sweepstakes would be the major attraction as opposed to phone time or internet use use because, "there was only one internet kiosk set up" at the internet café, but 39 computers with card readers. (Brief of Appellee, 21.) While true in *Barber*, where the pre-determined card "readers" were found on more than 1,300 electronic kiosks with no internet access, this is wholly untrue in the case at bar; each and every computer in the internet café had internet access. (T. 30.) The network of computers in the Moores' internet café contained no computers whatsoever which were merely "dumb readers" whose sole purpose was to read the cards and which had no internet access. *Id.* at 605. This is an important distinction – more than 1,300 electronic readers were around the dog-racing track in Barber, none of which were anything more than "dumb readers." *Id.*

The Alabama court in *Barber*, analyzing Alabama statues, based its ruling on several specific factual findings, none of which are present in the case at bar. Unlike the system analyzed in *Barber*, the sweepstakes promotion at issue in this case does not require a patron to open an account or buy any cybertime or even phone time to enter the sweepstakes, as it is

completely free to participate. *Id.* at 605, 608. The evidence in *Barber* showed that few customers were using the internet kiosks with their bought cybertime, and the owners of the operations at the dog track "provided more than 11 times as many [dumb] readers as Internet kiosks." *Id.* at 611. This is not true in the Moores' internet cafe. In *Barber*, unlike the present case, patrons were apprised only of the number of entries, and not the amount of cybertime purchased. In *Barber*, there was a finding in the trial court that it was obvious that most of the customers were more interested in getting the sweepstakes entries than in using the internet kiosks; no such finding was made here by any court. *Id.* at 612. The Alabama court there, which based part of its analysis on payout rates, also found: "Clearly, a substantial number, if not the majority, of customers pay to play the readers, rather than to acquire . . . cybertime." *Id.* at 612. No court in this matter has considered payout rates, nor has the State presented any evidence of such. There cannot be a finding made by any court in this matter, especially with respect to the evidence presented by the State, that the majority of the internet café's customers patronize the establishment to participate in the sweepstakes rather than to use the internet or buy long-distance telephone time. In fact, the long-distance provider for the Tel-Connect cards sold at the internet café provides the Moores with usage rates, showing that the Moores' patrons do in fact use their long-distance phone time they purchase. Specifically with respect to consideration, the Alabama court in *Barber* also found that only "a few patrons play for free." *Id.* at 615. This is also not true here as each and every patron participates for free in the sweepstakes at the internet café. With all of the above in mind, the Alabama court could find that consumers were paying for the entries, not the cybertime. *Id.* at 611. This is simply not true in the present case.

The State puts forward several more unsupported statements which are lacking of a citation to any record evidence. First, patrons in the present case did in fact use their phone time

unlike the patrons who did not use their internet time in the *Barber* case. With regard to the State's assertion that the "patrons that frequented this location either had no idea they were buying 'phone time' or never used the phone time that was allegedly purchased," the State fails to provide one shred of evidence to support this. (Brief of Appellee, 22.) A patron cannot buy sweepstakes entries, which have no monetary value, as the State would have this Court believe. This is simply another innuendo and misstatement by the State. In making its argument, the State conveniently excludes the evidence of the multiple signs and agreements Special Agent E.W. Williams did in fact admit were present and which explained the operation of the sweepstakes. Special Agent Williams was unable to testify that the no-purchase-necessary sign photographed as part of the investigation, and a document entitled, Phone-Sweeps Prepaid Sweepstakes – How it Works," were not in fact in the internet café; instead, he only testified that he did not remember seeing them. (T. 65; R. Supp. 14, 17, Defendant's Exhibits 2 and 4.) However, Williams later recanted this testimony and admitted that the Sweepstakes document was in fact in the internet café and among the items seized by the State in the investigation. (T. 66; R. Supp. 17, Defendant's Exhibit 4.) Williams admitted the Sweepstakes document made it clear that "sweepstakes points are awarded free each time a customer purchases long distance phone time," and that "the more minutes you purchase, the more free sweepstakes points are awarded." (T. 67-68; R. Supp. 17, Defendant's Exhibit 4.) Williams was unable to dispute those statements and did not find anything in the investigation that could disprove them. (T. 68.) The State also attempts to make much of the lack of a public phone bank in the Moores' internet café. (Brief of Appellee, 22.) This is specious reasoning; the phone cards provided long-distance telephone time and can be utilized on any phone, not just a phone within the internet café. Other

retail outlets such as Wal-Mart also sell phone time without the presence of phone banks. Were the cards only limited to the telephones inside the internet café, they would not be very useful.

Win points are cash prizes that could be redeemed and used for additional purchases of phone time, entitling the patron to more free entries, or kept and redeemed for his or her prize money. If a patron wishes to purchase more phone time, he may do so. If a patron wishes to pocket the cash prize and discontinue play, she may do this as well. Simply because cash prizes are available through the sweepstakes, this does not constitute consideration. The purchase of the phone card also does not constitute consideration for participation in the sweepstakes, because the money paid by the patron buys the long-distance phone time, not the participation in the sweepstakes. The State uses words such as "clearly" and "certainly," but again without any record citation to support those assertions. (Brief of Appellee, 23.) The testimony of the State's own witnesses in the Circuit Court shows exactly how unclear and uncertain the State was about the consideration element.

The State claims that the Moores' argument is that consideration is lacking because points can be redeemed by mail. (Brief of Appellee, 23.) This is a complete misrepresentation of the position of the Moores. Any mail-in points, such as those in the *Treasured Arts* case were not even used in the present case. The Moores never mailed in any sweepstakes entries, or even offered this to their patrons. Free entries were awarded for filling out a registration page each day a patron came into the internet café, without the labor and cost of mailing. The State of course argues the availability for free chances does not dispose of the question, citing *Barber* and *Henson*. (Brief of Appellee, 23.) However, here, the availability is not limited and the mail-in option was not even utilized by the Moores. Again, the State fails to provide any record evidence to support its assertions. Participation in the sweepstakes for free was not one limited

option, but in fact the only way one could participate in the sweepstakes. Despite the State's attempt to prove otherwise, there is simply no consideration present in this case.

The State argues that the purchased phone time is incidental, and disputes the comparison of the sweepstakes promotion at issue to those such as the Monopoly game at McDonald's or prizes awarded to purchasers of Coke products. (Brief of Appellee, 24-25.) The analogy to such sweepstakes is in fact quite logical. Like those at McDonald's, the internet café patrons may purchase a product, and entered the sweepstakes as an ancillary benefit to the purchase. All the revenue at the internet café is from sold phone time, not from sweepstakes entries, as there is no cost to participate in the sweepstakes. In fact, the purchase of the phone card no more fulfills the element of consideration than the purchase of a soft drink at a McDonald's which contains a sweepstakes game piece. Hundreds of such lawful sweepstakes games exist, and the record contains examples of several such sweepstakes. (R. 348-72.) Other lawful games also exist where the displays resemble spinning wheels. (R. 373-412.)

The assertion that the sweepstakes is a "high-stakes" game is unsupported. (Brief of Appellee, 24.) The State's assertion that the Moores' intent was not actually to sell phone time. is unproven and unsupported, and, even if true, would be immaterial to the analysis at hand. There not a mere "limited availability of free play" and also not merely "some opportunity for free plays" as the State argues, relying on *Barber*. (Brief of Appellee, 24-25.) Every patron, whether paying or not for phone time or internet time, participates in the free sweepstakes. Agent Williams admitted his mind was already made up before the investigation that the computers were illegal, as he testified that the purpose of his "investigation" was simply "to make sure that this was an illegal operation," and to prove the illegality of the internet café's

operation without regard to how the cards and the computers actually functioned and operated. (T. 81-82.)

The State conveniently argues that the important factor is to consider not how the sweepstakes promotion functions, but how this establishment functioned, which shows the underlying flaw in the State's case; the State is not concerned with perfectly lawful sweepstakes, but is instead on a mission to shut down the Moores' operation. (Brief of Appellee, 25.) However, the State proves neither. This Court should reverse the Circuit Court's judgment.

**B. Reward**

The Moores do not contest the fact that there is a potential for a participant to win cash prizes via the sweepstakes. Thus, this element is not challenged and need not be addressed by this Court; however, because the State makes some misleading assertions in this portion of their argument, the Moores now take the opportunity to respond briefly to those assertions.

The State argues that a potential reward is "present upon purchase of a phone card," and comes directly from paying for phone time, in an effort to show the element of consideration were present. (Brief of Appellee, 26-27.) However, the payment for phone time is not what results in a potential sweepstakes reward. It is instead the free giveaway sweepstakes points which allow the user to participate in the sweepstakes. In fact, it is possible for a customer to play the game every day of the year without ever purchasing a single minute of phone time.

**C. Chance**

With respect to the element of chance, the Moores simply re-emphasize the distinction between a finite, predetermined pool of winning sweepstakes entries compared to a spinning roulette wheel with infinite possible results. The possibility of holding a predetermined winner is totally outside the control of the patron. The State quotes *Mississippi Gaming Com'n v. Six*

*Electronic Video Gambling Devices*, 792 So. 2d 321, 327 (Miss. Ct. App. 2001) to argue that chance "is in the eyes of the patron/user." (Brief of Appellee, 28.) However, the slot machines there which required consideration in every case, are distinguishable from the sweepstakes here.

The State puts forward several unsupported sentences in this portion of its Brief, stating that 1) it does not matter where the chance occurs or at what point the chance occurs, 2) there is an undisputed randomness here, and 3) the clerk cannot deactivate a card. Yet again, the State provides not a single record citation to any evidence to support any of this. The State argues that Agent Williams "lost money the first day he played and won money the second day he played." (T. 63-64.) This, too, is misleading. Agent Williams never actually "lost money" at all. He bought phone time with his money. He no more lost any money than he would have if he had bought lunch. The Circuit Court was in err and its ruling should be reversed.

## II. WHETHER *TREASURED ARTS* IS APPLICABLE

The State insinuate that discussion of *Mississippi Gaming Commission v. Treasured Arts, Inc.*, 699 So. 2d 936 (Miss. 1997) (buying a phone card with a scratch-and-win game piece attached does not constitute consideration in a lottery) is improper. However, the trial court made specific findings with regard to the *Treasured Arts* case; thus, this Court upon review of the case at bar must revisit that case.

Though *Treasured Arts* differed slightly from the present case in that the question there surrounded the statutory definition of the word "lottery," as defined by the case of *Williams Furniture Co. v. McComb Chamber of Commerce*, 147 Miss. 649, 112 So. 579 (1927), and Section 75-76-3, the exact issue there nonetheless *centered on the element of consideration*, making that case controlling as it is similar and analogous in analysis to the present case. *Id.* at 938-39. In any event, the United States Supreme Court has completely rejected this attempted

distinction long ago, stating, "whatever may be the factual differences between a 'lottery,' a 'gift enterprise,' and a 'similar scheme,' the traditional tests of chance, prize, and consideration are applicable to each. We are aware of no decision, federal or state, which has distinguished among them on the basis of their legal elements." *Federal Communications Com'n.*, 347 U.S. at 291, n.8, 74 S.Ct. at 598, n.8. The State's analogy of arson to burglary on the other hand does confuse the issues and is weak, because – as the State concedes – those two crimes involve different statutes and different elements. A lottery is much more analogous to a slot machine because the two actually *share common elements*. This Court has the opportunity to hold that the sweepstakes here are nothing more than an electronic version of the scratch-and-win sweepstakes already found by the Mississippi Supreme Court to be legal.

The State cites *Mississippi Gaming Com'n v. Six Electronic Video Gambling Devices*, 792 So. 2d 321, 327 (Miss. Ct. App. 2001), quoting: "*Treasured Arts* is irrelevant, though, because reasoning based on whether the *risk* to win is a lottery avoids the entirely different issue of whether the *means* to win is by a slot machine." (Brief of Appellee, 29-30.) This is an out-of-context quote which certainly does not contemplate the absence of consideration as is the case today. The State also provides a misleading citation to *Six Electronic*, arguing that "where phone cards are used in a machine, the entire activity is nonetheless rendered illegal." (Brief of Appellee, 30.) This is a blatant misrepresentation of this Court's holding in that case.

## III. JURISDICTION WAS PROPER PURSUANT TO WARRANTS ISSUED UNDER CRIMINAL CHARGES

The State, arguing the Circuit Court simply went forward for the purposes of judicial economy, has put forward several arguments regarding jurisdiction – that Jeff Moore had no ownership, that no cause of action existed for the Justice Court to enter an order, and that

replevin was the proper cause of action. Clearly, this issue is in fact not "moot" as State argues. "The doctrine of mootness applies to cases where an actual controversy no longer exists." *Murray v. State*, 849 So. 2d 1281, 1290 (Miss. 2003) (quoting *Pickle v. State*, 791 So. 2d 204, 207 (Miss. 2001)). This certainly cannot be said of the case at bar as it is still hotly disputed.

The State's argument is in essence asserting that the court issuing a criminal warrant doesn't have jurisdiction to return items seized pursuant to that warrant once the case is dismissed. The State has wholly failed, throughout the entire proceedings in each of several courts, to provide any legal authority whatsoever for this proposition. The State chose the venue, had the criminal warrants issued, and had the property seized pursuant to the criminal warrants. Later, when the Justice Court ordered the machines to be returned, did the State fabricate the jurisdiction argument in an effort to sidestep the authority of the Justice Court. In fact, the Justice Court retains jurisdiction over the items because they were seized pursuant to the criminal warrants the Justice Court issued. Once more, this is a *criminal* appeal, and no matter how the State tries, it cannot overcome this fact. Further, no notice of hearing was required for counsel to appear in court on the day on which the trial was initially scheduled.

The State once more argues that the single remedy for the Moores to recover their seized property is through a replevin action required under Section 11-37-101. (Brief of Appellee, 32-33.) However, that statute merely outlines the procedure required in a replevin action; nowhere within that statute does the law require parties in any particular circumstance to file a replevin action to recover that property. Miss. Code Ann. § 11-37-101 (Rev. 2004). The State provides not one citation of meaningful authority to support the proposition that a separate replevin action was required in this matter. A new action is simply not required as the Justice Court properly maintained jurisdiction over the matter at all times.

Almost comically, the State accuses the Moores' position of being an "argument without any basis in law." (Brief of Appellee, 33.) This is wholly false. As can be easily seen even from a quick glance of the Moores' initial Brief of Appellants, the Moores did in fact cite law supporting this position. Because Mississippi has no statutes governing disposition of property seized under a search warrant, and a dearth of case law on the subject, the courts "must resort to common law principles pronounced by courts from our sister states." *Newman v. Stuart*, 597 So. 2d 609, 614 (Miss. 1992) (internal citations omitted). The origins and purposes of search warrants are rooted in aiding criminal prosecution, "with the ancillary purpose of restoring stolen property to its rightful owner." *Id.* (internal citations omitted). The accepted rule is that "[a] court generally has the authority to control the disposition of property seized pursuant to its warrant. An officer holding property must, therefore, respond to orders of the court for which he or she acted, and he or she holds property subject to the court's direction and disposition." CJS SEARCHES § 286. Therefore, when the property is seized, it remains under the custody of the court which issued the warrant, or the court having jurisdiction of the criminal prosecution in which the property is material evidence; in the case at bar, those two courts are in fact one and the same. *Id.* (internal citations omitted).

The State again repeats its argument that Section 9-11-9 controls, purposefully misleading this Court by a statute which is titled "Civil jurisdiction; monetary interest," and sets a monetary jurisdictional ceiling for matters related to civil debt proceedings. Miss. Code Ann. § 9-11-9. This statute, by its very title applies only to *civil* jurisdiction, and not to *criminal* jurisdiction. The present action is clearly a criminal matter. With respect to criminal matters, the Justice Court has jurisdiction of misdemeanors such as the charges initially filed against the

Moores, but which have now been dismissed for almost two (2) years. MISS. CONST., Art. 6, § 171; Miss. Code Ann. § 99-33-1. See also Miss. Code Ann. § 9-9-21.

The State argues that even though the State had dismissed charges against the Moores, this did not make the seized items legal. (Brief of Appellee, 34.) This is true to a degree – the State's dismissal of the charges did not make the items legal; the dismissal, however, is what brought the case, or should have brought the case, to its conclusion. This is well-spun by the State – while it is true that the dismissal of the charges does not make the seized items legal, other factors do in fact make the computers legal. No sufficient evidence to prove the computers were illegal gambling devices was ever presented by the State.

The State does not – and *cannot* – cite to any record evidence whatsoever to support the position that the items are contraband per se. While no property interest exists in illegal machines, those machines must first be proven to be illegal gambling machines. The rule is not – and cannot be – simply that when the State calls the computers "illegal gambling machines," this makes it so. The Supreme Court in *Trainer v. State*, 930 So. 2d 373 (Miss. 2006) held that where machines are clearly illegal gambling devices, by the nature of having *already been adjudicated as such*, seizure is permissible. *Id.* The Court in *Trainer* dealt with "Cherry Masters," machines which had already been designate as illegal gambling machines in Mississippi as a matter of law in the *Henson* case. *Id.* The same is not true here – the computers at issue have never been adjudicated as illegal gambling machines by any court.

The State attempts to draw an analogy from the criminal charges dropped in this case to other narcotic charges, specifically likens the seized computers to cocaine. The State argues that if cocaine were seized in a criminal raid, the criminal defendants in that hypothetical case would have no right to repossess the cocaine. This is in all likelihood true; however, this only applies if

the substance seized was in fact determined to be cocaine. If the substance was, for example, baby powder or powdered sugar, then it would be factually impossible for the defendants to be guilty of possession of an illegal narcotic and the defendants would have a right to repossess the completely legal substance. Thus, this cocaine analogy wholly fails. Cocaine is illegal - the computers at issue in this case are not.

If this is not a criminal appeal, why does the State draw the analogy to another crime, cocaine possession, even stating that the computers are no different from "cocaine or any other illegal narcotic?" (Brief of Appellee, 35.) Would the State seriously consider the seizure and possession of the cocaine by the State, pursuant to a court-issued criminal warrant, a civil matter? The Circuit Court clearly erred in rendering its decision and order. This Court should reverse the Circuit Court.

## IV. PUBLIC POLICY FAVORS REVERSAL OF THE CIRCUIT COURT

The State argues that various states have examined "identical" sweepstakes systems, but again provides no authority to support this position, and cannot show that the systems referred to are in fact identical. Outside of the Alabama case previously discussed and distinguished, the State has no authority to support its position at all. In fact, multiple authorities[2] outside

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[2] See, e.g., *Glick v. MTV Networks*, 796 F. Supp. 743 (S.D. NY 1992) (promotion was lawful because an alternative method of free entry was reasonably available); *American Treasures, Inc. v. State*, 173 N.C.App. 170, 617 S.E.2d 346 (N.C. App. 2005) (sale of long-distance phone cards by Treasured Arts, Inc., was not a mere subterfuge to engage in illegal lottery scheme); *Bohrer v. City of Milwaukee*, 248 Wis. 2d 319, 327, 635 N.W.2d 816, 820 (Wis. App. 2001) (milkcaps "pog" promotional game of chance was a legal sweepstake because it conformed to the state statute and did not require consideration); *Pepsi Cola Bottling Co. v. Coca Cola Bottling Co.*, 534 So. 2d 295 (Ala. 1988) (if a fully effective free method of entry, incidental profit or benefit to company neither provides the required consideration nor negates the free participation aspect); *Mid-Atl. Coca-Cola Bottling Co. v. Chen*, 296 Md. 99, 460 A.2d 44 (Md. Ct. App. 1983) (mandatory element of consideration not present in giveaway promotion); *Coca-Cola Bottling Co. of Wisconsin v. La Follette*, 106 Wis.2d 162, 316 N.W.2d 129 (Wis. App. 1982) (sales promotion program was not illegal lottery, in part because payment was not required to participate; statute proscribing sales with the pretense of prize was not applicable; wrongful enforcement of the statute would deprive manufacturer of increased sales volume); *People v. Eagle Food Centers, Inc.*, 31 Ill.2d 535, 540-

Mississippi are in accord with the *Treasured Arts* analysis.The State concludes with the dramatic leap to say that a ruling by this Court that the State has failed to prove its case here – that the computers seized are actually illegal gambling devices – would "render Mississippi a haven for all types of machines," and that "public confidence in the gaming industry will cease." (Brief of Appellee, 36-37.) The Circuit Court committed clear error in finding for the State, as there was no evidence to support such a finding, and should be reversed.

## CONCLUSION

The State's argument that a display with the "look and feel" of a slot machine should be made illegal is like saying a minor should not be able to consume sparkling grape juice simply because it has the look and feel of white wine. (Brief of Appellee, 38.) The Circuit Court was clearly in error in ruling against the Moores, primarily because there is no consideration or any evidence to prove otherwise, and must therefore be reversed.

Respectfully submitted,

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541, 202 N.E.2d 473, 476 (Ill. 1964) (no consideration required because no payment was required to participate in in-store sweepstakes promotion); *Cal. Gasoline Retailers v. Regal Petro. Corp. of Fresno*, 330 P. 2d 778, 785, 786 (Cal. 1958) (consideration not present where anyone could have participated "free for the asking" with no purchase – benefit of attracting possible paying customers is "too remote to constitute a consideration for the chances"); *Brice v. State*, 156 Tex.Crim. 372, 376, 242 S.W.2d 433, 435 (Tex. Cr. App. 1951) (consideration lacking because participants not required to be a customer or to purchase merchandise or to do anything other than to register without charge at the store).

## CERTIFICATE OF SERVICE

Pursuant to Miss. R. App. P. 25(c) and (d), I, JOHN P. SCANLON, attorney for Appellants, Ronnie Moore and Jeff Moore, do hereby certify that I have this day filed an original and three (3) bound copies of this Reply Brief of Appellants, and have sent, via U.S. Mail, a copy of the bound brief to opposing counsel at the address listed below:

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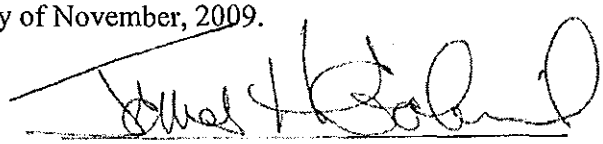
Respectfully submitted, this the 18th day of November, 2009.



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December 3, 2009



**VIA U.S. Mail**
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**Re:** ***Ronnie Moore and Jeff Moore vs. State of Mississippi*;**
**In the Court of Appeals of Mississippi,**
**Case No. 2009-CA-00235-COA**

Dear Ms. Gillis:

It has come to my attention that in our Reply Brief of Appellants we recently submitted to the Court, as well as in our initial Brief of Appellants, a volume number was inadvertently and erroneously omitted from the citation to the Corpus Juris Secundum, both in the body of the Brief and in the table of authorities. This error appears on page 21 of the Reply Brief of Appellants and on pages 34-35 of the initial Brief of Appellants. The full citation should read: "79 C.J.S. Searches § 286."

This citation supports the proposition of law that 1) the court issuing a search warrant, or the court of the place where property is seized, has the authority to order the return of the seized property; and 2) in the absence of a prosecution, the court to which a warrant and property are returned has jurisdiction to order the return of the seized property. Additionally, within that citation in the actual Corpus Juris Secundum volume, the following cases are cited: *People v. Superior Court (Laff)*, 25 Cal. 4th 703, 107 Cal. Rptr. 2d 323, 23 P.3d 563 (2001); *Matter of Death of VanSlooten*, 424 N.W.2d 576 (Minn. Ct. App. 1988); *People v. Icenogle*, 164 Cal. App. 3d 620, 210 Cal. Rptr. 575 (2d Dist. 1985); *People v. Fleming*, 29 Cal. 3d 698, 175 Cal. Rptr. 604, 631 P.2d 38 (1981); *Sawyer v. Gable*, 400 So. 2d 992 (Fla. Dist. Ct. App. 3d Dist. 1981); *Matter of Documents Seized Pursuant to a Search Warrant*, 124 Misc. 2d 897, 478 N.Y.S.2d 490 (Sup 1984).

Also, in our Reply Brief of Appellants, there are multiple references to the "*Henson*" case without a full citation, both in the body of the Brief and in the table of authorities. This error appears on pages 15 and 22 of the Reply Brief of Appellants, but was correctly cited in the initial Brief of Appellants. The full citation should read "*Mississippi Gaming Commission v. Henson*, 800 So. 2d 110 (Miss. 2001)."

We apologize for the errors and sincerely hope this did not cause the Court of Appeals any inconvenience. Please pass this along to the appropriate panel or judge reviewing this matter. Should you have any questions regarding this matter, please do not hesitate to contact me. Thank you for your assistance.

Sincerely,

**PYLE, MILLS, Dye & Pittman**

John P. Scanlon

JPS/jms

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